DECISIONS

OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM MAY 1, 1900, TO JUNE 30, 1901.

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[1] On page 168, after "thereunder" in line 4, insert, "referred to the canal grant made by the act of July 3, 1866, and recited the proceedings had thereunder."

On page 171, after "claim" in second line of last paragraph, insert, "in the local office."

On page 172, in seventh line from bottom, insert "Ship" before "Canal."

On page 174, for "claims" in line 2 read "claim."

On page 182, in line 11, for "decision" read "decisions."

[1] On page 168, after "thereunder," in line 4, insert "referred to the canal grant made by the act of July 3, 1866, and recited the proceedings had thereunder."

On page 171, after "claim," in second line of last paragraph, insert "in the local office."

On page 172, in seventh line from bottom, insert "Ship" before "Canal."

On page 174, for "claims" in line 2 read "claim."

On page 182, in line 11, for "decision" read "decisions."

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

STATE SELECTION—SETTLEMENT—ACT OF JUNE 18, 1894.

ZEIGLER *v.* STATE OF IDAHO.

One who settles upon land subsequent to an application by the State to have it surveyed under the act of July 18, 1894, and who after survey but during the period of preferred right of selection accorded to the State applies to enter the same, acquires no right as against the State.

A qualified settler who, after the expiration of the period of preferred right of selection on the part of the State, is residing on the land, will be protected by the Department as against a subsequent selection by the State, even though he may have failed to assert his claim within three months after the land became subject to entry.

No rights are secured under State selections tendered prior to the filing of the township plat of survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 1, 1900.* (G. B. G.)

This is an appeal by the State of Idaho from your office decision of April 29, 1899, rejecting its application to select, per lists Nos. 5 and 6, for State, penitentiary, and normal schools, the NW. ¼ of Sec. 14, T. 41 N., R. 1 W., Lewiston land district, Idaho, under the grants to the State for such purposes made by the act of July 3, 1890 (26 Stat., 215), entitled "An act to provide for the admission of the State of Idaho into the Union."

By an act of August 18, 1894 (28 Stat., 372, 394–395), it was provided that the governors of certain States, including the State of Idaho, might apply to the Commissioner of the General Land Office for the survey of any township or townships of public lands remaining unsurveyed in any of the several surveying districts in the State at the date of the application, and that:

the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a period to extend from such

application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants.

By permission and under authority of this act, the governor of the State of Idaho filed in your office, May 7, 1895, an application for the survey of said township, and a notice of the withdrawal thereof from settlement issued from your office May 14, 1895, to take effect as of the date of the filing of the State's application for survey. The survey was made, and it is stipulated by the parties "that the plat of survey of said township was filed in the local land office at Lewiston, Idaho, January 25, 1898." This is also shown by the records of the local office. See instructions of October 21, 1885 (4 L.D., 202), and Benson *v.* State of Idaho (24 L.D., 272).

In the meantime, however, and on January 14, 1898, the State of Idaho filed its said lists Nos. 5 and 6, embracing said tract, and, February 14, 1898, Harry N. Zeigler applied to make homestead entry thereof, alleging settlement April 20, 1895.

May 27, 1898, your office ordered a hearing to determine the respective rights of the parties, which contest was heard at the local office July 20, 1898. August 12, 1898, and before the local officers rendered their decision in the case, the State filed new lists of selections, Nos. 5 and 6, embracing said tract, which new lists were stated to be offered in lieu of the former lists, for the reason that the selections made in the former lists were "premature, the same having been made before the township plat was filed in this [local] office." September 26, 1898, upon the stipulations entered into between the parties at the hearing, and the evidence adduced thereat, these officers recommended that the State's selections be canceled as to said tract, and that Zeigler's homestead application be allowed, from which decision the State appealed to your office.

During the pendency of this appeal, your office on consideration of the State's selection lists Nos. 5 and 6, both the original and second lists, held, by decisions of March 29 (list 5), and April 4, 1899 (list 6), that the original lists presented to the local office before the filing in that office of the plat of the survey of the township were premature and ineffectual, and directed that they be canceled. That the original lists were regarded by the State as premature and ineffectual is shown by its subsequent declaration that the same were premature and by its filing new lists on August 12, 1898.

If the statement in Zeigler's application, that he commenced his settlement on said tract April 20, 1895, were true, this date being prior to May 7, 1895, the date of the State's application for survey and the withdrawal effected thereby, he would, under the act of August 18, 1894, *supra*, be clearly preferred to the State, as held in Charles D.

Brown *v.* State of Idaho (29 L. D., 590). But from the testimony it appears that Zeigler first "went on the land in controversy in the latter part of May, 1895," and that he made an actual settlement thereon in May, 1897, which was continued to the date of the hearing. His settlement was therefore subsequent to the State's application for survey, and he secured no right to the land as against a selection thereof by the State made during the period of sixty days next following the filing of the township plat of survey in the district land office. His homestead application, tendered on February 14, 1898, was during the period of reservation provided for in the statute and no rights were secured thereby nor by reason of the appeal from the rejection thereof by the local officers, as said appeal entitled him to a judgment only upon the correctness of the action taken at the time of the presentation of the application.

The period of the reservation and the preferred right of selection granted the State expired March 26, 1898. As Zeigler was a resident upon the land at this time, the prior and premature selection of the State being ineffectual as was also his premature application to make homestead entry, his settlement became thenceforth a valid one, and it but remains to be determined whether the government can protect him in his settlement, he having failed, as far as shown by the record before the Department, to make application to enter the land within three months after it became subject to entry, as provided by section three of the act of May 14, 1880 (21 Stat., 140), and sections 2265 and 2266 of the Revised Statutes, or prior to August 12, 1898, when the State filed its new lists of selections.

Under the act of July 3, 1890, *supra*, making the grant to the State, for State, penitentiary, and normal schools, it is provided, by section 14, that—

> All lands granted in quantity or as indemnity by this act shall be selected, under the direction of the Secretary of the Interior, from the surveyed unreserved, and unappropriated public lands of the United States within the limits of the State entitled thereto.

The authority of the Secretary of the Interior over the selection of lands granted by this act is similar to that exercised in the matter of the selection of indemnity lands under grants made to aid in the construction of railroads. Relative to the latter class it has been held by this Department that this authority was sufficient to enable the Secretary to protect a qualified settler who has placed valuable improvements upon the tract and who is residing thereon with intent to secure title by compliance with the public land laws at the time an indemnity selection is tendered, even though such settler may have failed to make timely filing or entry prior to the proffer of said selection. (Dunnigan *v.* Northern Pacific R. R. Co., 27 L. D., 467.)

It is therefore directed that Zeigler be allowed a reasonable time, to be fixed by your office, within which to make proper application and complete entry of this land, and thereupon the new selection of the State will stand rejected, as to this tract.

With this modification, the decision appealed from is affirmed.

TOW *v.* MANLEY.

Motion for review of departmental decision of February 16, 1900, 29 L. D., 504, denied by Secretary Hitchcock, May 2, 1900.

BURTON ET AL. *v.* DOCKENDORF.

Motion for review of departmental decision of February 6, 1900, 29 L. D., 479, denied by Secretary Hitchcock, May 2, 1900.

REPAYMENT—CASH ENTRY—ASSIGNMENT.

HENRY J. MCCOMB.

One who takes an assignment of the interest of a cash entryman subsequent to the cancellation of the entry acquires no right to repayment of the purchase money under either section 2362 of the Revised Statutes or section 2 of the act of June 16, 1880.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 7, 1900.* (C. J. G.)

Henry J. McComb has filed a motion for review of departmental decision of February 15, 1900 (not reported), denying his application for repayment of the purchase money paid by Abiram Moore on cash entry No. 23,869, made March 25, 1857, Plattsburg series, for the E. ½ of Lot 2 of the NW. ¼, Sec. 5, T. 64, R. 36, Booneville land district, Missouri.

Moore's entry was canceled July 22, 1859, for conflict with warrant location No. 74451, under the act of 1855. McComb made application for repayment as the assignee of Moore through mesne conveyances. The basis of the denial of said application by the Department was that McComb, having acquired his interest subsequently to the cancellation of Moore's entry, namely, on March 27, 1889, is not a qualified applicant for repayment under section 2 of the act of June 16, 1880 (21 Stat., 287).

The contention is made in the motion for review that said act of June 16, 1880, according to its title, is not applicable to this case in which

Moore made a private cash entry under the act of April 24, 1820 (3 Stat., 566); but that the application for repayment by McComb as the assignee of Moore is controlled by the act of January 12, 1825 (4 Stat., 80), as amended by the act of February 28, 1859 (11 Stat., 387).

The said acts of 1825 and 1859 were consolidated in the Revised Statutes as follows:

SEC. 2362. The Secretary of the Interior is authorized, upon proof being made, to his satisfaction, that any tract of land has been erroneously sold by the United States, so that from any cause the sale can not be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated.

The act of June 16, 1880, is entitled:

An act for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase money, and commissions paid on void entries of public lands.

The said act provides, among other things, as follows:

SEC. 2. 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 be duly canceled by the Commissioner of the General Land Office.

This act is additional to the provisions of Sec. 2362 of the Revised Statutes, and its manifest purpose was to enlarge the scope of said section by extending to entrymen under homestead, timber-culture, desert-land, and other laws the same remedy as to repayment that had been previously provided for cash entrymen under the statutes relating to public and private land sales.

The circular instructions of August 6, 1880, and the General Circular issued October 1, 1880, after referring to section 2362 of the Revised Statutes, and the act of June 16, 1880, contain the following definition:

Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law.

This definition and construction has been uniformly adhered to. The reasons for limiting an assignee's claim to repayment, upon failure of confirmation, to the period after completion of entry, and prior to cancellation thereof, are the same under either statute, viz, prior to entry no legal, assignable, or transferable interest in or title to public lands is recognized; and after cancellation of the entry no such interest or title exists. As to this there is, and can properly be, no distinction between the prior statutes and the act of June 16, 1880, the intention

of the latter merely being, as stated, to enlarge the scope of the former. Hence McComb, having acquired his interest subsequently to the cancellation of Moore's entry, is not the party to whom repayment may be made.

The motion for review is hereby denied.

BARKLAGE ET AL. *v.* RUSSELL.

Motion for review of departmental decision of January 9, 1900, 29 L. D., 401, denied by Secretary Hitchcock, May 7, 1900.

REINS *v.* MONTANA COPPER CO. ET AL.

Motion for review of departmental decision of February 5, 1900, 29 L. D., 461, denied by Secretary Hitchcock, May 7, 1900.

RESERVATION—PREFERRED RIGHT OF CONTESTANT.

WILLIAM H. SCHMITH.

Whatever preferred right a contestant may have on the cancellation of the entry under attack, is defeated by an intervening proclamation by the president declaring the establishment of a forest reservation that includes the land embraced within the contested entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 9, 1900.* (J. L. McC.)

William H. Schmith has appealed from the decision of your office, dated December 18, 1899, sustaining the action of the local officers in rejecting his application to make homestead entry for the E. ½ of the N. E. ¼ and the E. ½ of the S. E. ¼ of Sec. 30, T. 29 N., R. 3 W., Seattle land district, Washington.

The ground of said rejection was that the land described lies within the limits of the Olympic Forest reserve, and became subject to the operation of the executive order of February 22, 1897, creating said reserve, on March 1, 1898 (See 29 Stat., 901; 30 Stat., 34).

Schmith's application is accompanied by his affidavit, setting forth that when he moved upon the land in January, 1895, it was embraced in the homestead entry of one Cummings, who had abandoned it. Schmith has, since that date, made improvements on the land to the value of about fifteen hundred dollars. All the money he could earn was needed for the support of his family; but as soon as he could afford to do so—to wit, on February 25, 1898—he filed affidavit of

contest against Cummings' entry, as a result of which said entry was canceled on January 14, 1899. He asks to be permitted to make homestead entry by virtue of his preference right.

Your office decision quotes the excepting clause of the executive order of February 22, 1897, which is as follows:

> Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry, or covered by any lawful filing duly of record in the proper United States land office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; . . . . *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler, or claimant continues to comply with the law under which the entry, filing, settlement, or location, was made.

Commenting upon the above-quoted extract from the proclamation your office decision says:

> Schmith's settlement was not a "valid settlement," made "pursuant to law," for the reason that at the time he settled the land was covered by Cummings' homestead entry, and was not, therefore, subject to such settlement. He initiated contest against Cummings' entry during the time when the order creating the reserve was suspended by act of June 4, 1897 (30 Stat., 34-36); but when, on January 14, 1899, the entry was finally canceled as a result of such contest, the order was again in effect. As the proclamation contained no provisions excepting the rights of successful contestants from the force and effect of the reservation, it destroyed any privilege which he might have had, had the reservation not been made.

In his appeal from said decision Schmith sets forth the undeniable equities in his behalf, and contends that, "by reason of his successful contest against the homestead entry of Cummings the said tract was segregated from the public domain, subject to the application of Schmith within the period prescribed by the laws and regulations governing contests."

The Department concurs in the conclusion of your office in this respect. "Whatever preferred right a contestant may have on the cancellation of the entry under attack, is defeated by an intervening proclamation by the president declaring the establishment of a forest reservation that includes the land embraced within the contested entry" (Jefferson E. Davis, syllabus, 19 L. D., 489).

Said decision of your office is therefore hereby affirmed.

LABATHE *v.* ROBORDS.

Motion for review of departmental decision of October 30, 1899, 29 L. D., 281, denied by Secretary Hitchcock, May 9, 1900.

HOMESTEAD ENTRY—SETTLEMENT—QUALIFICATIONS.

BROWN *v.* CAGLE.

The qualifications requisite on the part of a homesteader must exist at the date of entry, and if after settlement and prior to entry the settler for any reason becomes disqualified, the privilege gained by settlement is lost.

A married woman is not a qualified homestead applicant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 9, 1900.* (F. W. C.)

With your office letter of March 5th last was transmitted the showing made by Laura Donnelly, *nee* Cagle, in response to departmental decision of December 20, 1899 (29 L. D., 381), in which you were directed to call upon Mrs. Donnelly to show cause why her homestead entry covering the NE¼ of Sec. 22, T. 23 N., R. 1 W., Perry land district, Oklahoma, should not be canceled.

This tract was formerly embraced in the homestead entry of Walter C. Roberts, made September 19, 1893, against which both Morris Brown and Laura Cagle instituted contests upon the ground of prior settlement. The several contests against the entry of Roberts were consolidated and resulted in a decision awarding to Laura Cagle the right to make entry of the land.

Brown subsequently petitioned for a rehearing, alleging that Miss Cagle had failed to maintain residence upon the land, and by departmental decision of June 6, 1899 (28 L. D., 480), a hearing was ordered upon said charge.

Upon consideration of the petition of Laura Donnelly, *nee* Cagle, for a revocation of the order for said hearing it appeared that Miss Cagle, who following the decision in her favor had made entry of the land, had prior to her entry married one John D. Donnelly, and in consequence the order for a hearing was revoked and you were directed to call upon Mrs. Donnelly to show cause why her homestead entry should not be canceled.

In the case of Gourley *v.* Countryman (27 L. D., 702) it was held that the rights gained by settlement are lost where the settler prior to entry acquires ownership of other land in such an amount as to disqualify him as a claimant under the homestead law.

No vested right is acquired by mere settlement and occupancy of public lands. If after the settlement and prior to entry the settler for any reason becomes disqualified the privilege gained by settlement is lost, for the qualifications requisite to make entry must exist at the date of the entry.

The marriage of Miss Cagle to Donnelly prior to her entry of this land is admitted; therefore she was not qualified to make entry under

the homestead laws. (Case *v.* Kupferschmidt, 30 L. D., 9.) Her entry will therefore be canceled.

Morris Brown was also a settler upon this land and a contestant of the entry by Roberts. His claim has been since maintained, and as shown by the record was subject only to the claim of Laura Cagle. In view of her disqualification it is directed that Brown be permitted to make entry of the land within a time to be fixed by your office.

WHITE STAR OLGA FISHING STATION.

Motion for review of departmental decision of May 31, 1899, 28 L. D., 437, denied by Secretary Hitchcock, May 9, 1900.

APPLICATION—HOMESTEAD ENTRY—QUALIFICATIONS—RESIDENCE.

CASE *v.* KUPFERSCHMIDT.

The qualifications requisite to make homestead entry must exist at the date of entry, and any rights acquired by the filing of an application are lost where the applicant subsequently and prior to entry becomes disqualified to enter.

A married woman, in the absence of legal cause for separation from her husband, is not free to select or maintain a separate residence, and is therefore disqualified to make homestead entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 9, 1900.* (F. W. C.)

John Kupferschmidt has appealed from your office decision of September 1, 1898, holding for cancellation his homestead entry, made April 26, 1898, covering the NW¼ of Sec. 18, T. 138 N., R. 63 W., Fargo land district, North Dakota.

This tract was formerly embraced in the homestead entry of one Gotlob Ottinger, made February 4, 1896.

On March 28, 1898, one George Bennett initiated a contest against said entry, on which hearing was ordered for April 30, following.

On March 29, 1898, being the day following the filing of the contest by George Bennett, Ottinger's relinquishment was filed in the local office, whereupon his homestead entry was canceled and Bennett was notified of his preferred right of entry by reason of his contest.

During the period of preferred right accorded Bennett under his contest, to wit, April 5, 1898, May E. Case tendered an application to make homestead entry of this land, which was rejected by the local office "because the tract applied for is reserved for thirty days from March 29, 1898, for George Bennett," and she was advised of her right of appeal from such rejection, and on May 5, following, her appeal was filed in the local office.

Prior to the filing of said appeal, to wit, on April 26, 1898, John Kupferschmidt tendered his homestead application to enter this land, accompanied by Bennett's waiver of his preferred right, said waiver having been executed the day before. The local officers accepted Kupferschmidt's application, the same being permitted to go of record.

The appeal of Miss Case from the rejection of her application was considered by your office June 23, 1898, and it was held that the rejection of her homestead application was improper, and the local officers were directed to notify Kupferschmidt that he would be allowed thirty days within which to show cause why his entry should not be canceled. In response to said notice Kupferschmidt, on July 16, 1898, filed his affidavit, in which he alleged, in substance, that he made his entry in good faith, without any knowledge of a prior right or claim to the land; that he was residing upon the land when he made his entry; that the improvements upon the land were worth $300; that Miss Case and her attorney both knew, when filing the appeal from the rejection of her application, that he, Kupferschmidt, had made entry of the land and was residing thereon, but that no notice was given him of the filing of said appeal; and that Miss Case has never resided upon the land or made any improvements thereon.

Upon consideration of this showing your office decision of September 1, 1898, held Kupferschmidt's entry for cancellation, holding that Miss Case had a prior right to enter the land by reason of her application, tendered as before stated, and from that decision Kupferschmidt has appealed to this Department.

Since the pendency of the case before the Department on appeal, there has been filed evidence of the marriage of Miss Case to one Eugene Warren, on November 12, 1898, and it is claimed on behalf of Kupferschmidt that by reason of said marriage she is disqualified from making entry of this land under the homestead laws.

Under the rules established by this Department an application to enter tendered by a stranger to a contest during the period of preferred right accorded a successful contestant by the act of May 14, 1880 (21 Stat., 140), must be suspended to await the action of the contestant. Miss Case's application could not be allowed while Bennett had a preferred right of entry, nor could it be thereafter allowed unless at the time of its allowance she possessed the qualifications required by the homestead law. Therefore, even if the decision of your office recognizing and according to Miss Case priority over Kupferschmidt by reason of her prior application was correct upon the facts then presented, she can not now be permitted to make homestead entry of the land, because she has in the meantime become disqualified from making entry through her marriage with Eugene Warren. The homestead law requires the establishment and maintenance of a home upon the land entered to the exclusion of one elsewhere, and therefore contem-

plates that a homestead entry shall only be made by one who is free to choose his domicile or place of residence. By her marriage Miss Case elected to make her husband's domicile her domicile. He then became the head of the family and entitled to choose the place of their joint residence. Since then she has not, in the absence of legal cause for separation, been free to select or maintain a separate home or place of residence (Jacobs on Domicil, sections 209, 213–215, 404; Schouler on Domestic Relations, 4th Ed., sections 37–39; 2 Bishop on Married Women, sections 157–159; Anderson *v.* Watts, 138 U. S., 694, 706) and is therefore not qualified to make entry under the homestead law. Her homestead application will stand rejected.

MEADERVILLE MINING AND MILLING CO. *v.* RAUNHEIM ET AL.

Motion for review of departmental decision of February 5, 1900, 29 L. D., 465, denied by Secretary Hitchcock, May 9, 1900.

CONTEST—PRACTICE—COSTS.

MENDENHALL *v.* CAGLE.

In a contest under section 2 of the act of May 14, 1880, the contestant must pay the costs of the contest, including the cost of testimony taken by deposition on behalf of the contestee.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 11, 1900.* (C. J. G.)

Pursuant to departmental decision of February 9, 1898, in the case of Cagle *v.* Mendenhall (26 L. D., 177), and as the result of a contest on the ground of prior settlement, Byron E. Cagle made homestead entry, on April 14, 1898, for the N. W. ¼ of Sec. 22, T. 23 N., R. 1 W., Perry land district, Oklahoma.

April 26, 1898, Watson J. Mendenhall filed an application to contest said entry, asking for a rehearing and alleging that said Cagle had entered the Cherokee Outlet, where the land in controversy is situated, during the prohibited period. Cagle filed a motion to dismiss said contest on the ground that the question of "soonerism" had already been adjudicated by the Department (20 L. D., 447, and 21 L. D., 90), which motion was denied by the local officers, and hearing was accordingly ordered for January 25,1899.

The Department, on the last-mentioned date, in the case entitled Mendenhall *v.* Cagle (28 L. D., 50), denied a petition filed by Cagle, addressed to the supervisory power of the Secretary, asking the dismissal of Mendenhall's contest, the case in the meantime having been

continued to April 3, 1899. The Department at the same time directed that the local officers be instructed to proceed with the hearing ordered by them, it being stated with reference to the taxation of costs incident to said hearing:

> This contest will be treated as one under the second section of the act of May 14, 1880 (21 Stat., 140), and Mendenhall will be required to pay the expenses of the trial, as is usual in such cases.

On the day set for the hearing, to wit, April 3, 1899, Cagle filed a motion to require Mendenhall to comply with rule 54 of practice and departmental decision of January 25, 1899, in the matter of costs. The said motion was to the effect that Cagle then had certain depositions in the express office at Perry, taken in accordance with the rules of practice, containing material evidence, still unpaid for, and prayed that Mendenhall be required to make a cash deposit or otherwise secure the payment of the costs of the hearing. This motion was sustained by the local officers to the extent of requiring Mendenhall to pay all the costs of taking testimony in the local office, but was overruled by them so far as requiring him to pay the costs of taking the depositions.

From this action Cagle appealed to your office, the case, by stipulation of the parties, being continued to May 15, 1899.

May 1, 1899, your office rendered decision holding that Mendenhall was required to pay the costs of taking all the testimony, including the depositions taken in behalf of Cagle; and June 16, 1899, denied a motion for review. In the meantime the case was continued first to June 15 and then to July 15, 1899.

June 21, 1899, Cagle filed a motion in which he stated that one of the depositions in the express office at Perry had already been destroyed, and that he feared others would also be destroyed unless the charges thereon were paid. He therefore prayed that Mendenhall be required "to at once make a cash deposit sufficient to pay for said depositions and all other necessary expenses of defendant in this cause." The local officers sustained this motion, and Mendenhall was "ordered to make a sufficient deposit to pay for the depositions herein mentioned within ten days."

It appears that Mendenhall failed to make a deposit as he was directed to do. It does not appear what action, if any, was taken in the case on July 15, 1899, but on July 17, 1899, Mendenhall filed the following instrument:

> Comes now W. J. Mendenhall, the contestant in the above-entitled cause, and refuses to comply with the order of the register and receiver requiring him to make a deposit with the register and receiver of said land office to pay the cost of taking depositions on behalf of the defendant for the reason that there is no authority in law or in the rules of the Department for the register and receiver or the receiver to demand or collect fees for such purpose, and the contestant hereby serves notice to

the receiver of said land office not to pay any of the money heretofore deposited by the contestant to pay the cost of taking any deposition or depositions in behalf of the defendant.

Thereupon the local officers dismissed the contest, from which action Mendenhall, on August 14, 1899, appealed to your office, where, on December 2, 1899, the action of said officers was affirmed. Mendenhall has appealed to the Department.

The second section of the act of May 14, 1880, is as follows:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any preemption, homestead or timber-culture entry, he . . . shall be allowed thirty days from date of notice to enter said land.

Rule 54 of practice reads thus:

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

The fact that Mendenhall's contest is under the second section of the act of May 14, 1880, leaves no question as to his liability for the costs of contest, and the fact that Cagle's testimony was taken by deposition does not relieve Mendenhall of the liability, as that is merely one of the modes prescribed by the rules of practice for securing evidence.

The decision of your office, sustaining the action of the local officers in dismissing Mendenhall's contest, is hereby affirmed, and the case closed.

TIMBER LAND APPLICATION—NOTICE—FINAL PROOF—PRACTICE.

BARTLETT *v.* SMITH.

Under the provisions of rule 1 of the rules relating to final proofs, approved July 17, 1889, a timber land applicant may, on account of accident or unavoidable delay, be allowed ten days after the date named in the published notice, for the submission of final proof, within which to make such proof and payment.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 19, 1900.* (L. L. B.)

January 4, 1899, Elijah Bartlett made timber land application for the NW. ¼ of Sec. 26, T. 21 N., R. 8 E., Seattle, Washington, and advertised that he would submit his final proof March 30, 1899. In his published notice he misdescribed the name of one of his witnesses, and for that reason he readvertised his notice, fixing the date for submitting his proof on July 7, 1899. On said last named date he appeared, and was allowed ten days within which to complete proof and payment. Eight days later, to wit, July 15 (not 10), 1899, he made

payment and received final cash certificate. He also submitted an affidavit of non-alienation, in which he stated that he was disappointed in getting the necessary amount of money for payment of the land on the day fixed for final proof "notwithstanding that affiant had long prior thereto arranged to have the amount for that purpose, but was wholly unable to get it before this date." In the meantime, on July 10, after the day fixed in the notice for submitting final proof, and before Bartlett had made payment for the land and so completed his proof, Albert Smith presented his sworn statement, and applied for the same tract of land under the timber and stone act. His application was rejected, because of the pending claim of Bartlett, as above set out. Smith appealed, and by your office decision of October 20, 1899, the action of the local officers was approved, and Smith now has further prosecuted his appeal to this Department.

Counsel for appellant complains, in substance, that it was error to allow Bartlett ten days after the date fixed in the notice in which to submit final proof and make payment for the land; that if payment and proof are not made on the day named in the published notice, the land is subject to entry by a stranger to the record; that his client, Smith, having tendered an application properly verified after the day set for proof and payment by Bartlett, and before Bartlett had tendered such proof and payment, his application should have been accepted, and it was error to reject it and issue certificate to Bartlett upon payment thereafter and within ten days after the day fixed in the notice.

To sustain his contention counsel for Smith cites and relies upon the cases of J. M. McDonald (20 L. D., 559); Caleb J. Shearer (21 L. D., 492); and James N. True (26 L. D., 529).

By circular of your office, approved by Secretary Noble, July 17, 1889 (9 L. D., 123), rules were established for taking final proofs "in all cases where the same were required by the general land laws or regulations of the Department."

Rule 1 is as follows:

> 1. Final proofs in all cases where the same are required by the general land laws or regulations of the Department, must be taken in accordance with the published notice; provided, however, that such testimony may be taken within ten days following the time advertised in cases where accident or unavoidable delays have prevented the applicant or his witnesses from making such proof on the day specified. Section 7 of the act of March 2, 1889 (25 Statutes, 854).

That final proof is required before patent shall issue upon a timber land entry does not admit of doubt. The statute itself provides that before the entry is allowed or patent issued, the applicant shall furnish to the register of the land office satisfactory proof of the publication of his notice; the character of the land (chiefly valuable for timber, unoccupied, &c.); and that it contains no valuable deposits of certain specified minerals. (20 Stat., 89–90.) The rules above quoted,

therefore, have application to timber land entries, in common with homestead, etc.

The cases relied upon by counsel for Smith all have reference to republication of notice, and in none of them is it held that an adverse right, asserted after publication and within the ten days thereafter allowed for proof and payment, will defeat the claim of the original applicant. Bartlett has shown that by "unavoidable delay" he was unable to make payment on the day fixed in his notice, and within ten days thereafter he submitted proof and payment. He is directly within the regulations of July 17, 1889, above quoted.

The decision appealed from is affirmed, and the entry of Bartlett will stand intact.

ACT OF JUNE 4, 1897—APPLICATION TO SELECT—FOREST RESERVE.

EDGAR A. COFFIN.

An application to select lands under the act of June 4, 1897, must be rejected where the lands offered as a basis for such selection are in any manner encumbered, so that the United States can not, by the acceptance of a relinquishment of the lands offered, be reinvested with all the right and title with which it had previously parted.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 19, 1900.* (E. B., Jr.)

Your office decision of April 10, 1900, rejects the application of Edgar A. Coffin made October 21, 1899, to select, under the act of June 4, 1897 (30 Stat., 11, 36), lot 3 section 1, lot 3 section 2, NE¼ of the SE¼ section 12 and SE¼ of the NE¼ section 18, T. 61 N., R. 23 W., Duluth, Minnesota, land district, in lieu of the SW¼ of section 24, T. 20 N., R. 7 E., G. and S. R. M., Arizona, on the ground that the land offered as a basis for such selection is subject to the grant, made by one James W. Thurber remote grantor of the applicant, of a right of way across and upon the same, which right is an encumbrance thereon, and therefore renders the land unacceptable as such basis under the said act. Coffin has appealed from said decision, contending that your office erred in rejecting the said application on the ground stated.

The land offered as a basis for the lieu selection is surrounded by the San Francisco Mountains Forest Reserves and was patented to said Thurber June 7, 1892. By deed dated July 7, 1895, said Thurber and his wife granted—

A permanent right to appurtenant easement and right of way for any and all uses and purposes in timber and lumber operations including logging roads and railroads over, across and upon any and all of the following lands, to wit: The south-west quarter of section twenty-four, in township twenty, north range seven east of Gila and Salt River Meridian, in Coconino County, Arizona Territory. To have and to hold the same and use the above described easement and right of way together with all

and singular the rights and appurtenances thereto and in any wise belonging unto the said Arizona Lumber and Timber Company, its successors and assigns forever.

It does not appear that the easement and right of way granted in said deed has ever been released or otherwise extinguished.

In the case of F. A. Hyde *et al.* (28 L. D., 284) construing the provision of the act of June 4, 1897, *supra*, providing for an exchange of lands, and under which Coffin's application is made, it was held that—

> Before a selection under said act can be approved, the United States must be reinvested with all the right and title to the tract relinquished, with which it had previously parted.

And in official regulations of May 9, 1899 (28 L. D., 521, 523), and December 18, 1899 (29 L. D., 391, 394), after repeating the above holding in the case of Hyde *et al.*, it is said that where, as is the case here, the legal title to the land offered as a basis for the selection has passed out of the United States—

> there must also be filed with the relinquishment a duly certified abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes and from other incumbrance.

The easement and right of way granted by the said deed is, until duly released or otherwise extinguished, a permanent charge upon the land in the nature of a freehold estate which passes with the fee to the land itself. No such easement and right of way was chargeable upon the land under the patent to Thurber. The United States would not receive back again upon acceptance of the deed from Coffin all the right and title to the land, with which it had previously parted. That such an easement and right of way is an incumbrance upon the land see McGowen *v.* Myers (60 Iowa, 256) and other cases cited in note on page 839, Vol. 19 Am. and Eng. Encyc. of Law.

The decision of your office rejecting Coffin's application is correct, and is affirmed accordingly.

RAILROAD SELECTION—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO. *v.* KORSMOE.

An attempted selection, subsequent to January 1, 1898, does not present a claim for adjustment under the act of July 1, 1898, for the reason that by the terms of said act the claims of the company are limited to those which are claimed to have attached by definite location or selection prior to January 1, 1898.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 22, 1900.* (F. W. C.)

With your office letter of April 7, last, was transmitted an application, filed on behalf of the Northern Pacific Railway Company, invok-

ing the exercise of the supervisory authority of this Department and asking for the issue of a writ of certiorari, under rules 83 and 84 of practice, directing your office to forward the papers in the case of the Northern Pacific Railway Company *v.* Gustav G. Korsmoe, involving the SE. ¼ of Sec. 33, T. 135 N., R. 43 W., St. Cloud land district, Minnesota, for consideration and adjudication.

This same tract was involved in the case of Gustav G. Korsmoe *v.* Per Nilson, which was considered in departmental decision of November 19, 1898 (not reported), in which Korsmoe was awarded the right to make entry of the land. From the recitation made in said case it appears that this tract is within the indemnity limits of the grant made by the act of July 2, 1864 (13 Stat. 365), to aid in the construction of the Northern Pacific railroad, and was included in the list of selections tendered on July 8, 1885, and rejected for conflict with a listing made of the same lands on account of the grant for the St. Paul, Minneapolis and Manitoba Railway Company. From said rejection the Northern Pacific Railroad Company duly appealed. Said appeal was pending, undisposed of, on February 18, 1895, when Korsmoe tendered his homestead application for this land, alleging settlement in 1880. April 11, 1895, Per Nilson also tendered his homestead application for this land.

The respective claims of Korsmoe and Nilson and the Northern Pacific Railroad Company to this land were considered in your office decision of October 14, 1896, in which the action of the local officers in rejecting the attempted selection made by the Northern Pacific Railroad Company was affirmed and from such action said company failed to appeal. As between Korsmoe and Nilson the right of entry was awarded in your office decision to Nilson, and it was upon the appeal by Korsmoe that the departmental decision of November 19, 1898, before referred to, was rendered, in which your office decision of October 14, 1896, as between Korsmoe and Nilson, was reversed and Korsmoe was awarded the right to make entry of the land. In said departmental decision of November 19, 1898, any claim of the company to this land by reason of the selection made thereof was not considered, for the reason that the company had abandoned its claim under its attempted selection of this land by failure to appeal from your office decision affirming the action of the local office in rejecting the same.

It now appears that on June 6, 1899, Korsmoe made homestead entry of this land and, after due notice by publication, made final proof and final certificate issued thereon August 3, 1899.

On June 7, 1899, the Northern Pacific Railway Company again applied to select this land, which application was rejected by the local officers for conflict with the homestead entry made the day previous by Korsmoe. From said rejection the company appealed.

By your office decision of January 12, last, the rejection of said proffered selection by the railway company was affirmed, and therein it was held that the company's claim to this tract had been adjudicated and Korsmoe's entry was approved for patenting. From said decision the Northern Pacific Railway Company attempted to appeal, urging that the conflicting claims between the railway company and Korsmoe should have been disposed of under the provisions of the act of July 1, 1898 (30 Stat., 597, 620).

March 21, last, your office returned the appeal, "holding that, under the circumstances of this case, there was no right in the company to make reselection of the land nor was there further right of appeal from your said office decision of January 12, last." Thereupon the company filed the application under consideration asking for a writ of certiorari directing your office to forward the papers in this case.

In the argument filed in support of said application it is stated that—

> In the present case the previous conflict between Korsmoe and the company was not carried to final decision by the Secretary, but the decision of the Commissioner adverse to the company had become final by failure of the company to appeal. It was questionable whether such a state of facts would entitle the case to be adjudicated under act of 1898, and on June 7, 1899, the company attempted to reselect the land thus bringing to the department an existing live conflict between the company and Korsmoe, which would without question bring their conflicting claims within the provisions of said law.

It would seem to be clear that there was not on January 1, 1898, any claim being asserted to this land by the Northern Pacific Railroad Company by reason of any selection made of this land. The attempted selection of July 8, 1885, had been rejected by the local officers and by your office upon appeal, and by its failure to appeal from your office decision all claim under said attempted selection was abandoned long before January 1, 1898. The attempted selection of June 7, 1899, does not present a claim for adjustment under the act of July 1, 1898, *supra*, for the reason that by the terms of said act the claims of the company are limited to those which are claimed to have attached by definite location or selection prior to January 1, 1898. The act provided:

> That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished.

The individual claims, as against the railroad grant, subject to

adjustment under this act, are limited to those originating prior to January 1, 1898, and the conflicting claim of the railroad is necessarily limited to one claimed to have attached by definite location or selection prior to that time, else there would have been no possible obstacle to the individual claim and therefore no conflicting claims to adjust.

If the matter were regularly before this Department upon appeal, the decision of your office rejecting the proffered selection of June 7, 1899, without regard to the act of July 1, 1898, would be affirmed, and without further consideration of the application for certiorari the same is denied.

WAGON ROAD GRANT—ACT OF JULY 2, 1864—RAILROAD LANDS.

KING *v.* EASTERN OREGON LAND CO.

As to lands within the limits of that portion of the Northern Pacific grant made by the act of July 2, 1864, and forfeited by the act of September 29, 1890, and also within the limits of the wagon road grant of February 25, 1867, no right existed under the earlier grant, at the date when the later became effective, that served to defeat the operation thereof.

King *v.* Eastern Oregon Land Co., 23 L. D., 579, modified.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 22, 1900.* (F. W. C.)

The land involved in this controversy is the SE. ¼ of Sec. 27, T. 2 S., R. 16 E., The Dalles land district, Oregon, and is within the limits of that portion of the grant made by the act of July 2, 1864 (13 Stat., 365), to aid in the construction of the Northern Pacific railroad, which was forfeited and restored to the public domain by the act of September 29, 1890 (26 Stat., 496); it is also within the limits of the grant made by the act of February 25, 1867 (14 Stat., 409), to aid in the construction of The Dalles military wagon road.

It was held by this Department that because of the fact that the grant to aid in the construction of the Northern Pacific railroad was prior in point of time it defeated the grant to aid in the construction of The Dalles wagon road to the extent of the overlap, and following the passage of the forfeiture act of September 29, 1890, *supra*, the unpatented lands within said conflicting limits were ordered restored as a part of the forfeited lands. Upon said restoration Rufus H. King made homestead entry of this land on October 1, 1893, and offered final proof under said entry, at which time the Eastern Oregon Land Company filed a protest against the acceptance of said proof claiming a prior right to purchase the lands under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556), having purchased the lands from The Dalles Military Road Company.

In consideration of the respective claims to this land it was held in departmental decision of December 26, 1896 (23 L. D., 579), that the provisions of the act of March 3, 1887, applied only to lands granted for railroad purposes and could not be invoked for the protection of a purchaser under a wagon road grant.

The Eastern Oregon Land Company duly filed a motion for review of said decision, which was suspended because of the pendency in the court of a suit brought to determine the rights of the wagon road company within said conflict, which case was recently decided by the supreme court. See Wilcox *v.* Eastern Oregon Land Company (176 U. S., 51). In said case it was adjudged that the act of July 2, 1864, *supra*, making the grant to aid in the construction of the Northern Pacific railroad, only granted lands that were *not* reserved, sold, granted, or otherwise *appropriated*, and free from preemption or other claim or rights, *at the time the line of that road* was *definitely fixed*, and a plat thereof filed in the office of the Commissioner of the General Land Office; that Congress had power to dispose of or appropriate, in its discretion, any lands within the exterior lines of *general route* of that road by statute passed for the benefit of another company before the Northern Pacific Railroad Company filed a map of definite location, and that such lands, if not otherwise identified, at the date of the passage of a later act, than by a plat or map of general route were not excluded from the operation of such an act as lands previously "reserved, sold, granted, or otherwise appropriated" by the act of 1864.

Under this decision it is unnecessary to consider the question as to the respective rights of the several claimants to this land under the homestead law, and the application to purchase under the act of 1887, for the reason that it must be held that the tract in question, being otherwise free at the date of the attachment of rights under the grant to aid in the construction of the wagon road, passed under said grant and is not subject to other disposition by this Department. It follows that the entry by King was erroneously allowed and the same must be canceled. The claim of the Eastern Oregon Land Company will be duly protected through the patenting of the land under the wagon road grant, and its application to purchase will stand rejected.

The previous decision of this Department in this case, in so far as it held this land to be excepted from the wagon road grant, is recalled and vacated.

HOMESTEAD ENTRY—LEAVE OF ABSENCE—RESIDENCE.

KATHARINE O. ELDER.

Where a homesteader is granted a leave of absence, the time of his absence shall not be deducted from the period of residence required by law, but he must show full five years' residence exclusive of the time of actual absence under his leave.

Acting Secretary Ryan to the Commissioner of the General Land Office, May 22, 1900.
(W. V. D.) (J. L. McC.)

Katharine O. Elder, on January 31, 1894, made homestead entry for the N. E. ¼ of Sec. 25, T. 10 N., R. 3 E., Santa Fe land district, New Mexico.

On June 8, 1899, she made final proof, showing that in February, 1895, she built a house, sixteen by forty feet, on said land, in which she soon afterward established residence; that she subsequently made other improvements, the whole valued at five hundred dollars; and that she has been actually present upon said land during substantially the entire period covered by her entry, excepting two leaves of absence, each of one year, granted her on account of ill-health.

Her entry papers were transmitted by the local officers to your office, which, on October 28, 1899, rejected said final proof as insufficient, saying:

> It will be observed that the period of residence from date of entry to date of proof aggregates five years, five months, and eight days, from which must be deducted the two years of absence granted, leaving three years, five months and eight days, which is short one year, six months, and twenty-three days from the period required under the homestead law. Her entry will therefore remain suspended until she can show within the statutory period, in the form of an affidavit, duly corroborated, without further advertisement, additional residence and cultivation for a period of one year, six months, and twenty-three days.

Miss Elder has appealed, contending in substance that she ought to be considered as having complied with the law at the end of five years from the date of her entry, notwithstanding her two years' absence; in other words, that three years' actual presence on the land, together with two years' constructive residence while actually absent on leave, constituted a substantial compliance with the law, which requires five years' residence of a homestead settler prior to the issue of final certificate.

The law bearing upon the question here presented is found in section 3 of the act of March 2, 1889 (25 Stat., 854), which provides that when it shall be made to appear to the register and receiver of any land district that any settler—

> is unable, by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to receive a support for himself, herself, or those dependent upon him or her, upon the lands settled upon, then such register and receiver may

grant to such settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time; and such settler so granted leave of absence shall forfeit no rights by reason of such absence: *Provided*, that the time of such actual absence shall not be deducted from the actual residence required by law.

The question herein raised does not appear to have ever been settled by the Department. The circular of your office, dated March 8, 1889 (8 L. D., 314), instructing registers and receivers how to proceed under said act, contains no reference to the proviso. The departmental decision in the case of Charles H. Whitaker (14 L. D., 207), holds that a settler who has received leave of absence is not entitled to an extension of time within which to make final proof and payment upon his pre-emption claim; but it sheds no light upon the question of the time within which a settler having leave of absence may prove up on his homestead entry.

In the case of Quein *v.* Lewis (20 L. D., 319), the Department quotes the proviso to show that a settler's absence under leave of absence "serves to protect the settler while in effect;" and adds, relative to the settler's duties (page 322):

> Actual residence upon and cultivation of the land, the making of it his home in reality, and not merely in pretense, constitute the small sum named in his bond; and that much he must render in all cases, though the time therefor may be extended under the leave of absence act.

In the above paragraph, "the time therefor" can refer to nothing except the time of "actual residence upon and cultivation of the land;" which, it seems to be assumed, will be extended (instead of remaining the same as it otherwise would be,—to wit, five years) in case of leave of absence.

In the case of May Lockhart (22 L. D., 706, 708), the Department said, with reference to the act of March 2, 1889:

> While the provisions of said section 3 will never be permitted to be invoked for the purpose of defeating the primary object of the settlement laws, and enable a settler to acquire title by residence and cultivation without residing upon and cultivating the land, yet I am of the opinion that whenever the conditions named in said section are made to appear to the Register and Receiver, the claimant should not be denied a leave of absence simply because no period of personal presence upon the land had intervened between the expiration of a former leave and the application for a second or subsequent leave.

While the above is not distinctly decisive of the question here in issue, it is indicative of the principle that should apply. If the local officers, by granting leave of absence, could "enable a settler to acquire title by residence and cultivation without residing upon and cultivating the land" for five years, as required by law, the means is thus placed in their hands to nullify the act of Congress to that extent. "Where a leave of absence is granted a homesteader under the act of March 2, 1889, a charge of abandonment will not lie until the expiration of six

months after the time for which the leave of absence was granted" (Hiltner *v.* Wortler, 18 L. D., 331); hence in the case at bar the action of the local officers to all intents and purposes afforded the entryman an opportunity to obtain the land after two and a half years' actual residence (if her contention be correct), while the law prescribes five years' actual residence.

Possibly some light may be thrown upon the meaning of the proviso by observing what conclusion is reached in a case where the law reads just the contrary to that now under discussion. Section 2305 of the Revised Statutes says:

> 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 or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time required to perfect title.

There can be no possible question as to the meaning of this act: for instance, that if a homestead entryman had served two years in the army or navy, he would be required to live upon his homestead only three years more before he would be entitled to receive patent. But when the law provides that, in case a person is granted leave of absence, the time of absence shall *not* be deducted, it is clear that it means directly the contrary to what it does when it provides that, in the case of a soldier or sailor, his period of service *shall* be deducted.

The Department is of the opinion that the law is correctly construed by your office decision appealed from; and the same is accordingly hereby affirmed.

FOREST RESERVES—SEC. 24, ACT OF MARCH 3, 1891—RULES AND REGULATIONS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 4, 1900.

1. Under the authority vested in the Secretary of the Interior by the act of Congress, approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," to make such rules and regulation and establish such service as will insure the objects for which forest reservations are created under section 24 of the act of March 3, 1891 (26 Stat., 1095), the following rules and regulations are hereby prescribed and promulgated:

OBJECT OF FOREST RESERVATION.

2. Public forest reservations are established to protect and improve the forests for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow.

3. It is the intention to exclude from these reservations, as far as possible, lands that are more valuable for the mineral therein, or for agriculture, than for forest purposes; and where such lands are embraced within the boundaries of a reservation, they may be restored to settlement, location, and entry.

PENALTIES FOR VIOLATION OF LAW AND REGULATIONS.

4. The law under which these regulations are made provides, that any violation of the provisions thereof, or of any rules and regulations thereunder, shall be punished as is provided for in the act of June 4, 1888 (25 Stat., 166), amending section 5388 of the Revised Statutes, which reads as follows:

That section fifty-three hundred and eighty-eight of the Revised Statutes of the United States be amended so as to read as follows: "Every person who unlawfully cuts, or aids or is employed in unlawfully cutting, or wantonly destroys or procures to be wantonly destroyed, any timber standing upon the land of the United States which, in pursuance of law, may be reserved or purchased for military or other purposes, or upon any Indian reservation, or lands belonging to or occupied by any tribe of Indians under authority of the United States, shall pay a fine of not more than five hundred dollars or be imprisoned not more than twelve months, or both, in the discretion of the court."

This provision is additional to the penalties now existing in respect to punishment for depredations on the public timber. The government has, also, all the common-law civil remedies, whether for the prevention or redress of injuries, which individuals possess.

5. The act of February 24, 1897 (29 Stat., 594), entitled "An act to prevent forest fires on the public domain," provides—

That any person who shall willfully or maliciously set on fire, or cause to be set on fire, any timber, underbrush, or grass upon the public domain, or shall carelessly or negligently leave or suffer fire to burn unattended near any timber or other inflammable material, shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than five thousand dollars or be imprisoned for a term of not more than two years, or both.

SEC. 2. That any person who shall build a camp fire, or other fire, in or near any forest, timber, or other inflammable material upon the public domain, shall, before breaking camp or leaving said fire, totally extinguish the same. Any person failing to do so shall be deemed guilty of a misdemeanor, and, upon conviction thereof in any district court of the United States having jurisdiction of the same, shall be fined in a sum not more than one thousand dollars, or be imprisoned for a term of not more than one year, or both.

SEC. 3. That in all cases arising under this act the fines collected shall be paid into the public-school fund of the county in which the land where the offense was committed are situate.

Large areas of the public forests are annually destroyed by fire, originating in many instances through the carelessness of prospectors, campers, hunters, sheep herders, and others, while in some cases the fires are started with malicious intent. So great is the importance of protecting forests from fire, that this Department will make special effort for the enforcement of the law against all persons guilty of starting or causing the spread of forest fires in the reservations in violation of the above provisions.

6. The law of June 4, 1897, for forest reserve regulations also provides that—

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

PUBLIC AND PRIVATE USES.

7. It is further provided that—

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

8. The public in entering, crossing, and occupying the reserves, for the purposes enumerated in the law, are subject to a strict compliance with the rules and regulations governing the reserves.

9. Private wagon roads and county roads may be constructed over the public lands in the reserves wherever they may be found necessary or useful, but no rights shall be acquired in said roads running over the public lands as against the United States. Before public timber,

stone, or other material can be taken for the construction of such roads, permission must first be obtained from the Secretary of the Interior. The application for such privilege should describe the location and direction of the road, its length and width, the probable quantity of material required, the location of such material, and its estimated value.

10. The permission to occupy public lands in the reserves for schoolhouses and churches, as provided for in the law, is merely a privilege, and is subject to any future disposition that may be made of such tracts by the United States.

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.

12. Under the term "to regulate their occupancy and use," the Secretary of the Interior is authorized to grant such licenses and privileges, from time to time, as may seem to him proper and not inconsistent with the objects of the reservations nor incompatible with the public interests.

PASTURING OF LIVE STOCK.

13. The pasturing of sheep and goats on the public lands in the forest reservations is prohibited: *Provided*, That in the States of Oregon and Washington, where the continuous moisture and abundant rainfall of the Cascade and Pacific coast ranges make rapid renewal of herbage and undergrowth possible, the Commissioner of the General Land Office may, with the approval of the Secretary of the Interior, allow the limited grazing of sheep within the reserves, or parts of reserves, within said States: *And also provided*, That when it shall appear that the limited pasturage of sheep and goats in a reserve, or part of a reserve, in any State or Territory will not work an injury to the reserve, that the protection and improvement of the forests for the purpose of insuring a permanent supply of timber and the conditions favorable to a continuous water flow and the water supply of the people will not be adversely affected by the presence of sheep and goats within the reserve, the Commissioner of the General Land Office may, with the approval of the Secretary of the Interior, also allow the limited grazing of sheep and goats within such reserve. Permis-

sion to graze sheep and goats within the reserves will be refused in all cases where such grazing is detrimental to the reserves or to the interests dependent thereon, and upon the Bull Run Forest Reserve in Oregon, and upon and in the vicinity of Crater Lake and Mount Hood, or other well-known places of public resort or reservoir supply. The pasturing of live stock, other than sheep and goats, will not be prohibited in the forest reserve so long as it appears that injury is not being done the forest growth and water supply, and the rights of others are not thereby jeopardized. Owners of all live stock will be required to make application to the Commissioner of the General Land Office for permits to graze their animals within the reserves. Permits will only be granted on the express condition and agreement on the part of the applicants that they will hereafter pay such reasonable price per head of sheep, goats, cattle, and horses to be grazed within the reserves as the Secretary of the Interior may hereafter require; and upon failure to pay such price upon demand, the permits granted them will be revoked and the animals removed from the reserve. Permits will also be revoked for a violation of any of the terms thereof or of the terms of the applications on which based.

RELINQUISHMENT OF CLAIMS.

14. The law provides that where a tract within a forest reservation is covered by an unperfected bona fide claim, or by a patent, the settler or owner may, if he so desires, relinquish the tract to the United States and select in lieu thereof a tract of vacant public land outside of the reservation, open to settlement, not exceeding in area the tract relinquished. No charge is to be made for placing the new entry of record. This is in consideration of previous fees and commissions paid. Where the entry is in lieu of an unperfected one, the necessary fees in the making of final proof and issuance of certificate will be required. Where the entry is based on an unsurveyed claim, as provided for in paragraph 17 hereof, all fees and commissions attending entry must be paid, none having been paid previously.

15. Where an application is made for change of entry under the above provision, it must be filed in the land office for the district in which the lieu selection lies. The application must describe the tract selected and the tract covered by the unperfected entry, and must be accompanied by a formal relinquishment to the United States of all right, title, and interest in and to the tract embraced in said entry. There must also be filed with the application an affidavit, corroborated by at least two witnesses cognizant of the facts, showing the periods and length of claimant's residence on his relinquished claim, as credit for the time spent thereon will be allowed under the new entry in computing the period of residence required by law. Residence and improvements are requisite on the new entry, the same as on the old,

subject only, in respect to residence, to a deduction of the period covered by the relinquished entry.

16. Where final certificate or patent has issued, it will be necessary for the entryman or owner thereunder to execute a quit-claim deed to the United States, have the same recorded on the county records, and furnish an abstract of title, duly authenticated, showing chain of title from the government back again to the United States. The abstract of title should accompany the application for change of entry, which must be filed as required by paragraph 15, without the affidavit therein called for.

17. In case a settler on an unsurveyed tract within a forest reservation desires to make a change of settlement to land outside of the reservation and receive credit for previous residence, he should file his application as provided for in paragraph 15, including the affidavit as to residence therein required, and describing his unsurveyed claim with sufficient accuracy to enable the local land officers to approximately determine its location.

18. All applications for change of entry or settlement must be forwarded by the local officers to the Commissioner of the General Land Office for consideration, together with report as to the status of the tract applied for.

LOCATION AND ENTRY OF MINERAL LANDS.

19. The law provides that "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry," notwithstanding the reservation. This makes mineral lands in the forest reserves subject to location and entry under the general mining laws in the usual manner.

20. Owners of valid mining locations made and held in good faith under the mining laws of the United States and the regulations thereunder, are authorized and permitted to fell and remove from such mining claims any timber growing thereon, for actual mining purposes in connection with the particular claim from which the timber is felled or removed. (For further use of timber by miners, see below under heading "Free use of timber and stone.")

FREE USE OF TIMBER AND STONE.

21. The law provides that—

> The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

This provision is limited to persons resident in the State or Territory where the forest reservation is located who have not a sufficient supply of timber or stone on their own claims or lands for the purposes enumerated, or for necessary use in developing the mineral or other natural resources of the lands owned or occupied by them. Such persons, therefore, are permitted to take timber and stone from public lands in the forest reservations under the terms of the law above quoted, strictly for their individual use on their own claims or lands owned or occupied by them within the State or Territory where such reservation is located, but not for sale or disposal, or use on other lands, or by other persons. Before any timber or stone can be taken hereunder from the forest reserves, the person entitled thereto must first make application to the forest supervisor in charge of the reservation, or part of reservation, setting forth his residence and post-office address, designating the location, amount, and value of the timber or stone proposed to be taken, the place where, and the purpose for which the said timber or stone will be used, stating, in case the application is for timber, what sawmill or other agent, if any, will be employed to do the cutting, removing, and sawing, and pledging that no more shall be cut from the reservation than he actually needs for bona fide use on his own land or claim; and that none shall be sold, disposed of, nor used on any other than his own land or claim; and guaranteeing to remove and safely dispose of all tops, brush, and refuse cutting beyond danger of fire therefrom. Upon receipt of the application, the supervisor will immediately make investigation of the facts in the case and transmit the application, with report and recommendation, to the superintendent in charge. If, in his judgment, the application be meritorious, and no injury to the forest cover will result from the removal of such timber or stone, he will thereupon approve such application, giving the party permission to remove the timber or stone under the supervision of a forest officer: *Provided*, That where the stumpage value of the timber exceeds one hundred dollars, permission must be obtained from the Department, and for this purpose the superintendent, in all such cases, will submit the application to the Commissioner of the General Land Office, with his recommendation thereon. In case the application be approved, the superintendent will be notified and the cutting will be allowed, under supervision, as in cases where the amount involved is less than one hundred dollars. Every forest supervisor having charge and supervision of the cutting of timber under the foregoing regulations will submit quarterly reports to the superintendent in charge of the reservation, who will promptly forward them to the Commissioner of the General Land Office for transmission to the Department, in order that the Secretary of the Interior may be advised of the quantity of timber cut and whether the privilege granted is being abused. These reports should

show the names of the persons who have applied, during the quarter, for permission to cut timber free of charge, the kind of timber applied for, the quantity, the stumpage value of the same, and the purpose for which the applicant desired to use it.

SALE OF TIMBER.

22. The following provision is made for the sale of timber within forest reservations in limited quantities:

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservation as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make a report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

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.

23. While sales of timber may be directed by this Department without previous request from private individuals, petitions from responsible persons for the sale of "the dead, matured or large growth of trees" in specified locations 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 stating distance and direction from the nearest surveyed land, and stating natural landmarks; the character of the country, whether rough, steep or mountainous, agricultural or mineral, or valuable chiefly for its forest growth. If the petition calls for matured green timber, it must show on what evidence it is asserted that the trees have attained their full growth, and it must be further shown that their removal will tend to preserve and promote the life and growth of the younger trees.

The desired timber should be described, as the case may be, according to the following classification: Standing green; down, not dead; standing dead; and down dead. If any of the desired timber be dead, state whether killed by windfall, fire, or other cause. If desired for saw timber, state the estimated quantity in feet, board measure, and value per thousand feet; state also the number of cords and value per cord of the tops and lops of the saw timber. If the entire amount of timber to be purchased is desired for cord wood, state the aggregate number of cords and value per cord. 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 three feet above the ground, 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 value per thousand feet, and an estimate of the cord wood in the tops and lops thereof, and value per cord; or if the entire purchase is to be used for cord wood, state the aggregate number of cords and value per cord. These petitions must be filed with the supervisor in charge of the reservation, or portion of the reservation, wherein the timber is situated. Upon receipt of such an application the supervisor will attach thereto an endorsement recommending the allowance or disallowance of the application, stating the reasons on which his recommendation is based, and immediately forward to the superintendent in charge, who will promptly forward the application to this office with recommendation.

24. Upon receipt of an application to purchase timber as above, the commissioner will cause further investigation to be made, if necessary, for the purpose of ascertaining all facts to enable intelligent action on the case. He will then transmit the application, with report and recommendation, to the Secretary of the Interior for action.

25. When a sale is ordered the commissioner will direct the publication of notice in accordance with the law above quoted; and if the timber to be sold stands in more than one county, publication will be made in each of the counties, in addition to the required general publication. The time and place of filing bids and other information necessary to a correct understanding of the terms of each sale, will be given in the notices. Before any notice is published, the applicant will be required to deposit with the receiver of the local land office, a sum sufficient to cover the cost of publication. In the event of the depositor being the successful bidder, this amount will be credited on the purchase price of the timber; but, in case the timber is awarded to another, the amount so deposited will be returned. If the applicant should fail to bid during the time fixed for filing bids, the deposit will be retained to pay the cost of advertising.

26. After a body of timber has been advertised, as above, and no sale made, the timber, in whole or in part, may, within one year thereafter, be sold by the Commissioner of the General Land Office, at private sale, for not less than the appraised value, without further notice by publication, and all notices for publication will contain a statement to this effect. Persons desiring to purchase timber at private sale should file application with the supervisor in charge of the reservation, or part of reservation, in which the timber is situated, stating the quantity of timber applied for, its location, the price offered, and the fact that the timber has already been advertised, giving the date of the advertisement. The supervisor will immediately forward such application, with report and recommendation, to the superintendent, who will promptly forward the application, with recommendation, to the Commissioner of the General Land Office. The commissioner will examine the application and forward to the Department, with recommendation, for final action. The superintendent will be notified by the commissioner of the action taken, and he will, in turn, notify the applicant and the proper supervisor.

27. The timber will not be sold for less than the appraised value, and when a bid or an offer to purchase at private sale has been accepted, the purchaser will be notified to make payment therefor. Payment for all timber purchased must be made to the receiver of public moneys for the land district in which the timber is situated. In sales in excess of five hundred dollars in value, allotments, at a fixed price, may be made to several bidders, to avoid monopoly. The right is reserved to reject any or all bids. A reasonable cash deposit, to be specified in the published notice, will be required to accompany each bid; and every applicant to purchase at private sale must deposit an amount equivalent to twenty per cent of the value of the timber applied for. These deposits must be made with the receiver of public moneys, and if sale is made, the amount will be credited on the purchase price of the timber. If sale is not made, deposits will be returned.

28. 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 Secretary of the Interior, in his discretion, upon the recommendation of the Commissioner of the Gen-

eral Land Office, and upon good and sufficient reasons being shown therefor.

29. Ample notice must be given by the purchaser, to the supervisor, of the proposed date of cutting and removal of the timber, in order that an officer may be designated to superintend the cutting. 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.

30. The act provides that the timber sold shall be used in the State or Territory in which the reservation is situated, and it is not to be exported therefrom. Where a reservation lies in more than one State or Territory, this requires that the timber shall be used in the State or Territory where cut.

31. 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 forest reservations under the act of June 4, 1897. 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.

32. Where timber has been appraised and advertised for sale and no satisfactory bid has been offered, a new appraisement and sale may be ordered after the lapse of one year, if, within that time, no application to purchase said timber at private sale, for not less than the appraised value, has been made.

33. 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.

BINGER HERMANN,
Commissioner.

Approved April 4, 1900.
E. A. HITCHCOCK,
Secretary.

The text of the law under which the above rules and regulations are prescribed is as follows:

[30 Stat., 34-36.]

AN ACT making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums be, and the same are hereby, appropriated, for the objects hereinafter expressed, for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, namely:

* * * * * * *

For the survey of the public lands that have been or may hereafter be designated as forest reserves by Executive proclamation, under section twenty-four of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available: *Provided*, That to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests: *Provided*, That the Executive orders and proclamations dated February twenty-second, eighteen hundred and ninety-seven, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations, be, and they are hereby, suspended, and the lands embraced therein restored to the public domain the same as though said orders and proclamations had not been issued: *Provided further*, That lands embraced in such reservations not otherwise disposed of before March first, eighteen hundred and ninety-eight, shall again become subject to the operations of said orders and proclamations as now existing or hereafter modified by the President.

The surveys herein provided for shall be made, under the supervision of the Director of the Geological Survey, by such person or persons as may be employed by or under him for that purpose, and shall be executed under instructions issued by the Secretary of the Interior; and if subdivision surveys shall be found to be necessary, they shall be executed under the rectangular system, as now provided by law. The plats and field notes prepared shall be approved and certified to by the Director of the Geological Survey, and two copies of the field notes shall be returned, one for the files in the United States surveyor-general's office of the State in which the reserve is situated, the other in the General Land Office; and twenty photo-lithographic copies of the plats shall be returned, one copy for the files in the United States surveyor-general's office of the State in which the reserve is situated; the original plat and the other copies shall be filed in the General Land Office, and shall have the facsimile signature of the Director of the Survey attached.

Such surveys, field notes, and plats thus returned shall have the same legal force and effect as heretofore given the surveys, field notes, and plats returned through the surveyor-general; and such surveys, which include subdivision surveys under the rectangular system, shall be approved by the Commissioner of the General Land Office as in other cases, and properly certified copies thereof shall be filed in the respective land offices of the district in which such lands are situated, as in other cases. All laws inconsistent with the provisions hereof are hereby declared inoperative as respects such survey: *Provided, however*, That a copy of every topographic map and other maps showing the distribution of the forests, together with such field notes as may be taken relating thereto, shall be certified thereto by the Director of the Survey and filed in the General Land Office.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

The Secretary of the Interior shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this act or such rules and regulations shall be punished as is provided for in the act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States.

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the Secretary of the Interior, under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office, in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the Secretary of the Interior, not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the Commissioner of the General Land Office and to the receiver in the land office in which such reservation shall be located of his doings in the premises.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be prescribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church.

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

* * * * * * *

Approved, June 4, 1897.

RELINQUISHMENT—QUALIFICATIONS.

GARRETT *v.* MOORE'S HEIRS.

A relinquishment of a homestead entry executed by one claiming the status of sole heir of the deceased entryman will not be accepted where it appears that said heir is a minor and that under the law of his domicile he is not competent to execute such an instrument.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 26, 1900.* (J. R. W.)

William C. Garrett has appealed to the Department from your office decision of February 6, 1900, involving lots 1 and 2 and the S. ½ of the NE. ¼ of Sec. 3, T. 13 N., R. 5 E., Oklahoma, Oklahoma.

John Moore made homestead entry of said land October 26, 1891. William C. Garrett filed contest affidavit against said entry February 10, 1897, charging abandonment for more than six months and failure to establish or maintain residence or cultivation by him or by any party by or through him. Affidavit was filed showing death of the entryman, and that he had no known heirs in the Territory of Oklahoma. Said Moore died August 9, 1896, without a will. Publication of notice was made for hearing at the local office, June 16, 1897. The trial was held on that day, and Leah Portise, claiming to be cousin and sole heir of said John Moore, appeared by counsel, W. H. Twine. September 1, 1897, the local office found that the evidence did not sustain the charge, and recommended dismissal of the contest. Contestant appealed to your office. May 10, 1899, your office decision affirmed the action of the local office and dismissed the contest.

July 25, 1899, there was filed in the local office the relinquishment of Chester Portise, of Wake county, North Carolina, as sole child and heir of Leah Portise, who died March 29, 1899. Affidavits were filed with said relinquishment, satisfactorily showing said Chester Portise was the sole heir of the deceased entryman, and was but twenty years of age. The local office on this relinquishment canceled the entry, July 25, 1899, and allowed William C. Garrett (presumably the contestant) to make homestead entry of the land. July 31, 1899, the local office reported such action to your office.

October 16, 1899, your office decision held said Chester Portise, being a minor, was by his non-age disqualified to execute any effective relinquishment, rejected the same, and held said Garrett's claim for cancellation. Said Garrett applied to your office for a review of said office decision, based on the allegation in the affidavits of Howell Brown and W. H. Twine, made before the register of the local office, July 25, 1899, "that Chester Portise is the head of a family."

February 6, 1900, your office decision denied said motion, and held:

It does not appear that these two affiants were personally acquainted with Chester Portise, and they did not set out any facts from which they concluded that he is the

head of a family. This affidavit does not warrant the finding that Portise is the head of a family. But the question, whether Chester Portise was the head of a family April 17, 1899, is immaterial, for the reason that he could not execute a valid relinquishment because he was a minor. If it had been shown that he was the head of a family, that fact would not warrant the holding that he was qualified to execute a valid relinquishment. Starkweather *v.* Starkweather, 15 L. D., 162.

The relinquishment was executed April 17, 1899, before an officer in Wake county, North Carolina. The affidavit that "Portise is the head of a family" was made at the local office, July 25, 1899. No facts were stated. Affiants did not claim to know said Portise. He may have been married July 25th, and have been unmarried April 17th previously.

It is contended that insomuch as the statute permits a minor, head of a family, to make homestead entry, such minor may make a relinquishment. It is also contended that by the law of Oklahoma (see Art. 7, 14 Ch., 18 Oklahoma Stat., 1893) a minor is by marriage emancipated, and made competent to contract.

As to the first assignment, if it were conceded that capacity to make an entry carries with it an implied recognition of power to relinquish an entry so made, yet that does not necessarily make the relinquishment in this case good. The entry was not made by said Portise, but by Moore, and came as property to Portise by descent, under section 2291 of the Revised Statutes. The entryman Moore having died without issue or widow surviving, his claim went to his nearest kin.

A minor cannot make a valid relinquishment. Starkweather *v.* Starkweather (15 L. D., 162).

The statute giving the right provides in what manner in may be exercised and enjoyed. It does not recognize the minor as having capacity to relinquish.

Nor does the fact that by the law of Oklahoma Portise might have conveyed property or made contracts, were he domiciled there, authorize him to contract in North Carolina, where he was domiciled and a minor, respecting property in Oaklahoma.

Story on Conflict of Laws, speaking of "Capacity of Persons," after discussing the subject of minority, sums up and says (Sec. 52):

> The result of the doctrine maintained by the jurists above named, except Paul Voet, is, that a person who has attained the age of majority by the law of his native domicile, is to be deemed everywhere the same, of age; and, on the other hand, that a person who is in his minority by the law of his native domicile, is to be deemed everywhere in the same state or condition. . . . Thus, Boullenois, says: "If a man has immovable property, situate in a place where the age of majority is fixed at twenty-five, and by the law of his own domicile he is of age at twenty, he may at twenty sell or alienate such immovable property. On the other hand, if by the law of the place where the immovable property is situate he is of age at twenty, but by the law of his domicile not until twenty-five, he cannot sell or alienate such property until the age of twenty-five."

Judge Story approves the doctrine that, though the conveyance as to form is controlled by the *lex loci* of the property, still the capacity to make the conveyance, contract, or disposition of the property is controlled by the law of the domicile of the party. Said Portise, being a minor, without power in North Carolina, the place of his domicile, to make a contract, could not make a valid release of rights in immovable property situate in Oklahoma, even though competent to do so, had he been domiciled there.

Your office decision, therefore, is correct.

SOLDIERS' ADDITIONAL HOMESTEAD—ASSIGNMENT.

D. H. TALBOT (ON REVIEW).

The Department will not undertake to determine rights claimed under an alleged assignment of a soldiers' additional homestead privilege, in the absence of an application for the exercise of said privilege.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 31, 1900.* (F. W. C.)

D. H. Talbot has asked review and reversal of unreported departmental decision of March 17, 1900, refusing to recognize or pass upon the legality of his claimed assignment of Cyril Grant's soldiers' additional homestead right, in the absence of an application to locate the same upon a specific tract of land.

In disposing of a similar application, made by Talbot, it was said (29 L. D., 273):

> The soldiers' additional homestead right is absolute, and exists by operation of law, as does the power to transfer or assign the right, and is not dependent upon departmental action for its validity. It may well be doubted if the Department has any jurisdiction to take action affecting such right, except in connection with an application to exercise the right by the soldier or his assignee, by its location upon the public land. The suggested change in the regulations contemplates the final adjudication of the right, in advance of any application to have it attach to specific land. Until such application is made the Department can not supervise the exercise of the right, and the United States is no proper party to a case which involves no more than the power of the soldier to sell or transfer his right, this power being recognized by the law itself.

Therein the question as to the propriety of returning to the practice of certifying the additional right under section 2306 U. S. R. S., was also considered and disposed of adversely to appellant.

If Cyril Grant was possessed of an additional right under said section and transferred it to Talbot, the latter may in turn sell it to another, and so it may pass through a dozen hands before it is exercised in the making of an entry.

These transfers are not required to be noted in the records of the land department, and are not subject to the approval or supervision of its officers, nor can such officers, for the purpose of protecting the transferee against other prior or subsequent transfers by his transferrer, or for the purpose of enabling the transferee to more advantageously dispose of the additional right, stop other necessary work, every time such a right is claimed to have been transferred, and inquire whether the right has been theretofore exercised and exhausted, or whether the transfer is genuine and absolute. The duty of these officers will be performed if these matters receive proper attention when an attempt is made to make entry of land under the additional right. Until then the transfer thereof does not concern them.

The motion is accordingly denied.

REED *v.* NELSON.

Motion for review of departmental decision of March 19, 1900, 29 L. D., 615, denied by Secretary Hitchcock, May 31, 1900.

ALASKAN LANDS—MINING CLAIM.

INSTRUCTIONS.

The phrase "as in the case of mining claims," occurring in section 32 of instructions of June 8, 1898, was not intended to modify or change the existing practice controlling the survey of mining claims.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *May 31, 1900.* (E. F. B.)

The Department is in receipt of your letter of February 27, 1900, enclosing a letter from the register of the land office at Rampart, Alaska, making inquiry as to the method to be pursued in obtaining official surveys of mining claims in Alaska. The information sought is whether a claimant can have his claim surveyed by a deputy-surveyor without first making application to the surveyor-general. You request instructions in view of the uncertainty that exists, because of the expression "as in the case of mining claims," occurring in Sec. 32 of instructions of June 8, 1898 (27 L. D., 248), relating to the disposal of lands in Alaska for the purpose of trade and manufacture under the 10th section of the act of May 14, 1898 (30 Stat., 409).

The expression referred to was made inadvertently. It was not the intention by the circular of June 8, 1898, to modify or change the existing practice controlling the survey of mining claims, which

requires the claimant to make application to the surveyor-general for the survey of his claim, and said circular is hereby modified by striking out the words "as in the case of mining claims," where they occur in section 32. You will instruct the local officers accordingly.

JACK B. BAKER.

Motion for review of departmental decision of March 1, 1900, 29 L. D., 563, denied by Secretary Hitchcock, May 31, 1900.

INDIAN LANDS—OTOE AND MISSOURIA LANDS.

INSTRUCTIONS.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 1, 1900.* (W. C. P.)

I am in receipt of your letter asking instructions under the act of Congress (Public No. 54) approved April 4, 1900, which reads as follows:

That the revision and adjustment of the sales of lands in the late reservation of the confederated Otoe and Missouria tribes of Indians in the States of Nebraska and Kansas, to which more than three-fourths of the adult male members of said tribes have given their consent, by an instrument in writing dated the twentieth day of November, eighteen hundred and ninety-nine, and now on file in the office of the Secretary of the Interior, is hereby approved and confirmed, and the Secretary of the Interior is hereby directed to carry the same into full force and effect as to all delinquent purchasers of said lands, their heirs and legal representatives, in the following manner, to wit: The Secretary of the Interior shall cause notice to be given to said purchasers, their heirs and legal representatives, respectively, of the amounts of the deferred payments found to be due and unpaid on their respective purchases under the adjustment hereby confirmed; and within one year thereafter it shall be the duty of such purchasers, their heirs and representatives, respectively, to make full payment in cash of the amounts thus found to be due by them, severally, and in default of such payment within said period of one year the entry of any purchaser so in default shall be forthwith canceled and the lands shall be resold for the benefit of the Indians at not less than the appraised value thereof, and in no case at less than two dollars and fifty cents per acre, as provided in the act under which they were originally sold. Upon making such complete payment within the time so fixed each purchaser, his heirs or legal representatives, shall be entitled to receive a patent for the lands so purchased.

The instrument in writing spoken of in the act is the result of negotiations among the adult male Otoe and Missouria Indians, James McLaughlin, United States Indian Inspector, representing the Secretary of the Interior, and J. A. Van Orsdel, representing the delinquent purchasers, and, omitting signatures, reads as follows:

I. The original appraised value of said lands together with twenty-five per cent (25%) of such appraised value shall for the purposes of this settlement represent the purchase price of said lands.

II. Interest shall be computed on the purchase price so ascertained at the rate of five per cent (5%) per annum, simple interest, from the date that interest should be computed under the original act of Congress providing for the sale of said lands to date of payment.

III. From the amount so ascertained to be due in each instance shall be deducted all payments heretofore made on said lands, both on account of principal and interest, together with simple interest thereon, at the rate of five per cent (5%) per annum, from date of payment until date of final payment, and the balance remaining after deducting said payments and interest thereon, as aforesaid, from the purchase price with interest thereon, as aforesaid, shall be considered the amount still due from said settlers and purchasers in each instance.

IV. All computations to be made under the direction of the Secretary of the Interior, and we fully authorize the adjustment of the matter on the basis as above set forth, and as provided by the act of March 3d, 1893.

V. It is further understood that this agreement and compromise shall apply only to the purchase money now delinquent, and that we will in no event agree to any further adjustment or refunding of any money whatever to those who have paid the full amounts due on their purchases made at the sale of said lands.

In testimony whereof, we hereby subscribe our respective names at the Otoe Sub-Agency, Noble County, Oklahoma Territory, this twentieth day of November, one thousand eight hundred ninety-nine.

You will cause careful computations to be made, in the manner provided in said instrument in writing, of the amounts due and unpaid from the delinquent purchasers, respectively. Referring to paragraph II of said instrument or agreement, the interest should be computed, for the purposes of the notice, from date of sale to such future date as you may adopt for the date of the notices. As soon as possible you will cause notice to be given such purchasers, their heirs and legal representatives, respectively, of the amounts of the deferred payments thus found to be due and unpaid at the date of notice, and that if the same, together with interest upon the original appraised value of the lands, as increased by the addition thereto of twenty-five per centum thereof, at the rate of five per centum per annum from the date of the notice to the date of final payment, less interest at five per centum per annum for the same period upon all payments theretofore made upon said lands, be not paid within one year after such notice, the entry of any purchaser so in default will be canceled, and the lands resold as provided in said act of April 4, 1900. Each notice should describe the land sold, state the date of the sale, the appraised value of the land, the date and amount of all payments upon the purchase, and all other matters entering into the computation of the amount due and unpaid at the date of the notice. Great care should be exercised to see that the parties interested in these purchases receive this notice; and it is suggested that the local officers be instructed, in addition to giving the personal notice herein provided for, to give publicity to the matter as a matter of news through the local papers, and to send a copy of the notice in each instance to J. A. Van Orsdel, the attorney who represented the delinquent purchasers in negotiating said agreement.

By departmental letter of July 18, 1895 (21 L. D., 55), your office was instructed to direct the local officers to notify the purchasers of these lands then in default in their payments, that if the amounts due from them respectively were not paid in ninety days the entries of those so in default would be canceled. Final action under this order was suspended November 9, 1895, and, afterwards, the Indians having consented to the allowance of a rebate of ten years' interest to all delinquent purchasers who would pay the amounts due after such rebate within ninety days after notice, your office was instructed by departmental letter of July 20, 1896 (23 L. D., 143), to direct the local officers to notify purchasers then in arrears that all, who within ninety days from notice should make settlement in full, would be allowed a rebate of ten years' interest, and that on failure to settle within that time, their entries would be canceled. Some of the purchasers accepted this offer, and made payment thereunder within the time prescribed, and patents have been issued to them. These are not delinquent purchasers within the terms of the agreement now under consideration, and no action will be taken as to them. Other purchasers tendered payment under that arrangement after the expiration of the time prescribed. This money was received, but no further action was taken, and no patents have been issued in those cases. Such transactions not having been closed, those purchasers are delinquent within the terms of the present agreement, and will be so treated.

Your office has at various times asked instructions in cases where parties have asked an extension of time to make payment under the order of July 20, 1896, or have claimed not to have received notice of that order in time to comply therewith. Such parties are within the terms of the present settlement, and they should be so notified.

MILLER *v.* TACOMA LAND COMPANY.

Motion for review of departmental decision of March 28, 1900, 29 L. D., 633, denied by Secretary Hitchcock, June 1, 1900.

MINING CLAIM—REGULATIONS OF JUNE 24, 1899, AMENDED.

INSTRUCTIONS.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 1, 1900.* (A. B. P.)

To conform to the principles announced by the supreme court in the case of Del Monte Mining Co. *v.* Last Chance Mining Co. (171 U. S., 55), as applied and followed by this Department in the recent

case of Hustler and New Year Lode Claims (29 L. D. 668), paragraph 7 of the mining regulations, approved June 24, 1899 (28 L. D., 577, 595), is hereby amended so as to read as follows:

7. The rights granted to locators under section 2322, Revised Statutes, are restricted to such locations on veins, lodes, or ledges as may be "situated on the public domain." In applications for patent to lode claims where the survey conflicts with the survey or location lines of another lode claim and the ground in such conflict is excluded, the applicant not only has no right to the excluded ground, but he has no right to that portion of any vein or lode the top or apex of which lies within such excluded ground, unless his location was prior to May 10, 1872. His right to the lode claimed terminates where the lode, in its onward course or strike, intersects the exterior boundary of such excluded ground and passes within it.

Paragraph 8 of said mining regulations is hereby abolished.

FOREST RESERVATION—LIEU SELECTION—ACT OF JUNE 4, 1897.

E. S. GOSNEY.

If agricultural lands are improvidently included in a forest reservation they can be eliminated therefrom only by a proclamation of the President or by the action of Congress, and, until so eliminated, such lands will continue a part of the reservation.

A homestead entry covering lands within the limits of a forest reservation, of record at the date of the proclamation establishing the reservation, is effective to except the lands covered thereby from the effect of the proclamation only so long as the entryman continues to comply with the law. On the relinquishment of the entry the exception declared in the proclamation ceases to be operative and the lands at once become a part of the reservation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 1, 1900.* (E. B., Jr.)

By decision of your office dated May 29, 1899, the application of E. S. Gosney, filed August 29, 1898, to select, under the act of June 4, 1897 (30 Stat., 11, 36), the S. E. ¼ of the S. W. ¼ of Sec. 20, T. 18 N., R. 8 E.; G. & S. R. M., Prescott, Arizona, land district, in lieu of the N. W. ¼ of the N. W. ¼ of Sec. 28, T. 28 S., R. 31 E., M. D. M., within the limits of the Sierra forest reserve, was rejected for the reason that the tract applied for is within the San Francisco Mountains forest reserves, established August 17, 1898, by proclamation of the President (30 Stat., 1780). From this action Gosney has appealed.

September 22, 1899, Gosney filed in your office his petition averring that he had, in good faith and without knowledge of the establishment of the San Francisco Mountains forest reserves, purchased the land first above described from one John L. Munds, who had entered the same as a homestead long prior to the establishment of the said reserves; that in pursuance of the terms of purchase Munds relinquished his claim to the land August 29, 1898, and his entry being thereupon

canceled, he, Gosney, filed his said application therefor the same day; that he expended $750 in procuring Munds' relinquishment, and has spent several hundred dollars in improving the place for use as his principal or headquarters stock ranch in connection with other tracts of land in the vicinity which he owns or has negotiated for; that to secure control of the stock range, of which the tract in question is an important part, he has expended not less than $10,000, and "will be greatly damaged beyond the value of this tract by the failure to secure the same for use in connection with other ranches and water rights for his stock ranches and grazing;" and that this tract is quite valuable for agricultural purposes, but of very little value as timber land, having only about fifty trees standing together on one corner of it, the balance being very fertile and much of it in cultivation for many years past: Wherefore, petitioner asked that the matter be investigated, the said tract exempted from the said reserves, and his selection thereof approved and patented. With the said petition, and in support thereof, were filed the affidavits of three witnesses, one of whom corroborates generally the allegations of the petition; the other affiants corroborate the petition as to the character of the land only.

Your office considered the said petition in its decision of October 9, 1899, and after finding that the said tract had been entered June 9, 1891, by said Munds under the homestead law, and the entry canceled August 29, 1898, upon Munds' relinquishment, and after reciting also the filing and rejection of Gosney's application, held, in the matter of said petition, as follows:

> In regard to the request that this 40-acre tract be now eliminated from the forest reserve in order that it may become subject to such selection, you are advised that, although provision is made by the act of June 4, 1897 (30 Stat., 36), for the restoration to the public domain of lands within a forest reservation, it is not believed to have been the intention of Congress that every small tract, here and there within a reserve, which might be devoid of timber and adapted to agriculture should be subject to restoration. Moreover, in this group of reserves where each individual reserve is so small in itself, it appears especially undesirable that any tracts should be eliminated.
>
> The application of E. S. Gosney for the elimination of said tract is, accordingly, hereby rejected.

From the rejection of his petition Gosney has also appealed.

The two appeals will be considered together. It is contended by the appellant (1) that the land in controversy is more valuable for agricultural purposes than for forest purposes, and that, therefore, it was not subject to executive withdrawal for forest reserve purposes, and said proclamation was ineffective to include it as a part of the said reserves or justify the rejection of Gosney's application for the same; (2) that even if the agricultural character of the land did not preclude it from reservation for forest purposes, it was excepted from inclusion in the said reserves by the express terms of the President's

proclamation, *supra*, being then embraced in the said entry of Munds, and (3) that being so excepted from the said reserves, upon the cancellation of the said entry it became "vacant land open to settlement," and properly subject to lieu selection under the act of June 4, 1897, *supra*.

It does not appear from the record whether the land is or is not agricultural in character, nor is it necessary to determine its character in considering Gosney's application. Even if it be assumed that this particular tract is agricultural in character, that alone would not render it subject to Gosney's application. Unless for other reasons it was excepted from the force and effect of the President's proclamation it fell within the same and was thenceforward actually reserved from lieu selection or other appropriation under the general land laws. In the case of E. S. Gosney, being an application to select lieu land in the same forest reserves by the same person now here as appellant, decided by the Department March 8, 1900 (29 L. D., 593), the material facts were precisely similar in every respect to those of the case at bar, except that in the former the land applied for was not covered by an entry, filing, or settlement claim at the date of the establishment of the said forest reserves. In each case the application to select was rejected by your office for the same reason. After setting out section 24 of the act of March 3, 1891 (29 Stat., 1095, 1103), providing for the establishment of forest reserves, and the provisions of the act of June 4, 1897, *supra*, which declare the purposes for which such reservations are established and the kinds of lands not intended to be included therein, and provide for the elimination therefrom of lands "better adapted for mining or agricultural purposes than for forest usage," the Department said, in the case cited:

> From these provisions of the act of 1897 it clearly appears that Congress did not intend to authorize the inclusion in public forest reservations "of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes"; and also that adequate provision is made for the elimination from such reservations of lands of the character just described and their restoration to the public domain.
>
> But where public agricultural lands are improvidently included in a forest reservation they can be eliminated therefrom only by a proclamation of the President or by the action of Congress, and until so eliminated they will continue a part of the reservation and be withheld from settlement and entry. It does not appear from the record in this case whether or not the land Gosney sought to select is agricultural in character. But if it be conceded that it is of such character it is still none the less reserved from entry or settlement, and so not subject to lieu selection, so long as it remains a part of a public forest reservation.

These views, if sound, are decisive upon the first contention of apellant. Upon further careful consideration the Department sees no reason to doubt their soundness, or to dissent from them in this case.

Relative to the authority of the President to establish forest reservations and to the character of the land which may be embraced therein, section 24 of the act of March 3, 1891, *supra*, and the provisions of the

act of June 4, 1897, *supra*, bearing thereon, being *in pari materia*, must be construed together to ascertain the intention of Congress in the premises. In said section 24 it is provided:

> That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

In the said act of June 4, 1897, it is provided that—

> No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

And that—

> Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain.
>
> The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve.

A very large discretion is evidently lodged in the President by these statutory provisions. His judgment is to be guided and controlled only along general lines. In the said legislation of 1891 practically no limit is placed upon the exercise of his authority to establish forest reservations from time to time, except that the lands reserved must be "public lands wholly or in part covered with timber or undergrowth." In the act of 1897 his authority is further limited only to the extent of the declaration therein of the purposes of such legislation, and that the inclusion in forest reservations "of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes" is not intended to be authorized thereby. Recognizing that lands "better adapted for mining or for agricultural purposes than for forest usage" had already been and might thereafter be included in such reservations, that act made provision for their elimination when ascertained as therein directed.

The language quoted in the two instances immediately preceding is worthy of particular notice. It is not simply lands that are merely agricultural in character that are not to be included in forest reservations, or, if included, may be restored to the public domain, but

"lands more valuable . . . for agricultural purposes than for forest purposes," or "for forest usage." The language used, it is evident, was carefully and wisely chosen. In determining whether any particular tract or body of land ought to be included in a forest reservation, or, if included, ought to be eliminated therefrom, its value to the reservation for forest purposes or for purposes of a reservation generally, and the effect of its omission or elimination therefrom are to be weighed against its value for agricultural purposes. Its relative position in the proposed or existing reservation may be of much importance in such determination. If immediately within the reservation boundary, for instance, its separation from the reservation might be a matter of small concern; but if at some distance within the reservation, and especially if many tracts be thus eliminated, the consequences thereof might, and probably would be, very injurious, affecting not only the integrity of the reservation, but its maintenance and control, and perhaps eventually rendering abortive the purposes for which it was established. Considerations like these may render the nature of the soil of such tracts or bodies of land, or their condition as to the growth of trees or other vegetation thereon, of minor importance in the determination; and when the tract is small, consisting of but forty acres, and far within the limits of the lands reserved, as in the present instance, the mere fact that it might be nearly or even entirely devoid of timber and distinctly agricultural land would not, under ordinary circumstances, if otherwise subject to inclusion in a forest reservation, justify its exception or elimination therefrom.

Appellant's second contention can not be sustained. The exception in the said proclamation of August 17, 1898, depended upon by appellant, reads as follows:

> Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and rules and regulations not in conflict therewith.
>
> *Provided*, that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

The tract in question was embraced in Munds' entry of record at the date of said proclamation. He had then already delayed making final proof beyond the period of seven years ordinarily allowed by the homestead law within which to make the same, and it does not appear that he thereafter submitted such proof and applied for the extension of one year provided for in certain cases by the joint resolution of September 30, 1890 (26 Stat., 684). Instead, as he admits in

his affidavit, he sold the land to Gosney and duly relinquished to the United States all claim thereto.

Whether notwithstanding the lapse of more than seven years since he made the entry the same was, within the meaning of the said proclamation, at the date thereof still a "legal entry" which might have been perfected had he elected so to do, and thereby continued and completed the exception declared in the said proclamation, it is not necessary to decide. By its terms the continuing effect of the exception was limited to those tracts, theretofore embraced therein, for which the entryman or claimants continued to comply with the law under which their entries, filings or settlements were made. Upon failure longer to comply with the law, as to any tract theretofore within the exception, the exception in favor of such tract ceased to be operative and the same fell within the reservation made by the proclamation. By his sale of the land embraced in his homestead entry, Munds violated the homestead law and defeated his right to perfect his entry, if such right thereto existed (Walker *v.* Clayton, 24 L. D., 79). By his relinquishment he expressly elected to discontinue compliance with the homestead law under which he claimed the tract. Either such sale or relinquishment was sufficient to destroy the continuing force and effect of the said exception; and thereupon the tract at once came under the reserving power of the President's proclamation and ever since by force thereof has been part of the said forest reserve and not subject to lieu selection under the act of June 4, 1897.

Gosney knew that Munds held the tract under the homestead law and he is chargeable with knowledge of the conditions on which alone the tract would continue excepted from the reserve. His allegation as to the expenditure of a considerable sum of money for and upon the said tract and as to the extraordinary value of the tract to him in his operations as a ranchman cannot therefore affect the result.

Appellant's third and last contention is dependent upon the second, which having fallen, the other must also fall with it. It need not therefore receive any consideration.

The decisions of your office rejecting his said application to select the land and refusing to order an investigation as to its character with a view to its elimination from the said reserves as requested by him, are both affirmed in accordance with the views herein expressed.

JARED WOODBRIDGE.

Motion for review of departmental decision of February 20, 1900, 29 L. D., 531, denied by Secretary Hitchcock, June 1, 1900.

FREE HOMESTEADS—ACT OF MAY 17, 1900.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, United States land offices, June 5, 1900.

Your attention is called to the provisions of the act of Congress of May 17, 1900 (Public No. 105), entitled "An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose," which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened for settlement, acquired prior to the passage of this act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry: *Provided,* That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect: *Provided, however,* That all sums of money so released which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States, and that in the event that the proceeds of the annual sales of the public lands shall not be sufficient to meet the payments heretofore provided for agricultural colleges and experimental stations by an act of Congress, approved August thirtieth, eighteen hundred and ninety, for the more complete endowment and support of the colleges for the benefit of agriculture and mechanic arts, established under the provisions of an act of Congress, approved July second, eighteen hundred and sixty-two, such deficiency shall be paid by the United States: *And provided further,* That no lands shall be herein included on which the United States Government has made valuable improvements, or lands that have been sold at public auction by said Government.

SEC. 2. That all acts or parts of acts inconsistent with the provisions of this act are hereby repealed.

You will observe that only settlers under the homestead laws upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this act by treaty or agreement from the various Indian tribes, are affected by this act.

This act does not change existing laws as to the time of submitting final proof and making payment of final commissions. See acts of July 26, 1894 (28 Stat., 123), June 10, 1896 (29 Stat., 342), June 7, 1897 (30 Stat., 87), and July 1, 1898 (30 Stat., 595).

Where final proof has been heretofore made for lands affected by this act and payment has not been made, such payment will not now be required by you.

Where the payments were authorized to be made in installments and a partial payment has been made but final proof has not been made, no other or further payment will be required when the homestead settler

makes his final proof, except the payment of the final commissions and testimony fees.

In reporting entries hereafter where the money is "released which if not released would belong to any Indian tribe," which were heretofore reported under a separate series, you will continue so reporting them in accordance with the instructions already issued.

Where the regular series of entries was kept, you will continue such series, reference being made on the entry papers and abstracts to the particular Indian reservation and the act under which the lands were ceded.

Where the right to commute homestead entries within any of the reservations covered by the act has been heretofore authorized by statute, homestead settlers may commute their entries therein in the time and at the prices now fixed by existing laws.

Entries, where settlement and residence are not requisite, as is the case under section 2306 R. S., do not come within the provisions of this act.

Approved:

E. A. HITCHCOCK,
Secretary.

RAILROAD GRANT—SETTLEMENT CLAIM.

OREGON AND CALIFORNIA R. R. CO. *v.* MILLER.

The right of the railroad company under the grant of July 25, 1866, attached to the granted sections when the map designating the line of road was filed with the Secretary of the Interior and accepted by that officer.

Land embraced within an unexpired pre-emption filing at the date of said grant is excepted from the operation thereof.

A settler upon surveyed land lying within the limits of said grant, prior to the definite location of the line of road, who does not file his pre-emption declaratory statement until after the definite location of the road, has no such claim as serves to except the land from the operation of said grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 7, 1900.* (F. W. C.)

The appeal of the Oregon and California Railroad Company from your office decision of February 15, 1896, in the matter of the homestead entry of William N. Miller, covering the S. ½ of the NE. ¼ and the S. ½ of the NW. ¼ of Sec. 23, T. 5 S., R. 3 W., Oregon City land district, Oregon, in which it was held that said tract was excepted from the grant made by the act of July 25, 1866 (14 Stat., 239), under which appellant lays claim to the land, has been considered.

Said tract is within the primary limits of this grant as adjusted to the line of definite location shown upon the map filed in this Depart-

ment October 29, 1869, but not accepted until January 29, 1870. It is of the class known as "unoffered" land, never having been proclaimed for offering at public sale.

On December 23, 1865, Franklin T. McClintock filed pre-emption declaratory statement covering the SW¼ of the NE¼ and the S½ of the NW¼ of said Sec. 23, and therein he alleged settlement upon the land December 19, 1865.

On April 21, 1870, Peter Bellique filed pre-emption declaratory statement covering the entire NE¼ of said Sec. 23, and therein he alleged settlement upon the land January 21, 1870.

Although proof and payment were never made under said filings, they have never been formally canceled upon the records.

It is on account of said pre-emption claims that your office decision holds the land in question to have been excepted from the grant made by the act of July 25, 1866, *supra.*

On October 21, 1887, William N. Miller was permitted by the local officers to make homestead entry of the land here in question, and after due publication of notice he submitted proof under said entry and final certificate issued thereon June 26, 1894.

The appeal urges error in your office decision in holding that the company's right did not attach until the acceptance of its map of definite location on January 29, 1870, and that the pre-emption filings by McClintock and Bellique served to except the land from its grant.

The first ground of error is similar to that made and resolved against the company in the case of Oregon and California Railroad Company *v.* Pickard (12 L. D., 133), in which case it was held that the right of the company under the grant of July 25, 1866, attached to the granted sections when the map designating the line of road was filed with the Secretary of the Interior and accepted by that officer. It must therefore be held that no error was committed in your office decision treating the date of the attachment of rights under said grant, in the vicinity of the tract in question, to have been on January 29, 1870, when the Secretary of the Interior accepted the map showing the line of definite location of the road opposite thereto.

As to the effect of the pre-emption filings made upon this land, that made by McClintock on December 23, 1865, was a subsisting claim at the date of the passage of the act making the grant and therefore served to except the tract covered thereby from the operation of the grant. (Oregon and California R. R. Co., 29 L. D., 268.)

Relative to the filing of Bellique, it will be seen that said filing was not made until after the acceptance by the Secretary of the Interior of the map of definite location of the line of railroad, but in his declaratory statement Bellique alleged settlement upon the land January 21, 1870, eight days prior to such definite location.

At the time of Bellique's settlement and thenceforward to the time of the definite location of the line of railroad, the land in controversy

was surveyed and was situate in an organized land district which had an established local land office and a duly authorized and acting register and receiver. During that time he could have filed the necessary declaratory statement in the local land office and have thereby established a record-claim to the land which would have prevented it from passing under the grant to the railroad company upon the definite location of the line of road; but Bellique did not file a declaratory statement and thereby establish a record-claim to the land before such definite location of the line of road, and his failure to do so was not due to any accident or omission, not the fault of himself, but of the government or some officer thereof. He did not therefore at the time of such definite location have such a claim as excepted the land from the grant to the company. (Tarpey *v.* Madsen, 177 U. S.)

Your office decision is affirmed as to the effect of the filing of McClintock, and is reversed as to the effect of the filing of Bellique, and Miller's entry will be canceled as to the SE ¼ of the NE ¼ of said Sec. 23.

REPAYMENT—ASSIGNEE—SECTION 2, ACT OF JUNE 16, 1880.

W. F. HOFFMAN.

The right of assignees to repayment under section 2, act of June 16, 1880, is restricted to assignees of the land, and does not extend to a purchaser of a mere claim for the money paid on the entry.

Acting Secretary Ryan to the Commissioner of the General Land Office, June 9, 1900.

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

This case has reference to the SE. ¼ and SW. ¼ of Sec. 13, T. 1 N., R. 1 E., La. Mer., Opelousas, now New Orleans, land district, Louisiana.

The records of your office show that the land was purchased by John Heap at Opelousas, Louisiana, under the act of March 3, 1811 (2 Stat., 662), at the rate of two dollars per acre, credit system, and that final payment was made therefor by his assignee, Joseph J. Scott, to whom final certificate No. 37 was issued November 4, 1826.

November 26, 1897, your office instructed the local officers to call upon Scott, his heirs or legal representatives, to show cause why his entry should not be canceled for conflict with the private grant to Alexander Fulton and William Miller, confirmed by act of April 29, 1816, and patented April 3, 1839. Notice was accordingly sent to Scott or his legal representatives by registered letter addressed to Loyd, Louisiana, the post-office nearest the land. Copies of your said office letter were also sent by the local officers to the postmaster nearest the land and to the clerk of the court of Rapides parish, requesting information as to the owner or claimants of said land. The said officers reported that the registered letter had been returned unclaimed and that the postmaster and clerk of court had failed to respond.

The entry was canceled by your office for conflict with the Fulton and Miller grant March 30, 1898.

Prior to the last-named date, to wit, March 14, 1898, W. F. Hoffman made application for repayment of the purchase money paid on said entry. Accompanying his application is a certified copy of a petition, filed December 23, 1897, addressed to the Judges of the Tenth Judicial District Court in and for the Parish of Rapides and State of Louisiana, setting forth that Joseph J. Scott departed this life many years since and that his succession has not been opened; that said succession is entitled to a land claim against the United States and located in the parish of Rapides. It was accordingly asked in said petition that an inventory be taken and an appraisement made of the effects of the succession and a curator appointed for the same.

Certified copies of the proceedings had under the petition are also filed, which show that appraisers were appointed; that the only property pointed out to such appraisers as belonging to the succession of Joseph J. Scott was final certificate No. 37, issued for the SE. ¼ and SW ¼ of Sec. 13, T. 1 N., R. 1 E., which was appraised as real estate and valued at $150.00; that a curator was appointed, and upon his representation that it was necessary to sell the property belonging to the succession of Scott and described in the appraisers' inventory, for the payment of debts, a sale thereof was ordered by the court; that said property after due notice was offered for sale by the sheriff of Rapides parish and by him sold, on March 5, 1898, to W. F. Hoffman for the sum of $100.00. The property sold is thus described in the sheriff's deed filed March 7, 1898:

> Final certificate No. 37, purporting payment for SE. ¼ and SW. ¼ of Sec. 13, Tp. 1 N., R. 1 E., under the credit system at the Opelousas land office in Louisiana, and all rights and claims thereunder against the United States government, being, lying and situated in the Parish of Rapides, Louisiana.

The application for repayment was transmitted March 15, 1898, and denied by your office May 6, 1898, on the ground that Hoffman is not an assignee within the meaning of the repayment statute; that the sheriff's deed can not be held to be an assignment of title to the land but rather "an assignment of a mere claim against the United States." No appeal was taken from this action but that fact is explained in an affidavit filed by Hoffman April 13, 1899, in which he states that he was employed in the volunteer military service of the United States. For this reason and because he had filed applications for repayment in several other similar cases, your office, under date of April 2, 1900, again considered the case and again denied the application, from which decision Hoffman has appealed here.

The act of May 10, 1800 (2 Stat., 73), provided for the establishment of land offices, and the sale of lands of the United States, in the territory northwest of the Ohio and above the mouth of the Kentucky

river, at not less than $2.00 per acre under a credit system. Upon payment being completed the register was required to issue a final certificate to the purchaser and upon its presentation to the Secretary of the Treasury, the President was authorized to grant a patent for the land "to the said purchaser, his heirs or assigns."

The act of March 3, 1811, *supra*, under which the land herein was purchased by John Heap, authorized the sale of lands in the territory of Louisiana, "on the same terms and conditions as have been or may be by law provided for the lands sold in the State of Ohio . . . and patents shall be obtained for all lands sold in the territory of Louisiana, in the same manner and on the same terms as is or may be provided by law for land sold in the State of Ohio."

Hoffman's contention is that the provision in the above acts authorizing the granting of a patent to an assignee, entitles him, as the person named in the sheriff's deed, to repayment of the purchase money paid by Scott. There may be some question whether Hoffman occupies the status of an assignee in any sense, for the reason, as stated in your office decision, that final certificate No. 37 was in fact never in the hands of the appraisers, and consequently was never pointed out to them as property belonging to the succession of Joseph J. Scott, as testified to by them, was never in the hands of the sheriff who sold the same, and was never delivered to Hoffman who purchased it. The whole proceedings culminating in the appointment of a curator and the sale of said certificate were apparently based on the order contained in your office decision of November 26, 1897, holding Scott's entry for cancellation.

If it be conceded, however, that the proceedings in the Rapides parish court were in all respects regular, Hoffman can not be considered in other light than the purchaser of a mere claim against the United States for re-payment of purchase money, which does not confer upon him the status of an assignee within the meaning of the repayment act. Section 2 of the act of June 16, 1880 (21 Stat., 287), is as follows:

> 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.

The construction placed upon this section by departmental circular of August 6, 1880, is as follows:

> Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are

completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law. To construe said statutes so as to recognize the assignment or transfer of the mere claim against the United States for repayment of purchase money, or fees and commissions, disconnected from a sale of the land or attempted transfer of title thereto, would be against the settled policy of the government and repugnant to section 3477 of the Revised Statutes.

This construction was adhered to in departmental instructions of November 2, 1895 (21 L. D., 366), the syllabus of which reads thus:

The right of assignees to repayment under section 2, act of June 16, 1880, is restricted to assignees of the land, and does not extend to persons holding an assignment of the claim for the money paid on the entry.

The language of the sheriff's deed to Hoffman, describing the property sold, shows that the transaction was wholly "disconnected from a sale of the land or attempted transfer of title thereto." According to that language final certificate No. 37 merely purports payment for said land, and that upon presentation of said certificate to the Commissioner of the General Land Office the purchaser of the land is entitled to receive a patent therefor; but it does not purport a conveyance of the land itself. The sheriff's deed could not therefore pass more than a claim for repayment of the purchase money paid by Scott. Besides, the proceedings of the district court of Rapides parish were had and application for repayment was made prior to the cancellation of Scott's entry.

It will be observed also that the repayment act requires, before purchase money is repaid, the "surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to the land." Neither of these accompanies Hoffman's application for repayment, and it is probably not within his power to furnish the duplicate receipt. Any relinquishment that might be executed by Hoffman would be of doubtful efficacy, because, as before shown, the sheriff's sale at most only transferred to him a possible claim against the United States for the purchase money paid by Scott but gave him no interest in the land which would be susceptible of relinquishment.

Furthermore it does not appear, as set forth in your office decision, that at the date of the proceedings had in the district court of Rapides parish, the equitable title to the land in question was vested in the succession of Joseph J. Scott, or that such title had not been transferred by him or vested in his legal heirs, or by them conveyed to other parties. With the appeal here is filed a certificate of the clerk of said court stating that upon examination of the records of Rapides parish he does not find any transfer made by Joseph J. Scott of the land in question, except that made by the sheriff's sale to W. F. Hoffman. The clerk also certifies, however, that the records of said parish were destroyed by fire in May, 1864, and that the records filed up to that date are not in his possession. As final certificate issued to Scott in

November, 1826, it is plain that the clerk's certificate can not be accepted as conclusive that Scott may not have sold the land, or that it did not vest in his legal heirs and was not conveyed away by them prior to 1864.

Altogether a case is not here presented coming within the contemplation of the repayment statute. The decision of your office is accordingly affirmed.

HOMESTEAD CONTEST—ABANDONMENT—ACT OF JUNE 16, 1898.

BROWN *v.* PETERS.

The requirement of the act of June 16, 1898, that the affidavit of contest, in a case where contest is initiated against a settler, on the ground of abandonment, at a time when the United States is engaged in war, must contain an allegation that the alleged absence of the settler was not due to his employment in the army, navy, or marine corps of the United States, is for the sole benefit and protection of the settler, and will be considered to have been waived by him where he personally appears at the hearing and makes a general defense to the charge of abandonment without objection to the omission from the affidavit of the required allegation.

The case of Burns *v.* Lander, 29 L. D., 484, cited and distinguished.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *June 9, 1900.* (A. S. T.)

On January 18, 1896, John H. Peters made homestead entry No. 14,794, for the NW¼ of Sec. 9, T. 135 N., R. 61 W., Grand Forks, North Dakota, land district.

On August 16, 1898, Mellie D. Brown initiated a contest against said entry upon the charge of abandonment and failure to settle upon, cultivate and improve the land as required by law, the charge in the affidavit being—

> that the said John H. Peters has wholly abandoned said tract, and changed his residence therefrom for more than six months since making said entry and next prior to the date herein; that said tract is not settled upon and cultivated by said party as required by law.

Notice was issued and served fixing October 5, 1898, as the date of hearing before the local officers, and on that day both parties appeared in person, with their attorneys. Peters' appearance was, in contemplation of law, a general one, although he denominated it as a special one, made for the sole purpose of objecting to the contest affidavit or complaint because not properly corroborated and containing contradictory charges, and further denominated his appearance as one made for the sole purpose of cross-examining witnesses of contestant and producing testimony on his own behalf.

Testimony was offered by both parties, and on February 20, 1899, the local officers found in favor of the contestant and recommended

the cancellation of the entry. From their action Peters appealed to your office, where, on August 22, 1899, a decision was rendered affirming the action of the local officers and holding Peters' said entry for cancellation. From that decision Peters has appealed to this Department and assigned errors as follows:

First. In holding that Peters' improvements on the land did not indicate a residence thereon.

Second. In holding that it does not appear from the testimony that Peters' actual residence was on the land in controversy.

Third. In holding that the contestee did not maintain an actual residence on the land in contest.

Fourth. In holding that the actual residence was upon other land.

Fifth. In affirming the decision of the register and receiver of the local land office.

Sixth. In disregarding the evidence of the witnesses who gave conclusive testimony on the question of residence in this contest, showing that the actual residence of the said Peters was on the land in question and not elsewhere.

Seventh. That the character of the improvements made on other land by the contestee indicated a residence by himself there, and not on the land involved in this contest.

It is unnecessary to review the testimony. Suffice it to say that it warrants the finding of the local officers and of your office, to the effect that the defendant's real home is not, and never has been, on the land in controversy, but is on another and different tract owned by him, some two and one-half miles from the land in question.

This contest was initiated two months after the approval of the act of June 16, 1898 (30 Stat., 473), which inhibits the initiation of contests after that time against such entries, on the ground of abandonment, unless it shall be alleged in the preliminary affidavit of contest that the settler's alleged absence from the land was not due to his employment in the military or naval service of the United States, either in the war with Spain, or any other war in which the United States might be engaged. (Burns *v.* Lander, 29 L. D., 484.) The only charge in this case is abandonment, and it is not alleged in the preliminary affidavit of contest that the defendant's absence from the land was not due to his employment in the army or navy in time of war.

The proof not only shows abandonment, or failure to establish residence upon the land, but that the defendant's absence from the land was not due to his service in the army or navy, and the question to be determined is whether or not the omission from the contest affidavit of the allegation prescribed by the statute is fatal to the contest.

The purpose of the act of June 16, 1898, was, among other things, to afford to settlers upon the public lands who should enlist or be actually engaged in the army or navy of the United States in time of war, immunity from contests on the ground of abandonment, where the absence from the land was due to such service. While it is clear that the local officers should not have issued notice upon an affidavit

of contest which did not contain the allegation required by the statute, yet under the facts of this case the question arises whether the entryman for whose sole benefit and protection the requirement was made, waived compliance therewith, where he appeared in the contest and, without objecting to the omission from the contest affidavit of the required allegation, made a general defense to the charge of abandonment.

A statutory or constitutional provision affecting one's property or alienable rights may be waived. (28 Am. and Eng. Ency., 535.) In the case of Shutte *v.* Thompson (15 Wall., 151) it was held that—

> A party may waive any provision whether of a contract or of a statute, intended for his benefit.

That was a case in which exceptions were filed to a deposition taken *de bene esse* under the act of Congress approved September 2, 1789, stating the circumstances under which depositions might be taken, and prescribing the mode in which they might be taken. The requirements of the statute had not been complied with as to notice to the opposite party, as to the oath to be administered to the witness, as to the officer before whom the deposition might be taken, or as to the required certificate showing the reasons why the deposition was taken. Counsel for the party who excepted to the deposition had accepted notice of the taking of it, and had appeared and cross-examined the witnesses, and the deposition had been filed in the papers of the case more than a year before the trial, and no exception had been taken to or endorsed upon it. The court, in discussing the point raised by the exception to the deposition, said:

> It must be conceded that the authority to take depositions *de bene esse* under the 30th section of the act of 1789 has always been construed strictly, being in derogation of the rules of common law, the formalities prescribed by the act must be observed; and many cases may be found in which such depositions have been rejected because it did not appear that the required conditions or formalities had been regarded. They are all, however, cases in which the party objecting did not attend the examination of the witness, or took no part in it. They are all consistent with the rule, that a party may waive any conditions that are intended for his sole benefit, and that he does waive every formal objection when he attends the examination of a witness, cross-examines without protest and remains silent until the witness has died.

It has been held that the immunity from suit belonging to a State, which is protected by the Constitution, is a personal privilege which it may waive at pleasure, and that its appearance in a court of the United States is a voluntary submission to its jurisdiction, and hence a waiver of the benefit of the constitutional provision in its favor. (Clark *v.* Barnard, 108 U. S., 436; Beers *v.* Arkansas, 20 How., 527.)

In the case of Warren *v.* Glynn (37 N. H., 340) the rule is stated by the court as follows:

> It is a general rule to which, if it be not universal, the present case does not seem to us to form any exception, that where general jurisdiction, or the power to act

exists, and the only objection to its exercise is one intended for the benefit and designed for the protection of the party complaining, such objection must be taken at the earliest practicable opportunity, after the party or his counsel become aware of the facts on which its validity depends, or it will be held to have been waived by the omission or neglect to urge it seasonably. The reason of the rule would seem to be that it is justly to be regarded as the folly or misfortune of a party if, knowing of a valid objection to a proceeding, he neglects to avail himself of it, but stands by and participates therein, unless he intends, as is the natural presumption from his silence, to waive altogether any objection on that account.

It is well settled that when one submits to the jurisdiction of a court, otherwise competent, and makes defense to an action brought therein against him, he is bound by the action of the court, and can not, after judgment, be heard to object to the manner in which the jurisdiction of the court was invoked by his adversary.

"Where a court has jurisdiction of the subject matter, and certain conditions are essential to its exercise, they may be waived by consent, and such consent may be inferred from a failure to object" (12 Am. & Eng. Ency. of Law, p. 300, note 5, and cases there cited).

In the case of Toland *v.* Sprague (12 Pet., 300) it was held (syllabus) that—

A party against whose property a foreign attachment has issued in a Circuit Court of the United States, although the Circuit Court had no right to issue such an attachment, having appeared to the suit and pleaded to issue, can not afterward deny the jurisdiction of the Court. The party had, as a personal privilege, a right to refuse to appear; but it was also competent to him to waive the objection.

The defense of a statute of limitations may be waived by the party entitled thereto, and having been waived and not set up prior to judgment, can not afterward be availed of. Thus it was held in the case of Retzer *v.* Wood (109 U. S., 185), syllabus, that—

In the absence of a statute to the contrary, the defense of a statute of limitations, which is not raised either in pleading or on the trial, or before judgment can not be availed of.

By law the local officers have general jurisdiction to hear contests against entries, based on the charge of abandonment. The statute in question, for the sole benefit and protection of the entryman, places a limitation upon the mode of invoking that jurisdiction in contests initiated after its passage, by way of requiring a preliminary allegation in the affidavit of contest to the effect that the charge of abandonment does not grow out of absence from the land due to service in the army, etc., but that compliance with such a requirement may be waived by the one for whose sole benefit and protection it is intended is fully established by the authorities.

The case at bar is readily distinguished from the case of Burns *v.* Lander (29 L. D., 484). In that case the defendant did not appear at the hearing, or make defense, and hence it could not be held that he waived the benefit of the requirement of the statute. But in the case at bar the defendant was personally served with a notice which

informed him of the nature of the charge in the affidavit of contest. He appeared at the hearing, cross-examined the contestant's witnesses, testified and introduced witnesses in his own behalf, basing his defense alone upon the ground that he had established and maintained his residence on the land as required by law, and he offered no objection to the sufficiency of the affidavit of contest, nor to the jurisdiction of the local office. The case was decided against him by the local officers on the issue thus joined. His action amounted to a waiver of the benefit of the statute, and the jurisdiction of the local officers can not now be called in question. The result is that your said decision is affirmed and Peters' said entry will be canceled.

CONTESTANT—PREFERENCE RIGHT—SOLDIERS' ADDITIONAL HOMESTEAD.

ROBESON T. WHITE.

A successful contestant who, in exercising his preference right, locates a soldiers additional homestead certificate upon the land formerly covered by the contested entry, and thereafter, under the belief that the first certificate is defective, locates another soldiers' additional right upon the same land, does not thereby waive any rights secured by the first location.

Acting Secretary Ryan to the Commissioner of the General Land Office, June 9, 1900.

(W. V. D.) (J. R. W.)

Robeson T. White, assignee of Winifred Carver, has appealed to the Department from your office decision of February 19, 1900, ordering a hearing and suspending his application to make additional homestead entry for the SE. ¼ of the SW. ¼ and the SW. ¼ of the SE. ¼ of Sec. 17, T. 3 N., R. 7 W., Helena, Montana.

March 14, 1870, George W. Carver made homestead entry for the N. ½, lot 1 of NW. ¼ and the NW. ¼ of the NE. ¼, Sec. 30, T. 37, R. 4 E., Ironton, Missouri, containing 79.17 acres. Said land was patented August 1, 1860, under the cash entry of George Stoney, Jackson series, made October 24, 1859. Carver's said homestead entry was canceled, June 15, 1877, for failure to make final proof. May 17, 1871, said Carver made homestead entry for the NE. ¼ of the NE. ¼, Sec. 30, T. 37 N., R. 4 E., Ironton, Missouri, which was canceled July 25, 1878, for failure to make final proof.

December 6, 1897, said White initiated a contest against the previous entry of John McCrimmon on the land in controversy, and McCrimmon's entry was canceled by relinquishment October 14, 1898, a decision being the same day rendered by the local office in the contest case in favor of contestant.

On the same day, said White, as assignee of Winifred Carver, widow of said George W. Carver, made application to make additional homestead entry for the said land, under section 2306 of the Revised

Statutes, as additional to Carver's entry first above described. Said White had a preference right to make entry of said lands under section 2 of the act of May 14, 1880 (21 Stat., 140), as successful contestant against a former entry thereof. It does not appear that final action by your office has ever been taken on said application.

September 9, 1899, William Moran filed his affidavit of protest against the application of said White, in which he alleges that in the fall of 1898 he tendered application for homestead entry for said land, which was rejected by the local office without explanation; he is informed and believes Robeson T. White has filed an application to make soldiers' additional entry of said land, and that such defect exists as to bar allowance of the additional entry asked for:

Protestant established a residence upon and improved the SE. ¼ of SW. ¼ and SW. ¼ of SE. ¼ of said section 17, at least ninety days ago, and is still maintaining his residence thereon.

October 2, 1899, the local office transmitted the application of said White, as assignee of Jacob Pugh, to enter said land as a homestead under section 2306 of the Revised Statutes, as additional to original entry by said Pugh, May 11, 1870, for the E. ½ of the SW. ¼ of Sec. 3, T. 36, R. 27, containing eighty acres, Boonville, Missouri, relinquished June 6, 1872, certificate of which right issued to said Pugh July 2, 1878, was recertified to William F. Moses September 19, 1899, under act of August 18, 1894 (28 Stat., 397), and was in due form assigned to said White, with White's affidavit showing his qualification as an entryman, and that—

I . . . do hereby apply to enter the SE. ¼ SW. ¼ and SW. ¼ SE. ¼ Sec. 17, Tp. 3 N., R. 7 W., Montana, as additional to said Jacob Pugh's original homestead on the E. ½ SW. ¼ Sec. 3, Tp. 36 N., R. 27 West (as the payment, or consideration to replace scrip filed with my application to make final entry upon said land filed in said land office Oct. 14, 1898, and yet unacted upon).

November 17, 1899, counsel for White filed in your office certificate of the local land officers at Ironton, Missouri, dated September 11, 1899, that the records of that office show that George W. Carver made the two entries above described; also affidavit of E. M. Robords, intermediate assignee of the Carver right, that Winifred Carver, widow of George W., at date of her assignment to him did not know that said George W. Carver had made two homestead entries, and acted honestly in assigning her right to enter 80.53 acres, and as it is now evident she had right to assign but 40.53 acres, he asks the application be allowed, and applied in entering 40 acres of the tract applied for.

The reason for the offer to substitute the Pugh additional right for the Carver right appears by affidavit of White, filed in your office, that—

affiant was advised by counsel that there seemed to be an infirmity in the proofs of the Carver right . . . Desiring to retain and assure his right to said land, and the

exercise of his preference right of entry thereon . . . and to evidence his good faith . . . he . . . procured the soldiers' additional homestead certificate of Jacob Pugh and filed the same . . . with an application to locate the same on the land described, to the end, and to no other, that should any incurable infirmity be found in said Carver right, the said Pugh certificate might be taken and used in whole or in part as the consideration for exercise of his preference right; he had no purpose in so filing the said Pugh certificate of abandoning his said first application, nor any right obtained thereby; on the contrary he did it for the express purpose of retaining and maintaining his preference right of entry.

On these facts your office decision was that:

By filing a second application (as assignee of Pugh) . . . White waived all right under his first application (as assignee of Carver), and the instant White signified his election to withdraw his application as the assignee of Winifred Carver, the right of any actual bona fide settler upon the land under the homestead law would attach.

Your office decision ordered a hearing to determine the facts as to Moran's right, and suspended White's application. White appealed to the Department.

It does not appear that White at any time withdrew, abandoned, or receded from his original application to enter. Being advised that there was infirmity in proofs of the Carver additional right, he offered to substitute the Pugh right. The intention to claim benefit of and attempt to exercise his preference right, earned by his successful contest of McCrimmon's entry, was the essential part of the transaction. In what manner or by what consideration the government should be satisfied for the land was only matter of incident to the essential and principal thing—the exercise of his preference right of entry. Had, for instance, the transaction been one of private entry on location of a land warrant, scrip, or payment of money, and it transpired that innocently a forged warrant, or scrip, or counterfeit money was paid, the entryman would be allowed to substitute other good warrant, scrip, or money, without prejudice to his entry.

Since it has been decided that soldiers' additional rights are simply property, and have lost their personal character, the additional right, as it has reference to acquirement of government land, has, as a logical consequence, become similar in character to a land warrant, scrip, or money. It is simply a form of legal consideration to the government for the title to the land entered. It is not of the substance of the transaction that one right or another right, one piece of scrip or another piece of like scrip, be surrendered as the consideration for the entry, so only as a legal consideration some valid additional right is surrendered.

But the facts tend to show that the first right offered to be located was perfectly valid. If Carver's entry of March 14, 1870, was erroneously allowed on land patented August 1, 1860, nearly ten years before, it was void at its inception, and did not impair his original right. The entry and its cancellation for want of final proof would

both be nugatory. His entry of forty acres May 17, 1871, would be a basis for exercise of the additional right, and leave him an additional right of one hundred and twenty acres. Mrs. Carver's assignment would then be good and White's first application valid.

There is nothing in the record to show that he has waived any right he acquired by his first application under the Carver right. His subsequent location of Pugh's right was due to erroneous information that there was infirmity in the Carver right, and was an attempt to conserve and protect his rights; not to waive them. White had earned his preference right, and all his acts were consistent with it and in assertion of it. To constitute a waiver of right one must, with full knowledge of his right, do or forbear doing something inconsistent with the right and of his intent to rely upon it. (Bishop Contracts, Ed. 1889, Sec. 792; Benecke *v.* Connecticut Mutual L. I. Co., 105 U. S., 355, 359; Pence *v.* Langdon, 99 U. S., 578, 581.) The offer to locate the Pugh right on the land was not inconsistent with claiming the land by location of the Carver right thereon. Having two rights, White could claim the land under either. If he had reason to apprehend infirmity in one right located on the land, White could properly reinforce or cure his entry by locating another right thereon. As, however, it appears White was moved to locate the second right on the land by errors of the land department in the matter of Carver's entries, he should be permitted to withdraw his Pugh right, if it be true, as appears by the record now, that the Carver right was good.

Your office decision is therefore reversed, the order for hearing vacated, and White will be permitted to protect his preference right and entry thereunder by location on the land of the Pugh right, or any valid additional right, if it should prove to be necessary so to do.

TIMBER LAND ENTRY—TRANSFEREE—EVIDENCE.

GEORGE READ.

A timber land entry held by a transferee will not be canceled upon the uncorroborated admissions of the original entryman, made out of court, that the entry was procured at the instance and for the benefit of the transferee.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 16, 1900.* (L. L. B.)

April 27, 1896, the timber land entry of George Read for the SE. ¼, Sec. 26, T. 40 N., R. 1 E., Redding, California, was by your office held for cancellation on the report of a special agent, who reported that the same was made at the instance and in the interest of the firm of Tatum and Bowen, now members of the Red Cross Lumber Mill Company.

July 30, 1896, hearing was ordered, which was duly had, and at

which another special agent, who had also recommended the cancellation of the entry, represented the interests of the government, and at which the entryman did not appear, he having transferred his entry to one Lancaster, who had again transferred the same to said mill company, which appeared by counsel in defense of the entry.

The register and receiver recommended the dismissal of the charge against the entry upon the ground that the evidence offered at the hearing was not sufficient to warrant the cancellation of the entry.

Upon examination of the record, your office, by decision of February 21, 1900, now here on appeal of the transferee company, held the entry for cancellation.

The only witness produced upon the part of the government was the special agent, who offered in evidence an affidavit of the entryman, and also testified that the entryman had promised to be present and submit his testimony at the hearing, but for some reason had failed to do so. The said affidavit is as follows:

STATE OF CALIFORNIA, *County of San Francisco:*

George Read being duly sworn deposes and says that he is a citizen of the United States, of lawful age, and that his P. O. address is 434½ Clementina St. State and county aforesaid. That he is the same George Read who made T. L. E. No. 1623, for the SE. ¼ Sec. 26, Tp. 40 N., R. 1 E., M. D. M., Shasta land district, Cala.

Deponent says that in Oct. 1887, at the time the said entry was made, that he was employed by the firm of Tatum and Bowen, merchants in the city of San Francisco, engaged in the business of lubricating oils, saws, etc. That while so employed he was directed one day to take the R. R. train and proceed to the town of Mott in Siskiyou county, and was told that he would meet J. J. Bowen, a member of the said firm of Tatum & Bowen, at the said town of Mott, and that the said Bowen would tell deponent what was wanted and required of him. That while on the train en route to the said town of Mott, deponent met two men who were employed in the machine shop of said Tatum and Bowen, that the names of those men were John Pohl and Clinton Warren. That they were also going to the town of Mott to meet the said Bowen. That upon our arrival at the said town of Mott we were met by the said Bowen with a team and conveyance who took us in the country to look at certain timber land which he desired us to file upon. That in accordance with the wish and desire of said Bowen, in whose employ deponent was, as heretofore stated, deponent looked at the land desired, and then in company with the said Bowen, deponent went to the land office in Shasta and there at the instance of said Bowen deponent filed upon the said tract of timber land for the use and benefit of the said Bowen. That the said Bowen paid all the land office fees, advertising, purchase money for the land, travelling expenses of deponent from San Francisco to and from the land in question, and all expenses incident to the entering of said land. That subsequently, about three months after applying to enter the said land, that a deed was brought to deponent to sign in the office of said Tatum & Bowen, that the said Tatum was present and also Lincoln Sontagg, that deponent signed said deed as requested transferring the land in question for a nominal consideration, as named in the deed, of five dollars, $5.00, but that deponent did not receive the said $5.00, nor any other amount for and in consideration of said land, and deponent further states that he did not at any time derive any use or benefit from the said land.

GEO. READ.

Subscribed and sworn to before me this 25th day of January, A. D. 1896.

J. P. PRYOR, *Spl. Agt. G. L. O.*

In addition to this he offered in evidence the tract-books of the local office, showing that the two men Pohl and Warren made filings for other tracts on the same day that Read made his filing for the tract in controversy, but did not show that such other entries were transferred by said Pohl and Warren.

From this it appears that the action of your office in holding this entry for cancellation is based upon the uncorroborated admissions of the entryman, who, although a party to the action, is not a party in interest.

While this Department has many times held that the entryman, although he may have transferred his entry, is a competent witness in investigations of this character, no reported precedent is found in which the entry in the hands of a transferee was canceled upon the unsupported admissions of the entryman that the entry was made in the interest of the transferee.

In the case of the United States *v.* Allard *et al.* (14 L. D., 392), relied on for your action, evidence was taken involving forty entries, and twenty of the entrymen appeared and gave testimony at the hearing, and all testified to practically the same facts, which developed a gigantic conspiracy to defraud the government. There were also many other witnesses introduced, not connected with the conspiracy, who testified that they were approached with the view of getting them to co-operate and enter into the fraud. In that case it is said (p. 398):

> It is true that, under ordinary circumstances, no very great weight could reasonably be given to the testimony of the original entrymen, who, when they took the necessary steps to procure their entries, appear to have each filed the sworn statement required by the statute. If they testified truthfully as witnesses in this case, they wilfully swore falsely when their original written statements were filed, unless it be true that they did not know the contents of such statements. In view, however, of the great amount of other evidence in the case, all strongly corroborative of the present testimony of these entrymen, there can be no reasonable question.

In the case at bar, but one transaction was being investigated, and by your office decision the entry was held for cancellation—not on the testimony of the entryman given at the hearing, but on his uncorroborated admissions and statements made out of court. When he applied for the entry he swore that it was made not in the interest, in whole or in part, of any other person. After he has transferred it, he says it was made wholly in the interest of the transferee. If the latter statement is true, he not only swore falsely when he made his entry, but made himself a co-conspirator with his transferee to defraud the government. The testimony of such a witness, much less his admissions, uncorroborated, are insufficient to destroy property rights. The entry will remain intact.

Your office decision is reversed.

MINING CLAIM—ADVERSE PROCEEDINGS—EXCLUDED GROUND.

BURNSIDE ET AL. *v.* O'CONNOR ET AL. (ON REVIEW).

An objection to the issuance of a mineral patent, based on an assertion of prior right to a portion of the land included in the entry, will not be entertained where the protestant fails to file any adverse claim during the applicant's period of publication.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 16, 1900.* (W. A. E.)

Patrick O'Connor *et al.* have filed a motion for review of departmental decision of November 11, 1899 (29 L. D., 301), which reversed your office decision of September 3, 1897, suspending mineral entry No. 1228, made May 25, 1897, by Samuel Burnside *et al.*, at the Pueblo, Colorado, land office, for the Mary Navin lode claim.

It appears that the Tiva placer claim, the Hibernia lode claim, and the Mary Navin lode claim overlapped, the land involved in this case being within the exterior limits of each of these claims.

Application for patent to the Tiva placer was filed December 7, 1892. No adverse claim was filed during the period of publication by either the Hibernia or the Mary Navin claimants, but subsequently protests were filed by both. In departmental decision of November 11, 1899, it was stated that an adverse was filed in time by the Mary Navin, but a further examination of the record of the Tiva placer application shows that this statement was erroneous, the protest of the Mary Navin claimants not having been filed until after the expiration of the period of publication. This, however, is not a material matter, as it in no wise affects the rights of the parties to the present case—the Hibernia and Mary Navin claimants.

June 1, 1893, mineral entry No. 312 was made upon the Tiva application.

April 25, 1894, the Tiva placer claimants filed a relinquishment of the ground in conflict; mineral entry No. 312 was canceled as to the area relinquished, and an amended survey ordered by your office on January 5, 1895; and the amended plat of survey was filed March 30, 1895.

February 7, 1894, prior to the relinquishment and amended survey of the Tiva placer, Patrick O'Connor *et al.* filed application for patent to the Hibernia lode claim, and notice thereof was duly published, beginning February 16, 1894. Both the published and posted notices contained this statement:

> Containing 9.075 acres excepting and excluding area in conflict with sur. num. 8527, Fountain Valley lode, also, without waiver of right, sur. 7771, Tiva placer. Net area of claim 6.455 acres.

During the period of publication on this application Samuel Burnside *et al.*, as owners of the Mary Navin claim, filed their adverse

against said application. It appears that the Hibernia and Mary Navin claims conflicted on both sides of the old south line of the Tiva placer. The portion of the conflict south of that line was included in the Hibernia application, and it was as to this portion of the conflict that the Mary Navin adverse was filed. The Mary Navin claimants, however, alleged a prior right to the whole of the conflict between the two claims, including that part of the conflict north of the old south line of the Tiva placer, which had been excluded from the notice of the Hibernia application and as to which no adverse claim was necessary, as well as that portion of the conflict south of said line which was included in the Hibernia application. Suit was instituted on this adverse claim, both portions of the conflict being included in the suit, and on June 17, 1897, judgment was rendered for the defendants, the Hibernia claimants, as to the entire conflict. Appeal was taken by the Mary Navin claimants, and the matter is still pending before the supreme court of Colorado.

June 20, 1896, Burnside *et al.* filed application for patent to the Mary Navin claim. This application excluded that part of the land in conflict between the Hibernia and Mary Navin lying south of the south line of the Tiva placer as originally surveyed, but included the land in conflict north of that line, the latter being the land which was excepted in the notice of the Hibernia application as in conflict with the Tiva placer, and afterwards relinquished by the Tiva claimants. No adverse was filed by the Hibernia claimants during the period of publication on the Mary Navin application.

May 25, 1897, Burnside *et al.* made mineral entry No. 1228 upon their application.

June 24, 1897, O'Connor *et al.* filed in your office a protest against the issuance of patent for the Mary Navin claim. Accompanying this protest was a certified copy of the judgment of the district court in the adverse suit of Burnside *et al. v.* O'Connor *et al.*, involving the conflict between the two claims.

September 3, 1897, your office suspended mineral entry No. 1228, to await the final disposition of the suit now pending before the supreme court of Colorado.

From this action Burnside *et al.* appealed, and by departmental decision of November 11, 1899, your office decision was reversed, it being held that as the Hibernia claimants had excluded the land here involved in the published and posted notices on their application for patent, and had failed to adverse either the Tiva placer or Mary Navin applications, they had no standing before the Department, as adverse claimants or otherwise, such as to warrant the suspension of the Mary Navin entry to await the result of the suit by the Mary Navin against the Hibernia.

It is alleged in the motion for review that the Hibernia lode was a

known lode at the date of the Tiva application for patent; that it was not necessary for the Hibernia claimants to file an adverse against the Tiva; that the Hibernia claimants did not exclude the land here involved from their application for patent; that said application, as filed in the local office, included all the conflict with the Tiva placer; that the register, in preparing the notices for publication and for posting in the local office, inserted the words, "also, without waiver of right, sur. 7771, Tiva placer;" that the Hibernia claimants have at all times claimed the land here involved; and that it was not necessary for the Hibernia claimants to file an adverse against the Mary Navin application, as there was already a suit pending in court involving the entire conflict between the Hibernia and Mary Navin claims.

Passing over the question as to whether the Hibernia claimants should have filed an adverse against the Tiva application—a question rendered immaterial through the subsequent relinquishment by the Tiva claimants of the land in conflict—it appears that the Hibernia application was filed at a time when the land here involved was still included in the Tiva entry; and that the notice of the Hibernia application, as published and as posted in the local office, excluded, "without waiver of right," the entire conflict with the Tiva. It makes no difference, so far as the rights of the Hibernia claimants are concerned, whether the words of exclusion were inserted in the notice by the register, as alleged, for, in the first place, the Hibernia claimants apparently acquiesced therein and allowed the notice to be published the full period of time without making any objection to the exclusion of the conflict with the Tiva placer, and, in the second place, this exclusion was necessary under the law, as the land excluded was, at that time, covered by the Tiva entry.

In the case of Woods *v.* Holden *et al.* (26 L. D., 198) it was held that 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. In the present case, the conflict with the Tiva placer being excluded from the notice of the Hibernia application, the Hibernia claimants could not make entry therefor without further notice of such intention, even if the Mary Navin claimants had not included it in their application.

It was also held in the case cited that 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 further, that 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. It was unnecessary for the Mary Navin claimants to file an adverse claim against the Hibernia applica-

tion, so far as the portion of the conflict excluded from the notice of the Hibernia application was concerned, and the fact that the Mary Navin claimants alleged, in their adverse, a prior right to that portion of the conflict, and also included it in their suit, could not, even if the suit was successfully prosecuted, confer upon the Mary Navin claimants, as against the government, any right to the area excluded from the notice of the Hibernia application.

The application for patent filed by the Mary Navin claimants on June 20, 1896, included that portion of the conflict between the Hibernia and Mary Navin lying north of the old south line of the Tiva placer, but excluded that portion of the conflict between the Hibernia and Mary Navin lying south of the old south line of the Tiva placer. That is, the Mary Navin application included that portion of the conflict which had been excluded from the notice of the Hibernia application and excluded that portion of the conflict which had been included in the notice of the Hibernia application. As the area in conflict lying north of the old south line of the Tiva placer had been excluded from the notice of the Hibernia application, the Hibernia claimants should, in order to protect any rights they may have had to said area, have filed their adverse claim against the Mary Navin application during the period of publication of notice of said application; but this they failed to do.

Summed up briefly the situation is this: The Mary Navin claimants filed their application for land subject to mineral entry and not included in the notice of any other mineral application; the Hibernia claimants had full opportunity to file an adverse claim against the Mary Navin application, but failed to take advantage of their opportunity.

Section 2325 of the Revised Statutes of the United States provides, in part, that:

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

The Hibernia having failed to file an adverse claim against the Mary Navin during the latter's period of publication, it must be assumed that no such adverse claim exists, and the Department can not now hear any objection from the Hibernia claimants to the issuance of patent for the Mary Navin, based merely on an assertion of prior right to a portion of the land included in the Mary Navin entry.

The provisions of the statute are clear, and as the Hibernia claimants have, by their own negligence, placed themselves in such a position relative to the Mary Navin application that it must be assumed

they have no adverse claim against said application, it is useless to suspend the Mary Navin entry to await the result of the suit by the Mary Navin against the Hibernia.

No sufficient reason being shown for disturbing departmental decision of November 11, 1899, herein, the motion for review is denied.

DESERT LAND ENTRY—INSANE ENTRYMAN—RELINQUISHMENT.

ELLINGSON *v.* AITKEN.

The desert land act of March 3, 1891, authorizes the sale and assignment of a desert land entry; and such a sale, made by the guardian of an insane entryman acting under an order of the court in accordance with local statutes, will be recognized by the Department.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 16, 1900.* (J. R. W.)

July 20, 1896, Richard Davies made desert-land entry for the N. ½ and the SW. ¼ of the NE. ¼ and the SE. ¼ of the SW. ¼ of Sec. 8, T. 2 N., R. 15 E., Bozeman, Montana. July 19, 1897, he filed proof of annual expenditure, and a month later was adjudged insane and committed to the insane asylum. August 9, 1898, Walter Aitken was appointed guardian of Davies' person and estate by the proper district court.

July 28, 1898, Henry Ellingson filed a contest against said entry, alleging failure to make the required first and second years' annual expenditures. After due service, both parties appeared at the hearing, and, February 23, 1899, the local officers recommended that the entry be canceled. May 20, 1899, Davies' guardian filed motion for review and for a rehearing, which he later withdrew, and the case was forwarded to your office. No appeal was taken.

November 22, 1899, on consideration of the record and evidence, your office reversed the action of the local office, and directed said contest be dismissed and the entry held intact. Contestant appealed to the Department.

After examination of the record and evidence, no error appears in your action. But for the fact that the record indicates that the real facts are probably not thereby disclosed, and from solicitude to protect the interests of the insane entryman, the Department is constrained to modify your office decision, as hereinafter indicated.

Since the case was pending here the guardian has filed a formal relinquishment to the United States of all the entryman's right, title and claim to the land, accompanied with a certified copy of the guardian's appointment and an order of the court, as follows:

In the District Court of the Sixth Judicial District, Montana, In and for the county of Park. In the matter of the Estate of Richard Davies, Insane. Order allowing Guardian to relinquish Desert Entry No. 744 and sell improvements at $100.

Now, on this 10th day of February, 1900, Walter Aitken, guardian of the estate of Richard Davies, insane, having presented his petition praying for an order allowing him to relinquish the desert entry filing No. 744, made by the said ward, and permitting him to sell the improvements thereon for the sum of one hundred dollars ($100) and having fully examined said petition, and heard evidence relating to the matters therein set forth, I find that it is for the best interest of the said estate that the said guardian be allowed to make relinquishment of said desert entry as prayed, and to sell the improvements thereon for the sum of $100.

Wherefore it is ordered and adjudged that the said Walter Aitken, guardian as aforesaid, is authorized and empowered to execute as such guardian, a due and proper relinquishment of said desert entry No. 744, and that he sell said improvements at private sale to Edwin Ellingson, for the sum of $100.

Done in chambers this 10th day of February, 1900.

FRANK HENRY, *Judge.*

The appeal being decided, the Department might well refer the case and relinquishment to your office for action, but, as a question of law only is presented, to avoid circuity of action and to expedite final action, the Department acts thereon.

No reported departmental decision is applicable to the case. In Dyche *v.* Beleele (24 L. D., 494) relinquishment by the guardian of an insane person was rejected, but a homestead entry was involved and the decision was controlled by the act of June 8, 1880 (21 Stat., 166), which provides that when settlers who have entries under "the homestead and preemption laws" become insane before expiration of the time during which residence, cultivation or improvement is required, their claims shall be confirmed upon submission of proof, &c., by any person legally authorized to act for them, showing that the entryman had in good faith complied with the requirements of the law up to the time he became insane.

Such specific provision for that class of cases is properly held exclusive as to them and by implication to forbid sacrifice of the unfortunate entryman's interest by relinquishment or abandonment, even though the guardian otherwise had authority to relinquish. This act is by its terms applicable to claims to public lands initiated by persons "as settlers thereon." Settlement not being required in desert land entries, the act is not applicable thereto.

Before inquiring whether the land department may, under federal statutes, accept a relinquishment by the guardian of an insane desert-land entryman, it is proper to inquire whether the guardian is by the law of his jurisdiction authorized to make it. The power of the guardian over the property of the insane is derived from the law of the jurisdiction lawfully appointing him. Guardians so appointed administer the estate under direction of the court as its officer. Sales or other disposition of the estate by the guardian under authorized orders of the court appointing him are binding and conclusive upon the ward and all the world. But the court can order only such dispositions of the ward's estate as the law gives it jurisdiction to make.

The law of Montana, wherein the land lies (Montana Codes of 1895, Div. 1, Part III, title III, section 343, and title XII, sections 2980 & 2982), provides:

SEC. 343. A guardian of the property must keep safely the property of his ward. He must not permit any unnecessary waste or destruction of the real property, nor make any sale of such property without the order of the district court, and must, so far as it is in his power, maintain the same with its buildings and appurtenances out of the income or other property of the ward, and deliver it to the ward at the close of his guardianship in as good condition as he received it.

SEC. 2980. Every guardian appointed under the provisions of this chapter, whether for a minor or any other person, must pay all just debts due from the ward, out of his personal estate, and the income of his real estate if sufficient; if not, then out of his real estate, upon obtaining an order for the sale thereof, and disposing of the same in the manner provided in this title, for the sale of real estate of decedents.

SEC. 2982. Every guardian must manage the estate of his ward frugally without waste. . . . The guardian may sell the real estate upon obtaining an order of the court or judge therefor.

The general rule for construction of such statutes is that they must be construed strictly and nothing taken by inference, except such powers as are necessary in order to carry out the powers granted. The State statutes require that the guardian "must keep safely" and "not permit unnecessary waste or destruction," "maintain the same . . . out of the incomes of other property and deliver it to the ward at close of his guardianship in as good condition as he received it." He must manage it "frugally and without waste." He may only use "the incomes of real estate" without an order of court for sale of the realty. Such language is clearly repugnant to the idea of abandonment or relinquishment and waste.

The court by the order above set out authorized the improvements to be sold from the entryman's claim, and that it be then relinquished. This would entail loss to the estate of all interest in the land. The statute requires the guardian to maintain the realty out of the incomes of other property, if sufficient, unless the court authorize sale of the realty. It would seem that under the Montana statute such order transcends the power granted to the court, unless the other property of the estate is insufficient to maintain and perfect the entry, and if it further appear that a sale of the realty cannot be made.

The act of Congress of March 3, 1891 (26 Stat., 1095), authorizes sale and assignment of a desert-land entry. Presumably the sale of the entry with the improvements will realize more for the ward's estate than the sale of the improvements alone. It does not appear that a sale could not be made.

The Department, however, finds in the record reason to apprehend that the real nature of the transaction is not correctly shown by the record as made, but that the real transaction was a sale of the ward's entry, or right in the land.

If the real transaction was a sale out and out of the ward's interest

in the land, his inchoate title or entry, such sale was within the express authority of the Montana statutes and is authorized by the act of Congress authorizing sale and assignment of desert land entries above cited, and would be upheld.

The interested party, Davies, being insane, has become, in a measure, the ward of every tribunal before which his interests are in any way in question. He being unable intelligently to care for his own interests, it becomes the duty of this, as of every other tribunal, to seek with solicitude to protect his estate from loss or expense. For that reason, and because it is apprehended that the true character of the transaction is not shown by the record, the Department modifies your office decision and directs that the parties have opportunity (if the fact is that the transaction was a sale of the entry) to obtain a modification of the order of February 10, 1900, of the district court, sixth district, Montana, Polk county, to show the fact. If it finally appear that the real transaction was a sale of the ward's interest in the land, as well as of the improvements, and has the approval of the court having jurisdiction of the guardianship, it will be respected and carried out by the land department.

Your office decision, as the record is presented, is without error, but with a view to the conservation of the interest of Davies' estate, is modified in accordance with the direction given herein.

MINING CLAIM—APPLICATION FOR PATENT—NOTICE.

ALBEMARLE AND OTHER LODE MINING CLAIMS.

Notice of application for patent to a mining claim will be held sufficient, where the locus of the claim is designated therein according to the official survey for patent, which survey ties the claim to what is generally believed to be a corner of the public survey, even if it should be ultimately shown that such is not the true corner.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 16, 1900.* (E. B., Jr.)

Charles H. Toll and others have appealed from the decision of your office requiring new notice to be given in the application for patent to the Albemarle, Ontario, Huron, and Pamlico lode mining claims, survey No. 997 A, B, C, and D, embraced in Santa Fe, New Mexico, mineral entry No. 58, made May 11, 1898, by said Toll and others.

Said requirement of your office appears to have been based upon a statement of the surveyor-general of New Mexico in his letter of August 2, 1898, to the effect that the *loci* of said claims are represented in the official survey thereof for patent to be 4,000 feet west of their actual positions as correctly shown by a survey recently made

under his direction, connecting these claims with U. S. locating mineral monument No. 1, Cochise mining district. As the notice of the application for patent represented the *loci* of the claims to be as shown in the said official survey thereof, your office decision of August 29, 1898, held such notice insufficient in view of said statement of the surveyor-general, and required new notice to be given by publication and posting, correctly describing the *loci* of the claims. In decisions of September 29 and November 1, 1898, on review, your office adheres to the said requirement. Appellants contend that the notice as already given correctly and sufficiently shows the true positions of the claims.

It appears that in the said official survey of the claims for patent the same were severally tied to a pine post supposed to be the southwest corner of section 13, township 18 north, range 4 east, N. M. P. M. This pine post and supposed corner of the public survey, though more than two miles (12,830 feet) from the nearest corner of the Albemarle group of claims, and therefore beyond the prescribed limit for an official survey connection (Mining Regulations, paragraph 41), was reported by the United States deputy mineral surveyor who made the survey to be the nearest public survey corner to said group of claims that he could find "after diligent and faithful search"; and it was for that reason, he states, that he tied the group to the pine post corner. Other instances having been reported to the surveyor-general of inability on the part of the deputy mineral surveyors to find corners of the public survey in said township, the surveyor-general was thereby, and for other reasons stated in his letters to your office of December 29, 1897, and April 12, 1898, not necessary to be recited here, not only led to believe that the said pine post was not the true corner of said section 13, but also to doubt whether the survey of the said township had been made and section and other corners thereof established in due compliance with law. Accordingly, in order to prevent confusion and uncertainty as to the true *loci* of mining claims in the vicinity, he caused the said U. S. mineral monument No. 1 to be established in January, 1898. He subsequently caused a survey of the connections of the Albemarle group to be made therewith as hereinbefore stated.

In establishing the said mineral monument the deputy surveyor, in addition to fixing its position by courses and distances therefrom to adjacent mountain peaks and otherwise, also ran a course and distance between the same and what he designates in his field notes as—

> Cor. of secs. 25, 30, 31, and 36, T. 18 N., R's 4 and 5 E., recently established by me [him] under contract No. 310, survey unapproved.

Because of various errors in the survey of said township 18 north, range 5 east, under said contract, one of which was the failure of the deputy surveyor to correctly establish the western boundary of such township, the survey was rejected by the surveyor-general and by

your office; and upon appeal from such action the matter was remanded by the Department May 14, 1900 (unreported), to your office for correction of the survey in the field and for further consideration and action in accordance with directions then given. That survey stands thus still unapproved, and the boundary between the said townships, to a supposed point on which, as above indicated, the deputy surveyor ran the course and distance from the said mineral monument, still remains unestablished to the satisfaction of the land department.

Based apparently upon the assumed correct establishment of the said corner of sections 25, 30, 31, and 36, and upon the course and distance between the same and the said mineral monument as fixing the relative positions of such mineral monument and the Albemarle group to the true southwest corner of said section 13, the surveyor-general concluded that the said pine post was about 4,000 feet west of such southwest corner, and hence that the *loci* of the claims of that group, as given in the survey which tied them to such post, were erroneously represented to be about 4,000 feet west of their true positions; but, as shown herein, the boundary line between the said townships, upon which the corner of said sections 25, 30, 31, and 36 must be found, is not now officially and satisfactorily established, and the conclusion of the surveyor-general, that the *loci* of the said claims are not at the places represented in the survey upon which the proceedings for patent were had, can not be accepted as correct. On the other hand, comparisons of the plat of survey of township 18 north, range 4 east, and the plat of the survey establishing the said mineral monument, in connection with other circumstances, tend strongly to support the conclusion that the said pine post, if not the true southwest corner of said section 13, is very near to that point.

But however this may be, and whether or not the said pine post is ultimately shown to be the true corner last mentioned, it appears that it was fixed in the ground and marked as such corners are required to be fixed and marked, and was apparently believed at the time and prior thereto, by the deputy mineral surveyor who made the said survey for patent and by other deputy mineral surveyors of the same land district, to be such corner. It further appears that, owing to controversies some years ago concerning the lands in this part of the township, between miners and private land grant claimants, many of the corners of the public survey were removed or obliterated, and that the said pine post has for some time been the best known, and in fact about the only generally accepted corner of the public survey in that neighborhood.

Under these circumstances if the tie connecting the Albemarle claims to the said pine post is correctly given as to course and distance in the notice of the application for patent, such tie will be held sufficient for the purpose of such notice, and if the notice is otherwise correct and

sufficient the same will be held to be good as a whole. Your office very properly states that the unusual length of the tie alone would not render it unacceptable in this case if otherwise sufficient. As was said in the case of Hallett and Hamburg lodes (27 L. D., 104), the only purpose of the requirement that the published notice shall give the connection by course and distance between a mining claim and a corner of the public survey or a mineral monument is that the land embraced in the application for patent shall be identified and made certain. If the tie here in question is correctly stated in the notice as given of the application for the Albemarle claims, then such purpose has been answered in the case at bar. Your office will take such steps as may be necessary to a correct determination upon that point.

It is not deemed necessary to consider and pass upon any other questions suggested in this case. Should it be found by your office that the said tie is correctly stated in the notice as heretofore given, then inasmuch as the *loci* of these claims are now made certain for purposes of the necessary description in a patent by the connection with the said mineral monument, you will thereupon pass the claims to patent if the proofs are otherwise sufficient.

The decision of your office is modified in accordance with the views herein expressed.

RAILROAD GRANT—ACT OF MARCH 3, 1875—RIGHT OF WAY.

MINNESOTA AND ONTARIO BRIDGE COMPANY.

The right of way privileges granted by the act of March 3, 1875, are limited to railroad companies organized as common carriers for the benefit of the general public; hence a company organized for the purposes of "surveying, ... laying out, ... constructing and operating a railway or railroad bridge," is not entitled to such privileges.

Secretary Hitchcock to the Commissioner of the General Land Office,
(J. I. P.) *June 22, 1900.* (A. M.)

You submitted to the Department with your letter of the 25th ultimo, a certified copy of the articles of incorporation and due proofs of the organization of the Minnesota and Ontario Bridge Company. You have recommended in your letter that these papers be accepted for filing under the provisions of the act of March 3, 1875 (18 Stat., 482), stating that they have been examined and found to conform with the regulations.

This company was organized under chapter 247 of the General Laws of the State of Minnesota, entitled "An act to provide for the incorporation of bridge companies," approved April 18, 1899, subject to the provisions of Title 1 of Chapter 34 of the General Statutes of 1878 and acts amendatory thereof.

The articles of incorporation of this bridge company state that "the general nature of its business shall be the surveying, laying out, ... constructing, ... and operating a railway or railroad bridge, with one or more tracks," from a point in the State of Minnesota to a point in the Province of Ontario, with the necessary approaches, railway tracks, etc. They do not state that the company is organized to construct or operate a railroad and such object is not mentioned in the articles.

As stated in departmental letter of February 27, 1900, returning to you without acceptance the papers filed by the Great Republic Gold Mining Company, the privileges of the right of way railroad act of March 3, 1875, "extend to *railroad* companies organized as common carriers for the benefit of the general public."

It does not appear that this is such a company as is contemplated by the above act, or that could under its articles of incorporation avail itself of the privileges thereof, and I decline to accept the papers as presented for filing thereunder. They are enclosed herewith to be returned to the company.

INDIAN RESERVATION—COMMUTATION—ACT OF MAY 17, 1900.

OPINION.

The first proviso to the act of May 17, 1900, does not extend the commutation provisions of section 2301 of the Revised Statutes to the lands within the purview of said act, it merely declaring that where such provisions already apply they shall remain in full force and effect; hence said proviso is not applicable to reservations for which, prior to the passage of the act, no right of commutation had been provided.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, June 23, 1900. (W. C. P.)

You have submitted to me for an opinion upon the question therein presented a letter of the Commissioner of the General Land Office asking as to the proper construction of the first proviso in the act of May 17, 1900 (Public—No. 105), reading:

Provided, That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect.

The act provides that all settlers under the homestead laws upon agricultural public lands acquired prior to the passage thereof by treaty or agreement from the various Indian tribes, who have resided, or shall reside, upon the tract entered for the period required by existing law, shall be entitled to patent without other or further charge than the usual and customary fees; after which follows the

proviso quoted above. The Commissioner says he has been asked to determine whether or not said proviso extends the right of commutation under section 2301, Revised Statutes, to reservations for which there was, prior to the passage of said act, no commutation provided.

In the various acts of Congress providing for the disposition of lands acquired from Indians, different provisions are found. In some instances the lands were to be disposed of under the general laws applicable to the disposition of public lands, in others, under certain laws mentioned, and in others under the homestead laws only, but always with the added requirement of payment of a certain price. In some cases nothing was said in regard to the right of commutation, in others, that right was specifically denied, and in still others the right to make payment was allowed in some instances after fourteen months and in others after twelve months. The language used in the provision in question must be read in the light of the conditions as they were at the time of its enactment. If it had been intended to make the commutation provision of the homestead law found in section 2301, Revised Statutes, applicable to all lands within the purview of this act of May 17, 1900, that intention would have been expressed in apt words. This was not done but it was enacted that the provisions of the laws providing for the disposal of such lands, in respect to the commutation of homestead entries, should remain in full force and effect. Where commutation was provided for before the passage of the said act of May 17, 1900, such provision is still operative, and where commutation was not provided for before that act, it is not provided for by it. The proviso is not that the commutation provision of the homestead law is hereby extended to all such lands, but it is that where there was, before its passage, any provision for commutation that provision shall remain in full force and effect. That act did not purport to change the laws in respect to the disposal of the lands within its purview, in any way except by relieving settlers under the homestead laws of all charges except for the customary fees of the local officers.

Approved:

E. A. HITCHCOCK,
Secretary.

STATE SELECTION—ENTRY—ACT OF AUGUST 18, 1894.

STATE OF IDAHO *v.* CODY.

A homestead entry improperly allowed during the period of preferred right of selection accorded the State by the act of August 18, 1894, on land surveyed under said act upon the application of the State, will be permitted to stand, as of the date of the expiration of said period, where the State fails to make a valid selection of the land until after the period of preferred right has expired.

Homestead entries and applications to enter made subsequently to the expiration of

the period of preferred right granted the State by said act, and prior to any valid selection by the State, take precedence over such selection when made.

No rights are secured under State selections tendered prior to the filing of the township plat of survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 23, 1900.* (G. B. G.)

All the land involved in this case is in township 41 north, range 1 east, Lewiston land district, Idaho, and for more particular description is the NW. ¼ of the SW. ¼ and the SE. ¼ of SW. ¼ Sec. 7, embraced in the homestead entry of Albert O. Cody, allowed January 26, 1898; the E. ½ of the SW. ¼ and the W. ½ of the SE. ¼ of Sec. 6, embraced in the homestead entry of C. O. Carlson, allowed January 26, 1898; lot 2, SE. ¼ NW. ¼ and S. ½ NE. ¼, of Sec. 18, embraced in the homestead entry of E. N. Brown, allowed January 28, 1898; the SE. ¼ of the NE. ¼ the E. ½ of the SE. ¼ of Sec. 7, and the NE. ¼ of the NE. ¼ of Sec. 18, embraced in the homestead entry of J. M. Price, allowed February 5, 1898; the W. ½ of the SE. ¼ of Sec. 7, and the NW. ¼ of the NE. ¼ and the NE. ¼ of the NW. ¼ of Sec. 18, embraced in the homestead entry of G. W. Gale, allowed February 8, 1898; lot 7, Sec. 6, lots 1 and 2, Sec. 7, embraced in the homestead entry of W. H. Scribner, allowed February 10, 1898; lots 4 and 5, SE. ¼ of the NW. ¼, SW. ¼ of the NE. ¼ of Sec. 6, embraced in the homestead entry of W. O. Griffin, allowed April 18, 1898; lot 5, NE. ¼ of the SW. ¼, N. ½ of the SE. ¼ of Sec. 18, covered by the homestead application of W. A. Adair, presented March 14, 1898; the SE. ¼ of the NW. ¼, the SW. ¼ of the NE. ¼, the NE. ¼ of the SW. ¼ and the NW. ¼ of the SE. ¼, Sec. 34, covered by the homestead application of J. A. Lieuallen, presented August 10, 1898.

The case is before the Department upon the appeal of the State of Idaho from your office decision of March 24, 1899, rejecting its application to select said lands per two lists No. 4; one for State penitentiary and the other for State charitable, penal and reformatory institutions, under the grant to the State for such purposes, made by the act of July 3, 1890 (26 Stat., 215).

By an act of August 18, 1894 (28 Stat., 372, 394-395), it was provided that the governors of certain States, including the State of Idaho, might apply to the Commissioner of the General Land Office, for the survey of any township or townships of public lands remaining unsurveyed in any of the several surveying districts in the State at the date of the application, and that—

the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except

under rights that may be found to exist of prior inception, for a period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land-office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants.

By permission and under authority of this act the governor of the State of Idaho filed in your office May 7, 1895, an application for the survey of said township 41 north, range 1 east, and a notice of the withdrawal thereof from settlement issued from your office May 14, 1895, to take effect as of the date of the filing of the State's application for survey. The survey was made and the plat thereof was filed in the local office at Lewiston, Idaho, January 10, 1898.

In the meantime, however, and on December 14, 1897, the State filed its two lists of selections as above stated. These selections being made before the filing of the township plat of survey in the local office were premature and invalid and the State took nothing thereby. Zeigler *v.* State of Idaho (30 L. D., 1). The State took no further steps to select said lands until August 12, 1898, when it filed two other lists of selections No. 4, embracing the same lands and for the same purpose. The period of the reservation of these lands and of the preferred right of selection given the State by the act of August 18, 1894, *supra*, expired March 11, 1898, which was the sixtieth day after the filing of the township plat of survey.

From the previous recitation it will be seen that the homestead entries by Cody, Carlson, Brown, Price, Gale, and Scribner were all allowed during the period of the reservation of these lands under the State's application for the survey of the township. The entries were therefore improperly allowed; but, as the State had not prior to the expiration of the period of preferred right of selection granted it by the act of August 18, 1894, to wit, on March 11, 1898, made a valid selection of the lands, said entries will be permitted to stand as of the date of the expiration of the period of said reservation and of the preferred right of selection in the State. After the expiration of that period the lands within this township became subject to entry and continued to be subject to selection by the State, but without any preference right. As before stated, the State took no steps to make selection of this land until August 12, 1898, while the period of preferred right had expired on March 11, 1898. The homestead entry by Griffin, allowed April 18, 1898, was a valid entry and took precedence over the State's subsequent selection. The applications by Adair and Lieuallen, tendered on March 14 and August 10, respectively, also took precedence over the State's list of selections proffered August 12, 1898.

To the extent of the entries made by the parties before referred to,

the selection by the State will stand rejected. As to Adair and Lieuallen, who are applicants only, they will be allowed to complete entry of the land embraced in their applications, within a time to be fixed by your office, and upon completion of their entries selection by the State as to the tracts embraced therein will also stand rejected. With this modification your office decision is affirmed.

OMAHA INDIAN RESERVATION—SECTION 2, ACT OF AUGUST 7, 1882—ACT OF MAY 17, 1900.

OPINION.

Section 2 of the act of August 7, 1882, which defines the class of persons entitled to purchase the lands opened to settlement by said act in the Omaha Indian reservation, does not refer to settlers under the homestead laws; hence the act of May 17, 1900, which is expressly limited to "settlers under the homestead laws of the United States," has no application to said lands.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, June 23, 1900. (C. J. G.)

I am in receipt of your request, under date of May 31, 1900, for an opinion as to whether the act of Congress of May 17, 1900 (Public—No. 105), entitled "An act providing for free homesteads on the public lands for actual and *bona fide* settlers, and reserving the public lands for that purpose," affects the lands embraced in the Omaha Indian reservation in Nebraska.

The body of the act referred to is as follows:

That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry.

The Omaha reservation was set apart under the treaty of March 16, 1854 (10 Stat., 1043). On August 7, 1882 (22 Stat., 341), an act was passed providing for the sale of a part of said reservation, described in section 1 of said act, in the following manner:

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each *bona fide* settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs at law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be

entitled to purchase, for cash through the United States public land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case according to the survey and appraised value of said lands as provided for in section one of this act: *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say, one-third of the price of said land to become due and payable one year from the date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made.

By the express terms of the act of May 17, 1900, only settlers under the homestead laws of the United States are contemplated therein. Section 2 of the act of August 7, 1882, refers to a different class of settlers from those under the homestead laws. The regulations prescribed by the Secretary of the Interior under authority of said section require a settler thereunder to proceed after the manner of a preemption claimant; that is, he is required within thirty days after settlement to file a declaratory statement, and at any time after six months from date of filing and within one year from date of opening, he must make actual entry of the land, submit final proof and make the first payment as provided in said section, unless he elects to make full payment at date of entry. No period of residence is specified in the law, but valuable improvements must be shown, and the regulations require at least six months' residence, but only as an evidence of good faith. From this it seems clear that settlers under this section are not "settlers under the homestead laws of the United States." I am therefore of opinion, and so advise you, that settlers under said section on lands embraced in the Omaha reservation are not affected by the act of May 17, 1900.

Approved:

E. A. HITCHCOCK,
Secretary.

OKLAHOMA LANDS—INDEMNITY SCHOOL SELECTION—ACT OF JANUARY 18, 1897.

GATES *v.* ROBERTSON.

One who exhausts his homestead privilege and also his right to purchase additional land under section 1 of the act of January 18, 1897, surrenders thereby any right or claim he may have acquired under said section as a *bona fide* occupant of other lands.

A lieu selection of school lands by a State or Territory operates as a waiver of all claim to the lands assigned as bases, and after the approval of such selection by the Secretary of the Interior it is not material to inquire how it was made in the first instance.

Where a claimant makes entry under the act of January 18, 1897, as an occupant,

and it afterwards appears that he was not an occupant on March 16, 1896, of one of the tracts included in his entry, the entry may nevertheless be allowed to stand for such tract, under section 2 of said act, where it is shown that he was an "actual settler" and residing upon a portion of the land included in his entry at the date of entry and no valid prior right had attached.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 23, 1900.* (W. A. E.)

August 3, 1897, William E. Gates made homestead entry for the SE. ¼ and cash entry for the SW. ¼ of Sec. 17, T. 2 N., R. 18 W., Mangum, Oklahoma, land district. Both entries were made under section 1 of the act of January 18, 1897 (29 Stat., 490).

November 2, 1897, Robert W. Robertson made homestead entry under the same act for the W. ½ of the NW. ¼ and lots 1 and 3 of Sec. 16, said township and range.

December 29, 1897, Gates filed an affidavit of contest against Robertson's entry, in so far as it covered lot 3 of said Sec. 16, alleging that the statement in Robertson's homestead affidavit that on March 16, 1896, he was occupying the land embraced in his homestead entry is false, to the extent that it relates to said lot 3; that the said Robertson has never at any time occupied or had possession of said lot 3 nor has he ever placed any improvements thereon; that contestant has continuously occupied and cultivated said lot 3 since May 3, 1889, and was in such occupation and use of it on March 16, 1896.

A hearing was ordered on this affidavit of contest and at the appointed time both parties appeared. Before proceeding to the taking of testimony, the defendant made a motion to dismiss the contest, which was overruled, and the contestant filed a supplemental affidavit in support of his contest, alleging that on April 30, 1898, he had leased said lot 3 from the school land board of Oklahoma for a period of three years from January 1, 1898. Testimony was then submitted on behalf of the contestant. No testimony was submitted by the defendant, but the contestant's witnesses were cross-examined. It was shown by the evidence that Gates had been in possession of said lot 3 since May, 1889; that he had fenced it, in connection with other land; that he had cultivated the greater part of it each year from 1889 up to the date of the hearing; and that Robertson did not have possession of it or any improvements thereon on March 16, 1896, or at any time prior thereto.

October 11, 1898, the register and receiver rendered separate decisions, agreeing, however, in their conclusions that the contest should be dismissed and Robertson's entry held intact.

On appeal, your office, by decision of April 12, 1899, affirmed the action of the local officers. A motion for review of your office decision was denied July 24, 1899, whereupon the contestant appealed to the Department.

The land involved in this case is situated in Greer county, Oklahoma, and is subject to disposal only under the provisions of the act of January 18, 1897, *supra*, and subsequent supplementary acts which need not be referred to, as they have no bearing on the questions here presented. A full history of the conditions leading up to the passage of the act of January 18, 1897, is given in the case of Frank Johnson (28 L. D., 537). In that case it was stated that the act is a remedial one, and like all other remedial acts is to be liberally construed.

The portions of said act applicable to the present case are as follows:

SEC. 1. [In part.] That every person qualified under the homestead laws of the United States, who, on March sixteenth, eighteen hundred and ninety-six, was a bona fide occupant of land within the territory established as Greer county, Oklahoma, shall be entitled to continue his occupation of such land with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right from the passage of this act within which to initiate his claim thereto, and shall be entitled to perfect title thereto under the provisions of the homestead law, upon payment of land office fees only, at the expiration of five years from the date of entry, except that such person shall receive credit for all time during which he or those under whom he claims shall have continuously occupied the same prior to March sixteenth, eighteen hundred and ninety-six. Every such person shall also have the right, for six months prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred and ninety-six, not exceeding one hundred and sixty acres, which, prior to said date, shall have been cultivated, purchased, or improved by him.

SEC 2. That all land in said county not occupied, cultivated, or improved, as provided in the first section hereof, or not included within the limits of any townsite or reserve, shall be subject to entry to actual settlers only, under the provisions of the homestead law.

* * * * * * *

SEC. 4 Sections numbered sixteen and thirty-six are reserved for school purposes as provided in laws relating to Oklahoma, and sections thirteen and thirty-three in each township are reserved for such purpose as the legislature of the future State of Oklahoma may prescribe. That whenever any of the lands reserved for school or other purposes under the laws of Congress relating to Oklahoma, shall be found to have been occupied by actual settlers or for town-site purposes or homesteads prior to March sixteenth, eighteen hundred and ninety-six, an equal quantity of indemnity lands may be selected as provided by law.

By act approved June 23, 1897 (30 Stat., 105), the time for the exercise of the preference right of entry given by the first section of the act of January 18, 1897, to *bona fide* occupants of public lands in Greer county was extended to January 1, 1898.

As heretofore stated, the record shows that contestant Gates was, on March 16, 1896, an occupant of lot 3 of section 16, the land here involved, and as such was entitled to enter it under the first section of the act of January 18, 1897, if he had so desired. He chose, however, to make homestead and cash entries for other lands. Having exercised his rights under said section by taking other lands to the full amount to which he was entitled, he thereby surrendered any right or claim he might have had as a *bona fide* occupant to said lot 3.

It appears, however, that he is now claiming it under a lease from the school land board of Oklahoma. The records of your office show that by indemnity list, filed March 22, 1898, the Territory of Oklahoma selected other lands in lieu of those embraced in Robertson's homestead entry, and that said list was approved by the Department August 29, 1899. This selection of lieu lands was a waiver, on the part of the Territory of Oklahoma, of all its claim to the lands alleged as bases, which thereupon became subject to disposal as a part of the public domain. Rice *v.* State of California (24 L. D., 14).

In the case of Todd *v.* State of Washington (24 L. D., 106), it was held that the approval of a school indemnity selection by the Secretary of the Interior passes the title thereto, and, in contemplation of law, makes such selection the act of the Secretary, and it is thereafter not material to inquire how such selection was made in the first instance. It is therefore unnecessary, at this time, to consider the question presented in the appeal as to whether the Territory of Oklahoma should properly have selected indemnity land in lieu of said lot 3, the tract involved in this contest.

The Territory of Oklahoma having waived its claim to lot 3 on March 22, 1898, by the selection of other land in lieu thereof, had thereafter no authority to lease said lot 3, and Gates acquired no right to the lot by virtue of the lease executed on April 30, 1898.

It thus appears that apart from any consideration of the conflicting claim of Robertson, Gates now has no right to the tract in question, either as an occupant or settler under the act of January 18, 1897, or as a lessee of the Territory of Oklahoma, but occupies the position of a mere trespasser on the land.

At the time that Robertson made homestead entry he filed an affidavit in which he alleged that he was, on March 16, 1896, an occupant of the land he was seeking to enter. The correctness of this affidavit is not challenged, except as to lot 3, embraced in said entry. As above stated, the evidence shows that on March 16, 1896, he was not occupying said lot 3; that he had not placed any improvements thereon or exercised control over it; but that it was at that time in the occupation and possession of Gates.

Gates had, however, at the date of Robertson's entry, already waived his claim to said lot 3 by making homestead and cash entries for other land, and the only existing adverse claim was that of the Territory of Oklahoma, a claim that was subsequently waived.

As Robertson was not an occupant of said lot 3 on March 16, 1896, he was not entitled to make entry therefor under the first section of the act of January 18, 1897, but the question is presented as to whether his entry may be allowed to stand, as to lot 3, under the second section of said act.

The determination of this question involves the construction of the

words "actual settlers only," as used in the section under consideration.

At the time he made entry Robertson was living on land adjoining said lot 3—land which he included in his entry in connection with lot 3—and was therefore an "actual settler." It is true that he had at that time no improvements upon lot 3, and the land upon which he was living was in a different quarter section, but was it the intention of Congress to limit an actual settler's right of entry to the legal subdivisions to which his settlement notice extended? As heretofore said, this act is to be liberally construed. The more liberal view is that the leading idea in the mind of Congress in connection with the second section of said act was the disposal of these lands only to those who would make their homes thereon, and where a man is actually living on land subject to disposal under said act, and makes entry therefor, it makes no difference if he includes in his entry other adjoining land, subject to entry, to which his settlement notice has not extended. The *notice* given by settlement extends only to the technical quarter section upon which it is made, and if any valid adverse claim had been asserted to said lot 3 at any time prior to Robertson's entry, his entry might have been defeated as to said lot, but in the absence of the assertion of any valid adverse claim thereto, there appears to be no reason why his entry should not be allowed to stand as to the lot in question.

Your office decision is accordingly affirmed.

Gates's contest is dismissed, and Robertson's entry will remain intact, subject to compliance with law.

OKLAHOMA LANDS—INDEMNITY.

TERRITORY OF OKLAHOMA.

Section 4 of the act of January 18, 1897, reserving sections thirteen and thirty-three in Greer county, Oklahoma, for "such purpose as the future State of Oklahoma may prescribe," makes provision for indemnity only for lands in said sections which are found to have been "occupied by actual settlers or for townsite purposes or homesteads" prior to March 16, 1896, and as the right to indemnity under sections 2275 and 2276 of the Revised Statutes, as amended, is limited to sections reserved for school purposes, there is no law authorizing indemnity for losses in sections 13 and 33, in said county, occasioned by such sections being fractional.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 23, 1900.* (L. L. B.)

By your office decision of June 9, 1899, the selections by the Territory of Oklahoma of certain lands described in list 5, amounting to 6,230.06 acres, in lieu of lands lost in place in sections 13 and 33, by reason of certain townships being fractional, were rejected.

Section 4 of the act of January 18, 1897 (29 Stat., 490), providing for the entry of lands in Greer county, is as follows:

> Sections numbered sixteen and thirty-six are reserved for school purposes as provided in laws relating to Oklahoma, and sections thirteen and thirty-three in each township are reserved for such purpose as the legislature of the future State of Oklahoma may prescribe. That whenever any of the lands reserved for school or other purposes under this act, or under the laws of Congress relating to Oklahoma, shall be found to have been occupied by actual settlers or for townsite purposes or homesteads prior to March sixteenth, eighteen hundred and ninety-six, an equal quantity of indemnity lands may be selected as provided by law.

By this section indemnity was allowed only when these reserved sections should be found to have been "occupied by actual settlers or for townsite purposes or homesteads prior to March sixteenth, eighteen hundred and ninety-six." No provision is here made to indemnify against loss occasioned by reason of these sections being fractional in quantity or where one or more are wanting by reason of the township being fractional or from any other natural cause.

Sections 2275 and 2276 of the Revised Statutes, as amended by act of February 28, 1891, provide for indemnity for such fractional losses only where they pertain to sections 16 and 36, reserved for school purposes. There is, therefore, no law authorizing indemnity for the losses presented in the list here asked to be approved.

The school leasing board for the Territory of Oklahoma, who have prosecuted this appeal, ask the Secretary, in the event he shall find that there is no law authorizing these lieu selections, "to recommend to Congress of the United States an amendment of the law, which shall allow the selection of indemnity land for sections 13 and 33 the same as are now allowed for sections 16 and 36." In answer to this request it is sufficient to say that the reservation of sections 13 and 33 was made for "such purpose as the legislature of the future State of Oklahoma may prescribe," and inasmuch as this purpose has not yet been prescribed (the State not having been organized) a recommendation in the premises at this time is not deemed to be advisable.

The decision of your office is affirmed.

INDIAN RESERVATION—TIMBER CUTTING—MINING CLAIM.

OPINION.

The owner of a *bona fide* mining claim in the Colville Indian reservation has the same right, by virtue of the act of July 1, 1898, extending the mining laws to said reservation, to use and remove the timber upon his claim, as the owner of a mining claim elsewhere.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, June 26, 1900. (W. C. P.)

I am in receipt by your reference, with request for opinion, of a letter from the Commissioner of Indian Affairs of May 24, 1900, relative

to the cutting of timber on mining claims on the south half of the Colville Indian reservation, Washington.

The proposition of the Indian Office is to enter into a contract with the owners of certain mining claims permitting them to place a saw-mill plant on such mining claims for the sole purpose of cutting lumber and timber to be used on such claims for the development of the property. A contract to this effect was submitted for your approval, which was refused.

The Indian Office has resubmitted the matter for further consideration, and has presented an argument sustaining the right of mineral claimants on this reservation to cut timber upon their claims, and in support of the propriety of making the proposed contract says:

> The office is aware that there is no law, and so far as known no precedent for the making of such agreements with miners. But it is thought that miners and mining companies on that portion of the reservation who are developing properties in good faith will be willing to enter into such arrangements, because risking nothing by violations of the law they will have nothing to lose, whereas timber trespassers and speculators—those locating claims under the guise of miners, only to procure the timber—will thereby be deterred from operating on the reservation at all.

By the act of July 1, 1892 (27 Stat., 62), a portion of the Colville reservation was "vacated and restored to the public domain." The remaining portion became and remained the Colville Indian reservation. The act of July 1, 1898 (30 Stat., 571, 593), contains the following provision:

> That the mineral lands only in the Colville Indian reservation in the State of Washington, shall be subject to entry under the laws of the United States in relation to the entry of mineral lands: *Provided*, That lands allotted to the Indians or used by the government for any purpose or by any school shall not be subject to entry under this provision.

Thus the mineral lands within the boundaries of the present reservation were made subject to location and entry under the mining laws. The owner of a *bona fide* mining claim on these lands therefore has the same right to use or remove the timber found upon his claim which is possessed by the owner of a mining claim situated elsewhere, and this Department has no more authority to control the exercise of this right in the one case than in the other. This right is not possessed by timber trespassers or speculators, who locate claims "under the guise of miners, only to procure the timber," but is restricted to owners of *bona fide* mining claims and authorizes them to cut timber from their own claims for use in the development or working thereof or to remove such timber when necessary to facilitate the convenient and proper development or working of the claims. This right has long been recognized by Congress and the courts and is not one which can be withheld or granted by this Department as a matter of discretion; but it is the duty of the officers of the Department to see to it that the right is not abused by those by whom it is possessed and that it is not

enjoyed by those who do not possess it. The owner of a *bona fide* mining claim in the Colville Indian reservation may, for the purposes and to the extent herein specified, lawfully cut or remove timber from his claim, in the absence of any contract or agreement with any officer charged with the administration or supervision of Indian affairs, and one who is not the owner of a *bona fide* mining claim in such reservation can not, even if he obtains such a contract or agreement, lawfully cut or remove timber from any lands in said reservation. I am therefore of the opinion that the execution and approval of a contract such as is submitted will not establish, add to or take from the rights of owners of *bona fide* mining claims in the premises.

Approved:

E. A. HITCHCOCK,
Secretary.

ABANDONED MILITARY RESERVATION—HOMESTEAD APPLICATION.

ALLEN H. COX.

Lands in abandoned military reservations coming within the purview of the act of August 23, 1894, were by said act opened to homestead entry as well as to settlement.

A homestead application for surveyed lands in the Fort Hays military reservation, opened to settlement and entry by the act of August 23, 1894, presented by a qualified applicant and rejected, at a time when said lands were legally subject to entry, and pending an appeal, serves to except the lands covered thereby from the subsequent grant to the State by the act of March 28, 1900.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 26, 1900.* (G. B. G.)

This is an appeal by Allen H. Cox from your office decision of September 13, 1899, rejecting his application to make homestead entry of lots 8, 10 and 11, and the S. ½ of the SE. ¼ of Sec. 4, T. 14 S., R. 18 W., Wa-Keeney land district, Kansas.

This land is within the limits of the abandoned Fort Hays military reservation established by executive order of August 28, 1868, and contains more than five thousand acres of land. October 22, 1889, this order was revoked and the land turned over to this Department for disposal under the act of July 5, 1884 (23 Stat., 103). August 23, 1894, Congress passed an act (28 Stat., 491), for the disposal of lands in abandoned military reservations, which declared that—

> All lands . . . . within the limits of any abandoned military reservation . . . . where the area exceeds five thousand acres . . . . 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

nd are now residing upon any agricultural lands in said reservation, and for a period of six months from the date of settlement when that shall occur after the date of his act.

In a circular of December 1, 1894 (19 L. D., 392), addressed to registers and receivers, prescribing rules for the administration of said last named act, it was said by this Department that—

> Under the terms of this act, settlement may be made on any of these reservations, whether surveyed or not, where the area exceeds five thousand acres. Where the lands in such reservations have been surveyed and the triplicate plats filed in your office, you will allow homestead entries to go to record therefor, if the entrymen are duly qualified to make entry, as in the case of other surveyed public lands.

March 22, 1895, the Secretary of the Interior again withdrew from settlement and entry the land remaining undisposed of in this reservation, and this withdrawal continued in effect until revoked by departmental order of June 13, 1899 (L. & R. Misc. 396, p. 305).

August 11, 1899, the application of Cox to make homestead entry of the land above described was presented at the local office and rejected, and September 13, 1899, your office affirmed the action of the local officers, and Cox has appealed to the Department, as above stated. After the presentation of said application and after the aforesaid action thereon by the local officers, the land was temporarily withdrawn from disposal by departmental order of August 24, 1899 (L. & R. 398, p. 472), and March 28, 1900, an act of Congress was passed (Public—No. 47), granting to the State of Kansas the abandoned Fort Hays military reservation, with the proviso that the act "shall not apply to any tract or tracts within the limits of said reservation to which a valid claim has attached, by settlement or otherwise, under any of the public land laws of the United States."

At the date the application of Cox was presented the land in this reservation had been surveyed, and it appearing that he was qualified to make a homestead entry of any land legally subject thereto, the only question presented by his appeal is, whether the land applied for was subject to homestead entry August 11, 1899.

The act of August 23, 1894, *supra*, in terms opened all of the lands in said reservation, then remaining undisposed of, to settlement under the public land laws of the United States.

The executive withdrawal of March 22, 1895, could at best operate to take these lands out of the provisions of said act only so long as that withdrawal was in force, and it having been revoked June 13, 1899, the status of this land was on August 11, 1899, the same as if the withdrawal had not been made. That it was intended by the act of August 23, 1894, to open all lands within its descriptive provisions to entry as well as settlement seems clear from that provision of the act which gives to *bona fide* settlers a preference right of entry for a period of six months from the date of the act. The provision for a

preference right of entry necessarily presupposes that a right of entry which was not a preference right had already been conferred by the act in opening the land to settlement under the public land laws.

The said departmental circular of December 1, 1894, directed that homestead entries be allowed for these lands, and this, in addition to being a contemporaneous construction of the act, was also an adjudication upon which seekers after public lands had the right to rely.

Congress at any time before the allowance of the application of Cox had the right to make other disposition of this land, but it has not done so. The act of March 28, 1900, *supra*, granting the lands in this reservation to the State of Kansas, specially excepted any tract or tracts within the limits of the reservation to which a valid claim had attached by settlement or otherwise, and the claim initiated by the homestead application of Cox was a valid one.

The decision appealed from is reversed, and the case remanded, with directions to allow the entry.

COAL LANDS—FOREST RESERVATIONS—ACT OF JUNE 4, 1897.

T. P. CROWDER.

The words, "the existing mining laws of the United States," are to be construed, in legislative enactments, as embracing sections 2347 to 2352, inclusive, of the Revised Statutes, commonly known as the coal land law, unless an intention to the contrary is expressed.

Coal lands are mineral lands within the meaning of the act of June 4, 1897, and as such are subject to entry, when found in forest reservations, the same as other mineral lands within such reservations.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 29, 1900.* (E. B., Jr.)

By decision of June 24, 1899, your office sustained the decision of the local office at Los Angeles, California, rejecting the coal land declaratory statement of T. P. Crowder offered October 27, 1898, for the SE¼ of the NE¼, or lot 9, of section 1, T. 2 N., R. 6 W., and lots 5, 6 and 15, of section 6, T. 2 N., R. 5 W., S. B. M., on the ground that the tract described was not subject to entry as coal land, being partly within the San Bernardino and partly within the San Gabriel forest reservations. Mr. Crowder has appealed to the Department from the decision of your office, contending that coal lands are mineral lands and as such, under the provisions of the act of June 4, 1897 (30 Stat., 11, 35–6), are subject to entry in the usual manner, notwithstanding such forest reservations.

It appears that that part of the tract which is in said section 1 is within the San Bernardino forest reserve established February 25, 1893, by proclamation of the President (27 Stat., 1068), and that the

remainder of the tract is within the San Gabriel forest reserve, similarly established December 20, 1892 (27 Stat., 1049). Appellant alleges in his declaratory statement that he came into possession of the tract August 30, 1898, and has ever since remained in actual possession; that he has located and opened a valuable mine of coal thereon, and has expended in so doing the sum of $150 in labor and improvements; and that he is well acquainted with each and every legal subdivision of the land, and there is not, to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place bearing gold, silver or copper, nor any valuable deposit of those minerals.

The said statement appears to be in due compliance, both as to form and substance, with the coal land law and the existing regulations thereunder. But the tract is now, and has been since long prior to the date on which such statement was offered for filing, embraced, as already shown, in the said forest reservations, and by the express terms of the said proclamations establishing such reservations the lands covered thereby are "reserved from entry and settlement," and all persons are warned "not to enter or make settlement upon" them.

Assuming that the tract here in question is coal land, does the act of June 4, 1897, *supra*, as contended by appellant, notwithstanding the inclusion of the tract in the said reservations, permit him to acquire title thereto upon compliance with the provisions of the coal land law, sections 2347 to 2352, inclusive, of the Revised Statutes?

The said act provides, among other things, that—

All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be as far as practicable controlled and administered in accordance with the following provisions:

No public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes.

* * * * * * *

Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: *Provided*, That such persons comply with the rules and regulations covering such forest reservations.

* * * * * * *

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found bet-

ter adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained.

The foregoing provisions of the said act apply to all public forest reservations established under authority of section twenty-four of the act of March 3, 1891 (26 Stat., 1095, 1103), among which are the said San Bernardino and San Gabriel reservations. Congress did not deem it sufficient to declare, in the act of 1897, the purposes for which all such reservations are established, and that it is not the purpose of forest reserve legislation to authorize the inclusion in forest reservations of lands more valuable for the mineral therein than for forest purposes, and to provide for the elimination therefrom of such lands and for their restoration to the public domain. With respect to mineral lands the act goes much farther than that. It specifically provides that nothing therein shall prohibit any person from entering upon such reservations, under rules and regulations to be prescribed by the Secretary of the Interior, "for all proper and lawful purposes, including that of prospecting, locating and developing the mineral resources thereof," or from making entry of "any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto." Prospecting, locating, developing and making entry of mineral lands in forest reservations are thus clearly and distinctly authorized and made lawful.

It is not necessary therefore that such lands should first be eliminated from such reservations and restored to the public domain before they can be prospected, located, developed or entered under the mining laws. Subject to the requirement that in prospecting, locating and developing the same "the rules and regulations covering such forest reservations must be complied with," the status of mineral lands in forest reservations does not differ in any respect from that of lands of the same character outside of such reservations. It only remains then to inquire whether coal lands are "mineral lands . . . . subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto," within the meaning of the said act of 1897.

It must be assumed, unless an intention to the contrary is clearly shown in the act, that the language just quoted is to be given the usual and generally accepted meaning of the same words as employed elsewhere in the statutes, and in the decisions of the Department and the courts. That coal is a mineral in both the common and the scientific understanding of the words is not open to question, and that min-

eral lands embrace and include lands valuable for their deposits of coal, within the generally accepted meaning of the terms as used in the laws relating to the disposal of the public lands, is well settled. It was because this is so that in the act of July 2, 1864 (13 Stat., 365, 368), granting lands to the Northern Pacific railroad, and in the act of July 27, 1866 (14 Stat., 292, 295), granting lands to the Atlantic and Pacific railroad companies, Congress deemed it necessary, in order to take coal lands out of the general exception of mineral lands from the grant, to specifically provide that in those acts the words mineral lands should not be held to include coal lands.

The sections of the coal land law under which Crowder's declaratory statement is offered are part of Chapter Six, entitled Mineral Lands and Mining Resources, Title XXXII—The Public Lands, in the Revised Statutes; and commencing with section 2347 thereof, and following closely the sections relating to lands containing the more precious minerals, as gold, silver, copper, etc., they comprise the balance of the chapter. Coal lands are thus by authority of Congress, in clear and unequivocal terms, classed as mineral lands, and the laws which provide for their disposal are likewise made part of the mining laws. See also Mullan *v.* United States, 118 U. S., 271, 278; Colorado Coal and Iron Co. *v.* United States, 307, 324–27; and Pacific Coast Marble Co. *v.* Northern Pacific R. R. Co. *et al.*, 25 L. D., 233.

It is not believed that in using the words "subject to entry under the existing mining laws," etc., Congress intended to limit the prospecting, locating, developing and entry of the mineral lands in forest reservations to any particular class or kind of mineral lands, and especially to include all other mineral lands of every description save only coal lands. Such would seem however to be the interpretation which must be given to the language under consideration if the decision of your office in this case is correct.

It happens, due no doubt chiefly to the fact that the original acts of Congress relating to coal lands and to the other mineral lands respectively, were passed at different times, and so were promulgated to the local land offices with separate circular instructions, that the sections of the said chapter six and legislation relating to the same subject enacted since the revision of 1873, and the rules and regulations thereunder, are still found divided into two separate circulars, one of which, embracing such of those sections and later legislation as relates to lands valuable for minerals other than coal, is known and designated as "United States Mining Laws and Regulations Thereunder," and the other, relating to coal lands, as "Coal Land Law and Regulations Thereunder," and that, under these circumstances and for convenience of reference, the statutes embraced in the former have come to be spoken of as the mining laws and those in the latter as the coal land law. Such nomenclature, adopted and used as a mere matter of con-

venience, is not of controlling influence in construing the statute in question. The latter division of chapter six of the Revised Statutes is in a broad sense, and when there is no indication to the contrary, as truly a part of "the existing mining laws of the United States" as the former division of that chapter.

It is believed that the mining laws as a whole, and not any part or division thereof, are referred to by the language under consideration. There is nothing in the act of 1897, nor in any other legislation by Congress of which the Department is aware, nor in the decisions of the courts or the Department, which would justify the conclusion that the words last above quoted from the act of 1897 are used therein in any narrow or restricted sense nor in any other than as relating to mineral lands of every kind and class—to coal lands as well as all other mineral lands. See Pacific Coast Marble Co. *v.* Northern Pacific R. R. Co., *et al.*, *supra*, pp. 239–40, and Coleman *et al. v.* McKenzie *et al.*, 28 L. D., 348, 352.

This is believed to be also the only reasonable conclusion. No substantial reason has been suggested to the Department why coal lands, and they alone of all mineral lands, should have been excepted from the provisions of the act in question. It is not reasonable to conclude, when a contrary view is permissible, that Congress would expressly provide, as it did, that settlers, miners, residents and prospectors for minerals should be permitted to use, for necessary firewood, the timber of forest reservations, for the protection and preservation of which the reservations were established, and at the same time would lock up against such persons, as well as all others, the coal therein which could be spared with much less detriment to the reservations. There is much reason, on the other hand, to support such contrary view. The cutting of timber for firewood, evidently permitted only as a necessary measure for the comfort and well-being of the persons enumerated, would be obviated to some extent, at least, by the use of the coal mines on the reservations, and the injury to the reservations from the opening and operating of the mines would be small indeed in comparison to the loss of timber.

The said decision of your office is reversed. You will direct the local office to accept and file the said declaratory statement, and permit entry of the land upon due showing of compliance with the law providing for the disposal of coal lands.

PRIVATE CLAIM—RESERVATION—SELECTION OR LOCATION.

BACA FLOAT NO. THREE.

All lands within the section of country ceded to the United States by the treaty of Guadalupe Hidalgo and the Gadsden treaty, covered by Spanish or Mexican claims, were, by the eighth section of the act of July 22, 1854, and the act of August 4, 1854, reserved from other disposition until the validity or invalidity of such claims was finally determined.

The state or condition of lands, whether vacant, or reserved on account of an existing Spanish or Mexican claim, at the date of their selection or location under the sixth section of the act of June 21, 1860, determines whether the title thereto passed by such selection or location; and an attempted selection or location of lands embraced in any such claim is not validated so as to become operative as to such lands upon their subsequent release from reservation by the final action of the courts declaring such claim to be invalid.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 30, 1900.* (A. B. P.)

By departmental decision of July 25, 1899 (29 L. D., 44), your office was directed to cause survey to be made of the grant known as the "Baca Float No. 3," by the surveyor-general of Arizona, under the selection or location of June 17, 1863. In that decision the Department held, among other things, that the duty of investigating and determining, in the first instance, the question of the known character of the lands embraced in said selection or location, at the time the same was made, and the question as to whether the lands were at that time vacant and subject to selection under the terms of the Baca grant, rests with the surveyor-general. Instructions were thereupon given to the effect that all persons alleging an interest in the lands adverse to the Baca claimants should be allowed to be heard before the surveyor-general, at such times and places as he may appoint, during the progress of the survey in the field, on the two questions: (1) as to the known character of the lands at the date of said selection or location, and (2) as to whether the lands were then vacant.

Subsequently a petition was filed by R. E. Key and twenty-two others, alleged settlers on portions of the lands claimed under the selection of June 17, 1863, wherein it was in substance asked that a hearing be ordered with the view to allowing the petitioners an opportunity to show cause against the validity of said selection. Among the matters set forth in the petition was an allegation to the effect that large bodies of the lands within the exterior limits of said selection or location were, at the date thereof, embraced within certain Mexican grants alleged to have been made prior to the acquisition of title to that section of country by the United States, and that such alleged grants have recently been adjudged invalid by the courts.

By decision of December 11, 1899 (unreported), said petition was

denied as to all the allegations thereof except the one just referred to. As to that allegation the Department said:

> Questions therefore arise as to whether the lands included within these claimed grants were in a state of reservation under the concluding provision of section eight of the act of July 22, 1854 (10 Stat., 308), or otherwise, at the time of said selection or location, and if in a state of reservation at that time, whether they were subject to selection or location by the Baca Heirs and whether the subsequent judicial determination of the invalidity of said grants can operate to the advantage or benefit of said selection or location.
>
> It is believed that these questions, resting as they do upon the construction of certain laws and treaties, and not upon any disputed or uncertain matters of fact, should be determined before the survey of said selection or location is proceeded with, in order that the lands within the said claimed Mexican grants may be included in or excluded from the survey, as may be right in the premises.

Directions were therefore given that the petitioners be allowed thirty days within which to present in writing a statement of their claim and contention with respect to said matters, and that the Baca claimants be allowed the same length of time after the filing of such statement to make answer thereto; all the papers to be thereupon returned to the Department for its consideration and action. Both the petitioners and the Baca claimants were served with notice of said decision.

A written statement of their claim and contention was accordingly filed by the petitioners, accompanied by a number of affidavits and other documentary evidence in support thereof. Copies of said statement and other papers were served on the Baca claimants, and an answer has been filed by counsel for one of said claimants. April 6, 1900, the papers were forwarded by your office to the Department as directed by the decision of December 11, 1899.

The Baca grant here in question is the third of the series of selections or locations authorized by section six of the act of June 21, 1860 (12 Stat., 71, 72), which provided as follows:

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said [same] tract of land as is claimed by the town of Las Begas [Vegas], to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however,* That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

The grant embraces nearly one hundred thousand acres. The record indicates that the selection or location of June 17, 1863, conflicts with the claimed limits of two Mexican grants, one known as the Tumacacori and Calabazas grant, and the other as the San Jose De Sonoita grant. The indicated conflict with the former embraces over twenty

thousand acres, and with the latter about four thousand three hundred acres.

By articles eight and nine of the treaty of Guadalupe Hidalgo (1848, 9 Stat., 229–30), and article five of the Gadsden treaty (1853, 10 Stat., 1035), it was provided that the property of Mexicans within the territory ceded to the United States by the Republic of Mexico, should be "inviolably respected," and that they and their heirs and grantees should be permitted "to enjoy with respect to it guaranties equally ample as if the same belonged to citizens of the United States."

With the view to discharging the treaty obligations thus imposed, the Congress, by the eighth section of the act of July 22, 1854 (10 Stat., 308), provided:

That it shall be the duty of the surveyor-general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act.

By act of August 4, 1854 (10 Stat., 575), it was further declared—

That, until otherwise provided by law, the territory acquired under the treaty with Mexico commonly known as the Gadsden treaty, be, and the same is hereby incorporated with the Territory of "New Mexico," subject to all the laws of said last named Territory.

By act of February 24, 1863 (12 Stat., 664), Arizona was carved out of the Territory of New Mexico, and organized as a new Territory, with its present boundaries, including the western portion of the lands ceded by the Gadsden treaty, wherein the Tumacacori and Calabazas, and San Jose De Sonoita grants are situated. The second section of the act provided for the appointment of a surveyor-general and other officers for the new Territory. It was further provided that the "powers, duties, and the compensation" of said officers—

shall be such as are conferred upon the same officers by the act organizing the territorial government of New Mexico, which subordinate officers shall be appointed in

the same manner and not exceed those created by said act; and acts amendatory thereto, together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act are hereby extended to and continued in force in the said Territory of Arizona until repealed or amended by future legislation.

The contentions by the petitioners, substantially stated, are:

1. That the portions of the lands within the exterior limits of said selection or location of June 17, 1863, which were also within the claimed limits of said Mexican grants, were, at the date of said selection or location, in a state of reservation under the provisions of the eighth section of said act of July 22, 1854, and therefore not subject to selection under the granting act of June 21, 1860, *supra;*

2. That in view of such reservation the said selection or location is to that extent void; and

3. That the lands within said selection or location but not within either of said Mexican grants, are mineral in character, and for that reason not subject to the Baca grant.

In the answer filed on behalf of the Baca claimants it is contended, in substance and effect:

1. That it was not contemplated by the eighth section of the act of July 22, 1854, that the reservation thereby created in favor of claimants under Mexican grants should become operative in any case until the filing with the surveyor-general of a petition for the confirmation of the grant, and that as no such petition was filed as to either of the grants in this case until after June 17, 1863, there could have been no reservation of lands on account thereof at that time;

2. That even if it be held that such reservation was in force in favor of the claimants under said Mexican grants, at the date of the Baca selection or location, the same has been abrogated as to all the lands within the claimed limits of the Tumacacori and Calabazas grant, by reason of said grant having been adjudged to be wholly invalid by the courts, and as to most of the lands within the claimed limits of the San Jose De Sonoita grant, by reason of that grant having been likewise adjudged to be in the greater part invalid; and that as the result of such abrogation, the Baca selection or location at once became operative upon the lands thus released from reservation so as to effectively include them within that grant; and

3. That the lands within the said Mexican grants were not occupied by the claimants thereunder or otherwise at the time of the selection or location of June 17, 1863, and were therefore vacant and subject to selection within the meaning of the act of June 21, 1860, *supra.*

The territory of New Mexico was originally organized under the act of September 9, 1850 (9 Stat., 446), prior to the Gadsden treaty. The lands acquired by the United States under that treaty were, by the act of August 4, 1854, as we have seen, incorporated with the Territory of New Mexico "subject to all the laws" of that Territory,

including, of course, the eighth section of the act of July 22, 1854. The last named act, as far as applicable to the Territory of New Mexico, was clearly amendatory of the original organization act of 1850, and to that extent was, therefore, "extended to and continued in force" in the new Territory of Arizona, by the act of February 24, 1863, *supra*, "until repealed or amended by future legislation." No such repealing or amendatory legislation having been enacted at the time of the Baca selection or location of June 17, 1863, it follows that the provisions of said section eight of the act of July 22, 1854, were in full force and operation throughout the Territory of Arizona at that time.

The Tumacacori and Calabazas grant appears to have been based upon a certain instrument in writing dated April 18, 1844, "made and executed by the treasury department of Sonoro in compliance with the law of the Mexican Congress of the 10th of February, 1842, providing for the denouncement and sale of abandoned pueblos," running in the name of Don Francisco Alejo Aguilar, to whom said treasury department sold the land April 18, 1844. A petition for confirmation was filed June 9, 1864, with the surveyor-general of Arizona, who, in his report, recommended that the grant be confirmed. Proceedings looking to such confirmation, instituted in the Court of Private Land Claims established by the act of March 3, 1891 (26 Stat., 854), resulted in a decree by that court rejecting the claim on the ground that the sale to Aguilar was void for want of authority in the treasury department of Sonoro to make it. On appeal to the supreme court the decree below was affirmed. (See Faxon *v.* United States, 171 U. S., 244.)

The title to the San Jose De Sonoita grant rests upon certain proceedings for the sale of the lands embraced therein, had under the Mexican government in 1821. A petition for its confirmation appears to have been filed with the surveyor-general December 30, 1879. A suit involving its validity, instituted in the Court of Private Land Claims, resulted in a decree by that court rejecting the claim on the ground that "the entire proceedings" upon which the title is based "were without warrant of law and invalid." On appeal to the supreme court, however, the decree below was in part reversed and the grant sustained to the extent of one and three-fourths *sitios*. (See Ely's Administrator *v.* United States, 171 U. S., 220.)

I. Were the lands within the limits of these Mexican grants "reserved from sale or other disposal by the government," under the eighth section of the act of July 22, 1854, at the date of the Baca selection or location of July 17, 1863?

The manifest purpose of the enactment of this legislation was the adoption of a means whereby effective steps might be taken as early as practicable looking to the discharge of the obligations imposed upon

the United States by the treaty of 1848, with respect to property rights of Mexicans within the territory ceded by that treaty. A like purpose is equally manifest with respect to the lands ceded by the treaty of 1853, both in the act of August 4, 1854, whereby such newly-ceded lands were "incorporated with the Territory of New Mexico, subject to all the laws" of that Territory, and in the later act of February 24, 1863, which extended such legislation to the new Territory of Arizona. It was made "the duty of the surveyor-general," under instructions from the Secretary of the Interior, "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico," within the ceded territory, and to make full report on all such *claims* as originated prior to the treaties of 1848 and 1853, which report was to be submitted to Congress for its action with the view to the confirmation of all *bona fide* grants and thus giving effect to the stipulations of said treaties with respect thereto. It was further provided that "until the final action of Congress on such claims, all lands covered thereby" should be "reserved from sale or other disposal by the government."

The matters for investigation and report by the surveyor-general were Spanish or Mexican *claims* to lands, and the reservation for the benefit of such *claims* was to embrace "all lands covered thereby." There is nothing in the act indicative of a purpose on the part of Congress to postpone the effective operation of the reservation in any case to the time of the filing with the surveyor-general of a petition for the confirmation of the claim, or to any other time. Indeed, there is no provision requiring the filing of any such petition with the surveyor-general or elsewhere. The natural and most reasonable interpretation of the language of the statute is that the reservation was to become immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated prior to the treaty of cession. The purpose being that the lands should be reserved until final action could be had on the claim, it was quite as necessary that the reservation should be effective for such purpose before as after the commencement of proceedings under the statute by the surveyor-general. Otherwise the lands might have been disposed of by the government before the commencement of such proceedings and thus the very object of the statute would have been defeated.

It mattered not whether the claim was a valid one. If the lands were covered by a Spanish or Mexican *claim* they were to be reserved for the very purpose of affording an opportunity of investigating and determining the validity or invalidity of the claim. This investigation was to be made in the first instance by the surveyor-general but the action of that officer was not to be final. His report was to be submitted to Congress and there the means of final action were to be

provided. To fully meet the purpose of the reservation it was necessary that it should at once become operative whenever and wherever lands were covered by a *claim* such as the statute describes.

The Department is therefore of the opinion that in so far as the lands here in controversy were covered by the Tumacacori and Calabazas claim, or by the San Jose De Sonoita claim, on June 17, 1863, such lands were at that time in a state of reservation under the eighth section of the act of July 22, 1854, and, for that reason, were not vacant lands subject to selection or location by the claimants under the Baca grant. While this conclusion is not in entire harmony with the views expressed by the Department in the case of Joseph Farr (24 L. D., 1), or with those in the case of the Tumacacori and Calabazas Grant (16 L. D., 408), it is the result of mature deliberation and is believed to be the correct conclusion.

II. The next question to be considered is whether the final judicial determination of the invalidity of the Tumacacori and Calabazas grant in its entirety, and of the invalidity of the San Jose De Sonoita, in part, can operate to the advantage or benefit of the Baca grant claimants. In other words, the question is: Did the Baca selection of June 17, 1863, become operative upon the lands covered by said Mexican *claims*, upon, and to the extent of, their release from reservation by the final action of the courts, as aforesaid, so as to include the lands thus released within the Baca grant?

It is well here to observe that by express provision of the act of June 21, 1860, the right of selection thereby granted the Baca heirs was to continue in force during the period of three years from the passage of the act and no longer. The language used is clear and explicit. The right to select was to continue for three years, *and no longer*. The three years during which selection could be made therefore expired with the expiration of the 21st day of June, 1863, and thereafter no right of selection under the act existed.

In the case of Shaw *v.* Kellogg (170 U. S., 312), the supreme court had under consideration selection No. 4 of the series authorized by said act of June 21, 1860, and in the discussion of the questions there presented the court said (page 332):

> The grant was made in lieu of certain specific lands claimed by the Baca heirs in the vicinity of Las Vegas, and it was the purpose to permit the taking of a similar body of land anywhere within the limits of New Mexico. The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say "lands then known to contain mineral," for it can not be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be

an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries.

It was under the authority of that case that the Department, in the decision herein of July 25, 1899, held that the time with reference to which the character of the land selected, whether mineral or not, is to be determined, is the date of the selection and not the date of the survey of the claim.

The same authority would seem to be equally applicable and controlling as to the present controversy. If the time with reference to which the character of the land is to be determined, is the date of the selection, it is but reasonable that the same rule should be followed in the determination of the condition or state of the land, that is whether vacant, or reserved on account of an existing Spanish or Mexican *claim*. Besides, the selection was to be made within three years. "The title was then to pass," says the court; also, that it was intended by Congress "that the title when it passed should pass absolutely." No selection or location could thereafter be made, nor could any lands as to which title did not pass under the grant within the three years, thereafter be included within, or as a part of, the grant. From this it necessarily follows that the Baca claimants are entitled under the selection or location of June 17, 1863, only to such lands as were then vacant, or free from reservation, and not known to be mineral. In other words, they are now entitled to have surveyed as within their grant only those lands as to which the title passed to them when the selection or location of June 17, 1863, was made. To the extent that the lands here in controversy shall be found by the surveyor-general to have been, at the date of said selection or location, within the claimed limits of the aforesaid Mexican grants, the same having been at that time, as has been shown, in a state of reservation for the benefit of the claimants under those grants, the title did not pass by such selection or location to the Baca claimants, and it is accordingly held that such lands can not be included within the survey of the Baca grant, but must be excluded therefrom.

III. The third contention by the petitioners, to which the affidavits filed by them principally relate, is not within the purview of the order of December 11, 1899, according them a hearing before the Department preliminary to the execution of the survey directed by the decision of July 25, 1899. In that decision plain directions were given as to the officer by whom, the manner in which, and the time with reference to which the character of the land, that is whether known mineral or not, is to be determined, and nothing further need be said on that subject.

IV. It is contended by the Baca people that the lands embraced within said Mexican grants were not occupied by the claimants there-

under or otherwise when the selection or location of June 17, 1863, was made, and that they were therefore at that date vacant lands subject to selection under the act of June 21, 1860. In so far as the contention is intended to negative the idea of actual occupancy of the lands at the time by the Mexican grantees, or their agents or others claiming under them, it presents a question which rests upon matters of fact, and the same answer as made to the third contention by the petitioners applies with equal force to this. It should be here repeated, however, so that there can be no mistake or misapprehension in the matter, that to the extent said lands were at the time covered by either of said Mexican *claims*, and for that reason within the statutory reservation hereinbefore referred to, it can not be held that they were *vacant lands* within the meaning of that term as used in said act of June 21, 1860.

All the matters presented by the petition and answer having been disposed of, you are directed to cause the surveyor-general of Arizona to proceed with the survey of the Baca grant, in accordance with the views expressed and principles announced in this decision and in the former decision of July 25, 1899.

APPROXIMATION—EXCHANGE OF LANDS—ACT OF JUNE 4, 1897.

OPINION.

There is no authority for applying the rule of approximation permitted in entries under the homestead and other laws to cases of exchange of lands under the act of June 4, 1897; but the rule that "a slight difference in the acreage of the tract relinquished and selected will not be deemed an inequality in quantity," may be followed in proper cases arising under the exchange provisions of said act.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, June 30, 1900. (E. B., Jr.)

By your reference, for an opinion in the premises, I am in receipt of a letter from the Commissioner of the General Land Office dated June 8, 1900, requesting to be instructed whether the rule of approximation permitted in entries under the homestead and other laws, "as laid down in the cases of Henry P. Sayles, 2 L. D., 88, and Julius Cramm, 17 L. D., 205," may be applied in cases of exchange of lands under the act of June 4, 1897 (30 Stat., 11, 36).

By the rule referred to an applicant for patent under the homestead and certain other laws is permitted to pay for and include in his entry whatever excess there may be in the acreage of his claim over the amount ordinarily limited by the law, provided such excess is not greater than the deficiency below such amount which would result should a subdivision be excluded from the entry. The rule is not

statutory but is grounded in expediency, amounting in some cases, under the homestead law at least, almost to a rule of necessity.

There is no authority in the act of June 4, 1897, *supra*, for applying the rule above stated in any case of an exchange of lands thereunder, nor does it seem that the application of such rule therein could be justified on the ground of necessity. The said act expressly provides that in lieu of the tract relinquished the settler or owner thereof may select a tract of the character described therein "not exceeding in area" the tract relinquished. It contains no provision requiring or authorizing the payment or receipt of any money in the transaction, but on the other hand prohibits any "charge for making the entry of record or issuing the patent to cover the tract selected."

Paragraph 11 of the regulations under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), for the adjustment of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, was prepared to meet conditions similar to those under the act of 1897 which are the occasion of the Commissioner's request for instructions relative to the application of the said rule of approximation. The paragraph reads as follows:

> Selections will be limited to a quantity of land not exceeding that relinquished, but, since all selections must be according to legal subdivisions which generally approximate but do not always embrace the same area, a slight difference in the acreage of the tract relinquished and selected will not be deemed an inequality in quantity.

I am of the opinion that the rule stated in the above paragraph 11 may be followed in proper cases arising under the exchange provisions of the act of 1897, and that it will be found sufficient in the proper administration of those provisions; but that the said rule of approximation as applied in cases arising under the homestead and other laws is not applicable to cases of exchanges of lands arising under the said act of 1897.

Approved:

THOS. RYAN,
Acting Secretary.

RAILROAD GRANT—INDEMNITY SELECTION—DUPLICATION OF BASES.

HASTINGS AND DAKOTA RY. CO. *v.* PATTIS.

In the case of a duplication of bases in a railroad indemnity selection list, an approval of the list to the extent of the basis assigned renders the remaining tracts dependent upon said basis unsupported, and a new assignment of basis for such remaining tracts can not be allowed so as to affect intervening adverse rights.

Acting Secretary Ryan to the Commissioner of the General Land Office, June 30, 1900.

(W. V. D.) (E. J. H.)

The SW. ¼ of Sec. 33, T. 121 N., R. 41 W., Marshall land district, Minnesota, is within the indemnity limits common to the grants to

the St. Paul, Minneapolis and Manitoba and the Hastings and Dakota railway companies, for which withdrawals were made but revoked on May 22, 1891 (12 L. D., 541).

On October 29, 1891, pursuant to departmental decision in a case between said companies (13 L. D., 440), the Hastings and Dakota company filed list No. 1 for the selection of indemnity lands, among which were the S. ½ of Sec. 29, T. 123 N., R. 43 W., and the S. ½ of Sec. 33, T. 121 N., R. 41 W., aggregating 640 acres, assigning the same basis for each of said selections, to wit, the S. ½ of Sec. 35, T. 116 N., R. 29 W., embracing 320 acres.

On April 26, 1894, Albert Pattis made homestead application for the SW. ¼ of said section 33, alleging, in his corroborated affidavit filed therewith, that he "commenced his settlement and improvement on the land Oct. 1, 1891;" that he established actual residence thereon in March, 1892, and had maintained such residence ever since; and that his improvements consist of a house, barn, well, and 80 acres under cultivation, all of the value of $400. He also alleged, in his homestead affidavit, that he had declared his intention to become a citizen of the United States, and possessed the requisite qualifications to make entry. A certified copy of his declaration of intention to become a citizen, made on February 3, 1892, is on file in the case.

The company filed a protest against the allowance of Pattis' application, making its usual claim of superior rights under its selection, but in no wise traversing his allegations as to residence, improvements, or qualifications to make entry.

The case was forwarded to your office without hearing or action thereon by the local officers, so far as disclosed by the record, where, on November 8, 1899, your office decision found, as matter of fact, substantially, that the company had asserted claim to the two half-sections under its designated selections (S. ½ Sec. 29–123–43, and S. ½ Sec. 33–121–41), for which it had furnished but one half-section as basis; that it appeared that the SE. ¼ of said section 29 was approved to the company on March 29, 1897; that your office had, on August 19, 1898, rejected homestead application of William Fritz for the SE. ¼ of said section 33, as offering no bar to the company's selection thereof; and that the company's selection of the SW. ¼ of section 29 had, on October 29, 1898, been held for cancellation on contest with homestead applicant, Christian Akre.

Thereupon it was held that, in view of the foregoing, it was evident that the company had exhausted its rights so far as its selections under the basis furnished was concerned; that the company's selection of the tract in controversy (SW. ¼ Sec. 33–121–41) was unsupported and therefore invalid; and that, although Pattis was not qualified as to citizenship on October 29, 1891, to make entry, he was shown to have become duly qualified on February 3, 1892, and to have established residence

upon the land in March, 1892; and the company's selection was held for cancellation, as to said tract, with a view to allowing the application of Pattis therefor.

From this decision the company has appealed, and alleges several errors in your office decision. Some of these need not be considered herein for the reason that the Department has recently, in numerous cases, held against the company's contention.

It is, however, urged that it was error in your office decision not to have followed the ruling of the Department in the case of the Chicago, Rock Island and Pacific Railroad Company *v.* Wagner (25 L. D., 458), in which case it was held that—

> There is no necessity for the enforcement of the rule requiring specifications of loss to accompany indemnity selections, where the grant is practically adjusted and found largely deficient, and no one is claiming adversely to the company at such time, and, under such circumstances, a selection without designation of loss will be recognized, as against a homestead entry not made until after submission of the adjustment.

In that case the grant was practically adjusted, the tract there involved being perhaps the only one within the grant undetermined.

While it is true that in the case of the grant now under consideration a preliminary statement had been submitted by your office prior to the selection in question, which evidenced a large deficiency, yet it should be remembered that many thousand acres within the limits of this grant were still being claimed adversely to the company; and further, that this land was within the common limits of two grants and that each of the grantee claimants was asserting a right to make selection thereof; that the prior proffered selections by both companies were rejected on October 23, 1891 (13 L. D., 440), for want of, or invalidity in, the basis assigned, and that in said decision this tract, with others, was held to be "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 entries."

Under the circumstances the company can not evade the requirements in the matter of the specification of losses, nor will opportunity be afforded to substitute a valid for an invalid specification, where other rights have intervened.

As the SE. ¼ of Sec. 29, T. 123 N., R. 43 W., was approved to the company on March 29, 1897, and the case of Wilhelm Fritz against said company as to the SE. ¼ of Sec. 33, T. 121 N., R. 41 W., has been decided by the Department in favor of the company and the case closed in January 1900, it is evident that the company has exhausted its indemnity rights so far as the selection under the basis in question is concerned.

Your decision in favor of Pattis is therefore affirmed, and upon his perfecting entry within a time to be specified by your office, the company's selection of the tract involved will be canceled.

SWAMP LAND—RELINQUISHMENT.

FERGUSON *v.* STATE OF LOUISIANA.

A relinquishment by the proper officers of a State, of lands included in an approved swamp-land list, on the ground that said lands are not of the character contemplated by the swamp-land grant to the State, will be accepted as sufficient authority for cancelling, upon the records of the land department, the certification to the State of the lands in question.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 3, 1900.* (H. G.)

Samuel S. Ferguson appeals from the decision of your office of January or February 6, 1900, holding for cancellation his homestead entry, made August 9, 1897, for the S. E. ¼ of Sec. 18, T. 10 S., R. 3 E., St. Helena Meridian, New Orleans land district, Louisiana. The said tract is included in swamp-land list No. 50, approved November 14, 1895; but prior to or with Ferguson's application for homestead entry was submitted the relinquishment and reconveyance of the land by the governor of the State of Louisiana to the United States.

This instrument was executed by the governor July 30, 1897, under the great seal of the State, is attested by the secretary of State, and bears on its face the endorsement of the register of the State land board, dated August 9, 1897, certifying that the selection of the State for the tract is noted on his records as canceled. The body of the relinquishment recites that the tract is not of the character of land contemplated in the grants of swamp lands to the State, but is high and easily susceptible of cultivation by a settler now actually residing thereon, and that therefore the governor, acting under the advice of the register of the State land office, relinquishes, reconveys, and sets over the same to the United States government. Your office held that the action of the local office permitting Ferguson to complete his entry was improper, because the swamp-land selection was not an entry and could not come within the provisions of the act of May 14, 1880 (21 Stat., 140), and the swamp-land claim of the State was directed to be reinstated on the records of the local office. The land having been approved to the State as swamp land, your office allowed the entryman sixty days within which to show cause why his entry should not be canceled, and suggested that the showing directed to be made should point out some law of the State authorizing the governor to execute such a relinquishment and reconveyance. The appeal does not cite any statute of Louisiana expressly authorizing the governor of the State to execute such an instrument, but insists that because no such law can be cited, it does not follow that the executive has not such power delegated to him by the general law of the State, as he is vested with the power to sign patents for lands sold by the State,

which necessarily implies the right and prerogative to sign relinquishments for the same class of lands.

The second section of the act of May 14, 1880 (21 Stat., 140), provides 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 open to settlement and entry without further action by your office. As your office held, this provision does not cover the relinquishment of a swamp-land selection, and the relinquishment should have been forwarded by the local officers to your office for action, instead of their holding that when it was filed the land was open to entry and settlement.

By permitting the showing of cause by the entryman as to the authority of the governor to execute the instrument tendered, your office indicated that the entry might stand if such a showing was made.

Although the proceeding is somewhat novel, it is an admission by the executive of the State that there was error in the approval of the list of swamp lands certified or approved to the State, for the reason that the lands are not of the character granted. Patent has not issued, and until the government thereby parts with its title it is not precluded from correcting such an error or mistake. The error should be corrected when, by its solemn act, the State had made such an admission, if the admission is made by competent authority and is in binding form.

The original swamp-land grant to Louisiana was by the act of March 2, 1849 (9 Stat., 352), but a new and substantive grant was made to that State and other States by the act of September 28, 1850 (9 Stat., 519), which operated to remove the restrictions and exceptions of the prior grant to Louisiana (State of Louisiana, on review, 26 L. D., 5, 9). "In the act of 1850 making the grant, Congress, as it had the right to do, clearly indicated the officer, to wit, the governor, whose action in the premises should be the action of the grantee" (Michigan Land and Lumber Co. *v.* Rust, 168 U. S., 589, 598).

Under the statutes of Louisiana, the register of the State land office, who is appointed by the governor by and with the advice and consent of the senate, has general charge of the lands donated to the State, but the governor issues all patents on behalf of the State for all State lands sold by authority of its laws. (Revised Laws of Louisiana, Wolff's compilation, 689, 690.) These statutes and the act of Congress of September 28, 1850, recognizing the action of the governor of the State as that of the grantee, seem to confer power upon the governor to execute a reconveyance to the United States, particularly as the instrument he executes recites that he was acting under the advice of the register of the State land office, and under the conviction expressed in the instrument that the lands relinquished and conveyed were not

of the character granted to the State, and were therefore solemnly renounced.

This written admission on the part of the State, made by its executive who had power to perform such an act, will be accepted as sufficient ground for cancelling, on the records of your office and of the local office, the certification to the State of the tract in question, and under the circumstances the entry will be permitted to remain intact.

The decision of your office is therefore reversed, and further proceedings will be had in conformity with this opinion.

REPAYMENT—PRICE OF LAND WITHIN RAILROAD LIMITS.

JOEL P. THURSTON.

The even-numbered sections within the primary limits of the grant to the Southern Pacific Railroad Company on account of its branch line, and also within the forfeited portion of the grant to the Atlantic and Pacific Railroad Company, are properly rated at the double minimum price, although within such conflicting limits the prior grant of the odd-numbered sections to the Atlantic and Pacific company operated to defeat the grant to the Southern Pacific.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 3, 1900.* (F. W. C.)

Joel P. Thurston has appealed from your office decision of April 2, last, denying his application for repayment of the double minimum excess required to be paid by him on his purchase made on October 29, 1895, of the SE. ¼ of Sec. 8, T. 1 S., R. 6 W., S. B. M., Los Angeles land district, California.

Said tract is within the overlap of the grant made by the act of July 25, 1866 (14 Stat., 292), to the Atlantic and Pacific Railroad Company, with that made by the act of March 3, 1871 (16 Stat., 573), to the Southern Pacific Railroad Company, on account of its branch line.

The grant appertaining to the unconstructed portion of the Atlantic and Pacific railroad was forfeited by the act of July 6, 1886 (24 Stat., 123). As said road had not been constructed opposite this land prior to the date of the forfeiture, the grant to aid in the construction thereof in the vicinity of the land in question was forfeited by said act. The Southern Pacific railroad branch line was duly constructed opposite the land in question and there has been no forfeiture of the grant to aid in the construction thereof.

The question as to the price of the lands within the conflicting limits of these grants is considered in the instructions of June 6, 1899 (28 L. D., 479), adhered to on review (29 L. D., 166), and it was under these instructions that the application by Thurston was rejected, it

being held that he was properly charged at double minimum rate in making purchase of these lands.

In the case of Romona Lopez (29 L. D., 639), the question as to the price of the lands within these conflicting limits was further considered, the instructions above referred to being sustained and her application for repayment denied. In the appeal from your office decision denying the application for repayment under consideration, the correctness of the conclusion in the Lopez case is questioned, although that decision is not referred to in the decision of your office appealed from.

The Lopez case has been carried to the Court of Claims, it being known as the case of Romona Shang, formerly Lopez, *v.* The United States, No. 21,568, and in that case this Department was cited or called upon to give certain information, under section 1076 of the Revised Statutes. In returning answer thereto through the Department of Justice, in letter of June 8, last, addressed to the Attorney-General, it was stated that—

> The underlying and controlling feature of the question presented by the case pending in the Court of Claims is that in making grants of alternate odd-numbered sections in aid of the construction of railroads the alternate even-numbered sections within the primary or place limits of the grant were retained or reserved to the United States and were doubled in price. It was thought that the proximity of these remaining even-numbered sections to a line of railroad would enhance the value thereof, and that the government should take advantage of this enhanced value as a means of reimbursing itself for the lands granted (U. S. *v.* M., K. & T. Ry. Co., 141 U. S., 358, 371). These grants provide that where, for any of the reasons enumerated in the granting act the grantee company is unable to obtain any of the odd-numbered sections in the primary or place limits of the grant, other public lands in like quantity may be taken as indemnity therefor. The quantity of the grant, therefore, remains the same. The government obtains reimbursement through the double price put upon the even-numbered sections in the primary or place limits, whether the odd-numbered sections in such limits pass to the company under the grant or whether they are excepted from the grant and other lands in the indemnity limits (where the legal price of the even-numbered sections was not increased) are given to the company in lieu thereof. The reason for reimbursement is the same in either case.
>
> Here the land entered by Lopez was in an alternate even-numbered section within the primary or place limits of the grant to the Southern Pacific. This grant was never forfeited and the road was constructed. The land therefore received the benefit which flows from the construction of the road and that benefit was realized by Lopez who entered the land. The adjoining odd-numbered sections, which did not fall within the excepting clauses of the grant to the Atlantic and Pacific, did not pass to the Southern Pacific under the later grant to that company but were, because of the prior grant to the Atlantic and Pacific, excepted from the grant to the Southern Pacific and that company was given, and has received or is entitled to receive, other public lands in lieu of those so excepted. The government was therefore justified in reimbursing itself for the lands given to the railroad company by doubling in price the even-numbered sections adjacent to the aided railroad. The controlling feature of the statute is that whether the grant to the Southern Pacific was satisfied from the odd-numbered sections within the place limits or from other public lands,

the government was to be reimbursed by doubling the price of the even-numbered sections in the place limits.

This disposes of the several errors specified in the appeal under consideration, and for the reasons given the decision of your office is affirmed.

FOREST RESERVES—AMENDMENT TO RULES AND REGULATIONS OF APRIL 4, 1900.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 5, 1900.

Paragraph 13 of the rules and regulations governing forest reserves, issued April 4, 1900, is hereby amended so as to read as follows:

PASTURING OF LIVE STOCK.

13. The pasturing of sheep and goats on the public lands in the forest reservations is prohibited: *Provided*, That in the States of Oregon and Washington, where the continuous moisture and abundant rainfall of the Cascade and Pacific coast ranges make rapid renewal of herbage and undergrowth possible, the Commissioner of the General Land Office may, with the approval of the Secretary of the Interior, allow the limited grazing of sheep within the reserves, or parts of reserves, within said States: *And also provided*, That when it shall appear that the limited pasturage of sheep and goats in a reserve, or part of a reserve, in any State or Territory, will not work an injury to the reserve, that the protection and improvement of the forests for the purpose of insuring a permanent supply of timber and the conditions favorable to a continuous water flow, and the water supply of the people will not be adversely affected by the presence of sheep and goats within the reserve, the Commissioner of the General Land Office may, with the approval of the Secretary of the Interior, also allow the limited grazing of sheep and goats within such reserve. Permission to graze sheep and goats within the reserves will be refused in all cases where such grazing is detrimental to the reserves or to the interests dependent thereon, and upon the Bull Run forest reserve in Oregon, and upon and in the vicinity of Crater Lake and Mount Hood, or other well-known places of public resort or reservoir supply. The pasturing of live stock, other than sheep and goats, will not be prohibited in the forest reserves so long as it appears that injury is not being done the forest growth and water supply, and the rights of others are not thereby jeopardized. Owners of all live stock will be required to make application to the Commissioner of the

General Land Office for permits to graze their animals within the reserves. Permits will only be granted on the express condition and agreement on the part of the applicants that they will agree to fully comply with all and singular the requirements of any law of Congress now or hereafter enacted relating to the grazing of live stock in forest reserves, and with all and singular the requirements of any rules and regulations now or hereafter adopted in pursuance of any such law of Congress; and upon failure to comply therewith, the permits granted them will be revoked and the animals removed from the reserve. Permits will also be revoked for a violation of any of the terms thereof or of the terms of the applications on which based.

BINGER HERMANN,
Commissioner.

Approved July 5, 1900.
E. A. HITCHCOCK,
Secretary.

INDIAN LANDS—AUTHORITY OF SECRETARY TO CANCEL LEASE MADE BY INDIAN ALLOTTEE.

OPINION.

If a lessee holding under a farming and grazing lease, executed by an Indian allottee, in pursuance of the act of February 28, 1891, and acts amendatory thereof, fails to comply with the terms and conditions of the lease, the Secretary of the Interior has the right to declare the expiration thereof; but such declaration, in the absence of a stipulation to the contrary in the lease, will not preclude judicial inquiry as to whether there was proper cause therefor.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, July 5, 1900.

I am in receipt, by reference, of a letter from the Commissioner of Indian Affairs, requesting to be advised as to whether authority is invested in the Secretary of the Interior to cancel a farming and grazing lease executed by Bear Robe, an allottee of the Arapahoe tribe of Indians in Oklahoma, in favor of one John C. Dyer, under the provisions of section 3 of the act of February 28, 1891 (26 Stat., 794, 795), and acts amendatory thereof.

By agreement of October, 1890, ratified by act of Congress approved March 3, 1891 (26 Stat., 989, 1022), the Cheyenne and Arapahoe tribes of Indians ceded to the United States a certain described tract of country in the Indian Territory, subject to the allotment of land in severalty to the individual members of said tribes as provided for in article 3 of said agreement. Article 6 provides for the issue of patents to the allottees in the manner designated in section 5 of the act of February 8, 1887 (24 Stat., 388), which provides that, upon approval of an allotment by the Secretary of the Interior, the title

thereto shall be held in trust for the allottee for the period of twenty-five years, and at the expiration of said period the title thereto shall be conveyed in fee simple to the allottee, or his heirs, free from all incumbrances. The said section also provides that "if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void." It was provided, however, by section 3 of the act of February 28, 1891, *supra:*

> That whenever it shall be made to appear to the Secretary of the Interior that, by reason of age or other disability, any allottee under the provisions of said act, or any other act or treaty can not personally and with benefit to himself occupy or improve his allotment or any part thereof the same may be leased upon such terms, regulations and conditions as shall be prescribed by such Secretary, for a term not exceeding three years for farming or grazing, or ten years for mining purposes.

This section was slightly modified by the act of August 15, 1894 (28 Stat., 286,305), among other things the term of the lease being enlarged to five years, which was subsequently reduced, however, to three years by the act of June 7, 1897 (30 Stat., 62, 85). The farming and grazing lease in question, which describes the NW. ¼ of Sec. 18, T. 11, R. 8, was approved by the Department August 12, 1897, for three years from July 1, 1897. Among others the lease contains the following stipulations:

> And said parties of the first and second parts each for themselves, their executors, administrators, and assigns, covenant and agree that this indenture is made with the express proviso that if any of said rents shall remain unpaid for thirty days after the same shall have become payable as aforesaid, or if the party of the second part shall, in violation of this indenture and without the consent of the party of the first part and the Secretary of the Interior, assign this lease or underlet, or otherwise dispose of the whole or any part of said leased premises, or use the same for any purpose save that hereinbefore authorized and agreed upon, or shall commit waste or suffer it to be committed on said premises, or misuse or fail to take proper care of the same, or shall pay or surrender said rents to any person other than the party of the first part or his executors or administrators, or to such person as he may assign the same with the approval of the Secretary of the Interior, or that the Secretary of the Interior may appoint to receive the same, or shall fail to keep and perform all other agreements and covenants contained in this indenture, then, or in either of such contingencies, this lease shall thereupon expire at the option and election of the party of the first part or his executors, administrators, and assigns, with the approval of the Secretary of the Interior, without notice or demand from the said party of the first part, and said party of the first part may re-enter upon said premises and repossess and recover the same to all intents and purposes as though said party of the second part had never occupied the same, and without such re-entry and without demand for rent, said party of the first part may recover possession thereof in the manner prescribed by law relating to proceedings in such cases.

In a letter dated March 17, 1899, addressed to the Commissioner of Indian Affairs, the Acting Indian Agent of the Cheyenne and Arapahoe Indian Agency recommended the cancellation of said lease for the reasons set forth in a communication from Jesse T. Witcher, Addi-

tional Farmer in charge of the district in which the land involved is situated. The agent concluded his letter as follows:

From all I have been able to learn, Mr. Dyer is a very undesirable man to have on Indian lands, and Mr. Witcher says he has sub-let the land, which is contrary to the terms of his lease and the rules governing the leasing of Indian allotments; that the parties to whom he sub-leased have stolen and carried away all the improvements that were on the land. They also took wire from the land and appropriated it to their own use. In view of all this I am compelled to recommend the cancellation of the lease at once.

July 25, 1899, the Commissioner of Indian Affairs transmitted the lease, together with the letters of the Acting Indian Agent and the Additional Farmer, to the Department with the recommendation that the said lease be canceled, which was accordingly done July 27, 1899.

December 12, 1899, the Acting Indian Agent addressed a letter bearing on the case to the Commissioner of Indian Affairs, which accompanies the latter's letter of December 20, 1899, to the Department, and which is in part as follows:

On March 17th, 1899, I requested cancellation of a lease held by John C. Dyer on the northwest quarter of section eighteen in township eleven of range eight, allotted to Bear Robe, an Arapahoe Indian of this Agency, for the reason that Dyer was not a desirable tenant. Contrary to the express terms of the lease he had sub-let the land, and the parties taking possession had stolen and carried away all the improvements that were on the land, including the fence wire that had been issued by the government to the Indian.

Under date of August 4th, 1899, in your letter "Land 35933," you advised me that on July 25th, 1899, the lease was submitted to the Department with favorable recommendation, that it was cancelled by the Acting Secretary in accordance with my request, on July 27th, 1899, and you inclosed one part of the lease to me for the agency files.

Mr. Dyer was officially notified of the cancellation of his lease and on October 4th, 1899, he was given the specific reasons for the action taken by this office, and was requested to vacate the premises; this he positively refused to do.

On November 4th, 1899, the matter was referred to the United States District Attorney, who was given a complete history of the case and informed that the allotment was held for lease to other parties and that an application for the same was presented by John Wakefield and approved by this office, and he was allowed to enter into a lease in the manner prescribed by the Department.

Mr. Wakefield paid the first semi-annual payment of rental and desired to enter upon and occupy the land, which he was authorized by me to do. Instructions were issued to have Mr. Dyer ejected and the orders were carried out by the Farmer in charge of the district in which the allotment is located, and the Indian police.

Now it appears that Mr. Dyer brought suit against Mr. Wakefield in the probate court of Canadian county at El Reno for forcible entry upon the premises he (Dyer) was occupying. Mr. Wakefield was summoned to appear on November 3rd, 1899, which he did, but was never called. The judge decided in favor of Dyer and gave him instructions to re-enter upon and occupy the premises.

After the trial, or whatever it may be called, Mr. Wakefield explained everything to the probate judge, showing him his authority for going on the land and his receipt for the rental paid. The judge informed him that the case was closed and that the papers had nothing to do with his court and would not be considered; that the Acting Indian Agent was not running his court.

This being a case demanding immediate attention on the part of the United States, all the circumstances related were made known to the district attorney who was requested to take the matter up, to the end that the orders of the Department might be carried out and Mr. Wakefield, the rightful tenant left in unmolested occupancy of the land in question.

* * * * * * *

It was hoped that the district attorney would be able to have the decision set aside; but it appears that he was not; he having informed this office that the United States had no case at all, claiming that the Honorable Secretary had no right to cancel the lease.

* * * * * * *

In order that the contention of the U. S. District Attorney, Mr. J. W. Scothorn (who insists that the cancellation of this lease can only be made of legal effect after trial before a legal tribunal and decided on evidence showing sufficient cause why it should be canceled), he invites attention to decision in the case of Musgrove *versus* Harper *et al.*, supreme court of Oregon, August 13, 1898, reported 54 Pacific, page 187.

It is held in the decision referred to that so long as the proceedings looking to the leasing of land by an Indian allottee are *in fieri* the power of the Secretary over the matter is exclusive, and he can prescribe such regulations in reference thereto as he may deem necessary; but that after he has once approved the lease he has no authority to cancel the same, as the lessee thereby secures a vested interest, and the determination of the contingency upon which the lease should terminate belongs to the judicial and not to the executive department of the government.

At the time the lease under consideration was submitted for cancellation by the Commissioner of Indian Affairs, it does not appear that any question was raised as to the authority of the Secretary of the Interior in the premises; it apparently being taken for granted that the Secretary of the Interior, under his general supervision and control of Indian affairs as well as by virtue of the terms of the lease itself, possessed such authority.

Prior to the act of February 28, 1891, the allottee had no power to lease his land, either inherent or under the approval of the Secretary of the Interior. On the contrary, the act of February 8, 1887, in section 5, absolutely prohibited him from making any conveyance of his land or any contract touching the same, prior to the expiration of the trust period. While the act imposes this restriction, citizenship is, nevertheless, accorded to the allottee by section 6 of said act, upon the completion of his allotment and issue of patent, which makes him amenable to the laws, both civil and criminal, of the State or Territory in which he may reside. But the citizenship thus conferred is in nowise inconsistent with the retention of supervisory executive control over the allotted lands, and the non-tribal character of the land does not relieve the United States of the obligation to see that its trust toward the Indian is properly discharged. Beck *v.* Flournoy Live-Stock and Real-Estate Co. (65 Fed. Rep., 30); and United States *v.*

Flournoy Live-Stock and Real-Estate Co. *et al* (71 Fed. Rep., 576). The relation existing after completion of the allotment is thus described by Acting Attorney-General Jenks (19 Atty. Gen. Ops., 161, 164):

> But Congress has not deemed it safe, in making the Indian a freeholder, to give him at once the same control over the land as other freeholders enjoy. The legislation above mentioned deprives the Indian settler of the right of conveying or incumbering the land, in any way, for a period stated, or provides that it shall be held by the United States for a given time in trust for the sole use and benefit of the Indian, and, at the expiration of such time, be conveyed to him by patent.

And in the same volume, page 234, Attorney-General Garland says:

> Prior to the issuing of the second patent the United States is to act as trustee of the lands. This relation as to the lands is substituted for the guardianship heretofore exercised over the tribe. For twenty-five years or longer the obligation exists to see that the intent of the law shall be faithfully carried out, and no unlawful waste committed either by the *cestui que trust* or anyone else.

By section 3 of the act of February 28, 1891, Congress evidently intended to confer an additional right or benefit upon the allottee when shown to be within its provisions, but still believing that he was not yet capable of assuming the full rights and responsibilities of a land owner, made the leasing of his land dependent upon the prior approval of the lease by the Secretary of the Interior. As stated in an opinion by Assistant Attorney-General Hall (18 L. D., 497, 500):

> The provisions of the section quoted, concerning the land that may be leased, are very broad. It is not stated that the "allotment" of any particular class of allotments "may be leased," but of "any allottee" having the required disability. Here the Indian's untutored condition is recognized. The power to lease is not conferred in terms on him. The language of the section is, "the same may be leased" and the supervision and control of the whole matter is placed in the hands of the Secretary. The ability or inability of the allottee, under State laws, to contract has nothing to do with the question. He cannot evade the supervisory power of the Secretary over these lands.

So far as the allottees of these lands are concerned, they are still "the wards of the nation," and the Secretary of the Interior is the officer charged by law with the duties of guardianship (19 Op. Atty. Genl., 165). And the method by which the benefit contemplated by the section quoted may be best secured to the allottee is left entirely to the discretion of the Secretary, and becomes rather a question of administration than of law.

The allottee, while a citizen of the United States, is, as to his control of his land, under the supervision and care of the Secretary of the Interior, who is authorized to prescribe the "terms, regulations and conditions" upon which the allotted land may be leased. The authority of the Secretary of the Interior does not end with his approval of a lease but it is his duty to still see that the conditions of such lease are faithfully complied with, or if not complied with, that the penalties of a non-compliance upon the part of the lessee are properly enforced. In other words, he can do for the allottee, and in his name, whatever the allottee might have done if no restriction had

been placed upon his control of his land. This is the measure and extent of the Secretary's authority. He may declare the expiration of the lease because of failure upon the part of the lessee to comply with the conditions and obligations imposed upon him. After such declaration the matter must take the same course that it would were it a case between two individuals both of whom are capable of managing their own affairs and free of all supervision and control in respect to their lands. The rights of the Indian allottee are to be enforced through the same agencies as are the rights of other citizens. He is a citizen of the United States entitled to appeal to the tribunals of his country for protection and for the enforcement of his rights under and in accordance with the laws, the same as any other citizen. The fact that the government has seen fit to give him needed assistance in the management of his land does not put him above or beyond the control of the law. His rights must still be protected and enforced in conformity with the same laws which obtain in respect to any other citizen.

In this case the Secretary was, in my opinion, authorized to declare the expiration of the lease upon the happening of any of the events specified in the lease as a cause therefor, and the effect of this declaration, like that of any ordinary landlord in a similar case, would depend upon whether, in fact, there was cause therefor and, in the absence of a stipulation to that effect in the lease, the action of the Secretary of the Interior in declaring such expiration would not preclude judicial inquiry into the fact any more than would a like declaration of any ordinary landlord.

The difficulty here is that when Mr. Wakefield, the new lessee, was sued in forcible entry and detainer by Mr. Dyer, the original lessee, the former, instead of properly defending the suit, failed to interpose Dyer's default or breach of covenant, and the Secretary of the Interior's declaration of the lease's expiration by reason thereof. Wakefield thus apparently permitted Dyer to make out a case and obtain favorable judgment without the matter of his default or breach of covenant being brought to the attention of the court. If the facts were as represented in the papers submitted to me, and had been properly presented by Wakefield in defending against Dyer's suit, the result would probably have been the reverse of that actually reached.

Approved:

E. A. HITCHCOCK,
Secretary.

SWAMP-LAND GRANT—SELECTION—CHARACTER OF LAND.

STATE OF IOWA *v.* CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

Departmental approval of a survey of lands does not conclusively fix and determine the character of the lands with regard to the swamp grant, but has the effect of *prima facie* establishing their character as returned by the survey; and in case of the selection by the State, under the swamp-land grant, of lands not returned as swampy in character, the burden is upon the State to show that they are of the class granted.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 5, 1900.* (F. W. C.)

The State of Iowa has appealed from your office decision of December 23, 1899, rejecting its claim to and selection of lots 14 and 15, Sec. 29, T. 97 N., R. 34 W., Des Moines land district, Iowa, as a part of the swamp and overflowed lands granted to it by the act of September 28, 1850 (9 Stat., 519).

These lots were at the time of the original survey of this township in 1855 erroneously returned by the deputy surveyor and represented on the official plats of survey as forming part of a lake, and were, for that reason, excluded from the public surveys.

After an investigation ordered on the application of W. L. Hemphill *et al.*, an additional survey was ordered to be made of these lands in pursuance of departmental decision of March 8, 1898 (26 L. D., 319). As resurveyed, additions were made to the public lands amounting to 1,230 acres, 533.71 acres of which were returned by the surveyor as swamp land, and the remainder, which included the two lots in question, were designated as farming land free from swamp or overflow. The plat of this additional survey and the accompanying report of the surveyor, were transmitted to this Department on July 13, 1898, and upon consideration thereof the Department, on June 25, 1898 (28 L. D., 119), concurred in the recommendation of your office that the survey as made be approved and the lands disposed of as other public lands.

On August 30, 1898, the day fixed for opening the additional lands disclosed by the resurvey, Edward B. Evans, as agent for Palo Alto county, in which the land is situated, filed in the local office a claim on behalf of the county under the swamp land grant, which included the tracts in question. At the same time the Chicago, Milwaukee and St. Paul Railway Company listed these tracts, and others disclosed by said survey, as inuring to it under the grant made by the act of May 12, 1864 (13 Stat., 72), to aid in the construction of the McGregor Western railroad, some of which were, like the lots in question, included in the claim presented by the county, and at the same time a number of applications were presented under the homestead laws embracing the

land disclosed by said survey and conflicting with the claims as presented by the county and the railway company.

Thereupon the local officers advised all persons whose claims conflicted with that of the county under the swamp grant, of the claim presented by the county, and allowed them thirty days in which to file affidavits as to the non-swampy character of the lands involved in their respective claims, and on October 28, 1898, a hearing was ordered, after due notice to all parties, to determine the true character of the lands selected and claimed by the county as inuring to it under the swamp-land grant. The hearing appears to have been regularly held, and at said hearing the railway company was duly represented.

In consideration of the testimony adduced at said hearing, the local office, on April 2, 1899, held that the swampy character of each and every lot included in the claim made by the county was thereby established, and rejected the claims of the railway company and the several homestead applicants, in so far as they conflicted with the claim of the county. Notice of said decision appears to have been served on all parties in interest; from which no appeal was taken.

The record in said hearing was forwarded to your office on June 1, 1899, and by your office decision of June 14, 1899, the case was closed as to a portion of the land involved, but as to the lots in question the decision of the local officers was reversed because it conflicted with the return of the surveyor made at the time of the survey of the land in question.

Under date of July 13, 1899, in answer to an inquiry addressed to your office by the agent for the county, as to the effect of your decision of July 13, 1899, relative to the lots in question, it was stated by your office that—

> This office will not receive selections of swamp lands in place from county agents and will insist upon selections being made by the proper State official as provided in the act of the legislature, approved Jan. 24th, 1853 (Revised Code of Iowa, 1880, p. 1112).

On September 28, 1899, the governor of Iowa duly appointed and commissioned Edward B. Evans as the agent of the State, authorizing him to select the swamp and overflowed lands inuring to the State in Palo Alto county, and on October 23, 1899, Evans filed in the local office a claim to lots 14 and 15, being the lands here in dispute, as swamp and overflowed lands, accompanying his application by his commission from the governor, together with his affidavit, corroborated by two witnesses, in which it was alleged that more than one-half of each legal subdivision was swamp and overflowed land within the meaning of the act of Congress of September 28, 1850. In support of said selection a petition and brief was filed by Evans asking that the State's selection, or claim, be considered as having been filed on August 30, 1898 (the time of filing other applications on behalf of

the county), and that the testimony submitted at the hearing hereinbefore mentioned, held on December 8, 1898, be considered in support of the State's claim. A copy of said petition and brief was by registered mail served on the land commissioner of the Chicago, Milwaukee and St. Paul Railway Company. These papers were forwarded by the local officers on November 17, 1899, and on December 16, following, resident counsel for the Chicago, Milwaukee and St. Paul Railway Company filed an answer to the said petition and brief insisting that your office, by its decision of June 13, 1899, had found the testimony submitted at the hearing hereinbefore mentioned, insufficient to overcome the return made by the surveyor and that it would be improper either to antedate the State's pending selection, or claim, or to consider in support thereof the testimony submitted at the hearing held on December 8, 1898.

On December 23, 1899, your office, upon consideration of the matter, held that as the report made by the surveyor was duly approved by this Department, his return as to the character of the lands had become final, and for that reason alone the State's selection, or claim, as to the lots in question was rejected; from which action the State has appealed to this Department.

The first question presented for determination under the appeal is as to the effect of the action of this Department in approving the survey and return made by the surveyor of the additional land in this township.

In the case of Archer *et al. v.* Williams (26 L. D., 477), it was held by the Department that—

> 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.

And it was further held in said case, on authority of Linn County, Iowa (19 L. D., 126), that—

> Where the field notes of survey do not show the tracts claimed to be swamp and overflowed the burden is upon the State to show such tracts to be of the character granted.

It would, therefore, appear that, while the approval by the Department, on June 25, 1898, of the survey had the effect of establishing *prima facie* nonswampy character of said lots 14 and 15 and thereby imposing upon the State the burden of showing that such lands were in fact swamp, yet the approval of said survey should not be held to so conclusively fix and determine the character of the land as to bar the State from having an opportunity to show, by proper evidence, the true character of the land, and that the same is otherwise than as designated by said survey. Moreover, the State of Iowa not having

elected to rely upon the field notes of survey as the basis for adjustment of its grant under the act of September 28, 1850, there is nothing appearing in the record of the proceedings had herein which could be held to estop the State from asserting the right to select, as swamp, the lots in question, if, in fact, the same are of the character granted by said act.

It but remains to determine whether the record made upon the application by the county can be properly considered by this Department in determining the character of this land. As before shown, your office, in letter of July 13, 1899, advised the agent for the county of Palo Alto that you would refuse to receive selections of swamp land in place from county agents. By a statute of the State, approved January 13, 1853, all the swamp and overflowed lands granted to Iowa were granted to the counties, respectively, in which they were situated, and the counties have been recognized as the grantee of the State in many cases before the courts. Emigrant Co. *v.* County of Wright, 97 U. S., 339; Emigrant Co. *v.* County of Adams, id., 61; Mills County *v.* Railroad Companies, 107 id., 557; McCormick *v.* Hayes, 159 U. S., 332.

On the original presentation of the claim on behalf of the county, which includes this tract, all adverse claimants were duly advised thereof, hearing was regularly had without objection, and, in the opinion of this Department, the record made at said hearing can and properly should be considered in determining the true character of the lands in question. It is therefore directed that you proceed with the adjudication of the claim filed on behalf of the State and county under the swamp-land grant, to the land in question, giving due regard to the return made at the time of the survey of this land.

In this connection the attention of the Department is called to the fact that by departmental decision of April 14, last, in the case of W. L. Hemphill *et al. v.* Chicago, Milwaukee and St. Paul Railway Company, the decision of your office rejecting the several homestead applications conflicting with the claim made by said company, including the tract here in question, was affirmed and you were directed to certify to this Department for approval the company's listing of the land, which included the land here in dispute. No question as to the swampy character of the lots in controversy, or as to the right of the State of Iowa thereto, under the swamp land-grant, was raised or considered in connection with that case, and said decision will not preclude the investigation and determination of the true character of the lots in controversy by your office as hereinbefore directed, and to that extent the order to certify for approval the listing by the railway company is, for the present, suspended.

Herewith are returned the papers in the case for the disposal of the claim of the State as hereinbefore directed.

FOREST RESERVE—EXCHANGE OF LANDS—ACT OF JUNE 4, 1897.

GIDEON F. MCDONALD.

By relinquishment and reconveyance to the United States, under the exchange provisions of the act of June 4, 1897, of lands within the limits of a forest reserve, and the selection of other lands in lieu thereof, the party making such relinquishment and selection acquires a right to have the selection approved, if there is otherwise no objection thereto, of which he can not be divested by the subsequent elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 5, 1900.* (E. B., Jr.)

Under date of the 19th ultimo your office asks instruction in the matter of the selection by Gideon F. McDonald, under the exchange provisions of the act of June 4, 1897 (30 Stat., 11, 36), of the N. E. ¼ of Sec. 21, T. 6 S., R. 23 W., E. M. P. M., Bozeman, Montana, land district, in lieu of the S. E. ¼ of the N. E. ¼ of Sec. 17, the N. ½ of the N. W. ¼ of Sec. 34, T. 28 N., R. 13 W., and the N. W. ¼ of the S. E. ¼ of Sec. 14, T. 28 N., R. 15 W., W. M., State of Washington.

It appears that said selection was filed in the local office November 25, 1899, accompanied by a duly executed and recorded deed of relinquishment and reconveyance from McDonald to the United States of the three tracts last described, the previous title of the United States thereto being then in McDonald under patents of the United States and certain mesne conveyances. At the time of the filing of said selection and prior thereto the tracts embraced in the said deed of relinquishment and reconveyance, and in lieu of which the selection is made, were within the limits of the Olympic forest reserve in said State. Subsequently, on April 7, 1900, by proclamation of the President, that part of the forest reserve within which the said tracts are situated was restored to the public domain. No action has as yet been taken upon said selection.

The question arises—and it is upon this point you ask instructions—whether, in view of the elimination from the boundaries of the said reserve of the tracts in lieu of which the selection is made, the latter may now be approved if no other objection is found thereto.

When the selection was filed the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of the forest reserve and a proper basis for a selection under said act, and the land selected by McDonald in exchange was, according to the records of your office, of the character subject to such selection and free from other claim or appropriation. By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of

the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired. Your office will therefore carefully examine the papers and records pertaining to this selection and if it is found to be otherwise free from objection, the fact of the elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations, will not prevent approval of the selection.

CONTEST—HOMESTEAD ENTRY—INDIAN OCCUPATION.

MA-GEE-SEE *v.* JOHNSON.

In neither the joint resolution of December 19, 1893, nor that of May 27, 1898, is there any absolute confirmation of entries theretofore made, but only a conditional confirmation, dependent upon the requirement that such entries shall be made regularly in accordance with the public land laws.

Lands "in the possession, occupation and use of Indian inhabitants" are not "unappropriated public lands" within the meaning of section 2289 of the Revised Statutes, and are therefore not subject to entry under said section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W.V. D.) *July 5, 1900.* (V. B.)

September 30, 1891, Olof Johnson made homestead entry for lots 3, 4 and 5 and NW. ¼ NW. ¼, Sec. 27, T. 43 N., R. 27 W., St. Cloud land district, Minnesota. Subsequently, April 17, 1895, said entry was canceled as to lot 5 and the NW. ¼ NW. ¼, for conflict with an Indian claim. On November 6, 1897, Johnson made final proof, after notice, before the clerk of the district court of Mille Lac county, Minnesota, which proof was filed in the local office December 27, 1897. On the same day Ma-gee-see, a Chippewa Indian, filed in said office his corroborated affidavit of contest against said entry, claiming that he had resided with his family upon said lots 3 and 4 since May, 1882, to November 30, 1897, erected a house and barn thereon, improved and cultivated the same, and asked for a hearing between himself and said entryman to determine their rights in the premises.

A hearing was ordered, of which notice was given to the defendant and also to the Commissioner of Indian Affairs. The hearing was had on March 22, 1898, both parties being present, and represented by attorneys.

On September 3, 1898, the register and receiver rendered decision that—

> In view of public resolution No. 36, passed by the Senate and House of Representatives, declaring all public lands formerly in the Mille Lacs Indian reservation subject to entry, and reserving as a burial ground for the Mille Lacs Indians, lot 3, Sec. 28, and lots 1 and 2, Sec. 33, T. 43 N., R. 27 W., 4th P. M., it is hereby ordered that the application of the plaintiff be and the same is hereby rejected, and the contest dismissed and the final proof of defendant allowed.

An appeal was taken by the plaintiff, and your office, on March 6, 1899, found from the testimony that the land had been in the possession of the plaintiff and his relatives for many years prior to Johnson's settlement thereon; that their people were buried on the place and that Johnson must have known these facts, if not at the time of his settlement, before he had made any considerable improvements, and it was held that the Indian's rights were such as are recognized and protected against the intrusion of white settlers by departmental circular of May 31, 1884 (3 L. D., 371; reissued October 26, 1887, 6 L. D., 341).

The action of the local officers was reversed, the final proof of Johnson was rejected and his entry held for cancellation.

On the appeal of Johnson from said decision the case is presented for consideration here.

Ten specifications of error are presented in behalf of the appellant, which may be grouped as follows:

Error in your finding that the land was so occupied or settled upon by Ma-gee-see in September, 1891, the date of Johnson's entry, as to be within the inhibition against entry by the whites, contained in the departmental circulars of May 31, 1884, and October 23, 1887; error not to have ruled that the entry of Johnson was confirmed by the joint resolution of December 19, 1893 (28 Stat., 576), and that of May 27, 1898 (30 Stat., 745); error in not finding that the contestant lost any rights he may have had to said land through abandonment and by laches, in failing to assert his claim between date of Johnson's entry and the time of his making final proof thereon; error not to have found that the claim of Ma-gee-see was based upon the rights and claim of his father, which were determined and extinguished by the selection and assignment of other contiguous lands to the latter, and error not to have found that there is nothing in the record to show that contestant is now qualified, or is seeking, to obtain title to the tract in controversy.

The first question to be considered is whether the entry of Johnson is confirmed by the action of Congress, as asserted; for if that question be answered in the affirmative then your judgment must be reversed.

These lands are within what was formerly the Mille Lac Indian reservation, and there are a number of reported decisions of the Department in relation thereto, so that the present status of those lands is

well settled; there is no need to recite at length the history of the legislation relating to said reservation, its cession and the disposal of lands therein. It is sufficient to say, that under existing law and the departmental decisions, the land may be disposed of under Johnson's homestead entry, as other public lands are subject to disposal.

But Johnson claims that his entry having been made in September, 1891, it was absolutely confirmed by the subsequent legislation of Congress in the joint resolution of December 19, 1893, and of May 27, 1898, *supra*.

This contention is not sustained by the language used in those resolutions. That of 1893 provides that all *bona fide* homestead entries, made after January 9, 1891, and before notice was received at the local office of the decision of the Secretary of the Interior of April 22, 1892, "be and the same are hereby confirmed, where regular in other respects," etc.

The joint resolution of 1898 declares that all public lands formerly within the Mille Lac reservation shall be subject to entry by any *bona fide* qualified settler under the public land laws of the United States and that such applications to make entry shall be received and "treated in all respects as if made upon any of the public lands of the United States," etc.

Clearly the object of the first resolution was to legalize entries made within the prescribed period, "where regular in other respects," and the object of the second resolution was to declare, among other things, that the lands in the former reservation were public lands and subject to entry by qualified settlers "under the public land laws."

In neither resolution is there any absolute confirmation of entries theretofore made, whether rightfully or wrongfully, but only a conditional confirmation, dependent upon the requirement that all such entries must be made regular in accordance with the public land laws.

There being then no absolute confirmation as contended, the question arises, Was the entry of Johnson regularly made in accordance with the provisions of the homestead laws?

Section 2289, Revised Statutes, only authorizes such entries to be made by qualified persons upon "unappropriated public lands;" and the Department has by the circulars heretofore cited, prohibited the allowance of entries by the whites of lands "in the possession, occupation and use of Indian inhabitants;" thus effectively declaring that such lands are not "unappropriated."

In this case, upon a careful consideration of the evidence, the Department is convinced that at the date of Johnson's entry, and for two years thereafter, the land in question was "in the possession, occupation and use" of the contestant, Ma-gee-see; and therefore, in the opinion of the Department, said entry was erroneously and irregularly allowed in violation of the circulars of the Department and of the homestead laws.

In view of the conclusion thus reached, it is not necessary to pass upon the remaining specifications of error further than to say, the fact that other adjoining lands were granted to the father of the contestant, or that he may have thought these two lots were included in that grant, has no bearing upon the case, except in so far as the latter fact tends to show his assertion of claim to these lots. Nor is the question of the qualifications of the Indian, or of his purpose, to obtain title to the lots involved in this case. It may, however, be remarked that in a letter dated August 24, 1899, from the Commissioner of Indian Affairs to this Department, relating to this case, it is stated: "This land is covered by an Indian allotment application made by the said Indian who is the plaintiff in this case."

It is sufficient to say in reply to the charge that contestant abandoned his claim, or by laches has lost any rights he may have had, that the evidence abundantly shows he was driven from the land by the threats of the defendant, accompanied by a display of fire arms, followed by his arrest in the summer of 1893 by the sheriff, who took him to Princeton. From this arrest he was released upon his promise not to return to the land, except to gather his growing crop. The defendant though testifying in the case does not deny that the threats were made as stated, but admits that he caused the arrest for the purpose of driving the Indian from the land, which, it appears, he was successful in doing.

Upon a full consideration of the whole case your judgment is affirmed and the entry of Johnson is ordered to be canceled.

SWAMP-LAND—INDEMNITY—EVIDENCE.

STATE OF ILLINOIS (CHAMPAIGN COUNTY).

No limitations are imposed as to the time within which the claim of a State for swamp-land indemnity may be presented, aside from those contained in the instructions of September 19, 1891, and claims pending at the date of those instructions should not be rejected on the ground that they are stale.

The provisions in the act of April 18, 1818, making donation to the State of Illinois of five per cent. of the net proceeds of the sale of public lands therein, is a direct appropriation for the specific purposes named in the act and can not be made the basis of a charge against the State or of a set-off against its claim to swamp-land indemnity.

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.

The field notes of a survey made prior to the swamp-land grant are of but little weight in determining the character of the land; but where the State has elected to make the selection of swamp lands by its own agents in the field, the burden is upon it to show that the lands selected are of the character contemplated by the grant, if the field notes show otherwise.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 5, 1900.* (H. G.)

The State of Illinois, by its grantee, the county of Champaign in said State, appeals from the decision of your office of August 2, 1897, rejecting its claim to the purchase money received by the United States from the sale of lands regularly made to parties applying therefor between September 28, 1850, the date of the swamp-land grant to a number of the States of the Union, including Illinois (9 Stat., 519), and March 2, 1855, the date of the act granting indemnity to said States entitled to the swamp-land grant (10 Stat., 634) for swamp lands sold since the grant was made.

A motion for review was filed in your office and was denied February 28, 1899. The brief accompanying the motion is made the brief and argument of the appellant here.

It appears that on behalf of said county of Champaign Mr. Isaac R. Hitt, acting as its duly authorized agent, pursuant to his contract with the county authorities, selected the lands as the basis of the swamp-land indemnity claim on June 22,1883, alleging that they were swamp lands at the date of the grant to the State. On June 15, 1892, the said agent certified that the claim before your office was the complete and final claim of the county, as required by the regulations of September 19, 1891 (13 L. D., 301).

It appears that the original swamp-land selections were made by the State on October 17, 1853, and October 12, 1854, amounting to 87,466 acres. This list was followed by the said selection made by the State and county agent of 73,120 acres on June 22, 1883. Various settlements were made on these claims. The selection of 78,000 acres was rejected, 18,200 acres have been patented to the State, and a payment of cash indemnity for 6,877.91 acres has been made. This leaves unsettled and undetermined a land indemnity claim for 46,600 acres and the cash indemnity claim of 10,880 acres, the aggregate of 272 claims of forty acres each.

The latter claim alone is the one now under consideration, as, under existing legislation, the land indemnity claim will not now be passed upon, there being no public lands within the State of Illinois with which to satisfy it (13 L. D., 301).

The tracts for which cash indemnity is claimed have been examined in the field three times by special agents of the Department. The first report, that of Special Agent Walker in 1885, was disapproved or not followed by your office, and an examination was made in 1886 by Special Agent Elliott. Upon appeal by the State from the rejection of the claim by your office based upon his report, this Department held that the claim should not be rejected solely upon the report of a special agent, as that was not proper evidence in the case, and

your office was directed, if the facts therein set forth were sufficient to justify a doubt as to the correctness of the proof submitted, that a further investigation should be ordered, in the course of which the State should be afforded an opportunity to contradict by evidence the allegation that any tract of land for which it asked indemnity is not of the character contemplated by the act of September 28, 1850 (State of Illinois, Champaign County, 10 L. D., 121, 123, citing and following Poweshiek County, Iowa, 9 L. D., 124). Evidently following this disposition of the matter, an examination of the tracts was made by Special Agent Johnston in 1890. His report is to the effect that he examined 342 tracts, 261 of which he reported as swamp lands and 81 tracts as non-swampy in character.

The description of the tracts, which are alleged to be 272 in number, is omitted, as the insertion of the description thereof is given in the decision of your office and need not be repeated here.

In the examination of 86 or 87 tracts by Special Agent Walker, and 174 (or 186) tracts by Special Agent Johnston, the State submitted the evidence of two witnesses as to the swampy character of each of the said tracts, which tends strongly to show that the greater portion of the same were so far swamp and overflowed as to be too wet for cultivation, and were, therefore, of the character of lands passing by the swamp-land grant to the State, the criterion established by the granting act (Railroad Co. *v.* Smith, 9 Wall., 95, 99). Your office does not accept this proof, and finds it insufficient in detail as to some of the tracts reported favorably upon by Special Agents Walker and Johnston. It appears that Special Agent Elliott did not examine any witnesses, and his report is based upon his investigation and inspection of the tracts previously reported by Walker, upon which your office acted, allowing cash indemnity of $3,926.38 on 3,772.46 acres.

The question at issue is fairly presented in the decision of your office: Whether or not the 272 tracts constituting the cash indemnity claim, or any of them, were "swamp lands within the true intent and meaning of the swamp-land grant of September 28, 1850." If they were and due proof has been made, the State is entitled to the purchase money received by the United States for them; if, on the other hand, they were not lands of the character granted, or if due proof has not been presented, the claim must be rejected.

The evidence which your office considered consisted of the reports of Special Agents Walker, Elliott, and Johnston, the minutes of examination made by the latter, the sworn testimony of the witnesses taken before Special Agents Walker and Johnston, and the field notes of survey.

The reports of the special agents are not regarded as evidence by this Department. So it was held in the case upon the former appeal here (State of Illinois, Champaign County, 10 L. D., 121). Such

reports are entitled to great respect, but where they create a doubt as to the character of the land or the validity of the claim, another investigation should be had, and in this case was had, the third that was made in the field by departmental direction, and which was supported by proof as to 174 or 186 of the tracts reported upon. While these reports are conflicting and have caused the complications in the case, it appears that Walker and Johnston reported upon claims upon separate and distinct tracts, and that the latter was ordered to examine and report upon the residue of the claims remaining unadjusted and unsettled.

It is asserted by your office that the testimony is insufficient as it appears to be of a wholesale character and made by the same persons in nearly all of the cases, and that the answers are stereotyped and state merely the opinions of the witnesses as to the character of the land. The witnesses swear that they were acquainted with the character of the land, and that, in its original condition and at the date of the granting act, it must have been swamp land, that is, the major portions of the several tracts were so far swamp and overflowed as to be unfit for cultivation. In some cases the lands are declared by them to be yet swamp and unreclaimed, and in others, and in the majority of cases, they were found to be in cultivation and to be reclaimed either by ditches or by tiling, or by both of these methods. The testimony falls short of being of suspicious sameness, but on the contrary shows a knowledge of each tract and varies accordingly. It seems to be conceded that the State makes no claim to any tracts but those reported upon favorably by the special agents, except, perhaps, in the case of Walker's report, the State contending that such special agent left before the State was permitted to adduce testimony as to the tracts not passed upon favorably by him. The testimony taken before Special Agent Walker was much more specific in character than that taken before Agent Johnston, some of the answers having been omitted in the latter proof. This was done, it is asserted by the appellant, and with reason, because such answers would have been merely cumulative and but a repetition of what the witnesses had already detailed, or because such answers were rendered unnecessary from the fact that, while the major portions of the tracts of which the witnesses testified were too wet to be fit for cultivation, they were not, in reality, "overflowed lands," but boggy or marshy lands.

In some of the answers made to like questions before Special Agent Walker, reference was made to other questions where sufficient answers were given. It is contended on the part of the State that the proof objected to is of the same character as that accepted in like cases, and even in this case, upon the claims passed for settlement and allowed upon the report of Special Agent Elliott, and this is evidently true.

That the witnesses did not know the land sufficiently near to the time

of the grant is a further objection raised to their testimony, and the case of Macon County, Illinois, decided by this Department June 1, 1892 (unreported), is cited as holding that, where the witnesses for the State did not testify as to the character of the land nearer to the swamp-land grant than 1870, the claim should be rejected.

The case cited does not establish the rule which has been followed in the disposition of such claims. It is announced in the case of Archer *et al. v.* Williams (26 L. D., 477, 479):

> In nearly all cases, the best evidence obtainable of the character of the 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 the 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 of the witnesses is to the effect that they became acquainted with the tracts, about which they testified, either in 1855, 1865, 1867, or one or two years later. The tracts were then swamp and overflowed, and the major portions of them were unfit for cultivation owing to their swampy character. Some of them have been reclaimed by ditching or draining by tiling, and others and fewer are yet in their unreclaimed state. It is true that the witnesses do not reside near all of the tracts in question. They testify positively, however, to the character of the lands, and from their age, their occupation, and knowledge of the country, as well as their personal examination of the tracts, they appear to be fully qualified to testify to the character of the lands. It would be an herculean task on the part of the State to produce only witnesses from the neighborhood of widely separated tracts to testify in such cases. Such proof as that offered has always been received as satisfactory, accompanied by the certificate that the witnesses are credible, and there does not appear to be any reason why a departure from the rule should be made in this case.

This testimony is but secondary evidence, but it is permitted by the regulations in force when it can be shown that it is the best obtainable. The instructions require that—

> before presenting this secondary evidence the State agent should file his own affidavit setting forth fully and satisfactorily the reasons for the failure to present the first-mentioned class of witnesses (those having knowledge of the condition of the land at the date of the grant), and also setting forth that the witnesses whose testimony he offers have the best knowledge of the land extending nearest to September 28, 1850, of any that can be obtained.

No such affidavit has been found in the record, but no objection is taken to the proof by your office decision on this ground, and it seems to be conceded that such an affidavit has been filed. An informal inquiry at your office leads to the conclusion that such an essential requirement has been complied with. If it has not been, the claim, of course, must stand rejected; but it is fair to presume that this requisite provision has been met by the State.

The further objection is made that the proof has, in some cases, been altered by the insertion of the word "not" in the answers stating that the character of the land "has been changed by tile and open ditches." There appear to be twenty-three of these changes made, but they do not show that the proof has been altered with any fraudulent or corrupt intent, as the lands in such cases were those that had not been reclaimed.

A further objection is made to the field notes of Special Agent Johnston, which are evidently copied from his memorandum in the field, and which, although written in lead pencil, seem to be neat, orderly, and carefully transcribed. This can not be considered as objectionable, as it is not to be supposed that the agent, by presenting clear and legible copies of his original notes in convenient book form, transgressed any of the instructions to him issued. There appears to be nothing in the record to warrant a suspicion that these notes are not copies of the original notes by the special agent.

The field notes of the survey, taken from surveys made from 1821 to 1823, long before the swamp-land grant was made to the State, are of but little value in determining the character of the land, as they were not made with reference to the grant, and the attention of the surveyors was not especially called to the classification of such lands, as has been required since the passage of the swamp-land act. The State of Illinois has elected to make the selections of swamp lands by its own agents in the field, and is not bound by the field notes of survey. While the field notes are to be considered for what they are worth in connection with the case, they are of little weight under the circumstances and do not serve to overcome positive and undisputed testimony. They are never deemed conclusive in a case where the State is not bound by them, even since the enactment of the swamp-land grant, although the burden is upon the State to disprove them when adverse. (Poweshiek County, Iowa, 9 L. D., 124, 128.)

Another objection to the payment of the claim is that the State accepted the five per centum allowed by law on the sale of lands, and now demands the entire amount of the cash proceeds of the sale. This objection is without force. The provisions of the act of Congress admitting Illinois into the Union, relating to the reservation of such portion of the proceeds of the public lands to the State, are as follows:

That five per cent. of the net proceeds of the lands lying within such State, and which shall be sold by Congress from and after the first day of January, one thou-

sand eight hundred and nineteen, after deducting all expenses incident to the same, shall be reserved for the purposes following, viz: two-fifths to be disbursed, under the direction of Congress, in making roads leading to the State, the residue to be appropriated by the legislature of the State for the encouragement of learning, of which one-sixth part shall be exclusively bestowed on a college or university.

(See section 6, act of Congress of April 18, 1818, 3 Stat., 428, 430.)

This donation to the State was a direct appropriation for the specific purposes named in the act. Such an appropriation can not be made the basis of a charge against the State, or as a set-off against the present indemnity claim.

It is apparent that if the State is entitled to indemnity at all, it is entitled to it without diminution by reason of such provisions of the admission act. No such deduction has heretofore been made in any similar claim. To establish a different rule now, after payments have been made in full for the indemnity claimed in other cases, would be to make an exception in this case not warranted by any provisions of law or departmental rule.

It appears, from exhibits submitted with the motion for review made before your office, that the county of Champaign has expended over four hundred thousand dollars in the drainage of 169,640 acres of swamp lands within its boundaries, a charge met by the issuance of its bonds, to be reimbursed by taxes upon the lands benefitted; and this amount and the acreage of lands so improved is largely in excess of the claim of the State for swamp-land indemnity, or for selections in place of swamp lands passing to the State. Drainage districts have been created and large sums of money have been expended by private means for ditching and tiling. The showing made by the appellant in this respect indicates that the claim of the State is not based upon careless or perjured testimony. The witnesses are vouched for as trustworthy, and their good character is also certified to by prominent county officials. None of the collusion and fraud developed in the case of Linn County, Iowa (19 L. D., 126), cited by your office, is disclosed in this case, and fraud can not be gleaned from the record.

It is admitted that the agent for the State and county is to receive a contingent fee covering his disbursements as well as his services if the prosecution of the claim be successful, but such a contract does not invalidate or weaken the claim of the State. Like contracts have been held valid and have been enforced by the supreme court of the United States (Taylor *v.* Bemis, 110 U. S., 42, 46; Wright *v.* Tebbetts, 91 U. S., 252). The agent prosecuting the claim has been duly appointed by competent authority, and his compensation can be no matter of concern to this Department, even though he has furnished his own means to prosecute the claim and to pay all expenses incident thereto, including the fees of the witnesses.

The presentation of the claim in 1883, thirty years after the original

claim was presented and adjudicated, is made an important factor in the case by your office decision, because the claim is a stale one and is for that reason of a questionable character, requiring a close scrutiny as to its merits. Furthermore, it was held by your office that as the original and proper selections of the State did not embrace the lands involved in this claim, the tracts in question could not be properly selected thirty years thereafter, and that the State is estopped from disturbing the title of the purchasers of the land since their entries are *res adjudicata*. It seems that if the claim were void because not presented in time, that question should have been raised at the outset and not held in abeyance until after the lands had been inspected by the several special agents and proof taken as to the character of the lands and until after a portion of the claim, reported favorably upon by Special Agent Elliott, had been paid. The original selections were made in October, 1853, and in October, 1854. If these claims were intended to be final, no further claim should have been considered.

No limitations have been imposed by this Department as to the time of presenting these claims, except by the instructions of September 19, 1891 (13 L. D., 301), which required that a term should be put to the work of examining swamp-land selections in the field, and that a certificate should be filed by the duly authorized agent of the State before final action is taken on the claim of the State for swamp lands in place or cash or land indemnity, reciting that the claim represents a "full and final" claim of the State. The claim now under consideration was filed long before these instructions were promulgated, and under the regulations of August 12, 1878. It has been recognized, and, pursuant to such regulations, special agents have been appointed to investigate, take proof, and report upon the tracts involved for which indemnity was claimed, and a portion of the claim has been paid.

The case of McCormick *v.* Hayes (159 U. S., 332), cited by your office, is not applicable to the case at bar. The controlling question in that case was that parol evidence is inadmissible to show, in opposition to the concurrent action of Federal and State officers having authority in the premises, that the lands in controversy were in fact, at the date of the act of 1850, swamp and overflowed ground. In the course of the opinion, it appeared that the county, a grantee of the State, selected lands in the section in which the tract in dispute formed a part, without including the latter in the selection, and that this selection was acquiesced in by this Department. The lands were certified twice to the State under a railroad grant, and the State never questioned that certification or applied for a re-examination as to the character of the lands. The county interested never contended that the lands belonged to it as the grantee of the State until it sold them to the plaintiff in the suit cited, taking his promissory note therefor, more

than thirty years after the Secretary of the Interior first certified them to the State as railroad grant lands. In the case at bar the county of Champaign, as grantee of the State, has asserted its claim in the regular method, through the regular channel, and does not ask for the lands themselves as part of the State's selection. Its claim has been recognized without question as to its right to make it when it was finally made as its final claim, it has been investigated three times in the field, proof has been taken thereunder, and a payment has been made thereon. If the doctrine of estoppel can be applied in the case, it would work against the government and not against the State.

That the claim is a stale one and should be subject to careful scrutiny is manifest. Provision is made for secondary proof in such cases, and this proof has been furnished. Repeated attempts have been made to obtain the necessary information as to the validity of the claim of the State, and at considerable expense special agents have been appointed to attend to these duties. It is unfortunate that these agents do not agree in their reports. But, while it appears that your office has been zealous in its efforts to protect the rights of the government, there should be some limit to these examinations, and it is apparent that further investigation in the field would not throw any additional light upon the claim of the State. The claim can not be avoided on the ground that it is a stale one, or is barred by antecedent settlement.

The report of Special Agent Johnston, upon his investigation ordered by your office at the suggestion of this Department in view of the doubts arising from the report of Special Agent Elliott, together with the proof taken before him and Special Agent Walker, which must be held to be satisfactory and competent, must be followed if the secondary evidence has been vouched for and the absence of primary and direct evidence excused in compliance with the regulations. If such regulations have been followed in this respect, the claim must be passed for allowance.

The decision of your office is therefore reversed.

REPAYMENT—MORTGAGEE—ASSIGNEE.

VALLEY LAND AND IRRIGATION CO.

Where an entry is erroneously allowed, but before its cancellation the land is mortgaged, and the mortgagee receives a deed therefor under foreclosure proceedings initiated subsequent to such cancellation, he is an assignee within the meaning of the act of June 16, 1880, and as such entitled to repayment.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 9, 1900.* (C. J. G.)

This case involves the application of the Valley Land and Irrigation Company, of Huron, South Dakota, for repayment of the pur-

chase money paid by Nils Pramheis for the SE ¼ of Sec. 34, T. 116 N., R. 63 W., Huron, South Dakota, land district.

The records show that Pramheis made homestead entry for the land September 8, 1881, at the Watertown land office, Dakota Territory, and affidavit of contest was filed against said entry May 15, 1882, in which abandonment was alleged. The local officers rendered decision in favor of the contestant October 5, 1882, which was affirmed by your office on appeal August 20, 1883, and the entry canceled December 6, 1883. Pramheis appealed to the Department.

In the meantime by a change in the lines of the land districts on October 1, 1882, the land embraced in Pramheis's homestead entry came within the jurisdiction of the Huron land office, and the local officers not knowing of the pending contest allowed Pramheis on July 21, 1883, to make commutation cash entry for said land under section 2301 of the Revised Statutes. The commutation cash entry was canceled by your office March 17, 1884, and Pramheis made application for repayment of his purchase money May 10, 1884. He was subsequently advised by your office that in order to have said money refunded it would be necessary for him to execute a form of application which was inclosed to him, and also to surrender his duplicate receipt. No further action appears to have been taken by Pramheis relative to repayment.

The Department, on March 31, 1888, rendered decision in the case, in which the action of your office in cancelling the entries was affirmed, it being held that Pramheis's homestead entry was properly canceled as he had failed to comply with the requirements of the homestead law, and that it was clearly error for the land officers at Huron to allow him to make commutation cash entry pending the contest against his homestead entry.

Under date of July 18, 1899, the Valley Land and Irrigation Company applied for repayment of the purchase money, amounting to $200, paid by Pramheis. With its application the company filed an abstract of title as the basis of its claim for repayment, and on September 27, 1899, the company was advised by your office as to what was deemed to be further necessary to complete its said application. It appears that the requirements of your office in this respect were complied with by the company.

April 3, 1900, your office rendered decision in which, after stating the history of the case, it was found that the Valley Land and Irrigation Company, under the ruling announced in the cases of California Mortgage, Loan and Trust Co. (on review, 26 L. D., 425), and Commonwealth Title, Insurance and Trust Co. (28 L. D., 201), was entitled to repayment of the purchase money as the assignee of Nils Pramheis; but in view of the decision of the Comptroller of the Treasury under date of October 7, 1899 (Decisions of the Comptroller of the Treasury,

Vol. 6, p. 334), disallowing the claim of the Commonwealth Title, Insurance and Trust Co., aforesaid, after the same had been approved by this Department, your office held that the application of the Valley Land and Irrigation Company must be denied. The said company has now appealed here.

From authenticated papers filed in this case it appears that on July 25, 1883, Pramheis and wife executed a mortgage, which was duly recorded, on the land in question in favor of John W. Smith, trustee of the Valley Land and Irrigation Company, to secure the sum of $450, $200 of which was paid as the purchase price of said land; that upon application of the Valley Land and Irrigation Company the mortgage was foreclosed and the land sold by the sheriff of Spink county, South Dakota, on July 9, 1892, the said company becoming the purchaser; and that on August 2, 1893, after the expiration of the period of right of redemption, the land was conveyed by sheriff's deed to the company.

The facts of this case clearly bring it within the ruling announced in the cases of California Mortgage, Loan and Trust Co., and the Commonwealth Title, Insurance and Trust Co., *supra*. In the last mentioned case the Auditor for the Interior Department concurred with the conclusion reached therein and recommended repayment, but this action, as stated, was disapproved by the Comptroller of the Treasury, who in effect holds that a mortgage is simply the security for a debt and not a conveyance of title, and that a mortgagee who purchased the land under foreclosure proceedings initiated after the cancellation of the entry is not an assignee within the meaning of the act of June 16, 1880 (21 Stat., 287). This matter was fully discussed in the cases referred to, and upon examination of the Comptroller's decision no sufficient reason, in the opinion of this Department, is presented for changing the ruling made in those cases. Believing as it does, for the reasons stated in the cases referred to, that the ruling therein is proper, this Department is unable to agree with the views expressed by the Comptroller and is therefore unwilling to recede from said ruling. Under that ruling the Department is of opinion that the Valley Land and Irrigation Company is an assignee within the meaning of said act, and as such entitled to repayment.

The decision of your office is reversed, the claim of the Valley Land and Irrigation Company for repayment of the purchase money paid by Pramheis is approved, and the same will be forwarded to the Treasury Department for payment.

MINING CLAIM—DEPUTY MINERAL SURVEYOR—EMPLOYE OF THE GENERAL LAND OFFICE.

W. H. LEFFINGWELL.

A deputy mineral surveyor who has no interest, real or contingent, in a mining claim at the date of the survey thereof by him, nor at the date of the application for patent thereto, but who subsequently makes entry thereof, does not come within the spirit of section 452 of the Revised Statutes, prohibiting employes of the General Land Office from "purchasing or becoming interested in the purchase of the public land."

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 9, 1900.* (G. B. G.)

W. H. Leffingwell has filed a motion for review of departmental decision of September 9, 1899 (unreported), which affirmed the decision of your office holding for cancellation mineral entry, No. 1573, for the Lucky Jack, Carlo, Maud S. and Mable S. lode claims, situated in the Pueblo land district, Colorado.

This entry was made by the said Leffingwell December 31, 1897, he being, at the date of the location of the claims, at the date of the surveys thereof, and at the date of the application for patent, a deputy mineral surveyor, being the surveyor who surveyed the claims, but it affirmatively appears that he was not and did not contemplate becoming interested in the claims until after the surveys thereof had been made and approved by the surveyor-general.

The decision of your office and the decision of the Department in affirmance thereof are put upon the ground that a deputy mineral surveyor is disqualified from making an entry of mineral lands by reason of section 452 of the Revised Statutes which provides that:

> The officers, clerks, and employes in the General Land-Office are prohibited from directly or indirectly purchasing or becoming interested in the purchase of any of the public land; and any person who violates this section shall forthwith be removed from his office.

And by reason of the circular of September 15, 1890 (11 L. D., 348), based upon said section, which provides that:

> all officers, clerks, and employes in the offices of the surveyor-general, the local land offices, and the General Land Office, or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office, are, during such employment, prohibited from entering, or becoming interested, directly or indirectly, in any of the public lands of the United States.

Without at the present time considering the correctness of the conclusion arrived at in the case of Floyd *et al. v.* Montgomery *et al.* (26 L. D., 122, 136) and similar cases, in so far as it was therein held that the prohibitive provisions of said section embrace a deputy mineral surveyor, it is sufficient to say that the facts in this case, as disclosed by the record, are materially different from those stated in the cases referred to.

Independently of the statute it would be within the power of the land department in making regulations for the survey of mining claims to provide against the survey thereof by one interested in the claim, the reason therefor being manifest. In the case under consideration Leffingwell had no interest, real or contingent, in the claims involved at the date of the survey thereof by him, or at the date of the application for patent thereto, and under these circumstances it is not believed that he is within the spirit of the statute or circular above quoted.

Departmental decision of September 9, 1899, is hereby vacated, and your office will pass this entry to patent, unless other objection appears.

ABANDONED MILITARY RESERVATION—ACT OF MAY 28, 1896.

SNYDER *v.* STATE OF SOUTH DAKOTA.

The purpose of the second proviso to the act of May 28, 1896, was to validate and protect homestead and pre-emption claims upon lands in the Fort Sully abandoned military reservation initiated by settlement prior to the date of its passage, and to this extent said act supersedes the general act of July 5, 1884, as to the disposition of lands in said reservation.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *July 9, 1900.* (W. M. W.)

Robert M. Snyder has appealed from your office decision of February 2, 1900, affirming the action of the local office rejecting his application to make homestead entry for the W. ½ of the NE. ¼, the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼ of Sec. 20, T. 113 N., R. 81 W., Pierre, South Dakota, land district.

The land applied for is situated within the boundaries of the Fort Sully military reservation which was established by executive order of December 10, 1869, and modified by a similar order of January 17, 1877. The lands embraced in said reservation were placed under the control of the Interior Department November 5, 1894, for disposition under the provisions of the act of July 5, 1884 (23 Stat., 103). The survey of the township in which the land here involved is situated was accepted by your office March 14, 1899.

The local officers gave notice that the lands embraced within said abandoned reservation would be opened to entry May 15, 1899, at 10 o'clock, A. M. At the time thus fixed Snyder filed his application to enter the land in question under the homestead law, alleging his qualification to make homestead entry, and further—

That prior to the 19th day of March, 1896, I placed a house and other improvements on said land and settled upon the same and established my residence in said house thereon prior to said date and have since continued to reside on and improve

said land all for the purpose of entering the same under the homestead laws of the United States.

That prior to and on the 28th day of May, 1896, I was a *bona fide* homestead settler on said land and have since continued to be such.

The register and receiver rejected Snyder's application for the reason that he failed to show that he was "in the occupation of said land, or any portion of the Fort Sully military reservation prior to the location of such reservation, or that he had settled thereon prior to January 1, 1884." Snyder appealed, and February 2, 1900, your office affirmed the judgment of the local officers, and he appeals therefrom to the Department.

Snyder claims the right to make homestead entry for the land in question by virtue of the provisions of the act of May 28, 1896 (29 Stat., 189), which provides:

That the lands situated in the Fort Sully military reservation, in the State of South Dakota, may be selected at any time within one year after the passage of this act, or the approval of the survey of said reservation by the Secretary of the Interior, by the State of South Dakota as a part of the lands granted to the State under the provisions of an act to provide for the admission of South Dakota into the Union, approved February twenty-second, eighteen hundred and eighty-nine, and for indemnity school lands; and when said lands are selected as herein provided the Secretary of the Interior shall cause patents to be issued therefor to the State of South Dakota: *Provided*, That the State of South Dakota shall have a preference right over any person or corporation to select said lands subject to entry by said State, granted thereto by the act of Congress approved February twenty-second, eighteen hundred and eighty-nine, for a period of sixty days after the foregoing lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States: *Provided further*, That such preference right shall not accrue against *bona fide* homestead or pre-emption settlers on any of said lands at the date of the passage of this act.

The purpose of Congress in passing this act was to validate and protect homestead and pre-emption claims upon lands in said reservation initiated by settlement prior to the date of its passage, and to this extent the act of 1896 supersedes the general act of July 5, 1884, as to the lands embraced in this reservation.

Snyder makes a *prima facie* showing that he settled on the land applied for prior to the 28th day of May, 1896, and was at that time living upon said land, and that he continued to reside upon it up to the time he applied to enter it. Under the circumstances, his showing, in the absence of anything to the contrary, appears to be sufficient to bring his claim as a settler within the terms of the act of May, 1896.

It appears from your office decision that on the same day Snyder's application to enter was rejected, the State of South Dakota was permitted to select the tracts applied for by Snyder, among others, as school indemnity lands, in list No. 3, Pierre series. You will therefore order a hearing, after due notice to the State, in order to afford

Snyder an opportunity to establish his claim to a prior right of entry in this land by reason of settlement antedating May 28, 1896, and upon such evidence the case will be readjudicated in the light of the decision herein made. The decision of your office is accordingly reversed.

MINING RIGHTS AND CLAIMS IN ALASKA—ACT OF JUNE 6, 1900.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., July 11, 1900.

The following provisions in the act of Congress approved June 6, 1900, entitled "An act making further provision for a civil government for Alaska, and for other purposes," relate to mining rights and mining claims in Alaska and are published for the guidance of the local officers in their administration of the law and for the information of those concerned.

ESTABLISHMENT OF RECORDING DISTRICTS BY THE JUDGES OF THE DISTRICT COURT.

SEC. 13. The judges of the district, or a majority of them, shall, as soon as practicable after their appointment, meet, and by appropriate order, to be thereafter entered in each division of the court, divide the district into three recording divisions, designate the division of the court to supervise each, and also define the boundaries thereof by reference to natural objects and permanent landmarks or monuments, in such manner that the boundaries of each recording division can be readily determined and become generally known from such description, which order shall be given publicity in such manner by posting, publication, or otherwise as the judges or any division of the court may direct, the necessary expense of the publication of such order and description of the recording divisions to be allowed and paid as other court expenses.

At any regular or special term an order may be made by the court establishing one or more recording districts within the recording division under the supervision of such division of the court and defining the boundaries thereof by reference to natural objects and permanent landmarks or monuments, in such manner that the boundaries thereof can be readily determined.

The order establishing a recording district shall designate a commissioner to be ex officio recorder thereof, and shall also designate the place where the commissioner shall keep his recording office within the recording district:

Provided, The clerk of the court shall be ex officio recorder of all that portion of the recording division under the supervision of his division of the court not embraced within the limits of a recording district established, bounded, and described therein as authorized by this act, and when any part of the division for which a clerk has been recording shall be embraced in a recording district, such clerk shall transcribe that portion of his records appertaining to such district and deliver the same to the commissioner designated as recorder thereof.

Whenever it appears to the satisfaction of the court that the public interests demand, or that the convenience of the people require, the court may change or

modify the boundaries or discontinue a recording district or change the location of the recording office, or remove the commissioner acting as ex officio recorder, and appoint another commissioner to fill the office.

SEC. 14. The clerk as ex officio recorder must procure such books for records as the business of his office requires and such as may be required by the respective commissioners designated as recorders in his division of the court, but orders for the same must first be obtained from the court or the judge thereof. The respective officers acting as ex officio recorders shall have the custody and must keep all the books, records, maps, and papers deposited in their respective offices, and where a recorder is removed or from any cause becomes unable to act, or a recording district is discontinued, the records and all the books, papers, and property relating thereto shall be delivered to the clerk or such officer or person as the court or judge thereof may direct.

The record books procured by the clerk, as herein provided, shall be paid for by him, on the order of the court, out of any moneys in his hands, as other court expenses are paid.

REQUIREMENTS FOR THE RECORDING OF NOTICES OF MINING LOCATIONS, AFFIDAVITS OF ANNUAL WORK DONE ON MINING CLAIMS, ETC.

SEC. 15. The respective recorders shall, upon the payment of the fees for the same prescribed by the Attorney-General, record separately, in large and well-bound separate books, in fair hand:

First. Deeds, grants, transfers, contracts to sell or convey real estate and mortgages of real estate, releases of mortgages, powers of attorney, leases which have been acknowledged or proved, mortgages upon personal property;

Second. Certificates of marriage and marriage contracts and births and deaths;

Third. Wills devising real estate admitted to probate;

Fourth. Official bonds;

Fifth. Transcripts of judgments which by law are made liens upon real estate;

Sixth. All orders and judgments made by the district court or the commissioners in probate matters affecting real estate which are required to be recorded;

Seventh. Notices and declaration of water rights;

Eighth. Assignments for the benefit of creditors;

Ninth. Affidavits of annual work done on mining claims;

Tenth. Notices of mining location and declaratory statements;

Eleventh. Such other writings as are required or permitted by law to be recorded, including the liens of mechanics, laborers, and others: *Provided*, Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated.

MINERS MAY MAKE RULES AND REGULATIONS. MINING RECORDS HERETOFORE MADE, LEGALIZED.

SEC. 16. Any clerk or commissioner authorized to record any instrument who having collected fees for so doing fails to record such instrument shall account to his successor in office, or to such person as the court may direct, for all the fees received by him for recording any instrument on file and unrecorded at the expiration of his official term, or at the time he is required to transfer his records to another officer under the direction of the court. And any clerk or commissioner who fails, neglects,

or refuses to so account for fees received and not actually earned by the recording of instrument shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined not less than one hundred dollars nor more than one thousand dollars, and imprisoned for not more than one year, or until the fees received and unearned as aforesaid shall have been properly accounted for and paid over by him, as hereinbefore provided. And in addition such fees may be recovered from such clerk or commissioner or the bondsmen of either, in a civil action which shall be brought by the district attorney, in the name of the United States, to recover the same; and the amount when recovered shall be by the court transferred to the successor in office of such recorder, who shall thereupon proceed to record the unrecorded instruments: *Provided,* Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this act or the general laws of the United States; and nothing in this act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: *Provided further,* All records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act.

MINING LAWS EXTENDED TO THE DISTRICT OF ALASKA. TIDE LANDS SUBJECT TO EXPLORATION AND MINING. RIGHTS TO DREDGE AND MINE BELOW LOW TIDE, SUBJECT TO RULES AND REGULATIONS BY SECRETARY OF WAR. RESERVATION OF SIXTY-FOOT ROADWAY BY ACT OF MAY 14, 1898, SHALL NOT APPLY TO MINERAL LANDS.

SEC. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the District of Alaska: *Provided,* That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further,* That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation

of a roadway sixty feet wide, under the tenth section of the act of May fourteenth, eighteen hundred and ninety-eight, entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," shall not apply to mineral lands or town sites.

RIGHTS OF INDIANS AND PERSONS CONDUCTING SCHOOLS OR MISSIONS.

SEC. 27. The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong; but nothing contained in this act shall be construed to put in force in the district the general land laws of the United States.

BINGER HERMANN,
Commissioner.

Approved July 11, 1900:
THOS. RYAN,
Acting Secretary.

DEVER ET AL. *v.* AYARS.

Motion for rehearing denied, July 13, 1900, by Acting Secretary Ryan. See 28 L. D., 169, and 29 L. D., 7.

FETTE *v.* CHRISTIANSEN.

Motion for review of departmental decision of April 30, 1900, 29 L. D., 710, denied by Acting Secretary Ryan, July 13, 1900.

FOREST RESERVE—SEC. 3, ACT OF MARCH 2, 1899—ACT OF JUNE 4, 1897.

CLARKE *v.* NORTHERN PACIFIC RY. CO.

There can be no lawful selection of lands under the third section of the act of March 2, 1899, until a proper deed has been filed, and duly approved by the Department, conveying to the United States the lands in lieu of which selection is made; and such a deed does not relate back to a prior defective unapproved deed, and selection made thereunder, so as to cut out intervening adverse claims.

By relinquishment and reconveyance to the United States, under the exchange provisions of the act of June 4, 1897, of lands within the limits of a forest reserve, and the due selection of other lands in lieu thereof, the party making such relinquishment and selection acquires a right to have the selection approved of which he can not be divested by a subsequent order withdrawing the selected lands "from settlement, sale or disposal," pending a determination "whether or not they shall be permanently reserved for forest purposes."

Acting Secretary Ryan to the Commissioner of the General Land Office, July 13, 1900.

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

The Northern Pacific Railway Company, hereinafter for convenience called the company, has appealed from the decision of your office

dated September 30, 1899, holding the claim of C. W. Clarke to the W ½ of the NW ¼ of section 28 and the NE ¼ of the NE ¼ of section 30, T. 22 N., R. 8 E., W. M., Seattle, Washington, land district, to be superior to that of the said company, and therefore holding the company's claim for rejection.

Clarke claims the tracts above described under the exchange provisions of the act of June 4, 1897 (30 Stat., 11, 36); the company under the act of March 2, 1899 (30 Stat., 993), entitled, "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Ranier National Park," section 3 of which reads:

> That upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: *Provided*, That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks.

The Northern Pacific Railway Company having become the lawful successor in interest of the Northern Pacific Railroad Company, filed, on June 29, 1899, under said section 3, a deed of release and conveyance to the United States, dated May 5, 1899, and executed by both companies, and also by the Central Trust Company of New York as trustee, of certain lands in the said park and reserve as bases for selections to be made thereafter, and, on July 8, following, filed its list No. 75 of selections, which list included the land in controversy. In the meantime, however, to wit, July 6, 1899, the company withdrew the said deed in order to make corrections therein necessary to make it effective and in conformity with the statute. July 25, 1899, the company filed a new deed under said section 3, of release and conveyance to the United States, dated July 19, 1899, and executed by it and each of the other companies named above, which was accepted by the Department July 26, 1899, and the company was thereupon declared to be authorized to select lieu lands as provided in the said section 3. July 31, 1899, the company filed its substitute list No. 75 of selections, which list included the land in controversy.

Clarke's selections of the tracts above described in lieu of certain lands within the limits of the Cascade Range forest reserve, State of Oregon, were filed in the local office July 20, 1899, accompanied by a

deed relinquishing and reconveying to the United States the said lands within the limits of the Cascade Range forest reserve, the title to which was theretofore in him and which he offered as bases for said selections.

The company's contention that by the filing of its said deed dated May 5, 1899, and of its list of selections dated July 8, 1899, it acquired such a right to the lands in question as to preclude their selection by Clarke on July 20, 1899, cannot be sustained. Nor can its insistence be upheld that its later deed of relinquishment and its selections thereunder relate back to its prior deed and selections so as to cut out the intervening claims of Clarke. The above quoted provision (section 3) of the act of March 2, 1899, required the "execution and filing with the Secretary of the Interior of a proper deed releasing and conveying to the United States the lands" therein indicated and contemplated the acceptance of such deed by the Secretary before any selections could be lawfully made by the company. The deed of May 5, 1899, having been withdrawn prior to the filing of the list of July 8, 1899, there was nothing at that time before the land department to warrant or support the filing of that list, and the company secured no right thereby. Until a proper deed was filed and duly accepted no list of selections could be lawfully filed under that act. None was so filed until July 31, 1899, and no claim was initiated by the company to the land in controversy until then, when its substitute list was filed including the same with the other lands therein described.

Clarke had already, eleven days prior to the last-mentioned date, selected the land under the act of June 4, 1897. The land was then, so far as appears, subject to such selection. It was not thereafter subject to selection by the company, which could only, according to the express terms of said section 3, select land, if otherwise subject to selection, "to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection." Clarke's "adverse claim or right" having "attached" or "been initiated" prior to any valid selection of the land by the company, the same must be held to be superior to the claim of the company, which was therefore properly rejected by your office.

The attention of the Department has been called to the fact that on October 10, 1899, your office, pursuant to direction of the Department dated October 4, 1899, withdrew "from settlement, sale or other disposal, the unoccupied and unappropriated portions" of the public lands in the said township 22 north, range 8 east, together with certain other lands, "till it is finally determined whether or not they shall be permanently reserved for forest purposes." This withdrawal still remains in full force and effect. It does not, however, affect the claims of Clarke to the lands embraced in his said selections within said township.

In the recent case of Gideon F. McDonald (30 L. D., 124), arising under the act of June 4, 1897, wherein, subsequent to his selection, accompanied by a proper deed of relinquishment and reconveyance to the United States of the lands owned by him within the limits of a forest reserve and sought to be exchanged, and before any action had been taken on the selection, that part of the forest reserve within which such lands were situated was restored to the public domain, the Department said:

> When the selection was filed the land embraced in the accompanying deed of relinquishment and reconveyance was within the limits of the forest reserve and a proper basis for a selection under said act, and the land selected by McDonald in exchange was, according to the records of your office, of the character subject to such selection and free from other claim or appropriation. By his deed of relinquishment and reconveyance to the United States of his own land situate within the boundaries of the forest reserve, and by his selection of the lieu land, McDonald accepted the standing offer or proposal of the government contained in the act of June 4, 1897, and complied with its conditions, thereby converting the mere offer or proposal of the government into a contract fully executed upon his part, and in the execution of which by the government he had a vested right. After McDonald had fully complied with the terms on which the government by said act had declared its willingness to be bound, no act of either the executive or legislative branch of the government could divest him of the right thereby acquired. Your office will therefore carefully examine the papers and records pertaining to this selection and if it is found to be otherwise free from objection, the fact of the elimination from the boundaries of the forest reserve of the lands in lieu of which the selection is made, after full compliance by the claimant with the lieu land act and regulations, will not prevent approval of the selection.

The same principle announced in the case of McDonald applies in the case at bar. If the lands selected by Clarke were subject to selection at the time he made selection thereof and if, as appears to have been the case, the lands embraced in his deed of relinquishment and reconveyance were proper bases for his selections, he acquired, at the time of filing such selections and deed of relinquishment and reconveyance, vested rights in the execution by the government of its part of the contract for the exchange of lands. The lands embraced in his selections were therefore not subject to the said withdrawal, having been previously appropriated and segregated from the other public lands in the said township by such selections.

The decision of your office is affirmed in accordance with the views herein expressed.

BROWN *v.* CAGLE.

Departmental decision of May 9, 1900, 30 L. D., 8, recalled and vacated, July 16, 1900, by Acting Secretary Ryan, and directions given that the hearing ordered by departmental decision of June 6, 1899, 28 L. D,, 480, proceed.

STATE SELECTION—ACT OF JUNE 20, 1894—BURDEN OF PROOF.

WHITTINGTON *v.* STATE OF MISSISSIPPI.

The act of June 20, 1894, authorizing the governor of the State of Mississippi to select, for university purposes, out of the unoccupied and uninhabited lands of the United States in said State, a specified amount of land, was not a grant *in præsenti*, but title to the lands designated only vested in and accrued to the State upon selection and certification, legally exercised as authorized in the act, and subsequently approved.

An *occupant* of a tract of land, within the meaning of the act of June 20, 1894, is one who has the use and possession thereof, whether he resides upon it or not.

In making selection under the act of June 20, 1894, it devolved upon the State to show affirmatively that the lands selected were of the character designated in the act, but such showing having been made, and the selection approved, it was thereafter incumbent upon the party attacking the validity of the approved selection to assume the burden of proof.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 18, 1900.* (J. H. F.)

The Department has considered the appeal of John R. Whittington from your office decision of February 23, 1899, rejecting his homestead application for the NE. ¼ of Sec. 26, T. 3 S., R. 9 W., St. S. M., in Jackson, Mississippi, land district, for conflict with selection made by the State of Mississippi under the act of June 20, 1894 (28 Stat., 94).

The land involved is a part of the lands formerly reserved for naval purposes, and restored to the public domain, on March 14, 1895, upon certification of the Secretary of the Navy to the Secretary of the Interior, under the act of March 2, 1895 (28 Stat., 814).

On May 10, 1895, the governor of the State of Mississippi filed in the local office at Jackson a duly certified list of lands selected by him, for university purposes, under said act of June 20, 1894, *supra*, which list embraced about 23,000 acres of land, including the land in controversy, and all of which lands were formerly within the limits of the reservation for naval purposes as aforesaid. Thereafter certain lands, situated on Back Bay near the city of Biloxi, which the Department held were not subject to selection by the State (20 L. D., 510), and certain tracts for which adverse claims had been presented, were eliminated from said list, and on January 30, 1896, such list, thus rendered clear, was approved by the Department, and you were directed to issue patents to the State for the lands embraced therein.

On May 21, 1897, Whittington applied to make homestead entry of the tract hereinbefore described, accompanying such application by corroborated affidavit alleging that he had been occupying and inhabiting said land ever since 1893. The local officers rejected said application, and, on appeal by Whittington, your office, on September 9,

1897, ordered a hearing "to determine the exact status of the tract involved at the date of the State's selection," in pursuance of departmental instructions of August 9, 1897 (25 L. D., 106). Hearing was duly had, the testimony being taken before F. H. Lewis, clerk of the circuit court of Jackson county, on March 12, 1898. Upon consideration of the testimony submitted, the local officers held that the land involved was occupied and inhabited by Whittington on May 10, 1895, the date of the State's selection, within the meaning of the law, and recommended that his homestead application therefor be accepted and the claim of the State rejected.

From said action of the local officers the State appealed, and by your office decision of February 23, 1899, from which the appeal now under consideration herein was taken by Whittington, it was found that the alleged settlement of Whittington was a mere pretense; that he never was in actual *bona fide* occupancy of the land in question; and the decision of the local officers was reversed and Whittington's application to make homestead entry was rejected.

The errors assigned by appellant are, in substance, as follows:

1. That your office erred in holding that the land in controversy was subject to selection by the State.

2. That you erred in holding that the land was unoccupied and uninhabited on May 10, 1895, the date of the State's selection, within the meaning of the act of June 20, 1894, *supra*.

In support of the first assignment of error above mentioned, appellant's counsel insist that the act of June 20, 1894, was a grant *in præsenti*, authorizing selections to be made only from the then unoccupied and uninhabited lands subject to selection, and that the provisions of said act could not have any operation *in futuro* and thereby become applicable to lands which, at the date of the passage of said act, were reserved for naval purposes, but which were thereafter, and prior to the State's selection, restored to the public domain under the provisions of the act of March 2, 1895, *supra*.

Counsel on behalf of the State insists that the act of June 20, 1894, was not a grant *in præsenti*, but for quantity, taking effect *in futuro*, and under which title vested in the State only upon selection made; that title to all lands selected, and which, at date of such selection, were within the descriptive terms of the act, thereby became vested in the State; and that the lands in the former naval reserve having been released therefrom and restored to the public domain prior to the State's selection, made on May 10, 1895, the provisions of the act of June 20, 1894, were then applicable to said lands and the same became subject to the State's selection thereunder.

It is also insisted, in behalf of the State, that the question of the right of the State to select, under the provisions of the act of June 20, 1894, lands formerly embraced within said reservation for naval pur-

poses, was specifically determined favorably to the State by departmental decision of June 3, 1895 (20 L. D., 510), and that such right has since been repeatedly recognized by the Department, and that the doctrine of *stare decisis* should be invoked and applied to the case under consideration.

Departmental decision of June 3, 1895, *supra*, was rendered upon consideration of the original list of lands selected by the governor of the State of Mississippi on May 10, 1895, and, after referring to the act of June 20, 1894, it was therein stated:

> I find nothing in this act which will prevent the State of Mississippi from selecting such of the "unoccupied and uninhabited" lands of the United States as were restored to the public domain by the act of 1895, *supra*, except the lands which the act provides shall be disposed of in a special manner.

And after holding that so much of said lands as are situated on Back Bay were subject to disposal only under the townsite law, it was further said:

> I therefore direct that the State of Mississippi be authorized to select any of the "unoccupied and uninhabited" lands within the late naval reservation, except the lands directed to be disposed of under the townsite law by the act of March 2, 1895. You will prepare a list of selections made by the governor of the State of Mississippi, in accordance with this letier, and send it forward for my approval.

In pursuance of the foregoing departmental decision, the clear list of selections made by the State, hereinbefore mentioned, was subsequently approved January 30, 1896. Patents not having been issued on said approved list, further action thereon was suspended by departmental instructions of August 9, 1897 (25 L. D., 106), to await the result of hearings thereby ordered to determine the exact status of certain tracts, embraced in said list, at date of the State's selection, May 10, 1895, where settlement thereon prior to such selection had been duly alleged; but subsequently, January 20, 1899, the Department revoked said order of suspension and directed that patents be issued on said approved list except for lands involved in hearings already ordered. In pursuance of such direction, patents were issued to the State of Mississippi, on February 21, 1899, for 15,713.53 acres of the lands embraced in said list, all of which lands were formerly within said reservation for naval purposes.

On May 2, 1900, an additional list of lands selected by the State, embracing 1,104.25 acres, a portion of which lands were formerly naval reserve lands, was approved by the Department, and on May 17, 1900, patent was duly issued thereon.

Whether any of the lands thus patented to the State have been sold since issuance of patent is not shown, but under the circumstances hereinbefore set forth it is apparent that the construction of the act of June 20, 1894, which has heretofore obtained in the Department, and which has been repeatedly recognized, should not now be changed or

disturbed unless such construction is clearly erroneous. (Taylor *v.* Yates *et al.*, 8 L. D., 279; Wright *v.* Roseberry, 121 U. S., 497.)

But is the construction which the Department has heretofore placed upon said act erroneous? Elaborate briefs touching this question have been filed by counsel, and as there are a number of cases alleged to be pending both in the Department and in your office, involving this same question, it will be considered.

The language of the act (omitting the enacting clause) is as follows:

> That the governor of the State of Mississippi be, and he is hereby, authorized to select out of the unoccupied and uninhabited lands of the United States within the said State twenty-three thousand and forty acres of land, in legal subdivisions, being a total equivalent to one township, and shall certify the same to the Secretary of the Interior, who shall forthwith, on receipt of said certificate, issue to the State of Mississippi patents for said lands: *Provided*, that the proceeds of said lands, when sold or leased, shall be and forever remain a fund for the use of the University of Mississippi.

It will be observed that the language employed in the foregoing act differs materially from that used by Congress in granting lands to aid in the construction of railroads and in granting swamp and overflowed lands to the several States, and other similar acts which have been construed by the Department and the courts to be grants *in præsenti*, or in the nature of a float until definite location, whereupon title attached and took effect as of the date of the act. (Wright *v.* Roseberry, 121 U. S., 488; Missouri, Kansas & Texas Railway *v.* Kansas Pacific Railway, 97 U. S., 491; United States *v.* Southern Pacific Railroad, 146 U. S., 570.)

The language almost invariably and uniformly employed by Congress to create a grant *in præsenti* and to vest a present title to designated lands, is that "there be and hereby is granted," or other similar operative words of like import, which clearly indicate a purpose to create an immediate interest and effect a present transfer of title; and although the specific tracts of land granted, by the employment of such language, may not be capable of identification until a time subsequent to the passage of the act, yet, when in fact identified, title thereto attaches and relates back to and takes effect from the date of the passage of the granting act.

The language of the act under consideration, therefore, is not such as is usually used and employed by Congress to create a grant *in præsenti* and to effectuate a then present transfer of title to designated lands. On the contrary, the express language of the act in question merely "authorizes" the governor of the State of Mississippi to select, out of the unoccupied and uninhabited lands of the United States within said State, 23,040 acres of land. The authority or privilege conferred by the act might or might not be exercised on behalf of the State. No limitation as to the time within which such authority or

privilege should be exercised is prescribed by the act. The language employed does not purport to transfer to and vest in the State the then present title to any lands of the designated class belonging to the United States, within the State, and there is no means prescribed in the act whereby the lands authorized to be selected could be ascertained until such authority was exercised and such selection was in fact made.

Counsel for appellant cite, among other authorities, the case of Bardon *v.* Northern Pacific Railroad (145 U. S., 535), and also Kansas Pacific Railway Co. *v.* Dunmeyer (113 U. S., 629), in support of their contention hereinbefore mentioned, but an examination of the authorities cited will show that they do not justify the construction of the act of June 20, 1894, herein contended for by appellant. The case of Bardon *v.* Northern Pacific Railroad, *supra*, arose under the act of July 2, 1864 (13 Stat., 365). The land involved was within the place limits of the grant to the Northern Pacific Railroad Company, and at date of the grant was covered by a preemption entry, which was subsequently canceled prior to definite location of the road, and the court held that the land did not pass to the railroad company under its grant, but after cancellation of the preemption entry, remained public lands of the United States.

In the case of Kansas Pacific Railway Co. *v.* Dunmeyer, *supra*, the land involved was within the place limits of the grant to the Union Pacific Railroad Company, act of July 1, 1862 (12 Stat., 489), and a homestead entry was of record thereon at date of definite location of the road, which entry was subsequently canceled, the claim having been abandoned, and it was held that notwithstanding the subsequent abandonment of the homestead claim and cancellation of the entry, the land involved was excepted from the grant to the railroad company.

Both in the act of July 2, 1864, *supra*, and in the act of July 1, 1862, *supra*, Congress used the pertinent language, found in the granting clause of said acts, respectively, "that there be, and hereby is, granted," importing a present grant, and both of said acts contained an express reservation of lands to which preemption or homestead claims had attached at date of definite location of the roads. The cases cited, therefore, involved acts containing language identical with that usually employed in railroad grants, and which, as hereinbefore mentioned, are construed to be grants *in præsenti*, but which language is materially different from that which Congress deemed proper to use in the act of June 20, 1894. It must be presumed that Congress, at the time of the passage of the act under consideration, had knowledge of the construction which the courts had placed upon the language usually employed in creating grants to aid in the construction of railroads and other similar grants *in præsenti*, and the fact that materially different language was used in the act of 1894 evidenced a legis-

lative purpose to make the provisions of the act applicable to any lands of the United States, within the State, which, at the date of the exercise by the governor of the authority therein conferred, were of the descriptive class designated therein. The right granted by this act is akin to the right to indemnity in lieu of disposals prior to definite location of the road, usually contained in grants of public lands to aid in the construction of railroads, under which no title passes until selection is made in the manner prescribed in the act making the grant. Oregon and California R. R. Co. (28 L. D., 363); Kansas Pacific Railroad *v.* Atchison Railroad (112 U. S., 414, 421); St. Paul Railroad *v.* Winona Railroad (*ibid.*, 720); Barney *v.* Winona and St. Peter Railroad (117 U. S., 228, 232); United States *v.* Missouri, Kansas and Texas Railway Co. (141 U. S., 358).

In view of the foregoing considerations and authorities, therefore, it is apparent that the act of June 20, 1894, *supra*, was not a grant *in præsenti*, vesting in the State a then present title to any lands of the United States, within said State, of the designated class, but that title thereto only vested in and accrued to the State thereunder upon selection and certification, legally exercised as therein authorized, and subsequently approved; and inasmuch as no rights to or interest in any lands of the designated class could be acquired by the State, under said act, until the same were selected as therein authorized, the Department is unable to see anything either in the letter or apparent purposes of the statute which would render its provisions inapplicable to any lands of the United States, within said State, which, at date of selection, were of the class designated in said act. The construction heretofore placed upon said act by the Department, therefore, was not erroneous and will be adhered to, and it follows that the land in controversy was subject to the State's selection, if, at date of such selection, it was of the descriptive class designated in said act.

The remaining question, then, for determination is, whether said land, on May 10, 1895, the date of the State's selection, was "unoccupied and uninhabited" within the meaning of said act of June 20, 1894, *supra*.

The testimony submitted, on behalf of Whittington, at the hearing shows that he was, at date of hearing, an unmarried man about 26 years of age; that he deadened the trees upon about one and a half acres of said land in 1884, when he was twelve or thirteen years of age, and that he constructed out of pine timber a small house on the land in 1893; that at the date of the hearing his improvements were worth fifty or seventy-five dollars; and that at such time he had his bed and cooking utensils upon the land and slept there when not away at work with his team. The testimony on behalf of the State shows that, in May, 1895, there was no roof on or floor in the house, which the State's witnesses designate as a "pen," unfit for human habitation;

that the house or pen was first covered with a quilt; that a roof was put on it in 1897; that subsequently the roof was blown off and thereafter the house remained in that condition; and that Whittington never occupied or resided upon the land, but lived with his father not far distant from the land in question. It will be seen that the testimony submitted by Whittington is very meagre. In addition to the foregoing he testified that the land in question has been his "homestead" since and including May, 1895, and that he did not apply to make entry thereof until 1897 because he was discouraged, but no testimony in rebuttal of the conditions disclosed by the testimony on behalf of the State was offered. It is evident that the land in question, at date of the State's selection, was not "inhabited" by Whittington, and the nature, character, and extent of his improvements thereon at such time were insufficient to constitute "occupancy" thereof within the meaning of that term as ordinarily used and applied. No part of the land was ever enclosed or cultivated by Whittington, and on May 10, 1895, he was neither in possession nor in the actual use and enjoyment of any part thereof for any of the ordinary farm purposes. In the case of Frank Johnson (28 L. D., 537) it was held by the Department that—

> An *occupant* of a tract of land, as the word is ordinarily used, is one who has the "use and possession" thereof, whether he resides upon it or not, and Congress so used the word in the act of January 18, 1897.

This definition seems applicable to the act under consideration, and so applying it, the land in question was, at the date of the State's selection, "unoccupied and uninhabited" within the meaning of the act of June 20, 1894, *supra*.

In this connection, it is contended by counsel for the State that the words "unoccupied and uninhabited," found in the act of 1894, *supra*, and the provisions of the act of March 2, 1895, *supra*, according to *bona fide* settlers a preference right of entry of the lands restored by the latter act, should be construed *in pari materia*, and that when so construed, residence upon the land is essential in order to defeat the State's selection.

This contention is unsound. The preference right provision of the act of 1895 is as follows:

> 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.

The preference right of entry accorded *bona fide* settlers on said lands at date of the passage of said act applied only to qualified homesteaders who were then actually residing upon said lands, to the exclusion of a home elsewhere (Carillo *v.* Romero *et al.*, 28 L. D., 2)

Whittington, however, could not in any event avail himself of the preference right accorded by said act because he failed to assert any claim to the land in question by filing an application to enter within the period prescribed therein. (Diaz *v.* Glover, 27 L. D., 144.) But because Whittington was not residing upon the land at date of the passage of said act, and failed to file an application to enter within the statutory period, it does not necessarily follow that the land was of the descriptive class subject to the State's selection. The designated lands authorized to be selected by the State are defined by the language of the act of June 20, 1894, *supra*, and not by the provisions of the act of March 2, 1895. Both counsel for appellant and the State complain of the rule applied by your office, in consideration of the case, touching the burden of proof. The Department is unable to find in your decision any direct expression in this regard.

It devolved upon the State, upon selection made, to show affirmatively in the first instance that the lands so selected were of the character designated in the act of 1894, *supra*, but such showing having been made according to the requirements of your office and the Department, and such selection having been approved, it was thereafter incumbent upon the party attacking the validity of the approved selection to assume the burden of proof. Johns *v.* Marsh *et al.* (15 L. D., 196); Willis *v.* Parker (8 L. D., 623).

There being no error apparent in the record, your decision is affirmed.

HOMESTEAD ENTRY—QUALIFICATIONS—ACT OF JUNE 6, 1900.

BOLIN *v.* MCCULLY.

Under the act of June 6, 1900, amending section three of the act of May 14, 1880, an unmarried woman who settles upon, improves, and establishes and maintains a *bona fide* residence upon a tract of public land, with the intention of obtaining title thereto under the homestead law, and thereafter marries, is not by her marriage disqualified from making entry for said tract.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 18, 1900.* (V. B.)

Joseph B. McCully has made application for a rehearing in the case of Amanda Bolin against him, wherein, by departmental decision of March 29, 1900 (unreported), was affirmed that of your office, holding for cancellation the homestead entry of said McCully for the SW. ¼ of Sec. 21, T. 33 N., R. 2 E., Lewiston, Idaho, and awarding to the contestant the superior right to said land.

As a basis for said rehearing McCully alleges that Amanda Bolin, on February 5, 1900, married John Bolin, who had theretofore made homestead entry for another tract of land, which he thereafter relin-

quished for a valuable consideration, thereby, it is alleged, exhausting his homestead right. Accompanying said petition is filed what purports to be a certified copy of the marriage license and marriage certificate of said Amanda Bolin and John Bolin, dated February 5, 1900.

In the answer of Mrs. Bolin to the petition the marriage to John Bolin is not denied, but it is insisted that inasmuch as the marriage took place after her application to enter the tract in controversy was made, the subsequent marriage cannot deprive her of the right she acquired by her prior settlement and application, and further, that the alleged disqualification of her husband, if it exists, can have no effect upon her rights in the premises.

Without entering upon a discussion of the questions thus presented, the application for a rehearing must be denied.

Since said application was filed, Congress passed an act, June 6, 1900 (Public—193), amending section 3 of the act of May 14, 1880 (21 Stat., 140), as follows:

> Where an unmarried woman who has heretofore settled, or may hereafter settle, upon a tract of public land, improved, established, and maintained a *bona fide* residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, and has married, or shall hereafter marry, before making entry of said land, or before making application to enter said land, she shall not on account of her marriage forfeit her right to make entry and receive patent for the land: *Provided*, That she does not abandon her residence on said land, and is otherwise qualified to make homestead entry: *Provided further*, That the man whom she marries is not, at the time of their marriage, claiming a separate tract of land under the homestead law.

It appears from the decisions in the case that Mrs. Bolin, a widow, with seven children, settled upon the tract in controversy, then vacant and unsurveyed, in December, 1895, and erected a small house; in March thereafter she established residence, with her family, therein, and commenced to enclose and improve the tract, posting notices stating that she had taken the land as a home; that she remained upon the tract until she and her hired help were driven away by the threats and intimidating conduct of McCully, who subsequently made homestead entry of the tract, the day the same became subject to entry, and she forthwith filed contest against his entry. The Department declared that her—

> settlement was clearly prior to that of McCully, and her right superior. Her failure to maintain residence on the tract, in view of McCully's threats and conduct, was excusable.

In view of the finding of facts and the ruling of the Department, it is apparent that Mrs. Bolin comes within the description and purview of the cited act. As an unmarried woman she settled upon a tract of public land, improved, established and maintained (in contemplation of law) a *bona fide* residence thereon, with the intention of obtaining title thereto under, and by compliance with the requirements of, the

homestead law, and thereafter married, before making entry of said tract.

This marriage is, therefore, under said act of Congress, of itself, no bar to her entry, if she be otherwise qualified.

Ordinarily, the qualifications of one who seeks to make entry to the public lands will not be prescribed or passed upon by this Department until the application to enter comes here in the regular way. But the question of Mrs. Bolin's qualifications being directly presented by the motion for rehearing, it seems opportune, upon the denial of that motion, to instruct your office that upon the presentation of application to make entry of the tract in question by Mrs. Bolin, McCully's entry will be canceled and her entry will be allowed; provided that she will supply the affidavit of her husband, or other competent testimony, to show satisfactorily that at the time of the marriage he was not claiming a separate tract of land under the homestead law; also her own corroborated affidavit that she has not abandoned her residence on said tract, otherwise than she was compelled to remove personally from the land by the threats and intimidation of McCully.

FOREST RESERVE—EXCEPTED LANDS.

JOHN E. HENRY.

Lands within the limits of a forest reserve, which at the date of its establishment are covered by a lawful pre-emption filing of record, are excepted from such reserve subject to claimant's continued compliance with law; but in the event of the cancellation of such filing the land at once becomes a part of the reserve.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 18, 1900.

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

This is an appeal by John E. Henry from the decision of your office dated March 19, 1900, rejecting his applications, made March 7, 1898, (1) to have the S. ½ of the NE. ¼, the NW. ¼ of the SE. ¼ and NE. ¼ of the SW. ¼ of section 6, T. 21 S., R. 30 E., M. D. M., Visalia, California, land district, eliminated from the Sierra Forest Reserve and restored to the public domain, and (2) to be allowed to make homestead entry thereof. His application to have the land eliminated from the reserve and restored to the public domain was rejected on the ground that the showing made was not sufficient to justify the elimination of the tract, citing Jared Woodbridge, 29 L. D., 531; and his application to make homestead entry thereof was rejected on the ground that being part of a forest reserve the land was not subject to homestead entry, his alleged subsequent purchase of the possessory claim and improvements of another party giving him no right to the land. The appeal assigns error both of law and of fact.

It appears that the township in which the land in question lies was

surveyed in December, 1883, and that the plat of the survey was filed in the local office February 9, 1884. November 10, 1884, Lewis J. Elster filed his pre-emption declaratory statement for the land, alleging settlement September 1, 1884. The land being unoffered he had thirty-three months from the date of his settlement within which to make final proof and payment therefor, that is, until June 1, 1887. No final proof has been made by Elster. On April 17, 1886, however, long before final proof by him became due, the survey of the township was suspended by your office on account of alleged fraud in the survey, which suspension still continues. The effect of such suspension was to extend the time for making final proof and payment until after the suspension shall have been removed.

Elster's pre-emption filing appears, therefore, to be still alive.

The said forest reserve was established by proclamation of the President February 14, 1893 (27 Stat., 1059). By its express terms all lands within the boundaries of the reserve, which were, at the date thereof, "covered by any lawful filing duly of record in the proper United States land office," were excepted from the force and effect thereof, but with the proviso that such exception was not to continue to apply to any such tract of land unless the claimant should continue to comply with the law under which the filing was made. Elster's filing excepted and still excepts the land in question from the operation of the said proclamation. Such land is not now, therefore, and never has been a part of the said reserve, and the application to eliminate the same and restore it to the public domain does not rest upon any basis of law or of fact.

If it be true, as Henry alleges, that Elster sold and delivered possession of the land and the improvements thereon to him in October, 1897, such action on the part of the latter would be ground for cancelling his filing of record. If such cancellation were made, however, the land would immediately, by the terms of the said proclamation, become part of the said reserve, and would not be subject to homestead entry so long as it remained a part of the reserve.

It appears that the land was examined, under direction from your office, by Wm. C. Bartlett, then forest superintendent. The material facts stated in his report, which are the same in substance as stated in affidavits filed by Mr. Henry, are set out in your office decision and need not be recited here. They were not found sufficient in the opinion of your office to justify the elimination of the land, even assuming, as your office did erroneously, that the land was part of the said reserve. The Department sees no reason to differ from the view taken by your office in relation to the elimination of the land, if it were in fact part of the reserve. If it were freed, therefore, from Elster's pre-emption filing and became part of the reserve it would not avail Henry anything.

The rejection of his applications to have the land eliminated from the said reserve and restored to the public domain, and to be allowed to make homestead entry thereof, is affirmed, in accordance with the views herein expressed.

In view of Henry's allegations that Elster sold and delivered possession of the land and the improvements thereon to him, you will call upon the latter to show cause, within sixty days from notice, why his said pre-emption filing should not be canceled of record, and will thereafter take such action in the premises as may seem to be required.

FORFEITURE ACT OF MARCH 2, 1889—JURISDICTION—NOTICE—ACTS OF MARCH 3, 1887, AND MARCH 2, 1896.

LAKE SUPERIOR SHIP CANAL, RAILWAY AND IRON CO. ET AL. *v.* PATTERSON.

The confirmation by the third section of the act of March 2, 1889, forfeiting certain lands granted to aid in the construction of railroads, so far as it may embrace lands included in approved selections made by the State of Michigan on account of the canal grant of July 3, 1866, is dependent upon whether such lands were, on May 1, 1888, in the actual occupancy of a *bona fide* pre-emption or homestead claimant; if so, the pre-emption or homestead claim is confirmed without regard to such previously approved State selection, but proof of qualification and compliance with law on the part of such homestead or pre-emption claimant must be shown in the usual manner.

The presence of rival pre-emption claimants on May 1, 1888, each coming within the confirmatory provisions of the forfeiture act, will not operate to the advantage of a claimant under the canal selection.

In the absence of some specific provision to the contrary in legislation respecting the public lands, the administration thereof is wholly within the jurisdiction of the land department, and the determination of rights under the act of March 2, 1889, falls within that jurisdiction.

The suit instituted by the United States in December, 1890, in the circuit court of the United States for the western district of Michigan, against the Lake Superior Ship Canal, Railway and Iron Company, did not operate to divest the land department of jurisdiction, or require a suspension of proceedings before the land department upon a claim filed by a pre-emptor invoking the confirmatory provisions of said forfeiture act, where such pre-emptor was not made a party to said suit until long after the filing of his claim in the land department.

The proceedings by a homestead or pre-emption claimant for the purpose of obtaining proper recognition of his claim under the confirmatory provisions of the forfeiture act of March 2, 1889, are essentially of the same nature as those governing the submission of final proof in ordinary homestead and pre-emption cases, and rules of practice five to sixteen, inclusive, respecting notice and hearings in contest cases, do not apply thereto.

There is no statute requiring special notice to any person or claimant in proceedings before the land department to establish a claim for public land; but in the practice followed special notice of such proceedings is given to all adverse claimants as shown by the records of the local office. But where it appears that knowledge of the proceeding has been brought to the attention of an adverse claimant,

or where notice of his claim was not filed in the local land office, such claimant will not be heard to plead want of notice on the ground of not having been specially notified.

The preference accorded by said forfeiture act to pre-emption and homestead claimants of the class therein described, is in no respect affected by the confirmatory provisions of either the act of March 3, 1887, or March 2, 1896, where the same are invoked by a claimant under a canal selection, because the earlier act is confined to certifications or patents "to or for the use or benefit of any company claiming by, through or under grant from the United States to aid in the construction of a railroad," and the later does not in terms include canal selections or by its language evidence a purpose to repeal such preference.

Irregularities in proceedings before the General Land Office not indicative of favor or partiality, affecting merely a suspension of action and subsequent resumption of the consideration of a case, or refusal to afford an opportunity to be heard orally, are not deemed material, where it appears that all parties had ample opportunity to be heard upon the merits, through written or printed briefs, before the suspension, and have been fully heard by printed briefs and in oral arguments before the Secretary of the Interior upon appeal.

The Secretary of the Interior in the exercise of his supervisory power as head of the land department may, even in the absence of an appeal, transfer the consideration of any matter pending before the General Land Office to the Deparment, and after due opportunity to the parties in interest to be heard, may render decision therein correcting and obviating any errors or irregularities in the proceedings or decision of that office.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 19, 1900.* (F. W. C.)

This case involves the NE ¼ of Sec. 3, T. 44 N., R. 35 W., Marquette, Michigan, land district, and is before the Department upon the separate appeals of the Lake Superior Ship Canal, Railway and Iron Company and Willard P. Cook from your office decision of May 4, 1898, holding that Ann Patterson had a *bona fide* pre-emption claim to said land on May 1, 1886, arising and asserted by actual occupation of the land under color of the laws of the United States, which was confirmed by the closing sentence in section three of the act of March 2, 1889 (25 Stat., 1008).

The land is within the clear limits of the grant made by the act of June 3, 1856 (11 Stat., 20), to the State of Michigan, to aid in the construction of a railroad from Ontonagon, in said State, to the Wisconsin State line. The line of said railroad was definitely located November 30, 1857, and this land was certified to the State of Michigan on account of said grant December 12, 1861. The governor of the State, on August 14, 1870, executed a relinquishment of the claim of the State and a reconveyance of the land to the United States. This relinquishment was treated as effective by the land department, and the land here in controversy, being thereafter selected by the State for the benefit of the Portage Lake and Lake Superior Ship Canal Company, the beneficiary named in the act of July 3, 1866 (14

Stat., 81), was accordingly certified to the State by the Secretary of the Interior May 22, 1871.

By the first section of the act of March 2, 1889, the lands granted to the State of Michigan by the act of June 3, 1856, which were opposite to and coterminus with the uncompleted portion of any line of railroad in aid of which said grant was made, were forfeited to, and the title thereto resumed by, the United States, and the lands were declared to be a part of the public domain. The land here in controversy was opposite to and coterminus with the uncompleted portion of the line of road from Ontonagon to the Wisconsin State line.

By the third section of said act it was provided:

> That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior, under color of the public land laws, where the consideration received therefor is still retained by the government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby confirmed: *Provided, however*, That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales or entries of lands, or any tract in any such State selection, upon which there were *bona fide* pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

May 1, 1889, Patterson tendered at the local office a preemption declaratory statement covering the land here in question, alleging actual and continued occupancy thereof since before May 1, 1888, under color of the laws of the United States, but her declaratory statement was rejected by the local officers, and their action affirmed upon successive appeals to the Commissioner of the General Land Office and the Secretary of the Interior. The reason assigned for the rejection was the selection and certification of the land for the benefit of the Portage Lake and Lake Superior Ship Canal Company under the act of 1866. January 7, 1895, after the decision of the supreme court in the case of Lake Superior Ship Canal, Railway and Iron Company *v.* Cunningham (155 U. S., 354), holding such a selection and certification to be wholly void and of no effect, Patterson filed in the local office her affidavit, setting forth her claim to the land in the following language:

> That on the 31st day of March, A. D. 1888, she settled upon and improved the NE. ¼ of Sec. 3, in T. 44, of R. 35 W., in the Marquette land district, that such settlement and improvement was made for the purpose and in the expectation of making for herself a permanent home thereon; that she had, on the 1st day of May, A. D.

1888, a *bona fide* pre-emption claim thereon, which claim arose and was asserted by her actual occupation of said premises under the color of the laws of the United States; that such claim was within the spirit, intent and express provisions of the act of Congress approved March 2, 1889, and was in fact expressly confirmed thereby; that she has, by residence upon, improvement and occupation of said premises, fully complied with all the requirements of law respecting pre-emption claims upon the public domain. This affiant further prays that said tract may be certified and patented to her by the Department of the Interior of the United States, under and by virtue of said confirmatory act of Congress, and other acts of Congress relating thereto. This affiant further states that she can, if necessary, substantiate the foregoing matters of fact, entitling her to the relief here prayed, by the affidavits of the following persons residing near said tract: Jos. Poirrier, Fred H. Williams, James McGuire, Geo. Reed, Lyman Carter, John Lynch.

Upon the filing of this affidavit a hearing was ordered thereon by the local officers, and notice thereof was posted in a conspicuous place in the local land office for a period of six weeks just preceding the time fixed for the hearing and was published for a like period in a newspaper printed and published in the county where the land is situate, said newspaper being the one nearest the land. The notice read as follows:

U. S. Land Office Marquette, Mich., Jan. 8, 1895. Notice is hereby given that Ann Patterson has filed in this office evidence that she had on the first day of May A. D. 1888, a *bona fide* pre-emption claim to the northeast quarter of Section No. 3, in Township No. 44 north, of Range 35 west; that such claim arose and was asserted by her actual occupation of said tract under color of the laws of the United States; and praying that said premises may be certified, approved and patented to her under the act of Congress approved March 2d. A. D. 1889, and other Congressional legislation. Now all persons who claim an adverse interest in said premises, and desire to contest such claim or the relief sought, are hereby notified to appear before this office on the 18th day of Feb., A. D. 1895, and offer evidence in support of such adverse interest. The claimant names the following witnesses residing near said tract to prove the matters of fact entitling her to the relief prayed: Joseph Poirrier, Fred H. Williams, Lyman Carter, John Lynch, James McGuire.

PETER PRIMEAU, *Register.*
RUSH CULVER, *Receiver.*

Soon after the filing of Patterson's affidavit of January 7, 1895, counsel for the Lake Superior Ship Canal, Railway and Iron Company (for convenience called the canal company herein), acting in its behalf, called at the local land office and was fully informed by the local officers of the pending case and the date of the hearing, and made copious notes, memoranda, etc., from the records of the local office, and took copies of Patterson's said affidavit, and of the notice of hearing issued thereon.

At the time designated in the notice the canal company entered a special appearance and in writing objected to the hearing, urging that the land had passed beyond the jurisdiction of the land department by reason of the certification to the State for the benefit of the Portage Lake and Lake Superior Ship Canal Company, which certification was

claimed to have been confirmed by the act of March 2, 1889; that a suit in equity, brought by the government to test the title to said land, was pending in the circuit court of the United States for the western district of Michigan, whereby that court had acquired jurisdiction of the matter to the exclusion of the land department; and that special notice of the hearing had not been given to the Portage Lake and Lake Superior Canal Company, or its transferees. The canal company did not name any transferees of the Portage Lake and Lake Superior Ship Canal Company or request that any of them be specially notified or that the hearing be postponed for that purpose, nor did it assert that it did not have actual or timely notice of the claim of Patterson or of the hearing ordered thereon or that, for any reason, it could not safely proceed with the hearing at the time designated. The local officers overruled the objections to the hearing, to which ruling the canal company excepted, and the hearing was then proceeded with, the canal company fully participating therein by cross-examining Patterson's witnesses, examining witnesses in its own behalf and producing other evidence in support of its claim.

The evidence taken at the hearing shows that Patterson is a native born citizen of the United States, and was over twenty-one years of age May 1, 1888; that in the latter part of March, 1888, she made actual settlement upon the land in controversy with the intention of making it her home and acquiring title thereto under the pre-emption law; that she repaired and made habitable a dilapidated and abandoned log cabin which she found upon the land, and on May 1, 1888, was actually residing upon and occupying the land as her permanent place of abode; that since then she has continuously resided upon and occupied the land, has cleared and cultivated a portion thereof and has placed improvements thereon of considerable value; and that her said claim was initiated and maintained in good faith. The evidence, however, leaves in some doubt the qualifications of Patterson as a pre-emptor. It is shown that prior to her said settlement she was the wife of one Hugh Patterson, but whether their marriage relation was dissolved before May 1, 1888, either by a decree of divorce or by his death, is left somewhat uncertain, although both are suggested by her testimony. There is no affirmative showing that she was not on May 1, 1888, the proprietor of three hundred and twenty acres of land in any State or Territory, that she had not theretofore exercised a right of pre-emption, or that she did not quit or abandon a residence on land of her own in the same State or Territory to take up a residence on the land here in question, but that which is shown goes far toward inducing the belief that she possesses the required qualifications. The canal company produced no evidence upon this subject.

The records of the local office showed the selection and certification of the land for the benefit of the Portage Lake and Lake Superior

Ship Canal Company, the beneficiary named in the canal grant, but did not show any transfer by that company of any right or interest in the land. At the hearing the Lake Superior Ship Canal, Railway and Iron Company submitted evidence showing that the name of the original canal company had been changed in 1871 to the Lake Superior Ship Canal, Railroad and Iron Company; that in 1877, through certain foreclosure proceedings, the lands, property and corporate rights and franchises of the last-named company were transferred to the Lake Superior Ship Canal, Railway and Iron Company; that on July 3, 1889, this company executed a contract with the Metropolitan Lumber Company, purporting to transfer to such lumber company the pine timber and pine trees upon certain of the lands claimed by it under said canal grant, including the land in controversy, which contract contained the following stipulation, the canal company being designated as party of the first part and the lumber company as party of the second part:

> In consideration of the execution of the foregoing agreement of sale, and the full performance thereof by the party of the second part, above named party of the first part agrees to defend and protect the title to said timber and the right to cut the same to the said party of the second part in the fullest way against the claims of all persons claiming the same under the homestead or pre-emption laws, and to furnish men to watch the same to the same extent as heretofore, which men said party of the second part shall have the right to call on from time to time to go to such parts of said lands as may be deemed necessary by it, to look after trespasses or depredations actually committed, anticipated or feared. Said party of the first part further agrees to furnish counsel free of charge to defend the title to said timber, and the right of said party of the second part to cut the same, against all such claimants and generally to take such measures to protect said property and the title thereto, as has been heretofore adopted by said party of the first part, until all questions of title to said lands and timber have been settled:

and that on April 8, 1891, the canal company transferred its claimed interest in the lands selected and certified under the canal grant, to the Keweenaw Association, Limited, a partnership association formed under the laws of Michigan, but this transfer was made subject to the rights of said lumber company under said contract.

After the hearing was concluded, and on February 26, 1895, the local officers held that an absolute title to the land in controversy was confirmed in Patterson by the act of March 2, 1889, and recommended that it be patented to her accordingly. They also made the following alternative recommendation:

> If, however, it should be held that said act of Congress only confirmed a right to acquire title under the homestead or pre-emption law, we recommend that claimant's proof be approved, and that upon payment of the purchase price for said land we be allowed to issue to her final receipt for said tract.

After said decision Willard P. Cook filed in the local office his affidavit, corroborated by that of John Ross, alleging that Cook settled

upon the land about December 1, 1884, and made substantial improvements thereon; that he was upon the land and living there "about every three months" from the summer of 1885 to January or February, 1888; that he was absent from the land from January or February 1888 until in June following, when he returned to find a cabin erected by him occupied by a woman "whom he has since learned to be Ann Patterson;" that he "told her that he wanted to stay there, and she said he could not stay there, and to get out of there or she would shoot him;" that at the time of filing his affidavit he had just learned of the hearing and decision on Patterson's claim; that his right to the land was prior and superior to that of Patterson; and that he desired a hearing to establish his claim. He did not claim to have been in actual occupation of the land May 1, 1888, or at any time thereafter, or to have done anything toward the assertion or maintenance of his claim after his interview with Patterson in June 1888. He had tendered a pre-emption declaratory statement for the land December 6, 1884, which was rejected by the local officers, and this ruling was, on appeal to the Commissioner of the General Land Office, affirmed September 11, 1888. No appeal was taken from this decision of the Commissioner, nor did Cook tender a declaratory statement for the land, or apply to make entry thereof within three months after the act of March 2, 1889, or otherwise assert any further claim to the land until after the decision of the local officers in Patterson's favor.

In response to Cook's showing Patterson filed the affidavit of herself and several others, controverting the statements in Cook's affidavit, but the local officers, without considering the counter-showing, denied Cook's application for a hearing, holding, *inter alia*, that he was bound by the notice given and was concluded by the hearing had and the decision rendered.

The canal company and Willard P. Cook, separately appealed to your office.

The facts about the suit in the circuit court of the United States for the western district of Michigan, which is claimed to involve the title to the land here in question and to deprive the land department of all jurisdiction and authority in the premises, are as follows:

On and prior to October 9, 1890, there was considerable uncertainty and difference of opinion as to the effect of the act of March 2, 1889, upon the lands certified to the State of Michigan as aforesaid, by the Secretary of the Interior, under the canal grant. The appellant canal company had commenced actions in ejectment in the circuit court of the United States for the western district of Michigan, against many of the pre-emption and homestead claimants for said lands, and three of said cases had been selected as test cases and were then pending in the supreme court of the United States upon writs of error brought to reverse judgments of the circuit court rendered against the canal

company. One of these, the Cunningham case (155 U. S., 354), involved the right of the canal company to the immediate possession of a tract as against a homestead claimant who was in the actual occupancy thereof May 1, 1888; and another, the Finan case (155 U. S., 385), involved the right of the canal company to the immediate possession of a tract as against a pre-emption claimant who did not make settlement upon or enter into the actual occupation of such tract until after May 1, 1888. The special features of the third case need not be here mentioned. October 9, 1890, the Acting Commissioner of the General Land Office, in a communication to the Secretary of the Interior, called attention to the existing controversy respecting these lands between the canal company on the one part and the pre-emption and homestead claimants upon the other, and to the test cases pending in the supreme court, and then said:

> Meanwhile, as reported by agent Worden, the canal company is making preparations to cut all the timber on these lands before the suits can be decided by the supreme court. To this end roads are being made and camps built upon the lands in controversy and Agent Worden further states that there have already been serious collisions between the contending parties; the company openly asserting that they "will have the timber" on the said lands.
>
> I am strongly of the opinion that until the question of the title to the lands involved in this contention is finally passed upon by the proper authorities and confirmed in accordance with the provisions and restrictions of the act of Congress (approved March 2d, 1889) declaring the forfeiture, all persons should be enjoined from cutting timber for purely speculative purposes from any portion of the lands within the grant the title to which is yet in controversy.
>
> I therefore respectfully recommend that the within letter be transmitted to the Honorable Attorney-General with the request that, without delay, he cause proper action to be taken to prevent the further wholesale destruction of timber on these lands by all parties who are cutting or causing or procuring the cutting and removal of timber from the lands in question for purpose of sale or speculation pending the decision by this office as to the rights and titles involved.

October 11, 1890, the Acting Secretary of the Interior, in a letter to the Attorney-General transmitting and approving the recommendation so made by the Acting Commissioner of the General Land Office, said:

> In view of the facts as set forth in the Acting Commissioner's letter and communication from Agent Worden, I concur in the recommendation of the Acting Commissioner, and request that proper action be promptly taken to prevent the further wholesale destruction of timber on these lands, by all parties who are cutting or causing or procuring the cutting and removal of timber for purpose of sale or speculation, pending a decision as to the rights and titles involved.

In December 1890 the Attorney-General, evidently acting at the suggestion of the Acting Commissioner of the General Land Office, as approved by the Acting Secretary of the Interior, filed a bill in equity in the circuit court of the United States for the western district of Michigan, on behalf of the United States and against the canal com-

pany and others claiming to have obtained from the canal company a right to cut timber upon said lands. The bill referred to the railroad land grant made by the act of June 3, 1856, and recited the proceedings had thereunder; referred to the act of March 2, 1889; recited the settlement and occupancy by pre-emption and homestead claimants of portions of the lands certified to the State as aforesaid by the Secretary of the Interior under the canal grant; referred to the three test cases aforesaid, which were then pending in the supreme court of the United States; and alleged that the United States was desirous of protecting said pre-emption and homestead claimants; that the timber upon said lands was a material and necessary factor in enabling such claimants to make the improvements required by law, and unless an injunction issued out of that court as prayed in the bill, said lands would be cut over and devastated by the canal company and those claiming under it, "during the pendency of said appeals." The prayer of the bill was that the defendants be enjoined and restrained "until the further order of the court" from selling, assigning, transferring, cutting or removing any of the timber upon any of said lands, and for such other and further relief in the premises as to the court should seem meet and be agreeable to equity and good conscience. The bill asserted ownership in fee of said lands by the United States, but did not contain a prayer for the cancellation of the certification thereof to the State under the canal grant, or for the quieting of the title to the lands as against the canal company. It did not name any of the pre-emption and homestead claimants and did not make any of them parties. The tract claimed by Patterson was a part of the lands affected by the bill. About February, 1891, the canal company, with its co-defendants, answered the bill of the United States, and by such answer asserted title to said lands in the canal company, under the certification to the State made by the Secretary of the Interior under the canal grant, and under the confirmatory provisions of section 3 of the act of March 2, 1889, and alleged that there were not, on or prior to May 1, 1888, upon any of said lands, any *bona fide* pre-emption or homestead claims arising or asserted by actual occupation of the lands under color of the laws of the United States within the meaning of the act of March 2, 1889. At the same time the canal company filed in said suit its cross-bill against the United States and the Attorney-General thereof, repeating the matters set forth in said bill and answer, and praying that the title to the lands affected by said suit be quieted in the canal company as against the United States. This cross-bill did not name any of the pre-emption and homestead claimants and did not make any of them parties. In May, 1895, and after the hearing and decision in the local land office upon the claim of Patterson and upon the other pre-emption and homestead claims to the lands affected by said suit, the canal company and the Keweenaw Association, which had been

admitted as a defendant to the bill of the United States, filed in said suit, with the leave of the court obtained May 21, 1895, a supplemental cross-bill against the United States, the Attorney-General thereof, and the several pre-emption and homestead claimants to said lands, alleging, among other things, that the three test cases aforesaid had been decided by the supreme court of the United States December 10, 1894; that Ann Patterson and other persons named in such supplemental cross-bill were asserting and claiming that they had, on May 1, 1888, *bona fide* pre-emption or homestead claims upon portions of the lands affected by said suit, and had applied to the register and receiver of the United States land office at Marquette, Michigan, to be allowed to make proof of their said claims; that none of said persons had, on May 1, 1888, a *bona fide* pre-emption or homestead claim upon any of said lands arising or asserted by actual occupation of the land under color of the laws of the United States; that the title to said lands was by the act of March 2, 1889, confirmed and established in said canal company; that the officers of the land department of the government have no power or jurisdiction, as against the canal company or those claiming under it, to hear or determine the question whether there were *bona fide* pre-emption or homestead claims upon said lands on May 1, 1888, arising or asserted by actual occupation of the land, under color of the laws of the United States; and that the assertion of said pre-emption and homestead claims to said lands under section three of the act of March 2, 1889, and the said applications to the register and receiver of the said land office for permission to make proof of said claims cast a cloud upon the title of the canal company and those claiming under it. The prayer of this supplemental cross-bill was that a decree be entered in favor of the cross-complainants, declaring that said lands were confirmed to the canal company by the act of March 2, 1889, and enjoining said pre-emption and homestead claimants from prosecuting their alleged pre-emption and homestead claims to said lands before any officer of the land department. Upon the showing made in the bill filed by the United States a restraining order was issued against the defendants to that bill, prohibiting them from interfering with the timber upon said lands; but thereafter, and long before the filing of said supplemental cross-bill, this restraining order was modified to the extent of permitting the defendants to the bill of the United States to cut down and remove the timber, upon their giving a bond or bonds to account for the value thereof if so required by the court. No restraining order or injunction has been issued against the pre-emption or homestead claimants or any of them, under the allegations and prayer of the supplemental cross-bill. The suit has not proceeded to final decree upon the bill of the United States or upon either of said cross-bills, but is represented as now awaiting a hearing upon a demurrer to the supplemental cross-bill.

At the hearing before the local land office the canal company offered in evidence the pleadings and proceedings in the said suit of the United States, but these did not include the supplemental cross-bill or the order permitting the filing thereof, because there was no supplemental cross-bill, or order permitting its filing, until after a decision had been rendered by the local officers and after appeals therefrom had been perfected by the canal company and Cook.

June 21, 1895, after the Patterson case reached your office, and on the application of the canal company but without notice to Patterson, consideration of the case was suspended until October following, on account of the absence of one of the attorneys for the canal company, whose impaired health unfortunately compelled him to go to Europe for treatment. After the return of this attorney, and on January 2, 1896, counsel for the canal company were notified by your office that the case was reached for consideration, and were requested to file an argument or brief on behalf of the company. Presumably in response to this request they filed in your office, January 24, 1896, a copy of a proposed and unsigned stipulation providing for an oral hearing, and specifying the points to be discussed, with the statement that the same had been submitted to counsel for Patterson. February 25, 1896, nothing more having been done in the premises, your office again called the attention of counsel for the canal company to the status of the case and allowed ten days for the presentation of oral or written argument. February 28th counsel for the canal company requested that an oral argument be permitted upon March 4th, stating that notice of such request had been given to counsel for Patterson. February 29, 1896, counsel for Patterson, in a letter to your office, stated that they were that day, for the first time, notified of a desire on the part of the canal company to be orally heard; that Patterson's attorneys did not favor an oral hearing; that their printed brief on behalf of Patterson had been on file in your office since July, 1895; and that they rested the case on that brief. Oral argument was not had on March 4th, but in a telegram of March 5th, your office notified Benjamin Vosper, of Ionia, Michigan, one of Patterson's attorneys, that oral argument would be had at 10 a. m. March 7th. To this Mr. Vosper replied, by a telegram dated March 5th: "Can't reach there for argument, besides wife sick. We submit cases on printed briefs filed. Have not seen company's brief." It is stated by counsel for the canal company, in a letter to the Secretary of the Interior, dated May 13, 1898, that at the time so fixed, March 7, 1896, they "appeared before the Commissioner and made a preliminary statement or argument to show that the Commissioner should not proceed to consider the case until the determination of an equity suit pending in the State of Michigan in which the United States is complainant, affecting the lands in controversy," and that "after hearing us and ascertaining the

character and proceedings in the suit in Michigan the Commissioner decided that he would not hear argument on the merits of the case presented by the appeal, but would postpone the hearing and suspend action on said case and other like cases until the determination of the Michigan suit." The only application for this suspension was made at the oral hearing of March 7th, at which Patterson was not represented; no notice of the application was given to Patterson, and no memorandum of the granting thereof was made. However, that the application was in fact, though informally, granted, is shown by the letter of the then Commissioner of the General Land Office, dated July 18, 1896, called forth by an inquiry from Mr. John Burt of Iron River, Michigan, as to the delay in said cases in your office, in which letter it is said:

> I have to say that action in said cases is suspended because of the statement made on behalf of the company "That a suit is now pending in the circuit court of the United States, for the western district of Michigan, in equity, commenced by bill filed by the United States of America, against the said Lake Superior Ship Canal, Railway and Iron Company, and others, whereby the question of the title of the United States to the above tract of land is directly in issue and is the main question to be determined by the court in said cause." In view of this allegation, which applies to all the cases referred to above, this office has deemed it proper and expedient to suspend action on said cases until such time as said suit shall be determined.

After the lapse of about two years, and upon the written request of Patterson that the consideration of the case be proceeded with, your office, deeming it unwise to further prolong or continue the said suspension, took up the case of Patterson and considered the same upon the respective appeals of the canal company and Cook, and rendered decision thereon May 4, 1898. No notice of Patterson's request that the consideration of the case be proceeded with, or of the action of your office in taking up the examination of the case upon its merits, was given to the canal company except that which was given by the decision itself when rendered.

The decision of your office holds, in effect, that sufficient notice was given of the hearing upon Patterson's claim; that the certification of this land to the State under the canal grant of July 3, 1866, was void and of no effect, for the reason that the land was then the property of the State under the prior railroad grant of June 3, 1856; that neither such certification nor the pendency of the suit in the circuit court of the United States is an obstacle to the consideration and determination of this proceeding by the land department; that at the time of the passage of the act of March 2, 1889, none of the parties hereto had any right or title to the land in controversy, and that any present right or title thereto which any of them may have is dependent upon the confirmatory clauses of section three of that act; that upon May 1, 1888, Patterson had a *bona fide* pre-emption claim upon the land, arising and asserted by actual occupancy thereof, under color of the

laws of the United States, which was confirmed by said section three; that because of the existence of that pre-emption claim on May 1, 1888, there was no confirmation of any right or title under the canal selection; that the showing made by Cook was not sufficient to entitle him to a hearing; that section three of the forfeiting act did not confirm in the pre-emption and homestead claimants the full title to the lands actually occupied by them under color of the laws of the United States on May 1, 1888, but did confirm their pre-emption and homestead claims and thereby entitle them to perfect title thereto by compliance with such laws; and that Patterson should be permitted to make entry of and receive patent to the land in controversy, upon complying with the pre-emption law and making due proof thereunder.

JURISDICTION OF LAND DEPARTMENT OVER SUBJECT-MATTER.

The first matter for consideration is the contention that the land department has no jurisdiction of the subject-matter of this proceeding, because by reason of the selection and certification of the land in controversy under the act of 1866, for the benefit of the canal company, and the confirmatory provisions of the act of March 2, 1889, the legal title to the land has, *prima facie* at least, passed from the government, and with it all authority to consider and determine adverse claims thereto has become vested exclusively in the courts. The theory of the canal company is thus stated in its printed brief:

> *Prima facie*, then, all the lands that had been so selected and certified within the railroad grant were, by the act of Congress resuming title, disposed of, and the title thereto was vested in this appellant; and of course the Interior Department had no jurisdiction over them for any purpose.

It is clear from the decision of the supreme court in Lake Superior Ship Canal, Railway and Iron Company *v.* Cunningham (155 U. S., 354), that by the act of June 3, 1856, and the proceedings had thereunder, the title to the land in controversy passed to and vested in the State of Michigan to be used by it in aid of the construction of a railroad between Ontonagon and the Wisconsin State line; that this title remained in the State until it was forfeited to the United States by the act of March 2, 1889; that the relinquishment and reconveyance of said land to the United States by the governor of the State on August 14, 1870, was without authority of law and wholly void; that at the time of the selection and certification of said land under that act for the benefit of the Portage Lake and Lake Superior Canal Company, the land was, by reason of its prior appropriation and disposition under the act of June 3, 1856, not open to selection or certification under the act of 1866; that its selection and certification thereunder were, therefore, unauthorized, and absolutely void; that at the time of the passage of the act of March 2, 1889, none of the parties hereto had any valid right, title or claim to the tract in con-

troversy; that none of them now has any right, title or claim thereto except such as may rest upon the confirmatory provisions of that act; and that if on May 1, 1888, there was upon said land a *bona fide* pre-emption or homestead claim arising or asserted by actual occupation thereof, under color of the laws of the United States, such claim was confirmed by the act of March 2, 1889, otherwise the right and title of the canal company through the selection made under the canal grant was confirmed. In that decision the court said (pp. 378, 381):

> Some of the lands had been selected and certified to the State of Michigan by the officers of the land department in part satisfaction of the canal grant. Some were occupied by settlers claiming the right of pre-emption and homestead, and of these some were lands which had been selected and certified to the State. Possibly some were claimed by the State, or individuals, under the swamp land act, or other acts of Congress. Congress knew that these lands, the title to which it was purposing to resume discharged of all right on the part of the State of Michigan to use them in aid of the construction of a railroad, were already subject to other and conflicting claims, of no legal validity, yet of a character justifying consideration. Under those circumstances, with the view of securing an equitable adjustment of these conflicting claims, it enacted the second and third sections of this act.
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> Evidently, the intent of Congress was that in all cases of a conflict between a selection in aid of the canal grant and the claims of any settler, the confirmation should depend upon the state of things existing at a named date, to wit, May 1, 1888, that date being about ten months prior to the passage of the act. If at that time there were no *bona fide* pre-emption or homestead claims upon any particular tract the title of the canal company was confirmed. If, on the other hand, there was then a *bona fide* pre-emption or homestead claim, arising or asserted by actual occupation of the land under color of the laws of the United States, such pre-emption or homestead claim was to have preference, and was confirmed. It was the purpose to not leave open to dispute between the parties any question as to the relative equities of their claims, but to fix a precise time, and to describe with particularity the conditions which must exist at that time in order to give the one priority over the other. As there could be no valid transfer of a pre-emption or homestead claim, it was unnecessary to distinguish between such claimants and their grantees as was previously done in respect to cash purchasers. The claim of any settler coming within the scope of this clause was declared by it prior to the claim of the canal company, and was also as against the United States confirmed. So that, in any dispute which in this case arises, we must look to the condition of things on the 1st of May, 1888, in order to determine whether the defendant's homestead claim or the certification to the canal company was confirmed.

The court thus makes it entirely clear that Congress fully understood that upon some of the lands embraced in the selections made under the canal grant there were on May 1, 1888, *bona fide* pre-emption or homestead claims arising or asserted by acutal occupation of the land under color of the laws of the United States, which were equitably entitled to confirmation in preference to the selections under the canal grant, and that in such instances it was intended to confirm and give lawful effect to the pre-emption or homestead claims and not to give any effect, *prima facie* or at all, to the selections under the canal grant. To say that, *prima facie*, the selections under the

canal grant were confirmed is to say that *prima facie* there was on May 1, 1888, no *bona fide* pre-emption or homestead claims upon any of said lands arising or asserted by actual occupation of the land under color of the laws of the United States; yet there is no rule of law or experience which sanctions this assumption. It is plainly in contravention of the inference to be drawn from the statute, viz., that there were such claims, else there would have been no provision for their confirmation.

Depending upon the state of things existing May 1, 1888, the confirmation as to any given tract of land took effect, one way or the other, immediately upon the passage of the act of March 2, 1889, and was not *prima facie*, presumptive, or conditional, but absolute. The criterion then in respect of any given tract is, was it, on May 1, 1888, in the actual occupancy of a *bona fide* pre-emption or homestead claimant, under color of the laws of the United States? The act does not specifically place upon the land department the duty of determining this matter, nor does it locate it elsewhere. The duty necessarily rests somewhere, and in the absence of some declaration to the contrary in the act, the decisions of the supreme court declare that it falls upon the officers of the land department. In Catholic Bishop of Nesqually *v.* Gibbon, 158 U. S., 155, 166, 167, which involved the authority to administer similar confirmatory legislation, the court said:

> While there may be no specific reference in the act of 1848 of questions arising under this grant to the land department, yet its administration comes within the scope of the general powers vested in that department. Revised Statutes, section 441, reads: "The Secretary of the Interior is charged with the supervision of public business relating to the following subjects: . . . . Second. The public lands, including mines." And section 453 provides that "the Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in 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]."
>
> Referring to this latter section, and particularly the clause "under the direction of the Secretary of the Interior," it was said by Mr. Justice Lamar, speaking for the court in Knight *v.* Land Association, 142 U. S. 161, 177: "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." See also Barden *v.* Northern Pacific Railroad, 154 U. S. 288, and cases cited in the opinion. It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary.

Referring to the fact that in confirming cash purchases to original purchasers the act expressly authorizes the Secretary of the Interior to determine whether the purchases were made without fraud and in the belief that valid title was being obtained from the United States, the canal company, in its printed brief, urges:

> If Congress had intended to vest such power [to determine in each instance of conflict between a selection under the canal grant and a pre-emption or homestead claim whether the state of things existing May 1, 1888, worked under the act of March 2, 1889, a confirmation of the selection under the canal grant or a confirmation of the pre-emption or homestead claim] in the Interior Department it would have done so expressly, in such case, the same as it did in the case of cash purchasers. It is possible that Congress, in making the confirmation might have coupled with it a provision that the Interior Department should have authority to pass upon these facts, but it is sufficient for this argument that it did not do so. Expressly giving the power in one case and not giving it in the other is conclusive in our favor on this point.

The fault in this suggestion is that it overlooks general laws which refer questions of this character to the land department and which rendered it unnecessary for this act to speak upon the subject unless it was intended in respect of the whole or some portion of the act to depart from the general rule. The silence of the act in this respect is therefore a certain indication of the intention of Congress that it should be administered by the land department.

The terms of the provision confirming pre-emption and homestead claims are such that the *claims* only are confirmed. This is in keeping with section five, which reads:

> That all persons who may have settled upon and are now in possession of any of the lands hereby forfeited, and who may desire to enter the same under the homestead law, shall be allowed, when making final proof, for the time they have already resided upon and cultivated the same.

In respect, then, of these confirmed pre-emption and homestead claims there must be a compliance with the pre-emption and homestead laws, due proofs thereof must be submitted, entries secured and patents obtained. Until the issuance of patent the legal title will remain in the United States.

Any tract of land forfeited by this act which had been selected under the canal grant and upon which there was, on May 1, 1888, a *bona fide* pre-emption or homestead claim arising or asserted by actual occupation of the land under the laws of the United States, is necessarily in this situation: All right and title thereto under the railroad grant of 1856 has been forfeited, the title resumed by the United States, and the land restored to the public domain; the selection and certification under the canal grant of 1866 has been declared by the supreme court to have been unauthorized and absolutely void; Congress has declined to confirm such selection and has confirmed the pre-emption or homestead claim. A tract so situated is public land in the sense

that the legal title thereto is in the United States; that this title can be acquired by the pre-emption or homestead claimant only by compliance with the pre-emption or homestead law and the submission of due proof thereof; and that the failure of such claimant to perfect title to the land will subject it to acquisition by any qualified applicant under the public land laws. The administration of the laws applicable to such a tract falls within the scope of the authority of the land department and is not a matter of judicial cognizance. Nor is the exercise of that authority or the right of the pre-emption or homestead claimant to perfect title to the land and to demand a patent therefor dependent upon a judicial identification of the land as embraced in a confirmed pre-emption or homestead claim.

The fact that it is necessary to determine whether the land is public land is not an obstacle to action by the land department. This question arises with respect to every tract of land over which the land department is asked or undertakes to exercise authority in the administration of the public land laws. From the origin of our public land system it has been the uniform practice for the land officers to decide that question according to the best light which they can obtain, and it is doubtful whether it has ever before been suggested that administrative action must be preceded by a judicial determination of this question.

In Litchfield *v.* The Register and Receiver (9 Wall., 575), the plaintiff, alleging ownership of certain lands under a grant to the Territory of Iowa, and that they were no longer public lands or in any manner subject to sale or pre-emption by the government or its officers, sought by injunction to restrain the register and receiver of the local land office from entertaining and acting upon applications to pre-empt said lands. The court said:

> The lands in controversy are situated within the land district over which these officers have authority to receive proof of pre-emption, and grant certificate of entry. There are within that district, of course, lands open to sale and pre-emption. There would be no use for the land office if there were not. The very first duty which the register is called on to perform, when an application is made to him to enter a tract of land, is to ascertain whether it is subject to entry. This depends upon a variety of circumstances. Has there been a proclamation offering it for sale? Has it been reserved by any action of Congress, or of the proper Department? Has it been granted by any act of Congress, or has it been sold already? These are all questions for him to decide, and they require the exercise of judgment and discretion. The bill shows on its face that these officers, in the exercise of this duty, were considering whether the reservations of the departments and the acts of Congress, and the claim of the plaintiff under them, took these lands out of the category of lands subject to sale and pre-emption, and he asks the court to interfere by injunction to prevent them from determining that question, and that the court shall determine it for them. He says the court below erred because it did not require them to come in and answer to his claim of title, and at their own expense to put the court in posession of their views, and defend their instructions from the commissioner, and convert the contest before the land department into one before the court. This is

precisely what this court has decided that no court shall do. After the land officers shall have disposed of the question, if any legal right of plaintiff has been invaded, he may seek redress in the courts. He insists that he now has the legal title. If the land department finally decides in his favor, he is not injured. If they give patents to the applicants for pre-emption, the courts can then in the appropriate proceeding determine who has the better title or right. To interfere now, is to take from the officers of the land department the functions which the law confides to them and exercise them by the court.

The case here is the same. The land department must first determine whether the lands in controversy are public lands, and must act accordingly with respect to them. If it errs in that determination and gives a patent to one not entitled thereto, redress can then be sought in the courts in an appropriate proceeding. (See also Brown *v.* Hitchcock, 173 U. S., 473, and authorities there cited.)

The conclusion therefore is that the land department has full jurisdiction of the subject-matter and that Patterson selected the proper tribunal when she invoked the exercise of that jurisdiction.

WANT OF NOTICE.

It is next insisted that even if there be jurisdiction of the subject-matter no jurisdiction of the original canal company or its transferees was acquired, because they were not specially served with notice of the hearing upon the claim of Patterson. This contention is not well taken.

There is no general statute prescribing the manner in which notice of proceedings in the land department shall be given. There are statutes (Rev. Stat., Sec. 2325; Sec. 3, Act June 3, 1878, 20 Stat., 89; Act March 3, 1879, 20 Stat., 472; Sec. 10, Act May 14, 1898, 30 Stat., 409) requiring that notice of certain specified proceedings be given by posting and publication, but there is no statute directing special notice to any person or claimant in any instance. Generally speaking, the manner of giving notice of proceedings in the land department is confided to the officers of the Department. In respect of some of these proceedings, those which are most frequently employed, the manner of giving notice is fully covered by published regulations issued for the purpose of insuring uniformity of procedure and the employment of that mode of service which experience has indicated as most consonant with the purpose to be attained. In respect of other proceedings, usually those not frequently employed, the manner of giving notice is left to the officers before whom the proceedings are had, subject of course to the power of the Commissioner of the General Land Office and the Secretary of the Interior, as supervising officers, to disapprove of the notice given if it is not calculated to safeguard the public interests or to afford individuals whose interests are affected due opportunity to present their claims and be heard in support thereof.

This proceeding instituted by Patterson for the purpose of obtaining proper recognition of her pre-emption claim by the land officers, is one in which the claimant under the canal selection is so directly interested and the result of which will be so nearly identical with that which would follow the regular submission of final proof upon her claim, that the statute, published regulations and practice respecting the giving of notice of the intended submission of final proof should be held applicable, as far as may be, to the present proceeding. Tested by this rule the notice given was sufficient. That it conformed to the act of March 3, 1879, *supra*, and the published regulations of April 15, 1879 (6 Copp's Land Owner, 45), governing the notice of the intended submission of final proof upon pre-emption and homestead claims is not questioned; but it is insisted that the original canal company and its transferees should have been, but were not, specially notified and therefore the proceeding was without due notice.

By way of supplementing the notice deemed adequate by Congress in instances of the intended submission of final proof upon pre-emption and homestead claims, a practice has grown up of giving special notice to all adverse claimants shown by the records of the local office, but the manner of giving this special notice has not been uniform or well defined. At one time it was by addressing the posted and published general notice to the adverse claimant by name, "and to whom it may concern," by a line at the top of the notice (see 3 L. D., 112, 196); but this was subsequently disapproved (Reno *v.* Cole, 15 L. D., 174; Andrew Davis, 18 L. D., 525), and it was said that the special notice should be personal, or by registered letter, or by unregistered letter the receipt of which is shown or acknowledged. This practice, while not indispensable to due process or to due notice, was adopted as a matter of precaution and clearly serves a useful purpose. But lest it should embarrass rather than assist the land officers in the due and orderly administration of the public land laws the practice has been extended only to adverse claimants shown upon the records of the local office, that is, the original record claimant and transferees who have placed in the local office a statement of their interest. The purpose of this precautionary notice is to bring to the special attention of adverse record claimants the fact, brought to the general attention of the public through the posted and published notice, that a designated claimant is taking the steps necessary to perfect title to the land and that adverse claimants will be given opportunity at a stated time to be heard in opposition thereto and in support of their own claims. The accomplishment of this purpose, rather than the manner in which it is accomplished, is the matter most to be considered, and where it appears that this purpose has been fully accomplished the particular manner in which it was done becomes immaterial. Its efficiency is demonstrated.

At the time when this hearing was ordered the claimant under the canal selection, shown by the records of the local office, was no longer in existence. By change of name it had become the Lake Superior Ship Canal, Railroad and Iron Company in 1871, and by the sale of its lands, property, and corporate rights and franchises in 1877, under foreclosure proceedings, it had become extinct. Thereafter it had no interest in the land or in any controversy respecting it, and had no corporate existence, so that special notice to it was neither desirable nor possible.

The Lake Superior Ship Canal, Railway and Iron Company, the transferee, through such foreclosure proceedings, takes the position that while it has not filed in the local office any statement of its interest so as to make it a record claimant, it should, nevertheless, have been specially notified, because, as is claimed, the local officers were familiar with the then recent decision of the supreme court in the case of Lake Superior Ship Canal, Railway and Iron Company *v.* Cunningham, and knew of the interest of that company. If this position be conceded the result is not altered. When, soon after the filing of Patterson's affidavit, the local officers informed counsel for this company of the pending case and the date of the hearing, and permitted him to take copies of Patterson's affidavit and of the notice of hearing issued thereon, the company was specially notified, unless counsel was not authorized to act for the company in such matters and did not bring to the company's attention the information so entrusted to him in its behalf; and when, at the time and place named in the notice, the company appeared and objected to the hearing upon the grounds herein stated, it thereby made known that the purpose of the precautionary notice was accomplished, viz., that the company knew of the proceeding, understood its character, and was informed of its opportunity to be heard.

The records of the local office did not disclose that the Metropolitan Lumber Company or the Keweenaw Association, Limited, had any interest in the land in controversy and therefore they were not within the rule respecting precautionary or special notice. They were charged with knowledge of the invalidity of the selection of the land under the canal grant, of the terms of the act of March 2, 1889, and of the claim of Patterson evidenced by her possession of the land; and in all probability they had actual knowledge of the decision of the supreme court in the case of Lake Superior Ship Canal, Railway and Iron Company *v.* Cunningham. They were also notified by the terms of the contract and deed under which they respectively claim that there was a controversy as to the title to the land and that it was probably claimed under the pre-emption or homestead laws. Under these circumstances they could have anticipated the assertion of Patterson's claim before the local land office and have brought themselves

within the rule respecting special notice by filing in that office a statement of their interests and a request that they be specially notified of any proceeding affecting the land. Not having done this they are bound by the posted and published notice, and are as effectually concluded by the facts proven at the hearing as though they had been present and had participated therein.

It is also urged that the hearing was ordered by the local officers instead of by the Commissioner of the General Land Office; that notice was given by publication without any showing that due diligence had been used and personal service could not be made; and that, therefore, the proceeding was not initiated in conformity to rules of practice, 5 to 16 inclusive. These rules (see 4 L. D., 35; 23 Id., 593; 29 Id., 726) relate to purely adversary proceedings brought against a particular claimant to secure the cancellation of an existing claim of record, *prima facie* valid, and amounting to an appropriation of the land. They provide for personal service of notice of the contest, unless it is shown that due diligence has been used and personal service can not be made, in which event publication is authorized. They also direct that the hearing shall be ordered by the Commissioner of the General Land Office where the claim sought to be canceled has passed to final entry or its equivalent. But these rules do not apply to final proof proceedings or others of essentially the same nature. The proceeding instituted by Patterson was not originally an adversary one brought against any particular claimant or claim. The invalidity of the original canal selection was apparent on the records of the local office, and nothing was there shown indicating that its confirmation under the act of March 2, 1889, had been established or was recognized by the land officers. Patterson was not asking its cancellation, but was seeking to establish and perfect title to the land under her pre-emption claim alleged to have been confirmed by Congress. This was in the nature of a final proof proceeding, and not a contest under the rules of practice.

That the rules of practice cited (5–16) have not been understood to be applicable to proceedings like this is shown by the regulations issued December 30, 1889 (13 L. D., 423), to carry into effect the provisions of the act of March 2, 1889, respecting the confirmation of cash entries. These regulations directed the local officers, upon the filing of an application to establish and perfect title under a cash entry, to order a hearing thereon and give notice thereof by publication. This was in harmony with the established procedure for the submission of final proof upon pre-emption and homestead claims.

The act did not prescribe the procedure to be followed in carrying out its provisions respecting the confirmation of pre-emption and homestead claims to lands which were also covered by invalid selections under the canal grant, nor were any regulations ever issued for

that purpose. In this situation the local officers followed, as most applicable, the regulations governing the submission of final proof upon pre-emption and homestead claims and those issued for the purpose of carrying into effect the provisions of that act confirming cash entries. This procedure was appropriate and is approved.

EFFECT OF PENDING SUIT.

One contention of the canal company is that during the pendency of the existing suit in the circuit court of the United States for the western district of Michigan the land department is without authority to proceed in this case, and, even if there is not a want of authority, comity between co-ordinate jurisdictions requires that the land department should decline to proceed until the court has passed upon the case before it.

Because of the executive character of the land department and of what is hereinbefore said respecting its authority in administering public land laws, it is believed that the court and the land department are not tribunals of concurrent or co-ordinate jurisdiction, but, if they were, there was not, at the time of the hearing in the local office, that identity of subject and of parties in the suit in court and in the proceeding in the land department which is essential to the application of the general principle, in respect of courts of concurrent or co-ordinate jurisdiction, that whichever first obtains jurisdiction of the subject and parties will retain it to the end. The purpose of the suit, with respect to the land here in controversy, was not to determine whether on May 1, 1888, Patterson had a *bona fide* pre-emption claim on the land arising or asserted under color of the laws of the United States, but was to prevent the cutting and wasting of timber growing or found upon the land until the state of things existing on May 1, 1888, and Patterson's rights could be ascertained and determined by competent authority. Patterson was not a party to this suit when, on January 7, 1895, she invoked the authority of the land department, nor was any attempt made to make her a party until after she had obtained a favorable decision by the local office upon her claim and an appeal had been taken therefrom to the Commissioner of the General Land Office. She was an indispensable party to any suit the purpose of which was to determine whether, on May 1, 1888, she had a *bona fide* pre-emption claim on the land in controversy within the meaning of the act of March 2, 1889 (Litchfield *v.* Register and Receiver, *supra*), and so far as she and her claim are concerned, the pending suit had no status, and was the same as if not brought, until she was made a party thereto. Before this was done the land department had obtained full jurisdiction of the subject and all parties in interest, and, according to the rule invoked by the canal company, was entitled to retain that

jurisdiction until a final decision should be given, and this to the exclusion of all other tribunals of concurrent or co-ordinate jurisdiction.

Nor is this an instance where the land department for its own guidance, or for the mutual benefit of parties in interest should, as a matter of proper precaution or wise administration, suspend proceedings pending before it until a judicial decision is obtained upon the questions presented. The decision of the supreme court in the test case of Lake Superior Ship Canal, Railway and Iron Company *v.* Cunningham so completely construes the act of March 2, 1889, and sets forth the respective rights of the canal company and pre-emption and homestead claimants under the confirmation thereby given, and the decision of that court in Litchfield *v.* Register and Receiver, Catholic Bishop of Nesqually *v.* Gibbon, and Brown *v.* Hitchcock, so clearly mark the boundaries of departmental and judicial jurisdiction respecting the administration and execution of public land laws that the questions here presented can not be said to be new or open to discussion. These decisions if followed will guide the land department to a correct decision of the pending and similar cases, and when this can be done the parties in interest will be mutually benefited if a decision is given without more delay than is made necessary by the state of the public business before the Department and such careful examination as is indispensable to an ascertainment of the facts in each case and the application to them of the principles announced in the decisions named.

The facts affecting this branch of the case are as follows: Patterson claims to have in good faith effected a settlement upon the land in controversy before May 1, 1888, with the intention of perfecting title thereto by compliance with the pre-emption law, and to have since then continuously maintained the same in good faith; the act of confirmation was passed March 2, 1889; May 1, 1889, Patterson tendered a pre-emption declaratory statement for the land at the local office which was rejected by the local officers and by the Commissioner of the General Land Office and the Secretary of the Interior, on successive appeals, upon the erroneous theory that the outstanding selection and certification under the canal grant was an effective obstacle to departmental action until it should be canceled in a judicial proceeding in the courts; December 10, 1894, the supreme court in the test case against Cunningham declared such selection and certification absolutely void and announced the rule to be applied in determining the respective rights of the canal company and pre-emption and homestead claimants under the act of March 2, 1889; on January 7, 1895, almost immediately after this decision, Patterson reasserted her claim before the local office, and after due notice and a fair hearing, the inconvenience and expense of which to her was necessarily considerable, obtained a decision by the local officers sustaining her claim, and since then her claim has been further sustained by the Commissioner of the General Land Office

and is here on the appeal of the canal company. As against this the suit in court was commenced in December, 1890; no effort was made to determine Patterson's rights in that suit until she was made a party thereto following the canal company's appeal to the Commissioner of the General Land Office from the decision of the local officers in her favor; and now almost ten years after the institution of the suit, and five years after she was made a party thereto, the effort to determine the merits of her claim in that suit has progressed only to the extent of the filing of a supplemental cross-bill against her and the interposition of a demurrer thereto. She urges present action by this Department and the canal company urges a suspension of proceedings here during the pendency of the suit in court. This recital shows that any discretion lodged in the officers of the land department in such matters must be exercised in favor of present action by this Department, and not in favor of a supension of proceedings.

WILLIARD P. COOK'S CLAIM.

The officers of the local office could not have known in 1895, when a hearing was ordered upon the claim of Patterson, that Cook was then asserting any claim to the land. He had tendered a pre-emption declaratory statement therefor December 6, 1884, which was rejected by the local officers and was again rejected September 11, 1888, by the Commissioner of the General Land Office on appeal. No appeal was taken to the Secretary of the Interior, and consequently the record showed the claim to have been terminated. Moreover, this was all before the forfeiture act, when no pre-emption claim could lawfully be recognized or placed of record, and, while the land was restored to the public domain March 2, 1889, by the act of that date, Cook did not again assert a claim thereto until in 1895 after the hearing and decision in the local office on Patterson's claim. He did not therefore have a claim of record at the time when the hearing was ordered and was not in a position to receive or expect special notice. Upon his own showing Cook's relation to the land on and prior to May 1, 1888, was not such as to constitute him at that time a *bona fide* pre-emption claimant under color of the laws of the United States; but if his showing had evidenced such a claim on his part the time for asserting the same as against an adverse settler had long since passed when his affidavit asking a hearing in opposition to Patterson was filed. He failed to tender a declaratory statement within three months after the act of March 2, 1889, restoring the land to the public domain and giving effect to prior pre-emption and homestead settlements, or within three months after the decision in the Cunningham case declaring the selection and certification of the land under the canal grant absolutely void and therefore no obstacle to the assertion of a claim under the pre-

emption law and the act of March 2, 1889. Any claim which he may have had was therefore forfeited to Patterson, the next settler in the order of time (Rev. Stat., 2265), who tendered the required declaratory statement within three months after the passage of said act, and also within the like time after the rendition of said decision, and has otherwise, up to this time, complied with the conditions of the pre-emption law.

The presence of two rival pre-emption claims on May 1, 1888, each coming within the forfeiture act, would not operate to the advantage of the claimant under the canal selection.

ACTS OF MARCH 3, 1887, AND MARCH 2, 1896.

While no distinct proof was offered respecting the *bona fides* of any of the purchases under the selection and certification of the land under the canal grant, it is urged that these purchases were made in entire good faith and are within the protecting provisions of the acts of March 3, 1887 (24 Stat., 556), and March 2, 1896 (29 Stat., 42). The earlier act is in terms confined to certifications or patents "to or for the use or benefit of any company claiming by, through or under grant from the United States to aid in the construction of a railroad." The later act does not in terms embrace certifications or patents on account of a grant in aid of the construction of a canal and does not contain any provision or language evidencing a purpose to repeal any portion of the act of March 2, 1889; or to divest, disturb or affect any claim thereby validated or confirmed. That act expressly preferred pre-emption and homestead claims of the class there described to any right or title under the canal selections whether asserted by a *bona fide* purchaser or otherwise, and this is in no respect affected by the acts referred to.

PROCEEDINGS IN THE GENERAL LAND OFFICE.

It is manifest that the action of your office in suspending proceedings on account of the pending suit and subsequently resuming consideration of the case, under the circumstances recited herein, was not attended with that disposition to acquaint the parties with the action taken and to afford them an opportunity to present objections which would have been suggested by a closer regard for orderly procedure, but this irregularity was not indicative of favor or partiality.

All parties had ample opportunity to be heard upon the merits through written or printed briefs, and the time ordinarily allowed for filing these expired many months before the suspension on account of the pending suit. The volume and character of public business in your office are such that oral argument can be granted only in special cases and in the exercise of a proper discretion. The principal reli-

ance of claimants is upon written or printed briefs rather than upon oral arguments, and it has never been deemed a sufficient cause for reversing a decision of your office that oral argument was not had or permitted. The contention of the canal company that it did not have due opportunity to be heard in your office is not sustained. Another reason why this contention is without effect is that the Secretary of the Interior in the exercise of his supervisory power as head of the land department could by direct order, even in the absence of an appeal, have transferred the consideration of the entire matter from your office to his office, and upon giving the parties a hearing or opportunity to be heard could have rendered a decision therein correcting and obviating any errors or irregularities in the proceedings or decision of your office. Knight *v.* United States Land Association (142 U. S., 161, 178, 181), Hawley *v.* Diller (178 Id.,). That which could have been done in the absence of an appeal can equally be done upon an appeal. All parties have been fully heard upon this appeal by printed briefs and in oral argument, and this decision, given after full and patient consideration of everything which has been presented, will stand as the action of the head of the land department, uninfluenced by any error or irregularity in the proceedings in your office.

PATTERSON'S CLAIM.

The evidence produced at the hearing, the substance of which is hereinbefore recited, amply shows that on May 1, 1888, Patterson was in the actual occupation of the land under color of the laws of the United States and was intending to acquire title thereto by full compliance with the conditions of the pre-emption law; that her claim was initiated in good faith and has since been maintained in like manner. If on May 1, 1888, she was possessed of the requisite qualifications of a pre-emptor, her claim was validated or confirmed March 2, 1889, by the act of that date and she is entitled to perfect title to the land without regard to the prior selection and certification thereof under the canal grant. The evidence taken suggests but does not affirmatively establish that she was so qualified, and at the time of the oral argument on this appeal counsel representing her requested that she be given an opportunity to make clear proof of her qualifications. This she should be permitted to do, if she can, and you will direct the local officers to order a supplementary hearing for this purpose, with due notice to all parties claiming any interest under the canal selection, as shown by the records of the local office and the record of the former hearing herein. As herein modified, the decision of your office is affirmed.

RESERVOIR SITE—SOLDIERS' ADDITIONAL ENTRY.

J. M. LONGNECKER.

Lands which for a long period of time have been with the knowledge and acquiescence of the government included in the site of a reservoir used as a feeder of a canal in the maintenance and operation of which the government is interested, are not "unappropriated public lands" and are therefore not subject to soldiers' additional homestead entry.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 19, 1900.* (J. R. W.)

J. M. Longnecker, assignee of Matilda Parker, widow of Ira Parker, has appealed from your office decision of December 8, 1899, denying his application to enter the S. ½ of the SW. ¼ of Sec. 3, T. 6 S., R. 3 E., 1st P. M., Ohio, as a soldiers' additional homestead under section 2306 of the Revised Statutes.

The land applied for is part of the site of the Grand Reservoir, constructed during or prior to 1841 as feeder to the Miami and Dayton canal. By act of May 24, 1828 (4 Stat., 305), a grant of land was made to the State of Ohio, to aid in the construction of said canal, the second section of which act, among other things, provided:

> Said canal, when completed, shall be, and forever remain, a public highway, for the use of the government of the United States, free from any toll, or other charges, whatever, for any property of the United States, or persons in their service, passing through the same.

This provision makes the United States a party interested in the maintenance and operation of said canal.

Neither by the canal grant act, nor otherwise, was any provision made authorizing selection of lands for reservoirs or feeders; nor was the land in controversy selected by the State under the grant. It has, however, been in possession and use of the State, covered by the water of the reservoir and so forming part of the canal works, since 1841, nearly sixty years. No objection has to this time been made by the United States, owner of the land and interested in the maintenance of the canal. Under such circumstances, between private parties so situate, a presumption of appropriation of the land to such uses would arise. It would seem by analogy of reasoning, though time does not run against the government and such presumption could never become absolute to bar the government from right to reclaim the land, on such facts a presumption must arise that the land has been withdrawn from entry until affirmative action is taken by the government asserting its dominion over the land and opening it to entry or looking toward its disposal in some other manner.

It appears that this and other lands, by a pencil note on the plats of the public survey, were indicated to be covered by the waters of "St.

Mary's Reservoir for canal from Dayton to the Miami of Lake Erie." (John C. Turpen, 5 L. D., 25.)

The fact that the land in question has for nearly sixty years been occupied by the State of Ohio for the uses of a reservoir site, and was made part of its said canal works, in which the government is interested—all of which was done with knowledge and acquiescence of the land department, the officers of which noted the fact on the plats—show that these lands are not of the character subject to disposal under the homestead law, which includes in its provisions only "unappropriated public lands."

Your office decision is affirmed.

SCHOOL LANDS—ADJUSTMENT—INDEMNITY—SURVEY.

STATE OF FLORIDA.

Lands within a confirmed private claim in Florida have been "disposed of by the United States" within the meaning of section 2275, Revised Statutes, as amended by the act of February 28, 1891, and the State is therefore entitled to indemnity for sections sixteen included within such claim and thereby lost to its school grant.

The lines of the public survey may be extended or protracted over a confirmed private land claim for the purpose of ascertaining the amount of school land lost to the State by reason of sections sixteen being included within the limits of such claim.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *July 20, 1900.* (G. B. G.)

This proceeding had its beginning in the application of B. F. Hampton, State selecting agent for school lands in the State of Florida, asking that a survey be ordered of certain lands in said State embraced in the private land claim of one Collin Mitchel and known as the "Forbes Purchase," to the end that the loss to the school grant of said State by reason of said claim may be ascertained and satisfied by indemnity selection. The matter is before the Department upon the appeal of the State from your office decision of May 17, 1900, denying the application and holding that there is no authority of law for protracting the township lines of survey over a confirmed private land claim, or for extending the public surveys over said lands.

This claim was confirmed to said Mitchel by the supreme court of the United States at its January term, 1835, and again at its January term, 1841, and patent issued therefor June 9, 1842. See Mitchel *v.* United States (9 Pet., 711; 15 Pet., 51).

The territory of Florida was acquired from Spain by the treaty of Washington, February 22, 1819, and by the act of March 30, 1822 (3 Stat., 654), a territorial government was established therein. This act made no provision for a reservation of lands for the support of schools, but by an act of June 15, 1844 (5 Stat., 666), entitled "An

act to authorize the selection of certain school lands in the Territories of Florida, Iowa, and Wisconsin," evidently in recognition of the then established policy of the government to reserve section 16 in each township for the support of schools therein, it was provided that wherever said section in said Territories was then or might thereafter be included in private claims, held by titles confirmed or legally decided to be valid and sufficient, other lands equivalent thereto might be selected in lieu thereof.

The act of March 3, 1845 (5 Stat., 742), admitting Florida into the Union did not make a grant of land for school purposes, but section one of an act of the same date (5 Stat., 788), supplemental to the act of admission, granted to said State "section number sixteen in every township, or other lands equivalent thereto, for the use of the inhabitants of such township for the support of public schools."

Section 2275 of the Revised Statutes, as amended by the act of February 28, 1891 (25 Stat., 796), appropriates and grants, in lieu of sections sixteen and thirty-six, other lands of equal acreage, and authorizes the selection of such lieu lands within the State or Territory where said sections "are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States," and makes it the duty of the Secretary of the Interior, "without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations."

The decision appealed from rests upon the assumption that this section 2275, as amended, embraces all of the law now in force upon the question of indemnity school selections, and inasmuch as a confirmed private land claim is not an Indian, military, or other reservation, it is concluded that lands so situated do not occupy a status which authorizes your office to protract the township lines or to extend the public surveys over it.

In the administration of the school grants to the various States, it had been found that the law as it was prior to the amendment to section 2275 did not meet a variety of conditions whereby the States and Territories suffer loss of the granted sections without adequate provision for indemnity in lieu thereof. Special laws had been enacted in some instances to cover in part these defects with respect to particular States or Territories, and the act of February 28, 1891, *supra*, was passed to cure these defects and provide a general law applicable alike to all of the public-land States, but was in no sense intended as an additional grant to the States. See Congressional Record, Vol. 22, p. 3465.

In the case of the State of California (23 L. D., 423, 426), it was held that, in passing said act Congress intended that it should be applicable to all public-land States alike, and "intended that it should operate as a repeal of all special laws theretofore passed, in so

far as they conflicted with its provisions." The same view was taken by the Department in the later case of the State of Wyoming (27 L. D., 35). It may be well questioned if these rulings would control the determination of a question presented in this case, whether said act operated as a repeal of the act of June 15, 1844, *supra*, allowing indemnity to the Territory of Florida for section sixteen when found embraced in a private confirmed claim. The conditions in Florida were peculiar. There were many grants of large tracts of land in that Territory which had been made by the sovereignty of Spain, and which under the terms of the treaty of cession had to be confirmed. The grant to that State for school purposes would have been very materially diminished unless it was allowed indemnity for sections lost by reason of these private land claims, and the enabling act for that State, as has been seen, granted other lands equivalent to section numbered sixteen in each township, without specifying how such sections might be lost, and it must be presumed that Congress intended that the State should have its full grant of lands for school purposes, without reference to the causes which brought about a loss of the sections in place. But it will not be necessary to decide in this case whether the act of February 28, 1891, repealed the special act of June 15, 1844. It is believed that lands within a confirmed private claim in Florida have been "disposed of by the United States," within the meaning of section 2275, as amended. For the purposes of the question here presented there is no difference in a grant by the United States and a confirmation of title by the United States on account of a grant under the antecedent sovereignty of Spain. In either case it is a disposition of the land. The State is, therefore, clearly entitled, under the terms of said section 2275, as amended, to indemnity for section 16 within the limits of said private land claim.

It is first necessary, however, to ascertain the amount of land lost to the State on account of sections numbered sixteen being included within the limits of this confirmed private land claim. This can only be done by the extension or by the protraction of the lines of the public survey over said claim. Inasmuch as the public survey will never be extended over said claim, your office is of opinion that an ascertainment by the protraction of the lines of the public survey can not be made, because there is no warrant of law therefor, the direction therefor contained in section 2275 as amended, being limited to lands within an Indian, military or other reservation. While the section is limited to Indian, military or other reservations, it furnishes a good rule to be followed in adjusting school grants, in all cases where lands are in such condition that the immediate or possible survey thereof by the United States is not contemplated.

The decision appealed from is reversed, and the cause remanded, with directions to proceed in accordance with this decision.

MILITARY BOUNTY LAND WARRANT—ASSIGNMENT.

GEORGE C. ARRINGTON.

Assignments of military bounty land warrants will not be recognized by the land department unless made in accordance with the regulations established by said department governing such assignments.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 23, 1900.* (J. R. W.)

George C. Arrington has appealed from your office decision of May 28, 1900, refusing to approve his title by assignments to military bounty land warrant No. 93,095, issued September 14, 1857, to Corporal William E. Brown, under act of Congress of March 3, 1855 (10 Stat., 701).

Endorsed upon said warrant is what purports to be the assignment thereof by William E. Brown to Moses Ashley, without attesting witnesses, dated January 5, 1858, with a certificate of acknowledgment attached, of same date, by William E. Brown, before William C. Oliver, judge of the probate court, Green county, Alabama, under seal of said court.

Also attached is what purports to be the assignment of said warrant by Moses Ashley to W. I. Preston, attested by two witnesses, dated September 18, 1860, with certificate of acknowledgment of the same date before said William C. Oliver, judge of the probate court, Green county, Alabama, under seal of said court.

Also, not attached, with said warrant and attached papers is what purports to be the assignment of said warrant by W. I. Preston to George C. Arrington. These names are both written in erasures, as plainly appears by inspection of the paper. The assignment is attested by two witnesses, and dated September 18, 1860, the same date as the foregoing assignment of Ashley to Preston. The assignment is endorsed with a certificate of acknowledgment, dated March 31, 1873, before Thomas W. Roberts, judge of the probate court of Green county, Alabama, not under seal of the court. The official character at that time and genuineness of the signature of said Thomas W. Roberts are certified by Amand P. Smith, judge of the probate court of said Green county, endorsed thereon, dated January 1, 1900, and under the court's seal.

The act of March 22, 1852 (10 Stat., 3), provided:

> All warrants for military bounty lands . . . . are hereby declared to be assignable, by deed or instrument of writing made and executed after the taking effect of this act, according to such form and pursuant to such regulations as may be prescribed by the commissioner of the general land office.

By circular of October 17, 1853, and every circular subsequently issued, the assignment of a land warrant is required to be attested by

two witnesses (2 Dec. Op. and Instructions, 974; 27 L. D., 219). These regulations, having been formulated by authority of Congress, have till abrogated the force of a statute. They have stood for almost a half century, and have proven salutary and effective for prevention of fraud and for avoidance of complication of land titles resting on location of military bounty land warrants. No reason appears why they should not be preserved in their integrity, or why their requirements should not be impartially observed and enforced.

But were this assignment in due form, the instruments submitted would still be of doubtful character, and it could not be said that your office had erred in its action.

The erasures in the assignment from Preston to Arrington are entirely unexplained, and are plainly apparent. Without going into a discussion or review of the conflicting decisions upon the effect of erasures in written instruments, it suffices to say that unexplained they at least cast suspicion on the instrument.

Your office decision is affirmed.

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

Departmental decision of November 3, 1899, 29 L. D., 291, recalled and vacated, July 24, 1900, by Acting Secretary Ryan, and Fogelberg's application for reinstatement of his homestead entry denied.

NOYES *v.* STATE OF MONTANA.

Motion for review of departmental decision of April 26, 1900, 29 L. D., 695, denied by Acting Secretary Ryan, July 24, 1900.

MINING CLAIM—LOCATION EMBRACING PATENTED OR ENTERED LANDS.

GRASSY GULCH PLACER CLAIM.

The location of a mining claim can be made only upon the public lands of the United States; and there is no authority for placing the lines of a location within, upon, or across other claims embracing lands which have been patented or regularly entered under the public land laws and have thereby become the property of private individuals.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 25, 1900.* (A. B. P.)

April 19, 1899, James Fox *et al.* filed application for patent to the Grassy Gulch placer mining claim, survey No. 13032, Pueblo, Colorado, and, October 27, 1899, were allowed to make entry therefor. The claim appears to have been located January 21, 1899.

January 30, 1900, your office, upon consideration of the record of the entry, found and held as follows:

> In the survey, application and entry the ground claimed is described as tracts A, B, C, D, E, F and G, aggregating an area of 5.557 acres, each of the tracts being separated from the others by some of the following claims: Antelope lode, survey 9675, mineral entry No. 866 made April 6, 1896, patented July 3, 1896; Mule and Combination No. 2 lodes, survey 8670, mineral entry 1261 made June 28, 1897, patented February 1, 1899; Hillside and Santa Rosa lodes, mineral entry 1262 made June 28, 1897, patented November 16, 1898; Sequoia, Ozark and Moreau lodes, mineral entry 1929 made December 31, 1898; and the Bandera lode, survey 10157 for which mineral application 1644 was filed May 14, 1896, which application was rejected December 23, 1899.
>
> It will, therefore, be perceived that at date of location, as well as at all times subsequent thereto, the vacant claimed placer tracts were rendered noncontiguous by the lodes hereinbefore mentioned.
>
> There is no authority under the mining law and regulations for the location of a placer claim in two or more noncontiguous tracts. The fact that the applicants claimed in their location an apparently contiguous tract of 46.26 acres does not cure this defect for the reason that the lode claims were all embraced in patents, entries or applications at date of the placer location and the conflicting areas were not subject to location by the placer applicants. This office cannot therefore consider said Grassy Gulch placer location as a single location, but as seven separate locations each subject to separate and distinct proceedings for patent.

The local officers were thereupon directed to call on the applicants to show cause within sixty days from notice why their entry should not be canceled; and it was stated that in default of such showing, in the absence of appeal, the entry would be canceled without further notice. The applicants have appealed.

It is clear that the entry can not be sustained. The location of a mining claim can be made only upon the public lands of the United States. The lines of a location, for the purpose of establishing and defining certain rights under the mining laws, may be laid within, upon, or across the surface of other claims not yet patented or entered (Del Monte Min. Co. *v.* Last Chance Min. Co., 171 U. S., 55), but there is no authority for placing the lines of a location within, upon, or across other claims embracing lands which have been patented or regularly entered under the public land laws of the United States, and have thereby become the property of private individuals. Lands once patented, or regularly purchased and entered, are no longer a part of the public domain, and, consequently, no longer subject to location under the mining laws.

To the extent, therefore, that it was attempted, in making the Grassy Gulch placer location here in question, to place the lines thereof within, upon, or across the surface of other claims which had been previously patented or entered, said location was and is absolutely void and of no effect.

The several tracts embraced in said so-called location, in so far as

they are rendered non-contiguous by intervening patented or entered claims, can be located, applied for, and entered, under the mining laws, if at all, only as separate and distinct claims.

The decision of your office, holding the entry for cancellation, is accordingly affirmed, and the entry is hereby canceled.

RAILROAD LANDS—RELINQUISHMENT—ACT OF JULY 1, 1898.

OTIS S. SANDERS.

In the case of an unperfected claim, the relinquishment contemplated by the act of July 1, 1898, is of the whole thereof, and where such claim includes land in both odd- and even-numbered sections, and the individual claimant as against the Northern Pacific Railroad Company had, prior to the execution of a relinquishment under said act of the portion in the odd-numbered section, made entry for that portion of the claim within the even-numbered section, such partial relinquishment of the claim should not be accepted as a basis for the transfer of that portion of the claim to other lands.

Acting Secretary Ryan to the Commissioner of the General Land Office, July 25, 1900.

(S. V. P.) (F. W. C.)

Otis S. Sanders has appealed from your office decision of January 24, last, rejecting his application to select, under the act of July 1, 1898 (30 Stat., 597, 620), the NW. ¼ of SE. ¼ of Sec. 6, T. 16 N., R. 7 W., Olympia land district, Washington, in lieu of lots 1 and 4, Sec. 9, T. 16 N., R. 8 E., his claim to which was relinquished under said act.

It appears that on July 10, 1894, Sanders tendered a homestead application covering the S. ½ of the SW. ¼ of Sec. 4, and lots 1 and 4, Sec. 9, T. 16 N., R. 8 W., which application was rejected by the local officers as to the portion in the odd-numbered section for conflict with the grant to the Northern Pacific Railroad Company, from which action Sanders appealed to your office.

Following the passage of the act of July 1, 1898, *supra*, providing for the adjustment of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, to wit, on April 24, 1899, your office directed the local officers to advise Sanders of the privileges accorded him by said act, either to relinquish his claim in conflict with the railroad grant and select other land in lieu thereof, or to retain the same, whereupon the company would be invited to relinquish its claim.

In the following month, to wit, on May 25, 1899, he made homestead entry for the S. ½ of the SW. ¼ of Sec. 4, being the portion of the land in the even-numbered section embraced in his application originally tendered on July 10, 1894, and on September 25, following, executed a relinquishment of his claim to lots 1 and 4 of Sec. 9. This relinquishment appears to have been accepted by your office on October 13, 1899, without reference to the fact that he had not relinquished

his entire claim as shown by his application tendered on July 10, 1894, and notwithstanding the fact, as must have been shown by your office records, that he had on May 25, 1899, made homestead entry for the portion of the land in the even-numbered section.

The act of July 1, 1898, merely provided for the transfer of the claim asserted by the individual claimant as against the railroad grant. Paragraph 36 of the regulations issued under said act, approved February 14, 1899 (28 L. D., 113), provided—

> Where lands are selected by an individual claimant in lieu of lands the claim to which has not been carried to final entry and certificate, or to the submission of final proof entitling him to final entry and certificate, the claimant will be required to perfect his right to the lands selected by compliance with the law relating to that class of claims, and to submit proof thereof in the usual way, but credit will be given for his *bona fide* residence, improvements, cultivation, or reclamation, as the case may be, and for any payment of fees or purchase money upon the land relinquished, it being the purpose of the act to give individual claimants the same status with respect to the lieu lands selected by them which they occupied with respect to the lands relinquished.

It will be necessary, therefore, for Sanders to reside upon and otherwise comply with the homestead law upon the land selected in lieu of his claim in conflict with the railroad grant. This he could not do without abandoning his homestead entry, made prior to his relinquishment, for the portion of the tract in Sec. 4 covered by his original application. It further appears from his appeal that he has contracted with the railroad company for the purchase of lots 1 and 4 in Sec. 9, covered by his homestead application, and his claim to which was subsequently relinquished, as before stated. Whether this contract, which recognized the railroad claim, was made prior to the execution of his relinquishment under the act of July 1, 1898, does not appear, but as he states that he has already made two payments on account of said contract it probably was. If he had, prior to the execution of said relinquishment, entered into a contract with the railroad company for the purchase of the tract in the odd-numbered section, it may be, in view of his entry of the even-numbered section, that he did not have a contest with the railroad company which was subject to adjustment under the act of July 1, 1898, at the date of his relinquishment.

Under the circumstances, this Department must set aside the action taken by your office in accepting the relinquishment executed by Sanders, under the act of July 1, 1898, for only a portion of his claim. For this reason the action of your office in rejecting his application to select another tract in lieu of lots 1 and 4 in Sec. 9, is affirmed. Further consideration of his right to relinquish his entire claim and select other lands in lieu thereof, as provided for in the act of July 1, 1898, is at this time unnecessary.

HAWAII—LEASES—SECTION 73, ACT OF APRIL 30, 1900.

INSTRUCTIONS.

Section 73 of the act of April 30, 1900, relative to the leasing of agricultural land in the Territory of Hawaii, does not apply to "homestead leases" or "right of purchase leases" for which provision had theretofore been made in the Hawaiian laws.

Acting Secretary Ryan to Hon. Sanford B. Dole, Governor of Hawaii,
(S. V. P.) *July 27, 1900.* (W. C. P.)

The Department is in receipt of your communication of the 10th instant, desiring instructions as to whether the provision in section 73 of an act of Congress entitled "An act to provide a government for the Territory of Hawaii," approved April 30, 1900, "and no lease of agricultural land shall be granted, sold or renewed by the government of the Territory of Hawaii for a longer period than five years until Congress shall otherwise direct," applies to homestead leases and right of purchase leases.

Said section 73 provides:

> That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this act, shall continue in force until Congress shall otherwise provide.

An examination of the laws of Hawaii in connection with the provision of the territorial act referred to by you leads to the conclusion that your opinion that it was not intended that said provision should apply to homestead leases or right of purchase leases is justified. The homestead lease being for nine hundred and ninety-nine years and reserving no rent is, as you say, in effect the conveyance of the fee and is given after compliance with certain requirements as to residence upon and improvement and cultivation of the land very similar to the requirements of the homestead law in force in other parts of the United States.

The so-called right of purchase lease is a part of the proceedings in another method for the acquisition of public lands. It was evidently not intended to change the existing provisions of the Hawaiian law by which title to the public lands may be acquired, but it was the intention to continue those provisions in force for the present, at least.

You are therefore instructed that the provision of the territorial act referred to does not apply to homestead leases or right of purchase leases.

INDIAN LANDS—COMMUTATION—ACT OF MAY 17, 1900.

NEZ PERCE CEDED LANDS.

The commutation provision contained in section 2301, Revised Statutes, is applicable to Nez Perce ceded lands, but "the minimum price" provided for therein must, under the act of May 17, 1900, be determined without reference to that provision of the act of August 15, 1894, which requires each settler to pay $3.75 per acre for said lands, and as though no such provision had ever been made.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 27, 1900.* (W. C. P.)

The local officers at Lewiston, Idaho, having asked whether parties who wish to commute their homestead entries on Nez Perce ceded lands after the passage of the act of May 17, 1900 (Public—No. 105), will be required to pay $3.75 per acre or $1.25, you instructed them that the payment of the first-named price would be required, but that no injustice may be done you have submitted the matter to the Department for consideration and further instruction, if it is deemed necessary.

The requirement by which these lands were ceded by the Indians was approved by the act of August 15, 1894 (28 Stat., 286, 326), and it was directed that they should be subject to disposal "only under the homestead, town-site, stone and timber, and mining laws," with a proviso as follows:

Provided, That each settler on said lands shall, before making final proof and receiving a certificate of entry, pay to the United States for the lands so taken by him, in addition to the fees provided by law, the sum of three dollars and seventy-five cents per acre for agricultural lands, one-half of which shall be paid within three years from the date of the original entry; and the sum of five dollars per acre for stone, timber, and mineral lands, subject to the regulations prescribed by existing laws.

It was held that commutation of homestead entries might be allowed by the payment of the designated price for agricultural lands. The present inquiry arises in connection with the act of May 17, 1900, known as the "Free Homesteads Act," which provides—

That all settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry: *Provided*, That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect.

The law providing for the disposal of these lands contained no specific mention of section 2301, Revised Statutes, which relates to the

commutation of homestead entries. The homestead laws were, however, made applicable thereto, no exception being stated as to the commutation provisions, as was done in many of the acts providing for the disposal of lands acquired from the Indians. For this reason it was held that said provisions applied and that the minimum price of said lands should be the price specified in the act subjecting said lands to disposal, that is, $3.75 per acre. There is now, however, no requirement for the payment of that price in the case of a homestead entry perfected by the required period of residence, and hence there is no provision of law making the minimum price of these lands $3.75 per acre. The commutation provision contained in section 2301, Revised Statutes, is applicable to these lands, but "the minimum price" provided for therein must be determined without reference to that provision of the act of August 15, 1894, *supra*, which required each settler to pay $3.75 per acre for said lands and as if no such provision had ever been made.

RAILROAD GRANT—ADJUSTMENT—ACTS OF MARCH 3, 1887, AND MARCH 2, 1896.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO.

If in the adjustment of a railroad grant it appears that homestead or pre-emption claims have been erroneously canceled for conflict with the grant, the claimants should be notified and given opportunity to make application for reinstatement under the third section of the act of March 3, 1887, and to submit a showing in support thereof; and the title of any purchaser through the railroad company, to any of the land embraced in such homestead or pre-emption claim, will not be declared confirmed by the act of March 2, 1896, until after due opportunity to the claimant to make such application and showing.

Where title to lands erroneously certified or patented to or for a railroad company is adjudged to have been confirmed in a purchaser by the act of March 2, 1896, demand for the value of such lands should be made of the company for whose specific benefit they were certified or patented.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 31, 1900.* (F. W. C.)

With your office letter of February 2, last, was submitted a preliminary statement of the adjustment of the grant made to the State of Minnesota by the act of July 4, 1866 (14 Stat., 87), to aid in the construction of a railroad from Houston, Minnesota, to the western boundary of the State. Said grant was by the State conferred upon the Southern Minnesota Railway Company. By mesne conveyances all the land certified to and inuring on account of said grant and then undisposed of, passed to the Chicago, Milwaukee and St. Paul Railway Company in 1886.

Upon the completion of said adjustment it appeared that 12,381.34

acres had been erroneously patented on account of said grant, which amount was subsequently reduced, upon examination, to 11,549.06 acres, and a rule was laid upon the Chicago, Milwaukee and St. Paul Railway Company to show cause why reconveyance should not be made of said lands as contemplated by the provisions of the act of March 3, 1887, or to show a *bona fide* sale of said lands within the meaning of the act of March 2, 1896 (29 Stat., 42).

In its answer to said rule the Chicago, Milwaukee and St. Paul Railway Company showed that the lands were not patented to said company or for its use and benefit; further, that each and all of the tracts were purchased by said company for a valuable consideration and had been again sold to persons who made the purchase in good faith and for a valuable consideration.

Upon consideration of said answer your office found the proof of sale sufficient under the act of March 2, 1896, and that, with the exception of seven specified tracts, there are no conflicting claims of record. The status of these seven tracts is given, from which it appears that each of the tracts was excepted from the railroad grant by entries of record, either at the date of the grant or definite location of the road; that the claims asserted to these tracts were filed as long ago as 1878; that they do not seem to have been prosecuted but have never been finally disposed of; that they are generally for reinstatement of entries erroneously canceled for conflict with the railroad grant; and that in one instance, that of Felix Shultz, he has since purchased the land from the railroad company. As four of the parties appear to have removed from the lands claimed by them prior to the sale thereof by the railroad company, you recommend that their applications be denied and that the titles of the purchasers from the company be declared to have been confirmed by the act of 1896. As to the remaining two, Brandt and Haynes, you recommend that they be afforded an opportunity to make a showing as to whether they were residing upon the lands at the date of the sale by the railroad company, and that the rule laid upon the Chicago, Milwaukee and St. Paul Railway Company be dissolved and the title of the purchasers through said company be held to have been confirmed under the act of 1896, excepting as to the tracts embraced in the applications of Brandt and Haynes.

By the third section of the act of March 3, 1887, it is made the duty of the Secretary of the Interior, if in the adjustment of any railroad grant it appears that the homestead or preemption claim of any *bona fide* settler has been erroneously canceled on account of a railroad grant or withdrawal, to afford such settler a reasonable time within which to renew his application for the reinstatement of his claim. It is directed, therefore, that notice be given to all homestead or preemption claimants whose claims are shown by the records of your office to have been erroneously canceled for conflict with this grant,

allowing them ninety days within which to renew their applications for reinstatement under said act and to submit a showing in support thereof, and that confirmation of the title of any purchaser through the railroad company to land embraced in such homestead or preemption entry will not be declared until after due opportunity has been afforded the homestead or preemption claimant to make the showing as herein directed, and consideration has been given to any such showing as may be filed. Aside from the lands included in such conflicting claims, the showing before the Department is amply sufficient to meet the requirements of the act of 1896, and the title of the purchasers through the railroad company to any and all such lands for which the records do not show a claim subject to reinstatement under the third section of the act of March 3, 1887, is hereby declared to have been confirmed by the act of March 2, 1896, *supra*.

Relative to the claim of Shultz, who afterward purchased the tract of the railroad company, no opportunity need be afforded him to make a showing under the order herein given, but his purchase, and those through him, is declared to have been confirmed by said act of March 2, 1896.

The act of 1896 contemplated a recovery "against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made," of the value of the land not exceeding the minimum government price thereof. Proof of the showing made on behalf of the Chicago, Milwaukee and St. Paul Railway Company clearly relieves it from liability for the value of the lands under said act.

It does not clearly appear from the papers before the Department for whose specific benefit the lands in question were certified or patented under the grant of 1866. Of such company, however, if it be in existence, demand should be made for the value of the lands the title to which is herein declared to have been confirmed by the act of 1896.

Herewith are returned the papers for your further action in accordance with the direction herein given.

MINING CLAIM—EXPENDITURE—PARAGRAPH 53 OF MINING REGULATIONS.

TENDERFOOT AND OTHER LODES.

Paragraph 53 of the mining regulations, as amended March 14, 1898, providing that proof of the expenditure of five hundred dollars upon a group of several locations held in common is sufficient where protests or adverse claims prevent the application for patent embracing such locations from being passed to entry prior to July 1, 1898, is not applicable where it appears that under the regulations then in force, irrespective of adverse claims or protests, no entry of the claim could have been allowed until after said date.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *July 31, 1900.* (E. B., Jr.)

This is an appeal by Edward Parker, claimant of the Tenderfoot, Tenderfoot No. 1, Tenderfoot No. 3, and the Mollie Gibson lode mining claims, survey No. 12209, embraced in mineral entry No. 4428, made June 29, 1899, Leadville, Colorado, land district, from the decisions of your office dated September 8, 1899, and April 14, 1900, the latter on review, holding the entry for cancellation on the ground that it was not shown that five hundred dollars' worth of labor has been expended or improvements made upon or for the benefit of each location embraced in the entry as required by the mining laws.

As shown by the report of the deputy mineral surveyor who surveyed the claims for patent, and the certificate of the surveyor-general, the improvements credited to the claims consist of a discovery shaft on each, and, in addition, two drifts and a cut on the Tenderfoot, valued at a total of $980. Appellant contends that, under circular instructions of March 14, 1898 (26 L. D., 378), amending paragraph 53 of mining regulations approved December 15, 1897 (25 L. D., 561, 578), because of the filing and pendency of a protest hereinafter mentioned against the application, it is only necessary that an expenditure of $500 be shown upon the entire group of claims embraced in the said entry.

Said paragraph 53, as amended March 14, 1898, and still in force (28 L. D., 603), reads:

> 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.

The application for patent to the said claims was filed April 18, 1898. Publication of notice thereof was commenced in a weekly newspaper, April 30, following, and was continued until July 2, 1898, making ten insertions therein in accordance with paragraph 50 of official regulations then in force (25 L. D., 561, 578). No adverse claim was filed against the application, but on June 29, 1898, a protest was filed against it by one Benjamin F. Reed, which was not finally disposed of by your office until March 1, 1899. The appellant insists that this protest prevented the allowance of entry of the said claim prior to July 1, 1898, and that, therefore, the application falls within the exception stated in the proviso to paragraph 53 as amended, and it was only necessary to show an expenditure of $500 upon the said group of claims.

The insistence can not be maintained. The rule of paragraph 50 of official regulations, *supra*, requiring ten insertions of the notice of application when published in a weekly newspaper, as was the case here, was in force when this application was filed and so continued until March 25, 1899, when it was abrogated by the decision of the Department in the case of Davidson *v.* The Eliza Gold Mining Company (28 L. D., 224), wherein it was held that such rule was inconsistent with the statute upon the subject, and that—

> When the notice has been inserted in nine successive issues of a weekly newspaper and the full statutory period of sixty days has elapsed the publication is complete.

The change in the rule as to the period of publication in a weekly newspaper could not, however, avail anything in the case at bar. Under the regulations in force during the period of publication of notice of said application no entry of the said claim would have been allowed until after July 2, 1898.

It can not be truly said, therefore, that it was the said protest which prevented the application from being passed to patent prior to July 1, 1898. It is due primarily to claimant's own neglect to take advantage of the notice given in said paragraph 53, as amended, that it is now necessary for him to show an expenditure of $500 in labor or improvements upon or for the benefit of each of the above-named claims. Instead of proceeding promptly to give notice of his application, he allowed nearly two weeks to elapse after filing the same before commencing to publish notice thereof. That he is now to be put to additional expense and delay before securing patent, he has only himself to blame. His application does not come within the terms of the said proviso, but comes under the rule of the statute and of exist-

ing regulations requiring five hundred dollars' worth of labor to be expended or improvements to be made, prior to the expiration of the period of publication, upon or for the benefit of each mining location embraced in an application for patent. (See in connection the case of B. P. O. E. Gold Mining Co., 29 L. D., 605.)

The decisions of your office are affirmed.

LUTHYE ET AL. *v.* NORTHERN PACIFIC R. R. CO.

Motion for review of departmental decision of April 18, 1900, 29 L. D., 675, denied by Acting Secretary Ryan, August 1, 1900.

MINING CLAIM—APPLICATION—ADVERSE—ANNUAL EXPENDITURE—RELOCATION.

THE MARBURG LODE MINING CLAIM.

When the right to a patent to a mining claim has been fully acquired the equitable title in the purchaser is complete and there is no obligation on his part to make further expenditure in labor or improvements on the claim under section 2324 of the Revised Statutes, and no interests can thereafter be acquired by relocation or otherwise as against him.

The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts. It is a matter with which the land department has nothing to do, and hence can make no determination with respect to it.

The failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

A protest against an application for patent to a mining claim, alleging failure to keep up the annual expenditure under section 2324 of the Revised Statutes during the pendency of proceedings upon an adverse claim, or upon a former protest, and the relocation of the claim on account thereof, does not present matters which call for investigation by the land department.

The proceedings necessary to the completion of an application for patent to a mining claim, against which an adverse claim or protest has been filed, if taken by the applicant at the first opportunity afforded therefor under the law and departmental practice, will be as effective as if taken at the date when, but for the adverse claim or protest, the proceedings on the application could have been completed.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 3, 1900.* (A. B. P.)

April 4, 1896, The Auburn Gold Mining and Milling Company filed application for patent to the Marburg lode mining claim, survey No.

10,399, Pueblo, Colorado. Notice of the application was duly published, commencing April 18, 1896. During the period of publication an adverse claim was filed on behalf of a conflicting claim known as the Baby Dora lode. Suit thereon was duly instituted in the district court for the county of Fremont, State of Colorado, wherein said claims were then situated, and remained pending in said court until March 24, 1897, when it was dismissed upon stipulation by the parties.

June 20, 1896, a protest against the allowance of entry upon said application was filed by John Opie *et al.* August 18, 1898, the local officers dismissed the protest. That action was affirmed by your office, October 22, 1898, and, on appeal, was sustained by the Department in its decision of October 14, 1899, in the case of Opie *et al. v.* Auburn Gold Mining and Milling Company (29 L. D., 230).

In the meantime, June 4, 1899, one Joseph Crumby filed another protest against said application for patent, alleging, in substance and effect:

1. That the applicant company failed during the year 1898 to make the expenditure of $100, in labor or improvements on the Marburg claim, required by section 2324 of the Revised Statutes;

2. That on account of such failure the protestant and one John Mott relocated said claim January 1, 1899; and

3. That in view of such claimed relocation, entry and patent should not be allowed upon the present proceedings.

This protest was forwarded to the Department pending the appeal in the Opie case, but was remanded to your office for appropriate action. By decision of January 30, 1900, you held the protest to be insufficient and dismissed it. Crumby and Mott have appealed.

The Marburg claim was located in 1892. Section 2324 of the Revised Statutes, among other things, provides that—

> On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year.

Also, that—

> upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.

The case of Benson Mining and Smelting Company *v.* Alta Mining and Smelting Company (145 U. S., 428) was one where the applicants for patent had gone through the regular proceedings required to obtain patent to a mining claim in 1879, had paid the government price for the land, and had received the usual certificate of purchase. Thereafter they sold and conveyed the claim to other parties, who continued to do a large amount of work thereon until 1882, but did no work dur-

ing that year. A relocation of the claim was made in 1883, based upon the fact that no work was done in 1882. Patent was not issued to the applicants until 1884. The controversy involved the question of the ownership of the claim under the mining laws. The Benson company claimed under the patent of 1884, and the Alta company claimed under the relocation of 1883. On behalf of the latter company, the appellant in the case, it was contended that the provision of the statute requiring the expenditure of $100 in labor or improvements on the claim "until patent has issued therefor," must be literally construed, and that inasmuch as such expenditure was not made on the claim in that case for the year 1882, all rights under the original location and the application for patent and proceedings thereon in 1879, thereupon ceased, and the relocation of 1883 operated to vest the property in the relocators.

In reference to this contention, the supreme court, after quoting the language of the statute herein above referred to, said:

This language, standing by itself, apparently sustains the contention of the appellant; but a consideration of the provisions of all the statutes respecting mining claims makes it obvious that such is not the true construction. The precise question has never been presented to this court; but the import of several decisions is against appellant's contention. The uniform ruling of the land department has been against it, the question having been presented at an early day and fully examined. In the case of the American Hill Quartz Mine, reported in Sickels' Mining Laws and Decisions, pages 377 and 385, and also in Copp's U. S. Mineral Lands, page 254, are well-considered opinions by the Commissioner of the General Land Office and the Secretary of the Interior, each holding that, when the price of a mining claim has been paid the equitable rights of the purchaser are complete, and there is no obligation on his part to do further annual work, the delay in issuing the patent being a mere matter occurring in the administration of the land department, and the patent when issued by relation taking effect as of the date of the purchase.

In another part of its opinion the court further said:

Obviously section 2324 does not provide for the acquisition of title to the land. Its scope and purport are expressed in the opening words, as follows: "The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements:" and then follow several provisions in the nature of limitations on the general authority thus given to miners. Among them is that quoted. That evidently does not refer to the "location," or "manner of recording," but to the "amount of work necessary to hold possession of a mining claim," that is, to continue the mere possessory title. . . . And so we find that section 2325 provides that "a patent for any land claimed and located for valuable deposits may be obtained in the following manner:" and gives thereafter the various steps necessary to be taken to purchase the land. Near its close is this, as to the patent: "If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists." In other words, when the price is paid the right to a patent immediately arises. If not issued at once, it is because the magnitude of the business in the land

department causes delay. But such delay, in the mere administration of affairs, does not diminish the rights flowing from the purchase, or cast any additional burdens on the purchaser, or expose him to the assaults of third parties.

And after referring to and considering a number of authorities bearing on the subject, the court concluded its opinion on that branch of the case as follows:

There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser, with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government interests as against him.

The principle thus announced was followed and applied by the Department in the recent case of McCormack *v.* Night-Hawk and Nightingale Gold Mining Company (29 L. D., 373), wherein it was held, in substance and effect, that an applicant for patent to a mining claim who has gone through the regular proceeding srequired in such cases, has paid the purchase money for the land and obtained the usual certificate of purchase and entry, is not obliged to continue the annual expenditure upon the claim required by section 2324 of the Revised Statutes; and that such certificate of purchase and entry, as long as it remains uncanceled, is equivalent to a patent, in so far as the rights of third parties are concerned. See also Morgan *et al. v.* Antlers-Park-Regent Consolidated Mining Company (29 L. D., 114).

In the case of Cain *et al. v.* Addenda Mining Company (29 L. D., 62), which involved the construction of certain provisions of sections 2324 and 2325 of the Revised Statutes, the Department (pages 66 and 67) said:

The difficulty here arises from the fact that the Addenda company filed its application for patent in the local land office in 1879, made due posting and publication thereof and upon the termination of certain adverse proceedings in 1882 became entitled, upon paying the purchase price, to make entry of all the ground embraced in its application and notices which had not been awarded to others in such adverse proceedings. Instead of exercising this right the company took no further proceedings under its said application until in 1894, after the lapse of twelve years and after the institution of the suit by the protestants to quiet title in themselves to the portion of the ground here in controversy. The mining laws contemplate that proceedings under an application for patent should be prosecuted to completion within a reasonable time after the required publication, or after the termination of proceedings on adverse claims, if any are filed; otherwise by making application for patent and giving notice thereof, but without making payment of the purchase price, one would become entitled to project indefinitely into the future the assumption of section 2325 "that no adverse claim exists" notwithstanding the requirement of section 2324 that an expenditure of one hundred dollars in labor or improvements shall be made upon a mining claim during each year until entry is allowed.

The Addenda company permitted its application to lie dormant so many years without making payment of the purchase price that it must be held to have waived the rights obtained by the earlier proceedings upon the application. Its entry in 1894, therefore, ought not to have been allowed, and for that reason must be canceled.

The case of P. Wolenberg *et al.* (29 L. D., 302) was one where application for patent to a mining claim had been filed in December, 1896, and publication of notice thereon completed February 3, 1897, without

adverse claim or protest to prevent payment for the land and the allowance of entry. Payment was not made, however, until December 21, 1898, when entry was allowed. Upon a protest alleging, among other things, that the applicants for patent had failed to make an expenditure of $100 in labor or improvements on the claim for the year 1896, and that by reason of such failure the protestant had relocated the claim in March, 1897, your office, May 9, 1899, ordered a hearing for the purpose of determining, along with certain other matters, whether such expenditure had been made. On appeal by the entryman from that order the Department, in the course of its opinion, said:

> In the present case the order for a hearing, in so far as it directs an inquiry into the charge of failure to make an expenditure of one hundred dollars, in labor or improvements, on the Mascot claim during the year 1896, and the alleged relocation of the claim by reason thereof, clearly relates to matters over which the land department is without authority. The annual expenditure of one hundred dollars, in labor or improvements, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed to the courts and not to the land department. In this respect the requirement made by section 2324 is essentially different from that made by section 2325, which makes the expenditure of five hundred dollars, in labor or improvements, a condition to the issuance of patent, and therefore a matter between the applicant for patent and the government, the determination of which is committed to the land department. Where the required expenditure of five hundred dollars has been made upon a mining claim, failure to perform annual assessment work will not, in itself, prevent the issuance of patent or furnish any ground of protest against the allowance of a mineral entry.

In another part of the opinion, after citing and quoting from the Cain-Addenda case, *supra*, it was further said:

> In this case nearly two years elapsed after the required publication before any effort was made to carry the application to completion, and in the meantime there may have been, as claimed, a legal relocation of the claim, based upon a failure by the claimants to make the annual expenditure in labor or improvements which is necessary to the continued maintenance of their possessory right as against subsequent locators. The assumption, declared in section 2325 of the Revised Statutes, that no adverse claim exists in those instances where no adverse claim is filed in the local office during the period of publication, relates to the time of the expiration of the period of publication and to adverse claims which might have been made known at the local office before that time. It has nothing to do with adverse claims which are initiated subsequent to that time and which could not therefore have been made known at the local office during the period of publication. The statutory declaration does not compel any assumption in this instance to the effect that no adverse claim intervened between the earlier proceedings upon the application for patent, which ended February 3, 1897, and the making of the entry on December 21, 1898. In the presence of the claimed relocation of the Mascot after the expiration of the period of publication, the applicants for patent are not in a position to ask or urge that their laches or delay be disregarded. It follows that the entry must be canceled.

See also the same case, on review, 29 L. D., 488.

In Barklage *et al. v.* Russell (29 L. D., 401) the principle of the Cain-Addenda and Wolenberg cases was followed and applied. In that case the Department said:

The allegations of the protest amount to nothing more nor less than the assertion of a claim adverse to that of the entryman Russell, and arising subsequent to the period of publication of the notice of the application for patent. The land department has nothing to do with questions as to the performance of annual expenditure upon mining claims, nor of alleged relocations thereof by reason of failure to perform such expenditure, arising under section 2324 of the Revised Statutes. These questions are solely matters between rival or adverse claimants to mineral lands and go only to the right of possession of the land involved. The determination of that right, between such claimants, however, or whenever the adverse claim may be alleged to have had its origin, is committed by the mining laws to the courts alone.

In the more recent case of Reins *v.* Montana Copper Company *et al.* (29 L. D., 461), in applying the same principle to a somewhat different state of facts, it was said:

The facts in the case relative to the placer application for patent bring it clearly within the rule announced in the case of Cain *et al. v.* Addenda Mining Co., on review (29 L. D., 62), and approved and followed in the more recent cases of P. Wolenberg *et al.* (id., 302), and William Barklage *et al. v.* Jay E. Russell (id., 401), that failure to prosecute an application for patent to completion within a reasonable time after the expiration of the period of publication or the termination of adverse proceedings in the courts constitutes a waiver of all rights obtained by the earlier proceedings upon the application. This rule is equally applicable to the failure of the placer claimant to take and complete, within a reasonable time, the proceedings necessary to obtain a patent in pursuance of the judgment rendered in the adverse proceedings against the application for patent to the Betsy Dahl lode claim. That judgment could give the placer claimant no greater or higher right to a patent than was obtained by the earlier but unperfected proceedings upon its own application for patent . . . . That judgment is of no avail against subsequent laches. It is not such a judgment, but the making of a mineral entry, that relieves an applicant for patent from the obligation to perform annual expenditure. Hence the judgment in its favor afforded the placer claimant no immunity from a subsequent relocation of the claim and consequent loss of the right of possession if it failed to make thereon the requisite annual expenditure and did not resume work before such relocation. This being so, delay in perfecting a right to patent under a judgment obtained in opposition to the application of another, as well as delay in perfecting such right under one's own application, may amount to laches such as will entail a loss of the right acquired by the prior proceedings.

The case of Gillis *v.* Downey, decided February 28, 1898, by the United States circuit court of appeals for the eighth circuit (85 Fed. Rep., 483), was a suit instituted for the purpose of quieting title in the plaintiff to certain lands containing placer mines. In the course of its opinion the court said:

The bill sets out all the facts which show compliance by the complainant with the prerequisites of the federal statute investing him with the right of possession to the land in controversy, and entitling him to enjoy that right undisturbed, and to have his title to the possession quieted against the pretended adverse claim of the defendant. But it is insisted by defendant that, as he had made application to the land-office department for a patent, pursuant to the provisions of section 2325, Rev. St., and the 60 days prescribed therein for publication of notice of such application had expired before the complainant adversed the application, the complainant is precluded from contesting his right to a patent. It does not appear from the averments of the bill that the 60-days' notice was ever published, as required by the statute. But, assume

that it was, this fact has no application to the instance where the adverse claim does not arise until after the expiration of the 60-days' limitation, and the applicant for the patent has let his application lie dormant for a number of years without either paying the purchase money or doing the required work of $100 each year pending the application for patent. Enterprise Min. Co. *v.* Rico-Aspen Consol. Min. Co., 32 U. S. App., 75, 13 C. C. A., 390, and 66 Fed., 200, affirmed in 167 U. S., 108, 17 Sup. Ct., 762. The filing of the application for patent does not suspend the obligation to keep up the required work where, without paying the purchase money, the claimant permits his application to sleep for years, as in this case. And "upon such failure to comply with these conditions the claim or mine upon which the failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made." Black *v.* Mining Co., 163 U. S., 450, 16 Sup. Ct., 1101.

From the authorities stated the following propositions, bearing more or less directly upon the question here presented, may be regarded as settled law:

1. When the right to a patent to a mining claim has been fully acquired the equitable title in the purchaser is complete and there is no obligation on his part to make further expenditure in labor or improvements on the claim under section 2324 of the Revised Statutes, and no interests can thereafter be acquired by relocation or otherwise as against him;

2. The annual expenditure of one hundred dollars in labor or improvements on a mining claim, required by section 2324 of the Revised Statutes, is solely a matter between rival or adverse claimants to the same mineral land, and goes only to the right of possession, the determination of which is committed exclusively to the courts. It is a matter with which the land department has nothing to do, and hence, can make no determination with respect to it; and

3. That the failure of an applicant for patent to a mining claim to prosecute his application to completion, by filing the necessary proofs and making payment for the land, within a reasonable time after the expiration of the period of publication of notice of the application, or after the termination of adverse proceedings in the courts, constitutes a waiver by the applicant of all rights obtained by the earlier proceedings upon the application.

In this case the application for patent was filed in April, 1896. During the period of the publication the Baby Dora adverse claim was filed, and, within due time, suit was instituted thereon, the proceedings in which were not terminated until March 24, 1897. Prior to that date the Opie protest had been filed. That protest was not finally dismissed until October 14, 1899, and before that date the present protest, of June 4, 1899, was filed.

Section 2326 of the Revised Statutes, among other things, provides that—

> Where an adverse claim is filed during the period of publication, it shall be upon oath of the person making the same, and shall show the nature, boundaries, and extent of such adverse claim, and 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.

There is nothing to indicate that the Baby Dora adverse claim did not in all respects conform to the requirements of the statute. As a result of the filing of that adverse and the timely institution of suit thereon, all further proceedings upon the application for patent, with the exception stated as to the publication of the notice and the filing of proof thereof, were, according to the terms of the statute, stayed until March 24, 1897, when the adverse suit was dismissed and the adverse claim thereby waived. This stay of proceedings was absolute, made so by the statute. During its continuance the applicant company could do nothing further towards the completion of the patent proceedings except to cause the publication to be completed and the affidavit thereof to be made and filed. The effect of the stay was to absolutely prevent the making of entry until the controversy should be settled or decided by a court of competent jurisdiction or the adverse claim should be waived. If the company had offered to make entry the offer would have been rejected. If it had made tender of the purchase price of the land the tender would have been refused.

Practically the same condition has existed, in so far at least as the applicant's right to complete its patent proceedings is concerned, ever since the adverse suit in the court was dismissed. The Opie protest which had been filed and was then pending, presented some matters properly cognizable by the land department, and until those matters were inquired into and determined, it would, according to departmental practice in such instances, have been improper to have allowed entry on the application. Before that protest was determined the present one was filed, the effect of which was, and still is, to prevent entry being made. It thus appears that at no time since the expiration of the period of publication of notice of the application for patent, have the conditions been such that the applicant company could have paid for the land and made entry of its claim.

In full view of all this, the present protestants contend, in effect, that because of their assertion of a relocation of the claim for their own benefit, on account of the alleged failure of the applicant company to make an expenditure of one hundred dollars in labor or improvements during the year 1898, entry and patent for the claim can not be allowed upon the pending application, and that said company should be required to commence patent proceedings anew so as to afford the protestants an opportunity to file an adverse claim, based upon said alleged relocation. In other words, the contention is that the applicant company, notwithstanding no opportunity has as yet been afforded it to make payment and entry for the claim applied for, must nevertheless be held to have waived or forfeited all rights under its applica-

tion for patent, and the proceedings had thereon, because of the alleged omission in the matter of annual expenditure for the year 1898, and the relocation of the claim on account thereof.

The position assumed by the protestants is not believed to be a tenable one. Certain it is that the applicant here can not be charged with failure to prosecute its application to completion within a reasonable time after the expiration of the period of publication of notice thereof, as was done in the cases of Cain *et al. v.* Addenda Mining Company, P. Wolenberg *et al.*, Barklage *et al. v.* Russell, and Gillis *v.* Downey, hereinbefore referred to. In each of those cases the application for patent, without occasion therefor, was suffered to lie dormant for a number of years, with no effort on the part of the applicant to carry the same to completion. In this case, upon the filing of the Baby Dora adverse claim, further proceedings with the view to carrying the application for patent to completion, were stayed by statutory mandate. Nor can it be said here, as was done in the case of Reins *v.* Montana Copper Company, *supra*, that the applicant for patent failed to complete, within a reasonable time, the proceedings necessary to obtain patent after the judgment of the court in the adverse suit was rendered. The proceedings had on the protests since the termination of that suit, have, according to departmental practice, been equally effective to prevent the completion of the application for patent, as was the adverse suit prior to its dismissal. In each of the cited cases, failure by the applicant to seasonably press his application to completion was apparent, and during the existence of that failure other rights were claimed to have intervened. No such failure exists in this case, and there is no room for the application of the doctrine of laches. The law does not impute laches to a party because he has not done, nor offered to do, something which, even though he had made the offer, he would not have been allowed to do.

Again, section 2326 of the Revised Statutes, after providing that a party who has filed an adverse claim during the period of publication tion, shall within thirty days thereafter—

> commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment—

further declares as follows:

> After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess.

It is to be observed that under the statute, the party who succeeds in the court may, *without giving further notice*, file with the proper officer a copy of the judgment roll, accompanied by the necessary evidence of description, and of the amount of labor expended or improvements made as required in other cases, and obtain patent for the land which he has been adjudged to rightly possess, upon making payment therefor, together with the proper fees.

It matters not that the adverse suit may have been pending in the courts for years. The successful party is nevertheless entitled to his patent under the statute, upon filing a copy of the judgment roll and complying with the conditions stated, *without giving further notice.* From this it would seem necessarily to follow that an applicant for patent who has been adversed in the courts, is not obliged, after the commencement of the adverse proceedings, to keep up the annual expenditure under section 2324, in order to prevent the relocation and probable loss of his claim during the pendency of such proceedings. If this were not the intention of the law how could patent be obtained in such a case after the termination of the adverse proceedings, upon filing the required proofs and making the necessary payments, *without giving further notice?* If it had been intended that the question of annual expenditure during the pendency of adverse proceedings in the courts should be inquired into subsequently to the terminations of such proceedings, however prompt the applicant for patent may have been in endeavoring to carry his application to completion after the court's judgment in his favor, specific provision would doubtless have been made as to the manner of conducting the inquiry. The statute contains no such provision, and the positive declaration that the party entitled to the possession under the court's judgment may obtain his patent, upon compliance with the conditions stated, *without giving further notice*, strongly negatives the idea that any such inquiry was within the contemplation of the law makers.

If an applicant for patent, who has been adversed under the statute, is required to keep up the annual expenditure under section 2324 during the continuance of the adverse proceedings in the courts, it must be for the reason that without such annual expenditure the claim is liable to relocation and consequent forfeiture. There could be no other reason. In every case, therefore, where the litigation over the adverse claim continues for a period of time within which failure to make the annual expenditure might occur, and a relocation of the claim on account thereof might be made, although the adverse proceedings should ultimately be determined in the applicant's favor, there would have to be another notice and opportunity for an adverse suit in a court of competent jurisdiction to settle or determine the possessory right to the claim between the applicant for patent and any such relocator thereof, for the reason that it is not within the

province of the land department to determine possessory rights or questions involving the annual expenditure required for the maintenance thereof. It is plainly to be seen that if such were the law, the same proceedings might be repeated again and again under the same application for patent, and thus be the means of indefinitely delaying, if not entirely defeating, all applications against which adverse claims are filed. Such a construction would reduce the statute to an absurdity and should be rejected for that reason, if for no other.

Assuming that the applicant company, up to the date of the filing of the Baby Dora adverse claim, and subsequently to the time of the expiration of the period of publication, had done everything that under the law could be done, toward establishing its right to make payment for and receive patent to the land embraced in the claim applied for—and nothing to the contrary is shown—it must be conceded that all the equities are in favor of the company as against the contention of the protestants. It was through no fault or neglect of the applicant, but on account of the false clamor of an adverse claimant and of the protestants, Opie *et al.* and Crumby, that the required payment was not and could not have been made after the expiration of the period of publication and prior hereto. Every consideration of equity, therefore, seems to demand that the compulsory delay occasioned by the proceedings on the adverse claim, and on the protest of Opie *et al.*, should not operate to the applicant's prejudice. The view which accords with sound reason, as well as with the principles of equity and justice, clearly is that the proceedings necessary to the completion of the right to a patent, if taken at the first opportunity afforded therefor under the law and departmental practice, with respect to matters like that here under consideration, should be held to be as effective as if taken at the date when, but for the filing of the adverse claim and protest, the proceedings on the application could have been completed.

Nor is there any reason why the foregoing considerations, except the discussion of the provisions of the statute relating to the issuance of patent upon the judgment roll after the termination of adverse proceedings in the courts, should not apply with equal force to the delay caused by the filing of the Opie protest and the proceedings had thereon, during which time the claimed relocation by the present protestants was made. It was no more the fault of the applicant company that it was prevented from completing its patent proceedings in the one case, than it was in the other. There is no room for the imputation of laches in the one case, any more than in the other. It is equally clear that the absurd results suggested as a probable consequence of the construction contended for, if applied to delays caused by the pendency of adverse proceedings in the courts, would be just as likely to follow such a construction, if applied to delays caused by

the pendency of protest proceedings. In addition to this, it may be said that there appears to be no good reason, in view of the statutory provision allowing the issuance of patent upon the judgment roll after the termination of adverse proceedings in the courts, *without giving further notice*, why the same rule should not be followed upon the prompt completion of the patent proceedings after the termination, in the applicant's favor, of protest proceedings before the land department.

In view of what has been said, it is held that the allegations of the protest of Crumby *et al.*, to the effect that the applicant for patent in this case failed to make an expenditure of one hundred dollars in labor or improvements on the claim applied for during the year 1898, pending the proceedings on the Opie protest, and that on account of such alleged failure, Crumby *et al.* relocated the claim, January 1, 1899, presents no matters requiring or calling for an investigation by the land department. Nor are such matters sufficient to cause further delay in the completion, by the Auburn Gold Mining and Milling Company, of its patent proceedings, if, with reasonable promptness after notice of this decision, the necessary steps to that end are taken by said company.

The protest is accordingly dismissed.

DISPOSAL OF ORIGINAL PORTION OF FORT M'PHERSON ABANDONED MILITARY RESERVATION.

INSTRUCTIONS.

Commissioner Hermann to register and receiver, North Platte, Nebraska, August 3, 1900.

The appraisal of the original portion of the Fort McPherson abandoned military reservation, Nebraska, a tract four miles square, in townships 12 and 13 north, range 38 west, having been approved by the Secretary of the Interior, you are authorized and directed to allow entries to go to record for lands in both the odd and even numbered sections, as the claim of the Union Pacific Railroad Company to lands in the odd numbered sections has finally been closed out by office letter "F" of January 11, 1900, adverse to the company.

Said lands are subject to settlement and entry under the provisions of the act of August 23, 1894 (28 Stat., 491).

By letter "C" of August 30, 1898, you were directed to give the usual notice of the filing of the triplicate plats of the survey of the portion of the reservation above mentioned, fixing a date when entries would be allowed to go of record for lands in the even numbered sections under and subject to the provisions of said act of August 23, 1894, but not to allow any entries to go of record for lands in the odd numbered sections until further orders. You were also informed that

instructions would soon be issued as to the payment for these lands, rate of interest and manner of submitting proofs therefor.

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 4 per cent per annum.

A copy of the appraisal of the lands has been filed in your office by the appraisers, and upon the request of entrymen you will inform them at what rate per acre the lands entered by them have been appraised.

In allowing entries for the lands in this reservation you will in each case endorse on the application "Fort McPherson reservation, act of Aug. 23, 1894," and make the same notation 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 from date of settlement with full payment in cash, or after submitting ordinary five year 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 four per cent per annum from the date of the acceptance of the 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 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 McPherson 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 the 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 such 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.

Many tracts in this original portion of the reservation, and in the additions thereto, concerning which instructions were issued to you March 12, 1896, were appraised at $1.00, $1.25, $1.50, and $2.00 per acre.

Under the terms of the act of August 23, 1894, parties making homestead entries for these lands are required to pay therefor "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."

As the lands both in the original portion of the reservation and the additions are of the double minimum class, you will not accept payment at less than $2.50 per acre, the appraisal to the contrary notwithstanding, but the appraisal will govern as to tracts appraised at more than $2.50 per acre. Letter "C" of March 12, 1896, above referred to, is modified accordingly.

Said act of August 23, 1894, did not repeal the act of July 5, 1884 (23 Stat., 103); hence parties qualified to make entries under the latter act may do so, in which event they will not have to make other payment for the land than the usual fee and commissions. But in submitting proof on such an entry the party will be required to show that he settled on the reservation prior to its establishment or prior to January 1, 1884, and maintained continuous residence thereon from the date of settlement to the date of entry. See the cases of Reynolds *v.* Cole (5 L. D., 555) and Connelly *v.* Boyd (10 L. D., 489).

Approved:

THOS. RYAN,
Acting Secretary.

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

Departmental decision of February 21, 1898, 26 L. D., 252, recalled and vacated by Acting Secretary Ryan, August 4, 1900, "in so far as it held the showing of occupancy of the land by Neilsen at the date of the attachment of rights under the railroad grant sufficient to except the tract from the operation of the grant," and directions given that, "unless other and sufficient reason appears for denying the claim of the company, said tract will be clear-listed for approval as a basis for patenting the tract on account of the railroad grant."

HASTINGS AND DAKOTA RY. CO. *v.* KNUDSON.

Motion for review of departmental decision of April 7, 1900, 29 L. D., 650, denied by Acting Secretary Ryan, August 7, 1900.

PROTEST—CHARACTER OF LAND—DEFECTIVE FINAL-PROOF NOTICE.

DUFRENE ET AL. *v.* MACE'S HEIRS.

A hearing to ascertain the character of the land involved will not be ordered upon a protest by a mineral claimant against the patenting of a homestead claim upon which final proof has been made and certificate issued, in the absence of an allegation or showing by the protestant that the land in question, or a part thereof, was known to be valuable for its deposits of mineral at the date of the issuance of the final certificate.

In case of a defective notice of final proof on a homestead entry, by reason of the erroneous description therein of a part of the land involved, under which notice proof was made and final certificate issued, and the giving thereafter of a new and correct notice, the final certificate will stand as of the date issued, where the final proof is satisfactory and it is not shown that by reason of such erroneous description the right or claim of any one has been prejudiced; and inquiry as to the character of the tract erroneously described, as well as of the other tracts embraced in the entry, will not be allowed to include evidence of any exploration or discovery of mineral thereon subsequent to the date of said certificate.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 8, 1900.

(S. V. P.) (E. B., Jr.)

This is an appeal by W. D. Dufrene and Elmer Dufrene, claimants, of the Dufrene and the Dufrene No. 2 lode mining claims, respectively, from the decisions of your office dated November 29, 1899, and January 27, 1900, the latter on review, refusing to order a hearing upon their protests alleging the SE¼ of NE¼, the E½ of SE¼ and the SW¼ of SE¼ of Sec. 20, T. 6 N., R. 10 E., M. D. M., Sacramento, California, land district, for which Percy B. Mace made homestead entry No. 5936 July 3, 1891, to be mineral in character, and dismissing the said

protests, on the ground that the showing made was insufficient to justify the ordering of a hearing. The appeal assigns errors of law and of fact in the said decisions.

It appears that Percy B. Mace died in August, 1896, and that upon notice of final proof given by his father, Fayette Mace, as heir, final proof was made for the land above described, and final certificate No. 3745 was issued thereon November 8, 1897, in the name of "Fayette Mace, heir of Percy B. Mace, deceased." The entry papers having reached your office in due course it was there discovered that the said notice of final proof as published incorrectly described one of the legal subdivisions embraced in the entry as the SW¼ of the SW¼ of said section instead of the SW¼ of the SE¼ thereof, its true description. Because of this error in the notice, your office on May 13, 1898, directed that new notice by publication be given, and at the same time directed that the said final certificate be corrected so as to read, "heirs of Percy B. Mace, deceased," instead of as hereinbefore quoted.

Thereupon said Fayette Mace gave new notice of his intention to make final proof August 28, 1899, for the land embraced in the entry. He was unable, as appears from the report of the local office, to appear on the date set for hearing his final proof, by reason of sickness, and the hearing of the same was continued from time to time until September 14, following, when final proof was again offered. On August 28, 1899, the date on which final proof was to have been heard the second time, the said protests of W. D. and Elmer Dufrene were filed.

It appears that the Dufrene lode claim is situated partly in the SE¼ of the NE¼ and partly in the NE¼ of the SE¼ of said section, and that the Dufrene No. 2 lode claim is situated in the SE¼ of the SE¼ thereof, the location of the former having been made August 4, 1899, and of the latter August 12, 1899. Each protest is corroborated by the other protestant and by one Steven Rose. Each protestant alleges the due location in good faith of his claim; that the ground embraced therein and in the legal subdivision or subdivisions in which the same is situated is more valuable for the mineral, chiefly copper, contained therein than for purposes of agriculture; that the land is comparatively valueless for agriculture; and that it is in what is known as the Copper Belt, upon which the Newton copper mine is situated, about one half mile distant, and which has produced and is producing large quantities of copper. The allegations of Elmer Dufrene as to the mineral character of the land embrace also the said SW¼ of the SE¼, which is included in the entry and is the tract which was erroneously described in the first published notice of intention to make final proof. In the affidavit supporting his own protest W. D. Dufrene also states:

> I have known the ground covered by the said (Dufrene) mine for thirty odd years; this ground was worked for copper over thirty years ago by members of my

family and others and work stopped owing to the low price of copper. A shaft over one hundred feet deep was sunk on the formation showing a well defined vein or deposit of copper ore assaying as high as 11 per cent. The formation is continuous throughout the claim. I have recently taken out rock which assays as follows: 7.6 per cent in copper, 6 ozs. of silver to the ton, and some gold.

In response to these protests and affidavits said Fayette Mace filed his own affidavit stating:

That he is an expert in copper mining, having had years of experience in such mining as a practical miner and an owner of copper mines. That he is well acquainted with every foot of said land and the country immediately surrounding it; that he thoroughly prospected this land for copper, gold and silver between the years 1861 and 1865; that he sunk a number of prospect shafts on different portions of said land, and by such actual prospecting became absolutely satisfied that no mineral of either copper, silver or gold existed therein in quantities that would justify anyone in working any portion of said land for minerals of any kind. That at no place on said land could he find any permanent lead or deposit of any valuable metals; and that he is prepared to say, from his prospecting thereof, and does say, that there is no indications on said land of any valuable minerals on any portion of said land. That he has made every effort possible to trace the copper ledge of the Newton copper mine referred to in the mineral protests and that he could find no trace whatever of its extending across or into any part of said land, and that he believes that the same does not touch said land, and that if said ledge extends as far as said land that it runs at least fifty rods east of the east line of said homestead claim. That for the past thirty years no one has ever attempted in any manner to mine upon or prospect any portion of said land, although no objections were, or would have been made to such prospecting had they so desired. That the protestants herein have made no effort whatever to prospect said land—that they have not stuck a pick or shovel into the ground, nor have they done anything in the premises except to put up their location notices and file their protests herein. That affiant abandoned his prospecting on said land for mineral simply and solely because no minerals could be found therein, and not because the price of copper became low. That during all the prospecting he did on said land he failed to find or take out a pound of any character of valuable minerals, either of copper or other metal.

Affiant further avers that said land is valuable agricultural land, and especially for grazing purposes; that he has raised two tons of grain hay to the acre on land of this same character and adjacent to it. It is also first class land for fruit and grapes; that he has irrigating water ditches and water rights from which the greater part of this land can be irrigated.

Affiant Norman Johnson corroborates the foregoing affidavits from personal knowledge of all the facts therein stated.

He also filed affidavits of the superintendent and the foreman of the said Newton copper mine, each of whom states that he "visited" the mining claim of W. D. Dufrene, and that he saw there nothing to indicate the presence of mineral in paying quantities or that would justify working the same as a copper mine. The latter states, in addition, that—

The shaft called the "Heywood Shaft," lying several rods east of the east line of the Percy B. Mace, dec'd., homestead, bears considerable resemblance to the aforesaid Newton copper mine.

In their sworn motion for review, dated January 4, 1900, of your office decision of November 29, 1899, protestants allege, among other

things, that "on showing of ore bearing copper then made on said mining claims" one F. D. Hutchins, M. D., offered them $3,000 for their claims, which they refused; and they also allege "on information and belief" that said Percy B. Mace, deceased, never established his residence on the said land, or had any dwelling or place of abode thereon, or cultivated the same, and that neither said Fayette Mace nor any heirs of the said Percy B. Mace has resided on the land or cultivated the same since his death. In support of these allegations protestants filed the affidavit of said Hutchins, dated January 3, 1900, stating that on or about November 1, 1899, he offered protestants $3,000 for their said mining claims, and is still ready "to carry same out if the claimants will accept same and perfect their title"; of E. M. Carpenter, that the land in question has no value for agricultural purposes, is situated on the copper belt, and he believes it more valuable for mineral than agricultural purposes; of Frank Goss, that he has been on said land hunting and passing through the same every year for the last twelve years and during that time said Percy B. Mace did not reside thereon, nor has there been any house or dwelling or any cultivated land thereon; and of George Salzgeber, that he knew Percy B. Mace and knows the said land and that from July 3, 1891, until his death, according to affiant's information and belief, Percy B. Mace did not erect any building nor establish his residence on the land nor cultivate the same, nor has said Fayette Mace resided on or cultivated the land since the death of Percy B. Mace, nor was anything attempted thereon by either of them in the way of cultivation except to plant a very few walnut trees.

It will be observed that protestants have nowhere directly alleged at any time, notwithstanding they have had ample opportunity to do so and that the importance of such allegation and due showing thereunder have been pointed out in both of said decisions, namely, that the said land or any part thereof was known to be valuable for its deposits of copper or other mineral at the time final homestead certificate therefor issued on the entry of Percy B. Mace, that is, November 8, 1897, nor has any evidence been filed by them showing or tending to show that any valuable vein of copper or other mineral or any valuable mineral deposit was then known to exist therein.

Without such allegation or showing the Department or your office would not be justified in ordering a hearing as to the character of the land. Discoveries of mineral, however valuable, after the due issuance of final homestead certificate, would not affect in any way the right and title of the homestead claimant. It is true in this case notice as to one of the tracts involved was defective and new notice was found necessary and has been given, but if the final proof be satisfactory, and in the absence of prejudice shown to any one's right or claim to the land by reason of the erroneous description of the land in the first

notice, the final certificate will stand as of the date given therein, and inquiry as to the character of that tract, as well as of the others embraced in the entry, will not be allowed to include any exploration or discovery subsequent to such date.

It appearing that protestant's allegations and the affidavits filed in support thereof relative to non-compliance with the homestead law by Percy B. Mace and his heirs are, except as to the affidavit of said Goss, upon information and belief only; that due compliance with the homestead law in all the particulars covered by said allegations and affidavits is clearly and unequivocally shown by the testimony of four disinterested persons, in addition to that of Fayette Mace, taken at the hearing of final proof; and that such allegations were made and the said evidence filed, not with a view of instituting a contest against the entry under the homestead laws, but merely by way of strengthening protestant's claim to the land under the mining laws, the said allegations and evidence are not deemed sufficient to justify the ordering of a hearing in the premises.

The decisions of your office are affirmed accordingly.

EDGAR A. COFFIN.

Motion for review of departmental decision of May 19, 1900, 30 L. D., 15, denied by Acting Secretary Ryan, August 9, 1900.

PRIVATE LAND CLAIM—RESERVATION—ACT OF JULY 22, 1854.

KATHARINE DAVIS.

The reservation created by the eighth section of the act of July 22, 1854, of all lands claimed under Spanish or Mexican grants, did not depend for its efficiency upon action by the land department in giving notice of the withdrawal, but became immediately operative by force of the statute, and continued effective until said claims were finally adjudicated, whether such action was by Congress under the act of 1854, or by the Court of Private Land Claims under the act of March 3, 1891; and on the final rejection of a claim the lands embraced therein are immediately released from reservation and become at once open to settlement and entry without any formal order by the land department announcing the termination of the reservation.

An appeal from the action of the local officers properly rejecting an application because the land described therein is not subject to entry, confers no right upon the appellant, even though the land becomes subject to entry during the pendency of the appeal.

Acting Secretary Ryan to the Commissioner of the General Land
(S. V. P.) *Office, August 9, 1900.* (E. F. B.)

The Department has considered the appeal of Katharine Davis from the decision of your office of October 29, 1898, affirming the action of

the local officers rejecting her application, filed May 23, 1898, to make desert-land entry of the W. ½, Sec. 32, T. 9 S., R. 24 W., Tucson, Arizona.

The application was rejected for the reason that the land applied for is within the limits of the private land claim known as El Paso de los Algodones, and was reserved from sale or other disposition under authority of the eighth section of the act of July 22, 1854 (10 Stat., 308).

The appellant contends that the decision of the supreme court in favor of the United States in the case of United States *v.* Coe (170 U. S., 681), which involved the validity of this grant, virtually opened said lands to settlement under the land laws of the United States, and that said lands are no longer in a state of reservation. Your office affirmed the action of the local officers upon the ground that the decision of the court had not become final and that until the decision of the court, adverse to the grant, becomes final and complete the reservation of the land continues in force.

The surveyor-general of Arizona submitted a report to Congress upon said claim, recommending that it be rejected, but no action was taken thereon. The claim subsequently came before the Court of Private Land Claims, under the act of March 3, 1891 (26 Stat., 862), and was confirmed, but upon appeal to the supreme court of the United States the decision of the Court of Private Land Claims was reversed and the case was remanded for further proceedings (United States *v.* Coe, 170 U. S., 681). On May 22, 1899, the supreme court denied a petition for a rehearing, and thereafter the Court of Private Land Claims ordered and adjudged that the decree of confirmation theretofore entered in said case be vacated, set aside and annulled. It was further adjudged and decreed that the claim be rejected and the petition dismissed. A copy of said decree has been certified by the clerk of the Court of Private Land Claims and transmitted to your office, from which it appears that the decree rejecting said claim was entered of record November 27, 1899, and that the judgment is final.

The reservation created by the eighth section of the act of July 22, 1854, continued in force until the repeal of that section by the act of March 3, 1891, and the reservation necessarily arising under that act remained in force until the final determination of the claim under said act. The land was therefore not subject to entry May 23, 1898, the date of appellant's application, as the judgment of the court in said case had not then become final.

Appellant acquired no rights by virtue of an application tendered when the land was not subject to entry. The application having been properly rejected, she secured no right by her appeal, although the land might have become subject to entry while her appeal was pending.

Falje *v.* Moe (28 L. D., 371). The decision of your office rejecting her application is affirmed.

While this appeal was pending the Department received your letter of January 11, 1900, conveying the information that the judgment of the Court of Private Land Claims rejecting this grant had become final. In said letter you refer to the cases of Katharine Davis and Clinton D. Hoover pending before the Department upon appeals from the action of your office rejecting application to enter lands within the limits of said claim, and you submit for consideration the question "whether the final judgment of the court *ipso facto* opened the lands to entry, or whether the formal act of restoration remains within the jurisdiction of that department of the executive having control of the public lands." You state that the order reserving the lands emanated from the land department and express the opinion that before the lands reserved to satisfy the Algodones grant will become subject to entry, it will be necessary for the land department to revoke the order of reservation.

The reservation provided for by the act of July 22, 1854, *supra*, did not depend for its efficiency upon the ministerial action of the land department in giving notice of the withdrawal, but it became immediately operative by force of the statute upon all lands within the ceded territory covered at the time by any Spanish or Mexican claims which originated prior to the treaty of cession, and the reservation of the lands continued until the final action on such claim, whether such action was by Congress under the act of July 22, 1854, or by the Court of Private Land Claims under the act of March 3, 1891, *supra*.

The lands were reserved for the purpose of affording an opportunity to investigate and determine the validity or invalidity of the claim. The purpose of the reservation was accomplished when such investigation had been made and final action taken on the claim. It therefore follows that on the final adjudication and rejection of said claim the lands embraced therein became at once open to settlement and entry without any formal order on the part of the land department announcing the determination of the reservation.

HOMESTEAD CONTEST—ABANDONMENT—ACT OF JUNE 16, 1898.

POWELL *v.* LANDER.

The requirement of the act of June 16, 1898, that the affidavit of contest, in a case where contest is instituted against a settler, on the ground of abandonment, at a time when the United States is engaged in war, must contain an allegation that the alleged absence of the settler was not due to his employment in the army, navy, or marine corps of the United States, is for the sole benefit and protection of the settler, and will be considered to have been waived by him where he per-

sonally appears at the hearing and makes a general defense to the charge of abandonment without specifically objecting to the affidavit because of the omission therefrom of the required allegation, although he in general terms challenges its sufficiency.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *August 10, 1900.* (S. V. P.)

On October 7, 1895, August Lander made homestead entry No. 17,051, for the N. ½ of the NE. ¼ and the N. ½ of the NW. ¼ of Sec. 12, T. 160 N., R. 49 W., Crookston, Minnesota, land district.

On December 13, 1898, Elmer Powell filed affidavit of contest against said entry alleging abandonment by the entryman; but said affidavit did not allege that the entryman's absence from the land was not due to his employment in the military or naval service of the United States, as required by the act of Congress approved June 16, 1898 (30 Stat., 473).

Both parties appeared at the local office at the time fixed for the hearing and stipulated that the evidence should be taken before an officer and at a place named—

and that when the testimony is so taken, the same shall be returned and filed in the United States land office at Crookston, Minnesota, and by the Department considered, and all objections, if any there are, passed upon the same in all respects as if taken at the time and at the place designated by the notice herein, and that all irregularities, if any, as to the time, place and manner of taking the same, are hereby especially waived, each party hereto, however, reserving the right to raise such objections as he may consider proper and germane, and that he loses no rights in the premises so far as such objections are concerned, and that the office shall rule thereupon when the same are presented for consideration.

Attention was not then specially called to the fact that the preliminary affidavit of contest did not contain the allegation required by the act of June 16, 1898, and no objection was then made to the affidavit or proceedings upon that ground. The hearing was postponed to allow the taking of the evidence as stipulated. The parties appeared before the officer and at the time and place agreed upon, and before any evidence was taken the defendant objected "to the introduction or consideration of any testimony in this case, for the reason that the affidavit of contest and notice herein do not state sufficient facts or allegations as by rules required to constitute a cause of action."

The parties, respectively, presented their evidence to sustain and defeat the contest, the defendant making a general defense to the charge of abandonment.

When the matter came before the local officers they, without passing upon the general objection to the sufficiency of the affidavit, considered the evidence, found for the contestant and recommended the cancellation of the entry.

Upon appeal, your office, by decision of February 14, 1900, held that the defendant, by appearing on the day set for the hearing and agreeing to a continuance, thereby waived objection to the sufficiency of the affidavit and notice, and, on examination of the evidence, approved the action of the local officers.

The evidence taken at the hearing sustains the charge of abandonment and shows that the defendant's absence from the land was not due to employment or service in the army or navy.

In the somewhat similar case of Brown *v.* Peters (30 L. D., 57), it was said:

> The purpose of the act of June 16, 1898, was, among other things, to afford to settlers upon the public lands who should enlist or be actually engaged in the army or navy of the United States in time of war, immunity from contests on the ground of abandonment, where the absence from the land was due to such service. While it is clear that the local officers should not have issued notice upon an affidavit of contest which did not contain the allegation required by the statute, yet under the facts of this case the question arises whether the entryman, for whose sole benefit and protection the requirement was made, waived compliance therewith, where he appeared in the contest, and, without objecting to the omission from the contest affidavit of the required allegation, made a general defense to the charge of abandonment.

And after citing and quoting from several court decisions given upon somewhat similar statutes, it was further said:

> By law the local officers have general jurisdiction to hear contests against entries, based on the charge of abandonment. The statute in question, for the sole benefit and protection of the entryman, places a limitation upon the mode of invoking that jurisdiction in contests initiated after its passage, by way of requiring a preliminary allegation in the affidavit of contest to the effect that the charge of abandonment does not grow out of absence from the land due to service in the army, etc., but that compliance with such a requirement may be waived by the one for whose sole benefit and protection it is intended is fully established by the authorities.

That case differed from the one under consideration in the fact that here the sufficiency of the affidavit was challenged in general terms, while there, no general objection to its sufficiency was made. They are alike in that in neither was the absence of the allegation required by the act of June 16, 1898, specially pointed out or objected to, and in both the defendant appeared and made a general defense to the charge of abandonment, and the evidence showed that the entryman's absence from the land was not due to employment in the military or naval service. The difference is not material. The purpose of the statute was fully satisfied in both cases.

The evidence in this case shows that the contestant could have truthfully inserted the required allegation in his preliminary affidavit of contest and unquestionably he would have done so had the defendant challenged the sufficiency of the affidavit upon that specific ground before the hearing. The failure to comply with this statutory requirement, made for defendant's sole benefit and protection, should have

been specially pointed out by him if he intended taking advantage thereof. By his omission to make a timely and specific objection to the affidavit of contest on this ground, he waived compliance with the act of June 16, 1898, so far as the affidavit is concerned, and the requirement of the act in the matter of proof being fully complied with at the hearing it can not be said that the interests or rights of the defendant under the act have been prejudiced, neglected or affected.

Your office decision is affirmed.

MINING CLAIM—FORM OF LOCATION—SECTION 2331, REVISED STATUTES.

MILLER PLACER CLAIM.

Within the meaning of section 2331 of the Revised Statutes, all placer mining claims located after May 10, 1872, must "conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys," whether the locations are upon surveyed or unsurveyed lands.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 15, 1900.

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

August 18, 1899, your office suspended mineral entry No. 590, made May 24, 1899, by Walter S. Cheesman, for the Miller placer claim, survey No. 12,894, Denver, Colorado, on account of objections to the proof, and required the parties in interest to furnish additional evidence within sixty days from notice, or the entry would be held for cancellation. In response to the notice, claimant Cheesman filed his own and the affidavits of three other persons, together with a plat of said claim, intended to meet the requirements in respect to the deficiencies in the original proof, which showing was considered November 4, 1899, by your office, and held to be insufficient, and said mineral entry was held for cancellation.

The case is before the Department on the appeal of Cheesman from said decision.

Your office decision of August 18, 1899, described the claim as follows:

> The survey of the Miller placer is remarkable in shape. It is composed of two large tracts of land over three miles apart, the southernmost tract embracing in its limits and following the general course thereof, a portion of the South Fork of South Platte River, while the northernmost tract has running through it for its entire length a stream known as Lost Park Creek.
>
> The two tracts are connected by a narrow strip of land over three miles long apparently from 30 to 50 feet wide which forms a portion of the claim as a whole.

Then, after referring to certain stated deficiencies in the proof as to

the required expenditure in labor or improvements on the claim, your office further said:

A certificate of the surveyor-general showing that $500 in improvements or expenditures such as will be satisfactory to this office were placed upon the claim prior to the expiration of the period of publication, will, therefore, be required.

The record is silent as to the land embraced in the connecting strip regarding its value for minerals. The peculiarity of the shape of the survey requires that there should be filed a more comprehensive report than is now with the papers, showing the reason that actuated the claimant in locating a claim of such unusual form for the purpose of mineral development. Otherwise on its face and in view of the small and incomplete nature of the improvements and expenditures certified for the claim, it would seem that as a fact the claimant is attempting to secure and obtain patent under the mineral laws, for a water right and not a placer mining claim. See 2 L. D., 774; 3 ibid., 536; 5 ibid., 191.

You will accordingly call upon the parties in interest to furnish within sixty days from notice hereof evidence as above required to show that the Miller placer claim is such a claim as may be properly patented under the mining laws of the United States.

The above contains a correct description of the claim. Under the view taken of the record, it is not deemed necessary to enter upon the question of the sufficiency of the improvements made upon or for the claim.

The provisions of the statute with respect to the location, entry and patent of placer claims are in part as follows:

Sec. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Sec. 2330 [in part]. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

Sec. 2331 [in part]. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands.

The township embracing the land in question was surveyed in the field September, 1882, but the survey for some reason was suspended October 28, 1886, and the tract is therefore to be treated as unsurveyed land.

Under the last section of the Revised Statutes above cited, *all placer mining claims*, located after the tenth day of May, 1872, must "conform as near as practicable with the United States system of public land surveys, and the rectangular subdivisions of such surveys;" and this would appear to be the case whether the locations are upon surveyed or unsurveyed lands. In the matter of shape, the claim in question not only fails to approximate conformity "with the United States system of public land surveys," but appears to be totally at variance with such system, which affords no warrant for cutting the public lands into lengthy strips of such narrow width as is three miles in length of the claim here in question. Nothing is found in the showing made in response to your office decisions requiring further proof, or in the affidavits filed in the Department since your office decision of November 9, 1899, was rendered, which can justify the approval of the entry in its present shape, and for the reasons above given it must be canceled.

Your office decision holding the entry for cancellation is accordingly affirmed.

MINING CLAIM—SURVEY OF EXCLUDED GROUND.

ALBERT B. KNIGHT ET AL.

Where in the entry of a placer claim embracing legal subdivisions exclusions have been made on account of conflicting patented lode claims, a survey is necessary in order that the excluded tracts may be accurately described in the placer patent.

Acting Secretary Ryan to the Commissioner of the General Land Office, August 15, 1900.
(S. V. P.) (W. A. E.)

December 31, 1898, Albert B. Knight *et al.* made mineral entry No. 3716 for the Ulrich placer mining claim, described as the S. ½ of the NE. ¼ of the NE. ¼ of Sec. 21, and the SW. ¼ of the NW. ¼ of the NW. ¼ of Sec. 22, T. 3 N., R. 8 W., Helena, Montana, excluding all conflict with the patented lode claims, Sonora, M. E. No. 2791; Jelly Man, M. E. No. 1423; and Leggat No. 1, M. E. No. 1513.

By your office decision of June 15, 1899, addressed to the United States surveyor-general at Helena, Montana, said entry was considered, and the following language used in regard thereto:

> You did not designate the ground embraced in mineral entry No. 3716 as lots, but it appears from the tracing that the entry embraces all ground in the NE. ¼ of NE. ¼ of Sec. 21, not covered by mineral surveys, and that part of the SW. ¼ of NW. ¼ of NW. ¼ of Sec. 22, not covered by mineral surveys, the remaining vacant ground in the NW. ¼ of NW. ¼ of Sec. 22, being designated as lots 4 and 5.
>
> There is no question but that the said fractional S. ½ of NE. ¼ of NE. ¼ of Sec. 21 may be designated as a lot and so patented, but the land claimed in Sec. 22 does not

embrace all the vacant contiguous land in the NW. ¼ of NW. ¼ of said section. The land lying outside the limits of the tract embraced in entry being designated on your tracing as lots 4 and 5.

The Honorable Secretary of the Interior in the case of the Holmes Placer, 26 L. D., 650, holds that a patent for a placer claim should describe with mathematical accuracy the land intended to be conveyed thereby, and that where such a degree of accuracy cannot be obtained under an application that embraces lands theretofore surveyed and returned in irregular subdivisions, an additional survey will be required.

The attempt in this case to describe the irregular piece of ground in the NW. ¼ of NW. ¼ of Sec. 22, as one would describe a legal subdivision would necessarily cause confusion in the records, as well as the possibility of raising doubt as to the exact area patented. You will, therefore, advise claimants in this case that they will be required to have executed a survey of the land claimed by them in this entry and situate in the NW. ¼ of NW. ¼ of Sec. 22. This survey should be made as an original entry and given a regular number in your series. It is suggested that if said survey be executed that it would be preferable to embrace therein the land claimed in Section 21 as well as that lying in Section 22, but if it is the desire of claimants to simply have a final survey made of that portion lying in Section 22, the remainder of the entry, viz., fractional S. ½ of NE. ¼ of NE. ¼ of Section 21, should be designated by you as lot 5.

Advise claimants that they will be allowed sixty days from notice within which to make application for the survey of that portion of their entry lying in the NW. ¼ of NW. ¼ of Sec. 22, or to appeal, and that in default thereof their entry will be canceled, to the extent of said tract, without further notice from this office.

From this action the claimants have appealed. It is alleged in the appeal that the Ulrich placer mining claim was located many years ago, before the township in which the claim is situated was surveyed; that upon the extension of the public surveys said claim was conformed to legal ten acre subdivisions, as provided by law; that subsequently the area in conflict with the Sonora, Jelly Man and Leggat No. 1 lode mining claims was given up; and that no further survey is necessary, as the area embraced in mineral entry No. 3716 can be determined with mathematical accuracy.

The land in question is situated in the old Independence (formerly Rocker) mining district, the records of which have been lost or destroyed. The original location certificate is not with the record, but an affidavit, signed by two disinterested parties, filed with the papers in the case, shows that the claimants and their predecessors in interest have been in the quiet and undisturbed possession of said claim for at least twenty-three years last past; that the title has been maintained by occupation, possession, and working; that over three thousand dollars' worth of improvements have been placed on said claim; and that on account of the loss or destruction of the records of the Independence mining district it is now impossible to furnish a complete and connected abstract of title.

The records of your office show that the township in which this claim is situated was surveyed a portion at a time and the plats of these

various surveys were filed at intervals from June 29, 1877, to October 17, 1881.

The Sonora lode mining claim was located May 27, 1886, and the location thereof amended March 22, 1888. Patent was issued May 1, 1893. The Jelly Man lode claim was located April 21, 1886, and patented January 28, 1889. The Leggat No. 1 lode claim was located August 2, 1886, and patented February 15, 1890.

It is true, as alleged by appellants, that section 2330 of the Revised Statutes of the United States provides that "legal subdivisions of forty acres may be subdivided into ten-acre tracts," and that section 2331 provides that "where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required," but in the present case it appears that the subdivisions which the applicants have included in their entry, less the portions excluded therefrom on account of the conflicting patented lode claims, have been rendered fractional by reason of said excluded conflicts. This leaves irregularly shaped tracts, not designated by any lot numbers, and, as indicated by your office, the attempt to describe them as one would describe a legal subdivision, without also describing the excluded portions, would cause confusion in the records, as well as the possibility of raising doubt as to the exact area patented. It is therefore necessary that a survey should be made, from which your office can, with mathematical accuracy, describe the exclusions from the entry in issuing patent thereon. It is not sufficient that the necessary data might be obtained from the records of the excluded patented lode claims. Each case must stand upon its own record, and the applicants here must furnish as a part of the record of this case, the data necessary as the basis for patent. When this has been done patent may issue for the claim, describing it by legal subdivisions, as entered, and also describing, by proper metes and bounds, the parts excluded as in conflict with the patented lode claims.

Your office decision as thus modified is affirmed.

BEIK ET AL. *v.* NICKERSON.

Motion for review of departmental decision of April 12, 1900, 29 L. D., 662, denied by Acting Secretary Ryan, August 27, 1900.

TENDERFOOT AND OTHER LODES.

Motion for review of departmental decision of July 31, 1900, 30 L. D., 200, denied by Acting Secretary Ryan, August 28, 1900.

SCHOOL LANDS—INDEMNITY SELECTION—INVALID BASIS.

REID *v.* STATE OF MISSISSIPPI.

The "contingent location" of lands in sections 16, in the State of Mississippi, for the benefit of Indians, under executive order issued October 13, 1834, did not operate to reserve or appropriate said lands so as to prevent title thereto vesting in the State under and by virtue of the acts of Congress relating to school lands in said State.

The approval by the Department, and certification thereunder, of a list of indemnity school selections made by a State, covering lands of the character granted for indemnity purposes and free from adverse claim or appropriation, which list is *prima facie* valid, and only defective by reason of the erroneous assignment of an improper basis therefor, passes the legal title of the lands selected to the State, and the Department is thereafter without jurisdiction to revoke or cancel the selection so erroneously approved and certified.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *August 31, 1900.* (J. H. F.)

This case came before the Department on the appeal of James B. Reid from your office decision of November 9, 1899, rejecting his four several applications to make soldiers' additional homestead entries upon the following lands, E.½ NW.¼, Sec. 16, T. 26 N., R. 5 W., Choctaw Meridian, Jackson, Mississippi, land district, as assignee of John J. Holton; W.½ NW.¼, Sec. 16, aforesaid, as assignee of Lemuel James; E. ½ SW.¼, Sec. 16, aforesaid, as assignee of Edward Plumbee; and W.½ SW.¼, said section 16, as assignee of James Osborn. Said applications were rejected by your office upon the ground that said section is school land belonging to the State of Mississippi, title to which has passed to the State under act of March 3, 1803 (2 Stat., 229), and act of May 19, 1852 (10 Stat., 6).

The land involved is a part of the lands to which the Indian title was extinguished by treaty concluded with the Choctaw nation of Indians at Dancing Rabbit Creek, September 27, 1830, and ratified February 24, 1831 (7 Stat., 333).

By the terms of the 14th article of said treaty each Choctaw head of a family desiring to remain and become a citizen of the States was entitled to a reservation of 640 acres of land, providing he signified his intention so to remain to the United States Indian Agent within six months from ratification of said treaty.

Complaints having been made to the effect that many Indians failed to obtain reservations by reason of the mistakes and neglect of said agent in preparing the list registered by him, President Jackson, on October 13, 1834, issued an order (Ex. Doc. 138, p. 32) authorizing one George W. Martin to make "contingent" locations of such reservations where it appeared by probable evidence exhibited to him that Indians had failed to obtain reservations by reason of mistake or neg-

lect of said agent. Lands thus contingently located were to be temporarily suspended from sale, but it was expressly specified in said order that such contingent locations would be complete only in the event Congress subsequently sanctioned them and that such suspension from sale of the lands covered thereby would continue only until the decision of Congress thereon was obtained.

It appears that in pursuance of said executive order, Martin, in 1835, designated said section 16, hereinbefore described, as a "contingent location" for an Indian, Che-Ka-chyo, under the 14th article of said treaty, and said section was thereupon noted in pencil on the tract book of your office as "reserved" for said Indian under said treaty. Many similar "contingent locations" for other Indians, on other lands, appear to have been made about the same time by Martin under said order, and pencil notations thereof were made upon the tract-books in your office in the same manner.

On May 9, 1836 (5 Stat., 131), Congress by resolution provided that so much of the lands acquired by said treaty as had been "conditionally or otherwise located" by the locating agent of the United States should be withheld from sale "until the 1st day of December, 1836," but provided further "that nothing herein contained shall be taken or construed as indicating any intention on the part of Congress to confirm said claims."

By act of March 3, 1837 (5 Stat., 180), Congress provided for appointment of a board of three commissioners to ascertain the name of every Choctaw head of a family who had failed to obtain a reservation and who could show that he had complied with the requisites to entitle him thereto, and said act contained an express provision that nothing therein should be construed to sanction contingent locations made by Martin, "such contingent locations having been made without any legal authority."

Under a proviso contained in the act of June 22, 1838 (5 Stat., 251), however, the President was authorized to cause to be reserved any tract or tracts of land reserved to any Choctaw under said treaty until the claims thereto should be investigated by said commissioners. Instructions were issued to registers and receivers by your office construing the foregoing proviso to include "contingent locations" made by Martin, but by act of June 1, 1840 (5 Stat., 382), Congress provided that nothing in said proviso should be so construed as to defeat any right of pre-emption, nor should any pre-emption claim be defeated "by any contingent Choctaw location," and by section 10 of the act of September 4, 1841 (5 Stat., 453), it was provided that "so much of the proviso of the act of June 22, 1838, or any order of the President of the United States, as directs certain reservations to be made in favor of certain claims under the treaty of Dancing Rabbit Creek, be and the same is hereby repealed." Notwithstanding the validity of said

"contingent locations" was in the first instance dependent solely upon the subsequent sanction of Congress, which was never obtained but was expressly withheld, and although Congress had in 1837 declared them illegal and in 1841 repealed every provision of law authorizing the continuation of reservations thereunder, yet it appears that the pencil notations thereof made upon the tract books in your office have never been removed or modified, although such notations have not been treated or considered by your office as a bar to entry or other disposition of the lands covered thereby.

On July 30, 1888, the State of Mississippi applied to select indemnity lands in lieu of said section 16, appearing by said pencil notation upon the tract book of your office to be reserved for the Indian Che-Ka-chyo, and on August 14, 1890, your office submitted to the Department, for approval, a list of selections, embracing, among others, the selections made in lieu of said section 16, and it was stated in said list that said section was "reserved for Choctaw Indians under 14th article treaty September 27, 1830," and your office having certified that the indemnity was properly due the townships for which selections had been made, said list was approved by the Department August 22, 1890, and on September 1, 1890, said indemnity selections were duly certified to the State.

By your said office decision of November 9, 1899, hereinbefore mentioned, wherein the application of Reid to make soldiers' additional homestead entries upon the W. ½ of said section 16 was rejected, it was held that said "contingent location" for Che-Ka-chyo did not operate to "reserve" said section 16; that said section 16 at date of indemnity selection in lieu thereof was school land in place belonging to said State; that the certificate of your office stating that said section 16 was reserved, attached to the indemnity list submitted for approval of the Department in 1890, was erroneous; and that said indemnity selections in lieu of said section 16 having been made without authority of law, were void, and the same having been approved and certified by inadvertence and mistake, such approval and certification did not pass title to the land so selected nor divest the State of title to said base land, and said selections made in whole or in part upon the basis of said section 16 were held for cancellation as follows, to wit: SW. ¼ NE. ¼, SE. ¼ NW. ¼, SW. ¼ SW. ¼, Sec. 28; SE. ¼ NW. ¼, W. ½ SE. ¼, E. ½ SW. ¼, Sec. 32, T. 5 S., R. 15 W.; Sec. 19; W. ½ NE. ¼, S. ½ SE. ¼ and W. ½, Sec. 28, T. 5 S., R. 14 W.

It was further stated in your decision, however, that in order that no injustice might be done persons, who, relying upon the State's title, might have purchased or leased said lands so certified, the State would be allowed 60 days within which to designate a new basis for said selections, but that in default thereof the selections would be canceled without further notice.

It is contended by appellant that said section 16 was reserved for Indian purposes in such manner as to authorize the selection of indemnity in lieu thereof by the State. No authorities are cited in support of this contention. By the express terms of the executive order under which said "contingent location" was made by Martin the same was not to become a valid reservation for Che-Ka-chyo, under said treaty, unless the same was subsequently sanctioned by Congress, and it is apparent from the acts of Congress hereinbefore referred to that Congress as early as 1837 not only refused to sanction the "contingent locations" made by Martin, but expressly repudiated them and declared them to have been made without legal authority, and after the passage of the act of September 4, 1841, *supra*, no authority of law, for the further suspension from sale or other disposition of lands covered thereby, existed. Moreover, the Secretary of the Treasury, in an opinion rendered August 26, 1844, held that "these contingent locations or contingent reservations were unauthorized and illegal in the beginning, they have never been sanctioned, they have been expressly denounced and declared by the Congress to be illegal and without authority, they have never been reserved by any law or proclamation of the President of the United States. They were subject to the claims of settlers for pre-emption, they were subject to sale at the pleasure of the government, they were liable to selections which the State of Mississippi was authorized to make of 500,000 acres by act of September 4, 1841." It is therefore quite clear that the "contingent location" made by Martin for Che-Ka-chyo did not operate to reserve or appropriate said section 16 so as to prevent the title thereto vesting in the State under and by virtue of the acts of Congress relating to school lands in said State.

By section 12 of the act of March 13, 1803, *supra*, section 16 in each township in the Mississippi Territory was "reserved" from sale "for the support of schools within the same." December 10, 1817, the Territory of Mississippi was admitted as a State; on June 19, 1834, the plat of the survey of said township was approved; and by act of May 19, 1852, *supra*, the legislature of the State of Mississippi was authorized "to sell and convey in fee simple or lease for a term of years" all or any part of the lands theretofore "reserved" and appropriated by Congress for the use of schools within said State. For the purposes of this case it is unnecessary to determine at what particular time the complete title to said section 16 vested in the State, but it is apparent that the provisions of the foregoing act of 1852 constituted, in legal effect, a grant and operated to transfer to the State any interest in said lands then remaining in the United States and that the absolute title to said section 16, in place, was ever thereafter vested in the State and remained therein or in its grantees or lessees at date of the erroneous selection, approval and certification

of the indemnity lands in lieu thereof, as hereinbefore set forth. Under such circumstances two further questions are presented for consideration: First, has the Department jurisdiction to revoke its former approval of the lands so erroneously selected by and certified to the State? Second, was the State by such erroneous selection, approval and certification of indemnity lands thereby divested of title to the base land, said section 16? Your office held that the approval and certification of the indemnity selection, based on section 16 aforesaid, was absolutely null and void, and that the State thereby acquired no right, title or interest in the lands so selected, approved and certified. This ruling appears to have been based upon the case of Weeks *v.* Bridgeman (159 U. S., 541), the act of August 3, 1854 (Sec. 2449 U. S. Revised Stat.), and the following departmental authorities: Manser Lode Claim (27 L. D., 326); State of Nebraska (28 L. D., 358); Edwin F. Frost *et al.* (26 L. D., 239); Scott *v.* State of Nevada (ibid., 629), although said authorities were not expressly cited. In the case of Weeks *v.* Bridgeman, *supra*, the court, after stating the status of the land certified, to which one Brott had a subsisting adverse claim, referred to section 2449 Revised Statutes and said, since the land certified "was not subject to disposition as part of the public domain" on October 25, 1864, the action of the land department in including it within the lists certified on that day "was ineffectual" and that "as against Brott the certification had no operative effect." The court further said: "The distinction between void and voidable acts need not be discussed. It is rarely things are entirely void and without force and effect as to all persons and for all purposes and incapable of being made otherwise." An examination of the departmental decisions hereinbefore referred to will also disclose that in every instance the land erroneously certified was, at date of certification, embraced within an existing entry, grant or reservation, or was otherwise appropriated, and hence not of the "character" granted or intended to be granted for indemnity purposes, and under section 2449 Rev. Stat. and Weeks *v.* Bridgeman, *supra*, the certification in such cases was held to be ineffectual to pass title. But, in the opinion of the Department, the cases cited do not constitute authority for the action taken by your office in the case at bar. The land selected by and certified to the State in the case under consideration was, at date of selection and certification, free from subsisting claim or other appropriation, and was then of the "character" granted and intended to be granted for indemnity purposes, and hence the approval and certification under such circumstances does not fall within the nullifying provisions of Sec. 2449 Rev. Stat., nor within the ruling made in Weeks *v.* Bridgeman, *supra*. It is well settled that selection, approval, and certification passes title to the lands so selected and certified as completely as if transferred by patent, Frasher *v.* O'Connor (115 U. S., 102); and in

the case of Moore *v.* Robbins (96 U. S., 530) the court held that "a patent for public land, when issued by the land department, acting within the scope of its authority and delivered to and accepted by the grantee passes the *legal title* to the land. All control of the executive department of the government over the title thereafter ceases," and the court added, "but when fraud or *mistake* or misconstruction of the law of the case exists, the United States, or any contesting claimant for the land, may have relief in a court of equity." In the case of Germania Iron Co. *v.* United States (165 U. S., 383) the court said: "By *inadvertence and mistake* a patent in this case has been issued and the effect of such issue is to transfer the *legal title* and remove from the jurisdiction of the land department the inquiry into and consideration of such disputed questions of fact." The only apparent exception to the foregoing rule is where the instrument purporting to convey title is void on its face or when its invalidity is disclosed by reference, in the instrument itself, to matters of which judicial cognizance should be taken. In the case at bar the land erroneously certified belonged to the United States, was of the "character" granted for indemnity purposes and free from adverse claim or appropriation, and the Department in its approval of said selection was acting within the scope of its authority in such matters. No error was apparent on the face of the approved list or record pertaining thereto such as would impart notice of any infirmity in the title; the selection, approval and certification were, on the face of the proceedings, regular and prima facie valid, the same being defective only by reason of the erroneous assignment of an improper basis therefor. Under such circumstances clearly the legal title to the lands so selected, approved and certified passed to the State and the Department was thereafter without jurisdiction to revoke or cancel the selection so erroneously approved and certified, and the action of your office in holding said selection for cancellation was accordingly without authority. Butler *v.* State of California (29 L. D., 127); Hendy *et al v.* Compton *et al.* (9 L. D., 106).

The remaining question for determination is as to whether the State was divested of its title to said section 16, in place, by reason of its erroneous selection and acceptance of indemnity therefor. In this connection it is contended by appellant that the selection by the State of indemnity for said section 16 was, under the provisions of the act of February 28, 1891 (26 Stat., 796), a "waiver" of its right to said section in place. This contention, however, can not be sustained, because the selection and certification in the case at bar was prior to the passage of said act, and the selections which are authorized and declared to be a "waiver" by that act relate exclusively to cases where said section 16 or 36 "are mineral land or embraced within a military, Indian or other reservation." State of California (28 L. D., 57). In the case under consideration said section 16 was neither mineral in character nor

embraced within any reservation whatever, but was and had been always in place and the State had at least held the absolute title thereto from May 19, 1852, until July 30, 1888 (date of selection of indemnity), with power to sell and convey the same in fee simple or lease for a term of years, as the legislature of said State might deem best (act of May 19, 1852, *supra*). An examination of the case of State of California *v.* Gomez (17 L. D., 287) shows that the facts appearing therein brought said case within the provisions of the second section of the act of March 1, 1877 (19 Stat., 269), the express provisions of which revested in the United States the title to the base lands in lieu of which selection was made. But it must be noted that the provisions of this act apply only to the State of California, and it was also found in said case that the base land had not been sold by the State "while within its disposable power." The case of D. C. Powell (6 L. D., 552), cited in the above case, also came within the provisions of the act of March 1, 1877, *supra*, and in the following cases therein cited: 6 L. D., 71; 7 L. D. 270; 8 L. D., 394, the base lands were settled upon at date of survey and were otherwise appropriated at date when right of selection was exercised. In the case of Henderson *v.* Moore (12 L. D., 390) the base as shown by existing survey was covered by Lake Warner and the State agreed to accept and did accept indemnity in lieu of loss shown by such survey and afterwards the State's grantee was not allowed to take the base lands shown to be in place by a subsequent survey and upon which entry had been allowed, but in said case the right of selection was exercised prior to the resurvey and the State's grantee had attempted to acquire title to the base lands by deed from the State executed *after certification* and acceptance of the indemnity. In the case at bar, if the State can not now claim title to said section 16 it must be upon the broad principle of estoppel, in the absence of any statutory provision applicable to said case; but conceding that by selecting and accepting indemnity the State was thereby divested of title to said section, it could only operate to divest the State of whatever title the State then had thereto. If the State at any time while holding the absolute title to said section, from May 19, 1852, to July 30, 1888, conveyed or leased the land for a term of years, such conveyance or lease is binding upon the United States, and no act on the part of the State, after parting with title or executing a lease, could, under the doctrine of estoppel or waiver, in any manner affect the title of the State's grantee or lessee to said section 16. It is set forth by Reid, in his appeal herein, that in making said several applications to locate soldiers' additional entries upon the W. ½ of said section 16, he was acting in behalf of himself and co-owners, who have for many years claimed said land by virtue of title derived from the State of Mississippi, claiming said section 16 under the school grant to said State, and controversy having arisen

regarding the the status of said land, said applications were made by Reid to protect said title of himself and co-owners previously acquired from the State.

The act of May 19, 1852, *supra*, not only authorized the legislature of said State to sell and lease lands theretofore reserved for use of schools within said States, and ratified sales previously made by authority of the legislature, but also contained the further provision that said lands should in no case be sold or leased "without the consent of the inhabitants" of the township or district for which they were originally reserved and set apart. In pursuance of the provisions of said act the State provided, by appropriate legislation, for the leasing of said lands, and also for the sale thereof upon consent of the inhabitants of the respective townships being first obtained by a majority vote of the qualified electors of the township in which the land was situated. By Sec. 4160 of the code adopted by the legislature of said State in 1892 it was provided that the indemnity lands approved to the State August 22, 1890, which include the lands erroneously certified as hereinbefore set forth, should be allotted to the respective townships entitled thereto and that thereafter said lands should "be dealt with in all respects as other sixteenth section lands." Under the circumstances, considering the length of time title to said lands has been outstanding in the State, it is apparent that both the lands erroneously certified and said section 16 are, in all reasonable probability, incumbered by rights of third parties which in equity ought not now be disturbed and which in law could not now be divested.

In the opinion of this Department, therefore, the State ought to be required to designate a new basis for the lands erroneously certified, within a time to be fixed by your office, and in default thereof account should be taken of the excess of land so erroneously certified to the State and the government protected against any loss by reason thereof in the further adjustment of the State's school grant. Delaney *v.* Watts *et al.* and Miller *v.* Silva (8 L. D., 480); Butler *v.* State of California (29 L. D., 610).

Your decision in so far as it rejected the applications of Reid to make soldiers' additional entries upon the W. ½ of said section 16 is accordingly affirmed; but said decision is otherwise modified as hereinbefore directed.

RIGHT OF WAY—GRAVEL PIT—ACT OF MARCH 3, 1875.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The taking of gravel from a pit by a railroad company, for the use and maintenance of its line of road, is for a public purpose or use within the meaning of the act of March 3, 1875, and a right-of-way map filed under said act, showing a spur from the main line of the road to a gravel pit, constructed for the purpose of securing gravel for use along the main line of road, may be approved, if otherwise free from objection.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *September 4, 1900.* (F. W. C.)

With your office letter of June 25th last was forwarded a motion, filed by the St. Paul, Minneapolis and Manitoba Railway Company, for review of departmental decision of March 1, 1900 (not reported), returning, without approval, a map filed by said company under the general right of way act of March 3, 1875 (18 Stat., 482), showing a spur line from a point on the main line of said road to a point distant one and forty-three hundredths miles therefrom, terminating at a gravel pit.

From the showing made on behalf of the company in support of said map it appeared that the sole purpose of the said spur was to secure gravel for convenient use by it along the line of its road, and it was held in the decision under review that such a use was not within the contemplation of the grant made by the act of March 3, 1875, not being for a public purpose or use, and for that reason an approval of the map was refused.

In support of the motion reference is made to a decision of the supreme court of the State of Minnesota in the case of Minneapolis and St. L. R. Co. *v.* Nicolin (79 Northwestern Reporter, 304). In that case the company sought to condemn a right of way for an extension of its existing spur track to afford access to a gravel pit owned by it, which was resisted by a land owner, who maintained that the proposed taking was not for a public use but for the sole benefit of the stockholders of the company and for the benefit of their property. In disposing of the matter it was said by the court as follows:

> Lumber, ties, stone, and fuel are all necessary to the construction, maintenance, and operation of a railway; but each of them may be purchased in the open market, and usually within a reasonable distance of the place where it is to be used. Gravel, however, is not an article of general commerce. It can not be purchased in the market in quantities required by railroad companies, yet it is indispensable to the maintenance and safe operation of their roadbeds. To obtain it, they must go where nature has placed it; hence, gravel pits are practically and essentially adjuncts to the roadbed of a railway, and the taking of land by a railway company for a right of way from its roadbed to its gravel pit for the obtaining of gravel for the safe maintenance of its railroad is a taking for a public purpose. A taking of land for such a purpose differs only in degree from a taking for a right of way to its roundhouse or

machine shop. A taking is no more for the sole benefit of the stockholders in the one case than in the other. In this particular case the object of acquiring the right of way is for the purpose of reducing the cost of maintaining the roadbed of the petitioner. This is a purpose which directly affects the public, for the cost of maintaining and operating a railway is a material matter in determining the rate a railway company may legally charge for the transportation of passengers and freight.

Upon further consideration of the matter, this Department is of opinion that the construction of the court is a proper one and that the taking of gravel for the use and maintenance of the line of the company's road is for a public purpose or use, and it is therefore directed that the map be again submitted for the approval of this Department, if it is otherwise free from objection. The previous decision of this Department, refusing to approve the map, is accordingly set aside.

RIGHT OF WAY—ADDITIONAL STATION GROUNDS—ACT OF JULY 27, 1866.

SANTA FE PACIFIC R. R. CO.

It is not necessary, in order to warrant the approval of a plat of additional station grounds filed by a railroad company under the act of July 27, 1866, that the plat shall embrace only lands in actual use and necessary for the present operation of the road. The company has the right to anticipate the future necessities of the road, but the showing of present necessities must reasonably support the claim for future use.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(S. V. P.) *September 4, 1900.* (F. W. C.)

With your office letter of October 26, 1899, was transmitted an appeal, filed on behalf of the Santa Fe Pacific Railroad Company, from your office decision of August 16, 1899, refusing to submit for approval a plat filed by said company, as successor to the Atlantic and Pacific Railroad Company, under the provisions of the act of July 27, 1866 (14 Stat., 292), showing grounds at Grants, comprising 28 acres, selected for stations and other purposes, additional to its grant of right of way.

Upon said plat are the certificates of the president, chief engineer, and general manager of said company, to the effect that the grounds applied for are occupied and required for the purposes indicated and to their entire extent; that they are necessary for the uses and purposes of the operation of the road and are in actual use by the Santa Fe Pacific Railroad Company. In addition to these certificates there is an affidavit by the general superintendent of the company, in which he swears that—

he is now, and since 1882 has been, acquainted with the station, on the line of said railroad, at Grants, in New Mexico, and with its needs and necessities; that, since he first became acquainted with this station, the business of this station has constantly increased with the development of that country; that there is at that point the main line and side tracks, together with the station buildings, water tank and well, which,

except as to the tracks and water tank, are outside of the two hundred feet right of way; that the station grounds there are now, and have been, as they were in 1882, and have not been increased; that, in the experience of affiant, as a man acquainted with the operation of railroads, and especially with the operation of the Santa Fe Pacific Railroad, the station grounds at Grants station are not larger than the necessities of the business of the road require, looking to the development of the country and the business at such station, and the successful operation of the railroad; that the grounds south of the south side track are used for storing lumber brought to such station for shipment, and that there is a large coal deposit contiguous to such station which is at present undeveloped; that the station grounds at Grants station are valueless for any other purpose than station grounds, as crops can not be grown in that country without irrigation, and that these grounds are not susceptible of any irrigation at present developed in that country.

Your office decision finds that the "use of the additional grounds, except those occupied by the station buildings and well and the indefinite area used for the storage of lumber seems largely for some remote and uncertain future need," and for that reason refused to submit the map with recommendation for its approval, but requested the company "to amend the same so as to embrace the land necessary for the use and occupancy of the section-house, storage of lumber, etc."

From this it would seem that you are of opinion that a plat of lands selected for station and other uses must embrace only the lands in actual use and necessary for the operation of the road at the present time. This, in the opinion of the Department, is a rather limited view of the law. The company has undoubtedly a right to anticipate the future necessities of the road, but the showing of present necessities must reasonably support the claim for future use.

In the case of the Santa Fe Pacific Railroad Company (27 L. D., 322, 325), in discussing the right of the company to additional lands for stations and other purposes, under the grant of 1866, it was said:

Upon the contingency arising, it may be that the company would be entitled to at once enter into the possession and use of the lands needed, they being at that time free from other disposition, or, should it so desire, might formally apply for such additional lands in advance of occupation and use of the same, its application being accompanied by a showing as to the uses for which the same is desired and the necessity therefor.

This clearly contemplates an application for additional lands in advance of the use and occupancy of the same.

In addition to the showing filed originally with this application there has been filed in this Department affidavits by the general superintendent and chief engineer of the said Santa Fe Pacific Railroad Company, explaining the necessities for and the use intended to be made of these additional lands. The following is taken from the affidavit by the general superintendent:

That there is located upon said grounds, at said Grants Station, for which the application is made, a well, which was sunk about the year 1884, and which has been used

continuously for supplying water for the operation of said railroad; also a pumping plant in connection with said well.

That there is also located on said grounds two side-tracks used for general purposes in connection with the operation of said road and particularly for loading lumber and wool, of which commodities there are large shipments made from said station.

That said Santa Fe Pacific Railroad Company receives at said Grants Station large quantities of lumber of various kinds, for construction and maintenance purposes, and it is necessary that it have a considerable space for the storing of such lumber.

That said Santa Fe Pacific Railroad Company intends to and will in the immediate future install large coal chutes on said grounds for the purpose of storing and supplying coal for the use of its engines on said railroad, and that a considerable space of ground will be required for the erection of said coal chutes and the operation and use thereof.

That the said additional grounds, and the whole thereof, for which application is made, have been, during all of said time, and now are actually used as station grounds, including in such use the purposes and uses above set forth, and the same and the whole thereof are required for the proper conduct of the business of said Santa Fe Pacific Railroad Company required to be transacted at said station, and which may reasonably be expected to be transacted at said station in the near future.

The affidavit by the chief engineer is to the same effect.

The amount included in this application (28 acres) is only slightly in excess of that carried by the general right of way act of March 3, 1875 (18 Stat., 482), for like purposes, and the showing filed, considered in connection with the character and necessities of a transcontinental road, warrants the approval of the plat.

RAILROAD GRANT—AMENDED LOCATION—OCCUPANCY OF SETTLER.

OREGON AND CALIFORNIA R. R. CO. *v.* CROY.

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.

The occupancy of land within the primary limits of a railroad grant, at the time of the definite location of the road, by one who is not shown to have had any intention of acquiring title thereto from the United States, and who subsequently disposes of his improvements and abandons the land, is not sufficient to defeat the operation of the railroad grant in favor of a party who went upon the land long after definite location and who seeks to make entry because of such prior occupancy.

Acting Secretary Ryan to the Commissioner of the General Land Office, September 8, 1900.

(S. V. P.) (F. W. C.)

The appeal filed on behalf of the Oregon and California Railroad Company from your office decision of April 14, 1896, in which it is held that the S. ½ of the SW. ¼ of Sec. 9, and the NE. ¼ of the NE. ¼ of Sec. 17, T. 30 S., R. 9 W., Roseburg land district, Oregon, was excepted

from the grant made by the act of July 25, 1866 (14 Stat., 239), under which said company claims, has been considered.

As adjusted to the line of location shown upon the map filed by said company January 7, 1871, the tract in section 9 was within the primary or granted limits of said grant, and the tract in section 17 was within the indemnity limits of said grant; but on April 8, 1882, the company filed a map showing an amended line of definite location of the portion of the road opposite which the tracts in question lie, which it asked to have accepted. Its request was granted, and as adjusted to said amended line of location the tracts in question fell within the primary or granted limits.

The approved plat of survey of this township was filed in the local office on December 10, 1894, and the present controversy arose upon the filing in the local office of an application, by Sheridan H. Croy, on April 29, 1895, to make a homestead entry of this land, in support of which he alleged settlement on the land on October 20, 1894, against the acceptance of which the Oregon and California Railroad Company protested, alleging that the tracts had passed under the railroad grant.

Hearing was ordered, at which it was shown that at the time of the filing of the amended map of location this tract was occupied and claimed by one Frank Howard, he having been shown to have been in possession of said tract from September, 1881, to April 15, 1882. Howard was succeeded by other occupants until Croy came into possession of the land, on October 20, 1894, since which time he has resided thereon and improved it to the value of about $400.

Your office decision appealed from holds that the company waived any right to the withdrawal upon the map of 1871 by filing the amended map of location in 1882, and that its rights under its grant must be determined as of the condition of the land at the time of the filing of the map of amended general route; and because of the shown occupancy of the land by Howard at that date, it is held that the tract is excepted from the operation of the railroad grant.

In its appeal the company contends that the lands have been continuously withdrawn since 1871 and that no such rights were acquired by the occupancy of the land by Howard and those who succeeded him in possession as would defeat the operation of the railroad grant.

In the case of Oregon and California Railroad Company *v.* Kirkendall (26 L. D., 593) it was held (syllabus):

> 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.

Under this decision your office decision correctly ruled that the rights of the company must be determined in accordance with the

status of the land at the time of the filing of the amended location. It but remains, therefore, to determine the effect of the occupancy of this land by Howard at the date of the filing of the amended map of location.

Howard never asserted a claim to this land by any proceeding before the land department, and there is nothing in the record to show that his occupation prior to and at the time of the filing of the map of amended location was with any intent to acquire title from the United States. It is true that he could not have made entry or filing for this land, because it had not been surveyed; but assuming that he intended to claim it under the settlement laws, that he had continued to occupy and claim it until the filing of the township plat (which was subsequently to the filing of the map of amended location), and that he might have been permitted to prosecute his claim to a successful termination notwithstanding the filing of such map of location, his subsequent sale of his improvements and the abandonment of the land would not have passed such right to the purchaser thereof.

In the case of Tarpey *v.* Madsen (178 U. S., 215) one Olney had, after the filing of the map of location by the Central Pacific Railroad Company opposite the land there in question, filed a pre-emption declaratory statement, in which settlement was alleged subsequently to the filing of the map of location. Madsen, who had succeeded to the possession of the tract long after the definite location of the line of road, sought to show that in point of fact Olney had occupied, improved and claimed the land prior to the filing of the map of location; and in considering this branch of the case it was said by the court (page 220):

> Assume that such declaration was subject to correction by him [Olney], that he could thereafter have corrected the mistake (if it was a mistake) and shown that he occupied the premises prior to October 20, 1868, with an intent to enter them as a homestead or pre-emption claim, he never did make the correction, and there is nothing in the record to show that his occupation prior to April 23, 1869, was with any intent to acquire title from the United States.
>
> And in this respect we must notice the oft-repeated declaration of this court, that "the law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon." Ard *v.* Brandon, 156 U. S., 537, 543; Northern Pacific Railroad *v.* Amacker, 175 U. S., 564, 567. With this declaration, in all its fulness, we heartily concur, and have no desire to limit it in any respect, and if Olney, the original entryman, was pressing his claims every intendment should be in his favor in order to perfect the title which he was seeking to acquire. But when the original entryman, either because he does not care to perfect his claim to the land or because he is conscious that it is invalid, abandons it, and a score of years thereafter some third party comes in and attempts to dispossess the railroad company (grantee of Congress) of its title—apparently perfect and unquestioned during these many years—he does not come in the attitude of an equitable appellant to the consideration of the court.

In said case the court proceeds to a consideration of the rights of occupants upon the public lands, and the numerous decisions of the

court construing the excepting clauses from railroad land grants, and, in summing up the whole (page 228), says:

> We are of opinion that a proper interpretation of the acts of Congress making railroad grants like the one in question requires that the relative rights of the company and an individual entryman, must be determined, not by the act of the company in itself fixing definitely the line of its road, or by the mere occupancy of the individual, but by record evidence, on the one part the filing of the map in the office of the Secretary of the Interior, and, on the other, the declaration or entry in the local land office. In this way matters resting on oral testimony are eliminated, a certainty and definiteness is given to the rights of each, the grant becomes fixed and definite; and while, as repeatedly held, the railroad company may not question the validity or propriety of the entryman's claim of record, its rights ought not to be defeated long years after its title had apparently fixed, by fugitive and uncertain testimony of occupation; for if that be the rule, as admitted by counsel for defendant in error on the argument, the time will never come at which it can be certain that the railroad company has acquired an indefeasible title to any tract.

In view of said decision it is the opinion of this Department that the mere occupancy of the land by Howard was not sufficient to defeat the operation of the railroad grant, and that the tract in question passed to the railroad company under its grant, upon the filing of the map of amended location.

Your office decision is accordingly reversed and the homestead application by Croy will stand rejected.

SCHOOL LANDS—LIEU SELECTION—ACTS OF MAY 2, 1890, AND FEBRUARY 28, 1891.

THOMAS J. CREEL.

The act of May 2, 1890, reserving for school purposes sections sixteen and thirty-six in each township in the Territory of Oklahoma, did not make a grant to said Territory, either of sections in place or of the lieu selections therein authorized, but made a reservation for a future grant, which reservation included both sections in place and lieu selections, where such selections were made in accordance with law and are of the character of land appropriated for that purpose.

In case of a lieu selection of land not subject thereto, such land was not reserved or granted by any act of Congress, and such selection, although it may have been approved and certified by the Secretary of the Interior, is still subject to his jurisdiction and control.

Lands within said Territory included in a *bona fide* settlement claim, initiated before survey, must be treated as "appropriated" within the meaning of the act of February 28, 1891, and therefore not subject to lieu selection by the Territory, for school purposes, within the period of three months after the filing of the township plat accorded to the settler within which to place his settlement claim of record.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *September 11, 1900.* (G. B. G.)

The land in controversy in this case is the NE. ¼ of the NW. ¼ of Sec. 13, T. 1 N., R. 15 E., Woodward land district, Oklahoma, and

the case is before the Department upon the appeal of Thomas J. Creel from your office decision of October 17, 1895, approving the action of the local officers in rejecting his homestead application, presented August 29, 1895, for this tract, together with the balance of the NW. ¼ of said section. This action of the local officers and of your office was had because of the school indemnity selection of the tract in controversy by the Territory of Oklahoma, December 14, 1891, and the approval thereof by the Secretary of the Interior, August 8, 1894.

By section 18 of the act of May 2, 1890 (26 Stat., 81), sections numbered sixteen and thirty-six in each township in the Territory of Oklahoma were reserved for the purpose of being applied to public schools in the State or States thereafter to be erected out of the same, and in cases where sections sixteen and thirty-six, or either of them, are occupied by actual settlers prior to survey, the county commissioners of the counties in which such sections are so occupied are authorized to locate other lands to an equal amount, within their respective counties, in lieu of the lands so occupied. This act did not designate the character of lands which might be selected in lieu of the sections lost in place, but the act of February 28, 1891 (26 Stat., 796), amending sections 2275 and 2276 of the Revised Statutes, which was a general act applying to all of the public-land States and Territories, provides that the lands thereby appropriated and granted in lieu of sections sixteen and thirty-six, where settlements with a view to preemption or homestead have been made before the survey of the lands in the field, "shall be selected from any *unappropriated*, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur." The act of May 2, 1890, *supra*, did not make a grant to the Territory of Oklahoma, either of sections in place or of the lieu selections therein authorized. It did, however, make a reservation for a future grant, and this reservation included not only the sections in place, but also lieu selections, where such selections are made in accordance with law and are of the character of land appropriated for that purpose. But if a lieu selection is of land not subject to selection, the land was not reserved or granted by any act of Congress, and such selection, although it may have been approved and certified by the Secretary of the Interior, is still subject to his jurisdiction and control. Whether the land in controversy was subject to the selection of December 14, 1891, must be determined, as has been seen, by the provisions of the act of February 28, 1891, *supra*, and as to this the question presented by the record is, whether the land was appropriated at the date of selection.

It appears from the corroborated, sworn statement of Creel, accompanying his appeal, that he made homestead entry of a tract of land in Kansas in the year 1886, which he commuted to cash in 1887; that he removed to the land in controversy, which is in the public land strip,

and settled thereon September 27, 1890, believing that he was entitled to enter the same under the homestead law, notwithstanding his previous commuted entry, and that he has since that time continuously resided upon and improved the tract with a *bona fide* intention of acquiring title to the same under the homestead laws; that after a number of entries by parties similarly situated had been allowed by the local officers, he heard that your office ruled that the provisions permitting a second entry to those who had commuted an entry elsewhere did not apply to lands within the public-land strip, and that thereupon, January 22, 1894, he addressed a letter of inquiry to your office as to whether he would be permitted to make such entry, and received a reply in the negative; that an appeal having been taken from a similar ruling of your office in another case, he continued to reside upon and cultivate the tract, awaiting the determination of said appeal, and that, after the departmental decision in the case of William T. Dick (19 L. D., 540), he presented his application to make homestead entry, which was rejected, as hereinbefore stated.

In the case of William T. Dick, *supra*, it was held that a person is not disqualified from making an entry of land in the public-land strip because of the fact that he had previously commuted a homestead entry to cash elsewhere, and this ruling has since been followed.

It appearing, therefore, that Creel was qualified to enter said land under the homestead law, he was a qualified settler, and his settlement claim was an appropriation of the land for the time allowed him by law to place that claim of record, within the meaning of the act of February 28, 1891. For the protection of settlement rights at date of survey, being the time when the reservation, or, in the case of a State, when the grant of lands in place becomes effective, indemnity is provided, and, although no limitation is made in the act of 1890 in providing for the selection of lieu lands, it must be clear that it was not intended to protect a settler on the section in place at the sacrifice of another settler's interest on the tract that might be selected in lieu thereof. Lands included within a *bona fide* settlement claim must be treated as "appropriated" within the meaning of that word as used in the act of 1891. At the date of Creel's settlement the land was unsurveyed. The township plat of survey was filed in the local office, October 10, 1891, and the law allowed him three months from that time, or until January 10, 1892, to place his claim of record. Before that time, and on December 14, 1891, the Territory of Oklahoma selected the tract. At the date of selection, therefore, the land was appropriated by Creel's settlement and the Territory took nothing by its selection, or by the subsequent approval thereof by the Department.

Inasmuch as the commissioners for the county in which this land is situated admit that the selection was a mistake and request that it be

canceled, it will not be necessary to order a hearing to establish the facts shown *prima facie* by the affidavit of Creel.

The decision appealed from is reversed, and the cause remanded, with directions to cancel the Territory's selection, and allow Creel's application.

RAILROAD GRANT—GENERAL ROUTE—DEFINITE LOCATION.

SOUTHERN PACIFIC R. R. CO.

The act of July 27, 1866, making a grant of lands to aid in the construction of the main line of the Southern Pacific railroad, provided for the filing of a map of general route and for withdrawal thereon, and also for the filing of a map of definite location, or its equivalent, which latter map fixes the limits of the grant, and upon the filing thereof rights under the grant are held to attach.

The filing of the map of general route, and withdrawal thereon, do not prevent an appropriation of the land within said withdrawal, by the government, for Indian or other needful purposes, at any time prior to the filing of the map showing the line of definite location of the road opposite thereto.

Secretary Hitchcock to the Commissioner of the General Land Office,
(S. V. P.) *September 13, 1900.* (F. W. C.)

The Southern Pacific Railroad Company has appealed from your office decision of June 15th last, wherein the listing by said company of the N. ½ of Sec. 19, T. 5 S., R. 8 E., S. B. M., Los Angeles land district, California, as a portion of the land granted by the act of March 3, 1871 (16 Stat., 573), to aid in the construction of the Southern Pacific railroad (branch line), was canceled.

By the 23d section of the act of March 3, 1871, *supra*, Congress made a grant of land to the Southern Pacific Railroad Company, to aid in the construction of a railroad from—

Tehachapa Pass, by way of Los Angeles, to the Texas Pacific railroad at or near the Colorado river, with the same rights, grants, and privileges, and subject to the same limitations, restrictions and conditions as were granted to said Southern Pacific Railroad Company of California, by the act of July twenty-seven, eighteen hundred and sixty-six.

Among the provisions of the act of July 27, 1866 (14 Stat., 292), are the following:

Sec. 3. That there be, and hereby is, granted to the Atlantic and Pacific Railroad Company . . . . ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever, on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, at the time the line of said road is designated by a plat thereof, filed in the office of the commissioner of the general land office.

Sec. 6. *And be it further enacted*, That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not

be liable to sale or entry, or pre-emption, before or after they are surveyed, except by said company, as provided in this act.

By the 18th section the Southern Pacific Railroad Company was authorized to connect with the Atlantic and Pacific railroad, with a similar grant of land and subject to the same conditions and limitations.

It will be noted that the act of 1866 provides for the filing of a preliminary or map of general route, upon which a withdrawal was made from sale, entry or pre-emption, and further, for the filing in the office of the Commissioner of the General Land Office of a plat upon which the line of said road was to be designated, which latter map was to fix the grant.

In the case of Southern Pacific Railroad Company *v.* United States (168 U. S., 1, 54), in referring to this latter map or plat, upon which the line of road was to be designated, it is said by the court:

> The word "designated" in that act meant no more nor less than the words "definitely located" mean.

In other words, the act of 1866 provided for the filing of a preliminary map of general route and for withdrawal thereon, and also for the filing of a map of definite location, which latter map fixed the limits of the grant, and upon the filing of which rights under the grant, under the repeated rulings of the court, are held to have attached.

One month after the passage of the act of March 3, 1871, to wit, on April 3, 1871, the Southern Pacific Railroad Company filed a map upon which was delineated its branch line, and withdrawal was ordered thereon April 21, 1871. This map was not filed, nor intended, as a map of definite location. On the contrary, it was specifically denominated as a map of "general route," and no plat or map has ever been filed in this Department by said company, as a map of definite location, of the portion of said road opposite which the tracts in question lie.

Upon the reported construction of this portion of the road, examination was made by commissioners appointed for that purpose, as provided for in the act of 1866, and because of the failure of the company to file a map of definite location the limits of the grant were fixed or adjusted upon the line of constructed road, the map showing which accompanied the report of the commissioners and was filed in this Department January 31, 1878. Said map bears the following certificate:

> OFFICE OF THE SOUTHERN PACIFIC RAILROAD CO.,
> *San Francisco, California.*
>
> It is hereby certified that G. E. Gray is the chief engineer of the Southern Pacific Railroad Company and that the location of the road as represented on this map is correct and approved by the company; and also that said portion of the said road has been completed and equipped in all respects as required by law.
>
> CHARLES CROCKER,
> *President Southern Pacific Railroad Company.*
>
> Attest:
> JOSEPH L. WILLEUILT,
> *Secretary of the Southern Pacific Railroad Company.*

It might be stated that there was no material deviation in construction from the route indicated on the map of general route, but this fact did not relieve the company from the filing of a map designating the line as finally fixed or definitely located.

By executive order of May 15, 1876, withdrawal was made of certain lands for the use of the Mission Indians, and said withdrawal included the land in question.

In the adjustment of the grant for the Southern Pacific railroad branch line, the limits projected upon the line of constructed road shown upon the map filed January 31, 1878, have been respected both by the company and the land department. Your office decision treats the map of 1878 as equivalent to a map of definite location and as fixing the rights under its grant, and because of the previous reservation of this land for the Mission Indians, holds that it was excepted from and did not pass under the railroad grant.

In its appeal it is contended on behalf of the company, without questioning that the map of 1871 was merely a map of general route, that the withdrawal thereon prevented the subsequent reservation of the lands for the benefit of the Indians or for other needful purpose, and also cites numerous decisions of this Department, in contests between the railroad company and individual claimants, to the effect that its rights attached, or that its grant became effective, upon the filing of the map of April 3, 1871.

As between individual claimants and the company no claim could be predicated upon settlement or entry made after the filing of the map of general route, and as against such claims the grant in effect was operative from April 3, 1871, the date upon which the map of general route was filed.

The provision in the act of 1866 for withdrawal upon the filing of the map of general route, is almost identical with that contained in the act of July 2, 1864 (13 Stat., 365), to aid in the construction of the Northern Pacific railroad, the effect of which has been repeatedly considered by this Department and has been uniformly held not to prevent the executive from the exercise of his ordinary authority in the establishment of an Indian or other reservation within the limits of such withdrawal. (Northern Pacific R. R. Co. *v.* Martin, 6 L. D., 657; Northern Pacific R. R. Co., 20 L. D., 332.)

In the latter case 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 Coeur d'Alene Indian reservation, alleging ownership thereof under its grant on substantially the same grounds as are contended for in the appeal under consideration. It was 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). (See also Union Pacific Ry. Co., 29 L. D., 261.)

"The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section, until the road was definitely located and the map thereof filed and accepted." (Northern Pacific R. R. Co. *v.* Sanders, 166 U. S., 620, 630.)

It was within the power of the company to change the line of general route on final location, and until this Department was advised in appropriate manner of the location finally determined upon, no rights attached under the grant.

Your office decision therefore properly holds that the withdrawal upon the map of April 3, 1871, as a map of general route, did not prevent other appropriation by the government, of the land included in such withdrawal, for Indian or other needful purposes.

It follows that the reservation created for the Mission Indians in 1876 was a legal reservation, and, according to the express declaration of the act of 1866, which grants only those sections "not reserved" at the time of the filing of the plat designating or definitely locating the line of the road, such lands as were included in said reservation were excepted from the operation of the railroad grant.

Your office decision is accordingly affirmed.

RAILROAD GRANT—POSSESSION AND OCCUPANCY—ACT OF JULY 1, 1898.

NORTHERN PACIFIC RY. CO. *v.* TUBBS.

Possession and occupancy of a tract with an intention to subsequently enter it under the timber-culture law do not serve to bar indemnity selection thereof; and a claim under said law, based upon mere possession and occupancy, is not subject to adjustment under the act of July 1, 1898, as the claimant is not a purchaser of the land, and was not a settler thereon, under color of title or claim of right under any law of the United States or ruling of the land department, at the date of the passage of said act.

Acting Secretary Campbell to the Commissioner of the General Land Office, September 14, 1900.

(S. V. P.) (F. W. C.)

The Department is in receipt of your office letter of August 25th last, in the matter of the contest of the Northern Pacific Railway Company *v.* Hiram Tubbs, involving the SE. ¼ of Sec. 15, T. 15 N., R. 42 E., Walla Walla land district, Washington, in which you recommend that the railway company be again invited to relinquish this land.

From your office letter and accompanying papers it appears that on September 15, 1888, Hiram Tubbs tendered a timber-culture application for this land. The tract is within the indemnity limits of the grant to the Northern Pacific Railroad Company and was included in a list of selections filed December 17, 1883. At the time of the tender of said application Tubbs was a resident upon an adjoining tract for which he had made homestead entry and for which he received a patent. He had prior to the tender of his timber-culture application fenced and cultivated a small portion of the tract in question.

His contest with the railroad company was considered in departmental decision of June 20, 1898 (27 L. D., 86), in which his application was rejected for conflict with the railroad selection, and a motion for review of said decision was denied September 8, 1898 (id., 375).

By your office letter "F" of April 29, 1899, Tubbs was advised of his right to proceed under the act of July 1, 1898 (30 Stat., 597, 620), in the matter of his contest with the railroad company involving this tract, and he thereupon elected to retain the tract in question as against the railroad grant, and this tract was, with others, included in a list (List No. 12) of lands subject to relinquishment under said act, which list received the approval of this Department March 20, last. Thereupon the Northern Pacific Railway Company, as successor to the Northern Pacific Railroad Company, was invited to relinquish the lands included in said list under the act of July 1, 1898. In response the railway company submitted a showing evidencing a sale of this land on January 19th, last, to James C. Waymire and upon receipt thereof Tubbs was afforded another opportunity to transfer his claim to other land, as provided for in said act of July 1, 1898, to which he has responded refusing to make a transfer of his claim, urging that the railway is not "exempted from relinquishing its claim to said land on account of having sold said land on January 19, 1900, to one Waymire, because said sale was made subsequent to the date of the passage of said act and before the time had expired within which said Tubbs was permitted to make his election under said act." It is upon this refusal by Tubbs that your office recommends that the company be again invited to relinquish the land, notwithstanding its sale to Waymire.

Upon further consideration of this matter the Department is of opinion that Tubbs's contest is not subject to adjustment under said act. The facts relative to the claim of Tubbs were not presented to the Department at the time of the approval of the list before referred to. His showing evidences that he was not a purchaser of this land, neither was he a settler thereon, under color of title or claim of right under any law of the United States or any ruling of the land department, at the date of the passage of said act of July 1, 1898.

While it is true that he had fenced the land and cultivated a portion

of it, yet it had been repeatedly determined prior to the passage of the act of July 1, 1898, that possession and occupancy of a tract with an intention to subsequently enter it under the timber-culture law did not serve to defeat the grant or bar indemnity selection thereof (Northern Pacific R. R. Co. *v.* Violette, 19 L. D., 28; same *v.* White, id., 452; Romaine *v.* Northern Pacific R. R. Co., 22 L. D., 662), and it had been so held in his case prior to the passage of said act.

It was therefore error on the part of your office to have invited action by Tubbs under said act of July 1, 1898, and all proceedings had under said invitation are hereby set aside and his contest with the company involving this land will stand closed.

PRE-EMPTION CLAIM WITHIN LIMITS OF A TOWN—SECTION 2258 R. S.

SHRIVES *v.* TACOMA LAND COMPANY.

Section 2258 of the Revised Statutes expressly excludes from pre-emption "lands included within the limits of any incorporated town or selected as the site of a city or town," and a pre-emption declaratory statement for such land, and final proof thereon, should not be accepted, where no proceedings to subject the same to the settlement laws, under the act of March 3, 1877, were instituted prior to the repeal of the pre-emption law.

Acting Secretary Campbell to the Commissioner of the General Land Office, September 15, 1900.

(S. V. P.) (J. H. F.)

This case is before the Department on appeal by Abner Shrives from your office decision of April 16, 1900, affirming the action of the local officers in rejecting Shrives' final proof offered in support of his pre-emption declaratory statement filed for the S. E. ¼ of S. W. ¼ of Sec. 5, T. 20 N., R. 3 E., Olympia, Washington, land district, and allowing the Tacoma Land Company to make cash entry No. 1374 for said land under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556).

The land involved is situated within the limits of the grant made by joint resolution of Congress, May 31, 1870 (16 Stat., 378), for that portion of the main line of the Northern Pacific railroad between Portland, Oregon, and Puget Sound, but by reason of the existence of a homestead entry thereon at date of the passage of said resolution, said land was held to have been excepted from the operation of said grant by departmental decision of April 12, 1898, in the case of Tacoma Land Company *v.* Northern Pacific Railroad Company *et al.* (26 L. D., 503).

Said land also is, and ever since 1883 has been, within the incorporated limits of the city of Tacoma.

Shrives applied to make homestead entry of said tract September 24, 1892, claiming settlement and residence thereon since 1885, and,

on October 20, 1892, the Tacoma Land Company applied to purchase said land under the provisions of the act of March 3, 1887, *supra*, claiming such right as grantee and *bona fide* purchaser from the Northern Pacific Railroad Company under deed dated December 30, 1874. The respective claims thus presented, among other claims to the same land, were prosecuted to the Department and, by said departmental decision hereinbefore mentioned, the claim of Shrives to the land in question, under his alleged settlement, was fully considered and his homestead application therefor rejected, and the Tacoma Land Company was accorded the right to purchase said tract in pursuance to its application aforesaid, providing the same was found by your office to be otherwise regular.

October 31, 1898, motion for review of said departmental decision was denied (27 L. D., 575), and on January 19, 1899, your office closed the case as to Shrives and other adverse claimants, found that the proof submitted by said land company in support of its application to purchase was sufficient and in due form, and directed the local officers to allow said company to perfect cash entry for said land, in pursuance of such application, upon receipt of the necessary purchase money.

On November 19, 1898, notwithstanding said departmental decision, Shrives applied to file pre-emption declaratory statement for said tract, alleging settlement thereon October 1, 1885, and on December 12, 1898, the local officers allowed the same to be entered of record. December 20, 1898, Shrives filed notice of his intention to submit final proof, and notice was issued and duly published that such proof would be made before the register and receiver, February 3, 1899.

The Tacoma Land Company, on January 23, 1899, filed a protest against the submission of proof by Shrives, and, on January 25, 1899, said company tendered to the local officers the necessary purchase money for said tract and demanded that the same be accepted and receipt issued in accordance with the decisions of the Department and of your office, hereinbefore mentioned.

February 3, 1899, Shrives submitted final proof in support of his pre-emption claim, and the Tacoma Land Company appeared in support of its protest and cross-examined the witnesses offered by Shrives. At the same time, in response to affidavit filed by Shrives requesting that the authorities of the city of Tacoma be required, in accordance with the act of March 3, 1877 (18 Stat., 392), to elect what portion of the lands embraced within the corporate limits of said city should be withheld from entry, the said city appeared, by its mayor, who filed an answer in the case in the nature of a waiver of any claim to the land in controversy in virtue of the townsite laws. The answer of the city is duly verified, and sets forth, in substance, that the portion of the city of Tacoma, which is or has been settled upon, occupied, inhabited, or used for municipal purposes or purposes of commerce, trade,

or business, embraces fully 5,000 acres and is wholly upon private land; that the land in controversy, although within the corporate limits of said city, has not been settled upon, occupied, inhabited, improved, or used for municipal purposes or for the purposes of trade or business, and that said city of Tacoma is not and never has been entitled to have said land or any portion thereof withheld from pre-emption or homestead entry.

Upon consideration of the proof submitted by Shrives, the local officers expressed their opinion to the effect that Shrives, in law and equity, was entitled to the land, but, following departmental decision of April 12, 1898, *supra*, and the instructions contained in your said office decision of January 19, 1899, they rejected Shrives' final proof, accepted the tender of purchase money by the Tacoma Land Company, and allowed said company to make cash entry of the land, which action of the local officers was affirmed by your office decision from which the appeal herein considered was taken.

The errors assigned are, in substance, that your office erred in holding that Shrives had not initiated a valid settlement right prior to passage of the act of March 3, 1887, *supra*, and in holding that he had not "lawfully initiated" a claim to the land within the saving clause of the act of March 3, 1891 (26 Stat., 1095), repealing the pre-emption law.

Upon examination of the case of Tacoma Land Company *v.* Northern Pacific Railroad Company *et al.*, *supra*, involving this same land and to which case Shrives was a party, it is apparent that the questions now presented by the record herein are substantially identical with those involved in the former case in so far as Shrives was concerned therein. In reference to the claim of Shrives the Department then said:

> 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.

And again, it was further said:

> 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, . . . 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 proviso to that section and his application to make homestead entry will stand rejected.

It will be noted that while the claim of Shrives in said former case was presented under his application to make homestead entry, yet such

application was made under favor of the proviso contained in section 2 of the act of March 2, 1889 (25 Stat., 854), and was based upon the claim that he was, at the date of the passage of said act, a "pre-emption settler" upon said land and had initiated a valid claim thereto by reason thereof. It is therefore quite clear that all the rights of Shrives under his alleged settlement, both pre-emption and homestead, were fully considered, discussed, and adversely determined in said case, and there is nothing in the present record to cause the Department to in any manner modify or change its former ruling.

Moreover, section 2258 of the Revised Statutes of the United States expressly excludes from pre-emption "lands included within the limits of any incorporated town or selected as the site of a city or town." The land in controversy, at date of Shrives' alleged settlement, was, and ever since has been, within the incorporated limits of the city of Tacoma. In the case of Burfenning *v.* Chicago, St. Paul, Minneapolis and Omaha Railway Company (163 U. S., 321) a soldiers' additional homestead entry had been allowed and patent had been issued thereon for certain lands within the corporate limits of the city of Minneapolis, and the court held that, said lands having been reserved by act of Congress from homestead and pre-emption entry, the proceedings of the land department, in defiance of such reservation, although culminating in a patent, did not operate to transfer title to said lands.

The action of the local officers, therefore, in allowing Shrives to file declaratory statement and submit proof for the land in controversy under the circumstances hereinbefore set forth, in the absence of further instructions from your office or the Department, was erroneous, and your decision, affirming their subsequent action in rejecting said proof and allowing the Tacoma Land Company to make cash entry, is accordingly affirmed.

REPAYMENT—HOMESTEAD ENTRY CANCELED FOR CONFLICT.

WILLIAM H. CONLEY.

A homestead entry, made for land covered by a pre-emption declaratory statement, and subsequently canceled on the allowance of the pre-emption entry, is "canceled for conflict" within the meaning of the repayment act of June 16, 1880.

Acting Secretary Campbell to the Commissioner of the General Land Office, September 19, 1900.

(S. V. P.) (C. J. G.)

The Department has considered the appeal of William H. Conley from your office decision of July 25, 1900, denying his application for repayment of the fees and commissions paid by him on his homestead entry (Sioux Indian series) for the N. E. ¼ of Sec. 22, T. 104 N., R. 69 W., Chamberlain, South Dakota, land district.

The record of the case, as presented here, shows that on April 5,

1890, Charles J. Ashley filed pre-emption declaratory statement for the land described; that on February 24, 1899, William H. Conley made homestead entry for the land; that Conley filed a protest against the acceptance of the pre-emption proof offered by Ashley's heirs; that after a hearing upon said protest the land was awarded to said heirs; that Conley's entry was canceled by your office on August 10, 1899; and that on August 14, 1899, he applied for repayment of his fees and commissions, and on October 28, 1899, executed a relinquishment.

Your office denied the application for repayment on the ground that—

> Conley's entry did not fail because of conflict with rights that had been established on February 24, 1899, nor because it had been erroneously allowed. It failed because he was mistaken in his judgment as to what constituted compliance with the pre-emption law. The repayment act was not framed to remedy mistakes of entrymen; but to afford relief when their claims have failed, or would have failed through fault or error upon the part of the government.

Section 2 of the act of June 16, 1880 (21 Stat., 287), authorizes repayment in the following instances:

> In all cases where . . . . homestead entries . . . . have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed.

Your office properly held that Conley's entry was not "erroneously allowed" within the meaning of this section, as it is well settled that the filing of a pre-emption declaratory statement does not segregate the land covered thereby from the public domain; and hence Ashley's filing was no bar to the allowance of Conley's homestead entry. The Department does not concur, however, in the holding of your office that Conley's entry was not "canceled for conflict," within the meaning of said section. The case of John C. Angell (24 L. D., 575, 577) contains an expression of the views of the Department in this matter, which may be readily adopted as pertinent to the case under consideration, as follows:

> The filing of a pre-emption declaratory statement was not an entry of the land. Ever since the enactment of the pre-emption law it has been uniformly held by the land department that the filing of such declaratory statement does not segregate the land involved and does not withdraw it from entry. No decision to the contrary is attempted to be cited. A declaratory statement was an assertion by the pre-emptor of an intention to thereafter enter the land. That intention might be either carried into execution or abandoned. It has been the uniform practice in the land department to permit entries under the homestead, desert, and timber-culture laws of land embraced within existing pre-emption declaratory statements. These entries have always been treated as subject to the claim of the pre-emptor, and if he seasonably made his cash entry thereunder, any intervening entry of the same land was thereby defeated. If the pre-emptor failed to make his cash entry, the intervening entryman took the land. As to all persons other than the pre-emptor the intervening entryman had the prior and better right.

The allowance, therfore, of Angell's entry by the local land office was proper. It was not the case of an entry "erroneously allowed" within the meaning of the repayment statute. It was an entry in the *allowance* of which no error was committed.

Angell's desert entry was not "canceled for conflict" but was canceled because of his voluntary relinquishment. Had either of the pre-emption claims rightfully proceeded to final proof, payment and entry before Angell's relinquishment, then, and not until then, there would have been a conflict between such pre-emption entry and the desert entry of Angell. The conflict so resulting would have required the cancellation of the desert entry to the extent that the same included land embraced within the pre-emption entry, and upon such cancellation a right to repayment would have accrued under the statute.

In Conley's case a relinquishment, which is required by the repayment statute, was not filed until after he had made application for repayment, and after the land had been awarded to Ashley's heirs and the pre-emption claim had "proceeded to final proof, payment and entry." At that time there arose a conflict between the pre-emption entry and the homestead entry, which necessitated the cancellation of the latter. Your office evidently failed to observe the distinction between the act of filing the declaratory statement, which did not operate to segregate the land, and the act of consummating the same by making final proof and payment, which was a segregation and ultimately defeated the homestead entry. It is true there was no conflict until the pre-emption claim was perfected, but the statute does not provide that the conflict shall occur at the moment the homestead entry is allowed for land embraced in a pre-emption filing in order to warrant repayment, as appears to be the interpretation of your office, but it provides for repayment where the entry is "*canceled* for conflict," which conflict, in a case like the one under consideration, is contingent on the completion of his filing by the pre-emption claimant. Prior to that time the land remained subject to entry, and it might be that the pre-emption claimant would not complete his filing, in which event no conflict would arise and the intervening homestead entryman would take the land. But if the pre-emption claimant should prove up while the homestead entry was still of record, then said entry would have to be canceled for conflict, "and upon such cancellation a right to repayment would have accrued under the statute." It was upon this theory and understanding, implied at least, that Conley's homestead entry was made.

It is difficult to see in what respect the homestead entryman in this case is any more chargeable with error or mistake in making his entry, under the circumstances, than is the government in allowing him to make it. Both had equal knowledge of the conditions under which the entry was made. No deception or fraud was attempted or practiced, so far as the record shows.

As to the fact of Ashley's pre-emption declaratory statement being of record at the time Conley made his homestead entry, and that the

latter also had knowledge of the former's residence and improvements on the land in controversy, the Department has held that "an entry that on contest is canceled on account of the superior right of a *bona fide* settler is 'canceled for conflict' within the meaning of the repayment act of June 16, 1880." Nils N. Ydsti (27 L. D., 616), and George D. Cloninger (28 L. D., 21). It might with equal force and propriety have been held in those cases that the entrymen were chargeable with notice of the prior settlers' claims, as to hold Conley responsible in the present instance.

It is understood here that the action of your office in denying Conley's application for repayment is a departure from the practice, of long standing, in similar cases. Upon consideration the Department is of opinion that the former practice prevailing in such cases is the proper one, and that if there is no other obstacle than the one herein discussed to allowing Conley's application for the return of his fees and commissions, his said application should be approved.

The decision of your office is reversed.

INDIAN LANDS—ALLOTMENT—TRUST PATENT—CANCELLATION.

LIZZIE BERGEN.

The issuance of a first or trust patent on an Indian allotment does not terminate the jurisdiction of the Secretary of the Interior over the lands covered thereby as public lands, but until the issuance of the second or final patent he has authority, after due notice to all parties in interest, to investigate and determine as to the legality of any Indian allotment and to cancel such first or trust patent based upon an allotment erroneously allowed.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, September 25, 1900.

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

The Commissioner of the General Land Office has requested a reexamination of the question as to the authority of this Department to cancel a first or trust patent, issued upon an Indian allotment under the provisions of the act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794), at the same time recommending that he be authorized and directed to finally cancel Indian allotment No. 4, made for the benefit of Lizzie Bergen, minor child of Susan Bergen, embracing the SW. ¼ of the SW. ¼ of Sec. 4, T. 42 N., R. 11 W., Ashland, Wisconsin, land district, and the matter has been referred to me for opinion.

The act of 1887 contains a provision for the issuance of patents upon allotments as follows:

That upon approval of the allotments provided for in this act by the Secretary of the Interior he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and

will hold the land thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs, as aforesaid, in fee discharged of said trust and free of all charge or incumbrance whatever.

The question as to power and authority of this Department after the issuance of the first or trust patent upon an Indian allotment to inquire into the validity of such allotment, and upon ascertaining that it was erroneously allowed, to cancel such instrument, has been considered by this Department at various times, but the last ruling, being the one especially referred to by the Commissioner of the General Land Office, is found in an opinion of my predecessor of February 15, 1897, in the case of Hull *et al. v.* Ingle (24 L. D., 214). In that opinion, which was approved by the Secretary of the Interior, it was held that the issuance of a trust patent upon an Indian allotment terminates the jurisdiction of the Secretary of the Interior over the lands covered thereby, as public lands; that in the absence of special statutory provision he has no authority to cancel such a patent for the purpose of correcting an allotment erroneously made; and that the authority conferred upon him by the act of January 26, 1895 (28 Stat., 641), to cancel a trust patent, in order to correct a mistake in the allotment, is limited to cases where the error is one of those specifically named in said act.

Since that opinion was rendered the question as to the jurisdiction of this Department over land to which an equitable title has been acquired, the legal title thereto remaining and being in the United States, and as to the extent of its authority to inquire into and determine as to the validity of claims or rights asserted under such equitable titles, has been presented to and considered by both the supreme court and this Department in various cases. By the decisions rendered in such cases the extent of the jurisdiction and authority of this Department has been clearly defined and a rule has been so well established that the question is no longer an open one. In Michigan Land and Lumber Co. *v.* Rust, in a decision rendered December 13, 1897 (168 U. S., 589), 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.

In Brown *v.* Hitchcock (173 U. S., 473), it was sought to obtain a modification of the rule thus announced, and for that reason the ques-

tion was re-examined and the decision in Michigan Land and Lumber Co. *v.* Rust was emphatically re-affirmed, it being also said:

> Until the legal title to public land passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department.

In Hawley *v.* Diller (178 U. S., 476,488) the rule thus laid down is adhered to, it being said:

> The land department has authority at any time before a patent is issued to inquire whether the original entry was in conformity with the act of Congress.

In Parcher *v.* Gillen, decided by this Department January 17, 1898 (26 L. D., 34), after a reference to the statutes defining the powers and duties of the Department and to various decisions of the supreme court relating thereto, it was said:

> A consideration of these decisions interpreting the statutes defining the authority and duties 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.

In another place in that decision it was said:

> The true rule drawn from an examination of all the authorities is that jurisdiction of the land department ceases where the jurisdiction of the courts commences, 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.

In still another place the rule is stated as follows:

> 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 views thus expressed and the conclusion reached have been re-affirmed in numerous subsequent departmental decisions from which it is not necessary to quote here, but some of which may properly be mentioned, such as Power *v.* Olson *et al.* (26 L. D., 111); State of Florida (26 L. D., 117); Cagle *v.* Mendenhall (26 L. D., 177); Aspen Consolidated Mining Co. *v.* Williams (27 L. D., 1); Charles H. Moore (27 L. D., 481); Mee *v.* Hughart *et al* (28 L. D., 209), and Morrow *et al. v.* State of Oregon *et al* (28 L. D., 390). The well established rule is that so long as the legal title to any tract of the public domain remains in the United States, this Department has authority and jurisdiction to inquire into and adjudicate any claim to such tract and to see that it is disposed of and the legal title passed only according to law, but that when the legal title thereto passes out of the United

States that authority and jurisdiction of the executive department ends and thereafter the courts have exclusive jurisdiction in the premises.

An Indian allottee, by virtue of the approval of his allotment by the Secretary of the Interior, acquires an equitable title in the land thus allotted to him, but the legal title remains in the United States. The authority of the Secretary of the Interior after an allotment has been approved but before the first or trust patent has been issued, to investigate the legality thereof was upheld by my predecessor in an opinion rendered February 15, 1897 (24 L. D., 264), which was approved by the Secretary of the Interior. That opinion stated the conclusion reached as follows:

> The Secretary of the Interior has authority to investigate the validity of an Indian allotment at any time prior to the issue of the first patent provided for in the allotment act, and upon sufficient cause shown to rescind the approval of the allotment and reject it.

The next step in the administration of the law in respect to these allotments is the issuance of an instrument in compliance with the requirement that upon approval of an allotment the Secretary of the Interior shall cause a patent to issue which shall be of the legal effect and declare that the United States does and will hold the land for twenty-five years in trust for the Indian or his heirs. The use of the word "patent" to designate or give a name to the instrument to be thus issued is not a happy choice of language. The supreme court has described a patent as follows (Langdeau *v.* Hanes, 21 Wall., 521, and Wright *v.* Roseberry, 121 U. S., 488, 499):

> In the legislation of Congress a patent has a double operation. It is the conveyance by the government when the government has any interest to convey, but where it is issued upon the confirmation of a claim of a previously existing title, it is documentary evidence having the dignity of a record, of the existence of that title, or of such equities respecting the claim as justify its recognition and confirmation.

It is clear that the instrument to be issued upon the approval of an allotment is not, and is not intended to be, a conveyance of the interest or title of the government nor is it issued in confirmation of previously existing title. By the context it is shown that the purpose of that instrument is to evidence a present trust coupled with a promise to convey in the future, a situation much like that arising by operation of law between the United States and an entryman who has made proof of compliance with the law and received a final or patent certificate from the land officers. Speaking of such an entryman the supreme court, in Orchard *v.* Alexander (157 U. S., 372, 383), said:

> The government holds the legal title in trust for him and he may not be dispossessed of his equitable rights without due process of law. Due process in such case implies notice and a hearing. But this does not require that the hearing must be in the courts, or forbid an inquiry and determination in the land department.

In legal contemplation after the first or trust patent is issued the United States holds the legal title for the benefit of the Indian allottee

who holds the equitable title. The language used clearly negatives the idea that it was intended that the first or trust patent should have the effect of at once vesting in the Indian allottee the full legal title to the land. Under the decisions cited herein, so long as the legal title of any tract of the public domain remains in the United States, and so long as the law under which such tract is being disposed of is in process of administration, this Department has authority and jurisdiction to investigate the legality of any claim thereto, and it is the duty of the Secretary of the Interior as the head of the Department and as the officer charged by law with the supervision of business relating to the public lands, to take such action as will prevent the improper or unlawful disposal thereof. The same reasoning applies in the case of Indian allotments as in other cases, where an equitable title has been acquired. A suit by the United States to recover the legal title or to determine whether the claimant has acquired an equitable title, could not be maintained in the one case any more than in the other. It seems clear that the same rule as to the right of the United States to appeal to the courts must govern in the one case as in the other. A suit could not be maintained by the United States to recover a title it had not parted with, nor is it necessary for the United States to resort to the courts to enable or authorize its own officers to decline to make an illegal conveyance of a part of the public domain. If the officers of this Department have no authority in the premises they will be compelled to sit idly by and allow illegal claims to allotments to remain of record for the full trust period and at the end of that time to issue a patent conveying the fee to the illegal claimant, whereupon it will become their duty to immediately institute proceedings in the courts to secure the cancellation of the patent and the revesting of the title in the United States. It was never intended that such an anomalous condition should exist in connection with these allotments (Knight *v.* United States Land Association, 142 U. S., 161, 178), a condition which would result in as great injury to the Indian as to any one else. A due and proper regard for the ultimate well-being of the allottee would of itself prevent a construction of the law that would work him such injury if any other could be found not inconsistent with the recognized rules of construction. The best interests of the Indians as well as the proper administration of public affairs, demand that there be some tribunal where the rights claimed under said law may be determined without waiting for the trust period to expire. The courts not having jurisdiction, the Interior Department having charge of public business relating both to the public lands and to the Indians, is the only tribunal fitted to make such determination, and the decisions of the supreme court justify the conclusion that it is clothed with full authority in the premises.

The fact that Congress by the act of January 26, 1895 (28 Stat., 641),

declared that the Secretary of the Interior should have authority during the time the United States should hold the land in trust for an Indian allottee, to cancel the trust or conditional patent in certain cases where the patent had been erroneously or wrongfully issued, may be considered an expression of opinion by Congress that he did not previously possess such authority. That view of the matter is entitled to respect, but as said in Hull *v.* Ingle, *supra*, it is not decisive of the question. Prior to the passage of this act it had been held by this Department that the issuanee of the first or trust patent deprived the Department of jurisdiction in the premises. To this effect was the opinion of the Assistant Attorney General of July 15, 1892 (Lizzie Stricker, 15 L. D., 74). On August 17, 1894, the Commissioner of Indian Affairs made a report on the bill which afterwards became the law of January 26, 1895, in which he said:

> In administering the allotment act cases have occurred where patents have been issued to persons whose names were not correctly given and in some cases to the same person under different names. In these cases the Department has held that there is no authority of law for the cancellation of the patent improperly issued. I deem the passage of the bill in question to be very desirable and accordingly have the honor to recommend favorable consideration by Congress.

The Department transmitted this report to the chairman of the Senate Committee on Indian Affairs with its approval.

The report of the House Committee on Indian Affairs on said bill contains the following paragraph:

> The purpose of the bill is so well and briefly stated in the bill itself that nothing need be added. The want of such a bill has long been felt in the Interior Department. Mistakes have occurred, and doubtless will again, in the allotment of land to Indians, by the premature issue of the deed, by mistake in name, in allotting to persons not entitled, and in many other ways. The Department holds that errors of that kind can not be corrected, and that much injustice is done to the government and to the Indians.

The statement on the floor of the House of Representatives as to the purpose and effect of the proposed legislation is to the same effect. Mr. Lynch in charge of the bill said:

> Mr. Speaker, this bill which has been drawn at the Interior Department, is designed to enable the Secretary of the Interior to correct errors which occur occasionally in making allotments of lands to the Indians. Sometimes, the Indian is mis-named or his name is mis-spelled, or there is a wrong description of the land. At present, the Department has no means of making corrections in such cases. The bill simply confers the necessary authority.

In view of the departmental ruling that the Secretary of the Interior was without authority to correct mistakes in Indian allotments after the issuance of the first or trust patent it was deemed necessary that he should be given such authority. This was evidently the primary and controlling inducement for the enactment of the law of 1895. It was passed to meet the then existing conditions and to afford a relief

demanded for the proper protection of the rights and interests of both the government and the Indian. If the Secretary of the Interior had authority under existing laws to cancel for sufficient cause a trust patent, the passage of the act of 1895, purporting to invest him with that authority in certain cases, ought not of itself to be given the effect of abridging the existing authority. In Sutherland on Statutory Construction it is said (Sec. 231):

> A legislative enactment based on a misconception of the law does not *per se* change the law so as to make it accord with the misconception.

In Endlich on the Interpretation of Statutes (Sec. 374) it is said:

> It is an obvious inference from what has gone before, that enactments of any specific provision on a particular subject are not to be regarded as conclusive declarations that the law was different before.

In Black on Interpretation of Laws (Sec. 90) the rule is stated as follows:

> But the enactment of a specific provision on a given subject does not, of itself, prove that the law on that subject was different before; for such enactment may have been made in affirmance of the existing law, and to remove doubts.

This act of 1895 does however demonstrate that the matter of investigating and determining questions as to the erroneous allotment of lands to Indians before the transfer of the legal title is not, in the opinion of Congress, a matter belonging exclusively to the judiciary, but is one that may properly be devolved upon the executive branch of the government. If such determination were a purely judicial function Congress could not withdraw the matter from judicial cognizance or confer upon an executive department authority and jurisdiction in the premises. In the case of Murray's Lessee *et al. v.* Hoboken Land and Improvement Co. (18 How., 272) it was claimed that certain acts of Congress were unconstitutional because they authorized the Secretary of the Treasury to do certain things which were judicial in their nature and could be done only by the judicial power. The court said (p. 275):

> It must be admitted that if the auditing of this account and the ascertainment of its balance and the issuance of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they or either of them so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceedings.

At another place (p. 284) it is said:

> To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which from its nature is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination. At the same

time there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States as it may deem proper.

This declaration is referred to with approval in subsequent decisions. (Fong Yue Ting *v.* United States, 149 U. S., 698, 715; King *v.* Mullens, 171 U. S., 429; United States *v.* Duell, 172 U. S., 576, 582; La Abra Silver Mining Co. *v.* United States, 175 U. S., 423, 456.)

If the investigation and determination as to the legality of such claims is not purely judicial in character, no special enactment is necessary to confer jurisdiction thereof upon this Department, because it is then a matter clearly coming within the general grant of authority to the Department.

The Secretary of the Interior is by law (Rev. Stat., Secs. 441, 464) charged with the supervision of public business relating to Indians just as he is with that relating to public lands. Speaking of the statutory provision (Rev. Stat., Secs. 441, 458, 2478) clothing him with authority to supervise the public business relating to public lands, the supreme court in Knight *v.* United States Land Association (142 U. S., 161, 177) said:

> 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 supervisory agent of the government to do justice to all claimants and preserve the rights of the people of the United States.

And again, in Catholic Bishop of Nesqually *v.* Gibbon (158 U. S., 155, 167), after quoting the above extract from Knight *v.* Land Association, the court said:

> It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary.

What is said in these decisions respecting the administration of public land laws is equally applicable to statutes pertaining to Indian affairs, so that whether the Indian allotment acts be regarded as public land laws or as pertaining to Indian affairs, their administration, unless there be express direction to the contrary, falls wholly and absolutely under the supervision of the Secretary of the Interior. Not only is there no express direction to the contrary, but the allotment acts themselves bear affirmative evidence that their administration is to be under the supervision of the Secretary of the Interior. The period of this supervision will continue so long as the legal title remains in the

United States, that is, until the matter of transferring to the Indian allottee the title of the United States is completed. The act of 1895 must therefore, in the light of the decisions of the supreme court herein cited, be considered either as based on a misconception of the authority of the Secretary of the Interior or as a direction to him to proceed to exercise the authority already vested in him in the premises.

The scheme of holding the allotted land in trust was no doubt adopted in the interest and for the protection of the Indian and the law should be so contrued as to secure to him the greatest possible benefit consistent with a just interpretation of that law and a due regard of the interests and rights of the United States in the premises. There is no reason to believe that any just claims of the Indians will be injuriously affected by reason of the Secretary of the Interior having jurisdiction to investigate the validity of an allotment at any time before the expiration of the trust period. Congress so indicated in part at least in the act of 1895.

This Department has heretofore shown great solicitude for the Indians' welfare and will no doubt continue to exercise the same care hereafter. In any event the law must be read according to its true intent and meaning, and when thus read and construed in the light of the decisions herein referred to, it leads inevitably to the conclusion that until the legal title shall have passed by the issuance of the second or final patent the authority and jurisdiction to investigate and determine as to the legality of any Indian allotment is vested in this Department.

The authority of this Department is not to be exercised arbitrarily and without giving the parties interested notice of proposed action and an opportunity to be heard, or in other words without due process of law. This right of interested parties to have notice of proceedings in the land department and an opportunity to be heard in defense of their rights or claims is asserted in various decisions of the supreme court and emphasized in Brown *v.* Hitchcock, *supra*, where it is said:

> Neither do we affirm that the administrative right of the Departments in reference to proceedings before them justifies action without notice to parties interested, any more than the power of a court to determine legal and equitable rights permits action without notice to parties interested.
>
> * * * * * * *
>
> But what we do affirm and reiterate is that power is vested in the Departments to determine all questions of equitable right or title, upon proper notice to the parties interested and that the courts must, as a general rule, be resorted to only when the legal title has passed from the government.

It is not intended to intimate by anything said herein that third parties should be invited to attack such allotments with the expectation or hope of securing some advantage by reason of such attack. In Bryant *et al. v.* Gill *et al.* (29 L. D., 68), it was said:

The statute giving a preference right of entry to the successful contestant of a preemption, homestead, or other entry has never been extended, directly or by implication, to Indian allotments for which conditional or trust patents have been issued.

In view of the conclusion reached that this Department has jurisdiction and authority in the premises until the issuance of the second or final patent upon an Indian allotment, it is not necessary to discuss or consider the act of January 26, 1895, *supra*, with a view to determine whether, under the proper construction thereof, this case comes within its terms. In no event can it be construed to give the Secretary of the Interior jurisdiction in any case where he would not have it within the rule herein suggested as the proper one.

In the case presented by the Commissioner of the General Land Office it appears from his report that an allotment was made for the benefit of Lizzie Bergen, a minor child of Susan Bergen, for the SW. ¼ of the SW. ¼ of Sec. 4, T. 42 N., R. 11 W., Ashland, Wisconsin, land district, which was approved and upon which a trust or conditional patent was issued October 21, 1893. The General Land Office, by decision of October 9, 1896, held that said allotment was illegal and fraudulent because made for land not subject to allotment, and because it was not made for the sole use and benefit of the allottee, but in the interest of other persons and for speculative purposes. Susan Bergen was given notice of that decision and that she would be allowed sixty days within which to show cause why said allotment should be sustained, but took no action in response thereto. By a subsequent report of a special agent of the land office it is alleged that Lizzie Bergen's father is a white man and a citizen of the United States, and the Commissioner of the General Land Office suggests, as a further reason for the cancellation of the allotment, that said child is a citizen of the United States and not entitled to an allotment. In view of the fact that at the time of said notice to the mother of this allottee this Department held that it had no authority to cancel a trust patent except in special cases mentioned in the act of 1895, by reason of which she may have believed herself justified in neglecting to make any response to such notice, and of the fact that a new allegation against the validity of the allotment has been made, said allotment should not be cancelled without further notice to the parties interested. In all cases involving the investigation of Indian allotments every precaution should be taken to insure that notice of the proceedings shall reach all the parties and in cases like this, involving the allotment of a minor, it would seem well that the guardian, if there be one, and both parents, as well as the allottee, should be notified. In all cases the Commissioner of Indian Affairs should be given information of the action taken and contemplated and the investigation should proceed as in the case of an investigation of an allotment before the issuance of the first or trust patent. All matters of procedure as to which the regulations

for investigating Indian allotments prescribe no specific rule, the instructions of August 18, 1899 (29 L. D., 141), as to the procedure in special agent's reports against the validity of claims to the public lands, should be observed.

Approved:

E. A. HITCHCOCK,

Secretary.

FOREST RESERVATION LANDS—EXCHANGE PROVISIONS ACT OF JUNE 4, 1897.

WILLIAM C. QUINLAN.

The provision of section ten of the act of March 3, 1893, that the lands in the Cherokee Outlet "shall be disposed of to actual settlers under the homestead laws only," precludes the allowance of an application to select such lands under the exchange provisions of the act of June 4, 1897, in lieu of lands within a forest reserve.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *September 25, 1900.* (E. B., Jr.)

William C. Quinlan appeals from the decision of your office dated February 20, 1900, in the matter of his application, filed January 14, 1899, to select, under the exchange provisions of the act of June 4, 1897 (30 Stat., 11, 36), the NW ¼ of the SE ¼ of Sec. 19, T. 25 N., R. 17 W., Woodward, Oklahoma, land district, in lieu of the NW ¼ of the NE ¼ of Sec. 31, T. 27 S., R. 30 E., M. D. M., situated within the limits of the Sierra Forest Reserve, State of California, of which he claims to be the owner in fee simple under patent from the United States.

Said decision holds that the tract first described is not subject to selection under the act of June 4, 1897, for the reason that by section 10 of the act of March 3, 1893 (27 Stat., 612, 642), such tract, with other lands in what was then known as the "Cherokee Outlet," was opened to settlement to actual settlers under the homestead laws only, and for the further reason that the provision of that section requiring a payment before the issuing of patent, of one dollar per acre for certain lands, including the tract in question, was, at the date of your office decision, still in force, unaffected by the provision of the act of June 4, 1897, which declares that "no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected;" and therefore rejects Quinlan's application. Appellant contends that the tract was at the time of filing his application "vacant land open to settlement," and, as such, was subject to lieu selection under the last-mentioned act.

Since the passage of the act of May 17, 1900 (Public—No. 105), known as the free homestead act, which repealed the provisions of said

section 10 as to all further payments for the lands covered thereby except "the payment to the local land officers of the usual and customary fees," the second ground of objection stated in your office decision, to the application of Quinlan, is removed. The first ground of objection, however, appears to be well taken.

So much of the said section 10 of the act of March 3, 1893, providing, among other things, for the disposal of the lands in the "Cherokee Outlet," including the tract in question, as is here in point, reads:

> The President of the United States is hereby authorized, at any time within six months after the approval of this act and the acceptance of the same by the Cherokee Nation as herein provided, by proclamation, to open to settlement any or all of the lands not allotted or reserved, in the manner provided in section thirteen of the act of Congress approved March second, eighteen hundred and eighty-nine, 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" (twenty-fifth United States Statutes, page ten hundred and five); and also subject to the provisions of the act of Congress approved May second, eighteen hundred and ninety, entitled "An act to provide a temporary government for the Territory of Oklahoma to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes."

Section thirteen of the act of March 2, 1889 (25 Stat., 980, 1005), and section eighteen of the act of May 2, 1890 (26 Stat., 81, 90), which are referred to in the provision above set out from section 10 of the act of March 3, 1893, as controlling the manner of disposal of the lands therein specified, each expressly provides, in substantially the same language, that the lands covered thereby "shall be disposed of to actual settlers under the homestead laws only," with certain exceptions not here in point.

The exchange provision of the act of June 4, 1897, under which Quinlan claims, is as follows:

> That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided, further,* That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

Quinlan is not seeking title to the tract in question as a settler under the homestead laws, in any sense, but solely under the above provision of the act of June 4, 1897, as the owner of a tract covered by a patent and included within the limits of a public forest reservation. The provision that the lands covered by the said section 10, including the tract he seeks to be allowed to select, "shall be disposed of to actual settlers under the homestead laws only," is imperative and mandatory,

forbidding the disposal of any such lands in any other manner or under any other laws.

The contention that the provision that these lands shall be disposed of to actual settlers under the homestead laws only is repealed, so far as it stands in the way of the operation of the act of 1897, by that provision of the later act which allows the selection thereunder of "a tract of vacant land open to settlement" in lieu of the tract relinquished, or by the provision of the act of June 6, 1900 (Public—No. 163), which declares, subject to a limitation not necessary to be recited here, that all selections of land under the act of 1897 "shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry," can not be sustained. To hold the affirmative of that proposition would be to find in the later acts a repeal of the earlier, to the extent indicated, by implication merely. Such repeals are not favored. In Frost *v.* Wenie (157 U. S., 46, 58), cited with approval in United States *v.* Healey (160 U. S., 136, 147), the supreme court said:

> It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part, the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.

The above quoted provisions of the act of 1897 and June 6, 1900, are not absolutely irreconcilable with the provision in question of the act of 1893. No purpose to repeal that provision is expressed or indicated in the later acts. The later acts being *in pari materia* are to be read together, and so read they and said provision of the act of 1893 can stand and each be given effect in its appropriate sphere. In legal effect section 10 of the act of 1893 is local and limited in its operation to certain specified lands in Oklahoma, while the exchange provisions of the acts of 1897 and 1900 are general and operative upon all vacant surveyed non-mineral public land subject to homestead settlement and entry where not otherwise specially provided.

In confining lieu selections under the later acts to surveyed lands subject to homestead settlement and entry it does not by any means follow that Congress thereby expressed an intention to include all lands wherever found which might answer that description or classification regardless of the fact that by oft repeated declaration it had proclaimed its purpose to dispose of all lands in Oklahoma Territory acquired by treaty from Indian tribes to actual settlers under the homestead laws only. It is not believed that any considerations of apparent expediency nor anything short of a clearly expressed intention to depart from that purpose and subject such lands to the opera-

tion of the exchange provisions of those acts would justify the construction contended for by appellant. No such intention is manifest and the Department must therefore be guided and controlled in its conclusion by the well settled rule relative to repeals by implication as hereinbefore stated by the supreme court.

The decision of your office is affirmed in accordance with the views herein expressed.

SWAMP LAND SELECTION—CORRECTIVE LIST—ACT OF MARCH 3, 1857.

STATE OF LOUISIANA.

A list of swamp land selections filed by the surveyor-general if not based upon proper data may be corrected by such officer through the filing of a second list, and thereafter the first list is not a pending list of swamp land selections upon which the confirmatory provisions of the act of March 3, 1857, will operate.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *September 25, 1900.* (A. S. T.)

On March 28, 1851, the U. S. surveyor-general for Louisiana reported to your office a list of alleged swamp lands in T. 14 N., R. 4 E., Louisiana meridian, New Orleans land district, Louisiana, which list embraced, and designated as swamp lands, sections 1, 2, 3, 4, 5, 9, 10, 11, 12, 13, 14, 15, 16, 21, 22, 23, 24, 25, 26, 27, 34, 35, and 36, in said township.

On May 20, 1853, the register and receiver of said district transmitted to your office another list of swamp lands in said township, duly certified by said surveyor-general, and by him designated as being "Corrective of and additional to list approved March 28, 1851" (the list first above mentioned). With said second or "corrective" list the surveyor-general filed the following explanatory statement:

SURVEYOR-GENERAL'S OFFICE,
Donaldson, La., May 20, 1853.

The field notes of Henry Washington, from which a part of the above selections were made, are not as explicit upon the subject and extent of swamp lands as would be desired. It will be seen that some difference exists between the present selections and those of the 28th of March, 1851; this arises from the uncertainty of the field notes as to what should constitute swamp lands. The former list was made out not only from the description of the land in the field notes, but from the general character of the lands upon Bayou Lafourch, whereas the present list is based strictly upon the statement made in the field notes of survey, listing as swamp lands only those designated as such in express terms.

R. W. BOYD,
Surveyor General, La.

By your office letter of June 6, 1899, you informed the register and receiver of the land office at New Orleans that action had been taken on said list of May 20, 1853, and that practically all the lands embraced

therein had been approved to the State or the State had received indemnity therefor, and that on the list of March 28, 1851, is noted, "superseded by list approved May 20, 1853, see certificate at foot of said list;" and that on the tract books of your office, opposite the tracts enumerated in the first list, which were not included in the "corrective list," is posted "rejected by Sur. Gen'l, see list approved May 20, 1853."

In your said office letter it was stated, in substance, that said list of May 20, 1853, was taken and understood by your office to be substituted in lieu of said list of March 28, 1851, and that the following tracts in said township 14 N., R. 4 E., which were included in said list of March 28, 1851, were omitted from the list of May 20, 1853, to wit:

Lots 4 and 5 in section 2; SE. ¼ of section 3; SW. ¼ of NW. ¼ of section 5; N. ½ of NE. ¼ of section 9; E. ½, N. ½ of NW. ¼, SE. ¼ of NW. ¼ and E. ½ of SW. ¼ of section 10; all of section 11; S. ½ of NW. ¼ and SW. ¼ of section 12; W. ½ of section 13; all of section 14; E. ½, E. ½ of NW. ¼ and E. ½ of SW. ¼ of section 15; all of section 16; N. ½ of NE. ¼ of section 22; all of section 23; NW. ¼ of NE. ¼, S. ½ of NE. ¼, NW. ¼ and S. ½ of section 24; all of section 25; all of section 26; all of section 36.

And in order to clear the swamp land selection records of your office and of said local office of "such imperfect selections" you directed the local officers to "allow the State sixty days within which to show cause why the selection of March 28, 1851, of the tracts above described, should not be canceled for the reasons herein stated."

On August 7, 1899, the State of Louisiana, by its attorney, filed its showing of cause why said selections should not be canceled, and upon consideration thereof by your office on December 5, 1899, said former action, holding for cancellation said original swamp land selection was adhered to and the local officers were directed to notify the proper parties of said decision, and that the State would be allowed the usual time to appeal therefrom.

On January 31, 1900, the State, by its attorney, filed its appeal from said decision of your office to this Department.

The substance of the contention on behalf of the State seems to be that said list of swamp land selections filed and certified by the surveyor-general on May 20, 1853, was not intended to be substituted in lieu of said list of March 28, 1851, nor to have the effect to abrogate and set aside the same, but was intended as an additional list of such selections, and that, inasmuch as both of said lists were certified by the surveyor-general and filed in your office prior to the passage of the act of Congress approved March 3, 1857 (11 Stat., 251), whereby the swamp lands selected under the act of September 28, 1850 (9 Stat., 519), were confirmed as such and directed to be patented to the several States entitled thereto, said confirmatory act applied to and operated

upon both of said lists, and had the effect to entitle the State of Louisiana to all the lands embraced in both lists.

It is insisted that said list of selections filed March 28, 1851, "was prepared by the surveyor-general in acccordance with a plan then in vogue, to wit, by selecting lands which were swamp, irrespective of whether the field notes of survey made prior to the grant shed any light upon the subject or not," and it is said that "a large quantity of the early selections were made from actual observation in the field or upon the basis of depositions taken by the surveyor-general of witnesses for the State as to the character of the land."

By the act of March 2, 1849 (9 Stat., 352), granting swamp lands to the State of Louisiana, it was provided that the Secretary of the Treasury should cause a personal examination of said lands to be made under the direction of the surveyor-general by experienced and faithful deputies, and that a list of lands thus found to be swamp lands should be made out and certified by the deputies and the surveyor-general to the Secretary of the Treasury. Such was the prescribed method of selecting swamp lands in Louisiana till November 21, 1850, when, in view of the act of September 28, 1850 (9 Stat., 519), which required all swamp lands to be listed by the Secretary of the Interior and proper lists thereof to be by him furnished to the governors of the several States entitled to such lands, the Commissioner of the General Land Office transmitted to the governors of all the States entitled to swamp lands under the law, a circular giving instructions relative to the selection of swamp lands and allowing each of said States to elect which of two methods it would adopt for the purpose of designating swamp lands, viz:

1. The field notes of government survey could be taken as the basis for selections, and all lands shown by them to be swamp or overflowed within the meaning of the act might be classed as swamp lands.

2. The States could select the lands by their own agents and report the same to the U. S. surveyor-general with proof as to the character of the same.

(General Land Office circular, March 17, 1896.)

By a decision of this Department rendered on April 14, 1887, *in re* the State of Louisiana, involving a claim under the swamp land act, the concluding portion of which is published in 5 L. D., 598, it was found and decided that the State, by an act of its legislature approved March 21, 1850, and by a letter from the governor to the Commissioner of the General Land Office, dated December 5, 1850, elected to make the selections of swamp lands granted to the State both by the act of March 3, 1849, and that of September 28, 1850, by the field notes on file in the office of the surveyor-general. The said list of March 28, 1851, having been filed and certified more than a year subsequent to the making of said election by the passage of said act of the legislature, said selections should have been made on the plan sug-

gested by the Commissioner of the General Land Office in said circular of November 21, 1850, and accepted and agreed to by the State, viz., from the field notes of survey on file in the office of the surveyor-general; but that this was not done, is apparent from said statement of the surveyor-general that "the former list [that of March 28, 1851] was made out, not only from the description of the land in the field notes but from the general character of the land upon the Bayou Lafourch," whereas the said list of May 20, 1853, was made in strict conformity with the plan agreed upon.

The list first filed by the surveyor-general was not based upon proper data, and its certification by him was therefore a mistake, and it was evidently his purpose to correct that mistake, as he had a right to do, by the filing of the second list, and when he had so corrected it, though the paper was left in your office, it was not there as a pending list of swamp land selections. The delay of the Secretary in acting upon swamp land selections pending in your office was the evil intended to be remedied by the act of March 3, 1857, and it was the intention of that act to confirm such selections as should have been approved by the Secretary, and the said list of March 28, 1851, having been in contemplation of law withdrawn by the officer who made it, and therefore not pending in your office at the time of the passage of the act of March 3, 1857, said act had no effect upon it. While it is true that both lists were on file in your office at the time of the passage of said confirmatory act, it can scarcely be doubted, from all the circumstances, that it was the intention of the surveyor-general that the list filed May 20, 1853, should supersede and take the place of the one previously filed. This appears not only from his statement to the effect that the list first filed was based in part upon improper data, while the list of May 20, 1853, was based upon the data agreed upon and recognized both by the government and the State as the proper criterion by which to govern said selections, but it also appears from the further fact that a portion of the lands embraced in the first list were also embraced in the list of May 20, 1853. If it had been his intention to leave said first list in force, where was the necessity for embracing in the second list a large portion of the lands already certified in the first? And if, as is argued, it was the intention that the second list should be merely supplementary to the first, only adding thereto such tracts as had been found to be swamp subsequent to the filing of the first list, why were all the tracts hereinbefore described excluded from the list of May 20, 1853? Said list of March 28, 1851, had not been acted upon by the Department. In the case of Michigan Land and Lumber Company *v.* Rust (168 U. S., 589), it is held that—

> 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.

That was a case where a survey had been made and from it a list of swamp lands had been made out, filed and approved by the Secretary of the Interior, and by him transmitted to the governor of the State of Michigan prior to the passage of the act of March 3, 1857, but it had been found that the survey upon which said list was based was incorrect, and for that reason a resurvey was had and a new list was certified and filed prior to the passage of said confirmatory act, a large number of tracts embraced in the first list being excluded from the new list. It was contended that said act of March 3, 1857, had the effect to confirm the first list of selections and to vest the State with title to the lands embraced therein and excluded from the new list, but the court held otherwise and that said confirmatory act operated only on said new list and had no effect upon the lands embraced in the first list and excluded from the new one.

In your letter of June 6, 1899, you say—

> Action was taken on the list of May 20, 1853, and practically all the lands embraced therein have been approved to the State, or the State has received indemnity therefor—

thus showing the State's acceptance of said selections. In the case of Michigan Land and Lumber Co. *v.* Rust, *supra*, the court, in discussing the effect of such acceptance by the State, said—

> 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 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, appeared to pass under the grant. He can not 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 appeared to be within its terms.

It is insisted that this is not applicable to the case at bar because it does not appear that the survey upon which, in part, the said list of March 28, 1851, was made, was erroneous. The principle involved is the same, the question being whether or not the first selection was made upon an improper basis, whether such improper basis resulted from an erroneous survey or from other data not recognized as a correct basis of selection.

It is argued that these selections should not be canceled because it is said that the State of Louisiana, believing and acting upon the assumption that the title to these lands had passed to it under said confirmatory act of March 3, 1857, has sold and disposed of a portion of said lands to persons who have probably improved the same, wherefore it would be a great hardship upon these grantees of the State to have said selections canceled and said lands returned to the public domain. The force of this argument is scarcely perceptible in view of what has

already been said, and besides, it appears that only a small amount, comparatively, of said lands has been thus disposed of by the State, and it is not thought that the State will be seriously embarrassed if required to reimburse the parties to whom it has sold lands to which it had no title.

There seems to be no error in your action in holding said list of selections for cancellation, and the same is therefore affirmed, and said selections of the tracts hereinbefore enumerated will be noted as canceled because superseded by the selections of 1853.

SWAMP LANDS—RESERVATION FOR SCHOOL PURPOSES.

STATE OF LOUISIANA.

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

Section sixteen in each township in the State of Louisiana, reserved for the support of schools by section ten of the act of March 3, 1811, did not pass under the swamp land grants to said State by the acts of March 2, 1849, and September 28, 1850.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *September 27, 1900.* (G. B. G.)

The land involved in this case is Sec. 16, T. 14 N., R. 4 E., New Orleans land district, Louisiana. It is claimed by the State of Louisiana under the swamp land grants of March 2, 1849 (9 Stat., 352), and September 28, 1850 (id., 519). The case is before the Department upon the appeal of the State from your office decision of August 22, 1899, holding that the State's swamp land claim is invalid, for the reason that the land has been reserved for school purposes.

There does not seem to be any dispute as to the facts. The township was surveyed and the land in controversy thus identified as section 16 long prior to the swamp land grant to the State. March 28, 1851, and again May 20, 1853, the surveyor-general for the district of Louisiana filed lists of swamp lands in your office, both of which embraced the tracts in dispute, and no action was taken by your office on these lists until September 15, 1898, when the list of 1853 was canceled as to said tract, for the reason that it was a duplicate claim. It is not questioned, and may be admitted for the purposes of a decision in this case, that the tract was in 1849 and 1850 swamp and overflowed within the meaning of the swamp land grants.

By section 10 of the act of March 3, 1811 (2 Stat., 662, 665), the President of the United States was authorized to offer public lands lying in the Territory of Louisiana for sale, "with the exception of

the section 'number sixteen,'" which was "reserved in each township for the support of schools within the same." There does not appear to have ever been a substantive grant of school lands either to the Territory or to the State of Louisiana. Did this reservation defeat the swamp land grants as to said tracts?

When a tract of land has been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands; and no subsequent law, or proclamation, or sale, would be construed to embrace it or to operate upon it, although no reservation were made of it. Wilcox *v.* Jackson, 13 Peters, 496, 513. See also Leavenworth, Lawrence and Galveston Railroad Company *v.* United States, 92 U. S., 733; Newhall *v.* Sanger, id., 761.

The land being only reserved, it may be that Congress had the power to include it within a grant made subsequent to the reservation, but the intention so to do must plainly appear. The fact that the land was swamp land does not take it out of the reservation for school purposes, nor does this fact alone justify a presumption that it was intended to be granted to the State by the grants of 1849 and 1850. There is no exception of swamp lands in the reservation for school purposes.

There are other questions attempted to be raised by the appeal and the brief filed in support thereof. The attention of the Department is called to the fact that the land in controversy is within what was known as the Maison Rouge private land claim, which claim has been declared invalid by the supreme court of the United States. It is also suggested that part of the land in controversy was sold to one Richard King, August 24, 1855, and patented to him under the act of January 27, 1851 (9 Stat., 565), entitled "An act to grant the right of pre-emption to certain purchasers and settlers on the 'Maison Rouge Grant,' in the event of the final adjudication of the title in favor of the United States."

It is not perceived how these matters can affect the right of the State to a section sixteen therein under its swamp grant. Reference is made in the appeal to certain motions for review of decisions of your office now pending therein, in which it may be these questions should be considered, but they do not affect the merits of the present case.

The decision appealed from is affirmed.

McCalla *v.* Acker.

Departmental decision of September 28, 1899, 29 L. D., 203, reversed on review by Secretary Hitchcock, September 27, 1900, it being found that in fact Acker had shown due compliance with the homestead law in the matter of residence.

APPLICATION FOR SURVEY BY STATE—PRIOR APPLICATION FOR SURVEY BY RAILROAD COMPANY.

STATE OF MONTANA *v.* NORTHERN PACIFIC RY. CO.

A reservation of unsurveyed lands upon the application of a State to have them surveyed under the acts of August 18, 1894, and February 22, 1889, will be revoked where it appears that prior to such application by the State a railroad company had made application for their survey under the provisions of the act of February 27, 1899, had made the deposit required by said act, and steps had been taken by the land department to execute such survey.

Acting Secretary Campbell to the Commissioner of the General Land Office, September 29, 1900.
(W. V. D.) (J. H. F.)

This case is before the Department on appeal by the State of Montana from your office decision of November 13, 1899, revoking a previous order made by your office, July 18, 1899, reserving from any adverse appropriation certain unsurveyed lands, for the survey of which the governor of said State had applied under the provisions of the acts of August 18, 1894 (28 Stat., 394), and February 22, 1889 (25 Stat., 676), said lands affected by said revocation being townships 14 and 16 north, range 22 west; 13, 14, 15, and 17 north, range 23 west; 16 and 17 north, range 24 west; 15, 16, 17, and 21 north, range 25 west; 16 and 17 north, range 26 west; 18 and 20 north, range 27 west; and 21 north, range 30 west, Missoula land district, Montana.

On April 17, 1899, the Northern Pacific Railway Company, in accordance with the provisions of the act of February 27, 1899 (30 Stat., 892), filed with the United States surveyor-general for Montana an application for the survey of the above-described townships, with other unsurveyed lands therein designated, situated within the limits of the grant to the Northern Pacific Railroad Company, by act of July 2, 1864 (13 Stat., 365), and now owned by its successor, said Northern Pacific Railway Company. April 29, 1899, the surveyor-general transmitted said application, together with an estimate of the cost of such survey, to your office for consideration, and on May 13, 1899, the surveyor-general was requested to prepare and transmit forms of advertisement inviting proposals for execution of said survey, upon the railway company's furnishing proper evidence that it had deposited the necessary sum to cover the cost of such survey and the examination thereof as required by said act of February 27, 1899, *supra*, and existing regulations thereunder.

In pursuance of said request the surveyor-general, on May 23, 1899, notified your office that the railway company had deposited the required amount ($14,928), and at the same time transmitted forms of advertisement inviting proposals for execution of the survey, which, having been submitted to the Department, were approved June 2, 1899, and publication thereof authorized in accordance with the recommendations

of the surveyor-general, and on September 16, 1899, contracts for said survey were duly perfected.

In the meantime, June 13, 1899, the governor of Montana filed an application, dated June 6, 1899, under the provisions of the acts of August 18, 1894, and February 22, 1889, *supra*, for the survey of certain unsurveyed lands, part of which, to wit, townships 13 and 14 north, ranges 24 and 25 west, and 16 north, range 23 west, were embraced in the prior application filed by the railway company, and by your office letter of June 23, 1899, the local officers were directed to give notice of the reservation of the lands, designated in the State's application, from adverse appropriation by settlement or otherwise, in accordance with the provisions of said act of August 18, 1894, *supra*. On July 13, 1899, the governor of said State filed a similar application, dated July 8, 1899, for the survey of certain other unsurveyed lands, considerable portions of which—being the lands hereinbefore first described—were also embraced in the application previously filed by the railway company, and by your office letter of July 18, 1899, the local officers were directed to give public notice that, in compliance with the provisions of the act of August 18, 1894, *supra*, all the lands designated in the State's second application would be reserved from any adverse appropriation by settlement or otherwise (except under rights of prior inception) from and after the date of the filing of said application in your office and for a period of sixty days from date of filing of the official plats of survey in the district land office, during which the State authorities might select any of the lands in said townships which were not embraced in any valid adverse claim.

By letters of October 27, and November 4, 1899, the Northern Pacific Railway Company called the attention of your office to the application for survey filed by the railway company April 17, 1899, and to the fact that the required deposit had been made and survey thereunder ordered prior to the filing of the State's applications, and insisted that under the provisions of acts of July 1, 1898 (30 Stat., 620), and March 2, 1899 (30 Stat., 993), said company had a right to select even-numbered sections; that as a basis for the attachment of such right, by selection, the company had made application for said survey under the special deposit law aforesaid, and, such survey having been ordered and provided for, your office was thereafter without authority to order any part of the lands designated in the company's application withdrawn or reserved for the benefit of the State under its subsequent application, and that such reservation as to the lands in conflict should be revoked.

Upon consideration of said matter your office, by decision rendered November 13, 1899, and upon authority of the case of the State of Washington (24 L. D., 122), revoked the reservation previously ordered by your office letter of July 18, 1899, as to all that part of said

lands for the survey of which the State applied July 13, 1899, and which was also embraced in the railway company's previous application—being the lands hereinbefore first described—but, apparently by inadvertence, no action was therein taken as to that part of said lands hereinbefore mentioned, embraced in the company's application, and which were also included in the State's application of June 13, 1899, and the reservation of which was declared by your office letter of June 23, 1899.

On December 13, 1899, motion for review of your decision of November 13, 1899, was filed, on behalf of the State, alleging error therein and praying that your previous order directing the reservation of the lands in conflict for the benefit of the State be reinstated, which motion, on January 19, 1900, was denied.

From your said decisions of November 13, 1899, and January 19, 1900, the State has appealed. Numerous errors are assigned, which, in substance, amount to the contention that your office erred in revoking, without notice to the State, the reservation previously ordered, and in holding that the reservation of the lands in question would in any manner affect the rights of the railway company under its grant or impair its right to select lands lost in place, and erred in holding that the case of the State of Washington, *supra*, was applicable to the case at bar.

Subsequent to your action of November 13, 1899, and January 19, 1900, the local officers called your attention to the fact that the portion of said lands embraced in the railway's application and also included in the State's application of June 13, 1899, and reserved June 23, 1899, was not referred to or embraced in your order of revocation of November 13, 1899, and upon consideration thereof, by office decision of February 8, 1900, you also revoked the reservation declared June 23, 1899, as to all that part of said lands hereinbefore mentioned, embraced in the railway company's application and also included in the State's application of June 13, 1899.

Referring to the errors assigned by appellant, the record shows that at the time your action of November 13, 1899, revoking the reservation previously declared by your office letter of July 18, 1899, was taken, the governor of Montana was duly notified thereof, in pursuance of which notice motion for review was promptly filed, and upon the denial of such motion appeal was duly perfected. The State was, therefore, not deprived of an opportunity to be heard in the matter, and was afforded an opportunity to protect whatever rights it may have had, if any, by motion for review before your office and by appeal to the Secretary of the Interior, and having availed itself of such opportunity thus accorded, no prejudicial error is apparent by reason of such action having been taken without previous notice to the State.

The act of February 27, 1899, *supra*, provides that when any railroad company claiming a grant of land under any act of Congress, desiring to secure the survey of any unsurveyed lands within the limits of its grant, shall file an application therefor, in writing, with the surveyor-general of the State in which the lands sought to be surveyed are situated, and deposit in a proper United States depository, to the credit of the United States, a sum sufficient to pay for such survey and for the examination thereof pursuant to law and the rules and regulations of the Department of the Interior, under the direction of the Commissioner of the General Land Office—

it shall thereupon be the duty of the Commissioner of the General Land Office, or the Director of the Geological Survey, as the case may be, to cause said lands to be surveyed.

In the case at bar, in pursuance of the foregoing statutory provision, the Northern Pacific Railway Company filed its application, made the required deposit, based upon estimates furnished by the surveyor-general in accordance with directions from your office, and thereupon your office ordered the survey so applied for, and forms of advertisement inviting proposals for the execution of such survey were approved and the publication thereof authorized by the Department, all of which was done prior to the filing of the State's application.

The act of August 18, 1894, *supra*, under which the State's application was filed, provides that it shall be lawful for the governors of certain States, including Montana, to apply to the Commissioner of the General Land Office for the survey of any township or townships of public land "then remaining unsurveyed" with a view to satisfying the public land grants to said States, and that the Commissioner of the General Land Office shall thereupon notify the surveyor-general of such application, who shall proceed to have the survey, so applied for, made as in cases of the survey of public lands. Said act further provides that upon the filing of such application the lands involved "shall be reserved from any adverse appropriation by settlement or otherwise," except under rights of prior inception, from date of filing such application until the expiration of sixty days after the filing of the township plat in the proper district land office, during which period of sixty days the State may select any of said lands, not embraced in a valid adverse claim, in satisfaction of its grant, and that the governor of such State, after filing such application, shall give notice thereof by publication for thirty days, and the Commissioner of the General Land Office shall also immediately give notice to the local land office in which said lands are situated of the reservation and withdrawal of said lands for the purposes of said act.

In the case of the State of Washington, *supra*, the State had applied for the survey of certain lands under the provisions of said act of August 18, 1894, *supra*, and its application was denied by your office

on the ground that said lands were then under contract for survey upon the application of settlers, and, upon appeal by the State, the action of your office was affirmed. The Department, in the case cited, said:

> The townships which remain unsurveyed are those for which the State may make application under this act. The unsurveyed townships may, therefore, be surveyed on the application of the State, or your office may direct the survey without such application, if deemed advisable. In the case under consideration, before the State filed its application your office had ordered the survey of the townships named, and the same were put under contract to be surveyed, so that they ceased to be townships for the survey of which applications would thereafter be received.

It is contended, on behalf of appellant, that the case cited is not applicable to the case at bar because in the case now under consideration the contracts for execution of the survey applied for by the railway company had not been let at date of the State's application, and that the railway company, by its application for survey, had acquired no interest whatever in the even-numbered sections of said lands, whereas the settlers, in the case cited, had acquired settlement rights upon the land sought to be surveyed.

In the opinion of the Department this contention is untenable. Examination of the case cited shows that the application of the State therein was denied, not because the settlers, who had applied for survey, had acquired subsisting settlement rights upon the land involved, for, such rights being of prior inception, it was expressly stated in said decision that—

> The effect is the same as to them [actual settlers] whether the survey is made on their petition or request, or on the application of the State. In either event their existing settlement rights must be respected.

And it was further noted that it was only over the future or prospective settler that said act of 1894 gave the State an advantage. But the facts upon which said decision was based are found in the concluding paragraph thereof, wherein it is said that—

> Inasmuch as prior to the application of the State, the survey had been determined upon and ordered by your office, with a view to the benefit of the settlers, the townships for the survey of which measures had thus been taken, were no longer within the provisions of said act of August 18, 1894, and your office properly so held.

In the case at bar, the right of the railway company to the odd-numbered sections within the limits of its grant having attached at date of definite location of the road, its title thereto could not in any manner be affected by a reservation for the benefit of the State under the provisions of the act of 1894, *supra*, but by act of July 1, 1898, *supra*, the railway company is given the right of selection of lands surveyed or unsurveyed, with this limitation, however, that so long as such lands remain unsurveyed such right of selection is limited to odd-numbered sections. It will thus be seen that the execution of the survey, applied for by the company, is an essential precedent to the

attachment of any right, by selection, under said act, to the even-numbered sections involved. But irrespective of any prejudice that might result to the railway company by the reservation directed by your office letter of July 18, 1899, the Department is of opinion that the survey of the lands embraced in the company's application having been determined upon by your office and sanctioned by the Department prior to the filing of the application of the State, said lands, at date of the State's application, were not then within the purview of the provisions of said act of August 18, 1894.

The fact that contracts for the execution of such survey had not been actually awarded can not be held to alter the conclusion herein reached in view of the other controlling steps that had been taken by your office, with the approval of the Department, prior to the filing of the State's applications. Those proceedings amounted to an order for said survey, and under them, especially by reason of the accepted deposit of the railway company, an obligation to the company had been incurred which under the act of February 27, 1899, could be satisfied only by the survey of the lands according to the provisions of that act.

Your decisions of November 13, 1899, and February 8, 1900, revoking the reservations previously directed by your office letters of June 23, and July 18, 1899, as to the lands in conflict, are accordingly affirmed.

RAILROAD LAND—CONFIRMATORY PATENT—SECTION 4, ACT OF MARCH 3, 1887.

KLUVER ET AL. *v.* LANE.

The good faith of a purchaser who is asking for confirmatory patent under section four of the act of March 3, 1887, is not affected by the fact that there were settlers on the land at the time of his purchase who were attempting to claim the same under the homestead law, and that the purchaser knew of their presence there, or was charged with constructive notice thereof, where the lands at such time were not subject to homestead settlement or entry, but were included in outstanding patents, regularly issued for the use and benefit of the railroad company, and the defect in the company's title as ultimately determined by the supreme court was in no respect affected by the presence or absence of settlers or settlement claims.

Acting Secretary Campbell to the Commissioner of the General Land Office, September 29, 1900.

(W. V. D.)

The Department has considered the appeals of H. C. Lane, William Schultz and John A. Larson from your office decision of September 1, 1899, rejecting the application of Lane under section 4 of the act of March 3, 1887 (24 Stat., 556), for a confirmatory patent for the S. ½ of Sec. 11, T. 95 N., R. 42 W., Des Moines, Iowa, land district, award-

ing the right to make homestead entry of the SE. ¼ of said section to Samuel A. Wilson, rejecting the homestead application of William Schultz for said SE. ¼, awarding Theodore Kluver the right to make homestead entry of the N. ½ of the SW. ¼ of said section, awarding the right to make homestead entry of the S. ½ of said SW. ¼ to John A. Larson, and rejecting his homestead application as to the N. ½ of said SW. ¼. Said land is in O'Brien county, Iowa, and is in like situation as the lands involved in Schneider *v.* Linkswiller *et al.* (26 L. D., 407), Linkswiller *v.* Schneider (95 Fed. Rep., 203), and Tow *v.* Manley (29 L. D., 504).

A hearing was had in the local office May 5, 1896, at which all the claimants appeared in person and by counsel, as a result of which the local officers recommended that the application of Lane for a confirmatory patent be rejected, the homestead application of Wilson for the SE. ¼ of said section be allowed, the homestead application of Schultz for said SE. ¼ be rejected, the homestead application of Kluver for the N. ½ of the SW. ¼ be allowed, and that the homestead application of John A. Larson for the whole of said SW. ¼ be rejected as to the N. ½ thereof and be allowed as to the S. ½. Upon appeal, your office, by decision of September 1, 1899, sustained the action of the local officers. The matter is now before the Department upon the further appeal of Lane, Schultz, and Larson.

The evidence shows that Lane purchased the SE. ¼ of said section from the railroad company October 11, 1888, under a contract providing for the payment of the purchase price in deferred payments; that at the time of entering into the contract he paid $160 thereon and thereafter paid in interest and deferred payments $373.91 thereon; that he purchased the SW. ¼ of said section from the railroad company October 15, 1888, under a contract providing for the payment of the purchase price in deferred payments; that he paid thereon at the time of entering into the contract $160, and thereafter paid in interest and deferred payments thereon $306.52, making a total payment upon the lands in controversy of $1,000.43; that pursuant to the terms of the contract he also paid the taxes upon the land for the years 1889 to 1894, inclusive, amounting to $359.01, the last payment of taxes being made September 24, 1895. No part of the purchase money has been refunded to Mr. Lane, or sued for or demanded by him, and neither contract has ever been surrendered or canceled. Both contracts were entered into after the land had been patented to the State of Iowa for the use and benefit of the railroad company, and before the institution of the suit October 4, 1889, whereby the United States sought to recover, and ultimately did recover, the title.

After the payments upon the purchase price hereinbefore recited, and after the commencement of said suit by the United States the railroad company notified Lane that he would not be required to make further deferred payments during the pendency of the suit affecting

title. There is no affirmative showing that Lane's purchase was not made in good faith, and his conduct in making deferred payments and in performing his obligation to pay the taxes upon the land is strong evidence that his purchase was an honest transaction on his part, entered into for the purpose and with the expectation of obtaining title to the land. The fact that there were settlers on the land who were attempting to claim the same under the homestead law and that Lane knew of their presence there, or was charged with constructive notice thereof, did not detract from the good faith of his purchase. The lands were not then subject to homestead settlement or entry but were included in outstanding patents regularly issued by the United States to the State for the use and benefit of the railroad company, and the defect in the company's title as ultimately determined by the supreme court was in no respect affected by the presence or absence of settlers or settlement claims. Tow *v.* Manley (29 L. D., 504).

Your office decision is therefore reversed, with instructions to sustain the application of Lane, under section 4 of the act of March 3, 1887, and to reject the several homestead applications.

ALASKAN LANDS—SURVEY—HOMESTEAD CLAIMS.

INSTRUCTIONS.

Acting Secretary Campbell to the Commissioner of the General Land Office, September 29, 1900.
(W.V. D.)

The Department is in receipt of your office letter of the 30th ultimo, making inquiry respecting proofs required to be filed with the returns of the survey of homestead claims in Alaska, made under authority of the act of May 14, 1898 (30 Stat., 409), and the regulations issued thereunder (27 L. D., 248).

By paragraphs 3 and 4 of said regulations special survey of homestead claims in Alaska can only be made where they are taken in the exercise of soldiers' additional homestead rights. Settlement, residence, cultivation and improvement are none of them conditions to the exercise of this right. While the special survey of these claims is to be made in the manner provided for in section 10 of said act, this does not mean that the surveyor's certificate or return should include any of the matters embraced in the first, second or third subdivisions of paragraph 34 of said regulations. These three subdivisions relate exclusively to claims sought to be acquired for the purpose of trade, manufacturing or other productive industry, and do not apply to soldiers' additional homestead claims. The surveyor's certificate or return should however include the matters embraced in the fourth, fifth and sixth subdivisions of said paragraph 34, but need not include

any of the matters embraced in the seventh, eighth, and ninth subdivisions thereof. In the case of soldiers' additional homestead claims the surveyor's oath to the essential matters required by the fourth, fifth, and sixth subdivisions of said paragraph 34 may be accepted for purposes of the survey, but other appropriate and satisfactory proof thereof should also be made by or on behalf of the claimant at the local land office at the time of presenting the proof otherwise required in such claims.

ABANDONED MILITARY RESERVATION—SETTLEMENT—ACT OF MARCH 3, 1893.

BLAIR *v.* STATE OF NEBRASKA (ON REVIEW).

A settlement on an odd-numbered section within Fort Randall abandoned military reservation, and an application to enter the tract settled upon filed prior to the expiration of the period accorded the State by the act of March 3, 1893, within which to exercise a preferred right of school indemnity selection, can not defeat the assertion of such right on the part of the State, unless the settler was an actual occupant of said tract prior to the establishment of the reservation or had settled thereon prior to January 1, 1884, in good faith, for the purpose of securing a home and entering the same under the general land laws.

Acting Secretary Ryan to the Commissioner of the General Land Office, October 4, 1900.
(W. V. D.) (G. B. G.)

This is a duly entertained and matured motion for review of departmental decision of June 27, 1899 (28 L. D., 569), which affirmed the decision of your office denying the application of Alexander H. Blair to make homestead entry of the NW. ¼ of Sec. 3, T. 34, R. 11 W., O'Neill land district, Nebraska.

This land is within the abandoned Fort Randall military reservation, and Blair's application, which alleged settlement thereon March 9, 1893, was rejected because of a selection of the tract, November 11, 1897, by the State of Nebraska, on account of its school grant, under an act of Congress of March 3, 1893 (27 Stat., 555), entitled "An act to provide for the survey and transfer of that part of the Fort Randall military reservation in the State of Nebraska to said State for school and other purposes," section one of which act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the odd-numbered sections in the portion of the Fort Randall military reservation situated in the State of Nebraska, after the same shall have been surveyed as herein provided, may be selected by the State of Nebraska at any time within one year after the filing of the official plats of survey in the district land office as a part of the lands granted to said State as school indemnity for school lands lost in place under the provisions of "An act to provide for the admission of the State of Nebraska into the Union," approved February ninth, eighteen hundred and sixty-seven: *Provided,* That no existing lawful rights under any of the land laws

of the United States providing for the disposition of the public lands shall be prejudiced by this act: *And provided further*, That said lands shall be accepted by said State of Nebraska in full satisfaction of lawful claims now existing, or that may hereafter arise, for school-land indemnity for a corresponding number of acres, upon assignment of the bases of the claims by description and selection in accordance with the regulations of the Interior Department within the period of limitation aforesaid; such selections to be equally distributed, so far as practicable, among the several townships.

The settlement as alleged by Blair in his said application having been made subsequent to the passage of said act, it was held by the decision under review that a settlement on an odd-numbered section within said reservation after the passage of the act of March 3, 1893, *supra*, and an application to enter the tract thus settled upon, filed prior to the expiration of the period accorded to the State by said act within which to exercise a preference right of school indemnity selection, cannot defeat the assertion of such right on the part of the State.

The motion for review proper presents no question which was not fully and carefully considered when the decision under review was rendered, and nothing which casts doubt upon the correctness of that decision upon the facts as then presented. But a reconsideration and modification of said decision is asked because of alleged newly-discovered evidence, and in an affidavit in support of said motion, Blair states:

> That at the date of his application for the tract of land involved herein, affiant was misled in the showing made as to the exact date of his settlement and residence upon said tract, in that affiant was laboring under the belief that his settlement right began to run from the date he removed his family upon the said tract, to wit, March 9, 1893, whereas the true date of affiant's settlement upon said tract was on the 19th day of February, 1893; that on the 22nd day of February, 1893, affiant commenced the construction of a dwelling house and stable upon the said tract of land, and resided upon and occupied the said land the greater portion of the time from February 22, 1893, to March 9, 1893, at which time affiant moved his family, consisting of wife and two children, upon the said tract, and have continued to reside thereon to the present time and cultivate and utilize said premises under the homestead laws of the United States.

These statements are corroborated by an affidavit signed by two persons, who aver personal knowledge of the facts therein stated, and, inasmuch as they are not controverted by the State, will be taken as true. The question, therefore, arises as to the effect of a settlement upon an odd-numbered section of land within the abandoned Fort Randall military reservation, made prior to the passage of the act of March 3, 1893, and existing at the date of the passage of that act.

If Blair's settlement upon said land was an existing lawful right under any land law of the United States providing for the disposition of the public lands, it is protected by the first proviso to section one of said act; otherwise such settlement was no bar to the State's right of selection. At the date of said settlement the land in controversy

was in the military reservation. October 20, 1893, the reservation was turned over to this Department by the Secretary of War for disposition under the act of July 5, 1884, or as otherwise provided by law. It is not necessary to inquire whether the military reservation ceased at the date of the passage of the act of March 3, 1893, or whether that reservation continued until October 20, 1893, when the War Department formally relinquished its control thereof. If the military reservation ceased March 3, 1893, this land being an odd-numbered section therein, was withheld from other disposition by said act for one year after the filing of the official plat of survey thereof in the district land office, in order that the State might by indemnity selection thereof satisfy losses in place in its school grant. At the date of Blair's settlement, and at all times since then to the time of the State's selection, no lawful right could have been initiated upon said land under any public land law of the United States, and hence at the date of the act of March 3, 1893, Blair did not have an existing lawful right. His act of settlement was not authorized by any law, was a mere trespass, and he took nothing thereby. The debates of Congress upon the bill which afterwards became the law above quoted seem to indicate that the "existing lawful rights" intended to be protected by said proviso were such as it was contemplated might exist by reason of the provisions of an act of July 5, 1884 (23 Stat., 103), entitled "An act to provide for the disposal of abandoned and useless military reservations," under which this land would have been disposed of, upon being turned over by the War Department, but for the special legislation contained in the act of March 3, 1893. Said act of July 5, 1884, provides that any settler who was in actual occupation of any portion of an abandoned military reservation prior to the location of such reservation, or who had settled thereon prior to January 1, 1884, in good faith and for the purpose of securing a home and entering the same under the general land laws, and had continued in such occupation to the date of the act, should be entitled to enter the land so occupied, according to the government surveys and subdivisions, if qualified to make entry under the homestead laws, provided that the land was subject to entry at the date of the withdrawal.

A question very similar to the one here involved was considered and passed upon by the Department in the case of John W. Imes (12 L. D., 288). That case arose under the act of February 13, 1891 (26 Stat., 749), which was an act providing for the disposition of the abandoned Fort Ellis military reservation in Montana. The act provided for an extension of the public surveys over the unsurveyed portion of the reservation, and gave the State the right to select at any time within one year after the approval of the survey any portion of said lands in satisfaction of its school grant, with the proviso: "That no existing lawful rights to any of said lands initiated under

any of the laws of the United States shall be invalidated by this act." At page 289, the Department said:

> The only lawful rights to these lands [that] could exist at the date of this grant to the State were those acquired under the act of July 5, 1884, that is, by settlers prior to the reserve, or to January 1, 1884, who continued occupancy for the purpose of securing a home.

Blair is not within the provisions of the act of 1884. He was not in actual occupation of the land in controversy prior to the location of the reservation and had not settled thereon prior to January 1, 1884.

The motion for review is denied.

MINING CLAIM—EXPENDITURE—IMPROVEMENTS BY PRIOR LOCATOR.

YANKEE LODE CLAIM.

No part of the value of permanent and immovable improvements on a mining claim, made long prior to the location thereof, by claimants under a previous location embracing the same ground, solely to improve and develop the prior claim, can be credited to the later claim toward meeting the requirement of the statute "that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself [the claimant] or grantors."

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 6, 1900.* (E. B., Jr.)

The Department has considered the appeal of Joe Golob and William Patterson from the decision of your office dated December 28, 1899, holding Leadville, Colorado, mineral entry No. 4429, made by them July 3, 1899, of the Yankee lode mining claim, for cancellation on the ground that the necessary statutory expenditure of $500 had not been made upon the claim or for its benefit.

It appears that the said claim is a relocation, made February 1, 1899, by Golob and Patterson, of the ground previously embraced in the John A. Logan lode mining claim, and that all the improvements upon such ground were made by the claimants of the John A. Logan, except the discovery cut of the Yankee, valued at $55, which was made by the locators thereof. In response to a call by your office for evidence relative to the improvements on the Yankee claim the claimants thereof filed a bill of sale, dated February 1, 1899, from one O. A. Hoopes, to them, of all his interest in the labor and improvement on the John A. Logan, the stated consideration being one dollar; also a bill of sale dated February 6, 1899, to them, from Thomas B. Hughes and James A. Greer, of a three-eighths interest in all workings and improvements on the John A. Logan, the stated consideration being $500.

The improvements made upon, and for the benefit of the John A. Logan, as tney existed at the date of the survey of the Yankee, Feb-

ruary 8, 1899, consisted of a tunnel 390.5 feet long, and two shafts 12 feet and 30 feet deep, respectively. Both of these shafts and about 270 feet of the tunnel are within the boundaries of the Yankee claim. The deputy mineral surveyor who made the said survey reported, at the time of the survey, that the last seventy feet of the said tunnel, value $700, was the property of the Yankee claimants, but said nothing about the ownership or value of the remainder of the tunnel. He reported both said shafts to be the property of the John A. Logan claimants, but did not place any valuation upon them. The only improvements credited to the Yankee claim in the certificate of the surveyor-general are the said discovery cut valued at $55 and the last seventy feet of the said tunnel valued at $700.

The decision appealed from declines to accept the said seventy feet of tunnel or any of the other improvements covered by the said bills of sale, as improvements upon the Yankee claim, for the reason that they were not made by the Yankee claimants or for the Yankee claim, but were made for the John A. Logan claim prior to the location of the Yankee. Appellants allege that they expended the sums named in the said bills of sale in good faith for the improvements covered thereby, and insist that they are entitled to credit therefor, in satisfaction of the statutory requirement of an expenditure of $500, to the same extent as if they had actually placed such improvements on the claim themselves since its location.

It does not appear that said Hoopes ever owned any part of the John A. Logan claim or of the improvements thereon. Hughes and Greer owned more than three-eighths of that claim at and immediately prior to its relocation as aforesaid, and, together with others claiming an interest therein, they filed, on May 5, 1899, during the period of publication for the Yankee, as claimants of the John A. Logan, an adverse claim against the application for the former claim, and commenced suit in support thereof in a court of competent jurisdiction. It does not appear when this suit was commenced, but it is shown to have been dismissed July 3, 1899, on motion of the plaintiffs.

Of the improvements placed on the John A. Logan only the last seventy feet of the said tunnel were represented to the deputy mineral surveyor, and embraced in the surveyor-general's certificate, as the property of the Yankee claimants. Yet the said bills of sale filed by them since the entry show, if they are to be relied upon, that these claimants then owned, by purchase, three-eighths of all those improvements within the limits of the Yankee claim. They did not, according to their own showing, acquire title from the John A. Logan claimants to all of the last seventy feet of the tunnel, but only to an undivided three-eighths interest in that portion of it, as well as in the balance of it within the Yankee claim. About one hundred and twenty feet of the tunnel, commencing at and embracing its mouth, are within the

limits of the Belle of Kentucky claim, survey No. 2286, and in this part, so far as appears, the Yankee claimants have no interest whatever. How they are to enter the tunnel and utilize their three-eighths interest in the last seventy feet, or in any part of it within their claim, for its development, under these circumstances, does not appear. Again, according to the present showing, the value of the improvements covered by the certificate of the surveyor-general—the three-eighths interest in seventy feet of tunnel, and the said discovery cut—is only $317.50.

Even if it were permissible, under any circumstances, for the land department to recognize and credit, as part of the statutory expenditure of $500, money paid in good faith by relocators, or those claiming under them, for tunnels, shafts, drifts, cuts or other workings of a similar character, which are inseparable from the relocated ground and were made therein under a prior location which has come to an end, such recognition and credit ought not, certainly, to be given in any case wherein it is not shown that such payment was made in the utmost good faith, or wherein it is at all doubtful whether the workings of the character indicated are adapted to and can be utilized for the development of the claim. Not only do the facts shown in the present case impugn the good faith of the alleged purchase and fail to show that the workings covered thereby are adapted to and are capable of being used toward the development of the Yankee claim, but the value of the improvements covered by the surveyor-general's certificate, as now shown, is much less than the amount prescribed by the statute. It is not necessary, therefore, to decide, in this case, whether or not the permanent and immovable improvements of prior locators may, under any circumstances, be purchased by relocators of the same ground, and the expenditure thus incurred be credited toward making up the statutory expenditure of $500 necessary to be shown as one of the conditions essential to the issue of patent for the claim.

It is enough in this case that it has not been shown by the claimants, as required by the statute (section 2325 R. S.)—

> that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself [themselves] or grantors.

The said tunnel and shafts now on the Yankee claim were made long before the location of that claim, by the claimants of the John A. Logan, solely to improve and develop the latter claim, and apart from any question of the alleged expenditure of money in their purchase by the Yankee claimants, however much they may inure to the advantage of the latter—and however great their value—in developing the Yankee claim, no part of such value can be credited toward meeting the above-quoted requirement of the statute. The claimants under the John A. Logan location, who constructed and owned those improvements, could

not, independently of an express contract, maintain any claim or action in the courts for the use or value of those improvements, as against the claimants of the Yankee, nor could they prevent such use by any lawful means. Being inseparable from the ground they are and have been, for all purposes, since the relocation of the claim, as much the property of the latter claimants before the alleged purchase as since.

The decision of your office is affirmed, in accordance with the views herein expressed.

Attention is invited to the protest filed January 8, 1900, by Theodore Fain, against the said entry, and the issuance of patent thereon. In view of the action herein already taken, the said protest should be dismissed.

INDIAN LANDS—BITTER ROOT VALLEY—ACT OF MARCH 2, 1889.

HARRY O. LATCHEM.

By the act of March 2, 1889, the government is authorized to appraise and sell patented Indian lands in the Bitter Root Valley, with the consent and for the benefit of the Indians, and in the discharge of this duty, which is in the nature of a trust, it must observe and pursue the requirements and directions contained in the statute, which require that such lands should not be sold for less than the appraised value of the land and improvements thereon.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 8, 1900.* (A. S. T.)

Harry O. Latchem has appealed to this Department from your office decision rendered June 18, 1900, rejecting his application to purchase the S. ½ SE. ¼, Sec. 32, T. 9 N., R. 20 W., M. M., Missoula land district, Montana, being a portion of the Bitter Root Valley Indian lands.

The applicant tendered, with his application, one-third of the appraised value of the land. He made no offer to pay for improvements thereon but filed with his application three affidavits of persons who allege that they are well acquainted with the lands, and it is now claimed (and in your said decision admitted), that said affidavits allege that there are no improvements on the land in question; but an examination of said affidavits shows that they do not contain that allegation, but, on the contrary, show that there are improvements of some value on said land.

It appears that the land in question, together with the N. ½ NE. ¼, of Sec. 5, T. 8 N., R. 20 W., was patented on March 13, 1876, to Charles Victor, a Flathead Indian, who had a log house and other improvements on the tract embraced in his patent.

By the act of Congress approved March 2, 1889 (25 Stat., 871), it was provided that all lands theretofore patented to Indians in the Bitter Root Valley in Montana, should, with the consent of the Indians

to whom such lands had been patented, be appraised and sold, and that the improvements on said lands should be appraised separately.

The land in question was appraised by the proper officer at $10 per acre, and the remainder of the land embraced in the patent of Charles, at $11 per acre, and his improvements at $300, the report of the appraising officer being as follows:

> Patent No. 41, S. ½ SE. ¼, Sec. 32, T. 9, and N. ½ NE. ¼, Sec. 5, T. 8, R. 20; acres, 160.61. The two tracts named in this patent lie in different townships and by the "range correction lines" do not connect. The former, occupied by Charles, has $300 in value of improvements. There is timber for fuel and a few sawmill trees; a few acres, not more than twenty, have borne good crops. It is well located and is valued at $10 per acre. The second tract is unimproved, just south of No. 38, and has considerable good timber. It is appraised at $11 per acre.

It would seem from said report that Charles resided on the tract in question and that about twenty acres of it were in a state of cultivation and had yielded good crops.

It appears from the records that the N. ½ NE. ¼, Sec. 5, T. 8, R. 20, was purchased by J. T. Carroll on February 12, 1900, and that he made full payment therefor at the appraised value, but that he did not pay for any improvements. That fact is cited in your said decision, which then says: "It must be held, therefore, that the improvements lie on the land desired by Latchem."

The fact that Carroll did not pay for any improvements on the land purchased by him does not prove, nor justify the inference, that there are improvements on the land in question. But the officer who appraised the land reports that there are improvements on it which he appraised at $300, and it is expressly provided by said statute "that no portion of said lands shall be sold at less than the appraised value thereof." No other appraisement of the land in question than the one above referred to has been made, and the statute expressly prohibits the sale at a less price than the appraised value. Therefore the application of Latchem to purchase said tract for less than its appraised value was properly denied.

The land in question had been patented to Charles, and, under said statute, could not be sold without his consent. He, or in case of his death, his heirs, are entitled to the proceeds of the sale when made. The government is authorized by the statute to sell the lands for the benefit of the Indians, but in discharging this duty, which is in the nature of a trust, it must observe and pursue the requirements and directions contained in the statute which gives it the authority to sell. One of said requirements is, that it shall not sell said lands for less than their appraised value; another is, that the person offering to purchase shall be required to tender a sum equal to one-third of the appraised value of the land, which evidently means the appraised value of the land and improvements thereon. The land and improvements

have been regularly appraised, the appraisement is a matter of public record, the Indians have acted upon it, and moved off the land, and now, years afterward, the government is asked to sell the land at a price less than the appraised value, and to allow this applicant to become the purchaser without complying with the requirements of the statute authorizing the sale. If he desires to purchase the land, let him comply with the plain provisions and requirements of the law under which alone the government has authority to sell it, and under which the Indians consented to the sale.

Your said decision rejecting the application is affirmed.

MA-GEE-SEE *v.* JOHNSON.

Motion for review of departmental decision of July 5, 1900, 30 L. D., 125, denied by Secretary Hitchcock, October 10, 1900.

HOMESTEAD CONTEST—ABANDONMENT—ACT OF JUNE 16, 1898.

CHESSER *v.* O'NEIL.

A long period of abandonment on the part of a homestead entryman having been shown to exist prior to and at the time of the outbreak of war, the presumption is that its continuance during the war was due to the original cause or intent, and not to the entryman's employment in the army, navy or marine corps of the United States.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 11, 1900.* (J. R. W.)

John Chesser appealed from your office decision of June 11, 1900, dismissing his contest against the homestead entry of James O'Neil, for the NW. ¼ of the SW. ¼ of Sec. 4, the E. ½ of the SE. ¼ and the SW. ¼ of the SE. ¼ of Sec. 5, T. 59 N., R. 18 W., Duluth, Minnesota.

May 23, 1891, said homestead entry was made. December 19, 1898, said Chesser filed a contest affidavit, duly corroborated, alleging:

> Said James O'Neil has wholly abandoned said tract and has failed to establish his residence thereon since making said entry. . . . The failure of claimant to reside on said land has not been on account of his absence in the military or naval service of the United States during any war.

After due proceedings, notice was given by publication. Hearing was had at the local office March 11, 1899. Defendant made default. March 18, 1899, the local office found that the land "has been wholly abandoned by said entryman as charged in the complaint," and recommended cancellation of the entry. Your office, on January 4, 1900, without action on the merits, remanded the contest to the local office and called for the submission of further "testimony upon the charge

that the alleged default, abandonment, was not due to the defendant's employment in the military or naval service," in default of which your office dismissed the contest.

The commencement of the war with Spain dated from April 21, 1898, as fixed by the act of April 25, 1898 (30 Stat., 364). The United States had been at war with no nation from the time of the entry, May 23, 1891, to April 21, 1898. War is an occurrence so affecting public history, the whole people and public matters of government, that courts and the public must take judicial notice of the fact. Turner *v.* Patton, 49 Ala., 406; Perkins *v.* Rogers, 35 Ind., 124; O'Ferrell *v.* Davis, 1 Ia., 560; Swinnerton *v.* Columbian Ins. Co., 37 N. Y., 174; Hix *v.* Hix, 25 W. Va., 481; Ogden *v.* Lund, 11 Tex., 688; Prize Cases, 2 Black (U. S.), 635.

The testimony shows that James O'Neil had not at any time resided upon or in any way improved or cultivated said tract; that at the time of the hearing the land was wild and uncultivated; that O'Neil's whereabouts was unknown; and that his absence from the land had existed for more than six years prior to the outbreak of war with Spain, during a period of peace between the United States and all the world.

The default having existed so long before the war, the presumption is that its continuance during the war was due to the original cause or intent and therefore not to the entryman's employment in the army, navy or marine corps of the United States. The proof was sufficient to meet the requirements of the act of June 16, 1898 (30 Stat., 473).

Your office decision dismissing the contest is reversed.

HAWAII—LAND PATENTS—ACT OF APRIL 30, 1900.

OPINION.

The provisions relating to the preparation, execution and issuance of patents for lands, found in sections 171, 172 and 200 of the laws of Hawaii (1897), are not specifically repealed by the act of Congress of April 30, 1900, and, as modified by the substitutions and amendments made by said act, said sections are and must remain in force until Congress shall otherwise provide.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, October 16, 1900. (W. C. P.)

I am in receipt, by your reference, with request for an opinion upon the question presented therein, of a letter from the Governor of Hawaii, in which, after referring to the provisions of the Revised Statutes (Secs. 450, 451 and 458) relating to the issuing of land patents, he says:

Does this provision bear upon the execution of land patents under the laws of the Territory of Hawaii, or shall I proceed in such matters under the provisions of our laws regardless of these provisions of the Revised Statutes?

Said sections provide, in substance, that the President may appoint a secretary to sign his name to patents for land sold or granted under authority of the United States and that all patents issuing from the General Land Office shall be issued in the name of the United States and be signed by the President and countersigned by the Recorder of the General Land Office.

The joint resolution of July 7, 1898 (30 Stat., 750), accepting the cession of the Hawaiian Islands, provides, as to the public lands, as follows:

> The existing laws of the United States relative to public lands shall not apply to such lands in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition.

Provision was made for the government of the Territory of Hawaii by the act of April 30, 1900 (31 Stat., 141). By section 73 of that act it is provided:

> That the laws of Hawaii relating to public lands, the settlement of boundaries, and the issuance of patents on land-commission awards, except as changed by this act, shall continue in force until Congress shall otherwise provide . . . . In said laws "land patent" shall be substituted for "royal patent;" "commissioner of public lands" for "minister of the interior," "agent of public lands," and "commissioners of public lands," or their equivalents.

Section 9 of said act provides:

> That wherever the words "President of the Republic of Hawaii," or "Republic of Hawaii," or "Government of the Republic of Hawaii," or their equivalents, occur in the laws of Hawaii not repealed by this act, they are hereby amended to read "Governor of the Territory of Hawaii," or "Territory of Hawaii," or "Government of the Territory of Hawaii," or their equivalents, as the context requires.

Provisions as to the preparation, execution and issuance of "royal patents" and "land patents" are found in sections 171, 172 and 200 of the laws of Hawaii (1897), none of which sections is found in the list of acts, chapters and sections of the laws of Hawaii specifically repealed by said act of Congress of April 30, 1900, *supra*.

These sections as changed by the substitutions and amendments made by the act of Congress are in force and are to remain in force until Congress shall otherwise provide. Thus a system differing from that provided by the Revised Statutes is for the present provided for the Territory of Hawaii. The provisions thus made applicable to this Territory must control.

Approved:

F. L. CAMPBELL,
Acting Secretary.

REPAYMENT—PRICE OF LANDS FIXED BY SECRETARY.

ALEXANDER MOORE.

Where the Secretary of the Interior, in the exercise of discretionary authority vested in him by act of Congress, fixes the price of lands at $2.50 per acre, regardless of their location with reference to a railroad land grant, repayment of the alleged double minimum excess paid by the purchaser is not authorized.

Acting Secretary Campbell to the Commissioner of the General Land Office, October 16, 1900.

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

Alexander Moore has appealed from your office decision of April 25, 1900, denying his application for repayment of alleged double minimum excess paid by him on cash entries Nos. 6479, 6480 and 6481, made November 15, 1877, for the W. ½ of SW. ¼, W. ½ of NW. ¼, NE. ¼ of SW. ¼, and SE. ¼ of NW. ¼, Sec. 2, T. 8 S., R. 5 W., San Francisco, California, land district.

The lands described were originally entered by Moore by the location of Chippewa Half Breed Scrip, issued under the treaty of September 30, 1854 (10 Stat., 1109), which locations were canceled for illegality, by your office, April 30, 1878, cash having been substituted therefor. The application for repayment is based on the allegation—the case of Kitty Maynard (27 L. D., 452) being cited—that the lands purchased have been found not to be within the limits of a railroad land grant, and that said application, therefore, comes within the terms of section 2 of the act of June 16, 1880 (21 Stat., 287), which, among other things, provides:

> And in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

An act of Congress approved June 8, 1872 (17 Stat., 340), among other things, provided:

> That the Secretary of the Interior be, and he is hereby, authorized to permit the purchase, with cash or military bounty-land warrants, of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September thirtieth, eighteen hundred and fifty-four, at such price per acre as the Secretary of the Interior shall deem equitable and proper, but not at a less price than one dollar and twenty-five cents per acre, and that owners and holders of such claims in good faith be also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned.

March 29, 1875, the Secretary of the Interior, upon a request by the owners and holders of this Chippewa Half Breed Scrip and the patented locations thereunder that they be permitted to avail them-

selves of the provisions of the above act, held as follows in a letter addressed to your office:

> Said act is, in my judgment, broad enough to cover these cases, and afford the relief asked for. . . .
>
> Under the authority vested in me by the said act, and in view of the strong equities attaching to the cases under consideration, I would recommend that the price of these lands be fixed at $2.50 per acre, that being the highest standard of value affixed by general laws to the public lands.
>
> You will proceed to issue such instructions, calling for the surrender of the outstanding scrip patents and the payment of the price herein named, as may be necessary.

By its very terms the repayment act presupposes that where the double minimum price, or $2.50 per acre, has been paid for land, it is because the same is or is presumed to be within the limits of a railroad land grant. Where such land is subsequently found not to be within the limits of a railroad land grant, the said act authorizes repayment of the excess. In case of the lands in question their price was fixed by the Secretary of the Interior, in the exercise of the discretionary authority vested in him by the act of June 8, 1872, at $2.50 per acre, without any reference whatever to the fact of their location within the limits of a railroad land grant. In other words, the alleged excess applied for by Moore was not paid by him because the lands embraced in his entries were within the limits of a railroad land grant, and therefore his claim does not come within the terms of the repayment act. The case is clearly distinguished from that of Kitty Maynard, *supra*.

The decision of your office is affirmed.

South Carolina Lode and Other Claims.

Petition for reinstatement of mineral entry canceled by departmental decision of March 12, 1900, 29 L. D., 602, denied by Acting Secretary Campbell, October 16, 1900.

MINING CLAIM—ADVERSE—SECTION 2326, REVISED STATUTES.

Long John Lode Claim.

Where an adverse claimant under the mining laws has been allowed, through inadvertence or mistake, to institute patent proceedings embracing his adverse claim and to make entry thereof during the pendency in court of a suit involving the same, the entry will be canceled.

Section 2326, Revised Statutes, contemplates that controversies between conflicting mining claimants, involved in adverse proceedings in the courts, shall be tried and determined, unless the adverse claim shall be waived, before entry is made by either party in the land office.

Acting Secretary Campbell to the Commissioner of the General Land Office, October 18, 1900.

(W. V. D.) (A. B. P.)

August 20, 1896, J. W. Ward *et al.* filed application for patent to the Long John lode mining claim, survey No. 10460, Pueblo, Colorado.

During the period of publication of notice of the application an adverse claim was filed by the owners of the conflicting Black Horse lode claim. In due time suit was instituted upon said adverse, which is still pending and undetermined. Notwithstanding these proceedings it appears that the Black Horse owners, October 20, 1896, filed an application for patent to their claim, embracing the conflict involved in the adverse suit, and that entry was allowed upon said application, including said conflict, March 9, 1900.

March 16, 1900, the local officers transmitted the papers in the case to your office, accompanied by the statement that the Black Horse application for patent was accepted and entry allowed thereon through inadvertence or mistake due to the fact that the survey of the Black Horse, being prior to that of the Long John, did not show the conflict between the two claims.

March 17, 1900, resident counsel for the Long John applicants filed in your office a motion asking that the Black Horse application for patent be rejected and the entry canceled as having been, respectively, illegally accepted and allowed.

By decision of July 19, 1900, your office, without specifically acting upon said motion, held that no action would be taken upon the Black Horse entry, "pending the determination of said adverse suit," but that "said entry will remain suspended until proper evidence of the determination of said suit is transmitted to this office."

The Long John applicants have appealed. They insist that their motion should have been granted, for the reason that the erroneous Black Horse entry, if allowed to stand, even though suspended, may operate to their prejudice in the trial of the adverse suit against them.

The Black Horse claimants, in their answer to the appeal, insist that they are not responsible for the inadvertence or mistake of the local office in accepting their application for patent and allowing entry thereon pending the proceedings upon the Long John application, and in the suit upon their said adverse claim, and that their entry should therefore be allowed to stand as suspended until their adverse shall have been determined.

There can be no question that the Black Horse application for patent was improperly accepted and that the entry thereon was erroneously allowed. Upon the state of the records in the local office the application should have been rejected when presented (Paragraph 49, Mining Regulations, 28 L. D., 602). That the errors committed may have been due to the inadvertence or mistake of the local officers can not avail the Black Horse applicants. Indeed, it can hardly be said that these applicants are themselves entirely blameless in the matter. They should not have filed an application for patent embracing land already involved in their undetermined adverse suit against a prior application for the same land. They did so, however, without disclos

ing the conflict, a fact necessarily known to them at the time, and this doubtless, in part at least, was the cause of the inadvertence or oversight on the part of the local officers.

The mining laws provide that where an adverse claim is filed during the period of publication, all proceedings upon the application for patent, except the publication of notice and making proof thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction or the adverse claim waived (Sec. 2326, R. S.). The applicant is not permitted to proceed to an entry of his claim. After the adverse claim is filed he can do nothing more under his application, except complete the publication of the notice and file the proofs thereof. All further proceedings are stayed, and the stay is absolute, until the controversy shall have been settled or the adverse claim waived.

Nor is there any provision allowing the adverse claimant to make entry unless and until the controversy shall have been decided in his favor. The statute clearly contemplates that the trial in the court shall be free from any complication, or possible advantage to either party, that might result from an entry in the land office embracing the conflict.

In this case the adverse suit is still pending awaiting trial. The appellants contend that before the trial is had the land office records should be cleared of the existing erroneous entry in favor of their opponents, in order that they may be placed in the position which the statute contemplates they should occupy.

The Department is of the opinion that this contention is sound. The case is not one in which an irregularly allowed entry may be suspended until the controversy with respect to it is settled by the land department. The real controversy in the case is over the right to the possession of the land involved as a mining claim, and that controversy has been transferred to the courts for settlement. It is not for the Department to say whether the Black Horse entry may or may not affect the issue involved in the trial of the case in the court. It is enough that the statute contemplates a trial and determination of the controversy in the court, unless the adverse claim shall be waived, before entry is made by either party in the land office. When such an entry has been allowed through inadvertence or mistake, as in this case, the proper thing for the land department to do is to cancel it.

The entry in question, to the extent of the conflict, will therefore be canceled. Your office decision is modified accordingly.

ABANDONED MILITARY RESERVATION—SELECTION BY STATE.

STATE OF UTAH.

The grant to the State of Utah of one hundred thousand acres for the establishment and maintenance of an institution for the blind, made by sections 12 and 13 of the act of July 15, 1894, is one of quantity to be selected by the State, under the direction of the Secretary of the Interior, "from the unappropriated public lands" within the State. The status of the lands at the date of their selection by the State is the criterion in determining the rights of the State under its selection.

The acts of July 5, 1884, and August 23, 1894, relative to the disposition of lands in abandoned military reservations, provide a mode for the disposal of such lands exclusive of all others, and lands thus set apart for disposition in a designated manner are not subject to selection as "unappropriated" public lands under said grant of July 15, 1894.

Acting Secretary Campbell to the Commissioner of the General Land Office, October 18, 1900.
(W. V. D.)

The State of Utah appeals from the decision of your office of April 6, 1898, holding for cancellation the selection by said State, made June 23, 1897, of certain lands, embracing 2,000 acres (in list No. 2), situated within the limits of the abandoned Fort Crittenden military reservation, in that State, in part satisfaction of the grant for the establishment of an institution for the blind.

The said abandoned military reservation has an area in excess of five thousand acres, and the lands embraced in the list of selections filed by the State are described as follows: SE. ¼ of Sec. 17, T. 5 S., R. 2 W.; SE. ¼ of Sec. 15, T. 5 S., R. 2 W.; SW. ¼ of Sec. 14, T. 5 S., R. 2 W.; NW. ¼ of NE. ¼, S. ½ of NE. ¼, and E. ½ of SE. ¼ of Sec. 20, T. 5 S., R. 2 W.; S. ½, S. ½ of NW. ¼, S. ½ of NE. ¼, and NE. ¼ of NE. ¼ of Sec. 21, T. 5 S., R. 2 W.; NE. ¼, SE. ¼, and SW. ¼ of Sec. 22, T. 5 S., R. 2 W.; NW. ¼ and SW. ¼ of Sec. 23, T. 5 S., R. 2 W.

The grant to the State for the establishment and maintenance of an institution for the blind was of one hundred thousand acres, to be selected under the direction of the Secretary of the Interior from the unappropriated public lands of the United States, within the limits of said State. (Sections 12 and 13, act of July 15, 1894, 28 Stat., 107, 110.) The granting act admitted the State of Utah into the Union upon certain conditions, and became operative by the President's proclamation of January 4, 1896, declaring that the prescribed conditions had been complied with. (29 Stat., 876; State of Utah *v.* Allen *et al.*, 27 L. D., 53.)

The matter for consideration is not that of a grant of specific sections in place where not "sold or otherwise disposed of by or under the authority of any act of Congress," at the time of the admission of the State into the Union, as was the case in the decision reported in

29 L. D., 418, but is that of a grant in quantity, and without location, of lands to be selected by the State under the direction of the Secretary of the Interior "from the unappropriated public lands" within the State. The status of the lands in question at the date of their selection by the State, rather than at the time of the admission of the State into the Union, is the criterion in determining the rights of the State under its said selections. This military reservation was established by executive order of July 14, 1859, but the lands included therein having become useless for military purposes were by the President's order of July 22, 1884, placed under the control of the Secretary of the Interior for disposition as provided in the act of July 5, 1884 (23 Stat., 103). During the continuance of the reservation the lands therein were withheld from disposition under the public land laws in order that they might be applied to military uses, and when the necessity for this terminated they were not subjected to disposition generally under the public land laws, but were, by operation of the President's order and the act of July 5, 1884, set apart for disposition in the particular manner specified in that act. The method of disposition so authorized was enlarged by the act of August 23, 1894 (28 Stat., 491), to the extent therein specified, and at the time of the selection of the lands in question by the State the acts of July 5, 1884, and August 23, 1894, provided an exclusive method for the disposition of lands in like situation, where non-mineral in character, unless the act admitting the State of Utah into the Union had the effect of adding another method of disposition by subjecting them to selection in satisfaction of grants in quantity and without location made to the State by that act.

It is not disclosed by the papers transmitted whether any of these lands had been disposed of pursuant to the acts of July 5, 1884, and August 23, 1894, prior to their selection by the State, or whether any claims thereto had been initiated under either of these acts at that time, but for the purposes of this decision, and subject to ascertainment by your office, it will be assumed that said acts, as to these lands, remain unexecuted, excepting that the lands have been placed under the control of the Secretary of the Interior for disposition thereunder.

The lands in this abandoned military reservation are not charged with any trust, as is sometimes the case with Indian lands, which are ceded to the United States in trust that they be sold and the proceeds held for the benefit of the Indians. Upon the extinguishment of this reservation the lands therein, in the absence of legislation providing a specific method for disposing of them, would have been open to disposition generally under the public land laws.

Many of the general land laws, such as the homestead law, the desert-land act, and the timber-culture law, authorize the entry and disposition of public land pursuant to their provisions, but these laws

do not, any of them, contain a provision indicating that the method of disposition therein authorized is exclusive of others. Upon the other hand, the mining laws and some statutes of local or restricted application contain provisions unmistakably indicating that the method of entry or disposition therein authorized is exclusive of all others. Lands thus set apart for disposition in a particular manner, to the exclusion of all others, do not, in the absence of some declared purpose to the contrary, fall within the operation of subsequent laws which in general terms authorize the disposition of unappropriated public lands. Such lands are in a sense appropriated.

The acts of July 5, 1884, and August 23, 1894, are of restricted application and relate only to abandoned military reservations. Congress could have directed that upon the abandonment of a military reservation, the lands embraced therein should be restored to the public domain for disposition generally under the land laws, or should be subjected to disposition only in a designated mode. The latter course was adopted. The act of July 5, 1884, directed that whenever, in the opinion of the President, any lands within any military reservation had or should become useless for military purposes he should cause the same to be placed under the control of the Secretary of the Interior "for disposition as hereinafter provided." Then followed provisions for the survey, appraisement, and disposition of the lands. The act of August 23, 1894, extended the mode of disposing of the lands embraced in a certain class of abandoned military reservations, including the one under consideration, by also subjecting them to the settlement laws, meaning thereby the homestead and townsite laws (29 L. D., 505), but the policy of the prior act of securing to the government the benefit of any enhancement in value of the lands resulting from their former use was adhered to, it being provided—

> That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior.

It does not appear to have been the purpose of the act of August 23, 1894, to repeal the act of July 5, 1884, or to wholly supersede it as to any abandoned military reservation, but rather to enlarge the authorized mode of disposing of the public lands within abandoned military reservations of the class described in the later act, and when the two acts are construed together, as they must be, it is plain that it was the purpose of Congress to provide in said acts an exclusive mode for the disposition of the public lands within abandoned military reservations. The two acts must be read as though all of their provisions were embraced in one act of the later date, and when so read we have a statute which among its earlier provisions declares that lands within

abandoned military reservations shall be placed in the control of the Secretary of the Interior "for disposition as hereinafter provided," and then specifies the methods of disposition intended. These do not include selections of lands by a State in satisfaction of a grant in quantity and without location. Because of the enhanced value of lands in abandoned military reservations, or because of other reasons growing out of their former use and surroundings, it was deemed more conducive to the public interests to set them apart for disposition in certain designated modes, to the exclusion of all others, than to unconditionally restore them to the public domain. (See case of R. M. Snyder, 27 L. D., 82.) In this sense they are appropriated—not disposed of in the sense of sold or its equivalent, but set apart for disposition in a particular manner in pursuance of a defined policy. This appropriation does not place the lands beyond the power of other disposition by Congress, but, so long as it stands unaltered, controls the Secretary of the Interior under whose direction the State selections in question must be made.

Under any view other than that here expressed the acts of July 5, 1884, and August 23, 1894, would by implication only be partially repealed by the act of July 15, 1894 (which as before shown took effect January 4, 1896), and that when each act and every part thereof can consistently stand and be given full operation.

For the reason that the lands here in controversy were at the time of their attempted selection by the State set apart for disposition in certain designated modes to the exclusion of that invoked by the State, and were therefore not unappropriated, the decision of your office rejecting the State's selection is affirmed.

TIMBER CULTURE CONTEST—NOTICE BY PUBLICATION—RULE 14 OF PRACTICE.

ORSTAD *v.* TIMLIE'S HEIRS.

In service of notice by publication under Rule 14 of Practice, as amended to take effect July 1, 1898, it is essential that notice of a contest against the heirs of a deceased timber culture entryman, whose address is not of record or named in the affidavit filed as the basis for publication, should be mailed to them, by registered letter, at the post office nearest the land in controversy.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 19, 1900.* (J. R. W.)

Edward Orstad appealed from your office decision of March 15, 1900, holding service of notice insufficient in his contest of Andreas Timlie's timber culture entry for the SE. ¼, Sec. 5, T. 157 N., R. 56 W., Grand Forks, North Dakota.

September 30, 1885, Timlie made his entry. October 6, 1897, Orstad filed his contest affidavit, obtaining no service of notice, and November 28, 1898, he filed an amended contest affidavit, corroborated, that—

> it has been impossible for the contestant to find either the aforesaid Timlie, or any of his heirs or legal representatives. That upon due and diligent inquiry he, this contestant, has been informed that the aforesaid Andreas Timlie, about the year 1889, died at Park River, Walsh Co., ... Dakota, where he was then engaged in the liquor business. That this contestant has made further inquiries and is unable to find any relatives or heirs of the said deceased entryman and he verily believes that there are none, and if there are, they are to him unknown. . . . . Contestant further alleges . . . . he has made due and diligent inquiry at Park River, Walsh Co., N. D., where said entryman died, and also at Grafton, the county seat of said county of Walsh, without being able to ascertain the names or addresses of any heirs or representatives of the said deceased.

On this affidavit contestant asked leave to publish notice and to serve copy by registered mail to Timlie's last known address, Park River, N. D.

December 21, 1898, publication was ordered and notice issued for hearing February 15, 1899. Publication and postings on the land and in the register's office were duly made and proven. Copy of the notice was by registered mail sent January 7, 1899, addressed to "Andreas Timlie, Esq., Park River, N. Dak," and returned unclaimed.

At the hearing defendants made no appearance, and upon the evidence submitted the local office recommended that said entry be canceled. Notice thereof was sent by registered mail addressed to "Andreas Timlie, or his heirs or legal representatives, Park River, N. Dak," and returned unclaimed. Your office decision held the registered mail notice of the contest to Andreas Timlie insufficient, vacated the action of the local office and remanded the case with leave to contestant, within sixty days from notice, to apply for a new process, failing which the contest was held for dismissal.

Your office decision correctly holds that registered mail notice to Andreas Timlie, after his death, was not notice to or service upon the heirs. The heirs having no record address, and their address not being named in the affidavit for publication, a copy of the notice should have been mailed to them by registered letter at the post office nearest to the land. This was essential to a compliance with Rule 14 as amended to take effect July 1, 1898 (26 L. D., 710). Without strict compliance with all requirements of constructive service, no jurisdiction is acquired. Lemert *v.* McMillan's Heirs (27 L. D., 432); Parker *v.* Castle (4 L. D., 84). Your office decision is therefore without error, and is affirmed.

The decision is not in conflict with Carpenter *v.* Kopecky's Heirs (29 L. D., 445), and Davies *v.* Lackner's Heirs (29 L. D., 587), which apply to service under Rule 14, prior to the time of its amendment (26 L. D., 710).

HOMESTEAD APPLICATION—QUALIFICATION—HEAD OF FAMILY.

KELLEY *v.* HASTINGS AND DAKOTA RY. CO.

To constitute one the head of a family it is not necessary that he or she should be under a legal obligation to support the family; it is sufficient if, acting from a sense of moral duty, one undertakes the care, attention, support and maintenance of a family to which he owes such moral duty.

A minor child may be the head of a family, within the meaning of the homestead law.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 24, 1900.* (A. S. T.)

On October 29, 1891, the Hastings and Dakota Railway Company, pursuant to a decision of this Department rendered on October 23, 1891 (13 L. D., 440), in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Hastings and Dakota Railway Company, selected the NW. ¼ of Sec. 35, T. 123 N., R. 43 W., Marshall, Minnesota, land district, and said selection was approved on March 29, 1897.

On November 16, 1894, Lizzie Kelley filed her application to make homestead entry for said tract, alleging that she established actual residence on said tract in May, 1891, with the intention of claiming it as a homestead, and had resided there ever since; that she had improvements on the land of the value of $800, consisting of a house, barn, granary, and one hundred and thirty acres under cultivation. A certified copy of her declaration of intention to become a citizen of the United States, made on May 23, 1894, was filed, and it shows that she was born in the year 1872. On October 18, 1899, your office rejected her said homestead application, upon the ground that at the date of said selection by said railway company she was disqualified from making a homestead entry, both by lack of citizenship and her minority. She appealed from your said office decision to this Department, and with her appeal filed her affidavit, duly corroborated, wherein she alleged that she was the daughter of Thomas Kelley, who became a citizen of the United States in 1881, by naturalization; that she was born in the year 1871, in Canada, and came to the United States in 1875, and has ever since resided here; that she was residing on the land in question on October 29, 1891, "and was at that time the head of the family, being the oldest of a large family of children and the one upon whom all depended for care and support." She also filed record evidence of the admission of her father, Thomas Kelley, to citizenship on June 22, 1881.

On June 16, 1900, this Department rendered a decision (unreported) holding that Miss Kelley's citizenship and residence on the land at the time of the company's selection were established, but that her showing as to her qualification as the head of a family was not sufficient, and the record was returned for the purpose of allowing her to make a

further showing in that regard. As such further showing, she filed her affidavit, duly corroborated, from which it appears that at the date of the company's selection of the land, her father and mother were both living; that her father was a cripple as the result of an accident, which left him both physically and mentally unsound, and that her mother was in feeble health and most of the time bedridden, which rendered them both incapable of supporting or having the care of their minor children, who were three in number besides this applicant, and were aged twelve, fourteen and sixteen years, respectively; that during the past four years said children had arrived at such ages that they could, to a great extent, support their parents, though she has continued to contribute to their support.

The company had notice of this showing made by Miss Kelley, and offered no evidence in contradiction of the allegations contained in said affidavit, but in reply thereto claims that the facts stated in the affidavit do not show that she is, and at the time of said selection was, the head of a family, within the meaning of section 2289 of the Revised Statutes.

To be qualified to make a homestead entry one must be the head of a family, or, if not the head of a family, the applicant must have arrived at the age of twenty-one years, but it is not necessary that he should have both of these qualifications; if he be twenty-one years of age, he need not be the head of a family; and if he be the head of a family, the fact that he may be under twenty-one years of age will not disqualify him.

The only question to be determined, therefore, is: Do the facts stated in the affidavit show Miss Kelley to have been the head of a family at the time of said selection and at the time of her said application to make entry for the land?

She was under the age of 21 years; her parents were both living, but both were incapacitated, the mother by physical and the father by both mental and physical infirmity, from looking after, protecting, supporting and having the care and management of the family. She being the oldest child assumed this duty, and performed it, taking care of and supporting, not only the other minor children, but the afflicted father and mother also.

To constitute one the head of a family, it is not necessary that he or she should be under legal obligation to support the family. It is sufficient, if, acting from a sense of moral duty, one undertakes the care, attention, support and maintenance of a family to which he owes such moral duty. Thus, it has been held that an unmarried woman, keeping house and bringing up two children of her deceased sister, is the head of a family. (Arnold *v.* Waltz, 53 Iowa, 706; *Ex parte* Brien, 2 Tenn. Ch., 33; Bradley *v.* Rodelspager, 3 S. Car., 226.)

A brother living with his widowed sister and her four small children and providing for them is the head of a family. (Wade *v.* Jones, 20 Mo., 75.)

An unmarried son who supports his mother and sisters is the head of a family. (Marsh *v.* Lazenby, 41 Ga., 153.) So also where he cares for his minor sisters only. (Greenwood *v.* Maddox, 27 Ark., 640.) And where he lives with and supports his mother only. (Parsons *v.* Livingston, 11 Iowa, 104.)

(See American and English Encyclopedia of Law, Vol. 7, p. 804, where the above and various cases are cited.)

In the case of Bray *v.* Colby (2 L. D., 78), Secretary Teller, in prescribing rules for the government of the land department in the allowance of entries by deserted wives, as the 5th rule provides: "5. Where the entryman's wife is deceased, the foregoing rules shall apply to his child who is not twenty-one years of age at date of the offer to purchase, commute or make final proof as an agent, or at date of the offer to enter, provided that in the latter case the child shall be the head of the family," thus recognizing that a minor child under these circumstances may be the head of a family.

The same doctrine was adhered to in the case of Massie *v.* Hamlet (28 L. D., 406), where it was held that, where a deserted wife had been divorced, the minor child of the entryman, being the head of the family, might submit final proof upon the entry.

According to the showing made in this case, this applicant was, at the time of said selection by the railroad company, the head of a family, and was then, with said family, residing on the land in question with intent to claim it under the homestead laws. She has continued to reside there ever since, and has made valuable improvements on the land, thus manifesting the good faith of her claim, and her said homestead claim must be held to have priority over the claim of said railway company.

Your said decision is therefore reversed, the approval of said selection is revoked as to the tract in question, said selection will be canceled as to said tract, and Lizzie Kelley's application to make homestead entry therefor will be allowed.

RAILROAD GRANT—DESERT ENTRY—SECTION 1, ACT OF APRIL 21, 1876.

NORTHERN PACIFIC RY. CO. *v.* MURRAY.

A desert-land entry upon land within the primary limits of a railroad grant, made after the definite location of the line of road opposite said land, is not confirmed by section one of the act of April 21, 1876, and in no wise affects the attachment of rights under the railroad grant, where the entryman does not claim to have ever been an actual settler upon the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 24, 1900.* (F. W. C.)

The Northern Pacific Railway Company has appealed from your office decision of July 18, last, rejecting its attempted listing under

the grant made by the act of July 2, 1864 (13 Stat., 365), of the SE.¼ of the NE.¼, lots 1 and 2, of Sec. 5, T. 22, R. 20 E., Waterville land district, Washington.

On June 5, 1899, the railway company's list was rejected for conflict with the desert land entry of Alexander Murray, covering said tract, made on July 16, 1886. Said entry by Murray has been since canceled for failure to make proof within the statutory period, and with the record transmitted is a letter from Murray, dated August 1, last, addressed to resident counsel of said railway company, in which he states that after making said desert entry he was unable to get water upon the tract to prove up in time; that he therefore purchased the tract from the Northern Pacific Railroad Company at the rate of $4.00 per acre, and that he has since transferred his interest in this property to other parties.

This tract is within the primary limits of the grant to the Northern Pacific Railroad and opposite the portion of its Cascade branch line definitely located December 8, 1884. Notice of withdrawal under said location was not forwarded the local officers until January 8, 1888.

The question as to whether this land passed under the railroad grant has been before considered by this Department in Northern Pacific Railroad Company *v.* Murray *et al.*, decided October 16, 1896 (not reported), in which your office decision of October 18, 1894, holding that the desert land entry by Murray, made, as before stated, July 16, 1886, was confirmed by the provisions of section 1 of the act of April 21, 1876 (19 Stat., 35), was affirmed.

The section referred to provides:

> That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

Murray does not claim to have been an actual settler upon this land, and his desert land entry was not confirmed by said act. Bond's Heirs *et al. v.* Deming Townsite (13 L. D., 665). Having been allowed after the definite location of the line of road opposite this tract, said desert entry in nowise affected the attachment of rights under the railroad grant, and the departmental decision of October 16, 1896, in so far as it held said desert entry by Murray to have been confirmed by the act of April 21, 1876, is hereby recalled and vacated and the tract involved, if otherwise subject to the grant, may be listed for patent.

ABANDONED MILITARY RESERVATION—SCHOOL LANDS—ACT OF JUNE 19, 1874.

STATE OF COLORADO.

The act of June 19, 1874, providing the method in which the lands formerly within the Fort Reynolds Military Reservation should be disposed of did not amount to a sale or disposition of said lands, and hence did not bring them within the exception of lands "sold or otherwise disposed of," contained in the grant of school lands to the State of Colorado.

The decision in the case of Gregg *et al. v.* State of Colorado, 15 L. D., 151, so far as in conflict herewith recalled and vacated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 24, 1900.* (F. W. C.)

With your office letter of March 3, last, was submitted, with favorable recommendation, list No. 14, embracing 920 acres in Secs. 1, 2 and 10, T. 21 S., R. 55 W., Pueblo land district, Colorado, selected by the State in lieu of an equal quantity of land, being portions of Sec. 16, T. 21 S., R. 62 W., and Sec. 16, T. 21 S., R. 63 W.

The lands in lieu of which the selections under consideration were made were formerly within the Fort Reynolds military reservation, which was created by executive order of June 22, 1868. The act of June 19, 1874 (18 Stat., 85), provides for the transfer of said reservation to the custody and control of the Secretary of the Interior, to be disposed of for cash, after appraisement, to the highest bidder, at not less than the appraised valuation nor less than $1.25 per acre.

It is learned from inquiry at your office that the school sections within said former reservation were not appraised, or offered for sale, at the time the other lands formerly within said reservation were appraised and offered for sale under said act, the theory being at that time (the State being admitted into the Union before the act of 1874 was executed) that the title of the State was complete in said sections. It appears, however, that on February 24, 1890, the State made selection of other lands in lieu of one of these sections numbered 16, but the selections were canceled by your office on the ground that the tracts in lieu of which the selection had been made had passed to the State under the school grant and the homestead applications of William R. Gregg and Lyman Thompson, covering portions of said section, were rejected for conflict with the grant to the State. Upon appeal by Gregg and Thompson the action of your office in cancelling the indemnity selections was reversed in departmental decision of August 5, 1892 (Gregg *et al. v.* State of Colorado, 15 L. D., 151), wherein it was held that as the Fort Reynolds military reservation was created prior to the survey, and as the act of June 19, 1874, did not specifically except from its provisions the school sections, they were excepted from the subsequent school grant and that the State was entitled to

indemnity therefor, and your office was directed to reinstate said indemnity selections. These selections are now before this Department for approval.

The grant to the State of Colorado for the support of common schools is found in section 7 of the act of March 3, 1875 (18 Stat., 474), by which it was provided:

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

The lands in this reservation were surveyed in September, 1875, but the survey does not appear to have been approved until 1880. By proclamation of the President, dated August 1, 1876, the State of Colorado was admitted into the Union, and thereupon the title of the State to the sections of the number granted became complete so far as identified by the government survey, within the limits of the former reservation, and as to those then unsurveyed, upon their identification by survey, unless the legislation contained in the act of June 19, 1874, providing the method in which the lands formerly within the Fort Reynolds military reservation should be disposed of, amounted to a sale or disposition of said lands.

As thus presented the case is controlled by the decision of the Department in the case of State of Utah (29 L. D., 418), in which it was held that the acts of July 5, 1884 (23 Stat., 103), and August 23, 1894 (28 Stat., 491), providing the method in which lands in abandoned military reservations should be disposed of, did not in themselves amount to a disposition of said lands, and hence bring them within the exception of land "sold or otherwise disposed of," contained in the grant of school lands to the State of Utah.

In the case under consideration it does not appear that the lands in place, in lieu of which the selections in question were made, have ever been disposed of by the United States.

Following the decision of this Department in the case of Gregg *et al. v.* State of Colorado, *supra*, an appraisement was made of the school sections in place formerly embraced within said military reservation, but they were never sold or otherwise disposed of. It is therefore held that said sections passed to the State under its school grant and the list submitted is herewith returned without approval, and you are directed to cancel said indemnity selections.

The decision in the case of Gregg *et al. v.* State of Colorado, *supra*, in so far as in conflict herewith, is hereby recalled and vacated.

SWAMP LAND—RAILROAD GRANT—LANDS EXCEPTED.

STATE OF LOUISIANA *v.* NEW ORLEANS PACIFIC RY. CO.

If a tract of land was swamp and overflowed and unfit for cultivation at the date of the swamp land grant to a State, such grant was a disposition of the land that excepted it from the operation of a subsequent grant to a railroad, even though no selection thereof was made by the State until after the attachment of rights under the railroad grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 31, 1900.* (G. B. G.)

The land involved in this case is the NE. ¼ of the SW. ¼ and the SE. ¼ of the SW. ¼ of Sec. 7, T. 2 N., R. 4 W., the E. ½ of the NE. ¼ of Sec. 35, T. 4 N., R. 5 W., and the NW. ¼ of the SE. ¼ of Sec. 33, T. 2 N., R. 7 W., Natchitoches land district, Louisiana. These lands are claimed by the State of Louisiana under the swamp land grants of March 2, 1849 (9 Stat., 352), and September 28, 1850 (id., 519). They were never included in any list of swamp lands reported to your office by a surveyor-general for the State of Louisiana, but were embraced in a list filed in your office, May 20, 1886, by one Charles Pomeroy, who signs his name thereto as State agent. The land is also within the primary limits of the grant made by the act of March 3, 1871 (16 Stat., 573, 576, 579), to the New Orleans, Baton Rouge and Vicksburg Railroad Company, which grant was afterwards conferred by assignment upon the New Orleans Pacific Railway Company, and opposite that portion of the road which was definitely located November 17, 1882. There were excepted from said grant all lands which had been sold, reserved or otherwise disposed of by the United States at the time the line of the road was definitely fixed.

By your office decisions of January 16, and April 28, 1900, it was held that the State's swamp land selection of said tracts being subsequent to the date when the rights of the railway company attached thereto under its grant, they were not excepted from the railroad grant, unless they were actually swamp lands. Your office then found from an examination of the field notes of survey that the said SE. ¼ of the SW. ¼ of Sec. 7 and the said E. ½ of the NE. ¼ of Sec. 35 were of the character granted by the swamp land laws, but that the character of the said NE. ¼ of the SW. ¼ of Sec. 7, and the said NW. ¼ of the SE. ¼ of Sec. 33, cannot be satisfactorily determined by the field notes of survey, and directed the local officers to allow the railway company sixty days within which to show cause why its listing of the two tracts found to be swamp land should not be rejected, and the land approved and patented to the State, and that the State be allowed the same time within which to apply for a hearing to further determine the character of the other tracts.

The State has appealed to the Department, substantially upon the

ground alleged that the field notes of survey show that these lands were swamp and overflowed within the meaning of the swamp land grants.

If the two tracts of land involved in the appeal of the State were swamp and overflowed and unfit for cultivation at the date of the swamp land grants, these grants were a disposition of the land, and they were therefore excepted from the grant to the railway company. It can make no difference therefore that the State's selection was subsequent to the attachment of rights under the grant to said company. The only question presented is as to the character of the land and the methods by which that character is to be determined. The swamp land grants to the several States are adjusted by the smallest legal subdivisions of the public surveys—that is, by forty acre tracts; and the rule is, that if the greater portion of those subdivisions were swamp and overflowed and rendered thereby unfit for cultivation, they passed to the State under said grants. Early in the administration of these swamp land grants, and prior to the said railroad grant, a rule was adopted which permitted the States to elect whether the character of the land should be determined by the field-notes of survey, or whether other proof should be offered of their character; and prior to said railroad grant the State of Louisiana elected to stand upon the field notes of survey. An examination of the field notes of the sections in which the lands in controversy are situate shows that the NE. ¼ of the SW. ¼ of said section 7 is not swamp land and that the NW. ¼ of the SE. ¼ of said section 33 is swamp land.

Your said office decision is accordingly modified by rejecting entirely the State's swamp land selection of the NE. ¼ of the SW. ¼ of said section 7, and by sustaining the State's swamp land selection of the NW. ¼ of the SE. ¼ of said section 33, and by directing that the railroad company be allowed sixty days within which to show cause why its claim to the NW. ¼ of the SE. ¼ of said section 33 should not be rejected and the land patented to the State as swamp land.

HOMESTEAD BY MARRIED WOMAN—ACT OF JUNE 6, 1900.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, United States land offices, June 27, 1900.

Your attention is called to the provisions of the act of Congress approved June 6, 1900 (Public—No. 193), entitled "An act to amend the act of Congress approved May fourteenth, eighteen hundred and eighty, entitled 'An act for the relief of settlers on the public lands,'" which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the third section of the act of Congress approved May

fourteenth, eighteen hundred and eighty, entitled "An act for the relief of settlers on the public lands," be amended by adding thereto the following:

"Where an unmarried woman who has heretofore settled, or may hereafter settle, upon a tract of public land, improved, established and maintained a bona fide residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, and has married, or shall hereafter marry, before making entry of said land, or before making application to enter said land, she shall not on account of her marriage forfeit her right to make entry and receive patent for the land: *Provided*, That she does not abandon her residence on said land, and is otherwise qualified to make homestead entry: *Provided further*, That the man whom she marries is not, at the time of their marriage, claiming a separate tract of land under the homestead law.

"That this act shall be applicable to all unpatented lands claimed by such entry-woman at the date of passage."

Where a married woman applies to make a homestead entry under this act, you will require her to show by affidavit that prior to her marriage she settled upon the land applied for, improved, established and maintained a bona fide residence thereon, with the intention of appropriating the same for a home; that the man she married was not, at the time of their marriage, claiming a separate tract of land under the homestead law. She should also give the date of her settlement and date of her marriage, and furnish the regular homestead affidavit showing that she is otherwise qualified to make homestead entry.

Approved:

E. A. HITCHCOCK,
Secretary.

SCHOOL GRANT—DESERT LAND FILING—UNSURVEYED SCHOOL SECTION.

BARNHURST *v.* STATE OF UTAH.

The reservation of sections sixteen and thirty-six for school purposes in the Territory of Utah, under the act of September 9, 1850, "when the lands in the said territory shall be surveyed . . . . preparatory to bringing the same into market," does not become effective as to lands in said sections on the survey of only two of the exterior lines thereof.

Lands "sold or otherwise disposed of" at the time of the admission of Utah into the Union are excepted from the school grant to said State; and where prior to said date a desert land filing has been properly allowed, and the first payment on the land accepted, the claimant thereby acquires such a right to complete his purchase and perfect title by further compliance with the desert land act, that the right of the State, if any, under its school grant, is subject to the prior right under said filing.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 31, 1900.* (J. H. F.)

This case is before the Department on appeal by Samuel J. Barnhurst from your office decision of June 28, 1898, holding for cancel-

lation his desert-land filing, made August 29, 1895, upon certain lands in the Salt Lake City, Utah, land district, described in his declaration as—

beginning at the northwest corner of Sec. 36, Tp. 36 south, Range 5 west, running thence south 240 rods, thence west 80 rods, thence north 240 rods, thence east 80 rods o the place of beginning, and, presumably, when surveyed, will be E. ½ NE. ¼ and NE. ¼ SE. ¼ of Sec. No. 36, township No. 36 south, range No. 6 west.

The records of your office show that the adjoining township on the east was surveyed in 1874 and that the adjoining township on the south was surveyed in 1884, thus fixing the south and east lines of the township and section in which the lands in question are situated.

By the act of September 9, 1850 (9 Stat., 457), subsequently incorporated into section 1946 of the Revised Statutes of the United States, sections 16 and 36 in each township in the Territory of Utah were reserved for school purposes; and by the act of July 16, 1894 (28 Stat., 109), providing for the admission into the Union of the State of Utah, it was provided—

That, upon the admission of said State into the Union, sections numbered two, sixteen, thirty-two and thirty-six in every township of said proposed State, and where such sections or any parts thereof have been sold or otherwise disposed of by or under the authority of any act of Congress other lands equivalent thereto, in legal subdivisions of not less than one quarter section and as contiguous as may be to the section in lieu of which the same is taken, are hereby granted to said State for the support of common schools.

Utah was admitted into the Union as a State January 4, 1896 (29 Stat., 876), at which time this grant took effect (State of Utah *v.* Allen, 27 L. D., 53).

By your office decision of June 28, 1898, aforesaid, it was held that by the prior survey of the townships lying east and south of the section in question the public surveys had sufficiently progressed at the date of Barnhurst's filing to indicate that the lands in question were a part of a section 36, and that therefore they were reserved to the Territory of Utah for school purposes by the act of September 9, 1850, *supra*, and were not subject to sale or disposition under the desert-land act.

It appears that at the time of making his filing Barnhurst procured the relinquishment of a prior desert-land filing for a portion of said land, for which he paid $75, and that since making his filing he has expended the sum of $550 in conducting water upon the land and in cultivating and improving the same. The appellant contends that the lands in question were unsurveyed at the time when his filing was made and were therefore not reserved by the act of September 9, 1850; that his filing having been accepted and partial payment for the lands made prior to the admission of the State into the Union, the lands had been "sold or otherwise disposed of" within the meaning of the school

grant and did not pass to the State as school lands so as to divest him of his rights under his desert-land filing.

The provision of the act of September 9, 1850, reserving lands for school purposes, is as follows:

> That when the lands in the said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory and the States and Territories hereafter to be erected out of the same.

This did not amount to a grant so as to preclude Congress from otherwise disposing of the lands. The full title remained in the United States, and if, prior to the admission of the State into the Union said sections or any parts thereof had been "sold or otherwise disposed of by or under the authority of any act of Congress," the same did not pass to the State under its school grant.

Were these lands unsurveyed at the time when Barnhurst's filing was made; or were they surveyed and in a state of reservation under the act of 1850?

The decision appealed from, holding that the lands were surveyed, followed a former decision of your office in the case of Samuel B. Reeves (6 Copp's L. O., 76), wherein it was held that—

> Sections 16 and 36 while unsurveyed may be embraced in a desert-land entry, but if the surveys have so far progressed as to indicate which are the school sections, they cannot be embraced in such entry.

In that case Reeve's desert-land filing embraced, in part, the N. ½ of Sec. 36, T. 16 S., R. 39 E., La Grande, Oregon, land district; prior to date of his filing the north line of said township had been run, as well as the greater part of the east line thereof; and it was held that the survey had sufficiently progressed to indicate the location of section 36 within the township in question, and that Reeve's filing as to the part within said section should be canceled.

The ruling thus made, however, was not in accord with the prior decision of the Department in the case of Harris *v.* State of Minnesota (1 Copp's L. L., 631), the essential facts in which are sufficiently stated in the syllabus, as follows:

> The township lines of a certain township in Minnesota were surveyed between January 1st and April 1st, 1871, and the northeast, southeast and southwest corners of section 36 established, but the subdivision of the township into sections, and subdivisions thereof, did not take place until between December 6, 1873, and January 17, 1874.
>
> Held, that Harris, having settled on section 36 in August, 1873, is entitled to his land and the State will be granted indemnity therefor.

By the act of February 26, 1859, subsequently incorporated into section 2275 of the Revised Statutes, it was provided that when sections 16 and 36 should be settled upon with a view to pre-emption,

"before the survey of the lands in the field," said sections should be subject to the claim of such settler; and the only question presented for determination in the case last above cited was, whether the survey of the exterior lines of the township could properly be held to be a survey of section 36 therein, within the meaning of the foregoing provision, so as to exclude a settlement on said section made thereafter and before the subdivision of the township in the field. The Department answered that question in the negative.

If, as held in said decision, the survey of the township lines is not a survey of a section within that township, two sides of which are described and fixed by the township lines, within the meaning of the statute protecting settlements made "before the survey of the lands in the field," the same condition could not be construed as a survey of such section within the meaning of the act of 1850, which withdraws the lands only upon their survey "preparatory to bringing the same into market."

In the case of Bullock *v.* Rouse (81 Cal., 591), the question was presented as to whether certain lands were surveyed so as to pass the title to the State of California under its school grant, at the time of the settlement thereon by Rouse, and therein it was held by the court (syllabus) that—

> No title to the sixteenth and thirty-sixth sections vests in the state until fully surveyed and marked out as required by law, and one who claims a portion of a thirty-sixth section under a certificate of purchase from the state does not acquire title as against a subsequent holder under a certificate of homestead entry issued by the United States, where it appears that the east half of the section, which includes the land in controversy, had not been fully surveyed and marked out when the state certificate of purchase was issued, though the section had been partially surveyed by the United States.

The seventh section of the act of March 3, 1853 (10 Stat., 244), which made the grant of school lands to the State of California, provides:

> That when any settlement, by the erection of a dwelling-house, or the cultivation of any portion of the land, shall be made upon the sixteenth or thirty-sixth sections before the same shall be surveyed, or when such sections may be reserved for public uses, or taken by private claims, other land shall be selected by the proper authorities of the state in lieu thereof.

The following is taken from the statement of the case in the decision last referred to:

> the greater part of the exterior lines of the township in which the land in question is situated had been run and established by the United States, and some of the sections therein had been ascertained and established. Lines had also been run on the north, south, and west sides of section 36, and section corners had been established at the ends of each of these lines, and quarter-section corners at the middle of each one of them. But the east line of this section had not been run, and no quarter-section corner had been established upon it. And on the plat of the survey of the township filed in the local land-office the whole of the east half of section 36 was marked and returned as unsurveyed.

In said decision it was said:

The government survey of the public lands is made by running and marking the lines of the townships and sections, and by marking the corners of the townships, sections, and quarter-sections. (Rev. Stats., secs. 2395 *et seq.*)

It is not necessary that a whole township be surveyed at one time, and often different parts of a township are surveyed at different times. But no survey of any part is complete until the lines and corners about that part are run and established as required by the statute. "Even after a principal meridian and a base line have been established, and the exterior lines of the township have been surveyed, neither the sections nor their subdivisions can be said to have any existence until the township is subdivided into sections and quarter-sections by an approved survey. The lines are not ascertained by the survey, but they are created." (Robinson *v.* Forrest, 29 Cal., 325.) "There is, in fact, no such tract of land as that described in the petition until it has been located within the congressional township, by an actual survey and establishment of the lines, under the authority of the United States, and the survey has been approved by the proper United States surveyor-general. A person may approximate to the lines that may be run—may surmise the precise lines—but the tract has no separate legal identity until the survey is made and approved under the authority of Congress." (Middleton *v.* Low, 30 Cal., 605.)

When Lowery obtained his certificate of purchase, the east half of the section had not been fully surveyed and marked out as required by law. And it was returned by the surveyor general, and shown on the map of the township filed in the land-office, as unsurveyed land. Under these circumstances, and in the light of the authorities above cited, we think it must be held that the title to the land in controversy had not vested in the State.

In the case at bar, at date of Barnhurst's filing, the land in question was not so far surveyed as to authorize a sale or other disposition thereof under the laws applicable to surveyed lands, and could not therefore be held to have been surveyed "preparatory to bringing the same into market," and as a consequence had not been reserved by the act of 1850.

By the act of March 3, 1877 (19 Stat., 377), Congress authorized the sale or disposition of unsurveyed desert lands.

The allowance of Barnhurst's filing was, therefore, proper and it but remains to determine whether the lands included therein had been "sold or otherwise disposed of" at the time of the admission of the State into the Union, within the meaning of the act of July 16, 1894, *supra*, making the grant of school lands to the State.

At the time of making his filing Barnhurst made payment of twenty-five cents per acre toward the purchase price as required by the desert land act. In order to perfect title to the lands he was also required to thereafter make proof of reclamation and to make a further payment of $1.00 per acre. The allowance of his filing and the acceptance of the first payment was not a final disposition of the land so as to entitle him to a patent, and yet by his acceptance of and partial compliance with the terms of sale offered by the government in the desert-land act, he had acquired such a right to complete his purchase and perfect title by further compliance with the terms of the desert-land act as to

make the lands "sold or otherwise disposed of" to the extent at least that the right of the State, if any, under the school grant, would be subject to his prior right under his desert filing. Law *v.* State of Utah (29 L. D., 623).

Your office decision is accordingly reversed, and Barnhurst's filing will be allowed to remain intact, subject to proof of compliance with law.

RAILROAD GRANT—GENERAL FORFEITURE ACT OF SEPTEMBER 29, 1890.

WILLIAMS ET AL. *v.* ELLIOTT.

The forfeiture provision in the act of September 29, 1890, did not operate upon lands opposite completed roads.

Within the common primary limits of two railroad grants made by the same act, a moiety is granted on account of each road, and where for any reason the State, being the grantee under both grants, is estopped from claiming on account of one of the grants, the United States and the State become tenants in common, each entitled to a moiety, of the lands so situated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *October 31, 1900.* (F. W. C.)

James M. Elliott, jr., and Maggie Elliott have each appealed from your office decision of November 12, 1896, holding for cancellation the purchase made by James M. Elliott under the provisions of Sec. 3, act of September 29, 1890 (26 Stat., 496), covering the SW. ¼ of the NE. ¼, the SE. ¼, the N. ½ of the SW. ¼ and the SE. ¼ of the SW. ¼ of Sec. 1, T. 12 S., R. 5 E., and also holding for cancellation the homestead entry of Maggie Elliott covering the SE. ¼ of the NW. ¼ of said section 1, all within the Huntsville, Alabama, land district.

The lands involved are within the primary limits common to two grants made by the act of June 3, 1856 (11 Stat., 17), to the State of Alabama, one to aid in the construction of a railroad from Gadsden to connect with the Georgia and Tennessee and Tennessee line of railroads, through Chatooga, Wills, and Lookout valleys, and the other a railroad from the Tennessee river, at or near Gunter's Landing, to Gadsden on the Coosa river. These grants were by the State conferred upon the Wills Valley Railroad Company and the Tennessee and Coosa Railroad Company, respectively.

In accordance with an act of the State legislature, the Wills Valley Railroad Company was consolidated with the Northeast and Southwestern Railroad Company, the claimant through the State to another grant made by the act of 1856, the name of the new corporation being known as the Alabama and Chattanooga Railroad Company. The present claimant under these grants is the Alabama State Land Company.

The Wills Valley railroad was duly constructed and there was cer-

tified to the State on account of the grant made to aid in the construction of that road an amount of land in excess of that granted, and proceedings have been recommended for the recovery of such excess. See U. S. *v.* Alabama State Land Co. (14 L. D., 129); and Alabama and Chattanooga Railroad Co. (16 L. D., 442). The tracts in question were not, however, included in the certifications to the State on account of that grant.

The governor of Alabama certified that the Tennessee and Coosa railroad was constructed and in operation at the date of the passage of the general forfeiture act of September 29, 1890, *supra*, from the Coosa river to Littleton, a distance of 10.22 miles, and as the reported construction was less than a section, provided for in the granting act of June 3, 1856, it was held by this Department in its decision of January 30, 1891 (Tennessee and Coosa Railroad Company, 12 L. D., 254, syllabus), that—

> The failure of the company to construct any portion of the road in accordance with the terms of the grant, renders it subject to the forfeiture act of September 29, 1890, not only as to the uncertified lands, but also as to the one hundred and twenty sections certified in advance of construction, provided such sections are in the possession and control of the State or company, and have not been sold to innocent purchasers for value.

In the case of the United States *v.* Tennessee and Coosa Railroad Company (176 U. S., 242), it was held that (syllabus):

> The provision in the act of September 29, 1890, c. 1040, that "there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation, to aid in the construction of a railroad opposite to and coterminous with the portion of any such railroad not now completed and in operation, for the construction and benefit of which such lands were granted, and all such lands are declared to be a part of the public domain," did not operate upon lands opposite completed roads, and such lands were not thereby forfeited or resumed.

The lands in question lie opposite the constructed portion of said road and under said last-mentioned decision it would follow that a moiety in these lands passed to the State on account of this grant.

Within the overlap of the grants for these two roads made by the same act of Congress, a moiety was granted on account of each road. An amount having been certified to the State in excess of that granted to aid in the construction of the Wills Valley road, no further claim to lands on account of that grant will be entertained. Sioux City and St. Paul Railroad Co. *v.* U. S. (159 U. S., 349). As the lands in question have not been certified on account of that grant, it results that the United States holds an undivided half interest in these lands.

Following the decision of this Department which held that the grant for the Tennessee and Coosa Railroad Company opposite the constructed portion of its road had been forfeited by the act of September 29, 1890, James M. Elliott, on January 1, 1894, made purchase,

under the provisions of section 3 of said act, of the SW. ¼ of NE. ¼, the SE. ¼, the N. ½ of the SW. ¼ and the SE. ¼ of SW. ¼ of said section 1.

The record in the case now before the Department shows that prior to the time of said entry Elliott had purchased the interests of both the Alabama State Land Company and the Tennessee and Coosa Railroad Company, in and to all the lands here involved, and that the reason his sister, on January 15, 1894, made homestead entry of the SE. ¼ of the NW. ¼ of said section was because of the provision in the section under which he made purchase limiting the right of purchase to 320 acres.

The contestants, with the exception of Samuel T. Fowler, lay claims to portions of the lands by reason of settlements made thereon during the year 1882, followed by continuous residence until ejected under proceedings instituted by Elliott in 1894. Fowler's claim rests alone upon a homestead application tendered on March 25, 1892.

This case was made up under the erroneous impression that the rights of the parties were to be adjudicated in accordance with the provisions of the general forfeiture act of September 29, 1890, but in view of the decision of the court above referred to, said act can have no application to the lands in question.

None of the contestants alleges a claim in himself nor does the record disclose such a claim as would be sufficient to defeat the grant to the Tennessee and Coosa Railroad Company as to any of the tracts involved, and it results that Elliott is protected in his purchase through that company of a moiety of all the lands here involved.

He may also be protected through his purchase from the Alabama State Land Company in the remaining moiety of all or a portion of these lands under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556), and in view of the fact that he has been misled by reason of the previous erroneous decision of this Department, he should be afforded an opportunity to make application under said act, if he so desires, and should he so apply, within a time to be fixed by your office, the rights of the conflicting claimants will be adjudged in accordance with the provisions of that act. His purchase made under the act of September 29, 1890, must be and is hereby directed to be canceled on the records of your office.

The homestead entry of Maggie Elliott is clearly invalid as to a moiety of the SE. ¼ of NW. ¼, and for that reason and because the rights granted by the 5th section of the act of March 3, 1887, *supra*, are not limited in amount, it is directed that her homestead entry be also canceled.

This tract is not claimed by reason of a settlement made thereon prior to the entry by Maggie Elliott, but was embraced in the prior homestead application of Samuel T. Fowler.

The question as to whether a homestead entry can be made of an

undivided half interest in a legal subdivision is reserved for further consideration in the progress of the case, but should it ultimately be determined that James M. Elliott, jr., has no right to make purchase of the government's interest in this tract, and that a homestead entry can be made of such an interest, the respective rights of Maggie Elliott and Samuel T. Fowler in the premises will then be determined.

Should James M. Elliott, jr., fail to make application under the act of March 3, 1887, within the time limited by your office, the respective rights of the contestants in the premises under their claims as made, will then be determined.

For the reasons given your office decision holding for cancellation the purchase by James M. Elliott and the homestead entry by Maggie Elliott is affirmed.

MINING CLAIM—EXPENDITURE—IMPROVEMENTS BY PRIOR LOCATOR.

RUSSELL ET AL. *v.* THE WILSON CREEK CONSOLIDATED MINING AND MILLING CO.

No part of a tunnel which lies wholly within ground excluded from an application for patent to a mining claim, which does not tend to the development of any part of the claim, and which if extended along its course according to the original plan would continue in excluded ground until it passed beyond the exterior limits of the claim, can be credited to the claim toward meeting the required statutory expenditure of five hundred dollars thereon.

Improvements upon an abandoned location, made by the prior locator, can not be credited to a later location embracing the same ground.

Acting Secretary Campbell to the Commissioner of the General Land Office, November 2, 1900.

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

October 5, 1896, the Wilson Creek Consolidated Mining and Milling Company filed application for patent to the Minnie Belle lode mining claim, survey No. 9892, Pueblo, Colorado, land district.

During the period of publication an adverse claim was filed by the owners of the Queen Isabella claim, and suit was instituted thereon. Prior to this time adverse suits had been instituted by the Wilson Creek company against the conflicting Christmas Bell, Independence, Sunnyside, and Luck Sure claims, and these suits were still pending.

October 24, 1898, the adverse suit of the Queen Isabella claimants was dismissed by the district court of El Paso county, Colorado, and on the same day said court, by separate decision in each case, awarded to the Wilson Creek company all the conflict between the Minnie Belle claim and the Christmas Bell, Independence, Sunnyside, and Luck Sure claims.

October 25, 1898, the Wilson Creek company applied to make entry upon its application for patent, excluding all conflict with the Hull City placer and the Lucky Guss, Mountain Beauty, Findley, and Atlanta lode claims.

On the same day R. P. Russell filed a protest against said application, alleging that there had been no valid discovery of mineral upon the Minnie Belle location; that five hundred dollars' worth of labor had not been expended nor improvements made on the claim prior to the expiration of the period of publication; and that said Minnie Belle claim conflicts with the Marion lode claim owned by protestant. October 28, 1898, Russell filed a supplementary protest, alleging that the published and posted notice of the Minnie Belle application for patent was imperfect and insufficient, in that said notice referred to a location certificate of that claim other and different from the amended location certificate, upon which the official survey was based.

November 2, 1898, A. H. Cronkhite also filed a protest against the Minnie Belle application. This protest contained substantially the same allegations as those in Russell's protests, but in addition thereto it was alleged that the discovery shaft of the Minnie Belle claim had not been sunk to the depth of ten feet prior to location, as required by the laws of the State of Colorado.

A hearing was ordered by the local officers on these protests, and at the appointed time Russell and the Wilson Creek company appeared by their attorneys, but Cronkhite made default. A motion to dismiss Cronkhite's protest was sustained by the local officers, and afterwards testimony was submitted by Russell and the defendant company.

By decision of June 22, 1899, the local officers held that Russell had failed to establish his charges of non-compliance with law, and dismissed the protest.

On appeal, your office, by decision of December 14, 1899, affirmed the action of the local officers; whereupon Russell filed further appeal to the Department.

The testimony is conflicting as to the discovery of mineral upon the Minnie Belle claim, but this question need not now be considered.

The certificate of the surveyor-general shows the improvements upon this claim prior to the expiration of the period of publication to be as follows:

Discovery shaft 25 feet deep	$250
Shaft 30 feet deep	350
Two small shafts	65
One-third interest in last 284 feet of tunnel	850
Winze	100
	$1,615

It is stated in the certificate that—

This tunnel, the first nineteen feet of which constitute the discovery tunnel of the Little Effie Lode, Sur. No. 12383, The Wilson Creek Consolidated Mining & Milling Company, claimant, is run for the development of this claim and the Buena Vista No. 2 and Denver No. 2 lodes, both unsurveyed and also claimed by the claimant herein.

It appears that the Wilson Creek company owns several adjoining claims, the Little Effie, Minnie Belle, Buena Vista No. 2, and Denver No. 2. These claims lie on a hillside, the Little Effie being the lowest, and the Denver No. 2 being the highest. The tunnel in question was started on the Little Effie claim and extends thence into the Minnie Belle claim. After this tunnel had been started, the Findley lode mining claim, conflicting with the Minnie Belle claim, was located. As shown on the plat, that portion of the tunnel lying within the exterior boundaries of the Minnie Belle claim is entirely within the conflict between the Minnie Belle and the Findley. Subsequently the Findley claimants applied for patent, claiming the entire conflict with the Minnie Belle, and the owner of the latter failed to adverse the Findley application during the period of publication. Having lost its rights to the area in conflict by the failure to adverse, the Wilson Creek company was obliged to exclude the conflict with the Findley when it filed its application at a later date for patent to the Minnie Belle. It thus appears that no portion of the tunnel in question lies within the area applied for by the Minnie Belle claimant. As now constructed the tunnel does not tend to the development of any part of the Minnie Belle claim included in the application for patent, nor would it benefit the Minnie Belle if it were extended along its course according to the original plan, as it would continue in excluded ground until it passed without the exterior limits of the Minnie Belle claim.

In regard to the thirty foot shaft, valued at $350, included in the surveyor-general's certificate, the testimony shows that it was not constructed by or at the expense of the Wilson Creek company, or its grantors, but was dug in the fall of 1892 as the discovery shaft of the conflicting Kentucky Bell lode mining claim, located by J. B. Bennett and Robert Ray. It appears that the Kentucky Bell location has been abandoned, and no work has been done thereon since the fall of 1892.

Section 2325 of the Revised Statutes of the United States provides (in part) 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 clearly appears that the thirty foot shaft was not constructed by the Wilson Creek company or its grantors, and the fact that the conflicting Kentucky Bell location has been abandoned since 1892 does not authorize the Wilson Creek company to include the discovery shaft of the Kentucky Bell in its list of improvements on the Minnie Belle.

Eliminating from the surveyor-general's certificate of improvements the tunnel and the thirty foot shaft, less than five hundred dollars' worth of improvements are shown which can properly be credited to

the Minnie Belle claim as applied for. Entry can not be allowed on the present showing upon the application of the Wilson Creek company for patent to the Minnie Belle claim.

In view of this holding, it is unnecessary to consider the further question presented by the record as to the sufficiency of the published notice upon the application for patent.

Your office decision is hereby reversed.

POWELL *v.* LANDER.

Motion for review of departmental decision of August 10, 1900, 30 L. D., 222, denied by Secretary Hitchcock, November 12, 1900.

REGULATIONS CONCERNING RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIRS OVER THE PUBLIC LANDS AND RESERVATIONS.

CIRCULAR.

Sections 18, 19, 20, and 21 of the act of Congress approved March 3, 1891 (26 Stat., 1095), entitled "An act to repeal timber-culture laws, and for other purposes," grant the right of way through the public lands and reservations of the United States for the use of canals, ditches, and reservoirs heretofore or hereafter constructed by corporations, individuals, or associations of individuals upon the filing and approval of the papers and maps therein provided for. When the right of way is upon a reservation not within the jurisdiction of the Interior Department, the application must be filed in accordance with these regulations, and will be submitted to the department having jurisdiction. A map and field notes of the portion within such reservation must be submitted, in addition to the duplicates required herein. This map and field notes must conform to all the provisions of this circular, and the local officers will forward them to this office.

The word *adjacent*, as used in section 18 of the act, in connection with the right to take material for construction from the public lands, is defined by the Department as including the tier of sections through which the right of way extends, and perhaps an additional tier of sections on either side (14 L. D., 117). The right extends only to construction, and no public timber or material may be taken or used for repair or improvements (14 L. D., 566). These decisions were rendered under the railroad right of way act, and are applied to this, as the words are the same in both.

The sections above noted read as follows:

SEC. 18. That the right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory,

which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: *Provided*, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interefere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

SEC. 19. That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of this canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 20. That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in a case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: *Provided*, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture.

SEC. 21. That nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch.

The act approved May 11, 1898 (30 Stat., 404), entitled "An Act To amend an Act to permit the use of the right of way through public lands for tramroads, canals, and reservoirs, and for other purposes," makes an important declaration in section 2 as to the purposes for which the rights of way under the act of 1891 may be used. The language of the act of 1898 is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the Act entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other

purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:

"That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"SEC. 2. That rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber-culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

1. These acts are evidently designed to encourage the much-needed work of constructing ditches, canals, and reservoirs in the arid portion of the country by granting right of way over the public lands necessary to the maintenance and use of the same. The eighteenth section of the act of 1891 provides that—

> The privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories.

The control of the flow and use of the water is therefore, so far as this act is concerned, 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. In submitting maps for approval under this act, however, which in any wise appropriate natural sources of water supply, such as the damming of rivers or the appropriation of lakes, such maps should be accompanied by proof that the plans and purposes of the projectors have been regularly submitted and approved in accordance with the local laws or customs governing the use of water in the State or Territory in which the same is located. No general rule can be adopted in regard to this matter. Each case must rest upon the showing filed in support thereof.

2. The act is not in the nature of a grant of lands; it does not convey an estate in fee in the right of way. It is a right of use only, the title still remaining in the United States. All persons settling on a tract of public land, to part of which right of way has attached for a canal, ditch, or reservoir, take the same subject to such right of way, and at the full area of the subdivision entered, there being no authority to make deduction in such cases. If a settler has a valid claim to land existing at the date of the filing of the map of definite location, his right is superior, and he is entitled to such reasonable measure of

damages for right of way as may be determined upon by agreement or in the courts, the question being one that does not fall within the jurisdiction of this Department. By section 21 of the act above quoted it will be seen that the approval of a map of a canal, ditch, or reservoir does not necessarily carry with it a right to the use of land 50 feet on each side, the approval of the Department granting only such right of way as the law provides. The width necessary for construction, maintenance, and care of a canal, ditch, or reservoir is not determined.

3. Whenever a right of way is located upon a reservation, the applicant must file a certificate to the effect that the right of way is not so located as to interfere with the proper occupation of the reservation by the Government. When the right of way is located on a forest or timber reserve, the applicant must file a stipulation under seal to take no timber from the reservation outside the right of way. In accordance with the provisions of the circular of February 24, 1898, the applicant will also be required to give bond to the Government of the United States, to be approved by the Commissioner of the General Land Office, 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." A bond furnished by any surety company that has complied with the provisions of the act of August 13, 1894 (28 Stat., 279), will be accepted, and must run in the terms of the stipulation above quoted. The amount of the bond can not be fixed until the application has been submitted to the General Land Office, when a form of bond will be furnished and the amount thereof fixed.

4. Canals, ditches, or reservoirs lying partly upon unsurveyed land can be approved if the application and accompanying maps and papers conform to these regulations, but the approval will only relate to that portion traversing the surveyed lands. (For right of way wholly on unsurveyed land, see paragraphs 16 and 17.)

5. Any incorporated company desiring to obtain the benefits of the law is required to file the following papers and maps with the register of the land district in which the canal, ditch, or reservoir is to be located, who will forward them to the General Land Office, where, after examination, they will be submitted to the Secretary of the Interior with recommendation as to their approval.

First. A copy of its articles of incorporation, duly certified to by the proper officer of the company under its corporate seal, or by the secretary of the State or Territory where organized.

Second. A copy of the State or Territorial law under which the company was organized (when organized under State or Territorial law), with certificate of the governor or secretary of the State or Ter-

ritory that the same is the existing law. (See eleventh subdivision of this paragraph.)

Third. When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

Fourth. When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of the State or Territory is required that it has complied with the laws of that State or Territory governing foreign corporations to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the "due proofs" required, as each case must be governed to some extent by the laws of the State or Territory.

Fifth. The official statement, under the seal of the company, of the proper officer that the organization has been completed, that the company is fully authorized to proceed with construction according to the existing law of the State or Territory, and that the copy of the articles filed is true and correct. (See Form 1, p. 339.)

Sixth. A true list, signed by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (See Form 2, p. 340.)

Seventh. A copy of the company's title or right to appropriate the water needed for its canals, ditches, and reservoirs, certified as required by the State or Territorial laws. If the miner's inch is the unit used in such title, its equivalent in cubic feet per second must be stated. In cases where the right to appropriate the water has not been adjudicated under the local laws, a certified copy of the notice of appropriation will be sufficient. In cases where the notice of appropriation is accompanied by a map of the canal or reservoir it will not be necessary to furnish a copy of it if the notice describes the location sufficiently to identify it with the canal or reservoir for which the right of way application is made. In cases where the water-right claim has been transferred a number of times it is not necessary to furnish a copy of each instrument of transfer; an abstract of title will be accepted.

Eighth. A copy of the State or Territorial laws governing water rights and irrigation, with the certificate of the governor or secretary of the State or Territory that the same is the existing law. (See eleventh subdivision of this paragraph.)

Ninth. A statement of the amount of water flowing in the stream supplying the canal, ditch, or reservoir, at the point of diversion or damming, during the preceding year or years. For this purpose it will be necessary to give the maximum, minimum, and average monthly flow in cubic feet per second, and the average annual flow. All avail-

able data as to the flow is required. The method of measurement or estimate by which these results have been obtained must be fully stated. In case there is no well-defined flow which can be measured, the area of the watershed, average annual rainfall, and estimated run-off at the point of diversion or damming should be given.

Tenth. Maps, field notes, and other papers, as hereinafter required.

Eleventh. If certified copies of the existing laws regarding corporations and irrigation, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of the State or Territory, the applicant may file, in lieu of the requirements of the second and eighth subdivisions of this paragraph, a certificate of the governor or secretary of state that no change has been made since a given date, not later than that of the laws last forwarded.

6. Individuals or associations of individuals making applications for right of way are required to file the information called for in the seventh, eighth, ninth, and tenth subdivisions of the previous paragraph. Associations of individuals must, in addition, file their articles of association; if there be none, the fact must be stated over the signature of each member of the association.

7. The maps filed must be drawn on tracing linen in duplicate, and must be strictly conformable to the field notes of the survey thereof. The maps should show other canals, ditches, laterals, or reservoirs with which connections are made, but all such canals, reservoirs, etc., with which connection is made must be represented in ink of a different color from that used in drawing those for which the applicant asks right of way.

8. Field notes of the surveys must be filed in duplicate, should be separate from the map, and in such form that they may be folded for filing. Complete field notes should not be placed on the map, but only the station numbers where deflections or changes of numbering occur, station numbers with distances to corners where the lines of the public surveys are crossed, and the lines of reference of initial and terminal points, with their courses and distances. Typewritten field notes with clear carbon copies are preferred, as they expedite the examination of applications. The field notes should contain, in addition to the ordinary records of surveys, the data called for in this and in the following paragraphs. They should state which line of the canal was run—whether middle or side line. The stations or courses should be numbered in the field notes and on the map. The record should be so complete that from it the surveys could be accurately retraced by a competent surveyor with proper instruments. The field notes should show whether the lines were run on the true or the magnetic bearings, and in the latter case the variation of the needle and date of determination must be stated. The kind and size of the instrument used in running the lines and its minimum reading on the horizontal circle should be noted.

The line of survey should be that of the actual location of the proposed ditch and, as exactly as possible, the water line of the proposed reservoir. The method of running the grade lines of canals and the water lines of reservoirs must be described.

9. The scale of the map should be 2,000 feet to an inch in the case of canals or ditches and 1,000 feet to an inch in the case of reservoirs. The maps may, however, be drawn to a larger scale when needed to properly show the proposed works; but the scale must not be so greatly increased as to make the map inconveniently large for handling.

10. All subdivisions of the public surveys represented on the map should have their entire boundaries drawn, and on all lands affected by the right of way the smallest legal subdivisions (40-acre tracts and lots) must be shown.

11. The termini of a canal, ditch, or lateral should be fixed by reference of course and distance to the nearest existing corner of the public survey. The initial point of the survey of a reservoir should be fixed by reference of course and distance to the nearest existing corner outside the reservoir by a line which does not cross an area that will be covered with water when the reservoir is in use. The map, field notes, engineer's affidavit, and applicant's certificate (Forms 3 and 4) should each show these connections.

12. When either terminal of a canal, ditch, or lateral is upon unsurveyed land, it must be connected by traverse with an established corner of the public survey, if not more than six miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the map, in the engineer's affidavit, and in the applicant's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given in the field notes.

13. When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark and course and distance to the terminus. The field notes must give an accurate description of the mark and full data of the traverse as required above. The engineer's affidavit and applicant's certificate (Forms 3 and 4) must state the connections. These monuments are of great importance.

14. When a canal, ditch, or lateral lies partly on unsurveyed land, each portion lying within surveyed and unsurveyed land will be separately stated in the field notes and in Forms 3 and 4 by connections of termini, length, and width, as though each portion were independent. (See paragraphs 11, 12, and 13.)

15. When a reservoir lies partly on unsurveyed land, its initial point must be noted, as required for the termini of ditches in paragraph 11, and so that the reference line will not cross an area that will be covered

with water when the reservoir is in use. The areas of the several parts lying on surveyed and unsurveyed land must be separately noted on the map, in the field notes, and in Forms 3 and 4.

16. Maps showing canals, ditches, or reservoirs wholly upon unsurveyed lands may be received and placed on file in the General Land Office and the local land office of the district in which the same is located, for general information, and the date of filing will be noted thereon; but the same will not be submitted to nor approved by the Secretary of the Interior, as the act makes no provision for the approval of any but maps showing the location in connection with the public surveys. The filing of such maps will not dispense with the filing of maps after the survey of the lands and within the time limited in the act granting the right of way, which map, if in all respects regular when filed, will receive the Secretary's approval.

17. In filing such maps the initial and terminal points will be fixed as indicated in paragraphs 12 and 13.

18. Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. In the case of a reservoir the distance must not be measured across an area which will be covered with water when the reservoir is in use, and permanent monuments must be set on the water line of the reservoir at the intersection of these lines of public survey. The map of the canal, ditch, or reservoir must show these distances and marks, and the field notes must give the points of intersection and the distances, and describe the marks. When corners are destroyed by the canal or reservoir, proceed as directed in paragraphs 21 and 22.

19. The map must bear a statement of the width of each canal, ditch, or lateral at high-water line. If not of uniform width, the limits of the deviations from it must be clearly defined on the map. The field notes should record the changes in such a manner as to admit of exact location on the ground. In the case of a pipe line, the diameter of the pipe should be stated. The map must show the source of water supply.

20. In applications for right of way for a reservoir, the capacity of the reservoir must be stated on the map in acre-feet (i. e., the number of acres that will be covered 1 foot in depth by the water it will hold; 1 acre-foot is 43,560 cubic feet). The map must show the source of water supply for the reservoir and the location and height of the dam.

21. Whenever a corner of the public survey will be covered by earth or water, or otherwise rendered useless, marked monuments (one on each side of destroyed corner) must be set on each township or section line passing through, or one on each line terminating at, said corner. These monuments must comply with the requirements for witness corners of the Manual of Surveying Instructions issued by this office

(p. 47, ed. 1894), and must be at such distance from the works as to be safe from interference during the construction and operation of the same. In the case of reservoirs these monuments are additional to those required in paragraph 18. In case two or more consecutive corners on the same line are destroyed, the monument shall be set as required in the Manual for the nearest corner on that line to be covered.

22. The line on which such monument is set will be determined by running a random line from the corner to be destroyed to the first existing corner on the line to be marked by the monument, setting on the random line a temporary mark at the distance of the proposed monument. If the random line strikes the corner run to, the monument will be established at the place marked; if the random line passes to one side of the corner, the north and south or east and west distance to it will be measured and the true course calculated. The proper correction of the temporary mark will then be computed and a permanent monument set in the proper place. The field notes for the surveys establishing the monuments must be in duplicate and separate from those of the canal or reservoir, being certified by the surveyor under oath. They must comply with the form of field notes prescribed in the Manual of Surveying Instructions issued by this office. When application is made for a canal or reservoir which is constructed and in operation, the method to be adopted in setting the monuments, being governed by the special features of each case, must be left to the judgment of the surveyor. No field notes will be accepted unless the lines on which the monuments are set conform to the lines shown by the field notes of the survey as made originally under the direction of this office, and unless the notes are in such form that the computation can be verified and the lines retraced on the ground.

23. The engineer's affidavit and applicant's certificate must both designate by termini (as in paragraphs 11 to 17, inclusive) and length each canal, ditch, or lateral, and by initial point and area each reservoir shown on the map, for which right of way is asked. This affidavit and this certificate (changed where necessary when an application is made by an individual or association of individuals) must be written on the map in duplicate. Applicants under the act of March 3, 1891, must include in the certificate (Form 4) the statement: "And I further certify that the right of way herein described is desired for the main purpose of irrigation," or "for public purposes," as the case may be. If for public purposes, the applicant should submit a separate statement of the nature of the proposed use. (See Forms 3 and 4, page 340.) No changes or additions are allowable in the substance of these forms, except when the facts differ from those assumed therein.

24. When the maps are filed the local officers will note in pencil on the tract books opposite each vacant tract traversed, that right of way for a canal (or reservoir) is pending, giving date of filing and name

of applicant, noting on each map the date of filing, over their written signature, transmitting them promptly to the General Land Office, with report that the required notations have been made. If it does not appear that some portion of the public land would be affected by the approval of such maps, they will be returned by the local officers with notice of that fact. If vacant land is affected by the proposed right of way the register will so certify on the map and duplicate over his signature.

25. Upon the approval of a map of location by the Secretary of the Interior the duplicate copy will be sent to the local officers, who will mark upon the township plats the lines of the canals, ditches, or reservoirs, as laid down on the map. They will also note, in ink, on the tract books, opposite each tract marked as required by paragraph 24, that the same is to be disposed of subject to the right of way for the canal, ditch, or reservoir.

26. When the canal, ditch, or reservoir is constructed, an affidavit of the engineer and certificate of the applicant (Forms 5 and 6) must be filed in the local office, in duplicate, for transmission to this office. No new map will be required, except in case of deviations from the right of way previously approved, whether before or after construction, when there must be filed new maps and field notes in full, as herein provided, bearing proper forms, changed to agree with the facts in the case. The map must show clearly the portions amended or bear a statement describing them, and the location must be described in the forms as the *amended* survey and the *amended* definite location. In such cases the applicant must file a relinquishment, under seal, of all rights under the former approval as to the portions amended, said relinquishment to take effect when the map of amended definate location is approved by the honorable Secretary. If the canal or reservoir has been constructed on the location as originally approved, and is to be used until the amended canal or reservoir is ready for use, the relinquishment may be made to take effect upon the completion of the canal or reservoir on the amended location.

27. The act approved February 26, 1897 (29 Stat., 599), entitled "An Act To provide for the use and occupation of reservoir sites reserved," permits the approval of applications under the above act of 1891 for right of way upon reservoir sites reserved under authority of the acts of October 2, 1888 (25 Stat., 505, 526), and August 30, 1890 (26 Stat., 371, 391). The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one. And any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided,* That the charges for water coming in whole or part from reservoir sites used or occupied

under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate.

When an application is made under this act a reference to it should be added to Forms 4 and 6. In other respects the application should be prepared according to the preceding regulations.

OIL PIPE LINES.

28. The act approved May 21, 1896 (29 Stat., 127), entitled "An Act To grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming," is similar in its requirements to the right-of-way act of March 3, 1891, and the preceding regulations furnish full information as to the preparation of the maps and papers. Applicants will be governed thereby so far as they are applicable.

29. The text of the act is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the right of way through the public lands of the United States situate in the State of Colorado and in the State of Wyoming outside of the boundary lines of the Yellowstone National Park is hereby granted to any pipe line company or corporation formed for the purpose of transporting oils, crude or refined, 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 said pipe line and twenty-five feet on each side of the center line of the same; also the right to take from the public land adjacent to the line of said pipe line material, earth, and stone necessary for the construction of said pipe line.

SEC. 2. That any company or corporation desiring to secure the benefits of this Act shall, within twelve months after the location of ten miles of the pipe line, if the same be upon surveyed lands and if the same be upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its line, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way.

SEC. 3. That if any section of said pipe line shall not be completed within five years after the location of said section the right herein granted shall be forfeited, as to any incomplete section of said pipe line, to the extent that the same is not completed at the date of the forfeiture.

SEC. 4. That nothing in this Act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care.

RESERVOIRS FOR WATERING STOCK.

30. The act approved January 13, 1897 (29 Stat., 484), entitled "An Act Providing for the location and purchase of public lands for reservoir sites," is as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may con-

struct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: *Provided*, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind.

SEC. 2. That any person, live-stock company, or corporation desiring to avail themselves of the provisions of this Act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many.

SEC. 3. That at any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this Act shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein.

SEC. 4. That Congress may at any time amend, alter, or repeal this act.

31. Although the title indicates that lands are to be sold for reservoir sites, the act does not provide for the sale of any lands, and therefore no lands can be sold under its provisions. The act, however, directs the Secretary of the Interior to reserve the lands from sale after the approval of the map showing the location of the reservoir.

32. Any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock, in order to obtain the benefits of the act must file a declaratory statement in the United States land office in the district where the land is located.

33. When the applicant is a corporation it should file also a copy of its articles of incorporation and proofs of its organization, as required in paragraph 5, subdivisions 1, 2, 3, 4, 5, 6, and 11.

34. The declaratory statement must be made under oath and should be drawn in accordance with Form 9 (page 342), and must contain the following statements:

First. The post-office address of the applicant; the county in which the reservoir is to be or has been constructed; the description by the smallest legal subdivisions, 40-acre tracts or lots, of the land sought to be reserved, under no circumstances exceeding 160 acres; that the land is not occupied or otherwise claimed; that to the best of the applicant's knowledge and belief the land is not mineral or otherwise reserved; the business of the applicant, including a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, giving the number and kinds of such stock,

the place where they are being bred or grazed, and whether within an enclosure or upon unenclosed lands, and also from where and to where they are being driven or transported; the amount and description of the land owned or claimed by the applicant in the vicinity of the proposed reservoir; that no part of the land sought to be reserved is or will be fenced, but the same will be kept open to the free use of any person desiring to water animals of any kind; and that the lands so sought to be reserved are not, by reason of their proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

Second. The location of the reservoir described by the smallest legal subdivisions, forty-acre tracts or lots, its area in acres, its capacity in gallons, the source from which water is to be obtained for such reservoir, whether there are any streams or springs within two miles of the land sought to be reserved, and if so, where.

Third. The number, location, and area of all other reservoir sites filed upon by the applicant, especially designating those located in the same county.

35. Upon the filing of such declaratory statements there will be noted thereon the date of filing over the signature of the officer receiving it, and they will be numbered in regular order, beginning with No. 1. The register will make the usual notations on the records, in pencil, under the designation of "Reservoir Declaratory Statement, No. —," adding the date of the act. The local officers will be authorized to charge the usual fees. (Sec. 2238, U. S. Rev. Stat.) The declaratory statement will be forwarded with the regular monthly returns, with abstracts, in the usual manner. In acting upon these statements the following general rules will be applied:

First. No reservation will be made for a reservoir containing less than 250,000 gallons, and for a reservoir of less than 500,000 gallons capacity not more than 40 acres can be reserved. For a reservoir of 500,000 gallons and less than 1,000,000 gallons capacity not more than 80 acres can be reserved. For a reservoir of 1,000,000 gallons and less than 1,500,000 gallons capacity not more than 120 acres can be reserved. For a reservoir of more than 1,500,000 gallons capacity 160 acres may be reserved.

Second. Not more than 160 acres shall be reserved for this purpose in any section.

Third. Not more than 160 acres shall be reserved for this purpose in one group of tracts adjoining or cornering upon each other.

Fourth. No reservation shall be made within one-half mile of the boundaries of a group of 160 acres of adjoining or cornering tracts already reserved under this act.

Fifth. The local officers will reject any reservoir declaratory statement not in conformity with these rules.

Sixth. Lands so reserved shall not be fenced, but shall be kept open to the free use of any person desiring to water animals of any kind. If lands so reserved are at any time fenced or otherwise inclosed, or if they are not kept open to the free use of any person as aforesaid desiring to water animals of any kind, or if the reservoir applicant attempts to use them for any other purpose, or if the reservation is not obtained for the bona fide and exclusive purpose of constructing and maintaining a reservoir thereon according to law, the declaratory statement, upon any such matter being made to duly appear, will be canceled and all rights thereunder be declared at an end.

Seventh. Notwithstanding the action of the local officers in accepting any such declaratory statement the Commissioner of the General Land Office will reject the same if upon considering the matters set forth therein it does not appear that the declaratory statement is filed in good faith for the sole purpose of accomplishing what the law authorizes to be done.

36. The reservoir, if not completed at the date of the act, shall be completed and constructed within two years after the filing of the declaratory statement, otherwise the declaratory statement will be subject to cancellation.

37. After the construction and completion of the reservoir the applicant shall have the same, including the lands necessary for the proper use and enjoyment thereof, not exceeding 160 acres, accurately surveyed and mapped, in accordance with the instructions of paragraphs 7 to 24, inclusive, so far as they are applicable. The map and field notes must be prepared in duplicate and must be filed in the proper local office. The map must bear forms 5 and 6 (page 341) modified as required by the circumstances, and the field notes must be sworn to by the surveyor.

38. When the map, field notes, and other papers have been filed in the local office the date of filing will be noted thereon and the proper notations will be made on the local office records, as in the case of the declaratory statement. The maps and papers will then be promptly forwarded to this office.

39. The maps and papers will be examined by this office as to their compliance with the law and the regulations; and to determine whether the amount of land desired is warranted by the showing made in the application. If found satisfactory they will be submitted to the honorable Secretary, and upon his approval the lands shown to be necessary for the proper use and enjoyment of the reservoir will be reserved from other disposition so long as the reservoir is maintained and water kept therein for the purposes named in the act.

40. Upon the receipt of notice of such reservation from this office the local officers will make the proper notations on their records and report the making thereof promptly to this office.

41. In order that this reservation shall be continued it is necessary that the reservoir "shall be kept in repair and water kept therein." For this reason the owner of the reservoir will be required during the month of January of each year to file in the local office an affidavit to the effect that the reservoir has been kept in repair and water kept therein during the preceding year, and that all the provisions of the act have been complied with. Upon failure to file such affidavit steps will be taken looking to the revocation of the reservation of the lands.

42. If the reservoir is located on unsurveyed land, the declaratory statement may be filed, the lands being described as closely as practicable.

43. The duty of this office in examining the maps and papers of all these applications is to ascertain whether the provisions of the acts of Congress are properly complied with; whether the proposed works are described in such a manner that the benefits to be granted under the various acts are defined so as to avoid future uncertainty; and whether the rights of other grantees of the Government are properly protected from interference. The above regulations are made for these purposes.

44. The widely different conditions to be considered in the operations proposed by the applicants make it impossible to formulate regulations that will furnish this office with the data necessary in all cases. This office will therefore call for additional information whenever necessary for the proper consideration of any particular case.

BINGER HERMANN, *Commissioner.*

Approved: June 27, 1900.

E. A. HITCHCOCK, *Secretary.*

FORMS FOR "DUE PROOFS" AND VERIFICATION OF MAPS OF RIGHT OF WAY FOR CANALS, DITCHES, AND RESERVOIRS.

FORM 1.

I, ——— ———, secretary (or president) of the ——— ——— Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with construction according to the existing laws of the State (or Territory) of ———, and that the copy of the articles of association (or incorporation) of the company filed in the Department of the Interior is a true and correct copy of the same.

In witness whereof I have hereunto set my name and the corporate seal of the company, this —— day of ———, in the year 19—.

[Seal of company.]

———— ————,

— of the ——— Company.

FORM 2.

STATE OF ———,
County of ———, *ss:*

———— ————, being duly sworn, says that he is the president of the ———— ———— Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: (Here insert the full name and official designation of each officer.)

[Seal of company.]

———— ————,
President of the Company.

Sworn and subscribed to before me this —— day of ———, 19—.

[SEAL.]

———— ————,
Notary Public.

FORM 3.

STATE OF ———,
County of ———, *ss:*

———— ————, being duly sworn, says he is the chief engineer of (or the person employed to make the survey by) the ———— ———— Company; that the survey of said company's (canals, ditches, and reservoirs), described as follows: (Here describe each canal, ditch, lateral, and reservoir, for which right of way is asked, as required by paragraph 23, being a total length of canals, ditches, and laterals of ——— miles, and a total area of reservoirs of ——— acres), was made by him (or under his direction) as chief engineer of the company (or as surveyor employed by the company) and under its authority, commenced on the —— day of ———, 19—, and ending on the —— day of ———, 19—, and that the survey of the said (canals, ditches, laterals, and reservoirs) accurately represents (a proper grade line for the flow of water, and accurately represents a level line, which is the proposed water line of the said reservoir), and that such survey is accurately represented upon this map and by the accompanying field notes. And no lake, or lake bed, stream, or stream bed is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map.

———— ————,
————— ————.

Sworn and subscribed to before me this —— day of ———, 19—.

[SEAL.]

———— ————,
Notary Public.

FORM 4.

I, ———— ————, do hereby certify that I am president of the ———— ———— company; that ———— ————, who subscribed the accompanying affidavit, is the chief engineer of (or was employed to make the survey by) the said company; that the survey of the said (canals, ditches, laterals, and reservoirs), as accurately represented on this map and by the accompanying field notes, was made under authority of the company; that the company is duly authorized by its articles of incorporation to construct the said (canals, ditches, laterals, and reservoirs), upon the location shown upon this map; that the said (canals, ditches, laterals, and reservoirs), as represented on this map and by said field notes, was adopted by the company, by resolution of its board of directors, on the —— day of ———, 19—, as the definite location of the said (canals, ditches, laterals, and reservoirs) described as follows—(describe as in Form 3)—and that no lake or lake bed, stream or stream bed, is used for the said (canals, ditches, laterals, and reservoirs) except as shown on this map;

and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of[1] (sections 18 to 21, inclusive, of the act of Congress approved March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes," and section 2 of the act approved May 11, 1898); and I further certify that the right of way herein described is desired for the main purpose of irrigation.[2]

Attest: ——— ———,
President of the ——— Company.

[Seal of company.] ——— ———,
Secretary.

FORM 5.

STATE OF ——— ———,
County of ———, ss:

——— ———, being duly sworn, says that he is the chief engineer of (or was employed to construct) the (canals, ditches, laterals, and reservoirs) of the ——— company; that said (canals, ditches, laterals, and reservoirs) have been constructed under his supervision, as follows: (Describe as required in paragraph 23) a total length of constructed (canals, ditches, and laterals) of ——— miles, and a total area of constructed reservoirs of ——— acres; that construction was commenced on the —— day of ———, 19—, and completed on the —— day of ———, 19—; that the constructed (canals, ditches, laterals, and reservoirs), as aforesaid, conform to the map and field notes which received the approval of the Secretary of the Interior on the —— day of ———, 19—.

——— ———,
———— ———.

Sworn and subscribed to before me this —— day of ———, 19—.

[SEAL.] ——— ———,
Notary Public.

FORM 6.

I, ——— ———, do certify that I am the president of the ——— company, that the (canals, ditches, laterals, and reservoirs) described as follows (describe as in Form 5) were actually constructed as set forth in the accompanying affidavit of ——— ———, chief engineer (or the person employed by the company in the premises), and on the exact location represented on the map and by the field notes approved by the Secretary of the Interior, on the —— day of ———, 19—; and that the company has in all things complied with the requirements of the act of Congress[3] (March 3, 1891, granting right of way for canals, ditches, and reservoirs through the public lands of the United States.)

——— ———,
President of the ——— Company.

Attest:
[Seal of company.] ——— ———,
Secretary.

[1] Here insert the description of the act of Congress under which the application is made when filed under some other act than that of 1891 and 1898.

[2] Or "for public purposes," as the case may be, see paragraph 23.

[3] Here insert the description of the act of Congress under which the application is made, when filed under some other act than that of 1891.

Forms 7 and 8 of circular of March 21, 1892, adapted for use under act of May 14, 1896, as required by paragraph 6, circular of December 23, 1896.

FORM 7.

STATE OF ———,
County of ———, *ss:*

———— ————, being duly sworn, says he is the chief engineer (or the person employed by) the ——— company under whose supervision the survey was made of the grounds selected by the company for electrical purposes under the act of Congress approved May 14, 1896; said grounds being situated in the ——— quarter of section —— of township ——, of range ——; in the State (or Territory) of ———; that the accompanying plat accurately represents the surveyed limits and area of the grounds so selected, and that the area of the ground so selected and surveyed is —— acres and no more; that the company has occupied no other grounds for similar purposes upon public lands for the system represented hereon; and that, in his belief, the grounds so selected, surveyed, and represented, are actually and to their entire extent required by the company for the necessary uses contemplated by said act of Congress approved May 14, 1896 (29 Stat., 120).

————— ————,
————— —————.

Subscribed and sworn to before me this —— day of ———, 19—.

————— ————,
[SEAL.] *Notary Public.*

FORM 8.

I, ———— ————, do hereby certify that I am the president of the ——— company; that the survey of the tract represented on the accompanying plat was made under authority and by direction of the company, and under the supervision of ———, its chief engineer (or the person employed in the premises), whose affidavit precedes this certificate; that the survey as represented on the accompanying plat actually represents the grounds required in the ——— quarter section —— of township ——, of range ——, for electrical purposes and to their entire extent, under the act of Congress approved May 14, 1896; that the company has selected no other grounds upon public lands for similar purposes, for the system represented hereon; and that the company by resolution of its board of directors, passed on the —— day of ———, 19—, directed the proper officers to present the said plat for the approval of the Secretary of the Interior, in order that the company may obtain the use of the grounds described under said act approved May 14, 1896 (29 Stat., 120).

————— ————,
President of the ——— Company.

Attest:

————— ————,
Secretary.

[Seal of the company.]

FORM 9.

Reservoir declaratory statement.

[Under act of Jan. 13, 1897 (29 Stat., 484).]

RES. D. S. No.——. } LAND OFFICE AT ———,
————, ——, 19—.

I, ———— ————, of ———, *do hereby certify that I am president of the* ——— *company, and on behalf of said company, and under its authority,* do hereby apply for the reservation of land in ——— County, State of ———, for the construction and

use of a reservoir for furnishing water for live stock under the provisions of the act of January 13, 1897 (29 Stat., 484). The location of said reservoir and of the land necessary for its use, is as follows: ——— of section —— in township ——, of range —— M., containing ——— acres.

I hereby certify that to the best of my knowledge and belief the said land is not occupied or otherwise claimed, is not mineral or otherwise reserved, and that the said reservoir is to be used in connection with the business of the applicant of

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The land owned or claimed by the applicant within the vicinity of the said reservoir (within three miles) is as follows: ———.

I further certify that no part of the land to be reserved under this application is or will be fenced; that the same shall be kept open to the free use of any person desiring to water animals of any kind; that the land will not be used for any purpose except the watering of stock; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

The water of said reservoir will cover an area of ——— acres, in ——— of section ——, in township ——, of range —— of said lands; the capacity of the reservoir will be ——— gallons, and the dam will be —— feet high. The source of the water for said reservoir is ———
and there are no streams or springs within two miles of the land to be reserved except as follows: ———.

The applicant has filed no other declaratory statements under this act except as follows:

No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
No. ——, ——— land office, area to be reserved ——— acres.
Total, —— acres, of which Nos. ——— are located in said county.

And I further certify that it is the *bona fide* purpose and intention of this applicant to construct and complete said reservoir and maintain the same in accordance with the provisions of said act of Congress and such regulations as are or may be prescribed thereunder.

[Seal of company.] ——— ———.

Attest:

———— ————,

Secretary.

STATE OF ———, *County of* ———, *ss:*

———— ————, being duly sworn, deposes and says that the statements herein made are true to the best of his knowlege and belief.

———— ————.

Sworn to and described before me this —— day of ———, in the year 19—.

[SEAL.] ———— ————,

Notary Public.

NOTE.—When the applicant is a corporation the form should be executed by its president, under its seal, and attested by its secretary. When the applicant is not a corporation or an association of individuals, strike out the words in italics.

LAND OFFICE at ———,
———— ————, 19—,

I, ———— ————, register of the land office, do hereby certify that the foregoing application is for the reservation of lands subject thereto under the provisions of the act of January 13, 1897; that there is no prior valid adverse right to the same; and that the land is not, by reason of its proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

Fees, $—— paid.

———— ————,
Register.

The description of the business of the applicant should include "a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an inclosure or upon uninclosed lands, and also from where and to where they are being driven or transported." Circular June 23, 1899.

STATE SELECTIONS—RESERVATION IN EXCESS OF GRANT.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, United States land offices, November 10, 1900.

Hereafter all lists of selections filed by the several States for lands granted in quantity must be accompanied with the certifiate of the selecting officer, or other duly authorized official, that the said selections and those pending, together with those approved, do not exceed the total amount granted to the State for the purpose stated.

This is to prevent the States from putting in reservation, on account of the several grants, a quantity in excess of the total amount granted, and you are directed to reject all lists proffered that do not affirmatively show that the selections are not in excess of the grant.

Approved:

E. A. HITCHCOCK,
Secretary.

MEXICAN PRIVATE CLAIM—SECTION 7, ACT OF JULY 23, 1866.

JACKS *v.* BELARD ET AL.

Where in the decree of confirmation the description of the boundaries of a Mexican private land claim is such that mistake as to identification of such boundaries on the ground is not inconsistent with entire good faith, a purchaser of the title of the claim, as confirmed, who receives patent for the lands included within the boundaries thereof as established by survey, has the right, under the seventh section of the act of July 23, 1866, to purchase from the government lands occupied by him as a part of said claim, to which no valid adverse rights had attached, but were by the survey excluded from said claim, though theretofore regarded as a part thereof, and were by the purchaser believed to be within the lines of his original purchase.

Departmental decision of December 15, 1899, 29 L. D., 369, in this case, recalled and vacated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *November 13, 1900.* (J. R. W.)

December 15, 1899, the Department rendered a decision herein (29 L. D., 369), reversing your office decision of October 29, 1898, and David Jacks filed a motion for review thereof, which was entertained, June 5, 1900. Due notice of the motion was given, and it is now submitted on the additional briefs of counsel.

The local officers rejected Jacks's application to purchase, under section 7 of the act of July 23, 1866 (14 Stat., 218), lots 1, Sec. 2; 1 and 2, Sec. 3; 1, 2, 3, 4, 5, and 6, Sec. 10; 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 and 11, Sec. 11; and 1 and 2, Sec. 12, T. 16 S., R. 1 E., M. D. M., San Francisco, California, and allowed the applications of Belard and others to enter said lands under the homestead laws. Upon Jacks's appeal to your office, the action of the local office was reversed, his application allowed, and the homestead applications were rejected. The homestead applicants appealed to the Department. Said departmental decision reversed the decision of your office.

The ground of the departmental decision under review, as stated in the opinion (29 L. D., 369), is that—

> The mere fact that Jacks supposed certain lands would be included within such boundaries, or that it was the general belief that those lands were included in the grant, would give no right of purchase under the act, because the limits of his purchase are the boundaries described in his deed, which follows the decree, and he took by such purchase all the lands which might be ascertained upon final survey of the grant to be included within said limits, whether they were more or less than he supposed would be included within said boundaries. Had it been determined that the survey of 1869 diminished instead of enlarging the grant, Jacks would have taken all the lands within the limits of the final survey, although it might have included lands that he did not suppose he had purchased. The purpose of the act was to remedy, by purchase from the United States, a defect in a title supposed to have been derived from the Mexican grantee, or his assigns. There was no defect in this title. It was confirmed according to the boundaries described in the grant and

as set forth in the petition for confirmation. The purchasers received patent for the full quantity "according to the lines of their original purchase," and the provisions of the act cannot be extended to allow a purchase of lands outside of those limits merely because the purchasers supposed that such lands would be included within those limits.

Section 7 of the act of July 23, 1866, *supra*, provides:

That where persons in good faith, and for a valuable consideration, have purchased lands of Mexican grantees, or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same, after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, under regulations to be provided by the commissioner of the general land office.

The decision under review treats the grant in question as having definite boundaries, and to this point attention will first be given.

Jacks's claim rests on his purchase of the Monterey Pueblo grant. No controversy is made as to the regularity of his purchase from the city. The boundaries of the grant as confirmed January 22, 1856, and described in the decree, were—

From the mouth of the river Monterey in the sea to the Pilarcitos; thence running along the Canada to the Laguna Seca, which is in the high road to the Presidio, thence running along the *highest* ridge of the mountains of San Carlos unto Point Cypres further to the north; and from said point, following all the coast, unto said mouth of the river Monterey, excepting and reserving therefrom such portions thereof as are held by individual owners by right or title derived from competent authority other than said pueblo or city.

After confirmation of the grant, February 9, 1859, the city conveyed to said Jacks and one D. R. Ashley (who subsequently conveyed to Jacks)—

The lands belonging to the city of Monterey, granted by the Mexican government to, or set apart by the former authorities of California for the Pueblo of Monterey, and confirmed by the United States Land Commissioners for California to said city, including and comprising all the right, title and interest which said city has or may have, whether in possession or in expectancy, in and to the lands, and every part and portion thereof, bounded as follows: commencing at the mouth of the Salinas or Monterey River and running up that stream to the site of Pilarcitos, thence through the canon to the Laguna Seca; thence following the summit of the hills and the city line between Monterey and Carmelo to Point Cypres; and thence following the Pacific Ocean to the place of beginning, and containing all the lands by the authorities of the United States confirmed to the said city of Monterey.

There has been much controversy as to the location on the ground of the boundaries and calls of the grant and decree of confirmation. January 5, 1869, the U. S. surveyor-general for California transmitted to your office a plat of a survey under the act of July 1, 1864 (13 Stat., 332), of the city lands of Monterey, "compiled from examined and approved field notes on file" in his office. This plat made "tract 2"

to embrace 2,431.4 acres. July 18, 1879, your office directed the surveyor-general—

> to make an investigation and . . . . ascertain and represent by sketch upon the official plat the highest ridge of mountains, from the Laguna Seca to Point Cypres, so as to show its direction and relation to tract 2.

January 21, 1880, the surveyor-general filed his report, with testimony taken and a topographical map, upon consideration of which, March 10, 1880, your office decision disapproved of the plat reported in 1869 and directed a new survey of the tract. Such survey was made and reported to your office, and approved by your office decision of September 25, 1886. This survey reduced the area of said "tract 2" to 1,650.99 acres, a less quantity by 780.41 acres. An appeal was taken from that decision by the city and by said Jacks, its grantee, and your office decision was modified, October 4, 1887 (Pueblo of Monterey, 6 L. D., 179), and a new survey ordered, which was made and approved (Pueblo of Monterey, 12 L. D., 364), and patent issued thereon.

The present applications of Jacks and of the homestead claimants are for a part of the lands so in 1869 included in the survey of the pueblo lands and later excluded therefrom. The township plat of survey of T. 16 S., R. 1 E., approved October 5, 1872, shows "tract 2" of the pueblo lands to include the lands Jacks applies for, and on that plat it is noted that they were "located by the U. S. surveyor-general in 1859" as part of the pueblo lands of Monterey.

It cannot be said that the lines, or boundaries, of the grant were "definite," in the sense that they were readily determined beyond reasonable liablity of honest error in location. The line lay along a ravine to a dry lagoon in a road, and thence along the highest ridge of the mountains of San Carlos to Point Cypres. There was no course or distance given for the boundary from the dry lagoon to the summit of the ridge. A ravine, dry lagoon, and summit of a ridge, are not definite objects, in a country where such objects are common features of the topography, until the particular objects intended are authoritatively determined. There appears in this particular case to have been two dry lagoons, one "located about a mile west and south of the first" (6 L. D., 188). There were also two ridges of mountains, one of which was higher by two hundred and twenty-two feet than the other, though not a watershed. The fact that a government surveyor in 1859 had located the boundaries to these pueblo lands so as to include the lands in question, and that a subsequent survey, disapproved March 10, 1880, did so, show that mistake as to identification of the boundaries of the grant was not inconsistent with entire good faith.

No force can be given to the fact that had the latter survey included more land in the finally determined boundary, such greater quantity would have inured to the claimant's benefit. Whatever proved to be within the ascertained boundaries, he would take as part of the grant,

without price and of right. The right here asserted under said act is one of purchase. Under the act he can get nothing but by payment of the full government price as an equivalent, and the right of purchase is dependent upon his occupation and the absence of any valid adverse rights. The two rights—that to claim under the grant and to purchase under the act—are independent and without direct relation to each other. The right to purchase is given in consideration that the land does not pass by the grant and to relieve against hardship arising from that fact. The fact that the claimant would have received this land, or more land, had the survey included it within the boundaries, does not therefore bear upon the question, but is wholly irrelevant to it.

The conclusion as a matter of law in the former decision of the Department, that the right of purchase cannot be exercised for lands finally excluded from the ascertained boundaries of this grant, is not, on further consideration, believed to be well grounded. If "the provisions of the act cannot be extended to allow the purchase of lands outside those limits," as to a grant of specified boundaries, then the law can have no effect except where the grant was invalid. There could be no right to purchase where the grant was, as in this case, confirmed in its entirety. Such a construction of the law is contrary to well settled rules for construction of remedial statutes.

In Hosmer *v.* Wallace (97 U. S., 575) said act of 1866 came in question where there had been a grant of definite quantity within boundaries of greater extent. Defendant had purchased from the grantee land excluded from the grant on final survey and had been by the land department allowed to purchase. The suit was for title by one who had settled on the land previous to defendant's purchase. The court held:

> The object of the act was to withdraw land continuously possessed and improved by the purchaser under a Mexican grant from the general operation of the preemption laws, and to give to him, to the exclusion of all other claimants, the right to obtain the title.

In Bascom *v.* Davis (56 Cal., 152) the court construed the act in question, and held:

> We think it was passed for the benefit of those who, in good faith, for a valuable consideration, had purchased lands which were supposed to have been granted by the Mexican government, and had used, improved, and continued in the actual possession thereof as provided in the act. It seems to us that the good faith of the purchaser, his payment of a valuable consideration and his occupation and improvement of the land, were the considerations which moved Congress to pass the act.

This construction was approved by the supreme court, where in fact there was no grant, but one was claimed and was generally supposed to have been made, in Beley *v.* Naphtaly (169 U. S., 353), as follows (361):

> This construction by the California court is entitled to very high consideration, and especially is this so in a case where the act was directed to a condition of things

in existence at the time of its passage and with which the courts of that State would be particularly familiar.

In Winona and St. Peter Railroad *vs.* Barney, 113 U. S., 618, this court construed an act of Congress which alluded to lands "granted as aforesaid," as including lands *purporting* to have been "granted as aforesaid," and this inclusion was made because the court was satisfied, taking all things into consideration, that such construction was what Congress meant. The court carried out that intention by supplying a word not found in the act.

For the reasons thus given, we think the act includes those persons who in good faith and for a valuable consideration have purchased land from those who claimed, and who were thought, to be Mexican grantees or assigns, provided they fulfill the other conditions named in the act.

In another case in California the contention was the same as in this case. In Watriss *v.* Reed (99 Cal., 134; 33 Pac., 775, 776) the court held:

Appellant insists that the grant fixed one definite boundary, or base, and that as the grant was only a quarter of a league wide, all purchasers under the Mexican grantee must have taken with notice that all lands lying more than a quarter of a league east of the base line did not belong to the grant, and that such purchasers can not, therefore, be regarded as *bona fide* purchasers, within the meaning of the act of 1866 . . . . This argument seems to be that, as the land never was a part of the grant, it never could have been excluded . . . . The object of the act was to give to the purchaser from the Mexican grantee the right of purchase from the government. He was assured by the act that if he made his purchase in good faith, took actual possession, and continued the same, and paid a valuable consideration, and the land was believed to be within the grant, he would be treated as a preferred purchaser of the land, and, upon paying for the same, would be entitled to a patent. If respondent's land was not within the lines of the grant, it was supposed to be, and the evidence shows that she honestly believed it to be within such lines, and this entitles her to the protection of the act.

The act is clearly remedial. "A remedial statute ought not to be so construed as to defeat in part the very purpose of its enactment." Beley *v.* Naphtaly, 169 U. S., 353, 361; United States *v.* Hodson, 10 Wall., 395. There is no essential difference between the condition of one whose supposed title in whole fails because of an inherent defect or imperfection, as was the case of the Romero grant, in Beley *v.* Naphtaly, *supra*, and that of one who is mistaken or misled as to its supposed extent, as in this case. The difference is only one of degree. In the first, the purchaser loses all his supposed purchase, in the latter only a part. The benefit of the act extends to the relief of the purchaser in either case alike, who comes otherwise within its terms.

The testimony of the witnesses, without any conflict or disagreement, was that in the general opinion in the neighborhood the lands in question were always regarded and supposed to be part of the pueblo lands until the decision of October 4, 1887, directing another survey, and even until the decision of April 13, 1891, approving the final survey. One of the witnesses had known the generally supposed boundaries and extent of the pueblo lands from 1846 (before the cession by

Mexico), and other witnesses had known their supposed boundaries and extent from various dates prior to Jacks's purchase.

Surveys made by government surveyors as early as 1859, and recognized by the surveyor-general of California, January 5, 1869, when he transmitted to your office a plat of a survey of the city lands of Monterey "compiled from examined and approved field notes on file" in his office, showed these lands to be part of the pueblo land. The township plat of the survey of T. 16 S., R. 1 E., approved October 5, 1872, shows "tract 2" of the pueblo lands to include the lands Jacks applies for, and on that plat it is stated that they were "located by the U. S. surveyor-general in 1859" as part of the pueblo lands of Monterey.

One purchasing a grant before any approved survey defining its boundaries must necessarily purchase with a view to an assumed, supposed or commonly believed extent. That supposed extent fixes "the lines of his original purchase." If afterward the approved survey of the grant fixes the boundaries to be other than were supposed at the time of his purchase, excluding (as in this case) a large portion of the land in contemplation at the time of purchase, it can not be said with truth that he has received all the land he purchased "according to the lines of his original purchase." The lines of the original purchase are the then supposed lines, whether they are the true lines are not. If they prove to be the true boundaries, he gets the lands "according to the lines of his original purchase" under the grant. If those supposed lines prove not to be the true boundaries, then, to the extent that any lands supposed to be included are thereby excluded from the grant, he does not, by the grant, get the lands purchased "according to the lines of his original purchase." The act affords relief in such cases.

These lands are proven to have been included among lands assessed to David Jacks and D. R. Ashley under the description of "City Lands of Monterey" in 1864, and every year to and including 1872, on all which they paid the taxes. They were in every subsequent year, including 1891, included in the lands assessed to Jacks, on all which he paid such taxes. This tends to show they were understood to be part of the pueblo lands purchased by him, and that they were, in contemplation of the parties, sold and included in the supposed extent and boundaries of his purchase.

It would not be questioned but that, had a surveyor at or before Jacks's purchase run a line including these lands, and had the city made its deed by the calls of such survey, Jacks's right to purchase from the government would be unquestionable "according to the lines of his original purchase." But if these lands were at that time, as the evidence clearly shows, generally recognized and understood to be part of and within the boundaries of the pueblo lands, they were as truly within "the lines of" Jacks's "original purchase" as though a line had

in fact been run, and monuments set, and the courses, calls, and monuments of the boundaries recited in the deed.

As to the use, improvement, and possession of the land in question prior and subsequent to July 23, 1866, the evidence shows that Jacks and Ashley entered into possession at the time of the sale of the public lands to them, and Jacks, after his purchase from Ashley, so continued. Till 1870 the lands were open and used with other lands for grazing. They and the neighboring owners did not dispute Jacks's and Ashley's ownership of these lands. Such use and occupation, being the use to which the lands were adapted, and the possession such as other owners in the vicinity exercised, was a sufficient use and occupation under the statutes. Hyatt *v.* Smith (unreported), December 19, 1872; Dallas *v.* White (5 C. L. O., 84); Watriss *v.* Reid (99 Cal., 134).

In 1870 lands in the vicinity generally began to be fenced. These lands, with others, were fenced and entirely enclosed by Jacks and others, and Jacks's right to these lands was recognized equally with his right to the other pueblo lands. On these lands he made roads for hauling water to his sheep camps on the hills, dug and curbed three or four wells from forty to one hundred and thirty-five feet deep, improved five water seepage places for drinking places for his stock, made a headquarters camp for his horse ranch costing $1350, and constructed extended fences. His expenditure on the lands in question to utilize it for stock raising has been over $3000, and that on the whole tract, regarded by him as an entirety, has been $6000.

The settlers and adverse claimants entered through breaches of Jacks's fence where the wires were cut at two places near the southwest corner of these lands. It does not appear who cut the fence, but that it was cut is not disputed, and that the adverse claimants entered by the breach is an admitted fact, proof of which is waived in the record. There is no claim of settlement prior to July 23, 1866, nor till after the later survey which excluded these lands from the grant.

The right of Jacks to purchase is therefore within the letter and spirit of the act of July 23, 1866, *supra*. The departmental decision herein of December 15, 1899, is vacated and recalled, and your office decision is affirmed.

Miller Placer Claim.

Motion for review of departmental decision of August 15, 1900, 30 L. D., 225, denied by Secretary Hitchcock, November 19, 1900.

OKLAHOMA LANDS—RESERVATIONS WITHIN VACATED TOWNSITES—ACT OF MAY 11, 1896.

CITY OF ENID.

The act of May 11, 1896, provides an exclusive mode for the disposition of public reservations within vacated townsites and additions thereto, where "patents for the public reservations in such vacated townsite, or additions thereto, have not been issued": first, a preferred right of purchase is accorded the original entryman; second, if such right is not exercised the land then becomes subject to disposition under the laws regulating the disposal of isolated tracts.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *November 23, 1900.* (L. L. B.)

This is an appeal from your office decision of May 18, 1900, refusing to issue patent to the city of Enid, Oklahoma, for lot 1 in McGuire's addition to said city.

The facts necessary to be considered are these:

Sometime in 1893, Luther M. McGuire made homestead entry covering the NW. ¼ of Sec. 8, T. 22 N., R. 6 W., Oklahoma. The tract adjoins the original Enid townsite entry, and, in 1895, McGuire commuted and received patent for the southwest forty acres of his said entry (except ten acres reserved, as hereinafter noted) for townsite purposes, and the same was thereafter included within the corporate limits of the city of Enid. The lot in controversy consists of ten acres, described by metes and bounds, within said commuted portion, and on the commutation of said entry was reserved for a "Public Square" under the provisions of section 22 of the act of Congress approved May 2, 1890 (26 Stat., 81).

Afterwards, W. H. McNeley acquired title to said commuted land, and, March 15, 1899, vacated the townsite plat of said land under authority of a legislative act of the Territory of Oklahoma, approved February 27, 1895 (Session Laws of Oklahoma, 1895, pages 90–91).

At date of vacating said plat, the city of Enid had not applied for or received patent for the said ten-acre lot, so as aforesaid reserved for public purposes.

March 7, 1900, the city of Enid, through its authorized attorney, applied for such patent, relying upon section 22 of said act of May 2, 1890, which provides:

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

It further provides that parties who have made homestead entries for lands under the laws applicable to Oklahoma may apply, as McGuire did, to purchase all or any part of the land embraced in the homestead

entries for townsite purposes, when it is made to appear that the same is needed for such use, and that the same reservations are to be made therefrom for like public purposes.

The territorial act of February 27, 1895, above referred to, and by authority of which said plat was vacated, is as follows:

Section 1. That in all cases where a homestead entryman has perfected his title to the land embraced in his homestead entry or any subdivision thereof, under the provisions of section 22 of the organic act, and in so doing has made reservations for parks and for schools and other public purposes, and the patentee or proprietor or proprietors of all the lots in any such townsite or addition thereto, desire to vacate the same or the plat thereof, it shall be lawful so to do as in this act hereinafter provided.

Sec. 2. Any plat of any townsite or addition thereto or any subdivision of land mentioned in section 1 of this act (except the reservations for parks and for schools and other public purposes and one street leading to any interior reservation), may be vacated by the original patentee thereof, at any time before the sale of any lots therein by a written instrument declaring the same to be vacated, duly executed, acknowledged or proved and recorded in the same office with the plat to be vacated; and the execution and recording of such writing shall operate to destroy the force and effect of the plat and the recording of the plat so vacated (except the reservations for parks and for schools and other public purposes and the excepted street leading to any interior reservation), and to divest all public rights in the streets and alleys laid out as described in such plat; and shall also operate to withdraw the lands so vacated from the corporate limits of the city, town or village of which it may have theretofore constituted a part or been included. And in case where any lots have been sold the plat may be vacated as herein provided, by all the owners of lots in such plat joining in the execution of such written instrument.

The application of the city for patent was rejected by your office in virtue of the act of Congress of May 11, 1896 (29 Stat., 116–117), which act is as follows:

That in all cases where a town site, or an addition to a town site, entered under the provisions of section twenty-two of an act entitled "An act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May second, eighteen hundred and ninety, shall be vacated in accordance with the laws of the Territory of Oklahoma, and patents for the public reservations in such vacated town site, or addition thereto, have not been issued, it shall be lawful for the Commissioner of the General Land Office, upon an official showing that such townsite, or addition thereto, has been vacated, and upon payment of the homestead price for such reservations, to issue a patent for such reservations to the original entryman.

If the original entryman shall fail or neglect to make application for the reservations within six months from the vacation of such townsite, or from the passage of this act, the reservations shall be subject to disposal under the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States, as amended by the act approved February twenty-sixth, eighteen hundred and ninety-five.

Sec. 2. That if a patent has already issued, or shall hereafter issue, for any such reservation, to any town or municipality, such town or municipality, upon the vacation of the town site or addition thereto, as aforesaid, may sell the same at public or private sale to the highest bidder after thirty days' public notice of such sale, and convey said lands to the purchaser by proper deed of conveyance, and cover the pro-

ceeds of such sale into the school fund of such town or municipality: *Provided*, That where, by reason of the vacation of an entire town site and all its additions, the municipal organization has ceased to exist, the reservations in such vacated town site which may have been patented to the town may be disposed of as isolated tracts under the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States, as amended by the act approved February twenty-sixth, eighteen hundred and ninety-five.

This statute provides a mode, exclusive of all others, for the disposition of public reservations within vacated townsites and additions thereto, where "patents for the public reservations in such vacated townsite, or addition thereto, has not been issued." First, a preferred right of purchase is accorded the original entryman; second, if such right is not exercised the land then becomes subject to sale as an isolated tract. In this case no patent for the reservation in question has issued, and its future disposition must be governed by section 2455 of the Revised Statutes as amended February 26, 1895.

The decision of your office is affirmed.

There is in the record an application by Henry J. Sturgis to enter the tract in question under the homestead law. This application is returned, with the record, for appropriate action by your office.

GREAT SIOUX LANDS—SECTION 21, ACT OF MARCH 2, 1889.

CIRCULAR.

Commissioner Hermann to registers and receivers, Bismarck, North Dakota, Huron, Pierre, Chamberlain, Rapid City, South Dakota, and O'Neill, Nebraska, April 21, 1900.

The second proviso to section 21 of the act of March 2, 1889 (25 Stat., 888), reads in part as follows:

That all lands herein opened to settlement under this act remaining undisposed of at the end of ten years from the taking effect of this act, shall be taken and accepted by the United States and paid for by said United States at fifty cents per acre, which amount shall be added to and credited to said Indians as part of their permanent fund, and said land shall thereafter be part of the public domain of the United States, to be disposed of under the homestead laws of the United States and the provisions of this act.

By President's proclamation of February 10, 1890, said act was declared to be in full force and effect. The period of ten years mentioned consequently expired on February 10th last.

The lands in said reservation not appropriated prior to February 11, 1900, are, by reason of the legislation quoted, a part of the public domain, and entries therefor will hereafter be reported under the public land series, but settlers will be required to pay the price fixed in

section 21 of said act of March 2, 1889, for all lands not previously entered, the language of the act in regard thereto being as follows:

That each settler, under and in accordance with the provisions of said homestead acts, shall pay to the United States, for the land so taken by him, in addition to the fees provided by law, the sum of one dollar and twenty-five cents per acre for all lands disposed of within the first three years after the taking effect of this act, and the sum of seventy-five cents per acre for all lands disposed of within the next two years following thereafter, and fifty cents per acre for the residue of the lands then undisposed of.

As regards lands entered prior to February 11, 1900, the prices to be paid by settlers are as stated on page 61 of office circular of July 11, 1899, and entries will be reported as heretofore under the Sioux Indian Series.

Approved:

E. A. HITCHCOCK, *Secretary.*

REPAYMENT—DESERT-LAND ENTRY.

WILLIAM D. WHEELER.

Repayment of the first instalment of the purchase money paid on a desert-land entry will be allowed where the entry did not conform to the statutory requirement in the matter of compactness and was for that reason erroneously allowed and could not have been confirmed.

Where an entry was erroneously allowed, and could not have been confirmed, the reason which led the entryman to relinquish his entry is of no moment and can not affect the right of repayment given to him by the express terms of the statute.

Departmental decision in the case of Francis E. Easton, 27 L. D., 600, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *November 28, 1900.* (C. J. G.)

December 22, 1879, William D. Wheeler made desert-land entry No. 266, for the S. ½ of NW. ¼ and S. ½ of NE. ¼ of Sec. 5; the S. ½ of NW. ¼, S. ½ of NE. ¼, the SE. ¼, and the SW. ¼ of Sec. 4, T. 20 N., R. 3 E. (containing 640 acres), Helena, Montana, land district.

July 31, 1884, your office canceled said entry for failure on part of the entryman to make final proof and payment.

February 7, 1899, Wheeler made application for repayment of the first instalment of the purchase money paid by him upon said entry, alleging that the same was not in "compact form" as required by the desert-land act, and therefore was erroneously allowed and could not be confirmed.

December 14, 1899, your office, having reference to the case of Francis E. Easton (27 L. D., 600), made the following requirement of Wheeler:

It will also be necessary for the applicant to demonstrate under oath in what respect his entry was not in the compact form required by the act of March 3, 1877

(19 Stat., 377), and to show that he abandoned his entry *solely* because of his knowledge or belief that it could not be lawfully confirmed.

The case is here now on appeal from this requirement.

The provision requiring compactness in a desert-land entry is found in the last proviso to the first section of the desert-land act of March 3, 1877 (19 Stat., 377), and is in the following words:

> *Provided*, That no person shall be permitted to enter more than one tract of land . . . which shall be in compact form.

September 29, 1900, your office was requested to report (1) whether Wheeler's entry as made was in compact form, (2) whether an entry in this form was permitted under the practice in force at the time his entry was made, and (3) whether, had compliance with law in other respects been shown, said entry would, under the rulings, have passed to patent.

October 5, 1900, your office reported (1) that the entry was not in compact form, (2) that prior to the issuance of the circular of instructions, dated September 3, and approved September 14, 1880 (Vol. 2, Copp's Public Land Laws, p. 1378), many entries had been allowed that were not in compact form, little attention being given to this requirement of the law and entries such as that of Wheeler having, apparently, been received without objection by your office, (3) that unless it had been clearly shown that the entry was as compact as the surrounding entries and the topography of adjacent lands would permit, the entry could not have been confirmed, that is, passed to patent, (4) that the records of your office do not disclose any reason for the allowance of this entry in the form in which it was allowed.

Under the instructions referred to, desert-land entries were required to be "by legal subdivisions compact with each other, as nearly in the form of a technical section as the situation of the land and its relation to other lands will admit of." In the case of Joseph Shineberger (on review, 9 L. D., 379), it was held (syllabus):

> The requirement of "compactness" is statutory, and an entry in obvious violation thereof is not protected by the fact that it was made prior to the issuance of departmental instructions with respect to said requirement.

Accepting the report of your office, it appears that the land embraced in Wheeler's entry was not in compact form. The entry was apparently therefore erroneously allowed and could not have been confirmed.

These facts bring the case within the terms of the second section of the act of June 16, 1880 (21 Stat., 287), which authorizes repayment—

> 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.

In the case of Francis E. Easton, *supra*, cited by your office, right to repayment was denied, although it appeared that the entry was made for land that did not belong to the United States either at the time when the entry was allowed, or when it was subsequently relinquished, and the reason assigned in said decision for such denial was that the entry had been relinquished by the entryman and that the relinquishment was due to an intention to abandon and surrender all rights under the entry, and not to any knowledge or belief that the entry was erroneously allowed and could not be confirmed. That decision fails to give effect to the plain language of the repayment act. Easton's entry was erroneously allowed, and could not have been confirmed, and the reason which led him to relinquish his entry was under these circumstances of no moment and did not affect the right to repayment given to him by the express terms of the statute. That decision is overruled.

The action of your office in requiring Wheeler to show that he abandoned his entry solely because of his knowledge or belief that it could not be lawfully confirmed, is accordingly vacated, and if upon further consideration, your office is still of opinion that the entry did not conform to the statutory requirement in the matter of compactness, and was hence erroneously allowed and could not have been confirmed, repayment will be allowed as applied for.

MINERAL LAND—CRYSTALLINE DEPOSITS—NATURAL CURIOSITIES.

SOUTH DAKOTA MINING CO. *v.* MCDONALD.

Land not shown to contain deposits, in paying quantities, of any of the mineral substances usually developed by mining operations, but which appears to be valuable and to be desired by the parties attempting to secure title thereto chiefly because of a cave or cavern the entrance to which is situated thereon, and for the crystalline deposits, and formations of various kinds, such as stalactites, stalagmites, geodes, etc., found therein, which are made the subject of sale by the parties not as minerals but as natural curiosities, is not mineral land within the meaning of the mining laws.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *November 30, 1900.* (A. B. P.)

January 15, 1894, Jesse D. McDonald made homestead entry, No. 4149, for the S. ½ of the NW. ¼ and lots 3 and 4 of Sec. 1, T. 6 S., R. 5 E., Rapid City, South Dakota. He alleged settlement June 1, 1890. June 4, 1895, he submitted his proofs, and final certificate was thereupon issued to him.

October 4, 1895, R. B. Moss, agent of the South Dakota Mining Company, filed a protest against McDonald's entry, wherein it was

alleged, in substance and effect (as far as material to be here stated), that the greater portion of the land embraced in said entry had been located under the mining laws, in the year 1890, by Jesse D. McDonald and others, as the Cave Lodes Nos. 1, 2, 3, 4, and 5, and the Cave Placers Nos. 1 and 2; that said mining claims had been later in the same year sold and conveyed by McDonald and his associates, or other parties in interest, to the South Dakota Mining Company; that during a portion of the time from 1891 to 1894, McDonald resided upon said mining claims as the agent and employe of said company and received from the company compensation for his services as such agent and employe; that McDonald's entry was fraudulently made in that he had never resided upon the land embraced therein except as the agent and employe of said company; and that said land has no value for agricultural purposes, but is of great value for the minerals, crystals, and valuable stones found therein.

October 26, 1895, your office ordered a hearing to determine the character of the land covered by McDonald's entry, but declined to entertain the charge of fraud contained in the protest. The hearing was had accordingly. The local officers found the land to be non-mineral, and recommended that the entry be sustained.

On appeal, your office, by decision of July 29, 1896, affirmed the finding below as to the character of the land, but held McDonald's entry for cancellation, as fraudulent. Thereupon both parties appealed to the Department.

February 8, 1898, the Department, having considered the record of said appeals, found and held as follows:

Upon the land in controversy is located the entrance to Wind Cave, a very extensive and beautiful cavern, and it seems to be this that both parties are striving to gain possession of. So far as the testimony already submitted shows, this land has little value except for this cave and the crystalline deposits therein, specimens of these deposits being sold at prices ranging from ten cents to twenty-five dollars.

In the present case, it appears that the ends of justice will be best subserved by ordering a further hearing. As said above, your office, in ordering the former hearing confined the investigation to the sole question as to the character of the land and specifically declined to bring in the question as to the regularity of McDonald's entry. Notwithstanding these instructions from your office, the company introduced into the record evidence tending to show that McDonald's entry was fraudulent. McDonald objected to the introduction of this evidence and confined the testimony of his witnesses to the sole question of the character of the land, as had been directed by your office. When the case came before your office, the land was held to be non-mineral, but McDonald's entry was held for cancellation as fraudulent, this latter action being based principally on the evidence introduced by the company contrary to the instructions of your office and over the objection of McDonald.

You will therefore instruct the local officers to appoint a day for further hearing upon all the questions involved in this case and notify the parties thereof. The evidence relating to the alleged mineral character of the land will be confined to its character as developed up to June 4, 1895, when final proof was submitted in the

homestead entry and final certificate issued thereon; evidence of discoveries after that time will not be received.

This action is not to be construed as a determination of the question, so ably argued by the attorneys on each side, as to whether land chiefly valuable for its crystalline deposits can be entered under the mining laws of the United States.

A second hearing was had in accordance with the directions thus given. Upon the testimony submitted the local officers found: (1) That the lands were "agricultural rather than mineral in character," and (2) that there was no fraud in McDonald's entry. They recommended that the protest be dismissed and that the entry be passed to patent. The protestant thereupon appealed.

By decision of July 21, 1899, your office sustained the finding of the local officers to the effect that the lands are non-mineral in character, but held McDonald's entry for cancellation for the stated reason that the record fails to disclose such evidences of cultivation and improvement as are sufficient to establish his good faith as a homestead claimant. A motion for review, filed by the protestant company, was denied August 17, 1899. The case is again before the Department upon the appeals of both parties.

But two material issues are presented: (1) The character of the land, and (2) the good faith of the homestead claimant,

The record, which is very voluminous, has been carefully examined. The testimony submitted at the second hearing fully confirms the statements of the Department, upon the record of the former appeals, to the effect that the entrance to an extensive and beautiful cavern known as Wind Cave is situated on this land; that the land has little value except for said cavern and the crystalline deposits contained therein; and that the possession of said entrance, and the consequent control of the only means of access to the cavern, constitute the basis of the real controversy between the contending parties.

This cavern is described as a great natural wonder. It appears to have been discovered about the year 1884, and has been explored for several miles square, but the full extent thereof has not yet been ascertained. A part of it lies under the lands in question, but how much, is not definitely shown. It is in a region of rock and consists chiefly of extensive fissures, generally parallel with one another, at irregular distances—from fifty to three hundred feet—apart. These fissures are in some places very narrow, but in other places they widen out into rooms or chambers, of different sizes and dimensions, varying from twelve feet square to as much as three acres in area, and from a few feet to fifty or sixty feet in height. The largest room or chamber yet discovered contains about three acres of floor surface, has numerous wings radiating from it, and has a dome-shaped ceiling sixty feet high at the highest point.

The fissures and rooms or chambers are not all on the same level, but are in irregular tiers. There are side-passages from one fissure to

another on the same level, and also ascending and descending passages from one level to another. The upper tier comes to the surface at the point of entrance on the land in question. A person can descend from tier to tier until he reaches a depth of five or six hundred feet below the surface, and there are unexplored openings which appear to lead to a greater depth. Several hundred rooms, chambers, and passage-ways, so-called—perhaps as many as one thousand—have been explored and opened up, at various times, by or under the direction of one or the other of the parties to this controversy.

Large quantities of crystalline deposits, and formations of various kinds, such as stalactites, stalagmites, geodes, "box-work," "frost-work," etc., etc., are found in the cavern. Specimens of these deposits and formations have been made the subject of sale at remunerative prices by the contending parties, not as minerals but as natural curiosities. Charge has also been made for admittance to the cavern and for the privilege of viewing its many natural wonders. The record clearly demonstrates that it is the source of revenue which these things furnish that the respective parties are striving to control.

The testimony introduced by the protestant company for the purpose of showing that the cavern contains valuable deposits of gold, marble, building stone, paint rock, and other mineral substances, falls far short of proving the land to be mineral in character within the meaning of the mining laws. It is not shown to contain deposits, in paying quantities, of any of the substances mentioned, or of any other substance such as is usually developed by mining operations. No serious effort has ever been made to develop the land, or any part of it, as a mining claim. The decision of your office holding the land to be non-mineral is clearly correct.

That the land has little or no value for agricultural purposes has already been stated. In addition to this the testimony shows that McDonald, the homestead claimant, has never made a *bona fide* effort to cultivate or improve the tract as an agricultural claim. Nor has he resided thereon in good faith as a homestead claimant for the period required by the homestead law, if, indeed, he has ever so resided on the land. Good faith in the assertion of his claim is not established by the testimony, but it is established thereby that his purpose in entering and endeavoring to obtain title to the land has not been that of securing a home. Your office correctly held that his entry should be canceled.

You recommend that an examination be made of this cavern by the government with the view to a permanent reservation of the lands covering the same for the benefit of the public. The Department concurs in this recommendation. You are accordingly directed to cause such examination to be made by a competent agent or employe of your office, to be specially designated by you for the purpose, who will be required to make full report upon the character, extent, and contents

of the cavern, as far as the same has been explored, and upon the conditions, if any, which may indicate the desirability or expediency of further explorations being made to the end that the full extent of the cavern may be definitely ascertained. Upon receipt of such report you will transmit the same to this Department, accompanied by your further recommendations in the premises, in order that the attention of the Congress may be called thereto in the event it shall still be deemed advisable that a permanent reservation of the lands embracing the cavern be established.

In the mean time the lands here in question, together with the lands immediately surrounding the same, to the extent deemed advisable by your office, and so far as not already disposed of, will be reserved from settlement, and from disposition under any of the public land laws.

The decision of your office is affirmed.

SETTLERS ON CEDED INDIAN RESERVATIONS—ACT OF MAY 31, 1900.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, United States land offices, June 18, 1900.

Your attention is called to that portion of the act of May 31, 1900 (Public—No. 131), 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 fiscal year ending June thirtieth, nineteen hundred and one, and for other purposes," which reads as follows:

> That the settlers who purchased with the condition annexed of actual settlement on all ceded Indian reservations be, and they are hereby, granted an extension to July first, nineteen hundred and one, in which to make payments as now provided by law.

As proof and payment must be made at the same time, an extension of time for making payment involves a corresponding time within which to make final proof. This act does not, however, limit the time within which proof and payment are to be made in cases where, under former acts, such payments will not become due until after July 1, 1901.

This act extends the time for making final proof and payment of final commissions on the lands affected by the act of May 17, 1900 (Circular June 5, 1900), where such payment becomes due prior to July 1, 1901.

Approved:

E. A. HITCHCOCK,
Secretary.

REPAYMENT—LAND EMBRACED IN RAILROAD GRANT.

HENRY CANNON.

If the greater portion of a legal subdivision included in a desert-land entry, made prior to survey, is found, upon survey, to be within an alternate odd-numbered section which had passed to a railroad company under its grant before the entry was allowed, and had therefore ceased to be public land, said entry was "erroneously allowed and can not be confirmed," and the entryman is entitled to repayment.

Excepting instances of cancellation for conflict, the criterion by which to determine whether repayment is authorized by section two, act of June 16, 1880, is not, What was the reason for the cancellation of the entry? but, Was the entry erroneously allowed and not susceptible of confirmation?

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 3, 1900.* (C. J. G.)

The facts in this case are that under the act of March 3, 1877 (19 Stat., 377), and on August 29, 1882, Henry Cannon made desert-land entry for six hundred and forty acres of unsurveyed land in the Helena, Montana, land district. August 10, 1887, the entry was canceled, after due notice to Cannon, for the reason that he had failed to show compliance with the desert-land law. The land was surveyed in the field in 1892, and the survey approved March 23, 1893. It is claimed that it was developed and ascertained by this survey that the land embraced in the entry was largely within an alternate odd-numbered section within the place limits of the grant to the Northern Pacific Railroad Company, and that by reason of the definite location of the line of said railroad, which was effected prior to the allowance of said entry, the lands within said alternate odd-numbered section had passed to said railroad company and had ceased to be public lands subject to the operation of the desert-land law prior to the allowance of Cannon's entry. The files of your office show that said line of railroad was definitely located July 6, 1882, prior to the allowance of Cannon's entry; that the land in question is non-mineral and otherwise of the character granted to said company if within an odd-numbered section; and that prior to the cancellation of his entry, Cannon called the attention of your office to the fact that the land covered by his entry was within the exterior limits of the grant to said company, and because of its unsurveyed condition he could not then determine whether it was within an odd-numbered section or an even-numbered one, in consequence of which he asked instructions from your office respecting the further steps to be taken by him.

Cannon now alleges that in large measure he complied with the requirements of the desert-land law respecting the lands covered by his said entry, but that his failure to fully comply therewith and to offer proof thereof was due to the fact that, after his said communication of

1886 and before the cancellation of his entry, he became fully convinced that the right to the greater portion of the lands covered by his entry had, prior to the allowance thereof, passed to the railroad company under its grant, and that therefore he could not obtain title thereto under his entry.

Your office decision now under review denied Cannon's application for repayment for the reason that his entry was not canceled because of any conflict with the grant to the Northern Pacific Railroad Company, but was canceled solely for the reason that he had failed to show compliance with the desert-land law.

The papers submitted are not such as to enable the Department to determine whether the lands covered by Cannon's entry as subsequently surveyed embraced the greater portion of any legal subdivision (Paragraphs 4 and 9, Circular of June 27, 1887, 5 L. D., 708; General Land Office Circular of 1884, pp. 35–36) of an alternate odd-numbered section within the place limits of the grant to the Northern Pacific Railroad Company, the right to which, by reason of the prior definite location of the line of said railroad, had passed to said company before Cannon's entry was made; but, if so, his entry embraced lands which had theretofore ceased to be public lands, which were not subject to the operation of the desert-land law, which ought not to have been included in Cannon's entry, and to which he could not obtain title by compliance with the desert-land law. Allowance of such an entry was erroneous, and the entry was not susceptible of confirmation. In such an instance the entryman, upon complying with the terms of the second section of the act of June 16, 1880 (21 Stat., 287), is entitled to repayment, because his entry is one which "has been erroneously allowed and can not be confirmed." It is true that at the time of the allowance of Cannon's entry the odd- and even-numbered sections within the place limits of the portion of the railroad grant including the lands in question had not been identified by survey, and that it could not then be told whether the lands in question would upon their future survey fall within an odd-numbered section the right to which had passed to the railroad company, or within an even-numbered section which remained public land; but it was known that the line of railroad had been theretofore definitely located and that upon the identification of the odd-numbered sections by the public surveys the right of the railroad company to these specific sections would take effect as of the date of the grant so as to cut off all claims initiated after such definite location. (Wisconsin R. R. Co. *v.* Price County, 133 U. S., 496; St. Paul and Pacific R. R. Co. *v.* Northern Pacific R. R. Co., 139 U. S., 1; Deseret Salt Co. *v.* Tarpey, 142 U. S., 241.)

It is immaterial that your office rested the cancellation of Cannon's entry solely upon the fact that he had failed to show compliance with

the desert-land law. Excepting instances of cancellation for conflict, the criterion by which to determine whether repayment is authorized by section 2 of the act of June 16, 1880, is not what was the reason for the cancellation of the entry, but was the entry erroneously allowed and not susceptible of confirmation? (See William D. Wheeler, 30 L. D., 355.)

The papers are herewith returned, and if, upon further investigation, the land covered by Cannon's entry is found to have embraced the greater portion of a legal subdivison in an alternate odd-numbered section which had passed to the railroad company under its grant before said entry was allowed, as is claimed by Cannon, his application for repayment will be allowed.

DUFRENE ET AL. *v.* MACE'S HEIRS.

Motion for review of departmental decision of August 8, 1900, 30 L. D., 216, denied by Acting Secretary Ryan, December 3, 1900.

MINING CLAIM—APPLICATION FOR PATENT—PROTEST.

COLEMAN *v.* HOMESTAKE MINING CO. ET AL.

In a case arising on a protest, by an alleged co-owner, against an application for patent to a mining claim, where the matters of protest involve disputed questions under a local statute of limitations, and as to the effect of conveyances of interests in the claim applied for alleged to have been made without consideration, the proceedings upon the application for patent will be suspended and the parties given an opportunity to litigate and settle the matter by appropriate judicial proceedings in the courts of the vicinity.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 3, 1900.* (C. J. W.)

August 5, 1899, the Homestake Mining Company and George Banschback filed application for patent to the Galatea lode mining claim, survey No. 270, Rapid City, South Dakota. Notice of the application was duly published for sixty days from August 7, 1899, during which period no adverse claim was filed. October 19, 1899, entry was allowed upon the application.

January 3, 1900, Timothy D. Coleman filed a protest against the issuance of patent on said entry as it stands, claiming to be a co-owner, with the applicants for patent, of said claim. He presented an abstract of title in support of his contention, and asked that his name be inserted in the patent proceedings as a co-owner of the claim.

January 20, 1900, your office directed the local officers to advise the applicants that they would be allowed sixty days from notice within

which to show cause why Coleman's name should not be inserted in the register's final certificate of entry, and in the patent when issued, or to appeal.

April 20, 1900, the applicants answered said rule, denying the protestant's claim of co-ownership, and, June 6, 1900, protestant replied thereto.

July 11, 1900, your office considered the answer and reply, and held that protestant's name should be inserted in the final certificate and in the patent, when issued.

The applicants have appealed.

The location of the Galatea lode claim was made by H. H. Bole and John Cranston, June 1, 1878, and all parties to the controversy claim title through them.

Coleman alleges that he received a deed, June 21, 1878, executed by H. H. Bole, one of said locators, for an undivided six hundred and twenty-five feet of said Galatea lode, which was recorded on the same day, in the office of the register of deeds of Lawrence county, South Dakota; that soon thereafter the record was destroyed by fire; that he did not cause the deed to be re-recorded until November 9, 1899; that about the 14th day of October, 1878, said H. H. Bole executed and delivered to him another deed for an undivided 212½ feet of said Galatea lode, which deed was not recorded until the 9th day of November, 1899. He claims that he is yet the owner of the interests indicated by said deeds.

The applicants, in answer to the rule to show cause, and in answer to the contentions of Coleman, say that the deeds under which Coleman claims were without valuable consideration, and vested no beneficial interest in him; that they had no notice or knowledge of said deeds until since they made entry; that if Coleman ever had any interest under said deeds he abandoned it; and that his claim is long since barred by the statute of limitations applicable to such matters in the State where the land lies. They file an affidavit, sworn to by Bole, in which he admits the execution of the deeds in question, but says, in substance, that they were executed for the purpose of saving him (Bole) from the consequences of certain threatened litigation; that said deeds were without any valuable consideration, and were intended as trust deeds for his benefit, and conveyed no beneficial interest in said land to Coleman; that Coleman never was in possession or control of the land or any part of it, and never asserted any right thereto until recently. These averments are denied by Coleman. They also file the affidavits of five other parties. The protestant filed eight affidavits in support of his contentions. In many respects the affidavits are directly contradictory, and leave the disputed points in doubt and uncertainty.

The abstract of title which accompanies the application for patent is duly attested by the register of deeds of Lawrence county, South

Dakota, under date of August 7, 1899, and purports to show title to the entire Galatea claim in the applicants, and that at that time there were no instruments of record in said register's office affecting the title to said claim, other than such as appear in said abstract (except conflicting claims or locations, if any).

October 10, 1899, said register of deeds certified that no conveyances affecting the Galatea claim had been recorded or filed in his office since the date of his former certificate, and upon this state of the record the entry in question was allowed.

The abstract of title filed by Coleman is dated December 27, 1899. It is entitled "Continuation of Abstract of Title in Galatea Lode." It is signed by the same register of deeds, and shows the record of the two deeds from Bole to Coleman, as stated in the protest.

In the case of Thomas *et al. v.* Elling, decided by the Department December 13, 1897 (25 L. D., 495), it appeared that Elling made application for patent for the Spratt lode mining claim, situated in the State of Montana. Thomas *et al.* filed protest and alleged adverse, in which it was stated that they were—

> the owners of and entitled to the possession of an undivided one-half interest in and to the Spratt lode mining claim, described in said application.

Suit was brought on the alleged adverse, and was still pending in the court when the case of the application for patent reached the Department on appeal from the action of your office refusing to dismiss the alleged adverse claim on the motion of the applicants. In considering the appeal, after citing the case of Turner *v.* Sawyer (150 U. S., 578), in support of the proposition that the protest or so-called adverse claim was not such a one as could be recognized as an adverse claim necessitating the institution of proceedings in a court of competent jurisdiction, the Department held as follows:

> 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. 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.

The case of Malaby *v.* Rice *et al.*, decided by the Court of Appeals of Colorado, September 10, 1900 (62 Pac. Rep., 228), was a suit brought by Rice *et al.* against Malaby, for the purpose of having the defendant adjudged a trustee, and as holding in trust for the benefit of the plaintiffs certain undivided parts of the Mallet lode mining claim, situated in the Cripple Creek mining district, in said State. The defendant had filed an application for patent and had secured an entry of the claim in his own name. In disposing of the questions presented the court said:

> The chief contention of defendant in his argument is that the United States land department alone had jurisdiction of the controversy, and that a court of equity should not, if at all, assume jurisdiction until a patent for the claim had been issued by that department. This claim is based upon an alleged rule of the general land office to the effect that "one holding a present joint interest in a mineral location in an application for a patent, who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issue of patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal." Without attempting to discuss the extent, application, or object of this rule, it is obvious that it does not, and could not, apply to the matter in controversy. Here the question presented was one solely for judicial determination, namely, whether or not the plaintiffs herein were holding a "present joint interest" in the location. If such a protest had been made, and received by the land department, it would not have assumed judicial functions, and undertaken to decide the controverted point, but would have referred the parties to the courts for redress. The plaintiffs had a clear right to commence this proceeding in court, because it was the court alone that could determine the matter. The suit was not an attack, either collateral or otherwise, upon the proceedings in the land office. Neither was the suit instituted prematurely. The parties were not compelled to wait until a final patent had been issued.

While accepting the decision of the Court of Appeals of Colorado, excepting that portion thereof which seems to hold that this Department can not ascertain and determine for itself, in the absence of any judicial determination thereof, who among contending claimants under the same location is the owner of a mining claim for which a patent is being applied for, and therefore whether the applicant is entitled to a patent, it is deemed the better course for all concerned in a case like this, involving disputed claims under a local statute of limitations and questions of fraud due to a claimed secret understanding as to the effect of conveyances of undivided interests in a mining claim alleged to have been made without any consideration, that the parties be given an opportunity to litigate and settle the matter by appropriate judicial proceedings in the courts of the vicinity, and for that purpose further action in this matter by the land department will be suspended for a period of ninety days from notice hereof, which will forthwith be given by your office. In the event that suit shall be so instituted by either party and prosecuted with reasonable diligence to a final determination, the suspension of proceedings in the land department will be continued

until the controversy is finally determined in the courts. In the event that no suit is brought within the time named you will retransmit the papers to this Department for such action as may be deemed proper.

Your office decision is modified to conform hereto.

ACQUISITION OF TITLE TO COAL LANDS IN ALASKA—ACT OF JUNE 6, 1900.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, District of Alaska, June 27, 1900.

Your attention is directed to the following act of Congress, approved June 6, 1900, extending the coal land laws to the District of Alaska:

"An act to extend the coal land laws to the District of Alaska."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That so much of the public land laws of the United States are hereby extended to the district of Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes.

Under the coal land law, sections 2347 to 2352, inclusive, of the Revised Statutes, and the regulations thereunder issued July 31, 1882, coal land filings and entries must be *by legal subdivisions* as made by the regular United States survey.

Section 2401 of the Revised Statutes, as amended by act of August 20, 1894, is as follows:

SEC. 2401 (as amended by act of August 20, 1894). When the settlers in any township not mineral or reserved by the government, or persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof, or when the owners or grantees of public lands of the United States under any law thereof, desire a survey made of the same under the authority of the surveyor-general, and shall file an application therefor in writing and shall deposit in a proper United States depository to the credit of the United States a sum sufficient to pay for such survey, together with all expenditures incident thereto without cost or claim for indemnity on the United States, it shall be lawful for the surveyor-general, under such instructions as may be given him by the Commissioner of the General Land Office and in accordance with law, to survey such township or such public lands owned by said grantees of the government and make return thereof to the general and proper local land office: *Provided,* That no application shall be granted unless the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys.

Under said section 2401 as amended, persons and associations lawfully possessed of coal claims, upon unsurveyed lands, may have such claims surveyed, provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys em raced by existing standard lines or bases for township and subdivisional surveys.

Although the system of public land surveys was extended to the district of Alaska by a provision contained in the act of Congress approved March 3, 1899 (30 Stat., 1098), no township or subdivisional surveys have been made, nor have any standard lines or bases for township and subdivisional surveys been established, within the district; therefore, until the filing in your office of the official plat of survey of the township, no coal filing nor entry can be made.

Approved:

E. A. HITCHCOCK, *Secretary.*

STATE SELECTIONS—SELECTIONS IN EXCESS OF GRANT.

STATE OF WASHINGTON *v.* FROST.

A state will not be permitted to contest an entry, with a view to selection of the land involved under a grant to the State, where it appears that approved and pending unapproved selections on account of said grant equal or exceed the full amount granted.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 5, 1900.* (F. W. C.)

With your office letter of November 28, last, was transmitted the record in the matter of the contest of the State of Washington *v.* John B. Frost, involving lot 2, NW. ¼ of SE. ¼, NE. ¼ of SW. ¼, and SE. ¼ of NW. ¼, Sec. 34, T. 20 N., R. 8 E., W. M., Olympia land district, Washington, on appeal by John B. Frost from your office decision of July 20, last, wherein his homestead entry covering the above-described tract was held for cancellation on the contest of the State.

A plat of the survey of the township in question was filed in the local office May 4, 1899, and on that date John B. Frost made homestead entry of the land in question, alleging settlement on the land in April, 1897. On the 27th of May, 1899, the State of Washington filed a list of selections, including this tract, the selection being on account of the grant of 90,000 acres for agricultural college purposes, made by the sixteenth section of the act of February 22, 1889 (25 Stat., 678). Said list was rejected as to all the tracts in conflict with entries of record and accepted as to the tracts free from conflict.

On July 1, following, however, the State filed a contest against Frost's entry setting up its preferred right of selection granted by the act of March 3, 1893 (27 Stat., 593). Hearing was held under said contest, and upon the testimony adduced the local officers found in favor of the entryman, but upon appeal your office decision of July 20, last, found that Frost was not a *bona fide* settler on the land at the date of the filing of the plat of survey of the township in the local land office, and for that reason sustained the contest brought by the State. Frost has appealed to this Department.

Two days after transmitting Frost's appeal, your office, by letter of November 30, last, called attention to the fact that there had been already approved on account of this grant of 90,000 acres, 78,593.34 acres, and that at the date of your report the State had pending, unapproved, selections amounting to 12,317.89 acres. It had thus, with the approved and pending unapproved selections, exceeded the total amount of the grant 911.23 acres.

In view of this report the Department dismisses the contest of the State against the entry by Frost, without consideration of the record made thereon, for the reason that a contest by the State will not be permitted with a view of selection under a grant where it appears that approved and pending selections on account of that grant equal or exceed the full amount granted. See circular letter addressed to registers and receivers, approved November 10, 1900 (30 L. D., 344).

HOMESTEAD SETTLER—QUALIFICATION—OWNERSHIP OF LAND.

PATTERSON *v.* MILLWEE.

One who has by a valid contract sold and agreed to convey lands, the legal title to which remains in him only as security for the unpaid purchase money, is not, within the meaning of the act of May 2, 1890, seized in fee simple of such lands.

A formal application to enter, made within three months from settlement, is not required to protect such settlement as against the intervening application of another, if the settler files a protest against the acceptance of said application, alleging his own priority, within three months after the land becomes subject to entry.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 6, 1900.* (J. R. W.)

Frank Millwee appealed from your office decision of August 2, 1900, holding that Dora Patterson has superior right to enter the SE. ¼, Sec. 2, T. 10 N., R. 3 E., Oklahoma, Oklahoma.

May 24, 1895, said Millwee made application to enter said land, which was rejected by the local office. On his appeal that action was reversed by your office decision of November 15, 1895, and November 21, 1895, his application was placed of record.

Other applications for the same land were made, not necessary to be noticed, no rights being now asserted thereunder.

August 21, 1895, Dora Patterson filed uncorroborated affidavit of protest against allowance of any of the applications to enter the tract, alleging that she, on May 23, 1895—

entered the Kickapoo reservation east of said tract and immediately entered upon and selected said tract as a homestead; as an evidence of her settlement she immediately staked said claim and remained in possession of the same, living in a tent until a house was erected thereon, which house she has occupied as her home since

the completion of the same. That said selection and settlement was made in good faith for the purpose of a homestead and prior to the settlement or selection of said tract by any other person, or persons, and that she still claims said tract as her homestead.

December 20, 1895, defendant moved for dismissal of said protest, because not corroborated and because Patterson filed no application to enter the land within three months from date of settlement. The motion was overruled. Notice issued, September 10, 1896, for hearing. Hearing was had at the local office February 24, 1898, both parties appearing in person and with counsel. The local office rendered opinion, January 14, 1899, that the motion to dismiss the protest should have been sustained; that it could not be determined on the conflicting evidence which party was the prior settler; that Millwee was not disqualified by being the owner of more than one hundred and sixty acres of land at time of settlement; that Patterson failed to file homestead application within the required time, and failed to establish her charges; and recommended that defendant's entry be held intact.

Your office decision held that said Millwee, at the time of his settlement was disqualified to make said entry under the act of May 2, 1890 (26 Stat., 81), which provides:

> 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 the said Territory of Oklahoma.

Millwee's disqualification to make entry was not charged in the protest. It arose during the hearing, on his cross-examination. November 13, 1894, Millwee was the owner of one hundred and sixty acres and some lots in Texas, which for $1150 he sold to Lizzie Ham, and by a bond for title agreed to convey to her upon payment of $650 deferred purchase money, the last installment of which matured March 1, 1897. August 14, 1895, Millwee conveyed the lands so sold to his vendee, reserving a vendor's lien for the unpaid purchase money. The *bona fides* of this bond for title and subsequent deed is not questioned.

An estate in fee simple is the greatest estate or interest in lands which can be possessed, or can exist. An owner in fee simple is defined by Blackstone (2 Com., 104) thus:

> He that hath lands, tenements, or hereditaments, to hold to him and his heirs forever, generally, absolutely and simply without mentioning what heirs, but referring that to his own pleasure or to the disposition of the law.

The object of the homestead statutes is to enable those not being owners of land to acquire homes. The object of the provision in question is to prevent those owning lands from abusing the public bounty and absorbing the public lands to the exclusion of the intended objects of the bounty. By section 2289 of the Revised Statutes of the United States, no one who is the "proprietor" of more than one hun-

dred and sixty acres is permitted to acquire any right under the homestead law. The object of the law, and the terms used in other acts *in pari materia*, must be considered and such equitable construction given as will effectuate the intent of Congress and attain the object it had in view.

The quality of Millwee's estate in the land was changed by the contract of sale. He no longer held title "absolutely," or had any interest in the title except as security for unpaid purchase money. (Boon *v.* Chiles, 10 Pet., 225.) His purchaser could, on payment, compel conveyance of the title, and was the real owner subject to the lien for purchase money. Millwee could not dispose of the land in violation of the contract. He had parted with possession and was at the time of the opening and of his application to enter living on a rented Indian allotment. Having no land for a home, he was clearly of the class intended to be granted the benefit of the homestead law. In Gourley *v.* Countryman, 27 L. D., 702, it was held:

> At common law the owner in fee simple of land was such an owner as had full disposal of the title during his lifetime and upon whose death the absolute title descended to his heirs.

It was held in that case that (syllabus):

> A final certificate for one hundred and sixty acres invests the holder with a fee simple title thereto, and under the provisions of section 20 act of May 2, 1890, operated to disqalify him as a homestead claimant.

The case last cited presents the converse of the proposition involved in the case at bar. Gourley by the final certificate did not acquire a legal title. That remained in the government until issue of patent. If Gourley became owner in fee simple, and disqualified, by acquiring complete equitable title and power to dispose of such right (Myers *v.* Croft, 13 Wall., 291), then, in the case at bar, Millwee ceased to be owner in fee simple upon execution of the bond for title, which deprived him of absolute title, power of disposal, and right to possession of the land (Vardeman *v.* Lawson, 17 Tex., 10), even though legal title still remained in the vendor. It follows that one who has by a valid contract sold and agreed to convey lands, the legal title to which remains in him only as security for the unpaid purchase money, is not, within the meaning of the act of May 2, 1890, *supra*, seized in fee simple of such lands. Your office decision is therefore in that respect reversed.

It is insisted by Millwee that as Mrs. Patterson did not within three months from her settlement make formal application to enter the land, she has no longer any right that she can assert against him. Upon this question your office decision held:

> Patterson having asserted her rights by way of protest within three months from date of her alleged settlement, a formal application to enter the land in question was not required. Mills *v.* Daly, 17 L. D., 345.

This part of your office decision is affirmed.

This requires a decision of the case upon priority of settlement and *bona fides* of establishment and maintenance of residence. Upon the priority of settlement your office decision found:

> Patterson rode a race horse specially trained for the occasion. Defendant rode a white pony which was apparently above the average. The testimony as to which first actually reached the land is conflicting, but it would seem that Patterson rode the speedier animal. The testimony further tends to show that defendant either fell or was thrown from his pony a short distance from the tract.

Both parties started at a gun-fire. The courses traversed by the contesting parties, if both pursued direct lines, could not differ by more than ten rods in a race of a few rods over a mile. Their points of arrival were near the northeast and southeast corners of the same quarter section, hidden from each other by an intervening rise of ground. It is not clear that any witness saw both arrive or noted accurately their order of arrival. While there is evidence which "tends to show that defendant either fell or was thrown from his pony a short distance from the tract," yet the weight of that evidence is somewhat discounted by that of defendant and others that what witnesses refer to as a fall from his horse was in fact defendant's voluntary act in throwing himself from his horse while yet running and setting his settlement stake before arising from the ground. In the rush of the race five parties staked and made settlement at different points of the same quarter section, each claiming priority over all the others, these two still urging their contentions.

Under the conflicting evidence it is not possible, after most careful consideration of the evidence, to form a determination of the question of priority of settlement so clear and satisfactory that no doubt will linger in the mind as to the accuracy thereof, but considering all the circumstances, the testimony of the witnesses, their degree of apparent candor, and opportunity for observation, the evidence preponderates to show that Patterson first reached the land and signified her intent and act of settlement by staking the tract. She did some initial, formal, acts of improvement, and next day, or soon after, put up a tent and occupied it for about ten days, and with help of her father began construction of a dugout. It was not immediately completed owing to the dry and hard condition of the ground and her financial circumstances. Her stay was not continuous, she being absent engaged in collecting means to prosecute and improve her claim. By July 16th her dugout was completed and she moved into it. She did some plowing and planting, and, while absent during part of the time, kept her things on the claim and was herself frequently there till February, 1896, since which time no question is made of her actual residence and cultivation.

Millwee's acts of residence and improvement differed little from those of Patterson. He was engaged in care of his crops on the rented

allotment, which he harvested and in part carried to the claim and cribbed and stored there for use. He completed and occupied a dug-out on the claim the latter part of September. There is no reason in the record to question the good faith of settlement, residence or improvement of either of the parties. Patterson having the priority of settlement must be accorded the right to enter the tract. The conclusion reached by your office decision, awarding her the right of entry and holding Millwee's entry for cancellation, is therefore affirmed.

THE MARBURG LODE MINING CLAIM.

Motion for review of departmental decision of August 3, 1900, 30 L. D., 202, denied by Secretary Hitchcock, December 8, 1900.

SECOND HOMESTEAD ENTRIES—ACT OF JUNE 5, 1900.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, United States land offices, June 27, 1900.

Your attention is called to the provisions of sections 2 and 3 of the act of Congress entitled "An act for the relief of the Colorado Co-operative Colony; to permit second homesteads in certain cases, and for other purposes," approved June 5, 1900 (Public—No. 148), a copy of which sections is hereto attached.

Section 2 provides that any person who has theretofore made a homestead entry and commuted same under Sec. 2301 R. S., and the amendments thereto, shall be entitled to the benefits of the homestead laws, as though such former entry had not been made, but commutation under Sec. 2301 R. S., shall not be allowed of an entry made under this section.

Section 3 provides that any person who prior to the passage of this act, has made a homestead entry, but from any cause has lost or forfeited the same shall be entitled to the benefits of the homestead laws, as though such former entry had not been made. Therefore you will not hereafter reject a homestead application on the ground that the applicant can not take the prescribed oath that he has not previously made such an entry or because he has perfected title under Sec. 2301 R. S., to land entered under the homestead law; but he will be required to show by affidavit designating the entry formerly made by description of the land, number and date of entry, or other sufficient data, to enable me to identifiy the same on the records of this office, and that it was forfeited, or commuted as the case may be, prior to the passage of the act.

In any case where the former entry was made subsequent to the date of the act, the rule given on page 19, circular of July 11, 1899, remains unchanged. It will be observed that an entry made under section 2 can not be perfected by commutation under Sec. 2301 R. S. The fact that applicants have purchased, under the provisions of the act of March 2, 1889 (25 Stat., 871), lands patented to the Flathead Indians in Montana, shall not be held to have impaired or exhausted their homestead rights by or on account of any such purchase.

Approved:

E. A. HITCHCOCK,
Secretary.

Sec. 2. That any person who has heretofore made entry under the homestead laws and commuted same under provisions of section twenty-three hundred and one of the Revised Statutes of the United States and the amendments thereto shall be entitled to the benefits of the homestead laws, as though such former entry had not been made, except that commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this section of this act.

Sec. 3. That any person who prior to the passage of this act has made entry under the homestead laws, but from any cause has lost or forfeited the same shall be entitled to the benefits of the homestead laws as though such former entry had not been made: *Provided*, That persons who purchased land under and in accordance with the terms of an act entitled "An act to provide for the sale of lands patented to certain members of the Flathead band of Indians in the Territory of Montana, and for other purposes," approved March second, eighteen hundred and eighty-nine, shall not be held to have impaired or exhausted their homestead rights by or on account of any such purchase.

Approved June 5, 1900.

SHRIVES *v.* TACOMA LAND COMPANY.

Motion for review of departmental decision of September 15, 1900, 30 L. D., 252, denied by Secretary Hitchcock, December 19, 1900.

HOMESTEAD—QUALIFICATIONS—INDIAN ALLOTTEE—ACT OF JULY 4, 1884.

FRANK BERGERON.

The act of July 4, 1884, confers the benefits of the homestead law upon "Indians" as distinguished from "citizens of the United States," and an Indian who, by virtue of having been allotted a tract of land, is a citizen of the United States and no longer an Indian within the purview of said act, is not entitled to take a homestead by virtue of its provisions.

A member of the Citizen Band of Pottawatomie Indians, in Oklahoma, who has received an allotment of his proportionate share of the land held in common by his tribe, is not thereby disqualified from taking land for a homestead as a citizen of the United States.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, December 22, 1900. (W. C. P.)

In response to your request for an opinion upon the matter presented by the letter of the Commissioner of Indian Affairs, requesting to be advised whether Frank Bergeron, a member of the Citizen Band of Pottawatomie Indians, who has received an allotment under the act of February 8, 1887 (28 Stat., 388), of eighty acres of land within the reservation for said band, is now entitled to make homestead entry of an additional tract of eighty acres of the public lands of the United States, the following is respectfully submitted:

The Commissioner of Indian Affairs says:

> The office does not see why the said Indian should not be permitted to make such entry under the Indian homestead law approved July 4, 1884 (23 Stat., 96). He might be required, however, to state that he is not the owner of more than 160 acres of land and has not acquired more than 320 acres under all the land laws just as any other homestead entryman is required to state.

The act of 1884 provides:

> That such Indians as may now be located on public lands, or as may under the direction of the Secretary of the Interior, or otherwise, hereafter so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States: etc.

This act confers the benefits of the homestead law upon "Indians" as distinguished from "citizens of the United States." This party is now, by virtue of having been allotted a tract of land, a citizen of the United States and no longer an Indian within the purview of said act, and is therefore not entitled to take a homestead by virtue of its provisions.

If he may claim the benefits of the homestead law it is by virtue of his status as a citizen of the United States and not because he was at one time an Indian.

Section 2289, Revised Statutes, as amended by the act of March 3, 1891 (26 Stat., 1095), provides that:

> Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section, or a less quantity of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to this land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

By the sixth section of the act of February 8, 1887 (24 Stat., 388), it is declared that every Indian born within the territorial limits of the United States to whom an allotment shall have been made, who

has voluntarily taken up his residence separate and apart from any tribe of Indians and has adopted the habits of civilized life, is declared to be a citizen of the United States and entitled to all the rights, privileges and immunities of such citizens.

Every Indian who has received an allotment of land is a citizen of the United States and every citizen of the United States having the other prescribed qualifications is entitled to the benefits of the homestead law. One who becomes a citizen by virtue of having taken his share of the lands of his tribe, as an allotment, is as much entitled to the benefits of the homestead law as one who becomes a citizen by any other method.

In Turner *v.* Holliday (22 L. D., 215) it was held that Holliday who had received a patent to eighty acres of land as a member of the Chippewa tribe of Indians, and who had severed his tribal relations and adopted the habits and customs of civilized life, was a qualified homestead entryman.

The reservation for the Citizen Band of Pottawatomies in Oklahoma, was paid for out of money belonging to the Indians (Treaty of February 27, 1867, 15 Stat., 531), and the allotment thereof to the individual members of the band was simply a dividing up of their property. The allottees received nothing from the United States by reason of such allotment. It does not seem that the mere fact that this man received his proportionate share of the land held in common by his tribe should of itself disqualify him from taking land for a homestead as a citizen of the United States.

After a careful consideration of this matter I am of opinion, and so advise you, that, upon the facts submitted, Frank Bergeron is entitled to the benefits of the homestead law. In making an application for an entry he would, of course, be required to establish his qualifications in the same manner as any other applicant.

Approved:

THOS. RYAN,
Acting Secretary.

FOREST RESERVATION—ACT OF JUNE 4, 1897—AMENDATORY ACT OF JUNE 6, 1900.

ROSE GOLD MINING AND MILLING COMPANY.

By the act of June 4, 1897, it was the purpose of Congress to provide a complete scheme for the control and administration of forest reserves, and by the last proviso of the amendatory act of June 6, 1900, it was intended that forest reservations then existing or thereafter to be created in the State of California should be exempted from the operation of said amendatory act only, the act of 1897 remaining in force, unchanged, as to such reservations.

Acting Secretary Ryan to the Commissioner of the General Land Office, December 24, 1900.
(W. V. D.) (E. B., JR.)

I have considered your office letter and accompanying papers, asking authority to sell, under the provisions of the act of June 4, 1897 (30 Stat., 11, 35), and the regulations of April 4, 1900 (30 L. D., 23), thereunder, a quantity of dead and matured living timber in the San Bernardino forest reserve in California. Your office letter presents a question as to the effect of the last proviso in the amendatory act of June 6, 1900 (31 Stat., 661), upon the authority theretofore existing under the original act of June 4, 1897, to sell such timber in a forest reservation in the State of California.

The question presented arises upon the application of the Rose Gold Mining and Milling Company to purchase one thousand cords of wood, to be cut in part from dead and in part from matured living timber on unsurveyed lands approximately in sections 30 and 31, T. 2 N., R. 3 E., and sections 25 and 36, T. 2 N., R. 3 E., S. B. M., within the limits of said reserve. The application conforms to the requirements prescribed in paragraph 23 of the regulations of April 4, 1900.

The act of June 4, 1897, is an appropriation act, in the body of which are found extended provisions for the control and administration of forest reserves established and to be established under section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103). The San Bernardino reserve was established February 25, 1893 (27 Stat., 1068), under the said section. The introductory paragraph to these provisions is as follows:

> All public lands heretofore designated and reserved by the President of the United States under the provisions of the act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said act, shall be, as far as practicable, controlled and administered in accordance with the following provisions.

Then follow provisions declaring the purposes for which these reservations are established; providing for the protection, under the supervision of the Secretary of the Interior, of the forests therein; authorizing the sale of "so much of the dead, matured, or large growth of trees found upon such reservations as may be compatible with the utilization of the forests thereon;" prescribing the time and manner of giving notice of intended sales of such timber; regulating the payment and disposition of the purchase price, and providing for suitable supervision of the cutting and removal of the timber; authorizing the Secretary of the Interior to permit, under regulations to be prescribed by him, a limited "use of timber and stone found upon such reservations free of charge by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes;" disclaiming an intent to prohibit the

egress or ingress of actual settlers residing within the boundaries of such reservations or to prohibit any person from entering upon such reservations for any proper and lawful purpose, including that of prospecting, locating, and developing the mineral resources thereof, subject to compliance with the rules and regulations covering such forest reservations; permitting the construction upon the reservations, by such settlers, of necessary wagon roads and other improvements, under rules and regulations to be prescribed by the Secretary of the Interior; authorizing the surrender or relinquishment by the settler or owner of any tract covered by an unperfected bona fide claim or by a patent, within the limits of such a reservation, and the selection in lieu thereof of other public land of equal area; authorizing the maintenance of schools and churches within the reservations and the occupation, for those purposes, of limited areas therein by settlers residing within the limits or in the vicinity thereof; providing that the jurisdiction, both civil and criminal, of the respective States over persons within such reservations, and their rights and duties as citizens thereof, shall not be affected or changed by reason of the establishment and existence of the reservations, except so far as the punishment of offences against the United States therein is concerned; authorizing the use, for domestic, mining, milling, or irrigation purposes, under State laws or the laws of the United States and the rules and regulations established thereunder, of all waters on such reservations; providing for the restoration to the public domain of any public lands embraced within such reservations and found better adapted for mining or agricultural purposes than for forest usage; declaring that any mineral lands in any such reservations, which have been or may be shown to be such and subject to entry under existing mining laws of the United States and the rules and regulations applicable thereto, shall continue to be subject to mineral location and entry; and, finally, authorizing the President to modify any executive order establishing a forest reserve and thereby to reduce the area or change the boundaries thereof, or to altogether vacate any order creating such a reserve.

This recital of the provisions of the act of June 4, 1897, shows that it was the purpose of Congress to thereby provide a complete scheme for the control and administration of these forest reserves. Without this, adequate protection could not be given to the forests in such reservations, the purposes for which the reservations are established could not be attained, and the establishment of the reservations would operate with unnecessary severity upon settlers residing therein and others holding bona fide claims or owning patented lands therein, by placing them in a state of greater or less isolation from market and business centers and from church, school, and social advantages, impairing the value of their property for residence and other purposes, and would also unnecessarily retard the development of the country adjacent or

tributary to the reservations by locking up and placing beyond lawful reach and utilization the timber, stone, and mineral resources and waters found within and on these reservations.

It would be extremely unusual if, in the practical operation of legislation upon a subject as new as that of forest reserves, experience did not demonstrate the necessity of changes in the law in order to make it properly effective. It was found, accordingly, among other things, in the administration of the law, that the provision authorizing the sale and removal of the dead, matured, and large growth of trees, "for the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations," did not accomplish the purpose intended, by reason of the delay and expense attending its operation, due largely to the long and costly notice required to be given by publication before each proposed sale of timber, whether the quantity to be sold was large or small. To remedy this defect a bill to amend the provision in question, which had received the careful consideration and approval of your office and the Department, was, on February 1, 1900, reported with approval to the House from its Committee on the Public Lands. After being amended by adding thereto the last proviso mentioned in your office letter, the bill became a law, June 6, 1900. It reads:

That chapter two of the laws of the first session of the Fifty-fifth Congress, being an Act entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes," approved June fourth, eighteen hundred and ninety-seven, be, and the same is hereby, amended by striking out the following words where the same appear in said Act, commencing with the word "Before," in line thirty-six, on page thirty-five of volume thirty of the United States Statutes at Large, and ending with the word "exists," in the forty-third line of said volume and page, as follows: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation published in the county in which the timber is situated, if any is therein published, and if not then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capital of the State or Territory where such reservation exists," and insert in lieu thereof the following: "Before such sale shall take place notice thereof shall be given by the Commissioner of the General Land Office, for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists: *Provided, however,* That in cases of unusual emergency the Secretary of the Interior may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sale at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale: *Provided further,* That he may, in his discretion, sell without advertisement, in quantities to suit applicants, at a fair appraisement, timber and cord wood not exceeding in value one hundred dollars stumpage: *And provided further,* That in cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the

Secretary of the Interior, at not less than the appraised valuation, in quantities to suit purchasers: *And provided further*, That the provisions of this Act shall not apply to existing forest reservations in the State of California, or to reservations that may be hereafter created within said State."

The question presented is, whether the last proviso of the foregoing amendatory act, which was attached in the House after the bill had been put upon its passage there, relates to that act only, or whether, as a part of such act, it is to be read into and form thereafter an operative part of the act of June 4, 1897. In the former case, forest reservations then existing or thereafter to be created in the State of California, only, are exempted from the operation of the amendatory act, the act of 1897 remaining in force unchanged as to such reservations; in the latter, by less than three lines at the close of an amendment to improve the methods of selling dead or matured living timber on forest reservations, the whole of the elaborate and comprehensive scheme of the act of 1897, as hereinbefore briefly set out, for the administration and control of forest reservations, is rendered inoperative and, in effect, repealed as to that State, thus cutting off the large areas of forest lands in reservations there from needful provision for their protection from fires and destructive trespass and depredation, and excluding the people residing thereon or adjacent thereto, owners of lands and holders of bona fide claims, miners, prospectors, and others, from all the liberal and beneficent provisions above enumerated which that act makes for their welfare. It is believed that the former, rather than the latter, construction accords with and is in fact declarative of the intent of Congress in the premises. The latter construction would discriminate very unjustly to the disadvantage of persons situated as above with respect to forest reservations in the State of California, and to the advantage of others similarly situated with respect to forest reservations in the other States and Territories.

A slight change in the punctuation of the act of 1900, by removing the quotation marks from the end of the last proviso thereto and placing them after the word "purchasers," immediately preceding that proviso, thus separating and eliminating such proviso from the part of the amendatory act to be inserted in the act of 1897, in lieu of what is directed to be stricken therefrom, will, it is believed, make both acts read as Congress intended them to read. By this change in punctuation the said last proviso will stand simply as a legislative direction that the change made in the act of 1897 by the act of 1900, relative to the sale of timber, shall not apply to existing forest reservations in the State of California or to reservations that may be hereafter created within said State," and this, the Department is well convinced, is its true purpose and intent. Such change of punctuation rests upon ample authority. It is well settled that for the purpose of arriving at

the true meaning of a statute, courts read the same with such stops or marks of punctuation as are manifestly required. United States *v.* Isham (17 Wall., 496, 502); Hammock *v.* Loan and Trust Company (105 U. S., 77, 84); United States *v.* Lacher (134 U. S., 624, 628); and United States *v.* Oregon and California Railroad (164 U. S., 526, 541).

Again, the construction herein arrived at seems to the Department to be the one consistent with sound reason. It does not seem reasonable that Congress should, by the language used in the said last proviso, have intended to withdraw from forest reservations then existing or thereafter to be established in the State of California, that executive administration and control which are essential to the due protection and preservation of the timber thereon and to harshly discriminate, as already pointed out, against all persons in that State whose interests are in any extent dependent upon the provisions of the act of 1897 as originally enacted. The most that seems to have been intended by said proviso was to except forest reservations in that State, by reason of conditions which, it was urged, were different from those existing in other States, from the new provisions of the act of 1900 as to the manner of making sales of timber on such reservations.

You are therefore advised that the sale of timber to the Rose Gold Mining and Milling Company may be made as applied for under the act of June 4, 1897, as originally enacted, and the said regulations of April 4, 1900, thereunder. The application of the said company and the papers which accompanied the same are herewith returned.

OLSON *v.* TRAVER ET AL.

Departmental decisions of March 10 and May 7, 1898, 26 L. D., 350 and 628, recalled and set aside by Acting Secretary Ryan, December 24, 1900, on the authority of the decisions of the Department in the cases of Burton *et al. v.* Dockendorf, 29 L. D., 479, and Tow *v.* Manley, 29 L. D., 504, and directions given that Traver's homestead entry be canceled and the application of Olson for a confirmatory patent be granted.

RIGHT OF WAY—ACT OF MAY 14, 1896.

NEW BEAR VALLEY IRRIGATION CO. *v.* ROBERTS, TRUSTEE.

On application for right of way for conduits, canals, and pipe lines, under the act of May 14, 1896, 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 the applicant has shown such *prima facie* right to the water as will entitle him to utilize, for the purposes contemplated, the grant for which he has applied.

An application for right of way for conduits, canals, and pipe lines, under the act of May 14, 1896, to be used for the purpose of generating, manufacturing, 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 purposes, and returned to its natural channel, without impairment to the rights of the prior appropriator or material abridgment of the uses to which it had been applied under such prior appropriation.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *December 24, 1900.* (J. H. F.)

This case is before the Department on appeal by the New Bear Valley Irrigation Company from your office decision of May 22, 1900, dismissing its protest against the granting of the application of E. D. Roberts, trustee, under the act of May 14, 1896 (29 Stat., 120), for right of way within the San Bernardino forest reserve for certain conduits, canals, and pipe lines, and for the use of 19.75 acres of ground in the E. ½ of the SE. ¼ of the SE. ¼ of Sec. 18, T. 1 N., R. 1 W., Los Angeles, California, land district, for the purpose of generating, manufacturing, and distributing electric power.

On December 3, 1897, Roberts, as trustee, filed an application for the proposed right of way and power-house site, accompanied by maps and field notes of the survey thereof and abstract of title to water rights to be used in connection therewith, and on June 22, 1898, an amended map was filed. These show the plan of the plant, and that the applicant proposes to divert the ordinary summer flow of water from the Santa Anna river, at a point on said stream in section 14 of said township, and convey it thence through an open cement ditch and tunnels to a point on Deer creek, a tributary of said river, where the water of said creek will also be diverted and the combined waters of said river and creek conveyed thence to a point in section 9 of said township where said waters will be united with the water from Bear creek, another tributary of Santa Anna river, diverted therefrom at a point on said stream in section 28 of said township and conveyed to the point of intersection in section 9 through cement ditches, pipe lines, and tunnels, and thence the combined waters taken from said streams are to be conveyed through cement ditch and pipe line to the power house site in section 18, where the same are to be utilized for electrical purposes, and returned to Bear creek near its junction with the Santa Anna river about four miles below the point of diversion on the last mentioned stream.

The New Bear Valley Irrigation Company, on April 19, 1898, filed a protest against the granting of Roberts's application, alleging that the protestant company, through valid appropriations made in accordance with the laws of the State of California, had acquired prior vested rights in and to the waters of the Santa Anna river and its tributaries; that said waters then were, and for many years have been, used by the

inhabitants of Highlands, Redlands, Crafton, Allessandro, and Perris, for irrigation and domestic purposes; that protestant had a valid location, made in 1889, for the building of a reservoir and the storage of all the surplus water flowing in the Santa Anna river, upon which $25,000 had been expended, and that Roberts's proposed diversion of the waters of said stream would materially diminish and curtail the amount of water to which protestant and the inhabitants of the towns hereinbefore mentioned were entitled for irrigation and domestic purposes, and would render worthless protestant's storage reservoir in process of construction.

Protestant having failed to specifically allege that its reservoir site was situated on that portion of the Santa Anna river from which applicant proposed to divert the water, your office, by decision of September 23, 1898, assumed that it was located below the point where the water was to be returned to its natural channel, and Roberts having shown a *prima facie* right to the use of sufficient water to utilize the grant applied for and that he proposed to return it unpolluted to the main stream without material loss in quantity, the protest was dismissed.

From the action of your office protestant appealed, and in further support of its protest subsequently filed a map and affidavits showing that its reservoir site is situated on the Santa Anna river about one mile below the point of applicant's proposed diversion of the water of said stream and about three miles above the point where the water is to be returned to the main channel. Upon consideration of the appeal, the Department, by decision of January 13, 1899 (not reported), held that the protest had been properly dismissed upon the record as presented before your office, but further held that the affidavits subsequently filed presented the issue directly as to whether the applicant could use the water for power plant purposes without seriously impairing the vested rights of others, and remanded the case to your office with directions to re-examine the same in the light of the additional affidavits and any filed in response thereto. The protestant having also alleged that the proposed diversion of water from the Santa Anna river would result in the destruction of the growing timber on the forest reserve, your office was further directed to make an investigation as to the probable effect of the granting of the application in that regard.

In pursuance of the departmental decision hereinbefore mentioned both parties filed additional affidavits, and upon consideration thereof, by your office decision of May 22, 1900, from which the pending appeal was taken, the protest was again dismissed, it being stated that the matter of alleged resulting injury to growing timber on the forest reserve would be further investigated in the interests of the United States before final action on Roberts's application.

The contention relied upon by protestant in its appeal is that, in virtue of prior appropriation of the waters of the Santa Anna river by persons, associations, and companies from whom the protestant company subsequently derived title by transfer through mesne conveyances, it had acquired a prior valid right to use all the waters flowing in said river and its tributaries at the points of Roberts's proposed diversion thereof, and that as a necessary incident to such use it had the right to store the water of said river, including that part thereof which Roberts proposed to divert, in the reservoir hereinbefore mentioned, when built, for purposes of distribution, and that for such reason Roberts has not shown a *prima facie* right to the use of water necessary to utilize the proposed electric plant, and is not, therefore, entitled to the grant for which he has applied.

The affidavits and other evidence of water rights filed on behalf of protestant show that prior to 1883 the waters of the Santa Anna river were used and controlled for irrigation purposes and domestic use by various individuals, and that these individual users of the water subsequently organized themselves into two associations known as the North Fork Water Company and the South Fork Ditch Association; that in 1884 a corporation known as the Bear Valley Land and Water Company built what is known as the Bear Valley dam, situated on Bear creek above the point where Roberts proposes to divert the waters of said creek; that subsequently the two associations above mentioned transferred all their water rights to the Bear Valley Land and Water Company, to the rights of which latter company the protestant company has succeeded by mesne conveyances; and that the combined waters flowing down Bear creek from the Bear Valley dam and flowing down the Santa Anna river have been utilized for many years by protestant and its grantors for irrigation and domestic purposes in the vicinity of Redlands and the other towns hereinbefore mentioned, which, however, are situated far below the site of the power house where Roberts proposes to return the diverted waters to their natural channel.

It is further shown that protestant's reservoir site, on the Santa Anna river, was originally located by one Brown in April, 1888, who claimed the right to construct at that point a dam one hundred and fifty feet high, and to retain above it enough water to fill it every winter to the extent of nine thousand inches, measured under a four-inch pressure, when it would otherwise run to waste, and to convey it down the river bed to the mouth of the canon, and thence, by pipes, flumes, or ditches, to the vicinity of Redlands, where the water was to be used for irrigation and domestic purposes; that Brown's rights under said location were subsequently transferred to the Bear Valley Land and Water Company and inured to protestant under the conveyances made to it by said company; that in pursuance of the location

made by Brown a tunnel, about eight hundred feet long, was constructed in 1889 to 1890, through a point projecting into the Santa Anna river, by which to convey the water from said reservoir, when built, to the bed of the river below, and that ever since the completion of said tunnel further work upon the proposed reservoir site has been practically discontinued, although it is claimed by protestant that some work has been done thereon each year, but the extent or character thereof is not shown; and in March, 1898, one Hubbard, by notice duly posted and filed, made a new location of a reservoir site, without respect to the previous location made by Brown, in which he claimed the right to build a dam at or near the same place designated in Brown's location, and convey the waters impounded therein down the Santa Anna river to the head of the Greenspot pipe line and the North Fork and Redlands canals, and thence through said pipe line and canals to Crafton, Redlands, Highlands, and vicinity, where the same was to be used for manufacturing, water power, irrigation, and domestic purposes.

The evidence of water rights filed by Roberts shows that he bases his claim thereto under locations made in 1897 on the waters of Santa Anna river and its tributaries, hereinbefore mentioned, at the various points of proposed diversion, and it is further shown on behalf of the applicant that the point where the waters of the Santa Anna river are now diverted by the protestant company, for use in Redlands and vicinity, and the mouth of the Santa Anna canon, the point of proposed diversion of the waters of protestant's reservoir when completed, are several miles below the point where Roberts proposes to return the waters of said stream and its tributaries to their natural channel, unpolluted and without material diminution in quantity; that the waters of the Santa Anna river and its tributaries aforesaid are now in actual use by the Southern California Power Company in the operation of its electric plant, without complaint by or injury to protestant; and that the point of diversion thereof by said company is below the point of Roberts's proposed return and above the point of diversion by protestant.

The question of the ultimate rights of the parties hereto in and to the waters of said streams, under their respective notices of appropriation, is solely within the jurisdiction of the State courts, and in pursuance of the policy announced in the case of Chicala Water Company *v.* Lytle Creek Light and Power Company (26 L. D., 520), the Department will not attempt to interfere with the control of said waters or determine the rights of the conflicting claimants thereto, except in so far as may be necessary to ascertain whether the applicant has shown such *prima facie* right to the use thereof as will enable him to utilize, for the purposes contemplated, the grant for which he has applied.

It is contended by applicant that whatever water rights were acquired under the notice of appropriation filed by Brown in 1888 have lapsed

and are now of no legal effect by reason of abandonment and discontinuance of work upon the reservoir site since the completion of the tunnel in 1890, and that in any event the proposed diversion by Roberts of the ordinary summer flow of water from Santa Anna river would not interfere with the proper use by protestant of its reservoir, when completed, as it is only intended to use such reservoir for the purpose of storing therein the augmented flow of said stream occasioned by the winter season and which would otherwise go to waste. It must be noted, however, that protestant's claim of right to impound the waters of said river embraces not only the storm waters of winter but the natural flow as well, and such claim is based not alone upon the notice of location filed by Brown in 1888 but also upon the original prior appropriation of the waters of said river by protestant's grantors and predecessors in interest.

In considering the case of Chicala Water Company *v.* Lytle Creek Light and Power Company, *supra*, it was said:

> 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.

And it was further therein stated that this principle would 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, *supra*.

The question for determination, therefore, in the case at bar is whether Roberts's proposed diversion and use of the waters of said river and its tributaries will materially abridge or impair the uses to which they have been appropriated by protestant.

The only uses to which the record shows protestant has appropriated the waters of Santa Anna river and its tributaries, and the only uses to which it is intended to subject the water proposed to be stored in its reservoir when completed, are those incident to and necessary for irrigation and domestic purposes in the vicinity of Redlands and other towns situated many miles below where Roberts proposes to return the diverted waters to their natural channel. No water of consequence enters the Santa Anna river between the points of diversion and return except that from Deer creek, which will be diverted by applicant's proposed plant before it reaches the main stream, and by conveying the diverted waters through pipes and cement ditches it is satisfactorily shown that protestant will suffer no loss in either the volume or quality of the water now used by it.

It is claimed by protestant, however, that there is a growing necessity for development of more water for the users under its system; that there are times during the summer when, owing to showers in

the valley below and the supply from the Bear Valley dam, the natural flow of the Santa Anna river is not needed for immediate irrigation and could be stored in the reservoir, when completed, for subsequent distribution, and that if Roberts is permitted to divert the same protestant will thereby be deprived of it for irrigation purposes. This claim appears to be based upon a future contingency rather than upon a present existing necessity, for it is shown that the Southern California Power Company is now, and for some time has been, actually diverting these same waters below the place of Roberts's proposed return, for the purpose of operating an extensive electrical plant, the right of way for which was granted under the act of 1896, *supra*, and protestant has failed to show that it has in any manner been prejudiced by the results of such actual diversion.

The water used by the Southern California Company is diverted in pursuance of a location made in 1896, at the junction of the Santa Anna river and Bear creek, wherein the water of said streams is claimed by said company to the extent of 9,000 inches, measured under a four-inch pressure. The notice of appropriation under which Roberts claims and the capacity of his proposed pipe line show that he only intends to use the waters of the Santa Anna river at the point of diversion to the extent of 5,000 inches. The record shows that the minimum flow of the Santa Anna river at that point is not less than fourteen cubic feet per second, and that by reason of the proximity of the mountains the average and maximum flow are much greater.

In the light of these considerations it is apparent that the proposed diversion by Roberts of the waters of the Santa Anna river will not materially abridge the legitimate and necessary use by protestant of its reservoir, when completed, for storage purposes, and that the diverted waters can be utilized by Roberts in the operation of the proposed plant and returned to their natural channel without impairment of the uses to which they have been appropriated by the protestant company.

The protest was therefore properly dismissed, and the decision of your office is accordingly affirmed.

RAILROAD LANDS—SECTION 5, ACT OF MARCH 3, 1887.

AMERICUS *v.* HALL (ON REVIEW).

The right of purchase accorded by section 5 of the act of March 3, 1887, is not lost by a surrender to the railroad company of the contract of purchase, for the purpose of securing a return of the purchase money, where there was in fact no assignment, and no intention to make an assignment, to the company, of the purchaser's interest in the land, and where he continues to assert his claim thereto.

The former departmental decision herein of April 19, 1900, 29 L. D., 677, recalled and vacated.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *December 31, 1900.* (J. R. W.)

This case is before the Department upon a motion, filed by John Hall, for review of departmental decision of April 19, 1900 (29 L. D., 677), whereby Hall's application, under section 5 of the act of March 3, 1887 (24 Stat., 556), to purchase the NE. ¼ of Sec. 9, T. 4 N., R. 17 W., Los Angeles, California, was denied, and the homestead entry of Virgil Americus therefor was sustained. The motion for review and briefs in support thereof have been served on the opposite party, who has been duly heard in opposition thereto.

The land in controversy is within the overlapping limits of the grant by act of March 3, 1871 (16 Stat., 573), to the Southern Pacific Railroad Company, branch line, and of the grant by act of July 27, 1866 (14 Stat., 592), to the Atlantic and Pacific Railroad Company, forfeited to the United States by the act of July 6, 1886 (24 Stat., 123). Title was quieted in the United States October 16, 1897, at suit of the government against the Southern Pacific Railroad Company (168 U. S., 1), and under instructions of April 13, 1898 (26 L. D., 697), the land was restored to entry September 6, 1898.

On that day Americus applied to make homestead entry of the land, alleging settlement and continuous residence thereon since January 21, 1893. The same day John Hall filed his application to purchase the land under section 5 of the act of March 31, 1887. October 14, 1898, Americus was allowed to make entry. February 16, 1899, pursuant to due notice, proof was submitted in support of Hall's application. Americus protested, on the ground that Hall had not purchased the land in good faith and that he (Americus) had an existing homestead entry thereon. A hearing was had, in which both parties fully participated. No serious dispute arose upon the facts.

The Southern Pacific Railroad Company sold the land to claimant's wife, Alice A. Hall, March 28, 1890, he paying for her $204.80 of his own funds. The contract of sale provided that upon failure of the company to perfect title to the land so as to convey it to Mrs. Hall, it would refund the $204.80, without interest. April, 1898, Hall and his wife were divorced. July 29, 1898, she assigned to him her contract, and August 22, 1898, Hall made to the company the following instrument:

> I, John Hall, to whom the within contract No. 10264 is sold, assigned and transferred, for and in consideration of the sum of two hundred and four 80/100, $204.80, to me in hand paid, do hereby sell, assign and transfer all my right, title, interest and claim in and to the within contract, unto the Southern Pacific Railroad Company, its successors and assigns forever. Witness . . . .

It is shown by the testimony that this instrument was not made with intent to abandon the right to purchase from the government under the act of 1887, *supra*, but to obtain repayment of the money from the

company for use in purchase of the land from the government, Hall having no other means wherewith to do so, and acting under advice of counsel that he could do so as well as though he still had the contract in possession.

Americus settled on the land January 21, 1893, purchasing at that time a house thereon, from one Rehart, for $20. He knew, or had heard at the time of his settlement, that Hall had purchased the land from the railroad company.

Upon these facts the Department, in its decision herein, April 19, 1900, *supra*, held that—

> The statute contemplates that the party applying to purchase the land from the government, shall be the owner, by purchase from the railroad company, or by assignment, or inheritance from one who purchased from the railroad company, of some interest in the land, and it cannot be said that Hall, after executing said assignment and surrendering possession of said contract to the railroad company, was the owner of any interest either in the land or in said contract.

This motion is made to correct alleged error in this ruling.

Said act provides:

> SEC. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

At the time of Mrs. Hall's purchase the land was not in occupation of Americus or of any adverse claimant under the settlement laws of the United States, nor was it settled upon by him after December 1, 1882, and prior to March 3, 1887, the date of passage of the act. His settlement did not defeat her right to purchase under the act. (Miller *v.* Tacoma Land Company, 29 L. D., 633, 634.) The land is of the character described in said section, and was sold by the railroad company to Mrs. Hall, a citizen of the United States, who purchased in good faith. John Hall, to whom she assigned, is a citizen of the United States and entitled to the benefits of the act unless debarred for some reason arising subsequent to her assignment. The case is within every

provision of the statute and is outside of every exception of it. Nothing, unless it be his surrender of the contract to the company, execution of the instrument above set out, and acceptance of the repaid purchase money for use in payment to the government of the purchase price for the land, could bar him of the benefits of the statute. Upon a further consideration of the question it is believed that the decision under review is erroneous, and that such facts would not have the effect to exclude him from the right to perfect his title under the statute.

That the statute is remedial has been recognized from its first construction by the Attorney General (6 L. D., 272, 275). It is an established canon of statutory construction that a remedial statute shall be so construed as most effectively to meet the beneficial end in view, suppress the mischief, and advance and prevent failure of the remedy. (Potter's Dwarris on Statutes, 231; 1 Blackstone's Com., 867; Sedgwick on Construction, 308, 316.) The evil aimed at and mischief to be remedied are stated by the Attorney-General (6 L. D., 275) to be—

> The wrong done the settler, who in good faith shall have purchased lands of the railroad company, to which the company, by the adjustment, is shown to have no legal right; . . . . the hardship he may be subjected to by the loss of his land, improvements and labor . . . . The whole scope of the law, from the second to the sixth section inclusive, is remedial. Its intent is to relieve from loss settlers and *bona fide* purchasers, who, through the erroneous or wrongful disposition of the lands in the grants by the officers of the government, or by the railroads, have lost their rights, or acquired equities which in justice should be recognized. . . . By the words of the act, the only requisite established, to entitle those wronged to its benefit, is, that they shall be citizens of the United States or shall have declared their intention to become citizens; that it shall have been sold to them by a railroad company as a part of its grant; that the land shall not have been conveyed to, or for the use of, the railroad company; that the lands shall be of the numbered sections prescribed in the grant and coterminous with the constructed part of the road; and that the purchaser shall have bought in good faith . . . . that it was sold under a claim of the grant to another in good faith is the ground of the equity.

See also Samuel L. Campbell (12 L. D., 247, 249); Sethman *v.* Clise (17 L. D., 307, 311); Grandin *et al. v.* La Bar (23 L. D., 301, 302).

To one who has purchased lands, especially if he has improved or made them his home, return of his purchase money is no adequate remedy for the loss occasioned by failure of title. Improvements can not be removed. His disappointment at loss of the title and land itself—that *pretium affectionis* which is the very foundation of the equitable doctrine of specific performance—remains unremedied. Equity recognizes that damages from denial of the title of lands purchased is often not capable of measure, and therefore gives the remedy of a decree for performance of contracts of purchase.

The statute is framed to extend equitable relief to a purchaser who has been led into purchase of an invalid claim, or color, of title, believing he would thereby acquire title. United States *v.* Winona,

etc., Railroad Company (165 U. S., 463, 481). Surrender of the contract and repayment of the money paid to the company does not, of itself, change the purchaser's relation to the land. When it was finally decided that the railroad company could not obtain patent for the land, its performance of the contract to convey title was thereby made impossible. The contract to convey then absolutely terminated. It thereafter merely evidenced a claim of the purchaser against the company for a sum of money as damages. Hall's means of acquiring title to the land were no longer dependent upon enforcement of any provisions of the contract, but arose from the statute and the fact of a prior ineffectual attempt to obtain title by a contract of *bona fide* purchase. When he surrendered the contract he thereby merely settled, satisfied, and extinguished the company's obligation to pay money damages.

The instrument he executed was not, in effect, an assignment of the contract or transfer of his interest in the land. The right to purchase which Hall then had did not pass by that instrument, because the railroad company was not competent to take it. It could thereby get no right to purchase under the act in question. That the company did not, in fact, regard itself as an assignee of the contract is clear from the fact that it at once endorsed the contract as canceled. The company was merely settling its liability for the money received upon its ineffectual contract. Hall did not intend to assign his right of purchase, but on the contrary settled his claim against the company for the money paid with the view therewith to exercise his right of purchase.

Had he retained the contract and made his purchase by use of other money, he would, without question, be entitled to perfect his title under the statute which he invokes. Yet he could next day assert his claim against the company for failure of its title, and could recover the money paid to it and any other damages recognized by law, not excluded by terms of the contract. Title to land and damages for failure of a contract to convey are distinct and unlike things. No one could argue that his title to the land would be impaired by demand and recovery of damages from the company after establishing his status and claim as a *bona fide* purchaser, and obtaining title from the government. If his status would not be impaired by subsequent demand and recovery of damages from the company, clearly a prior amicable adjustment and acceptance of the sum due as damages, if he did nothing more, would not exclude him from the benefits of the statute.

He did nothing more. That was the only effect of his act and of the instrument he executed. The transaction was honest, open, and legal. It was not a sale or transfer of his interest in the land. Of his status as a purchaser, the contract was as much evidence after its surrender to the company as when in his possession. If his purchase was in fact

a *bona fide* one, and upon adjustment and settlement of his claim against the company he surrenders the contract to the company merely as evidence of such adjustment and settlement, he does not thereby waive, surrender, or lose the right given him as such purchaser, by the statute under consideration. The right to purchase arises by force of the statute in consequence of an ineffectual purchase made in good faith, and is not dependent upon the continued existence of the particular form of evidence of that purchase in form of the ineffectual contract.

To hold that acceptance of return of his purchase money, or payment of damages, bars the purchase right, is to construe the statute as one for the protection of the railroad company against claims for damages arising by breach of its contracts. Obviously that was not its intention. As the applicant had not severed his relation to the land by abandonment of it, or by conveyance of his right to and interest in the land, his right to purchase under the act in question was not affected or impaired by acceptance of a return of the purchase money paid to the company.

The former departmental decision fails to distinguish between the rights arising on the railroad company's defaulted contract of sale, which sound in damages only, and the equitable right of the purchaser in and to the land itself recognized and given by the statute. The first were satisfied and the contract terminated by the convention of the parties executed in the form of an assignment, but without any such intention, force, or effect in fact. At that time the decision of the supreme court, quieting the government's title to the land, had been made and was known to the parties. They did not deal with the land or rights therein, that the railroad company had no intention to acquire nor Hall any intention to abandon or transfer. His object was thereby to obtain the money necessary to exercise his right of purchase and to acquire title from its holder, the government. He looked no longer to the company for title, but to the government, relying on its promise to grant him title upon his paying for the land. His right of purchase was unaffected by his settlement with the company.

The departmental decision under review was erroneous and is vacated. It is not necessary to now inquire whether departmental decision in Stryker *v.* Brinkley (19 L. D., 503) is inconsistent herewith.

Your office decision is reversed, and Hall will be allowed to complete his purchase.

FORT BUFORD ABANDONED MILITARY RESERVATION—ACT OF MAY 19, 1900.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, Miles City, Montana, and Minot, North Dakota, July 27, 1900.

Your attention is called to the provisions of the act of Congress of May 19, 1900 (Public—No. 108), entitled "An act providing for the disposal of the Fort Buford abandoned military reservation in the States of North Dakota and Montana," as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all public lands now remaining undisposed of within the abandoned military reservation in the States of North Dakota and Montana, formerly known as Fort Buford Military Reservation, and which are not otherwise occupied or used for any public purpose, are hereby made subject to disposal under the homestead, townsite, and desert-land laws: *Provided,* That actual occupants thereon upon the first day of January, nineteen hundred, if otherwise qualified, shall have the preference right to make one entry not exceeding one quarter section: *Provided further,* That any of such lands as are occupied for townsite purposes, and any of the lands that may be shown to be valuable for coal or minerals, such lands so occupied for townsite purposes or valuable for coal or minerals shall be disposed of as now provided for lands subject to entry and sale under the townsite, coal, or mineral-land laws, respectively: *Provided further,* That this act shall not apply to any subdivision of land, which subdivision may include adjoining lands to the amount of one hundred and sixty acres, on which any buildings or improvements of the United States are situated, but such lands shall be appraised and sold as now provided by law.

The act in question opens all of the lands undisposed of within said abandoned military reservation, to disposal under the homestead, townsite and desert-land laws; such legal subdivisions, to the extent of 160 acres in each case, on which any buildings or improvements of the United States are situated, being excepted.

It gives a preference right of entry for one quarter section of land to those who, on the first day of January, 1900, were actual occupants thereon and are otherwise duly qualified to make entry under the homestead law.

It also provides that lands that are occupied for townsite purposes or that are valuable for coal or minerals, shall be disposed of as now provided for such lands under the townsite, coal or mineral-land laws, respectively.

The lands within the reservation have not yet been surveyed; therefore, until the official plats of survey have been filed in your office, no applications to make entry under the homestead law can be received.

Applications, however, may be allowed when accompanied with affidavits that there were no occupants on the lands January 1, 1900, after the official filing of the plats of survey in your office in accordance with rules 1 to 4, inclusive, as prescribed on page 87 of circular of July 11, 1899.

After the expiration of three months from the date of filing of the township plats the preference right of entry given in the first proviso of the act, if not then asserted will, in the face of a valid adverse claim, be deemed to have expired and the affidavit above mentioned will not be required.

The rules and regulations in regard to townsite entries will be found in the circular of July 9, 1886 (5 L. D., 265), and you will be governed thereby, except that you will require to be filed with each townsite application, an affidavit that there are no adverse settlers upon the land whose actual occupancy dates back to January 1, 1900.

In relation to desert-land claims, you will proceed in accordance with the instructions contained in office circular of July 11, 1899, pages 39 to 44, inclusive, and also require affidavits in each case, as in homestead applications, indicated above.

All lands valuable for coal or mineral shall be reserved from disposal, except under the coal or mineral-land laws, respectively, and applications for such lands will be governed by the rules and regulations now in force in such cases.

Under date of December 1, 1897, all of the buildings and improvements on this reservation were offered at public sale under the act of July 5, 1884 (23 Stat., 103), and the purchasers required to remove the same within ninety days from date of purchase.

On February 27, 1899, the local officers at Minot, North Dakota, reported that all the buildings and improvements on the reservation had been sold, and the presumption is that they have all been removed; therefore the last proviso of said act in relation to lands upon "which buildings or improvements of the United States are situated," is inoperative.

Approved:

THOS. RYAN,
Acting Secretary.

SWAMP LANDS—KLAMATH INDIAN RESERVATION.

INSTRUCTIONS.

Directions given that the governor of Oregon be at once notified of all surveys that have been or that may hereafter be completed and confirmed within the limits of the Klamath Indian reservation in said State, and that the Indian Office be promptly notified of any selections made by the State of claimed swamp lands within said reservation, such lands to be particularly specified.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 4, 1901.* (W. C. P.)

Section 2490, Revised Statutes, contains a provision as to selections of swamp lands by the States of Minnesota and Oregon as follows:

and the selections to be made from lands already surveyed in each of the States last named under the authority of the act aforesaid, shall have been made within two

years from the adjournment of the legislature of each State, at its next session after the 12th day of March, A. D., 1860, and as to all lands surveyed or to be surveyed thereafter, within two years from such adjournment, at the next session after notice by the Secretary of the Interior to the governor of the State that the surveys have been completed and confirmed.

There is a question whether the State of Oregon is entitled, under the swamp land grant, to any lands within the limits of the Klamath Indian reservation, if there were any swamp lands therein on March 12, 1860, the date of the grant. And there is a still further question whether, if there are any such lands within the limits of said reservation, the State is entitled thereto, where the same are needed or desired for an allotment to an Indian belonging upon said reservation. It is obvious, however, that these questions can not appropriately be considered or definitely determined in the absence of a claim by the State, regularly asserted, to specific lands within the limits of said reservation, the character of which upon March 12, 1860, brings them otherwise within the description of lands embraced in said grant. Some of the State's officers seem to have heretofore informed the Indian Office, in a general way, that the State is asserting that there are lands within the limits of said reservation to which the State is entitled under the swamp land grant, but inquiry at your office elicits the information that no selections of swamp lands within the limits of said reservation have been made on behalf of the State, as contemplated by said grant.

You are therefore hereby directed to at once give the governor of the State of Oregon notice of all surveys that have been completed and confirmed within the limits of the Klamath Indian reservation in said State, and hereafter, upon the completion and confirmation of any such survey you will at once give him notice thereof. In such notices attention should be directed to the provision of law in respect to the time within which swamp land selections must be made.

For the purpose of making the necessary examination of the lands, preparatory to the making of swamp land selections, agents of the State, upon application to the Indian agent at such reservation, will be permitted to go on and over the reservation and to do all things necessary to the proper selection of any lands therein claimed to come within the terms of the grant to the State. This will not, however, justify or authorize the disturbing of the occupancy or claim of any Indian, and will not be considered as a recognition of the State's claim, but is done simply that the claim of the State, if any, may be properly presented, duly considered, and rightly determined.

Many of the lands in this reservation have heretofore been allotted to the Indians belonging thereon, but before the issuance of the first or trust patents for such allotments, it is deemed best that the claim, if any, of the State should be determined.

If any selections of claimed swamp lands within the limits of said

reservation are made by the State, your office will promptly give notice thereof to the Indian Office, particularly specifying the lands selected.

ALASKAN LANDS—SECTIONS 12 TO 14, ACT OF MARCH 3, 1891.

PRICE ET AL. *v.* MOORE.

There is nothing in the act of March 3, 1891, which would preclude one claiming land in Alaska, under sections 12 to 14 of said act, from giving a mortgage or creating a charge or lien upon the property for the purpose of obtaining money with which to carry on his business thereon, nor that would prohibit the giving of an option to the holder of such mortgage, charge or lien, to demand and receive a conveyance of an undivided interest in the property, after patent, in lieu of payment of the moneys due him thereunder; and it would not affect the case at all if it were shown that the holder of such mortgage, lien or option is an alien.

By the location, occupation and improvement of agricultural land in Alaska prior to the assertion of a claim thereto by the occupant, under the act of 1891, a superior right thereto is acquired by him as against all others except the United States.

An entry under the act of 1891 must be limited to the land possessed and occupied for purposes of trade and manufacture, taken "as near as practicable in a square form."

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 7, 1901.* (E. B., Jr.)

The land involved in this case is a tract of one hundred and sixty acres bordering on Skaguay Bay at the head of Lynn canal, is embraced in survey No. 13, Sitka, Alaska, land district, and is claimed by Bernard Moore under sections 12 to 14 of the act of March 3, 1891 (26 Stat., 1095, 1100), which provide for the sale of lands in Alaska, then or thereafter possessed and occupied "for the purpose of trade or manufactures." The said survey was made in the field in July, 1896, upon due application by Moore, was approved by the ex-officio surveyor-general of Alaska March 1, 1897, and accepted by your office March 25, 1897.

September 16, 1897, Moore applied to be allowed to make final proof and entry for the land, and November 4, 1897, was fixed by the local office as the date for hearing final proof. For reasons not necessary to recite, the hearing of final proof was postponed from time to time until February 16, 1898, when final proof was offered. In the meantime protests had been filed by J. G. Price, for himself and for citizens of Skaguay, by Emery Valentine and others, by the Southern Wharf Company, and by J. T. Field, together alleging, among other things, that Moore is not occupying any of the land in good faith for the purpose of trade or manufactures, but is seeking to make entry thereof for the benefit of others, and that protestants have placed valuable improvements upon the land, which is now

largely covered by the town of Skaguay, Field alleging, especially, in addition, a right to a portion of the land by virtue of prior possession and occupation.

A hearing was duly ordered for March 30, 1898, before the local officers, upon these protests, at which all parties appeared and evidence was submitted by all but said Field. As to him, upon his request therefor, a continuance was granted, and commissions were issued for the taking of testimony in his behalf at Juneau, Alaska, May 30, 1898, and at Dyea, Alaska, June 15, 1898, respectively. Field made no appearance thereafter in the case pursuant to the said continuance or otherwise. It does not appear, however, that any final disposition was made of his protest. It should have been dismissed for default, and that action is accordingly now hereby taken and his protest is dismissed.

Upon the evidence adduced the local officers found and held, in their decision dated August 15, 1898—

> that the claimant has shown such long prior occupancy and possession, together with all due diligence in making improvements upon the land in said claim, that he could not equitably be deprived of the rights and benefits which have accrued by reason of such improvements.
>
> * * * * * * *
>
> The evidence clearly shows—
>
> First. That most of the buildings and other improvements were completed or started by the claimant before the persons who are now protesting, and others, settled upon the land in question and asserted any rights thereto. (Page 21 Final Proof; pages 48, 71, 85, 100, 122 and 133, protest. test.; also pages 8, 10, 11, 14, 15, 31, 32, 35, 36, 55, 68, 72, 85, 86, 98, 108, 112, 113, 137 and 160, protest. test.) And that the claimant, shortly after such persons did arrive and settle on said claim, served written notice on several of these persons and posted copies of the same, warning them that they were trespassers and demanding that they deliver up possession. (See claimant's Exhibit "A"—Emery Valentine *vs.* Bernard Moore, and indorsement thereon.) And that promptly after its receipt, claimant posted the notice of application for patent in front of the post office at Skaguay. (See date of notice of application and page 80 protest. test.)
>
> Second. That having obtained the necessary financial assistance under the terms of his agreement with E. E. Billinghirst, he went on and completed such buildings, mill and wharf, as would constitute quite a considerable trading and manufacturing plant.
>
> The board is convinced that the claimant has acted in good faith, employing all legitimate means to perfect his improvements and establish his title to the land claimed.
>
> A preponderance of the evidence shows that but a portion of the land embraced in Bernard Moore's claim, is or was actually occupied and used by him for the purposes of trade and manufacture; that the timber on such claim is of such a character that little or none of it can be used for manufacturing into lumber, and that his improvements occupy but a small portion of the water frontage. It is shown that little or no lumber has ever been manufactured from the timber cut on the claimant's land, and that logs were and are brought up Taiya Inlet and floated up to the mill to be sawed up. (Pages 10, 22, 55, 59, 82, 124, 126, 137, 148, protest. test.)
>
> In order to include all of the improvements before mentioned and yet exclude the

large areas not occupied by the claimant, as in like manner contemplated in the decision of the Hon. Secretary of the Interior dated March 4th, 1898 (*ex parte* John G. Brady), the board deems it advisable to take some latitude in interpreting that portion of Par. 13 of the rules and regulations governing non-mineral entries in Alaska, approved June 3rd, 1891, which provides that the land "must be in one compact body and as nearly in square form as the circumstances and configuration of the land will admit," and to allow the applicant to amend his survey as indicated below, so that the land will be in the shape of an inverted letter "L."

Beginning at a point on the east line of U. S. survey No. 13 about 14 chains south of corner No. 13, thence along said east line to corner No. 1, thence following the meander line of said U. S. survey No. 13 to corner No. 4, thence northerly on a line parallel to the line of Moore's wharf 2¾ chains, thence N. 37° 30′ E. 8½ chains, thence N. 52° 30′ W. 11 chs., thence N. 37° 30′ E. 14 chs., thence S. 52° 30′ E. about 22 chs. to point of beginning.

The board have indicated in pencil upon the official plat of said U. S. survey No. 13, approximately, the lines as above described.

By so amending said survey, the claimant would acquire sufficient of the water frontage to transact all his wharfage, lumber and other business and yet leave a large portion open to the use and occupancy of others. He would receive all of the land actually occupied by his improvements and used by him for trading and manufacturing and but little more.

We believe the claimant to be justly entitled to this, and we so rule.

Upon appeal by claimants, by protestants, and John G. Price *et al.*, your office, by decision of July 11, 1900, reversed the decision of the local officers, finding "that the trading and manufacturing carried on on the land was not carried on by the claimant," and that claimant had not shown, as required by paragraph 34 of circular instructions approved June 8, 1898 (27 L. D., 248, 268), under the act of May 14, 1898 (30 Stat., 409), that the tract claimed does not include improvements made by or in possession of another person, association or corporation, and therefore held his application to make entry for rejection. From the decision of your office Moore has appealed to the Department.

It appears that Moore, who was the first occupant or claimant of any part of the land, went upon it in the latter part of 1887, cut some timber, put in cribs for a wharf, and cleared a small portion of the land. He then left, but returned early in June of the following year, built a log cabin on the land, enlarged his clearing and raised some vegetables thereon. He also filed, September 13, 1888, in the office of the district recorder at Juneau, Alaska, a notice of location of the land, wherein, after describing the tract, he recites his possession and claims the same for agricultural purposes by reason of actual occupation and appropriation. Moore was thereafter in the sole and undisputed possession and occupancy of the land until about midsummer of 1897, at which time the improvements thereon were the log house already mentioned, with frame addition, used for residence of himself and family, several acres cleared and partly fenced, a stable, a new wharf and approach, nearly completed, a store building and stock of merchandise, a bunk house, house occupied by Moore's father, a saw mill nearly complete,

two small log houses for men employed about saw mill and wharf, bridges over streams, wagon road, and skid roads into the timber. July 3, 1896, Moore filed in the office of the district recorder above mentioned a sworn notice reciting his location of 1888, but now claiming the land under the provisions of the act of 1891, *supra*, for purposes of trade and manufactures.

At the date of Moore's application to be allowed to make final proof and entry, September 16, 1897, the wharf and saw mill were com plete, the latter in operation with a capacity of 15,000 feet of timber per day, the entire improvements were valued at over $50,000, and the business amounted to over $5,000 per month. Other improvements were made between the last mentioned date and the close of the hearing upon the said protests, and the business of the store, wharf and saw mill had considerably increased.

In June, 1896, Moore entered into an agreement with one Ernest Edward Billinghirst, of Victoria, British Columbia, trustee f or certain undisclosed principals, wherein, after reciting his (Moore's) previous possession and occupation of the land and water frontage thereof, and that he—

> has used the same as a steamboat landing and for other purposes and still uses that portion of the wharf built by him on the said water frontage which has not heretofore been washed away, and is desirous of obtaining a government patent or other absolute title for the said land and water frontage and to rebuild and extend his wharf and wharfage accommodations,—

he agrees, in consideration of $1848 received from said Billinghirst, as trustee, aforesaid, and of other moneys to be advanced by such trustee, to take the necessary steps to have the land surveyed and patent issued to him, the said Bernard Moore; to execute and deliver on demand, after the issuance of such patent, a mortgage to Billinghirst, as trustee, to secure the payment of all moneys theretofore or thereafter so received and advanced, and, in the mean time, to charge and create a lien on the land and water frontage on account of all such moneys; that all costs and expenses, necessary and incidental, incurred by said trustee in connection with the obtaining of title to the land, and a reasonable remuneration to him for his time "in connection with the subject-matter of this agreement," shall be included in the said mortgage, charge or lien, "and to be eventually paid by the said Bernard Moore"; that in lieu of "accepting repayment for all such monies as aforesaid," the said trustee shall have the option, after patent, "to demand and receive an absolute conveyance of an undivided one-half interest in said land and water frontage and privileges, with all improvements thereon," which conveyance said Moore agrees to execute and deliver at said trustee's cost; and that he will well and truly pay to the said trustee, on demand, the said sum of $1848, and all other sums of money, if any, which may thereafter be advanced by the said trus-

tee or disbursed by him pursuant to this agreement. The said agreement was executed and acknowledged by the parties thereto June 29, 1896, and was filed for record in the office of the ex-officio recorder for the district of Alaska, July 8, following.

It is mainly upon this agreement and the alleged management and control by Billinghirst and those whom he represented of the business carried on at the said wharf, store and saw mill, after the execution of the agreement, and their alleged ownership of the major part of the improvements hereinbefore mentioned, that protestants' case against Moore is based. Without entering upon any extended discussion of the evidence relied upon to establish such alleged management and control, or such alleged ownership, by Billinghirst or those he represented, it is enough to say that it is not shown that there was any participation in or management or control of the said business, or any branch thereof, by them or any of them, or that they or any of them had any interest in the said improvements or exercised any ownership over the same which was not entirely consistent with the terms of the said agreement and properly permissible thereunder. The evidence shows that the business was initiated by Moore, that he has not at any time ceased to be identified therewith or surrendered control thereof, or done or permitted to be done anything which would not consist with his possession and occupation, under the act of 1891, of all the land needed for the carrying on of such business.

The said agreement is not in violation of any provision of the said act. There is nothing in the act which would preclude the giving of a mortgage or the creating of a charge or lien upon the property, as agreed by Moore, in order to obtain money with which to carry on his business there, nor that would prohibit the option therein given to Billinghirst or those he represented, to demand and receive from Moore a conveyance of an undivided half of the property *after patent*, in lieu of payment of moneys then due him or them under the said agreement. It would have been no infraction of the act of 1891, nor of any other law, for Moore to have mortgaged, or agreed to mortgage, the property prior to the issuance of patent in order to secure means necessary to carry on there any business within the purview of the statute.

As against the United States said agreement gave no right to Billinghirst or his principals and could only become operative upon such title as Moore might ultimately acquire. Viewed in this light, it would not affect the case at all, if, as contended by protestants, it be true that Billinghirst, or his principals, or both, are aliens. By section 3 of the act of March 2, 1897 (29 Stat., 618), aliens are permitted to acquire liens or mortgages upon real estate, in any of the Territories of the United States, as security for money lent; and also to enforce such liens and mortgages and acquire and hold title, for a limited period,

"to such real estate, or any interest therein, upon which a lien may have heretofore or may hereafter be fixed, or upon which a loan of money may have been heretofore or hereafter may be made and secured."

No claim of prior possession and occupancy, for townsite or other purposes, by any of the protestants, could be sustained against Moore as to any of the land in controversy necessary for the carrying on of the business which was being conducted thereon when, in the summer of 1897, the tide of fortune seekers which the then recent discoveries in the klondike or upper Yukon region had brought to Alaska began to flow in upon the tract on which Moore had located and claimed and of which he had for so many years prior thereto been in the undisputed possession. His claim and possession were then, and had been theretofore, open and notorious. That these protestants, and hundreds of others who established themselves in tents and cabins on the land he claimed, had notice of his claim, there can be no doubt. They not only disregarded and utterly ignored his claim of possession and occupancy beyond narrow limits about his residence, the wharf, saw mill and store, but they seized upon and occupied, and were still occupying at the time of the hearing, several of his buildings.

It is not necessary to consider what rights in or to the land Moore acquired, as against any subsequent claimant or a mere intruder, by his location, occupation and improvements prior to his assertion of a claim thereto under the act of 1891. That he did acquire rights by such location, occupation and improvements which he could have maintained as to all others except the United States is well settled (Davenport *v.* Lamb, 13 Wall., 418; Malony *v.* Adsit, 175 U. S., 281). It is enough that as to all the land necessary to his business Moore's occupancy, possession, and claim under the act of 1891 are prior to any occupancy, possession or claim by any other person under that or any other act. No such force, therefore, can properly be given in this case to the requirement of paragraph 34 of circular instructions under the act of May 14, 1898, *supra*, as your office decision proposes to give it. The most that was intended or that could have been intended by the said requirement was to afford due protection to prior property rights. It was certainly not intended to encourage or sanction open and high-handed invasion and trespass upon the property of another, or to secure to such invader and trespasser the fruits of his wrongful acts.

It only remains to inquire whether Moore is entitled to make entry of all the land he claims—one hundred and sixty acres—or of a portion thereof, only. His entry must be limited to the land possessed and occupied by him for purposes of trade and manufacture, taken in the form prescribed by the statute, that is, "as near as practicable in a square form" (John G. Brady, 26 L. D., 305, 308, and cases there

cited; and see also same, 27 L. D., 355). It appears from Moore's own testimony on final proof cross-examination that he had not occupied more than "from 60 to 75 acres" of the land claimed, for all purposes, under the act of 1891, and that this was adjacent to and included his wharf and water front. The local officers proposed, in their decision, to allow him about fifty acres, to be taken "in the shape of an inverted letter L," so as to include all his improvements but to limit his water frontage to only a part of what he would receive if he were allowed to take that area in the form prescribed by the statute.

Moore's entry, as already stated, can only be limited to the land possessed and occupied by him for purposes of trade and manufacture, taken as nearly as practicable in a square form. No sufficient reason appears why the land should be taken by him in the shape suggested by the local officers, or why it is not practicable for it to be taken in a substantially square form. A tract, substantially in square form, described as follows, would contain all Moore's improvements of any considerable value: Commencing at corner No. 1 of the said survey No. 13, thence following the meandered coast line to corner No. 6, thence by a line to be run N. 37 deg. E. 1700 feet, thence by a line to be run S. 53 deg. 30 min. E. to a point on the line of said survey between corners 1 and 13, thence on said last-mentioned line to cor. No. 1, place of beginning.

It is believed Moore should be allowed to pay for and make entry of the tract just indicated, upon procuring an amended survey properly describing the same. You will therefore direct that he be allowed to do so.

The decision of your office rejecting his application is accordingly reversed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—SECTION 3, ACT OF JULY 2, 1864.

NORTHERN PACIFIC R. R. CO. *v.* ROONEY.

Lands reserved on account of a prior grant at the date of the passage of the act of July 2, 1864, making the grant to the Northern Pacific Railroad Company, are excepted from the latter grant, but do not afford a basis for the selection of lands within the second indemnity belt of that grant, provided for by the joint resolution of May 31, 1870.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 10, 1901.* (F. W. C.)

By departmental decision of October 18, 1899 (29 L. D., 242), in the case of the Northern Pacific Railroad Company *v.* John Rooney, involving the S. ½ of SE. ¼ and S. ½ of SW. ¼, Sec. 5, T. 127 N., R. 33 W.,

St. Cloud land district, Minnesota, your office decision of May 27, 1898, in said case was affirmed, wherein the rejection by the local officers of the attempted indemnity selection of said tract by said company was sustained and the homestead application of John Rooney covering said tract was held for allowance.

The tract involved is within the second indemnity belt of the grant to the Northern Pacific Railroad Company, for which provision was made in the joint resolution of May 31, 1870 (16 Stat., 378), as follows:

> 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 direction 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 present claim of the Northern Pacific Railroad Company arises under the grant made in aid of the construction of its line of railroad by the act of July 2, 1864 (13 Stat., 365), and is based upon an indemnity selection of the land in controversy which was proffered at the local office November 5, 1883, and designated lots 4 and 5 of Sec. 3, and lots 1 and 2 of Sec. 5, T. 51 N., R. 17 W., Minnesota, lost to the grant within its place limits, as the basis for the selection.

Within a few days after the passage of the act of May 5, 1864 (13 Stat., 64), making a grant in aid of the construction of the Lake Superior and Mississippi railroad, there was filed in your office a map of the probable route of that road, and, under the direction of the Secretary of the Interior, your office, by letter of May 26, 1864, received at the local office June 3, 1864, withdrew from pre-emption and sale a body of lands about twenty miles in width along such probable route September 25, 1866, the route of said road was definitely located. The lands so as aforesaid designated as a basis for the indemnity selection in question were within ten miles of such probable route and were embraced in the withdrawal of May 26, 1864, but the route of the road as definitely located deviated from said probable route to such an extent that upon such definite location these lands fell within the twenty-mile indemnity belt provided for in said act. After this definite location, and acting under the direction of the Secretary of the Interior, your office, by letter of November 2, 1866, continued the withdrawal of May 26, 1864, in so far as the lands embraced therein fell within the place or indemnity limit fixed by the definite location of the route of the road. Selections of these base lands as indemnity

under the act of May 5, 1864, were regularly proffered September 30, 1872, and the selection was approved by the Secretary of the Interior and the lands certified under said grant, June 7, 1873.

In the decision of October 18, 1899, *supra*, it was said:

> as this land was reserved prior to the passage of the act of July 2, 1864, it could not therefore support selections within the second indemnity belt. It follows that the selection is not a proper one and for that reason its rejection by the local officers is affirmed.

A motion for review of said decision questions the reservation of this land prior to the passage of the act of July 2, 1864, but under date of November 22, last, your office reports that the statement just made is fully sustained by the records of your office, and a later brief on behalf of the railroad company seems to acquiesce in this report.

It is now contended by the company that the indemnity selection is fully supported by the loss designated, for the reason that the withdrawal on account of the grant made by the act of May 5, 1864, did not amount to a disposition of the land embraced therein, in that it vested no title under said grant, and no title could pass thereunder prior to the definite location of the line of road thereby aided, which occurred after the passage of the act of July 2, 1864.

That the lands designated as a basis for such selection were excepted from the Northern Pacific grant, and that said company is entitled to select other lands as indemnity therefor, is clear; but whether this selection can be exercised in the second indemnity belt provided for by the joint resolution of May 31, 1870, or can only be exercised in the original or first indemnity belt provided for by the granting act of July 2, 1864, is the question for determination, and this depends upon whether the reservation of these base lands, by reason of which they were excepted from the grant to the Northern Pacific Railroad Company, is to be treated as having been established by the withdrawal of May 26, 1864, which was prior to the passage of the act of July 2, 1864, or as having been subsequently established by the order of November 2, 1866.

Said joint resolution gives the right to resort to a second indemnity belt, upon certain conditions, "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 grant made by the third section of the act of July 2, 1864, was—

> every alternate section of public land, not mineral, designated by odd numbers, to the amount of twenty alternate sections per mile, on each side of said railroad line, as said company may adopt, through the territories of the United States, and ten alternate sections of land per mile on each side of said railroad whenever it passes through any State, and whenever on the line thereof, the United States have full title, not reserved, sold, granted, or otherwise appropriated, and free from preemption, or other claims or rights, at the time the line of said road is definitely fixed,

and a plat thereof filed in the office of the commissioner of the general land office; and whenever, prior to said time, any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

The word "reserved" was obviously employed in the same sense in this section and in said joint resolution, and whatever would constitute a reserving of place lands within the contemplation of one would be effective under the other.

That portion of the line of the Northern Pacific railroad opposite said base lands was definitely located November 20, 1871. If these lands were reserved at that time, they were equally reserved at the time of the passage of the act of July 2, 1864. They remained in a continuous state of reservation from before the passage of that act until after the definite location of the line of railroad thereby aided. There was but one purpose in the reservation and that was to keep the lands embraced therein in a condition where they would be available for the satisfaction of the grant made by the act of May 5, 1864. The withdrawal of May 26, 1864, was never revoked, and even in the absence of the order of November 2, 1866, it would have continued to be effective as to these base lands. Instead of establishing a new or independent reservation, that order, as to these lands, merely gave affirmative evidence of the intention to recognize the original withdrawal as still effective.

That an indemnity withdrawal made under a prior grant and existing at the time of the definite location of the line of the Northern Pacific railroad, is a reservation within the meaning of said section three, and excepts from the Northern Pacific grant the lands embraced in the withdrawal, even though they are not required to satisfy the prior grant and do not pass under it, is determined by the decision of the supreme court in the case of the Northern Pacific R. R. Co. *v.* Musser-Sauntry Co. (168 U. S., 604).

It is clear, therefore, that the reservation of these base lands dates from before, instead of after, July 2, 1864, and that they will not support a selection within the second indemnity belt provided for by the joint resolution of May 31, 1870.

The previous decision of the Department is adhered to and the motion under consideration is denied.

MINING CLAIM—ACT OF JUNE 3, 1878.

MICHIE *v.* GOTHBERG.

In a controversy between conflicting claimants to the same land, arising upon protest by a mineral locator against an application to purchase under the act of June 3, 1878 (amended by act of August 4, 1892), where it appears that the mineral location is based upon the discovery within its limits of a vein or lode of quartz, bearing copper and gold, that the same is in all other respects regular, and that the time intervening between the date of the location and the filing of the application to purchase under said act was so short as not to afford the mineral locator a reasonable opportunity to develop his claim sufficiently to ascertain with certainty the extent or value of the mineral deposit contained therein, such location is a "mining claim" within the meaning of the proviso to said act, and the land embraced therein is not subject to purchase thereunder.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 12, 1901.* (A. B. P.)

January 22, 1900, Martin J. Gothberg filed, in due form, his application to purchase, under the act of June 3, 1878 (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348), the NW. ¼ of the NW. ¼ of Sec. 13, T. 32 N., R. 80 W., Douglas, Wyoming, as chiefly valuable for stone. After notice duly given, he submitted final proof in support of his application, April 2, 1900.

On the date last mentioned, Donald Michie filed his corroborated protest against the allowance of entry upon said application and the submitted proofs, alleging, in substance and effect, that the land applied for contains mining improvements, and that valid mining locations have been made and are now existing on the same, with respect to which the law has been, in all respects, complied with.

A hearing was had upon the protest, at which both parties appeared and submitted testimony. The local officers found in favor of Gothberg and recommended that he be allowed to complete his application to purchase. Upon appeal by protestant, the action below was affirmed by your office, by decision of September 14, 1900. The further appeal by protestant brings the case here.

The record shows that the land in question is underlaid with a formation of granite, capable of being quarried in blocks, and of a character suitable for building purposes. The land does not appear to possess any value for agricultural purposes.

November 8, 1899, one James Michie (not a party to this controversy) located certain lands, embracing a portion of the tract here in question, as the Squaw Creek lode mining claim. Notice of such location was recorded in the office of the recorder of the mining district where the claim is situated, November 13, 1899. A survey of the claim was subsequently made and an amended notice of location, more particularly describing the same, was recorded, May 24, 1900, in the same manner as the original notice.

The evidence submitted at the hearing shows that several rhyolite

dykes—generally the source of copper deposits—pass through said claim, and that a discovery cut or shaft was sunk thereon, to the depth of ten feet or more (Sec. 2548, Revised Statutes of Wyoming, 1899), some time prior to January 1, 1900. With respect to this cut or shaft it is testified by one of the witnesses for protestant as follows:

Q. Who dug that shaft?

A. I did. It is a drift about fifteen feet, run into the hill, to intersect a quartz dyke.

Q. How high is the face of this open cut?

A. About eleven feet.

Q. Does it expose any mineral in place, or mineral bearing rock?

A. It exposes mineral bearing quartz in the bottom, where it intersects the dyke.

Q. What kind of mineral does this quartz bear, and give indications of?

A. Copper and gold.

Q. How long have you been engaged in prospecting and mining?

A. About seven years in the Casper Mountain district, and about twenty years in all.

Q. Are you familiar with what miners ordinarily call good prospects?

A. I am.

Q. Are the indications of mineral in the discovery shaft in James Mitchie's claim, concerning which you have testified, such as would, in your judgment, justify a man of ordinary prudence in expending time and labor in developing the same, with a reasonable expectation of developing a valuable mine?

A. In my judgment he would. I am spending time and money on the same indications, and getting good results.

It is further shown that said claim is situated in what is designated as a "mineralized belt;" that considerable prospecting for minerals was done upon this belt, in the vicinity of the claim, during the three years next preceding the date of the hearing; and that such prospecting had resulted in the discovery of indications of copper deposits to an extent justifying further expenditure of time and money in their development.

A location of an alleged "lode, vein, or deposit, bearing gold, silver, copper, or other precious metals," made April 2, 1900, by one Raphael Lund, also embraces a portion of the land in question. There is no evidence, however, that any discovery of a lode, vein, or other deposit, bearing mineral of the character described and claimed, or of any other character, has ever been made within the limits of this alleged location.

The statute upon which Gothberg's application to purchase is based, provides—

> That nothing herein contained shall defeat or impair any bona fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona fide settler, or lands containing gold, silver, cinnabar, copper, or coal.

It is further provided that the applicant shall make oath, among other things, that the land—

> contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belonged to the applicant, nor, as

deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal.

The *ex parte* proofs submitted by Gothberg substantially meet the requirements of the law, in the respects stated. The question presented by the protest and the evidence introduced in support thereof, as against the submitted proofs, is, whether it is shown that the land has upon it any mining claim, or mining improvements, or contains any valuable deposit of gold, silver, copper, or other precious metal, as claimed.

There are no mining improvements on the land except the aforesaid cut or shaft situated on the Squaw Creek location, nor does the evidence show that outside the limits of said location the land in question contains any valuable deposit of gold, silver, copper, or other precious metal.

It remains to be considered, however, whether the Squaw Creek location, viewed in the light of all the circumstances surrounding it as disclosed by the record, constitutes a "mining claim" within the meaning of the provision of the statute which says—

> That nothing herein contained shall . . . . . authorize the sale of any mining claim.

With respect to this location it is to be observed that the same was in all respects regularly made, having for its basis the discovery within its limits of a vein or lode of quartz, bearing copper and gold; that the making of the location, the sinking of the cut or shaft thereon, and the discovery of a lode or vein of mineral therein, as aforesaid, were all prior to the date when Gothberg filed his application to purchase; and that the time intervening between the date of the location and the filing of Gothberg's application was so short as not to afford the mineral locator a reasonable opportunity to develop his claim sufficiently to ascertain, with certainty, the extent or value of the mineral deposit contained therein.

Until a reasonable opportunity for the development of mineral actually discovered and located shall have been first given, it would be unjust to the mineral locator, to say the least, for the land department to require of him, in a case arising under the act upon which Gothberg's application is based, such a showing as to demonstrate that the land is more valuable for the minerals discovered and claimed, than for other purposes, or to hold that his location, in the absence of such a showing, under the circumstances, is not a "mining claim" within the meaning of the proviso to said act.

The act must have reasonable construction, and while it would be difficult to lay down a rule applicable to all cases that may arise under it, the Department is of the opinion that the Squaw Creek location is a valid location under the mining laws, and that, in view of the facts and circumstances of this case, the same constitutes a "mining claim"

within the meaning of said proviso. It follows that in so far as the land applied for by Gothberg is included in said location or mining claim, the same is not subject to sale under said act. No reason appears, however, why Gothberg's application may not be allowed as to the residue of the land embraced therein.

To the extent, therefore, that the application of Gothberg conflicts with the Squaw Creek mining claim, the same will be rejected, but as to the other land covered thereby it will be allowed.

The decision appealed from is modified to conform hereto.

RAILROAD LAND—ERRONEOUS CERTIFICATION—ACT OF SEPTEMBER 29, 1890.

EWING *v.* MCKINZEY ET AL.

The allowance of a graduation cash entry, and the acceptance and subsequent retention by the government of the purchase money paid thereon, constitute a sale of the land within the meaning of section 8 of the forfeiture act of September 29, 1890, the provisions of which not only expressly recognized the validity of such sale, but operated to confirm the title of the claimants thereunder.

The attempted cancellation of an entry without notice to the entryman, or his successors in interest, is void for want of jurisdiction.

The erroneous certification to a railroad company of lands not of the character granted, is no bar to the issuance of patent upon subsisting entries of record therefor at the date of such certification.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V.D.) *January 12, 1901.* (J. H. F.)

This case is before the Department on appeal by Hampton D. Ewing from your office decision of April 20, 1900, wherein it was held that the certification of Sec. 17, T. 5 S., R. 3 E., Montgomery, Alabama, land district, to the Mobile and Girard Railroad Company, under act of September 29, 1890 (26 Stat., 496), was erroneous and void by reason of the prior existing graduation entries thereon of Francis McKinzey and Sampson Turner, and that such entries should be passed to patent notwithstanding such erroneous certification.

The land involved is situated within the indemnity limits of the grant to the State of Alabama by act of June 3, 1856 (11 Stat., 17), to aid in the construction of a railroad from Girard to Mobile, the map of definite location of which was filed June 1, 1858, but is opposite a part of the proposed line of said road which was never constructed.

On October 5, 1859, Francis McKinzey, under the graduation act of August 4, 1854 (10 Stat., 574), made cash entry No. 15801 (St. Stephen's series) of the N. ½ of said section 17, and on October 8, 1859, Sampson Turner, under the provisions of the same act, made cash entry No. 15803 (St. Stephen's series) of the S. ½ of said section.

May 31, 1860, said section, with other lands, was certified to the

State of Alabama on account of its grant by act of 1856, *supra*. By act of September 29, 1890 (26 Stat., 496), said grant opposite that portion of said road which had never been constructed was forfeited, and by the 8th section of that act it was provided that the Mobile and Girard Railroad Company should be entitled to the quantity of land earned by construction of its road from Girard to Troy, a distance of eighty-four miles, and it was therein directed that the Secretary of the Interior, in making settlement and certifying to or for the benefit of the said company the lands earned thereby, should include therein all the lands sold, conveyed, or otherwise disposed of by said company, not to exceed the total amount earned by said company as aforesaid.

It appearing in the subsequent adjustment of said grant under the forfeiture act, that the land involved herein had been sold by the company, prior to the passage of said act, to one Abraham Edwards, the same was included in a list of lands, aggregating 302,181.16 acres, which list, on April 24, 1893, was approved and certified to said company for the benefit of its transferees under the provisions of that act, in accordance with departmental instructions relative thereto (12 L. D. 117; 16 L. D., 70 and 355).

On February 24, 1898, resident counsel for one James C. Stapleton, who claims to be the present owner of the land in question, through mesne conveyances from McKinzey and Turner, filed in your office an application alleging that the graduation cash entries hereinbefore mentioned had never been canceled, but were valid and subsisting entries of record, and requesting that patents be issued thereon. Said application was accompanied by the duplicate receipts issued to McKinzey and Turner at time of making their respective entries and also by an abstract of title showing present title to the land in Stapleton, derived from them, through subsequent transfers. Upon consideration of said application by your office, it was found that the original entry papers, pertaining to both of said entries, had remained in the files of your office, bearing the following indorsement: "Railroad land—Cancellation entered 14th May, 1860," and that on the tract book, opposite each entry, appears the following notation: "Canceled 14th May, 1860"; but no further evidence of cancellation of said entries was found, and on June 2, 1898, the local officers were directed to report the status of said entries as shown by the records of their office.

In response to said direction the local officers reported, under date of June 4, 1898, to the effect that said entries were intact and that the records of the local office "show no evidence of cancellation of either entry mentioned or suspension of the same."

Upon further consideration of the matter by your office letter of August 28, 1899, it was found that said entries had never been authoritatively or legally canceled; that by reason of the existence of said entries the land in question was expressly reserved from recertification

under the provisions of section 8 of the act of September 29, 1890, *supra;* that the certification of said land under date of April 24, 1893, was, therefore, void and of no effect, and the local officers were directed to notify Edwards, or the then present claimant of the land through the railroad company as disclosed by the county records, that he would be allowed sixty days in which to show cause why patents should not be issued on said entries. Notice of said decision, it appears, was served by registered letter addressed to Edwards, which was receipted for by one Gaston Scott (Edwards then being deceased), and on October 28, 1899, Hampton D. Ewing filed in your office a petition setting forth that he is a resident of Yonkers, New York; that the notice addressed by the local officers to Edwards had recently come into his possession informally; that at date of the issuance of such notice the records of the county in which the land in controversy is situated showed that title thereto, based on the certification thereof to the Mobile and Girard Railroad Company, had then become vested in himself; that not having been served officially with notice of your decision of August 28, 1899, he had not had an opportunity to answer the order to show cause, as therein required, and he asked to be allowed to intervene and be made a party to the proceedings relative to said land and that he be allowed opportunity to show why your previous order should be revoked and the certification of said land to the railroad company under the act of September 29, 1890, *supra*, allowed to remain as a valid vestiture of title thereto for his benefit.

On April 20, 1900, Stapleton's application for issuance of patents for the land involved was further considered, and by your office decision of that date, from which the appeal herein was perfected, it was found that Ewing, after receipt of due notice, had had ample opportunity to answer your previous order to show cause why patents should not issue on said entries; that in his petition, filed October 28, 1899, it was not denied that said entries were subsisting entries of record at date of recertification of the land to the railroad company under act of September 29, 1890, *supra*, and, in accordance with your decision of August 28, 1899, it was held that such recertification was erroneous and void and that patents should be issued on the entries aforesaid as applied for by Stapleton.

The errors assigned by appellant amount to the following contentions:

1. That the entries made by McKinzey and Turner were void *ab initio* because made upon lands which were not subject to the provisions of the act of August 4, 1854, *supra*, and because the land involved, at time of the allowance of said entries, had been withdrawn for the benefit of the grant made to the State of Alabama by act of June 3, 1856, *supra*.

2. That the notations of cancellation made on the entry papers and on the tract book of your office constituted and operated as a lawful cancellation of said entries.

3. That your office erred in assuming jurisdiction to hold and in holding that the certification of the land in controversy, April 24, 1893, under act of September 29, 1890, was void and constituted no bar to the issuance of patents on said entries.

Under the act of 1854, *supra*, any person was allowed to purchase lands falling within its provisions at the graduated price therein specified, upon making affidavit that he made entry thereof for his own use and for purpose of actual settlement and cultivation, and that he had not acquired under said act more than 320 acres. By section 1 of the act it was provided that all of the public lands of the United States which had been in market for a certain time prior to application to enter should be subject to sale at a specified price, but it was further therein provided that—

> this section shall not be so construed as to extend to lands reserved to the United States in acts granting land to States for railroad or other internal improvements, or to mineral lands held at over one dollar and twenty-five cents per acre.

The records of your office show that while townships 1, 2, 3 and 4 south of the thirty-first degree of latitude, and certain other lands, were withdrawn from sale on June 19, 1856, on account of the grant to the State of Alabama by act of 1856, *supra*, yet such records fail to disclose that the land in controversy was ever embraced in any order of withdrawal on account of such grant, and inasmuch as the land is situated outside of the primary limits of the grant and the proposed road was never constructed opposite the land involved, the same was apparently subject to entry under the graduation act at the time the entries of McKinzey and Turner were allowed of record. However, for the purposes of the case at bar, it is not necessary to determine whether the land at such time was properly subject to such entry, for by section 8 of the forfeiture act of September 29, 1890, *supra*, the railroad company was required to relinquish all its interest, right, title and claim in and to "all such lands within the limits of its grant as have heretofore been sold by the officers of the United States for cash, where the government still retains the purchase money," and it is further provided therein that "the right and title of the persons holding or claiming any such lands under such sales . . . are hereby confirmed." The railroad company accepted the provisions of the forfeiture act and executed the relinquishment therein required. The allowance by the local officers, in 1859, of the cash entries involved herein, and the acceptance and subsequent retention by the government of the purchase money paid thereon, constituted a sale of the land in controversy within the meaning of the forfeiture act, the pro-

visions of which not only expressly recognized the validity of such sale, but operated to confirm the title of the claimants thereunder. Appellant's contention that the notations appearing upon the original entry papers and on the tract book in your office operated as a lawful cancellation of said entries, can not be sustained. The entries have always remained intact upon the records of the local office, and such records disclose no evidence of cancellation or suspension. No order or decision of your office, authorizing the cancellation of said entries, is of record therein, and it is not claimed that any notice of the notations appearing upon the entry papers and tract book was ever served upon the entrymen. Any attempted cancellation of such entries by notation on the entry papers and tract book, without notice to the entrymen or their successors in interest, was void for want of jurisdiction, and in no manner operated to affect the legal status of said entries, which thereafter continued to be and remain intact the same as if such notations had not been made. (United States *v.* Montoya *et al.*, 24 L. D., 52.)

The remaining question for determination is whether the erroneous certification of the land in controversy to the railroad company, on April 24, 1893, under the act of 1890, *supra*, is a bar to the issuance of patent on the entries in question.

It will be noted that by the provisions of the act of 1890 all the forfeited lands within the limits of the grant of 1856 which had been sold by the United States for cash and the purchase money for which had been retained by the government, were expressly excluded from the lands thereby directed to be certified to or for the benefit of the railroad company; and in the approved list, under which the certification of April 24, 1893, was made, the provisions of said act, showing the exclusion from such certification of all lands so sold by the United States, were fully recited and expressly set forth, as was also the further fact that the company had relinquished all its right, title and claim in and to such lands.

It is, therefore, apparent that the land in controversy was by the terms of the forfeiture act itself not only expressly excluded from the lands thereby authorized to be certified to the railroad company, but that the list under which the same was erroneously certified showed, upon its face, that it did not purport to embrace land which had been theretofore sold by the United States, as aforesaid.

By act of August 3, 1854, now embodied in section 2449, United States Revised Statutes, it was provided that, where lands had been or should thereafter be granted to the several States or Territories, and the law did not convey the fee simple title of such lands or require patents to be issued, the certified lists of such lands should be regarded as conveying the fee simple of all the lands embraced therein which were of the character contemplated by such act of Congress and

intended to be granted thereby; but it was further provided therein that—

> 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.

In the case of Weeks *v.* Bridgman (159 U. S., 541), certain land, to which one Brott had a subsisting adverse claim, had been erroneously certified to the State of Minnesota under a grant to aid in the construction of a railroad within said State, and it was therein contended by the State's grantee that such certification was an adjudication that the land had not been previously disposed of and was free from adverse claim and that the certification operated to pass the legal title thereto; but the court, after referring to the provisions of the Revised Statutes hereinbefore quoted, and stating that the land was not included in the grant to the State by reason of the existence of Brott's claim, said:

> and since it was not so included, nor subject to disposition as part of the public domain on October 25, 1864, the action of the land department in including it within the lists certified on that day was ineffectual . . . . As against Brott the certification had no operative effect.

The facts disclosed by the record, as hereinbefore set forth, clearly bring the case at bar within the purview of the decision of the supreme court in the case cited, and, in the opinion of the Department, the erroneous certification of the land in controversy to the railroad company under the provisions of the act of 1890, *supra*, had no operative effect as against the then subsisting entries of record therefor, and hence constitutes no bar to the issuance of patent thereon.

Your decision is accordingly affirmed.

RECORDS—COMMISSIONER GENERAL LAND OFFICE.

HENRY N. COPP.

The control of the records, books and papers of the General Land Office is intrusted to the discretion of the Commissioner, and the Department will not interfere in such matter where no abuse of such discretion is shown.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 12, 1901.* (G. B. G.)

December 8, 1900, Henry N. Cop apddressed a communication to your office asking permission to make extracts from the abstracts of homestead entries sent to your office monthly from the local land offices, particularly the abstracts of such entries made between the years 1862 and 1875, "with the intention of using and selling the information thus obtained" as opportunity occurred.

December 18, 1900, your office, having the matter under consideration, denied the request as one inconsistent with the best interests of the service, for the reason stated that the abstracts are continually needed for reference by the force employed in adjudicating pending cases, and that the privilege, if granted to the applicant, must also be extended to all others desiring to avail themselves thereof, and would so crowd the limited accommodations provided as to seriously interfere with the transaction of business by other attorneys having special employment in matters pending before your office.

Mr. Copp has appealed from this ruling, and cites the departmental instructions of November 25, 1898 (27 L. D., 625), in support of his appeal. These instructions arose upon a communication from your office of November 7, 1898, submitting for the approval of the Department a proposed circular addressed to the registers and receivers of local land offices directing them not to allow examinations of their records or papers except by persons directly interested, either as parties or attorneys, in the specific matter then pending to which such records or papers relate. The Department, after reviewing the law bearing upon the question of the inspection of public records, as it generally obtained in the United States, and the prior orders and decisions of the Department upon such question as it related to the records of the land department, held that the records of the local land offices should be treated as open to inspection on the part of the public, subject only to the restriction that such examination shall not interfere with the orderly dispatch of public business. It is believed that the rule was then correctly stated, that it applies to the records of the General Land Office as well as the records of the local land offices, and that it may be extended to the papers and files of your office as well as the records thereof, assuming always that such inspection will not be injurious to the public interests. (See Greenleaf on Evidence, 1–476.)

Inasmuch as the request in the case now under consideration was denied upon the ground principally that its allowance would be injurious to public interests in that the work of the General Land Office would be seriously interfered with, it follows that your action should be approved, unless it be held that this conclusion of fact was error.

By section 453 of the Revised Statutes it is provided that the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, shall perform all executive duties in anywise affecting the public lands of the United States, and by section 454, Revised Statutes, that he shall retain charge of the records, books, papers and other property, appertaining to said office. These provisions not only define a duty in relation to the charge of the records, books and papers of the General Land Office, but imply a discretion in the Commissioner to control such records, books and papers as may seem to him best for the public service.

Inasmuch as it appears that the granting of Mr. Copp's request would only tend to advance a purely private or personal interest to the detriment of the larger public interest, there is not shown to be any abuse of discretion in this case, and the action of your office is approved.

ALASKAN LANDS—JURISDICTION OF THE SECRETARY OF THE INTERIOR.

OPINION.

The Secretary of the Interior has never been clothed with general jurisdiction of the public lands in Alaska, his jurisdiction being limited, under the several acts of Congress relating to such lands, to the administration of the mining laws, the townsite laws, the right-of-way law, the homestead laws, and the sale of land for trade or manufacture, and he is without authority to lease land in Alaska for propagating foxes, or to assume the care and control of land already leased for such purpose.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, January 16, 1901. (V. B.)

A letter of the Secretary of the Treasury dated December 15, 1900, to you, inclosing an opinion of the Solicitor of the Treasury, dated June 28, 1900, has been referred to me for an opinion—

as to whether under existing law the Secretary of the Interior has authority to lease islands in Alaskan waters, and, generally, what are the duties of the Secretary of the Interior in relation to the matters presented—

in said letter and opinion.

The Secretary of the Treasury states, in substance, that his department has, "under the authority" contained in the act of March 3, 1879 (20 Stat., 383), from time to time leased unoccupied and unproductive islands in the waters of Alaska for the propagation of foxes; but that he is advised by the Solicitor of the Treasury, in said opinion, that, under later legislation by Congress, the Secretary of the Interior is given general jurisdiction over the public lands in that District, other than "the Annette, Pribolof Islands, and the islands leased or occupied for the propagation of foxes," which islands are excepted from the provisions of the act of May 14, 1898 (30 Stat., 409), extending the homestead laws, etc., to the District of Alaska, and by implication remained under the jurisdiction of the Treasury Department.

In view of this opinion of the Solicitor, the Secretary of the Treasury, "in order to avoid a divided responsibility," asks that his department be relieved, by this Department, of the control of the islands theretofore leased for the propagation of foxes, or for other purposes, either prior or subsequent to the passage of the act of May 14, 1898, *supra;* and a list of twenty-eight islands which have been leased by the Treasury Department is given, but the dates when leased are not stated.

It becomes necessary to review at some length the legislation of Congress in relation to Alaska.

The first legislation on the subject is to be found in the act of July 27, 1868 (15 Stat., 240), embodied in section 1954 *et seq.*, Revised Statutes. This act declared that all the territory, together with its waters, ceded by the Emperor of Russia, shall constitute a customs collection district and that the laws relating to customs, commerce and navigation be extended to the mainland, islands and waters thereof. It was declared unlawful to kill any fur-bearing animal within the limits of the territory or the waters thereof. But the Secretary of the Treasury was authorized to prescribe rules and regulations under which fur-bearing animals, except seals, might be killed; no special privileges, however, to be granted. The said Secretary was authorized to prescribe needful rules and regulations to carry into effect all parts of the act except those specially intrusted to the President.

By joint resolution of March 3, 1869 (15 Stat., 348; R. S., 1959), the islands of St. Paul and St. George (Pribylof) are declared a special reservation for government purposes, and it was made unlawful for any person to land upon either island except by authority of the Secretary of the Treasury. Violators of the resolution were to be summarily removed by the Secretary of War.

There were subsequent acts passed by Congress relating to the killing of seals on said islands, under the supervision of the Secretary of the Treasury, the provisions of which acts are incorporated into the revised statutes commencing with section 1960, and have no particular bearing upon the present inquiry.

By section 8 of the act of May 17, 1884 (23 Stat., 24), providing a civil government for Alaska, it was created a land district, with proper land officers, and the mining laws only, and not the general land laws, of the United States were extended over it subject to regulations to be made by the Secretary of the Interior with the approval of the President.

By section 12, act of March 3, 1891 (26 Stat., 1095, 1099), the townsite laws were extended to Alaska under the supervision of the Secretary of the Interior and by sections 12 and 13 provision was made for the purchase, through the Department of the Interior, by qualified parties, of not exceeding one hundred und sixty acres of land for trade or manufactures. By section 14 certain exceptions were made to said right of purchase, among which were the "Pribylov Group or Seal Islands." By section 15 the Annette Islands were set apart as a reservation for the use of the Metlakahtla Indians.

On May 14, 1898 (30 Stat., 409), was approved an act extending the homestead laws and providing for the right of way for railroads in the district of Alaska. This act also amended the law in relation

to the purchase of land for trade or manufacture, and regulated entries on navigable waters. It expressly—

Provided, That the Annette, Pribolof Islands, and the islands leased or occupied for the propagation of foxes, be excepted from the operation of this act.

By act of March 3, 1899 (30 Stat., 1253), was provided a code of criminal procedure for Alaska. By section 173 the former prohibitions against killing fur-bearing animals are repeated, and the Secretary of the Treasury is empowered to grant authority to kill the same, except seals; to make regulations on the subject; and by section 176 the islands of St. Paul and St. George are again declared to be a special reservation.

By section 27 of the act of June 6, 1900 (31 Stat., 330), making further provision for a civil government in Alaska, it is expressly declared that nothing contained in said act "shall be construed to put in force in the district [of Alaska] the general land laws of the United States."

The provision in the appropriation act of March 3, 1879 (20 Stat., 377, 383), under which the Secretary of the Treasury acted in leasing islands for the propagation of foxes, is as follows:

That authority be, and is hereby, given to the Secretary of the Treasury to lease, at his discretion for a period not exceeding five years, such unoccupied and unproductive property of the United States under his control, for the leasing of which there is no authority under existing law, and such leases shall be reported annually to Congress.

It does not appear from the foregoing recital of the legislation of Congress that the Secretary of the Interior has been clothed with general jurisdiction of the public lands in Alaska, but that, on the contrary, his jurisdiction is limited and circumscribed under the recited acts of Congress to the specific matters mentioned, viz., the administration therein of the mining laws, the townsite laws, the right-of-way law, the homestead laws, and the sale of land for trade or manufacture. Even if the land department, under the supervision of the Secretary of the Interior, were possessed of general jurisdiction over the public land in Alaska, no authority is found under which that officer would be justified in leasing land for propagating foxes or for taking under his care and control land already leased for that purpose. The act of 1879, *supra*, on which the Secretary of the Treasury has acted, if it confers such authority, confers it only on that officer, and does not empower him to transfer his responsibility to this Department.

Moreover, the islands leased for the propagation of foxes are expressly excluded from whatever jurisdiction over the public lands has been conferred on this Department by the act of May 14, 1898, *supra*. Surely, in the face of the plain purpose, manifested by that exclusion and indicated elsewhere in the recited legislation, to leave

the jurisdiction over those islands where it then was, this Department is wholly without authority to act in the premises or to comply with the request of the Secretary of the Treasury, and I so advise you.

Approved:

E. A. HITCHCOCK,
Secretary.

MINING CLAIM—LOCATION LINES UPON PATENTED CLAIMS.

THE HIDEE GOLD MINING COMPANY.

The location lines of a lode mining claim are used only to describe, define and limit property rights in the claim, and may be laid within, upon or across the surface of patented lode mining claims for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins, where such lines:

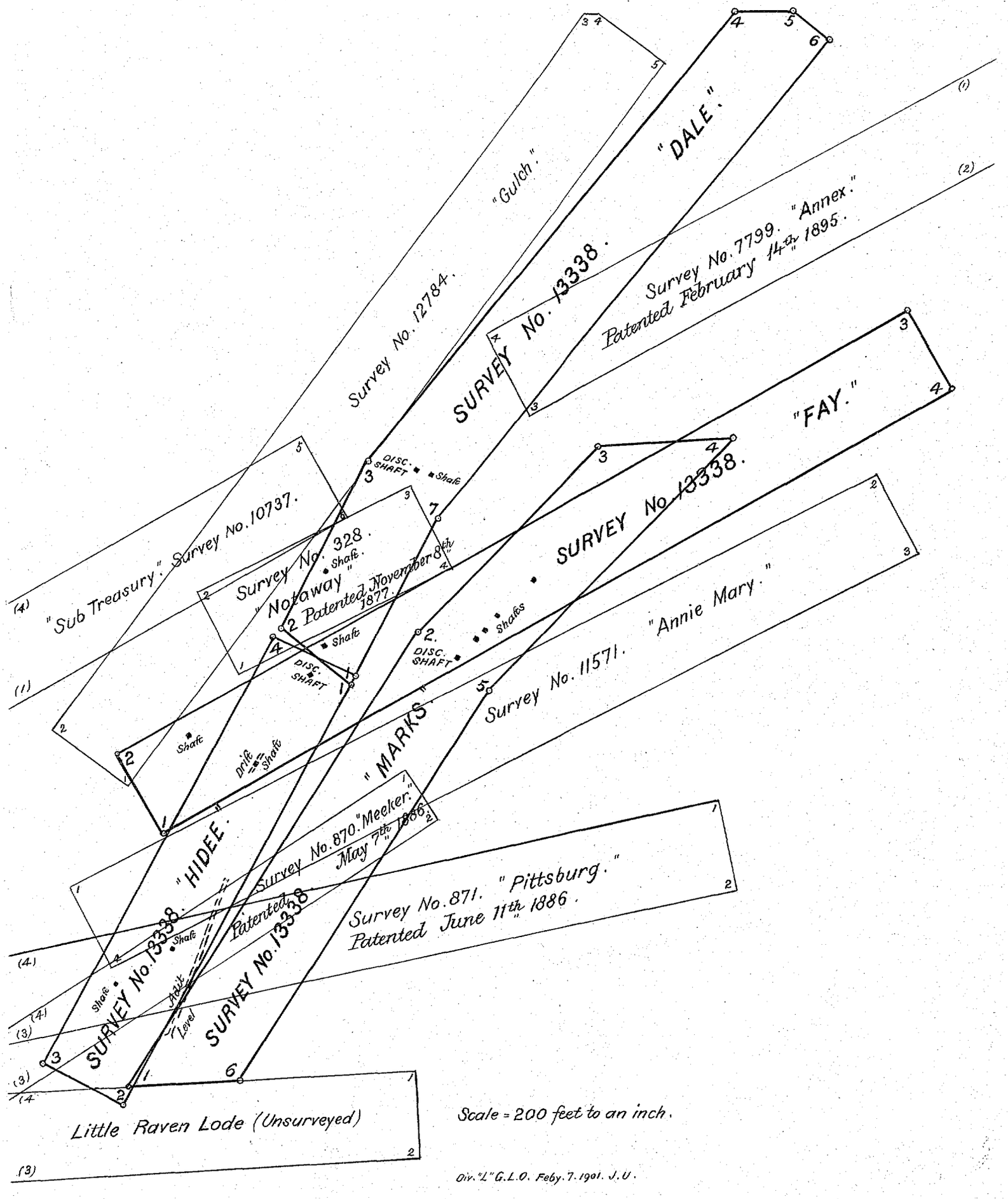
(*a*) Are established openly and peaceably.

(*b*) Do not embrace any larger area of surface, claimed and unclaimed, than the law permits.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 30, 1901.* (E. B., Jr.)

The Department has considered the appeal of The Hidee Gold Mining Company from the decision of your office, dated August 1, 1900, refusing, in the matter of the company's application for a patent to the Marks, Hidee, Dale, and Fay lode mining claims, survey No. 13338, embraced in mineral entry No. 707, Denver, Colorado, land district, to issue patent for the said Marks, Hidee, and Dale claims upon the survey thereof as made and approved, for the reason as stated that certain parts of the location lines of those claims had been laid within, upon or across other patented lode claims.

The application for patent was filed December 26, 1899, due notice thereof was given as prescribed by the statute and official regulations thereunder, and no adverse claim or protest having been filed, entry of the claim was allowed March 26, 1900. In the order first above given the claims were located January 15, 1894, March 24, 1896, March 24, 1896, and March 25, 1896, respectively. As located, surveyed for patent and entered, they form a contiguous group, portions of certain of the lines of location and survey and certain corners thereof being laid and established within and upon patented lode mining claims as shown by the accompanying diagram prepared from the official plat of survey, upon which the dates of the respective patents, as obtained from the records of your office, have been added. It will be observed that parts of the lines of the Dale, Hidee and Marks claims are laid also within and upon other claims, but as such other claims were not entered or patented until subsequent to the location of


"Gulch."
Survey No. 12784.
"DALE."
SURVEY No. 13338.
Survey No. 7799. "Annex."
Patented February 14th 1895.
"Sub Treasury." Survey No. 10737.
Survey No. 328.
"Notaway"
Patented November 8th 1877.
DISC. SHAFT
Shafts
"FAY."
SURVEY No. 13338.
Survey No. 11571. "Annie Mary."
"HIDEE."
SURVEY No. 13338.
Survey No. 870. "Meeker."
Patented May 7th 1886.
"MARKS."
SURVEY No. 13338.
Survey No. 871. "Pittsburg."
Patented June 11th 1886.
Adit Level
drift
Little Raven Lode (Unsurveyed)
Scale = 200 feet to an inch.
Div. "L" G.L.O. Feby. 7. 1901. J.U.

the three claims last named they need not be considered, as will hereinafter more clearly appear. As shown by the diagram portions of the location lines of the Dale are laid within and upon the patented Notaway and Annex; of the Hidee within and upon the patented Notaway, Meeker and Pittsburg; of the Marks upon and across the Meeker and Pittsburg; and corners No. 2 of the Dale and 4 of the Hidee are established upon the Notaway, corner No. 3, also, of the Hidee being established upon the Meeker. None of the location lines of the Fay were laid upon patented land, and there does not appear to be any objection to the issuance of patent for this claim.

The decision of your office holds, in effect, that it was unlawful to place any portion of the location lines of the Dale, Hidee or Marks claims within, upon or across any of the said patented claims; that the Dale, Hidee and Marks locations were absolutely void and of no effect southward from the most southerly point where a southern parallel end line could have been established for each of them, respectively, without entering upon or within any of the patented claims; that as a condition precedent to the issue of any patent embracing the Hidee and Marks claims, under said application and entry, "an amended survey will be necessary to establish a new southerly parallel end line of both of said locations, eliminating all conflict with the Pittsburg and Meeker and also to eliminate the conflict between the Notaway and the Hidee at the Hidee's northwest corner;" and that the entry must be canceled as to the Dale for the reason that, as the location of that claim is invalid and void to the extent above stated, and as the establishment of a valid end line therefor north of the Notaway would render the Dale non-contiguous to any member of the said group, that claim could not, on that account, be embraced in the said application and entry.

It is urged in the appeal that the object in extending the location lines of the claims in question within, upon or across the said patented claims was not to claim any of such patented ground, or any vein therein or pertaining thereto, but for the purpose of including and acquiring title not only to the discovery vein and all other veins apexing within the free and unappropriated ground within such location lines, and the ground itself as well, but also for the purpose of securing extralateral underground rights upon all such veins; and it is contended that for such purposes it was and is proper and lawful to lay any parts of the lines of a lode location of the length and breadth prescribed by the mining laws, within, upon, or across patented lode claims, and that patent may issue upon such locations as are here in question for any land embraced therein and all veins apexing in such land, to which the United States had title and which were unappropriated and subject to location when the locations were made.

None of the ground embraced in common between the boundary lines of the patented claims and the location lines of the several mem-

bers of the said group of claims (for convenience hereinafter called the Hidee group) is now claimed by the applicant for patent, nor, so far as appears, has ever been claimed by it or its predecessors in interest. All such ground is expressly excluded from the said application and entry. Neither is there disclosed any conflict as to underground extralateral rights or claims. The said application and entry do not, therefore, embrace or include any ground or extralateral right, title to which has passed out of the United States, or which is embraced or included in any other entry, but only that for which, unless the objection thereto of your office shall appear to be well founded, it shall be "assumed," in the language of section 2325 of the Revised Statutes, "that the applicant is entitled to a patent."

The mining laws of the United States upon which the said application and entry rest and which bear upon the question here presented are as follows:

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

SEC. 2320. Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, 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, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitations necessary. The end-lines of each claim shall be parallel to each other.

SEC. 2322. The locators of all mining-locations heretofore made or which shall hereafter be made, on any mineral vein, lode or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of 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. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges.

And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

SEC. 2324. The miners of each mining district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. . . . .

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to

the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

That the surface dimensions, parallelism of end lines, marking of boundaries and discovery of the vein or lode in case of each of the locations here involved are such as if the lines thereof had been laid wholly upon unappropriated public land would meet all the requirements of the foregoing provisions of the mining laws necessary to constitute each a valid lode location is not questioned. The locations of the Hidee group under consideration, although the lines thereof were laid in part within and upon patented claims, were apparently consummated openly and without provoking any objection or opposition whatever, in a single instance, from the owners of such patented claims. For anything that appears to the contrary, the locators may have entered upon the patented premises for the purpose of marking the location boundaries, with the full consent and approval of such owners. Was any mining law violated under these circumstances, or were any of the locations thus made invalid or void, in whole or in part, solely because the lines thereof were laid in part for the purpose alleged upon patented claims?

What was done by the locators in these cases had the sanction and approval of the custom of many years among miners throughout the mining regions of the west, and of the unbroken practice of the land department since the passage of the act of May 10, 1872, in the issuance of patents for lode claims, the lines of which, as in the case at bar, were laid in part within, upon or across patented claims. Claimed property rights of great value depend in each of the States and Territories over which the mining laws of the United States are operative, upon the maintenance of the principle involved in such custom and practice. Should it be duly declared to be unsound and unlawful by competent and final authority, every patent issued and every existing location dependent in any measure upon it would, in such measure at least, if not in entirety, be without legal effect and void. Such a conclusion, fraught with such deplorable results, should surely be avoided unless compelled by the plain and unmistakable terms of the law itself or by clear and unequivocal implication. The Department is convinced that no such conclusion is required or warranted. Your office decision does not point to, nor is the Department aware of, anything in the mining laws which sustains it. On the contrary, there is much in the law itself, and in the reason of the case, to uphold the contrary view contended for by appellant.

If the mining laws of the United States had followed the rule of the common law as to underground rights, and the mining laws of Spain and Mexico in confining the locator or owner of a lode mining claim to perpendicular lines on every side of his claimed ground, there would

be less reason for placing any of the lines of his location within, upon or across patented lands. The mining laws of the United States mark a distinct departure from these earlier laws in the matter of underground rights. In sections 2320 and 2322, set out above, there are given, in express terms, in addition to rights to the surface and the lodes or veins immediately beneath the same, as therein defined and limited, extralateral underground possessory rights to all veins, lodes, and ledges apexing within the vertical surface lines, and departing from a perpendicular in their course downward so as to extend outside such lines, confined, however, to such outside parts of such veins or ledges as shall lie between vertical planes drawn downward through parallel end lines of the locations, "so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges;" and section 2325 prescribes the method and the conditions, in pursuance of which, in the absence of any adverse claim, these possessory rights may be carried into full legal title. The sole purpose of requiring the end lines of lode locations to be parallel to each other was to limit and define the grant of such extralateral underground rights. The original mining statute of July 26, 1866 (14 Stat., 251), granted extralateral underground rights without requiring parallelism of end lines, but to avoid the difficulties and confusion which arose in ascertaining the extent of such rights under that statute, the requirement of parallelism in end lines was imposed by the act of May 10, 1872 (17 Stat., 91), and it is now well settled that in the absence of such parallelism no extralateral rights are granted by existing mining laws.

These extralateral underground rights are, not infrequently, the most valuable property rights under a lode location. Yet unless a lode locator can place the lines of his location within, upon or across the adjoining or intervening property of another he would often be compelled to choose between the loss of surface and the vein or veins beneath the same, and the loss of the extralateral underground portion of the vein. As was said by the supreme court in the case of Del Monte Mining Co. *v.* Last Chance Mining Co. (171 U. S., 55, 75)—

> It will often happen that locations which do not overlap are so placed as to leave between them some irregular parcel of ground. Within that, it being no more than one locator is entitled to take, may be discovered a mineral vein and the discoverer desire to take the entire surface and yet it be impossible for him to do so and make his end lines parallel unless, for the mere purpose of location, he be permitted to place those end lines on territory already claimed by the prior locators.
>
> Again, the location upon the surface is not made with the view of getting benefits from the use of that surface. The purpose is to reach the vein which is hidden in the depths of the earth, and the location is made to measure rights beneath the surface. The area of surface is not the matter of moment; the thing of value is the hidden mineral below, and each locator ought to be entitled to make his location so as to reach as much of the unappropriated, and perhaps only partially discovered and traced, vein as is possible.

And in the same case, directly upon the subject of the parallelism of end lines, the court said (pp. 84 and 85):

In this connection it may be properly inquired what is the significance of parallel end lines? Is it to secure to the locator in all cases a tract in the shape of a parallelogram? Is it that the surveys of mineral land shall be like the ordinary public surveys in rectangular form, capable of easy adjustment, and showing upon a plat that even measurement which is so marked a feature of the range, township and section system? Clearly not. While the contemplation of Congress may have been that every location should be in the form of a parallelogram, not exceeding 1,500 by 600 feet in size, yet the purpose was also to permit the location in such a way as to secure not exceeding 1,500 feet of the length of a discovered vein, and it was expected that the locator would so place it as in his judgment would make the location lengthwise cover the course of the vein. There is no command that the side lines shall be parallel, and the requisition that the end lines shall be parallel was for the purpose of bounding the undergound extralateral rights which the owner of the location may exercise. He may pursue the vein downwards outside the side lines of his location, but the limits of his right are not to extend on the course of the vein beyond the end lines projected downward through the earth. His rights on the surface are bounded by the several lines of his location, and the end lines must be parallel in order that in going downwards he shall acquire no further length of the vein than the planes of those lines extended downward enclose. If the end lines are not parallel, then, following their planes downward his rights will be either converging and diminishing or diverging and increasing the farther he descends into the earth. In view of this purpose and effect of the parallel end lines it matters not to the prior locator where the end lines of the junior location are laid. No matter where they may be, they do not disturb in the slightest his surface or undergound rights.

The court was there discussing only the question of the right of a junior locator of a lode claim to place any of his location lines within, upon or across a valid senior location, but the language employed is not on that account without application to the case at bar, and the important bearing upon this case of the court's decision upon that question will be shown further on. If, as would seem to be the case, it was the purpose of Congress, in framing and enacting the existing mining laws, which make what may be called a mining code, to grant to the lode claimant, in addition to the surface, all veins apexing within the same as therein limited, not only beneath such surface but also throughout their course downward outside thereof and between vertical planes through the parallel end lines, extended as therein provided, which could be given without conflict with the rights of prior locators or patentees, the end in view being to encourage and promote the extraction from the earth of the treasures of mineral wealth hidden in the veins and fissures of the rocks therein, to the fullest extent possible, such purpose and end would be contravened, and the carefully devised legislation of Congress in that behalf rendered largely abortive, if the conclusions reached in your office decision should come to be accepted as the correct exposition of the law.

The location or survey lines of a claim are not in themselves any part of the claim or property for which a patent is sought, but are only

used to describe, define, and limit property rights in the claim. What matters it then to the government, in the issue of patent, where the lines of a lode location have been placed, so long as no property belonging to another is claimed and the property to be patented is accurately described, and the lines do not embrace any larger area of surface, claimed and excluded, than the law permits, and, if laid within, upon or across private land, the same was done openly and not contrary to the will and rights of the private owner?

If mining improvements, which are in themselves often very valuable property, and are required by the mining laws (sections 2324, 2325 R. S., and the act of February 11, 1875, 18 Stat., 315), to keep alive the right of possession and to entitle a claimant to a patent, such as tunnels, drifts, etc., made for the development of a claim and actually contributing thereto, may be placed outside the claim and on private land, as it is well settled they may be (Lindley on Mines, Vol. 2, Sec. 631, and decisions there cited), there would not seem to be any substantial reason, in the absence of express or clearly implied statutory inhibition, why location lines, which are not property *per se*, may not also be laid, for the purposes and ends hereinbefore indicated, upon private property.

The precise question presented in this case has never, so far as the Department has been able to learn, been decided by any court. The nearest approach to it occurred in the decisions of the courts in the Del Monte-Last Chance case referred to above. In the decision by the circuit court in that case (given by Judge Hallett, but not reported) it was said, in view of the requirement of the statute as to parallelism of end lines of a lode location, and the dependency of extralateral rights theron, that if, in making his location to meet this requirement, the locator—

> gets upon the territory of other claimants, whether at the time of such location the claims adjacent have or have not been patented, his lines are well laid with reference to the territory actually open to that location.

And that, in order to acquire territory of triangular shape—

> even if the lines fell upon other claims which had already passed to patent, the result would be the same.

And again, in the same decision:

> We can easily conceive of a piece of ground being in a situation, on account of other locations adjacent to it, which would call for pretty nearly all the lines, both endlines and side-lines being upon other claims; I think they would still be effective as to the territory actually acquired under the location, although placed upon other claims.
>
> I comprehend the force of the argument that all lines located upon other claims of earlier date are invalid because they are not on territory open to location; but I do not believe that to be a correct position. I think that, the act of Congress requiring that a claim shall be of a certain form (and the locator in order to secure the territory which he wants will be compelled to conform to that shape), he may put his lines so as to take the territory to which he may be entitled rather than upon the territory itself.

While in view of the fact that in that case location lines had been laid not within, upon or across patented claims, but located claims, and therefore the language used, was, as to the case here under consideration, only in the nature of *obiter dictum*, and not controlling authority, still, as the expression of what the court would almost certainly have said had the facts and the language there used been in strict accord, and as the opinion of a judge of long and thorough acquaintance with the mining laws and experience in the trial and decision of cases arising thereunder, it is deserving of very respectful consideration.

The Del Monte-Last Chance case, *supra*, coming finally before the supreme court upon certain questions certified by the court of appeals for the eighth circuit, to the question—

> May any of the lines of a junior lode location be laid within, upon or across the surface of a valid senior location for the purpose of defining for or securing to such junior location under-ground or extralateral rights not in conflict with any rights of the senior location?—

the supreme court returned "an affirmative answer subject to the qualification that no forcible entry is made."

It is urged with great cogency of argument that the conclusion reached by the supreme court in its decision upon that question, and much of the reasoning upon which the decision rests, tend strongly to sustain and even require an affirmative answer to the question presented in the case at bar.

In the Del Monte-Last Chance case the chief, if not the only ground of objection urged and considered to the laying of any of the lines of a junior location within, upon or across the surface of a valid senior location, appears to have been that the same involved a trespass upon the territory of the senior locator and that "it can not be presumed that Congress intended that any rights should be created by trespass." To this objection the court gave very thorough consideration, but was "constrained to hold that it is not controlling," and that the conclusion did not necessarily follow that to justify an entry upon the senior location for the purpose stated was "to sanction a forcible trespass and thus precipitate a breach of the peace." The fallacy that such a conclusion follows of necessity from the premises stated is well illustrated, it is proper to remark in passing, by what appear to have been the facts in the case at bar relative to the consummation of the locations of the three members of the Hidee group in question. It is not deemed necessary to set out herein all the reasoning from which the court arrived at an affirmative answer to the question certified to it by the lower court. Some of it has already been given in the language quoted above from the court's decision.

It was conceded by the court, in substance, and is so well settled as to require no citation of authorities, that a valid and subsisting lode location is property in the highest sense of the term, that it has the

effect of a grant of the right of present and exclusive possession of the land located, and may, like other real property, be the subject of mortgage, sale, transfer or inheritance. Does the owner of a patented mining claim have any right or remedy then, as against a trespasser, which the owner of a valid subsisting lode location would not have? May not the patent be regarded, as far as the subject under discussion is concerned, as only proof of the perfected location or grant? The answer to the former of these questions, it seems, must be in the negative, and to the latter in the affirmative. It matters not, in the consideration of the objection stated, that the fee remains in the United States until the issuance of patent and that the right of possession may be lost by failure to maintain it, as against a relocator, in the manner provided by the statute. The right is none the less absolute and exclusive under a location than under a patent, while the former is maintained in accordance with the law. Even the right of possession and exclusive enjoyment under a patent of the government, or any other fee simple title, may also be lost by neglect, by reason of adverse possession for a comparatively limited period.

As said again by the supreme court in the Del Monte-Last Chance case, "This location does not come at the end of proceedings, to define and limit that which has been acquired after all contests have been adjudicated." The laying of the location lines of a claim is, indeed, among the very earliest steps in the proceedings to acquire title from the government, and of which in most instances the land department has no knowledge until long afterward—frequently many years afterward. In the meantime questions of trespass, if any, growing out of the laying of such lines upon the property of another, would usually have been settled in the courts—the only tribunals competent to settle such questions. The Department is not aware of any instance in all the history of claims for patent to mineral lands in which objection has been made by any owner of patented lands to the mere laying of location lines or placing of location stakes thereon by a mineral locator, where no part of the patented land was claimed by such locator.

It is the conclusion, therefore, of the Department, after very careful and mature investigation and consideration of the subject, that the long-established custom and practice before recited finds ample support in the law itself as well as in a wise and enlightened public policy relative to the disposal of the public mineral lands, and that a departure therefrom at this late day, entailing, necessarily, immediate and widespread confusion and uncertainty of titles to patented and unpatented mining claims, would be altogether unfortunate and without justification.

The decision of your office is reversed, in accordance with the views herein expressed. If there be no other objection thereto, you will pass the said entry to patent.

INSTRUCTIONS GOVERNING REPAYMENTS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 22, 1901.

TO REGISTERS AND RECEIVERS
of United States Land Offices.

GENTLEMEN:

Your attention is called to the following provisions of the act of Congress approved June 16, 1880 (21 Stat. 287), entitled "An Act for the relief of certain settlers on the public lands, and to provide for the payment of certain fees, purchase money, and commissions paid on void entries of public lands:"

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled "An Act to amend an act entitled 'An Act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States,' and amendments thereto," approved March third, eighteen hundred and seventy-three, and now incorporated in section twenty-three hundred and six of the Revised Statutes of the United States, which said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon canceled, the Secretary of the Interior is authorized to repay to such innocent parties the fees and commissions and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase money on lands erroneously sold by the United States.

SEC. 2. 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 excesses 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, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns.

SEC. 3. The Secretary of the Interior is authorized to make the payments herein provided for out of any money in the Treasury not otherwise appropriated.

SEC. 4. The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary instructions, to carry the provisions of this act into effect; and for the repayment of the purchase money and fees herein provided for the Secretary of the Interior shall draw his warrant on the Treasury and the same shall be paid without regard to the date of cancellation of the entries.

The foregoing act is additional to the provisions of sections 2362 and 2363, United States Revised Statutes.

APPLICATIONS.

1. Applications for repayment of fee, commissions, excess and purchase money should be made in the following or equivalent form:

To the COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: I hereby make application for repayment of the purchase money paid on entry of the —— of section ——, township ——, range ——, as per certificate No. ——, issued at ——, bearing date the —— day of ——, 1——.

(Applicant sign here. Give P. O. address.) —— ——,
—— ——.

STATE OF ——
COUNTY OF —— } ss.

On this —— day of ——, 19——, before the subscriber, a —— in and for said county personally came ——, to me well known to be the person who subscribed the foregoing application, who, being duly sworn, on —— oath, declares that —— ha—— not sold, assigned, nor in any manner encumbered, the title to the tract of land described in said application, and that the same has not become a matter of record.

(Applicant sign here.) —— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 19——.

—— ——,
—— ——.

The affidavit may be made before the register or receiver, or any officer authorized to administer oaths. When made before a justice of the peace, a certificate of official character is required.

FEES, COMMISSIONS, EXCESSES, ETC.

On fraudulent and void additional soldier and sailor entries.

2. The *first* section of the act authorizes the payment "to innocent parties" of the fees, commissions, etc., paid by them on fraudulent and void additional soldier and sailor homestead entries which have been canceled.

Repayment of fees, commissions, and excesses under section 1 can be made only to the party who paid the same. A conveyance of the land in these cases will not be deemed to carry with it the right to repayment.

Applications for repayment under this section must be accompanied by the duplicate receipt, or evidence of the loss of the same, and by a concise statement under oath setting forth all the facts and circumstances connected with the procurement and use of the fraudulent papers upon which the canceled entries were based, together with such documentary or other proof as may tend to establish the innocence of the parties relative thereto.

On entries canceled for conflict, or where the same have been erroneously allowed and can not be confirmed.

The first clause of the *second* section of the act provides:

3. For the repayment of purchase money and of fees, commissions, and excess payments, where entries of public lands are canceled for conflict, "or where, from any cause, the entry has been erroneously allowed and can not be confirmed."

In the case of applications for the payment of fees, commissions, etc., on canceled homestead and other entries, under the *second* section of the act, the duplicate receipt must be surrendered, together with a relinquishment in the following or equivalent form:

——— ———, ———, 19——.

I hereby relinquish to the United States all my right, title, and claim in and to the land described in receipt No. ———, issued at ———, ———, 1——, being for the ——— of section ———, township ———, and range ———.

——— ———.

Witness:

——— ———.

——— ———.

Acknowledged before me this ——— day of ———, 19——.

——— ———,

——— ———.

This relinquishment may be acknowledged before the register or receiver or before any officer authorized to take acknowledgments.

4. If the duplicate receipt has been lost or destroyed, an affidavit stating the fact must be furnished, together with a relinquishment in effect as in the above form.

DOUBLE-MINIMUM EXCESS.

The last clause of the *second* section of the act provides that "in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of $1.25 per acre shall in like manner be repaid to the purchaser thereof or to the heirs or assigns."

5. Applications for repayment of double-minimum excess should be made in the following form:

To the COMMISSIONER OF THE GENERAL LAND OFFICE.

SIR: ——— hereby make application for repayment of the double-minimum excess paid on entry of the ——— of section ———, township ———, range ———, as per certificate No. ———, issued at ———, bearing date the ——— day of ———, 1——.

(Applicant sign here. Give P. O. address.) ——— ———,

——— ———.

STATE OF ——
COUNTY OF —— } ss:

On this —— day of ——, 19—, before the subscriber, a —— in and for said county, personally came ——, to me well known to be the person who subscribed to the foregoing application, who, being duly sworn, on —— oath declares that —— has not sold or assigned —— right in any way to the double-minimum excess described in said application.

(Applicant sign here.) —— ——.

Subscribed and sworn to before me this —— day of ——, A. D. 19—.

—— ——,
—— ——.

6. The applicant must also furnish a corroborated affidavit showing that he is the identical party who made the entry on which repayment is claimed.

Repayment of double-minimum excess will be made only to the original entryman, his heirs or assigns. The sale and transfer of the land is not of itself treated as an assignment of the right to receive repayment of double-minimum excess.

PURCHASE MONEY.

Where patent has not been issued, and the title has not otherwise become a matter of record.

7. In applications for repayment where patent has not issued, the duplicate receipt must be surrendered. The applicant must make affidavit that he has not transferred or otherwise encumbered the title to the land and that the same has not become a matter of record.

Where the duplicate receipt has been lost or destroyed, a certificate will also be required from the proper recording officer, showing that the same has not become a matter of record and that there is no incumbrance of the title to the land thereunder. A like certificate must be furnished when the application is made by another than the original purchaser.

Where title has become a matter of record.

8. Where the title has become a matter of record, and in all cases where patent has issued, a duly executed deed, relinquishing to the United States all right and claim to the land under the entry or patent, must accompany the application. This deed must be duly recorded, and a certificate must also be produced from the proper recording officer where the land is situated, showing that said deed is so recorded and that the records of his office do not exhibit any other conveyance or incumbrance of the title to the land.

Where a valid title to the land embraced in a canceled entry has been conveyed by the government to other parties, the applicant for repayment under such canceled entry must reconvey to the United States the title derived from such invalid entry. If, however, the

applicant has acquired the valid title already conveyed by the United States, it will not be necessary for him to reconvey the land, but he may make a full statement, with corroborative evidence of the facts, waiving all claim under the invalid entry, and thereupon receive repayment of the amount erroneously paid.

The reconveyance to the United States must conform in every particular to the laws of the State or Territory in which the land is located relative to transfers of real property; in the case of a married man, in localities where the right of dower exists, there must be a release of dower by the wife, and in case of an executor or administrator, due proof of authority to alienate the estate.

Where a patent has been executed and delivered it must be surrendered.

HEIRS, EXECUTORS, ADMINISTRATORS, AND ASSIGNEES.

9. Where application is made by heirs, satisfactory proof of heirship is required. This must be the best evidence that can be obtained, and must show that the parties applying are the heirs and the only heirs of the deceased.

10. Where application is made by executors, a certificate of executorship from the probate court must accompany the application.

11. Where application is made by administrators, the original, or a certified copy, of the letters of administration must be furnished.

12. Where applications are made by assignees, the applicants must show their right to repayment by furnishing properly authenticated abstracts of title, or the original deeds or instruments of assignment, or certified copies thereof, and also show by affidavits or otherwise that they have not been indemnified by their grantors or assignors for the failure of title, and that title has not been perfected in them by their grantors through other sources.

13. Where there has been a conveyance of the land and the original purchaser applies for repayment, he must show that he has indemnified his assignee or perfected the title in him through another source, or produce a full reconveyance to himself from the last grantee or assignee.

ASSIGNEES.

Those persons are assignees, within the meaning of the statutes authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed and take assignments of the title under such entries prior to complete cancellation thereof, when the entries fail of confirmation for reasons contemplated by the law. To construe said statutes so as to recognize the assignment or transfer of the mere claim against the United States for repayment of purchase money, or fees and commissions, disconnected from a sale of the land or attempted transfer of title thereto, would be against the settled policy

of the government and repugnant to section 3477 of the Revised Statutes. (2 Lawrence, First Comp. Dec., 264, 266, and 6 Dec. Comp. of the Treasury, 334, 359.)

Assignees of land who purchase after entry are, in general, deemed entitled to receive the repayment when the lands are found to have been erroneously sold by the government. But this rule does not apply to the repayment of double-minimum excesses. (First Comp. Dec. in case of Adrian B. Owens, Copp's Pub. Land Laws, 1890, vol. 2, p. 1238.)

DEFINITION OF "ERRONEOUSLY ALLOWED."

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.

TRANSMITTAL OF APPLICATIONS.

14. Applications for repayment may be filed either in this office or in the proper district land office.

When an application is filed in the district land office the register and receiver shall transmit the same with a full report of the facts in the case, as shown by their official records, and recommend either the allowance or the disallowance of the claim. When an application is filed, either in the district land office or in this office, it should be accompanied by a statement setting forth fully the grounds upon which repayment is claimed.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved:
E. A. HITCHCOCK,
Secretary.

OKLAHOMA LANDS—OCCUPANT—SEC. 1, ACT OF JANUARY 18, 1897.

BOBBITT *v.* ENDSLEY.

An "occupant," within the meaning of the act of January 18, 1897, must have not only the possession, but the actual use and enjoyment of the land; hence, one who had parted with the actual use and enjoyment of his land, and had not, on March 16, 1896, renewed such use and enjoyment, was not on that date a *bona fide* occupant, and is therefore not entitled to the preference right of entry accorded by section 1 of said act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 24, 1901.* (W. A. E.)

August 4, 1897, George W. Endsley made homestead entry No. 283, for the SW. ¼ of Sec. 27, T. 2 N., R. 20 W., Mangum, Oklahoma, land district.

December 31, 1897, John W. Bobbitt filed his application to make homestead entry for the above described tract, claiming a preference right of entry under section 1 of the act of January 18, 1897 (29 Stat., 490). In an affidavit accompanying said application Bobbitt alleged that he was a *bona fide* occupant of said land on March 16, 1896; that prior to that date he had placed on the land improvements to the value of $250; that he established his residence on said land in 1888 and resided there continuously until September 15, 1893; that he was then forced to leave on account of the failure of his crops; that he left all his household furniture and a part of his farming implements on the land, as he intended to return as soon as possible; that during his absence nearly all his improvements were removed from the land without his consent; that when he went away he left the place in charge of an agent; and that he had not been financially able to return to the land prior to the date of his application.

A hearing was ordered on these allegations, and at the appointed time both parties appeared. No testimony was submitted at that time, but, on motion by Endsley, the register and receiver rejected Bobbitt's application on the ground that by Bobbitt's own statement he had abandoned the land for almost four years, and was not a *bona fide* occupant thereof on March 16, 1896.

On appeal, your office, by letter of September 16, 1899, remanded the case for hearing, and on December 13, 1899, both parties submitted testimony.

Upon consideration of the evidence, the register and receiver rendered dissenting opinions—the former recommending that Endsley's entry be held intact, and the latter that it be canceled in favor of Bobbitt.

August 6, 1900, your office affirmed the decision of the register and held Endsley's entry intact. Bobbitt's appeal from this action brings the matter before the Department.

There is no dispute as to the material facts in the case, which appear to be as follows:

In October, 1888, Bobbitt went on the land with the intention of making it his home and built a dugout, granary, fence, cow pens, horse lots, dug a well, and planted about seven hundred peach and walnut trees. During 1890, 1891, and 1892, he raised crops of corn, wheat, oats, millet, and sorghum. In 1892 his crops were destroyed by hail. Being in debt, and not being able to obtain employment near the land, he went to Ellis, Texas, in September, 1892, where he got

work picking cotton at one dollar and twenty-five cents per day. Before leaving this land he planted a crop of wheat, and in June, 1893, he returned and harvested it. He then went back to Ellis, Texas, but before doing so he rented the place to one Killen for a year, with the understanding that Killen should look after the place until he got back. His household goods and most of his farming implements were left on the land. Killen raised a crop of feed on the land in 1894, but during 1895 and 1896 the land lay idle. In September, 1895, Bobbitt's movable improvements were levied on, sold, and moved away. His goods were thrown out, and some of the neighbors took care of them. Killen left the vicinity of this land about January 1, 1896. It does not appear that Bobbitt took any further action in regard to this land up to the time he filed his application to make entry therefor. On March 16, 1896, the only improvements on the place were the well and some breaking, the latter grass grown and used as a common by the neighbors to pasture their cattle on.

Endsley went on the land in the spring of 1897, did some plowing, and put in a crop of cotton, Kaffir, and sorghum. In the fall of 1897 he built a dugout on the land, and in January, 1898, less than six months from the date of his entry, he established his residence on said tract, and has resided there continuously ever since.

By section 1 of the act of January 18, 1897, a preference right of entry was given to "every person qualified under the homestead laws of the United States, who, on March sixteenth, eighteen hundred and ninety-six, was a *bona fide* occupant of land within the territory established as Greer county, Oklahoma." The time within which this preference right should be exercised was originally limited to six months from the passage of said act, but subsequently it was extended, by act approved June 23, 1897 (30 Stat., 105), to January 1, 1898.

Bobbitt's application was filed in time, and the only question presented by the record is, whether he was a *bona fide* occupant of the land on March 16, 1896.

In the case of Frank Johnson (28 L. D., 537), the word "occupant," as used in the act of January 18, 1897, was held to mean one in the actual use and possession of the land claimed by him. To be an occupant one must have not only the possession, but the actual use and enjoyment of the land. In the case of Fleming *v.* Maddox (30 Iowa, 239), cited in the Frank Johnson case, the following language was used:

> If the farmer leases his farm to a tenant, he would still have the possession, because the possession of the tenant is that of his landlord, but he would not be in the actual occupation; he has parted with that to his tenant. The tenant, after entry under his lease, has the use and enjoyment of the premises, and pays to his landlord the stipulated rent therefor. But, where the owner of the land is in the actual use and enjoyment of it himself, although in such use and enjoyment he employs others to perform all the labor connected therewith, he is in its actual occupation, within the meaning of that term.

It appears from Bobbitt's own testimony that when he left the land here involved in 1893 he rented it to Killen for one year. In so doing, he parted with the actual occupation to Killen. On the expiration of Killen's lease in 1894, Bobbitt took no steps to renew his occupation, nor had he done so up to the date of the hearing in this case. Even if it be held, however, that leaving his household goods and farming implements stored on the land was a sufficient "use and enjoyment" of the land to renew his occupation on the termination of Killen's lease without further action on his part, yet even this small use and enjoyment was ended in the fall of 1895, when all his goods and movable improvements were moved from the land.

It thus appears that on March 16, 1896, Bobbitt was not in the actual use and enjoyment of the land in question, and consequently was not a *bona fide* occupant at that date.

Your office decision is hereby affirmed, Bobbitt's application is rejected, and Endsley's entry is held intact, subject to compliance with law.

SCHOOL LAND—SURVEYED LAND IN FOREST RESERVATION—SELECTION OF LIEU LAND.

OPINION.

A selection authorized by the State of lands in lieu of sections sixteen and thirty-six in a forest reservation, where the right of the State to said sections has attached under its school grant prior to the establishment of the reservation, is such a waiver of its right to said sections as to obviate the necessity for the formal relinquishment thereof to the United States, as required by circular instructions of March 11, 1899.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, January 26, 1901. (S. V. P.)

By departmental decision of January 30, 1899 (28 L. D., 57), it was held that where a surveyed school section numbered 16 or 36, the title to which has passed to a State, is subsequently included within the limits of a forest reservation, the State, under the authority of section 2275, Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), may waive its right to such school section and select other land in lieu thereof.

In pursuance of this decision, on March 11, 1899 (28 L. D., 195), the following circular instructions were issued, requiring that the waiver of the State be evidenced in the manner therein prescribed:

2. The State will be required to file with each list of selections a relinquishment to the United States, by the officer or officers charged with the care and disposal of such State lands, of all its right and title in and to the lands designated as bases; and also a certificate by such officer or officers that the State has not encumbered, sold or disposed of, nor agreed to encumber, sell or dispose of, any of the said lands, and that

none of them are in possession of any third party under any law or permission of the State.

3. The said relinquishment must be executed, acknowledged and recorded in the same manner as conveyances of real property are required to be executed, acknowledged and recorded by the laws of the State; and therewith must be filed a certificate by the recorder of deeds or official custodian of the records of transfers of real estate in the proper county, that no instrument purporting to convey or in any way encumber the title to any of said land is on file or of record in his office.

By letter of November 2, 1899, the Commissioner of the General Land Office submitted a communication from the State surveyor general of California, dated October 3, 1899, asking for a modification of said circular instructions in so far as they require the State to file with each lieu selection a formal deed relinquishing or waiving its right and title to the land in lieu of which the selection is made.

With the Commissioner's letter was also an application on behalf of purchasers from the State, asking for a similar modification of said regulations.

The surveyor-general in his letter states:

I regret to say that I am without the legal right or power to comply with the regulations now in force, and if your office insists upon its enforcement the State will be precluded for many years from securing title to many acres of land to which, in my judgment, she is entitled, and great hardships and annoyances will entail upon the individuals to whom she has already sold these lands. It seems to me that when I, as the surveyor-general of this State filed a selection and asked to select other lands and designated a section within a forest reserve as basis, it is all that could be asked of the State, and the fact that the State took other land as indemnity and sold it, and received and retained the money, would operate as a bar to the State ever claiming thereafter the section used as basis.

The act of Congress dated February 28, 1891, provides that "the selection of such lands in lieu thereof by said State or territory shall be a waiver of its right to said sections," and it would seem that this provision of the federal statute, coupled with the official acts of my office would meet all the requirements of your office.

By your reference an opinion is requested as to whether "the selection by the State of California of lands in lieu of sections sixteen and thirty-six in a forest reservation, where the right of the State to said sections has attached, is such a waiver of its right to said sections as to obviate the necessity for the relinquishment thereof to the United States as required by said circular instructions."

In support of the application of the surveyor-general a brief has been filed on behalf of the State.

The question herein arises under the following provisions of section 2275, Revised Statutes, as amended by the act of February 28, 1891, to wit:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Ter-

ritory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections.

The departmental decision under which these regulations were formulated holds that this section, so amended, not only authorizes the State to select indemnity for sections 16 and 36 where lost to the grant by reason of being included within any Indian, military, or other reservation before the title vests in the State, but also confers upon the State the privilege of exchanging for other lands said sections, where after the title has vested in the State the same are embraced within such a reservation.

The circular instructions under consideration were formulated with the view that, where the title to the base lands had vested in the State, an exchange thereof for other lands could only be effected through some act on the part of the State that would carry the full consequences of a reconveyance of the base lands to the United States.

The surveyor-general states that he has no authority to make a formal deed of relinquishment to the United States and in that manner return the title that has vested in the State, but insists that if he selects other lands in lieu of those to which the State has a vested title and such selection is approved by the Secretary of the Interior that a full reconveyance to the United States of the State's title will be thereby effected.

Scetion 2275, Revised Statutes, as so amended, which has been held as before stated to authorize a State to select lands in lieu of a school section, which has been embraced within the boundaries of a reservation, after the title thereto has vested in the State, contains the further provision that "the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections."

To say that this provision does not contemplate that this selection of other lands will constitute an effective waiver of the State's right to the lands to which it has a vested title, and in lieu of which the selection is made, is to say that the statute does not authorize a selection of lands in lieu of lands of that character. The provision as to waiver applies to all lands in lieu of which a selection is authorized. No distinction in the effect to be given to the selection can be based upon the fact that the title to the base lands has or has not vested in the State. In either case the selection of other lands in lieu thereof is a waiver of the right of the State to the base lands. Congress has authority to declare what effect shall be given to such a selection and to provide that it shall constitute a sufficient waiver of the State's claim to the base lands, and having done so, it is not necessary for this Department to require a further waiver in the shape of a formal deed of relinquishment.

If the surveyor-general has authority under the laws of the State

of California to act as its agent in the matter of effecting the proposed exchange, his present contention is well taken, and therefore the answer to the question submitted depends upon the ascertainment of his authority in the premises under the laws of the State.

Section 3398 of the Political Code of California provides:

> The surveyor-general is the general agent of the State for the location in the United States land offices of the unsold portion of five hundred thousand acres of land granted to the State for school purposes, and the sixteenth and thirty-sixth sections granted for the use of public schools, and lands in lieu thereof.

In the adjustment of the grant of school lands to the State of California, the Department has heretofore recognized the State surveyor-general as the legally authorized agent of the State, and has treated his official acts in connection with such adjustment as the acts of the State. (6 L. D., 403.)

No question would be raised as to the authority of that officer in the present instance were it not that he is here acting with respect to what is supposed to be a new class of selections. His selection of lands in lieu of school sections embraced in a reservation before the title of the State becomes vested, is recognized as a selection by the State, and, if approved by the Secretary of the Interior, is considered a conclusive waiver of all right of the State to the basis. But does his authority to select other lands in lieu of a school section confer upon him the requisite authority to act for the State where full title to the school section is vested in the State?

The grant of authority to this officer by the statute of the State is for the "location in the United States land offices . . . . [of] the sixteenth and thirty-sixth sections granted for the use of public schools, and *lands in lieu thereof.*"

Are the selections now under consideration lands in lieu of the sixteenth and thirty-sixth sections as such words are used in said statute?

In answering this question it must be remembered that the right to lieu lands rests upon the laws of Congress, and not upon the laws of the State, and that in the departmental decision under which these circular instructions were formulated, it is expressly decided that where sections sixteen and thirty-six are included within the limits of a forest reservation, the State is authorized to select other lands in lieu thereof under section 2275, Revised Statutes, as amended, whether the title to such school sections had or had not vested in the State before the establishment of the reservation, it being said in the decision that:

> The terms "indemnity" and "lieu selections" therefore, in the nomenclature of the public land laws, are not used simply to denote a compensatory allowance for lands which have been lost to a grantee, but are also at times employed to include the giving of one tract for another, the right to which is relinquished or waived by the grantee.
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> * * * * * * *
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> It is believed, therefore, that the conclusion herein reached accords with the intent

of Congress, and is in pursuance of a wise public policy. It gives to the State that which she reasonably asks—the right to select the tract herein described in lieu of the equal tract in section thirty-six, which is completely enclosed in the Sierra forest reservation. The selection, when approved, will operate as a waiver by the State of its right to the tract used as a basis.

The Department having determined that selections like those under consideration are lieu selections that will, when approved by the Secretary of the Interior, operate as a waiver of the State's right to the basis, it seems that the general authority conferred upon the surveyor-general by the State statute amply covers the case in hand. The phrase "lands in lieu thereof" as used in that statute certainly relates to any lands taken, by authority of the laws of Congress, in the place of sections sixteen or thirty-six. The taking of other lands by the State in place of such sections where, after the title has vested in the State, they are included within the limits of a forest reservation, being fully authorized by section 2275, as amended, the authority of the surveyor-general, under the State statute, to act on behalf of the State is manifest.

I therefore answer your question in the affirmative.

Approved:

E. A. HITCHCOCK,
Secretary.

MINERAL LAND—NON-MINERAL CLASSIFICATION—ACT OF FEBRUARY 26, 1895.

HOLTER ET AL. *v.* NORTHERN PACIFIC R. R. CO.

A decision by the General Land Office ordering a rehearing will not as a general rule be disturbed on appeal, but the Department has full authority to set aside such a decision whenever it is deemed proper and right to do so.

In case of a protest filed under the fifth section of the act of February 26, 1895, against the classification of land under said act, the Department will apply substantially the same rules, in determining the character of the land, that the classification commissioners are directed by said act to apply.

The rules prescribed by said act differ from those applied by the Department in ordinary contests involving the character of land in that mining locations made in any section of land are declared by said act to be *prima facie* evidence of the mineral character of the forty-acre subdivision embracing the same.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 26, 1901.* (W. A. E.)

The Department has considered the record in the case of A. M. Holter *et al. v.* Northern Pacific Railroad Company, on appeal by both parties from your office decision of July 21, 1900, remanding said case for a rehearing.

This case arises under the act of February 26, 1895 (28 Stat., 683), entitled "An act to provide for the examination and classification of

certain mineral lands in the States of Montana and Idaho." The lands to be examined and classified under this act are those lying within the primary and indemnity limits of the grant to the Northern Pacific Railroad Company in the States named. Sections three and five of said act read as follows:

SEC. 3. That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws, and the commissioners in making the classification hereinafter provided for shall take into consideration the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character. The classification herein provided for shall be by each legal subdivision where the lands have been surveyed. 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. Where mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as prima facie evidence that the forty-acre subdivision within which it is located is mineral land: *Provided*, That the word "mineral," where it occurs in this act, shall not be held to include iron or coal: *And provided further*, That the examination and classification of lands hereby authorized shall be made without reference or regard to any previous examination or report or classification thereof.

* * * * * * *

SEC. 5. That said commissioners shall, on or before the fifth day of each month, file in the office of the register and receiver of the land office of the land district in which the land examined and classified is situated a full report, in duplicate, in such form as the Secretary of the Interior may prescribe, showing all lands examined by them during the preceding month, and specifying clearly, by legal subdivisions, where the land is surveyed, or otherwise by natural objects or permanent monuments to identify the same, the lands classified by them as mineral lands and those classified as nonmineral; and with said report shall be filed all testimony taken and written communications received by said commissioners relating to the lands embraced in the report. The register and receiver shall file one duplicate of said report in their office, together with all accompanying testimony and papers, and the other duplicate shall be by them forwarded direct to the Secretary of the Interior, and said commissioners shall furnish to the Secretary of the Interior at any time such further or additional report or information as he may require concerning any matters relating to their duties or the performance of the same. Upon receipt of such report the register of the land office shall, at the expense of the United States, cause to be published in a newspaper of general circulation in the county in which the land is located, and in one newspaper published at the capital city of the State in which the lands may be situated, at least once a week for four consecutive weeks, notice of the classification of lands as shown by said report, and any person, corporation, or company feeling aggrieved by such classification may, at any time within sixty days after the first publication of said notice, file with the register and receiver of the land office a verified protest against the acceptance of said classification, which protest shall set forth in concise language the grounds of objection to the classification as to the particular land in said protest described, whereupon 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 nonmineral character of land in other cases; and an appeal from the decision of the register and receiver shall be allowed to the Commissioner of the

General Land Office and the Secretary of the Interior, under such rules and regulations as the Secretary of the Interior may prescribe: *Provided*, That at such hearings the United States shall be represented and defended by the United States district attorney or his assistant for the judicial district in which the land is situated, unless the Secretary of the Interior shall detail some proper officer of the Department of the Interior for that purpose. The compensation for such service shall not exceed ten dollars per day for each day's actual service before the register and receiver, to be paid out of the fund provided for the examination and classification of said mineral lands.

It appears from the record in the present case that the commissioners appointed under the above act for the Helena, Montana, land district, in their report filed July 5, 1898, as to lands examined during the month of June, 1898, classified the following unsurveyed tracts, with others, as non-mineral:

Beginning at a point three and one half miles west of the north quarter corner Sec. 5, Tp. 10 N., R. 5 W., which point when surveyed will be the N. E. corner of Sec. 3, Tp. 10 N., R. 6 W., running south one mile, thence east 40 chains, thence south one mile, thence west 40 chains, thence south 40 chains, thence west 20 chains, thence south 40 chains, thence east one mile and 20 chains, thence south three miles, thence west five miles, thence north six miles, thence east four miles to the place of beginning.

The above description is intended to cover, when surveyed, Secs. 3 to 10 incl., the W. ½ Sec. 11, the N. ½ Sec. 15, the SW. ¼ Sec. 15, the W. ½ of SE. ¼ Sec. 15, all of 16 to 23 inclusive and all of Sec. 26 to 35 inclusive, Tp. 10 N., R. 6 W., except such lands as are covered by U. S. mineral patents.

* * * * * * *

Beginning at a point six miles west of the S. W. corner of Sec. 34, Tp. 11 N., R. 5 W., which point when surveyed will be the S. E. corner of Sec. 33, Tp. 11 N., R. 6 W., running north one mile, thence west one mile, thence north one mile, thence east 40 chains, thence north one mile, thence west 40 chains, thence north one mile, thence west two miles, thence south four miles, thence east three miles to the place of beginning.

The above description is intended to cover, when surveyed, all of Secs. 17, 18, 19, 20, the W. ½ Sec. 21, all of Secs. 29, 30, 31, 32, & 33, Tp. 11 N., R. 6 W., except such lands as are covered by U. S. mineral patents.

August 16, 1898, Anton M. Holter and Thomas C. Power filed a protest against said classification, in so far as it affects Secs. 3, 5, 6, 8, 9, 10, the W. ½ of Sec. 11, the N. ½, the SW. ¼, and the W. ½ of the SE. ¼ of Sec. 15, Secs. 16, 21, 22, 23, 26, 27, 28, and 34 of T. 10 N., R. 6 W.; and Secs. 17, 18, 19, 20, the W. ½ of 21, Secs. 29, 30, 31, 32, and 33 of T. 11 N., R. 6 W. These descriptions are from an unofficial survey.

It was alleged by the protestants that the land covered by their protest is mineral in character and contains valuable deposits of gold, silver, and other precious metals; that it has no value for agricultural purposes; and that the classification thereof as non-mineral is erroneous.

A hearing was ordered on this protest, and at the appointed time the protestants and the Northern Pacific Railroad Company appeared

by their attorneys. Mr. J. C. English, assistant district attorney of the United States, also appeared and participated in the hearing.

December 15, 1899, the register and receiver rendered their decision recommending that the protest be dismissed. From this action the protestants appealed to your office.

By your office decision of July 21, 1900, the case was remanded for a rehearing, for the reason, as stated, that the record shows that the assistant district attorney of the United States cross-examined the protestant's witnesses and participated in the direct examination of the railroad company's witnesses; that the nature of the questions he propounded and the objections he made to testimony offered by the protestants show that throughout the trial he acted in effect for the railroad company; that it was the duty of the assistant district attorney to insist upon a mineral classification of this land; and that on account of his failure so to do, the case has not had a fair and adequate presentation.

From this action of your office both the protestants and the railroad company have appealed. It is stated in each of the appeals and accompanying arguments that a rehearing will serve no good purpose and will entail considerable additional expense; that a large amount of testimony has already been submitted; and that both the protestants and the railroad company are willing to stand on the record as made.

August 6, 1900, after the case was transmitted on the appeals of the protestants and the railroad company, the Department received from the Acting Attorney General a copy of a report made to the Department of Justice, on July 26, 1900, by William B. Rodgers, United States Attorney for Montana, as to the action taken by his office with reference to the present case.

From this report it appears that on April 27, 1898, the Attorney General gave general instructions to the United States Attorney for Montana to appear and represent the interests of the government at all hearings before the local land officers upon protests filed against the classifications made by the several boards of commissioners appointed under the act of February 26, 1895, for the Helena, Bozeman, and Missoula land districts.

July 20, 1898, before the protest in the present case was filed, a special agent of the General Land Office reported that A. M. Holter and T. C. Power (the protestants in this case) had trespassed upon a portion of the land here involved and cut therefrom fifteen thousand cords of wood, worth $2.50 per cord. October 31, 1898, the same special agent reported (apparently in amendment of his former report) that the Mullen Fuel Company, a corporation, of which Norman B. Holter was president and C. B. Power secretary, had trespassed upon sections 29 and 30, T. 11 N., R. 6 W., and cut therefrom fifteen thousand cords

of wood, worth $2.50 per cord. It appears that Norman B. Holter is a son of A. M. Holter, and C. B. Power is a son of T. C. Power, and that the said A. M. Holter and T. C. Power are the principal owners of the stock of the Mullen Fuel Company.

October 27, 1898, J. C. English, Assistant District Attorney, telegraphed the Attorney General as follows:

> A. M. Holter and T. C. Power, contestants, *v.* non-mineral classification of Sec. [Tp.] 10 and 11 N., R. 6 W. The N. P. Ry. appears on part of mineral land commissioners in defence of odd Sec. Is this office expected to appear in defence of classification of even Sec. These are the lands upon which several thousand cords of wood have been cut by contestants, and is now being investigated by the land department. Hearing now in progress.

In reply, the following telegram was sent:

> Defend even sections in protest against non-mineral classifications.
>
> RICHARDS,
> *Acting Attorney General.*

In accordance with these telegraphic instructions, English appeared at the hearing and participated therein, with the purpose of sustaining the non-mineral classification made by the commissioners. No witnesses were introduced by him, but he cross-examined the protestants' witnesses and participated in the direct examination of the railroad company's witnesses.

January 11, 1899, at the request of the Secretary of the Interior, the Attorney General directed the United States Attorney for Montana to bring suit against the Mullen Fuel Company to recover $30,000, the value of fifteen thousand cords of wood unlawfully cut by it from certain unsurveyed public lands, which, when surveyed, will be Secs. 29 and 30, T. 11 N., R. 6 W. This suit was immediately instituted and is now pending.

The United States Attorney for Montana states, in his report, that it would put his office in a very embarrassing position to attempt to follow the instructions contained in your office decision of July 21, 1900. In other words, it would be necessary for him to insist, in the suit now pending to recover the value of the wood cut from a portion of the land here involved, that the land in question is non-mineral in character, and at the same time to insist, at the rehearing before the local officers, that the same land is mineral in character.

Exception is also taken in the report to certain language used in your office decision of July 21, 1900, which might be construed as a reflection upon the official conduct of the assistant district attorney.

This report was forwarded to your office for consideration, and was returned to the Department by your office letter of August 14, 1900. Express and emphatic disclaimer is made in said letter of any want of perfect confidence in the professional character of said assistant district

attorney, but upon consideration of the entire matter your office declines to recall its decision of July 21, 1900, ordering a rehearing.

As a general rule, the Department will not disturb a decision of your office ordering a rehearing, as such action is considered merely interlocutory. There is no question, however, of the authority of the Secretary of the Interior to set aside a decision of your office, ordering a rehearing, whenever, for any reason, it seems proper and right to do so.

The present case is one calling for the exercise of that authority. Neither the protestants nor the railroad company desire a rehearing. On the contrary, they are objecting to it. A large amount of testimony has already been submitted at considerable expense, and it does not appear that any additional facts would be brought out at a rehearing or that any good purpose would be served thereby. Your office decision of July 21, 1900, ordering a rehearing, is therefore vacated, and the case will be considered on its merits on the record already made.

As no decision has been made by your office on the merits of the case, the ordinary procedure would be to return the record for such decision. Both the protestants and the railroad company, however, request that the case be now examined and decided on its merits by the Department. Such a course will avoid considerable delay, and, as the Department undoubtedly has full authority in the premises, this action will be taken.

Before passing to an examination of the evidence, it is necessary to consider and decide a legal proposition submitted by the protestants. Briefly stated, their contention is as follows: That in a case arising under a protest filed in accordance with the fifth section of the act of February 26, 1895, where the evidence submitted satisfactorily shows, taking into proper account the mineral discovered or developed on or adjacent to the land involved and the geological formation of said land or the lands adjacent thereto, that it is a reasonable probability that the land involved contains valuable mineral deposits, such land must be held to be mineral in character. In other words, that the question to be determined by the land department in such a case is not, whether the evidence, construed as in an ordinary contest between an agricultural and a mineral claimant, shows as a *present fact* that the land is more valuable for mineral than for agricultural purposes, or *vice versa*, but whether, observing the tests prescribed in the third section of the act of February 26, 1895, the evidence shows that it is reasonably probable that the land in controversy contains valuable mineral deposits.

So far as the Department is at present advised, the question here presented has never been decided by either the Department or the courts.

In section 3 of the act of February 26, 1895, it is provided—

> that all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws.

The language here used is in harmony with section 2319 of the Revised Statutes of the United States, which provides that—

> all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such.

The construction given to this section of the Revised Statutes by the Department and the courts is, that in order to render a particular tract of land subject to entry and purchase under said section, it must be shown that valuable mineral deposits have been found on such land in sufficient quantity to make it more valuable therefor than for agricultural purposes.

The question to be determined by the commissioners, therefore, in their work of classification, is, whether the land to be classified by them contains valuable mineral deposits in sufficient quantity to render the land more valuable therefor than for agricultural purposes.

In determining this question the commissioners are directed, by the third section of said act of February 26, 1895, to—

> *take into consideration* the mineral discovered or developed on or adjacent to such land, and the geological formation of all lands to be examined and classified, or the lands adjacent thereto, and the reasonable probabilities of such land containing valuable mineral deposits because of its said formation, location, or character.

The Commissioners are directed to take these circumstances into consideration, not to give them or any of them unusual or conclusive effect. The rules applied by the Department to an ordinary contest involving the mineral or non-mineral character of land are practically the same as those quoted from this section. The Department takes into consideration, in such a case, the mineral discovered or developed on or adjacent to the land in question, the geological formation of the neighborhood and the reasonable probabilities of the land containing valuable mineral deposits because of its formation, location, or character, giving to each circumstance the weight to which it seems properly entitled.

In only one instance do the rules laid down in the third section of said act, for the guidance of the commissioners in their work of classification, differ materially from the rules ordinarily applied by the Department to the determination of a contest involving the character of land. It is provided in said section that—

> Where mining locations have been heretofore made or patents issued for mining ground in any section of land, this shall be taken as prima facie evidence that the forty-acre subdivision within which it is located is mineral land.

The Department does not necessarily or ordinarily consider that the mere fact that some one has placed a mining location upon land is *prima facie* evidence that the land covered thereby, or the forty-acre subdivision in which it is located, is mineral. It appears, however, that an exception to the general rule of the Department is made in the case of a classification under the act of February 26, 1895. In section six of said act it is provided—

> That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, *when approved by the Secretary of the Interior*, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification. All lands so classified as above without protest, and the classification whereof is *disapproved by the Secretary of the Interior*, and all lands whereof the classification has been invalidated for fraud, shall be subject to hearing and determination in such manner as the Secretary of the Interior may prescribe.

In determining the question whether a classification against which no protest has been filed shall be approved or disapproved, the Secretary will consider the reasons assigned for the classification and apply the same rules by which the commissioners are to be guided. If it appears in any case that there is a mining location on a portion of the lands classified, this will doubtless, in the absence of any showing to the contrary, be accepted by the Secretary as *prima facie* evidence that the forty-acre tract upon which it is located is mineral; and since a mining location will be so considered by the Department where there is no protest against the classification, there seems to be no good reason why it should not be given the same weight where there is a protest against the classification.

It thus appears that the Department, in determining a case arising upon a protest filed against a classification under the act of February 26, 1895, will apply substantially the same rules that the commissioners are directed to apply, and that these rules differ only in the one material particular from the rules applied by the Department to an ordinary contest involving the character of land.

In such a case as the present one a question for determination is, whether, giving due consideration to the matters named in the statute, the land is shown to contain mineral in sufficient quantity and of such value as to justify a person of ordinary prudence in the further expenditure of his labor and means in an effort to extract it, with a reasonable prospect of success in developing a paying mine. (Castle *v.* Womble, 19 L. D., 455.) If this is shown, the land must be considered as containing valuable mineral deposits; if not, it can not be so considered.

The testimony in this case is very voluminous and contradictory. Owing to the fact that the two townships in which the land here involved lies have not been officially subdivided, and that the witnesses frequently located the particular portions of the land about

which they testified by reference to certain natural or artificial objects, which, although well known to the witnesses, are not easily placed by the Department, considerable difficulty has been experienced in properly analyzing the testimony. The facts about which there is no dispute appear to be as follows:

The land lies on the western slope of the Rocky Mountains, near the summit, and has an elevation of about 5,000 to 7,000 feet. It is cut by numerous creeks and gulches, the principal of which are Dog creek, Hope gulch, and the north fork of the Little Blackfoot river. The Northern Pacific railroad crosses the southeastern portion. For over thirty years this land has been prospected and many placer locations have been made along the streams and gulches. Most of these have been abandoned. A few of the mining claims appear to have been patented. Owing to the elevation, agricultural products, other than grass and hay, will not grow there sufficiently well to be remunerative. There is considerable difference of opinion between the witnesses for the protestants and the railroad company as to the amount and quality of the grass on the land, but there are several ranches there which seem to be in a prosperous condition, and several hundred tons of hay are cut from the land each year. The protestants in this case, Holter and Power, have a ranch on a portion of the land.

As to the question whether this land contains mineral in paying quantities, the witnesses for the protestants and the railroad company differ widely. The protestants' witnesses testified that it is one of the particularly well mineralized regions of Montana; that there are large outcroppings of mineral-bearing rock at various places, which give promise of becoming great mineral producers; that the formation of this land is identical with that of the land on the north, east, and south, which has been classified as mineral, and on which valuable and paying mines have been developed; and that placer gold in paying quantities has been found along all the streams and gulches on this land.

John McIrvin, George Powers, John Ball, N. Ward, Ben Pricer, John Larson, James Allison, and William Kloeden testified that they had done placer mining on this land at various times from 1866 to the present. Only Ward and Allison, however, seem to have done any work there recently. Ward did not state what success he had had, but Allison said he had made, on an average, about $2 or $3 a day. McIrvin and Powers testified that during the time they worked on the land they averaged about $4 a day apiece. Ball stated that some days he took out only $1 to $1.50, but that he had taken out as much as $70 worth of gold in one day. Larson testified that he averaged about $5 a day during the time he worked on the land. Pricer did not make any money out of his work on this land. Kloeden testified that he had done placer mining on this land from 1868 to 1895 and had taken out considerable gold, but does not state how much. Several lode

locations have been made on this land, but it does not appear that any lode mining has ever been successfully prosecuted there.

The principal witness for the protestants is Stephen F. Whalen. He spent nearly a month examining this land shortly before the hearing. After testifying as to the indications of mineral at various points, he sums up his reasons for believing this land to be mineral in character, as follows: First, the formation is composed of mineral-bearing rock; second, in this region mines are invariably developed in such formation as this; third, there are numerous croppings of mineral-bearing rock; fourth, there is a large number of mining claims located on and adjacent to this land, many of which promise to become good mines; fifth and sixth, it is such a region as would attract a mining man, and from appearances would pay for time and capital invested; seventh, there are now, and have been for years, placer mines in the gulches fed from the hills on this land; and eighth, this land is almost entirely surrounded by land which has been classified as mineral and is in every respect similar to the land so classified. This witness further testifies that valuable mines are being worked near the boundaries of this land, and the formation shows conclusively that the land here involved is on the same mineral belt.

The deposition of Walter H. Weed shows that he has been connected with the United States Geological Survey for the last fifteen years; that he made an official survey of this land in 1898; that it forms a part of the continental divide; that it is partly wooded and partly open grass land; that the geological formation is varied; that on a portion of the land are granitic rocks and andesite porphyry; that about the borders of the granitic and porphyry areas sedimentary rocks occur; that these rocks are upturned and much altered near the granite contact, and seamed with fractures more or less mineralized; and that, in his opinion, this land is more valuable for mineral than for agricultural purposes for the reason that only some small tracts are suitable either for grazing or for raising hay, and these tracts are underlain either by clay beds of economic value or by rocks showing indications of mineral veins, whose value can be determined only by exploitation.

On behalf of the railroad company, William Whetstone testified that he had prospected down Dog creek, across this land from north to south; that he sunk about fifty holes and obtained a few colors, but nothing of value; that he saw only one quartz ledge near Dog creek, and that did not amount to anything; that he also prospected about three weeks on Hope gulch, in the northwestern part of the land here involved, but found nothing there to justify staying; that he worked on Kloeden's placer claim in 1889, with the idea of leasing it if it proved to be valuable; and that he got about seven or eight dollars' worth of gold from that claim as the result of three weeks' work.

S. R. Oldaker, Charles F. Van Allen, A. J. Haley, Peter Mack,

Eugene Drosch, Lloyd Cannon, and Richard M. Mears examined this land together shortly before the hearing. All of these witnesses, except Haley, Mack, and Cannon, are employed in the land department of the Northern Pacific Railroad Company.

It appears that, although these two townships have never been officially subdivided, unofficial surveys have been made of the section lines. In their examination of the land, the witnesses above named noted the unofficial section corners, and in their testimony at the hearing they identified, to a considerable extent, the particular portions of the land they examined by reference to section numbers. Their testimony is practically identical, and is, in substance, as follows:

Section 3, T. 10 N., R. 6 W., is rolling. A large portion of this section is under fence and is used for grazing purposes. A small creek runs through the section, and along this creek are some old, abandoned placer workings. There are no cropping ledges or mineralized rock on this section. Section 5 is cut from the northwest to the southeast by Dog creek, and in the northeast part of the section are two small gulches. Along the creek and gulches are old, abandoned placer workings. The general formation of this section is of a slaty character. There is some good bottom land along Dog creek from which hay has been cut. There are no placer deposits and no mineral ledges on Sec. 6. The formation of this section is mostly slate, with some quartzite. Dog creek crosses the northeast corner of Sec. 8 and makes a good bottom there from which hay has been cut. There are no indications of mineral on this section. Sec. 9 is nearly all open prairie, with grass of a good quality growing over it. Two thousand or more head of sheep were grazing on this section at the time this examination was made. Dog creek runs through the section, and along the creek are old placer workings. On the side of a hill, near the creek, a shaft has been sunk. The formation disclosed is slate with some lime running through it. There is nothing on this section to indicate mineral. Sec. 10 is principally open meadow and is almost one continuous ranch. Holter and Power, the protestants in this case, have their ranch in sections 10 and 11. The west half of Sec. 11 is open grass land, similar to Sec. 10. There are no indications of mineral either on Sec. 10 or on the west half of Sec. 11. Sec. 15 is traversed from the northeast to the southwest by the Northern Pacific railroad. Two small gulches cross the section from the east, and on these gulches are some old placer workings. Some panning was done along one of these gulches, but not a color was found. On a hill near the center of the section are some old prospect holes. There is no evidence of mineral on this section. Thomas McDonald has a ranch on Secs. 15 and 16. The northwest quarter of Sec. 16 is traversed by Virginia gulch, which has been worked as placer for many years and is apparently worked out. Some panning along this gulch did not show a color. On a hill in the

northwest quarter of the section are four or five prospect holes which show iron-stained rock and rotten quartzite. A lot of hay has been cut from near the center of Sec. 21. Some panning was done from a gulch on this section, but without results. There are some old placer workings on Sec. 22. Panning along these old workings showed only one color. A reef of quartzite runs through this section. There are no indications of mineral on Sec. 23. The formation on this section is slate. A man by the name of Oleson has a ranch on the northwest quarter of the section. Sec. 26 is high, but not rough. There are no quartz or placer deposits on this section. The formation on Sec. 27 is slate and quartzite, which have no value for mineral. The open portions of this section are covered by grass of a good quality. Sec. 28 is high and rather rough. A gulch runs along the western side of this section. On one side of the gulch is an old shaft. The dump consists of sla e of a reddish cast. At another place on the section is a hole showing a greenish-stained rock. Near the center of the section is a prosperous looking ranch. Sec. 34 is hilly and almost entirely covered with timber. There is nothing on this section to indicate mineral. Sec. 17, T. 11 N., R. 6 W., lies in the hills, and is heavily timbered. On the southwest quarter of the section are three shafts, about forty, fifty, and twelve feet deep, respectively, and an open cut. This work has apparently been abandoned many years. There is nothing to indicate that this section has any value for mineral. Sec. 18 is crossed by Hope gulch. Along the gulch are some old placer workings. Considerable prospecting has been done in the northwest quarter of this section. A long open cut shows dolomite in which is a band of red-colored lime. There is some rock on this section that looked as though it might possibly carry mineral, but no assays were made of it. In the southeast quarter of the section is a big, fine meadow. The whole northeast quarter of Sec. 19 and a part of the southeast quarter is open grass land. The rest of the section is timbered. A man by the name of Page has a ranch in the northeast quarter. There are some old abandoned placer workings on the line between Secs. 18 and 19. No indications of mineral were found on Sec. 19. Sec. 20 is principally prairie land and a good portion of it is under fence. A man by the name of Thompson has a ranch near the center of the section. In the southwest quarter of the section is an old placer prospect hole. Some gravel from this hole was panned, but no colors were obtained. In the northwest quarter are two old prospect holes showing some iron-stained rock. No mineral-bearing rock was found on this section. The west half of Sec. 21 lies in the hills. There are no placer deposits there and no indications of mineralized rock. Section 29 is crossed from north to south by Hope gulch, which joins Dog creek in the southern part of the section. The portion of the section lying east of the gulch is open land; that lying west of the gulch has been timbered,

but the greater part of the timber has been cut off. There are some old placer workings along the creek and gulch. Gravel from these old workings was washed, but only two small colors were found. The general formation of this section is slate, but near the southwest corner is a lime reef. Sec. 30 is hilly. Near the southeast corner is a reef of limestone, along the edge of which some desultory prospect work had been done. There are no placer deposits on this section. Dog creek touches the southeast corner of Sec. 31. There are no placer workings on this section and no showing of anything of a mineralized nature. Sec. 32 is cut by Dog creek on the west. There are no placer workings along the creek and no showing of mineralized rock on the section. No examination was made of Sec. 33.

Lloyd Cannon, one of the witnesses above named, testified in addition that he first visited this land in 1890; that he prospected along Uncle Ben's gulch, in the northwest portion of the land involved; that he and his brother washed about thirty wagon loads of dirt in two weeks' time and got about eleven dollars' worth of gold; that he then left Uncle Ben's gulch and spent about two weeks prospecting Hope gulch and the country west of Dog creek for either placer gold or mineral-bearing rock; that he found neither, and quit the country; and that in 1895 he prospected Miller gulch, on this land, but found nothing.

It appears that the Mullen road, one of the first highways over the divide, crosses this land from east to west, near the center; that the Northern Pacific railroad was completed across said land in 1883; and that the land has accordingly been easily accessible to prospectors and miners for many years. Notwithstanding, however, the amount of prospecting that has been done thereon, it does not appear that any paying mines have ever been developed on the land. What gold formerly existed in the gulches and along the streams has apparently been washed out. The value of this land at the present time for mining purposes appears to be very small. On the other hand, the land is shown to have considerable present value for the grass and timber thereon.

Taking into consideration all the evidence, and especially that as to the mineral discovered or developed on or adjacent to the land, the geological formation of the neighborhood, and the reasonable probabilities of this land containing valuable mineral deposits because of its said formation, location or character, and giving to the mining locations thereon their due weight as *prima facie* evidence that the forty-acre tracts upon which they are situate are mineral in character, it nevertheless appears that the land does not contain mineral in sufficient quantity or of such value as to justify giving it a mineral classification.

The protest is accordingly dismissed, and the non-mineral classification is hereby sustained.

PRIVATE LAND CLAIM—ALGODONES GRANT—ACT OF JANUARY 14, 1901.

INSTRUCTIONS.

Commissioner Hermann to register and receiver at Tucson, Arizona, January 29, 1901.

Your attention is called to the provisions of the act of Congress approved January 14, 1901, entitled "An act for relief of occupants of lands included in the Algodones grant, in Arizona," which act is as follows:

Whereas the title to the lands in that section of the country in the county of Yuma and the Territory of Arizona, and included within the boundaries of the old Mexican land grant known as the Algodones grant, was tried by the United States Court of Private Land Claims, created for the settlement of titles to such grants, in the years eighteen hundred and ninety-five and eighteen hundred and ninety-six; and

Whereas in the hearing of said contest before said court the alleged grantees under said grant were successful and their title thereto by said trial court confirmed, and immediately thereafter the said alleged grantees, for large and valuable considerations, sold to numbers of people, citizens and bona fide settlers on said lands, in tracts of less than forty acres to each, and said settlers, then believing that they had a bona fide title to said lands sold, made lasting and valuable improvements and permanent homes thereon; and

Whereas the government of the United States appealed said cause from the decision of said court below, and on said appeal the said decision of the said court below was reversed, and the title to said grant in said alleged grantees adjudged to be void, and that the said lands included within the boundaries of said grant, and sold as aforesaid, belonged to the United States; and if said settlers, citizens, and occupants of said lands who so purchased the same as aforesaid be not permitted to retain the same, and pay the government therefor, they will be deprived of their homes, at ruinous consequences to them: Therefore,

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That where such persons in good faith and for valuable considerations purchased from the grant claimants prior to May twenty-third, eighteen hundred and ninety-eight, portions of the land covered by the said grant, and have occupied and improved the same, such persons may, within six months from and after the passage of this act, or within three months after the said lands shall be restored to entry, purchase the same at the price of one dollar and twenty-five cents per acre, upon making proof of the facts required by this act under regulations to be provided by the Commissioner of the General Land Office and approved by the Secretary of the Interior, joint entries being admissible where two or more persons have purchased lands on the same forty-acre tract: *Provided*, That no one person shall purchase more than forty acres, and no purchase shall be allowed for a less quantity than that contained in the smallest legal subdivision.

SEC. 2. That where persons duly qualified to make entry under the homestead or desert-land laws have occupied any of said lands with the intention of entering the same under the homestead or desert-land laws, such persons shall be allowed three months from and after the passage of this act, or after the said lands shall be restored to entry, within which to make their entries, and the fact that such persons have improved or reclaimed such desert lands shall be no bar to their making such entries.

The lands affected by this act were originally withdrawn from entry

on January 9, 1875, to satisfy the Paso de los Algodones grant, which was finally rejected by the courts on November 27, 1899.

In his decision of August 9, 1900 (30 L. D., 220), in the case of Katharine Davis, the Secretary of the Interior held that upon the final adjudication and rejection of the grant by the courts, the lands became at once open to settlement and entry; but the attention of the Department having been invited to the fact that a bill was pending before Congress for the disposition of the lands, the Secretary of the Interior on August 25, 1900, directed this office to withhold all the lands from settlement and entry until further orders, and you were accordingly advised by letter "G" of September 1, 1900.

The bill for the disposition of these lands having become a law, as stated above, it is now proper to take the action necessary to carry into effect the provisions of the law, and to restore to entry the lands that have so long been reserved.

Under the first section of the act persons who, prior to May 23, 1898 (the day on which the supreme court of the United States first held that the grant was invalid), purchased, in good faith and for valuable considerations, from the grant claimants, portions of the land reserved for the grant, and have occupied and improved the same, may within six months after the passage of the act, or within three months after the lands shall be restored to entry, purchase such land from the United States, at the price of one dollar and twenty-five cents per acre, upon making proof of the required facts under regulations to be provided by this office and approved by the Department. It is provided, however, that no one person shall purchase more than forty acres, and no purchase shall be allowed for a less quantity than that contained in the smallest legal subdivision; and provision is also made for joint entries, where two or more persons have purchased portions of the same forty-acre tract.

Persons who apply to avail themselves of the privileges of this provision of the law will be required to furnish the original deed of conveyance or certified copies of the record, or other cotemporaneous written evidence of conveyance or of an agreement to convey; and they must also furnish their affidavits, which must be executed before some officer authorized to act in homestead cases, showing that they purchased the lands applied for in good faith and for valuable considerations, and that they have occupied and improved the same. As the preamble to the act recites that the purchases were made by citizens, applicants will be required to show, in accordance with the regular rules, that they are either native born or naturalized citizens of the United States. Purchasers will be required to publish notice of intention to purchase in like manner as notice is published in homestead cases.

Upon the submission of satisfactory proof and proper payment, you

will issue cash certificates and receipts, making proper reference to the act of Congress, and you will give the series a new set of numbers, beginning with No. 1.

Where two or more persons apply for portions of the same forty-acre tract, joint proof may be submitted, and a joint certificate will be issued.

You will report entries made under the first section of the act on the regular Cash Abstract, making the necessary changes.

It will be observed that applicants to purchase are allowed six months by the act, and any entry, therefore, which may be allowed under the general land laws, will, of course, be subject to an application to purchase under the first section for the period of six months from the date of the approval of said act.

Section two of the act allows a preference right of entry for three months from the passage of the act to homestead settlers and to those who have occupied lands with the intention of entering the same under the desert land law, with the further provision that improvement or reclamation by the desert land claimants shall be no bar to their making such entries.

No special instructions are deemed necessary in connection with this section of the act. However, any entry allowed, not based on settlement or occupation as specified, will be subject, for the given period, to entries based upon such prior settlement or occupation. This rule is applicable, under the general law, to homesteads, and would not be noticed here, had not the act made the same provisions relative to those persons who may have occupied lands with the intention of entering the same under the desert land laws.

As soon as these instructions are received, you will issue a notice stating that the lands will become subject to entry on a day fixed by you, and named in the notice, which day shall not be less than thirty days from the date of the notice, and you will give publicity to the notice in accordance with the rule applying to the filing of township plats. See 4 L. D., 202.

Approved:

E. A. HITCHCOCK,
Secretary.

INDIAN LANDS—CONVEYANCE OF ALLOTTED LANDS.

PEORIA AND MIAMI INDIANS.

A conveyance of lands allotted to Peoria and Miami Indians under the act of March 2, 1889, made by the heirs of the allottee, within the period of inhibition named in the statute, is not effective to transfer title until approved by the Secretary of the Interior.

Assistant Attorney General Van Devanter to the Secretary of the Interior, January 29, 1901. (W. C. P.)

I am in receipt of your letter of January 21, 1901, enclosing for my consideration and appropriate action a letter of William M. Springer, attorney for William E. Rowsey, asking a reversal of my opinion of October 18, 1899 (29 L. D., 239), in reference to the conveyance of allotted lands by heirs of Peoria and Miami Indians.

The allotments to these Indians were made under the act of March 2, 1889 (25 Stat., 1013), which provided that "the land so allotted shall not be subject to alienation for twenty-five years" and "shall be exempt from levy, sale, taxation or forfeiture for a like period of years;" that the patents should recite these facts; and "that any contract or agreement to sell or convey such lands or allotments, so patented, entered into before the expiration of said term of years, shall be absolutely null and void." Afterwards this provision was modified by the act of June 7, 1897 (30 Stat., 62, 72), as follows:

> That the adult allottees of land in the Peoria and Miami Indian reservation, in the Quapaw agency, Indian Territory, who have each received allotments of two hundred acres or more, may sell one hundred acres thereof, under such rules and regulations as the Secretary of the Interior may prescribe.

The rules and regulations prescribed thereunder provided that all deeds should be subject to the approval of the Secretary of the Interior. The conclusion reached in my opinion of October 18, 1899, *supra*, was "that no conveyance of these allotted lands by the Indian allottee, or his heirs, made within the period of inhibition mentioned in the statute, has the effect of transferring title until approved by the Secretary of the Interior."

It seems to be conceded that the restriction against alienation is in all respects applicable to the lands in the hands of an original allottee, but it is strongly contended that it is personal to him and that the heir takes the land free of all restrictions as to alienation.

One of the authorities cited in support of this contention is Clark *v.* Lord (20 Kan., 390), which arose under the treaty of June 24, 1862 (12 Stat., 1237, 1240), with the Ottawa Indians, which provided for allotments to the individual members and the issuance of patent in which it was to be stipulated "that no Indian, except as herein provided, to whom the same may be issued, shall alienate or incumber the land allotted to him or her in any manner, until they shall by the terms of this treaty become a citizen of the United States." The court, speaking on this provision, said:

> The letter of this article limits these restrictions to the individual members of the tribe entitled under the treaty to the lands selected and allotted to them, and to whom patents are issued or to be issued. The reservation, as to the conveyance, is personal, from the language used, and was not intended to bind the heirs of allottees.

In Commissioners of Miami Co. *v.* Brackenridge (12 Kan., 114), the court had under consideration the clause in the treaty of June 5, 1854, with the Miami Indians (10 Stat., 1093), excepting lands from taxation. That treaty provided for the allotment of part of their lands to the Miami Indians, and for the issuance of patent, as follows:

> And the President may cause patents to issue to single persons or heads of families for the lands selected by or for them, subject to such restrictions respecting leases and alienation as the President or Congress of the United States may impose; and the lands so patented shall not be liable to levy, sale, execution or forfeiture.

The court pointed out that the purpose was to preserve the lands to the Indians, which was accomplished by the two provisions standing side by side, one restricting alienation and the other exempting from seizure and sale, and said:

> When they stipulated that patents for the land might issue "subject to such restrictions respecting leases and alienation as the President or Congress of the United States may provide," they contemplated restrictions simply on the Indian owners, and not on subsequent white purchasers. It was not thought that after the title had passed from the Indians to the whites there should be any restriction or limit to the latter's power of sale or lease. And if the restriction was not to be carried beyond the period of ownership, why should the exemption be? The two provisions are parallel; they stand side by side and are each general in their terms. They should be construed similarly and with reference to the obvious intent of the contracting parties.

The cases of McMahon *v.* Welsh (11 Kan., 280), and Frederick *v.* Gray (12 Kan., 518), arose under the treaty of January 31, 1855, with the Wyandotte Indians (10 Stat., 1161), by which the Indians were divided into classes, competents and incompetents, and lands allotted to them with the provision that the lands of the incompetent class were not to be sold for a period of five years, and then not without the express consent of the President of the United States. It was held that this restriction was purely personal and did not attach to the land in the hands of heirs of a deceased allottee.

In Lowry *v.* Weaver (4 McLean, 82), the land had been granted to one Burnet by a treaty providing that the land should never be conveyed by the grantee or his heirs without the consent of the President of the United States. Upon the death of this grantee the land was sold by the administrator of his estate to pay debts, under the order of the probate court, and a conveyance made to the purchaser. A question arose as to the validity of this conveyance. In the decision by the circuit court the question presented is stated thus:

> The great question in the case is whether the real estate in question was liable for the payment of the debts of Burnet; and was subject to be made assets, by the administration, under the laws of Indiana.

After pointing out that the restriction as to alienation was a wise one, for the protection of the Indian, the court said:

> But the deed in question does not come within the provision of the treaty. The grantee and, perhaps his heirs, may not be able to make a valid conveyance of the

land without the approval of the President. That may be considered a condition within the original grant, and is limited to the personal acts of the grantee and his heirs. But the conveyance under consideration is by operation of law. The land is not withdrawn from the sovereign action of the State. Like other lands, it may be taxed by the State, and is subject by the local law to payment of debts. This belongs peculiarly to State power. It regulates the transmission of real estate by deed or by operation of law and subjects it, in the mode described, to the payment of debts. Except by compact, or the voluntary legislative action of the State, lands within its limits can not be withdrawn from its ordinary action.

The opinion of the Attorney-General referred to (4 Ops., 529), involved a question as to the sale of lands for the payment of debts, the lands having been granted by treaties containing provisions against the conveyance without the consent of the President. It was said:

By the treaties, the Indian title of occupancy was extinguished; and the grants were as effectual to pass fee simple titles as if evidenced by letters patent. No doubt exists as to the right of the government to attach the condition restraining alienation without the consent of the President. But this was personal to the grantees, and does not apply to sales by act of law or proceedings *in invitum*.

It will be noticed that the direct question as to the rights of heirs of deceased allottees was considered only in Clark *v.* Lord, under treaty of June 24, 1862, with the Ottawas, and in McMahon *v.* Welsh and Frederick *v.* Gray, both under treaty of 1855, with the Wyandottes. In the first case the language is that "no Indian" shall alienate "the land allotted to him," and the court, construing this language literally and strictly, held that it applied to the allottee alone. In the other cases the restriction was imposed because of the ascertained incompetence of the allottee to manage his affairs, and the court held that the incapacity to sell was similar to the disability of a minor, and hence did not attach to the heir, who must be held to be competent. As stated in Frederick *v.* Gray, the holding was:

It was held in McMahon *v.* Welsh, 11 Kan., 280, that these restrictions on alienation were personal to the individual and not running with the land, and that therefore when land passed by descent from an incompetent to a competent Indian, the restraint on conveyance ceased and the right to convey became absolute.

In these cases the conclusion reached is based upon the express wording of the law governing, and they do not control in those cases where neither the wording nor the facts demonstrate an intention to limit the restriction to the allottee himself.

The other cases cited hold simply that a restriction against alienation does not apply after the land has passed from Indian owners to white holders, or does not apply as against conveyances by operation of law. In this latter class the law there under consideration contained no provision exempting the land from levy or sale for the payment of debts.

The decisions cited do not afford sufficient reasons for changing the views expressed in the opinion referred to, and subsequent legislation by Congress tends to justify the position then taken. A provision in

the act of August 15, 1894 (28 Stat., 286, 295), permitted any member of the Citizen Band of Pottawatomie Indians and of the Absentee Shawnee Indians, having received an allotment and being over twenty-one years of age, to sell and convey any portion of his allotted lands in excess of eighty acres, "the deed of conveyance to be subject to approval by the Secretary of the Interior, under such rules and regulations as he may prescribe." By section 7 of the act of May 31, 1900 (31 Stat., 221, 247), this provision was extended "so as to permit the adult heirs of a deceased allottee to sell and convey the lands inherited from such decedent," and in the same section is a provision as to the Peoria and Miami Indians, as follows:

That the provisions hereof as to the sale of inherited lands by heirs of deceased allottees of the Citizen Band of Pottawatomie Indians and Absentee Shawnee Indians are hereby extended and made applicable to the heirs of allottees of the Peoria and Miami Indians, who were authorized by the act approved June seventh, eighteen hundred and ninety-seven, to sell a portion of their lands, and all sales and conveyances of lands of deceased allottees by their heirs, which have been duly made and executed by such heirs and duly approved by the Secretary of the Interior, are hereby ratified and confirmed.

The provision of the act of 1894, which, as amended, is thus extended to the Peoria and Miami Indians, specifically provided that the deeds thereby authorized to be made should be subject to the approval of the Secretary of the Interior. There seems to have been some doubt as to the power to make such deeds even with that approval, and it was therefore thought necessary to ratify and confirm such deeds theretofore made and approved. If it had been intended to dispense with the approval of the Secretary on deeds of heirs of deceased allottees, a statement to that effect would have been made, and the ratification and confirmation would have been extended to all such deeds duly made and executed without reference to approval by the Secretary of the Interior. The inclusion of the one class in the confirmatory provision shows that it was not intended to give any recognition to the other class.

The fact that Congress did not stop with providing a rule for the future, but took action respecting past transactions, shows that the matter was considered in all its aspects and that it was intended to remove all doubt or question as to the rights and powers of the heirs of allottees in respect to the alienation of inherited lands.

After a further careful consideration of this matter in connection with the argument submitted and the authorities cited, I adhere to the conclusion reached in the opinion of October 18, 1899, "that no conveyance of these allotted lands by the Indian allottee or his heirs, made within the period of inhibition mentioned in the statute, has the effect of transferring title until approved by the Secretary of the Interior."

Approved:

E. A. HITCHCOCK, *Secretary.*

RESERVATION—USE OF TIMBER AND STONE—ACT OF JUNE 4, 1897.

OPINION.

A company or corporation engaged in mining or in prospecting for valuable mineral deposits is a "miner" or "prospector," as the case may be, within the meaning of the act of June 4, 1897.

The act of June 4, 1897, does not in itself permit any person, company or corporation to use, free of charge, stone or timber found upon a forest reservation, but confers upon the Secretary of the Interior authority to say, through regulations prescribed by him, by whom, among those named, and when and to what extent, the privilege named in the statute may be enjoyed.

The regulations of April 4, 1900, issued under the act of June 4, 1897, do not in terms include or exclude mining companies or corporations, and it rests with the Secretary of the Interior to determine, in the exercise of the discretion with which he is invested by the statute, whether these regulations shall include or exclude such companies or corporations.

Assistant Attorney General Van Devanter to the Secretary of the Interior, January 29, 1901. (W. C. P.)

I acknowledge the receipt of your communication of the 15th instant, calling my attention to that part of the forest reserve legislation in the act of June 4, 1897 (30 Stat., 11, 35), providing that "the Secretary of the Interior may permit, under regulations to be prescribed by him, the use of stone and timber found upon such reservations, free of charge, by *bona fide* settlers, miners, residents, and prospectors for minerals, for fire-wood, fencing, building, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes, such timber to be used within the State or Territory, respectively, where such reservations may be located," and also calling my attention to the regulations issued thereunder April 4, 1900 (30 L. D., 23, 28), and requesting to be advised whether this statutory provision and these regulations "apply to companies and corporations resident in the State or Territory where a forest reservation is located, owning mining claims in such State or Territory, that desire timber for any of the purposes mentioned in said act."

Section 1 of the Revised Statutes provides:

> That in determining the meaning of the Revised Statutes or of any act or resolution of Congress passed subsequent to February twenty-fifth, eighteen hundred and seventy-one, ... the word "person" may extend and be applied to partnerships and corporations, ... unless the context shows that such words were intended to be used in a more limited sense.

The laws relating to the disposition of mineral lands recognize the right of a company or corporation to locate, hold and acquire title to a mining claim. Section 2324, Revised Statutes, as amended by the act of February 11, 1875 (18 Stat., 315), provides that where "a person or company" runs a tunnel for the purpose of developing a lode "owned by said person or company" the money so expended shall be

considered as expended on said lode and "said person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same." Section 2325 prescribes what shall be done to obtain a patent to mineral lands by "any person, association, or corporation, authorized to locate a claim under this chapter having claimed and located a piece of land for such purpose." Section 2333 prescribes what shall be done to secure a patent "where the same person, association, or corporation, is in possession of a placer claim and also a vein or lode included within the boundaries thereof." Section 2321 prescribes what shall be deemed sufficient proof of citizenship, under the mining laws, "in the case of an individual, ... in the case of an association of persons unincorporated, ... and in the case of a corporation."

In McKinley *v.* Wheeler (130 U. S., 630), it was held that a corporation is not precluded from locating a mining claim upon the public land of the United States. This ruling is cited with approval in United States *v.* Trinidad Coal Co. (137 U. S., 160, 168).

Companies and corporations are thus placed on the same footing with individuals under the laws authorizing the exploration and purchase of valuable mineral deposits. There is nothing in the statute under consideration indicating an intention to exclude companies or corporations from its benefits, and applying to it the same course of reasoning adopted by the supreme court in McKinley *v.* Wheeler, *supra*, it must be held that a company or corporation engaged in mining or in prospecting for valuable mineral deposits is a "miner" or "prospector," as the case may be, within the meaning of this statute.

The statute does not in itself permit any person, company or corporation to use, free of charge, stone or timber found upon a forest reservation, but it does confer upon the Secretary of the Interior authority to say, through regulations prescribed by him, by whom, among those named in the statute, and when and to what extent, having regard to the purposes for which these reservations are established and to other public interests, the privilege named in the statute may be enjoyed.

The existing regulations to which my attention is invited do not in terms include or exclude mining companies or corporations, and it may be that attention was not drawn to this matter when the regulations were prescribed. It is for you to say, in the exercise of the discretion with which you are invested by the statute, whether these regulations shall include or exclude such companies or corporations.

Approved:

E. A. HITCHCOCK,

Secretary.

HOMESTEAD CONTEST—ACT OF JUNE 16, 1898.

INSTRUCTIONS.

The decisions of the Department in Burns *v.* Lander, 29 L. D., 484, and Chesser *v.* O'Neil, 30 L. D., 294, distinguished.

In determining whether the allegations in an affidavit of contest are sufficient under the act of June 16, 1898, the matter to be considered is whether said affidavit charges abandonment during a time of war, and, if it does, then the requirement that it must also contain the allegation that such abandonment was not caused by employment in the military or naval service of the United States, must be observed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 30, 1901.* (V. B.)

I am in receipt of your letter of January 12, 1901, wherein you ask to be informed—

if the decision in the case of Burns *v.* Lander, 29 L. D., 484, is overruled or affected by the decision of Chesser *v.* O'Neil, 30 L. D., 294.

To be more explicit, would not the allegations in the contest affidavit, against a homestead entry, be sufficient and confer jurisdiction upon the office, which showed clearly that the land had been abandoned six months or more before any war existed?

The act of June 16, 1898 (30 Stat., 473), requires that in contests for abandonment at a time when the United States is engaged in war, it shall be (1) charged in the affidavit of contest and (2) proved at the hearing that the settler's alleged absence from the land was not due to his employment in the military or naval service of the United States.

The case of Burns *v.* Lander, *supra*, arose on a charge of abandonment that covered a time when the United States was at war. The service of the notice of contest was by publication. The defendant at the hearing was in default, and in the disposition of that case it was held, under the first requirement of said statute, that, as there was no allegation that the settler's absence from the land was not due to his employment in the military or naval service of the United States, there was no jurisdiction to entertain the contest.

The case of Chesser *v.* O'Neil, *supra*, passes upon the sufficiency of proof under the second requirement of the statute, and holds that where the proof shows the abandonment commenced before a state of war, obviously it originated from a cause other than enlistment in the military or naval service of the United States during a time of war, and its continuance to the date of contest, in the absence of proof to the contrary, would be presumptively attributed to the original cause and be sufficient proof under the second requirement of the statute.

It will therefore be seen that the cases referred to are not in conflict, as the first case relates to the form and substance of the charge of abandonment, and the latter to the manner and measure of the proof of said charge. It is obvious from what has been said that said depart-

mental rulings do not conflict and that the later decision, in Chesser *v.* O'Neil, in no manner affects or modifies the conclusions announced in the case of Burns *v.* Lander.

In determining whether the allegations in an affidavit of contest are sufficient under this act, the only matter to be considered is whether said affidavit charges abandonment during a time of war, and, if it does, then the requirement that it must also contain the allegation that such abandonment was not caused by employment in the military or naval service of the United States, must be observed.

PRIVATE LAND CLAIM—SWAMP LAND—ACT OF JANUARY 12, 1855.

STATE OF LOUISIANA.

Where a private land claimant in the State of Louisiana failed to present to the district court of the State a petition setting forth his claim, within the time allowed therefor by the act of May 26, 1824, as re-enacted and extended by the act of June 17, 1844, the land embraced in his claim became, at the expiration of the period of reservation named in said later act, free, unreserved and unappropriated public land, and if of the character granted to the State by the swamp land grant of September 28, 1850, the subsequent confirmation of said private land claim, by the act of January 12, 1855, did not affect the State's title to so much thereof as had been granted as swamp land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 30, 1901.* (G. B. G.)

This is an appeal by the State of Louisiana from your office decisions of August 2, 1899, and January 4, 1900, denying its swamp land claim for fractional Sec. 20, T. 8 S., R. 12 E., St. Helena meridian, New Orleans land district, Louisiana, containing 44.24 acres.

The State claims the land under the swamp land grants of March 2, 1849 (9 Stat., 352), and September 28, 1850 (id., 519), and by virtue of a certain listing thereof as swamp lands by the surveyor-general of Louisiana, which list was regularly reported to your office, August 9, 1852. Your office denies the claim of the State, for the reason that said land is within the private land claim of one Francois Cousin, which was confirmed by an act of January 12, 1855 (10 Stat., 841), and for the further reason that it was omitted from a second list of swamp lands approved by the said surveyor-general and reported to your office in 1856, upon which second list was endorsed (apparently by the surveyor-general), "corrective of the list approved 9th August, 1852." The private land claim of the said Cousin was for 4,800 arpents (about 4,000 acres), and the said confirmatory act describes it by sections, township, and range, and directs the Commissioner of the General Land Office to issue a patent, or patents, for the land confirmed. But your office reports that no such patent or patents has been issued.

It appearing that no service of the State's appeal as originally presented had been made, it was returned to your office, November 2, 1900, with directions to advise the attorney for the State that it would not be considered unless served upon the parties in interest now holding under said act of confirmation. December 22, 1900, your office transmitted said appeal to the Department, with evidence of service upon George William Nott and the Salmen Brick and Lumber Company, by registered letters, containing copies of the appeal, addressed to the parties at New Orleans and Slidell, Louisiana, respectively, and deposited in the post office at Washington, D. C., December 12, 1900. There is also transmitted with such evidence of service a written statement by H. R. Warren, who signs himself clerk for the parish in which the land is situated, that the land in controversy is claimed by the said Nott and the said company. Neither of these parties has answered.

Section 5 of an act of March 2, 1805 (2 Stat., 324), provided that two persons be appointed by the President of the United States as commissioners, who, together with the register or recorder for the district for which they might be appointed, should ascertain, within their respective districts, the rights of persons claiming under any French or Spanish grant in the territories ceded by the French Republic by the treaty of April 30, 1803, and provided further that it should be the duty of said commissioners to make to the Secretary of the Treasury a full report of all the claims filed and their action thereon, which report it was directed should be laid by the Secretary of the Treasury before Congress at its next ensuing meeting. By section 10 of an act of February 15, 1811 (2 Stat., 617, 620–621), the President of the United States was authorized to direct the sale of public lands within the Territory of Louisiana, with the proviso:

> That till after the decision of Congress thereon, no tract of land shall be offered for sale, the claim to which has been in due time and according to law presented to the recorder of land titles in the district of Louisiana and filed in his office, for the purpose of being investigated by the commissioners appointed for ascertaining the rights of persons claiming lands in the Territory of Louisiana.

In the year 1815, James O. Cosby, commissioner of land claims, appointed under the said act of March 2, 1805, made a report upon the claims which had been examined by him, and submitted with his report three lists—one of claims which, in the opinion of the commissioners, were valid agreeably to the laws, usages, or customs of the governments from which the grant was derived; one of claims which, in his opinion, were not valid agreeably to the laws, usages, and customs of such governments, and a list of "anomalous claims," the nature of the titles upon which they were said to be founded not being established by satisfactory proof. The claim of Francis (Francois) Cousin is classified as an anomalous claim, and the commissioners

reported specifically, as to such claim, as follows: "Original papers burned in Orleans: proved by certificate of C. Trudeau." See Vol. 30, American State Papers, page 65. This report was communicated to the House of Representatives by the Commissioner of the General Land Office, January 2, 1816.

An act of May 26, 1824 (4 Stat., 52), provided that it should be lawful for private land claimants within the State of Missouri to present a petition to the district court of the State of Missouri setting forth their claims, and authorized the court to hear and determine the same, and gave the right of appeal in such cases from the district court to the supreme court of the United States. By section 5 it was provided that any claim to lands not brought before said court within two years from the date of the act should be forever barred, both at law and in equity, and, by section 7—

> That in each and every case in which any claim, tried under the provisions of this act, shall be finally decided against the claimant, and in each and every case in which any claim cognizable, under the terms of this act, shall be barred by virtue of any of the provisions contained therein, the land specified in such claim shall, forthwith, be held and taken as a part of the public lands of the United States, subject to the same disposition as any other public land in the same district.

By an act of June 17, 1844 (5 Stat., 676), said act of May 26, 1824, was "revived, re-enacted, and continued in force for the term of five years, and no longer," and extended to the State of Louisiana.

Francois Cousin did not file a petition under the permission granted by these acts, and the term within which he might have done so expired June 17, 1849. The reservation of the land covered by his claim ceased at that date. It was, therefore, free, unreserved and unappropriated public land at the date of the swamp land grant of September 28, 1850, and if of the character granted, the confirmation of said private land claim by an act of Congress thereafter could not affect the State's title to so much thereof as had been granted as swamp land, and Congress will not be presumed to have intended, by the act of January 12, 1855, *supra*, to confirm Cousin's claim to swamp lands.

The State of Louisiana having elected to stand upon the field notes of survey in the adjustment of its swamp land grants, the record is herewith remanded with directions that you adjudicate the claim of the State to these lands upon the field notes, and that due notice of your decision thereon be given to all parties, including the present claimants under the confirmed private grant, advising aggrieved parties of their right of appeal.

ABANDONED MILITARY RESERVATION—SURVEY—PRACTICE.

ALLEN H. COX (ON REVIEW).

The requirement that thirty days' notice must be given before a plat of survey will be treated as officially filed in the local office, has no application to an amended plat filed for the purpose of showing subdivisions of public lands in a surveyed township rendered fractional by reason of the reservation thereof and the platting and disposition of adjoining public lands.

Land in the Fort Hays military reservation excepted from the grant to the State made by the act of March 28, 1900, because included in a pending homestead application, under which entry was subsequently made, upon the filing of a relinquishment by the entryman becomes public land, subject to disposition, and, prior to the acceptance of the grant by the State, entries therefor may be properly allowed.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 30, 1901.* (G. B. G.)

By decision of June 26, 1900 (30 L. D., 90), the Department reversed your office decision of September 13, 1899, rejecting the homestead application of Allen H. Cox for lots 9, 10, and 11, and the S. ½ of the SE. ¼ of Sec. 4, T. 14 S., R. 18 W., within the abandoned Fort Hays military reservation, Wa-Keeney land district, Kansas, and directed the allowance of the entry. It was held by the Department that the lands within this reservation were restored to settlement and entry under the act of August 23, 1894 (28 Stat., 491), by departmental order of June 13, 1899 (L. & R. Miscellaneous 396, p. 305), that they were again put in reservation by departmental order of August 24, 1899 (L. & R. 398, p. 472), but that the homestead application of Cox, presented at the local office between these dates, on August 11, 1899, was a valid appropriation of the tracts in controversy, they being at the date of the application surveyed public lands of the United States subject to homestead entry, and that said application defeated to that extent the grant of said military reservation made to the State of Kansas by the act of March 28, 1900 (31 Stat., 52), there being a proviso in the act that it "shall not apply to any tract or tracts within the limits of said reservation to which a valid claim has attached by settlement or otherwise under any of the public land laws of the United States."

In a communication of October 6, 1900, addressed to the Secretary of the Interior and signed by "The Committee on F. H. M. Res., by Harry C. Freese, Sec'y," the said decision of the Department is complained of, it being alleged, in substance, among other things not necessary to notice, that the triplicate plat of the survey of said reservation has never been filed at the Wa-Keeney land office, that the plat which was filed in said office was not a plat of survey, but a copy of a plat showing areas and numbers of fractional lots in said reservation, and that if this plat be treated as a plat of survey, it has never, under

the instructions of October 21, 1885 (4 L. D., 202), been officially filed in said office, for the reason that these instructions were not complied with, in that no notice was given of a day after which applications to enter lands within said reservation would be received at the district land office. It is further suggested in said communication that Cox has relinquished the entry which he was permitted to make of the land involved under the said decision of the Department, and that it has since been entered by other parties, and it is contended that, if the departmental decision herein as to the validity of Cox's claim be adhered to, it should now be held that that claim was a personal one, and upon his relinquishment the grant to the State became operative as to said tract and prevented further entry of the land by other persons.

"The Committee on F. H. M. Res.," as such, has no standing before the Department, and there is no showing that it is authorized to represent the State in this matter, but, in view of the public interest involved, and because of the suggestion that the State has not yet accepted said grant and apparently hesitates to do so until the Department has acted upon the suggestions contained in said communication, it will be treated as the State's petition for a review of said decision.

By letter of January 11, 1901, the Department called on your office for a report as to the survey, or surveys, of lands within the abandoned Fort Hays military reservation, and as to the suggestion that Cox had relinquished his entry of the land in controversy and that other parties had been permitted to make entry thereof. Under date of January 21, 1901, your office reports that the subdivisional surveys of township 14 S., range 18 W., Kansas, were made from July 23, to 29, 1867; that the plat of survey as originally made did not show the Fort Hays military reservation, but shows that the survey included all the land in the township, and that this plat was forwarded to the local land office and received there by the register on November 1, 1867; that said survey was the only subdivisional survey ever made of said township under the direction of the General Land Office; that in July, 1868, after the establishment of said reservation, the reservation as declared, which included a part of townships 13 and 14 south, ranges 18 and 19 west, was surveyed under the direction of the War Department; that upon the receipt of the executive order setting aside said reservation, the General Land Office addressed a letter, on September 22, 1868, to the U. S. surveyor-general of Kansas, transmitting copies of the plats of said reservation made by order of the President, and directed him to "lay down on the original township plats in your office the Fort Hays Reservation, calculate the areas of fractional sections made so by the location of the reservation, and furnish duplicate and triplicate plats of these amended township plats to this office, and to that of the proper register's office at an early date, so that the land officers may

be informed of the reservation without unnecessary delay;" that in pursuance of these directions both the General Land Office and the register and receiver at Junction City, Kansas, were furnished with duplicate and triplicate plats, respectively, of the amended plats, showing the reservation and the lots made fractional by the laying down of the reservation on surveyed lands; that, so far as shown by the records of the General Land Office, no further surveys were made upon the ground in township 14 south, range 18 west; that after the abandonment of said reservation and the restoration of the lands included therein to the public domain and to the control of the Secretary of the Interior, the Commissioner of the General Land Office, as ex-officio surveyor-general for Kansas, approved, on July 7, 1899, a plat made in triplicate showing the subdivisional and fractional lots in townships 13 and 14 south, range 18 west, within said reservation; that the triplicate plat was forwarded to the local office, at Wa-Keeney, July 10, 1899; and that, according to the report of the local officers, it was received at that office on July 14, 1899, and filed the following day, but that no notice of any kind was ever given as to the filing of said plat and no date set upon which filings for said land would be received at that office.

It must be apparent from this complete statement of the facts as to the survey of this land, that there was no error in the statement made in the decision under review, that at the date Cox presented his application for the land, August 11, 1899, it had been surveyed. The triplicate plat of the original survey was filed in the local office as early as November 1, 1867. The survey of 1868 was made under the direction of the War Department, but it was, in effect, approved by the Commissioner of the General Land Office, and the surveyor-general was directed to lay down the Fort Hays reservation on the original township plats, which was done, and duplicate and triplicate plats of the amended township plats were filed in the local office. The plat approved July 7, 1899, was made entirely from these surveys and the plats thereof already on file in the local office. The plats which were filed in the local office July 15, 1899, were not original plats of survey, and served no additional use except to show the number of acres in some of the subdivisions made fractional by the reservation lines and to give numbers to those lots. It is ascertained from informal inquiry in your office, that where surveyed lands have been withdrawn for any purpose or appropriated to any use, and such withdrawal or appropriation renders fractional the subdivisons of the public surveys adjoining the lands withdrawn or appropriated, such fractional subdivisions are platted by the surveyor-general and these plats laid down on the original plats of survey and the amended plats filed in your office and the local land office where the land lies. The same course is pursued as to the lands withdrawn or appropriated in instances where the with-

drawal has been set aside, or the appropriation ceases to be effective, and the lands again become part of the public domain subject to disposition by the land department. But these amended plats are not regarded as plats of survey requiring notice of the filing thereof, and no such notice is given. The lands do not become subject to entry because of the filing of the amended plats, but because they are surveyed lands which have been restored to the public domain, and as to these plats the requirement that a plat of survey shall not be treated as officially filed in the local office until after thirty days' notice of the filing has no application in the practice of your office.

It results that the petition, in so far as it alleges error in the decision complained of, should be denied. Your office further reports, however, that the entry of Cox has been canceled, as per his relinquishments of August 16, and October 15, 1900, and that the lands covered by his entry have since been entered by Harry C. Freese and Thomas H. Long, and a question arises as to whether these entries should have been allowed, and whether, having been allowed, they may be permitted to stand.

The act of March 28, 1900, seems to make a grant *in præsenti*, being made in present words of grant. Certain conditions were to be assumed by the State, however, and by the terms of the act the State was required to accept the grant subject to the conditions named within five years from the date of the passage of said act. There may be a question as to whether the acceptance is a condition precedent or a condition subsequent, but a determination of this matter is not necessary in the disposition of the matter under consideration.

It is provided in said act—

> That the provisions of this act shall not apply to any tract or tracts within the limits of said reservation to which a valid claim has attached, by settlement or otherwise, under any of the public land laws of the United States.

Whether the words "has attached" refer to the date of the passage of the act, or the date of the acceptance of the grant by the State, may be open to question, but this, also, is not material to the matter under consideration. If they refer to the date of the passage of the act, then the pending application by Cox at that date, was sufficient to defeat the operation of the grant, for the language is plainly words of exclusion and can not be regarded merely as a saving clause saving rights then existing. If it refers to the time the State may accept the grant, which it has not yet done, then, upon the cancellation of Cox's entry, the right of the State not having attached as yet, and there being no withdrawal of the lands, the executive withdrawal having been defeated by Cox's application, as held in the previous decision of the Department, the lands covered thereby remained public lands, subject to disposition, and the entries subsequently made were regularly allowed.

PRIVATE LAND CLAIM—SWAMP LAND—CLAIM BY STATE.

STATE OF LOUISIANA.

The State of Louisiana is not entitled to the purchase money received by the government from the sale of lands in the Maison Rouge grant, claimed by the State to be swamp, where such lands were in a state of reservation at the date of the swamp grants to the State, although such lands may have been swamp and overflowed at the date of said grants and sold subsequently thereto.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *January 31, 1901.* (G. B. G.)

The lands involved in this case are: Fractional Sec. 13; the SW. ¼ of NW. ¼, SE. ¼ of SE. ¼ and SW. ¼, Sec. 14; Lot 4, Sec. 14; Lots 4 and 5, Sec. 15; Lot 5, Sec. 21; the E. ½ of NE. ¼ and E. ½ of SE. ¼, Sec. 22; the N. ½, N. ½ of SE. ¼ and N. ½ of SW. ¼, Sec. 23; SW. ¼ of SW. ¼, Sec. 23; Lots 1, 2, 3, 4, 5, 6, Sec. 24; N. ½ of NE. ¼ and NE. ¼ of NW. ¼, Sec. 25; N. ½ of NW. ¼, Sec. 26; N. ½ of NE. ¼ and Lot 1, Sec. 27, T. 15 N., R. 3 E.; and the SE. ¼ of NW. ¼, Sec. 23; the NE. ¼, Sec. 26; the N. ½ of NW. ¼, Sec. 26, T. 16 N., R. 3 E., New Orleans land district, Louisiana, and are covered by what is known as the "Maison Rouge" private land claim.

By your office decisions of July 3, 1899, and June 19, 1900, it was held that the State of Louisiana did not take these lands under the swamp land grants of March 2, 1849 (9 Stat., 352), and September 28, 1850 (Id., 519), and that it is not entitled to swamp land indemnity therefor under the acts of March 2, 1855 (10 Stat., 634), and March 3, 1857 (11 Stat., 251). The State has appealed to the Department.

By an act of March 3, 1811 (2 Stat., 662, 665), it was provided that no land in the Territory of Louisiana should be offered for sale the claim to which had been in due time and according to law presented to the recorder of land titles in the district of Louisiana, for the purpose of being investigated by the commissioners appointed for that purpose, until after the decision of Congress thereon, and by the acts of May 26, 1824 (4 Stat., 52, 54), and June 17, 1844 (5 Stat., 676), it was made lawful for any person or persons, or their legal representatives, having private land claims in the State of Louisiana, to present a petition to the district court setting forth the nature of the claim, and the court was authorized to hear and determine the question of title and the right of appeal was given to the supreme court of the United States. By the act of June 17, 1844, *supra*, these provisions were continued in force for the term of five years from that date and no longer. The effect of this legislation was to reserve from disposition the lands covered by the Maison Rouge grant, until June 17, 1849, and in case suit was instituted prior to that time, to reserve them until the final determination of the suit. See opinion of Attorney-General Cushing of July 23, 1856 (8 Attorneys-General's Opinions, p. 16).

February 13, 1843, the United States filed a petition in the circuit court for the district of Louisiana, stating that one Richard King had taken possession of and asserted title to part of the claim, described as having one mile front on the Ouchita river and five and a half miles depth, and being all that part of lot 19, according to the survey of John Dinsmore, that lies on the right side of said river in descending. The petition prayed that the land might be adjudged to belong to the United States. King answered and called his vendor, Daniel W. Coxe, in warranty, who also answered and set forth his title *in extenso* under the grant to the Marquis de Maison Rouge. The court decreed that the government's petition be dismissed, that the grant to Maison Rouge was valid, and that the said King and Coxe were the lawful owners of the parts of the grant held by them, as described in the answer of King. This decree was reversed by the supreme court of the United States, February 13, 1849 (mandate issuing May 22, 1849), it being held that the "instrument of writing relied on by the defendants did not convey, or intend to convey, the land in question to the Marquis de Maison Rouge," and the cause was remanded "with directions to enter a judgment for the United States for the land described in their petition." The United States *v.* King *et al.* (7 How., 833, 855). At its December term, 1850, the supreme court had this same so-called Maison Rouge grant under consideration upon the petition of Sarah Turner and others, filed June 12, 1846, in the district court of the United States for the district of Louisiana, in which court a decision had been reached in favor of the petitioners. The petitioners did not claim through Coxe. The case was submitted to the supreme court by the Attorney-General of the United States, upon the claim that that court had already decided, in the case of the United States *v.* King, *supra*, that the grant was invalid. The court, after noting that the case turned altogether in the district court upon the construction and effect of the instrument under which the petitioners claimed, said: "The question which this appeal brings up is, therefore, *res judicata*, nor does the court perceive any ground for doubting the correctness of the opinion heretofore pronounced." It was therefore directed that the petition of the claimants be dismissed. The United States *v.* Turner *et al.* (11 Howard, 663). At its December term, 1854, the supreme court had the same so-called grant under consideration, upon the petition of Daniel W. Coxe and thirteen other persons, among whom were Henry Bry and Hardy Holmes, filed in May, 1846, in the same district court, in which court a decision had been reached in favor of the petitioners. The supreme court, speaking by Chief Justice Taney, said:

This case cannot be distinguished from the case of the United States *v.* King *et al.* (7 How.,.833), and of United States *v.* Turner's Heirs (11 How., 663). The decree of the district court must therefore be reversed, and a mandate issued to the court below to dismiss the petition. The United States *v.* Daniel W. Coxe (17 Howard, 41, 42).

The contention of the State is, that the whole Maison Rouge grant was declared invalid by the supreme court in the case of the United States *v.* King *et al.*, *supra*, at its January term, 1849; that if these lands were ever in reservation by reason of the judicial inquiry as to the validity of said grant, the reservation terminated upon the court's decision in said case; that they were free, unappropriated, and unreserved, public lands at the date of the swamp land grants, and of the character of lands intended to be granted thereby; and that, inasmuch as they have since been sold and patented by the United States under the provisions of an act of January 27, 1851 (9 Stat., 565), the State of Louisiana is entitled to swamp land indemnity therefor under the provisions of the acts of March 2, 1855, and March 3, 1857, *supra*.

A survey of this claimed grant was executed by John Dinsmore, March 27, 1820, by order of the surveyor-general of the United States, south of the Tennessee river, the claim being by said survey divided into lots. It appears from your said office decision of July 3, 1899, and from the petition of the said Daniel W. Coxe and others, on file in the clerk's office of the supreme court of the United States, that lots 7, 12, and 13, according to said survey, were claimed by Coxe, through said alleged grant to the Marquis de Maison Rouge, and that in the year 1835 Coxe sold these lots to the said Henry Bry and Hardy Holmes, who joined in the said petition with Coxe to quiet their title to said lots. It further appears from your said office decision and from the records and files of your office that the lands involved in this case, and hereinbefore particularly described, were within said lots according to said survey. January 16, 1855, Henry Bry made cash entry covering 1210 acres; Julia C. Gordon, who was formerly the widow of Holmes, made cash entry covering 992.28 acres; and the said Bry and Gordon made cash entry covering 1012.40 acres of said land. These entries were made under the act of January 27, 1851, *supra*, which provided that upon a final adjudication by the court in favor of the United States on the "Maison Rouge Grant," every person, his heirs, or assigns, who, prior to March 1, 1849, purchased land in good faith, and for a valuable consideration, from Daniel W. Coxe, or other person holding titles derived under said grant, and who had improved the land so purchased, or any part of it, should be permitted to enter the tract or tracts so purchased. Under this act all of the land in controversy has been sold by the United States to the grantees of Coxe, and said entries have been carried to patent.

By the act of March 2, 1855, *supra*, the President of the United States was directed to cause patents to be issued to purchasers for cash who had made entries of the public lands claimed as swamp lands, and by the second section of the act it was provided that upon due proof by the authorized agent of the State that any of the lands purchased were swamp lands, the purchase money should be paid over to the

State. And by the act of March 3, 1857, *supra*, the provisions of the act of 1855 were extended to all entries of lands claimed as swamp lands, made since its passage.

It may be that the land embraced in the suit of the United States *v.* King, *supra*, was freed from reservation by the decision of the supreme court in that case February 13, 1849. But that decision did not relieve from reservation other lands covered by the Maison Rouge claim, and none of the lands involved in this appeal were embraced in that suit. The petition of the United States in that case asked only that the lands claimed by King be adjudged to belong to the United States, and the judgment is only as to the lands described in the petition. The lands for which indemnity is asked were not involved in that suit, but were involved in the suit of Daniel W. Coxe and others on petition, and this suit was not finally determined until December, 1854. None of these lands were claimed through King.

The only exception found in the act of September 28, 1850, *supra*, is of lands "which shall remain unsold at the date of the passage of this act," but all of the lands involved being at that date in reservation by virtue of the acts of Congress hereinbefore referred to, and the private land claim embracing them being under advisement by the courts, that grant did not operate upon them, although no exception was made of them. See Newhall *v.* Sanger (92 U. S., 761); Wilcox *v.* Jackson (13 Pet., 498); Leavenworth, Lawrence and Galveston Railroad Company *v.* United States (92 U. S., 733); State of Louisiana (30 L. D., 465).

It results that although the lands in controversy may have been swamp and overflowed lands at the date of the swamp grants, and although the United States has since sold them, the State is not entitled to the purchase money.

The decision appealed from is affirmed.

MINERAL LAND—RAILROAD GRANT—CLASSIFICATION.

MORRILL *v.* NORTHERN PACIFIC R. R. CO. ET AL.

Lands valuable on account of limestone deposits contained therein, and more valuable on account of such deposits than for agricultural purposes, are mineral lands within the meaning of the mining laws, and are therefore mineral lands within the meaning of the act of February 26, 1895, providing for the classification of lands within the limits of the Northern Pacific railroad grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 6, 1901.* (C. J. W.)

The lands in controversy in this case are situated in Sec. 7, T. 4 N., R. 10 W., Helena land district, Montana. The unpatented portion of

said section was, in December, 1897, classified as non-mineral in character by the board of commissioners appointed under the act of February 26, 1895 (28 Stat., 683), for the purpose of classifying lands within the limits of the grant to the Northern Pacific Railroad Company, situated in said land district.

February 25, 1898, Robert Morrill filed a protest against said classification, alleging ownership of two mining claims—one embracing the E. ½ of the NW. ¼ of the SW. ¼; the SW. ¼ of the NW. ¼ of the SW. ¼; the W. ½ of the NE. ¼ of the SW. ¼; the SE. ¼ of the SW. ¼; and the E. ½ of the W. ½ of the SW. ¼ of the SE. ¼ of said section 7; and the other embracing the NW. ¼ of the NW. ¼ of the SW. ¼ of said section. He further alleges, in substance and effect, that he is in possession of said mining claims, and has made large expenditures in labor and improvements upon the same, and has developed a large deposit of limestone thereon, valuable for fluxing purposes, and also for building purposes; that the land contains large and valuable deposits of limestone throughout the limits thereof; and that said lands have no value for agricultural purposes.

A supplemental report appears to have been made by the board of commissioners, more particularly describing the lands classified by them in said section 7 as the N. ½, the SE. ¼, the N. ½ of the SW. ¼, and the SE. ¼ of the SW. ¼ of said section.

March 9, 1898, a hearing was ordered upon Morrill's protest. The testimony was submitted before J. R. Eardly, United States commissioner, at Anaconda, Montana, April 30, 1898. The protestant and railroad company, and Thaddeus C. Davidson and Charles W. Atwater, intervenors, claiming to be purchasers of the land from said company, appeared and participated in the hearing. Final hearing before the local officers was had June 15, 1898.

It appears that the register was a member of the board of commissioners who classified the lands in 1897, to which fact he called the attention of your office before taking action on the record, expressing the opinion that, under the act of January 11, 1894 (28 Stat., 26), he was disqualified to unite with the receiver in the consideration of the case. Your office held that the register was not disqualified under said act, and, March 23, 1899, directed the local officers to proceed with the consideration of the case. March 28, 1899, they made a joint finding against the classification of the board of commissioners.

April 10, 1899, Davidson and Atwater appealed from the order of your office holding that the register was qualified to act in the case.

February 5, 1900, the Department directed—

> that the said register be excused from participation in the consideration and decision of said protest, and that some special agent of the land department be designated by your office to act in said matter in place of the said register.

The finding made by the local officers in the case was overlooked by

the Department in the letter of February 5, whereupon, February 10, 1900, further direction was given—

> that the record and papers relating to said protest be returned by your office to the local office for consideration and decision as directed in the departmental letter of the 5th instant, and as though no finding or recommendation had been made therein by the local officers.

February 21, 1900, your office returned the record to the local office for appropriate action. Special Agent H. E. Stece was designated to act with the receiver in disposing of the case. Said officers heard oral argument by counsel, and by stipulation of the parties made a personal examination of the premises, and thereafter, on April 11, and April 13, 1900, respectively, rendered separate disagreeing findings. The special agent found the lands to be non-mineral in character and the receiver found them to be mineral in character. Morrill appealed from the finding of the special agent, and the railroad company and Davidson and Atwater appealed from the finding of the receiver.

By decision of August 25, 1900, your office held the lands in dispute to be mineral in character and affirmed the finding of the receiver. The railroad company and Davidson and Atwater have filed separate appeals from said decision upon substantially similar grounds. They will be considered together.

The 3d section of the act of February 26, 1895, under which the classification in question was made, provides:

> That all said lands shall be classified as mineral which by reason of valuable mineral deposits are open to exploration, occupation, and purchase under the provisions of the United States mining laws.

The United States mining laws (Sec. 2319 Revised Statutes) provide:

> That 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 land in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such.

The question presented by the record is, whether the lands in controversy are shown to contain valuable mineral deposits such as render them open to exploration, occupation, and purchase, under the provisions of the United States mining laws. If so, their classification as non-mineral was improper and cannot be approved; otherwise said classification should be sustained.

A large number of witnesses testified in the case on either side, and in reference to some of the theories advanced there was decided conflict in the evidence. The protestant and quite a number of witnesses introduced by him testified that there is no part of said land which can be cultivated or upon which crops of any sort can be produced, and that they are almost valueless for grazing purposes. Some of the opposing witnesses testified that there are a few acres in a draw, or hollow, which

might be cultivated without irrigation if the rocks were removed. A number of others testified that a considerable quantity of the land could be cultivated if the rocks were removed therefrom and water conducted upon it for irrigation purposes, which, however, would require a ditch two and a half to three miles in length. With slight exceptions, the lands are hilly, descending by steps from the higher elevations to the lower levels, while rocks abound upon the surface or at a slight depth under it. The soil is light and thin, and, in the opinion of several of the witnesses, would be removed if water for irrigating purposes were applied to it. The prevailing opinion is that the lands would not produce crops sufficient to justify the cost of their irrigation. No agricultural use has been made of the lands, except to pasture a small number of stock for a part of each year. The grass is of scant growth and dies out early in the season. The conclusion drawn from the evidence as a whole is, that the lands are a low grade of grass lands, not adapted to other agricultural uses.

In addition to the testimony offered for the purpose of showing that said lands could be so improved as to be of some agricultural value, an effort was made to show that they possessed a surface value for building sites, on account of their proximity to the Butte, Anaconda and Pacific Railroad, and the city of Anaconda, in excess of their value for any other purpose. A conditional deed of sale of ten acres of the land by Thaddeus C. Davidson to M. Donahoe, for six hundred and fifty dollars, was put in evidence. The condition in the deed is that Donahoe is to pay the purchase price named therein for the ten acres, if Morrill fails in this litigation; otherwise he is to pay nothing. Davidson testified that Donahoe is vice-president of the Butte, Anaconda and Pacific Railway Company, and that said sale was made for the benefit of said company and the Anaconda Copper Mining Company. In explanation of the use of the term "surface value," Davidson says—

> I said that this land had a surface value over and above any grain or grass that might be grown on it, or any rock that might be found in it. Surface value, as I understand it, belongs to the agricultural part, and may be used either for building smelters, reduction works, stock yards, side tracks, or houses on it. My impression is that these people that bought the land, bought it with the intention of using a part of it to construct reduction works on. I said the surface value of this land was anywhere from fifty to sixty-five dollars per acre. The reason I say so is because I sold what I did sell of it for $65 an acre, and had it not been for the claim that Mr. Morrill was putting up to this land now in controversy, I could have sold it for the same price.

The lands in controversy are described as being about three miles from the city of Anaconda.

The testimony introduced by Morrill directly upon the question as to the mineral deposits in the lands is practically uncontradicted. Said testimony is to the effect that there is an extensive deposit of limestone rock underlying the main body of said lands, carrying a small per cent

of iron, rendering the rock valuable for fluxing purposes in the treatment of certain metalliferous ores in smelters, and that such ores are treated in the Anaconda smelters. The quantity of limestone contained in the lands appears to be sufficiently great to demonstrate that they are valuable for mining purposes, provided the limestone can be successfully mined and marketed.

A large quarry of limestone has been opened a few hundred yards above the railroad track, which passes through the lower edge of said lands, from which quarry it appears that the limestone can be rapidly and cheaply loaded upon the cars, to facilitate which Morrill has erected a suitable platform near the railroad track. Large quantities of limestone have been taken out and removed from said lands by people residing in the neighborhood for building purposes and used chiefly in the building of foundations for houses; but it does not appear that it has a market price for this purpose. It does appear, however, that Morrill, a few years prior to the hearing, sold upwards of three thousand tons of limestone from said quarry to the Anaconda Smelting Company, on which sale he realized a clear profit of fifteen hundred dollars. The limestone so sold was used for fluxing purposes, and similiar material is still being used by the Anaconda smelters, taken from land adjoining that in controversy.

The testimony taken as a whole clearly shows that the lands here involved are more valuable for the deposits of limestone contained therein than for agricultural purposes. Are they, for that reason, open to exploration, occupation, and purchase, under the provisions of the mining laws?

In the case of the Pacific Coast Marble Company *v.* Northern Pacific Railroad Company *et al.* (25 L. D., 233), after an elaborate discussion of the question as to what constitutes mineral lands within the meaning of the mining laws of the United States, the Department held:

> 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.
>
> The lands here involved being admittedly of great value for the deposits of marble they contain, and valuable only on account thereof, are clearly within the meaning of the rule thus laid down, and must therefore be held subject to entry under the mining laws, unless it be held that mineral lands of such character are not within the exceptions from the railroad and State grants in question.

It was further held in that case, with respect to the exception of mineral lands from the grants to the Northern Pacific Railroad Company, and the State of Washington, therein involved—

> That 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—that is, where they are more valuable on account of such

mineral deposits than for agricultural purposes—are "mineral lands" within the meaning of that term as used in the exception from the grants to the railroad company and to the State.

As the lands here in question come clearly within the rule thus announced, those portions thereof situated in sections 15 and 21, must be held as excepted from the grant to the Northern Pacific Railroad Company, and its application to select the same will be rejected. That portion in section 16, must be held as excepted from the grant to the State. Upon proper showing of compliance with the mining laws, the lands may be patented to the mineral claimant.

Beaudette *v.* Northern Pacific Railroad Company (29 L. D., 248) was a case where certain lands, situate in the Helena land district, Montana, were classified as non-mineral by the board of commissioners under the act of February 26, 1895, aforesaid. Upon protest against the classification, the lands were shown to contain valuable deposits of sandstone, and with respect thereto the Department held as follows:

It appearing that the land in controversy is of vastly more value on account of the sandstone it contains, than for agricultural purposes, it results that the classification thereof made by said commissioners is wrong, that the land although part of an odd-numbered section within the primary limits of the grant to the Northern Pacific Railroad Company did not pass under said grant, and that said classification cannot be upheld, nor the contention of said company that it is not mineral land within the meaning of the excepting clause of said grant be sustained.

In the case of Schrimpf *et al. v.* Northern Pacific Railroad Company *et al.* (29 L. D., 327), lands containing deposits of marble and slate were involved, and it was held that—

Marble and slate are mineral substances, and as such their existence on land in quantity and quality sufficient to render the land more valuable on that account than for agricultural purposes, makes such land mineral land within the meaning of the mineral laws and within the meaning of the excepting clause of the grant to the Northern Pacific Railroad Company, and therefore not subject to indemnity selection on account of said grant.

As early as the year 1883, in the case of Maxwell *v.* Brierly (10 C. L. O., 50), it was held by the Department that lands more valuable for deposits of limestone than for agricultural purposes are mineral lands, and subject to disposition under the mining laws. That case was referred to and the doctrine thereof approved in the Pacific Coast Marble Company case, *supra*.

It cannot be questioned that limestone is a mineral substance, and as the testimony shows that the lands in controversy have an actual value for the deposits of limestone contained therein, and are more valuable on account of such deposits than for agricultural purposes, they fall clearly within the rule announced in the authorities cited, and are accordingly held to be mineral lands within the meaning of the United States mining laws. It follows that they are also mineral lands within the meaning of the classification act of February 26, 1895, and were improperly classed as non-mineral.

The decision of your office is accordingly affirmed, and the classification of the lands as non-mineral is disapproved.

Your attention is called to the stipulation of counsel filed in the record, containing an agreed description of the land to which the controversy relates.

MINING CLAIM—LOCATION LINES ON PATENTED LAND—NOTICE.

THE ALICE LODE MINING CLAIM.

The location lines of a lode mining claim may be laid within, upon or across the surface of patented agricultural land for the purpose of claiming the free and unappropriated ground within such lines and the veins apexing in such ground, and of defining and securing extralateral underground rights upon all such veins, where such lines (*a*) are established openly and peaceably and (*b*) do not embrace any larger area of surface, claimed and unclaimed, than the law permits.

Where the notice of an application for patent to a mining claim gives no connecting line between the claim and a corner of the public survey, and does not otherwise designate the situation of the claim upon the ground with substantial accuracy, a new notice will be required.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 7, 1901.* (E. B., Jr.)

The Department has considered the appeal of Charles Barnicott *et al.* from the decision of your office dated July 27, 1900, in the matter of mineral entry No. 2717, made March 5, 1900, for the Alice lode mining claim, Salt Lake City, Utah, land district.

The said decision finds that the lines of location and of the official survey of the claim were laid in part within, upon or across certain lode mining claims, and a certain tract of agricultural land, all of which had been patented prior to the date of the location of the Alice; and therefore, notwithstanding such lines had been so laid without objection from the owners of the patented lands and presumably with their consent, held, in effect, that it was unlawful to place any of said lines within, upon or across the patented lands; that the said location was invalid and void to the extent that the lines thereof were so placed; and that an amended survey would be necessary to so adjust the boundary lines of the claim that none of them should be laid within, upon or across patented land.

It was also found by said decision that the notice of the application for patent did not give any connection between a corner of the claim and a corner of the public survey, and it was therefore held to be fatally defective and that it would be necessary for new notice to be given by publication and posting.

In default of an "application for an amended survey, and also for new notice" of the application for patent, within sixty days from service of notice of said decision, or of an appeal therefrom, it was stated therein that the entry would be canceled without further notice.

From the action of your office claimants have appealed to the Department.

The Department finds the facts to be as found in your office decision. Relative to the laying of the location lines of the claim within, upon or across patented lands it was held by the Department January 30, 1901, in the case of the Hidee Gold Mining Company (30 L. D., 420), that any of the location lines of a lode claim may, if established openly and peaceably, be laid within, upon or across the surface of patented lode mining claims for the purpose of embracing and including the discovery vein and all other veins apexing within the free and unappropriated ground within such location lines, and the ground itself as well, and of defining and securing extralateral underground rights upon all such veins.

That case did not involve the question whether the lines of a lode location may be laid within, upon or across the surface of patented agricultural land, but the Department is clearly of opinion that for the purposes and subject to the conditions stated the reason of the rule declared in the case cited justifies and requires an affirmative answer to the question. The decision of your office relative to the validity and effect of the laying of the location lines of the Alice claim within, upon or across patented lands, and to an amended survey of that claim, is therefore reversed.

It appearing, as found by the decision of your office, that the notice of the said application for patent did not give any connecting line between the claim and a corner of the public survey, and it also appearing that the same did not otherwise designate the situation of the claim upon the ground with substantial accuracy, so much of the said decision of your office as requires new notice to be given of the application for patent is hereby affirmed.

MINING CLAIM—CONFLICT—RIGHTS OF CLAIMANTS.

THE VULCANO LODE MINING CLAIM.

An applicant for patent to a valid lode location who excludes from his application a portion of his claim in conflict with a placer location, does not thereby waive or surrender any of his rights with respect to the possession and enjoyment of any part of the surface of his location lying without the conflict, or with respect to any veins, lodes or ledges the tops or apexes of which may be found, at any point outside the conflict, to lie within the surface lines of his location extended downward vertically, unless it clearly appears that by such exclusion he intended to waive or surrender such rights.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 7, 1901.* (A. B. P.)

December 18, 1899, The Volcano Gold Mining Company (hereinafter referred to as the Volcano Company) made entry No. 2239, for the

Vulcano lode mining claim, survey No. 9931, Pueblo, Colorado, excluding certain conflicts with other lode claims, and also the conflict with the previously surveyed Judson placer claim.

It appears that the Vulcano was located May 28, 1892, and that the Judson placer was located February 2, 1894. The conflict covers the northeasterly corner of the Judson placer and in part the westerly end of the Vulcano. It does not entirely cross the latter claim, but extends far enough to the north to embrace in part the center or assumed lode line of that claim.

By decision of March 26, 1900, your office, citing the case of Silver Queen Lode, decided February 23, 1893 (16 L. D., 186), held and directed, among other things, that the Volcano Company be allowed sixty days from notice within which to show cause why its entry—

> should not be canceled as to that portion of its claim which extends beyond the point where the Vulcano lode line intersects the east side line of the excluded Judson placer and passes within it, or to appeal; in default of which the entry will be canceled as aforesaid without further notice from this office. Should this decision become final, an amended survey will be necessary to establish the new westerly end line.

May 4, 1900, resident counsel for the Volcano Company filed in your office a motion in writing, in the nature of a motion for review, asking that the decision of March 26, 1900, be recalled and vacated, in view of the ruling of the Department in the case of the Hustler and New Year Lode Claims, decided April 18, 1900 (29 L. D., 668).

July 30, 1900, your office considered said motion and denied the same.

The Volcano Company thereupon appealed.

It must be assumed—nothing to the contrary having been shown—that the Vulcano location was and is in all respects a valid one. A valid location of a mining claim entitles the locators thereof, their heirs and assigns (section 2322, Revised Statutes), so long as they comply with the legal requirements governing their possessory title (section 2324, Revised Statutes), not only to rights with respect to the particular vein, lode, or ledge, the discovery of which forms the basis of the location, but also to the exclusive right of possession and enjoyment of all the surface included within the lines of the location, and of all veins, lodes, or ledges, throughout their entire depth, the tops or apexes of which lie inside of such surface lines extended downward vertically, in so far as they lie between vertical planes drawn downward through the end-lines of the location continued in their own direction, although such veins, lodes, or ledges may, in their course downward, depart from a perpendicular and extend outside the vertical side-lines of the location. In other words, a perfected location of a mineral vein, lode, or ledge secures to its owners, so long as their possessory title is maintained under the law, exclusive rights with respect to the possession and enjoyment of the surface of their claim, and exclusive rights, intralimital and extralateral, not only with respect to

the particular vein, lode or ledge located, but also with respect to all other veins, lodes or ledges the tops or apexes of which may be found to lie within the surface lines of the location extended downward vertically. These were the rights of the Vulcano locators and owners under their location, in so far, at least, as the Judson placer was concerned, before the conflict with the latter claim was excluded.

There is nothing in the record which shows, or even tends to show, that by the exclusion of the Judson placer conflict from its entry, the Volcano Company waived, or intended to waive, any rights secured to it by the Vulcano location, outside the excluded ground. It is apparent, therefore, that the decision of your office, if sustained, would deprive the Volcano Company of rights, not waived or surrendered by it, with respect to the possession and enjoyment of the surface of that part of the Vulcano location which lies outside and north of the excluded Judson placer conflict, and with respect to any veins, lodes or ledges the tops or apexes of which may be found to lie inside the surface lines of such part extended downward vertically. These rights having been secured to the locators and owners of the Vulcano claim, under and by virtue of their location, and there having been no waiver or surrender thereof by reason of the stated exclusion of the Judson placer conflict, the Department is of opinion that the action of your office, virtually requiring the surrender of such rights as a condition to issuing a patent for the claim, is contrary to the law and can not therefore be sustained.

The case of the Silver Queen Lode, cited by your office, is not like the present case, and is therefore without controlling effect in the disposition thereof.

The decision of your office is reversed, and if no other objection appears the Vulcano entry will be allowed to stand.

SCHOOL LAND—FOREST RESERVATION—LIEU SELECTION.

STATE OF CALIFORNIA.

The State is required, in making application to select land in lieu of sections sixteen and thirty-six in a forest reservation, where the title of the State to such sections has vested prior to the establishment of the reservation, to designate by specified subdivisions the lands in lieu of which indemnity is desired, and to show, by certificate of the proper officer having charge of its records of disposal of its school lands, that it has made no sale or other disposal of the lands assigned as a basis for its proposed lieu selection, and also, by certificate of the officer having charge of the record of titles to lands in the county where the lands lie which are assigned as a basis for the selection, that no conveyance of title, lease or other transfer of such lands, or of any interest therein, appears of record in his office.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 9, 1901.* (J. R. W.)

The State of California appealed from your office decision of August 25, 1899, rejecting its school land indemnity selection, list 3446, for lot 1, Sec. 6, T. 46 N., R. 13 E., M. D. M., Susanville, California, in lieu of 40.24 acres in Sec. 36, T. 1 N., R. 21 E., M. D. M., a surveyed section within the Yosemite Park.

The plat of survey of T. 1 N., R. 21 E., was approved and title to said section 36 vested in the State, January 27, 1882. May 19, 1899, the State filed its selection in the local office, which was rejected because not accompanied with a relinquishment of the base, as required by circular of March 11, 1899 (28 L. D., 195). The State appealed to your office, which rejected the selection because the particular legal subdivision of said section 36, in lieu of which the selection was made, was not designated, and no formal relinquishment thereof was filed, nor was there any certificate that the land relinquished had not been sold or disposed of and was not in possession of any third party under any law or permission of the State.

January 26, 1901, since your office decision, the Secretary of the Interior approved the opinion of the Assistant Attorney-General (30 L. D., 438), to the effect that the selection by the State of lands in lieu of sections sixteen and thirty-six in a forest reservation, where the right of the State to said sections has attached, is such a waiver of its right to said sections as to obviate the necessity for the relinquishment thereof to the United States, as required by said circular instructions.

It should be shown, however, that prior to such indemnity selection the State had not disposed of the land. The act of the legislature of California, approved March 14, 1891, gave the consent of the State to the act of Congress of October 1, 1890 (26 Stat., 650), to establish the forest reserve embracing said section 36, part of which is assigned as basis for the selection in question. Said act of the State of California provided that:

> No further sales of school lands within the exterior boundaries of the tracts so reserved, as aforesaid, shall be made by the State.

Nothing in the act, or in the record, indicates that the State had made no disposal of said section 36 prior thereto. The clear implication is that some portion of the school lands included within the exterior boundaries of said forest reserve had been disposed of, but "*further*" sales were forbidden. The right of the purchaser in such cases would not be affected. With its application to make lieu selections the State should, by certificate of its proper officer having charge of its records of disposals of its school lands, show that it has made no sale or other disposal of the lands assigned as the base for its proposed lieu selection, and also show by certificate of the officer having charge

of the record of titles to lands in the county where the lands lie which are assigned as base for the selection that no conveyance of title, lease, or other transfer of such lands or of any interest therein appears of record in his office, so that by its selection of lieu lands the State will be shown to vest the government with good title to the assigned basis therefor. To do so it would be necessary to indicate, as required by the circular, the particular land relinquished for which the indemnity is claimed. The selection was therefore, for these reasons, informal, and was properly rejected. Your office decision, thus modified, is for that reason affirmed. Such informality may, however, be cured, and, if cured, within a reasonable time to be fixed by you, the selection may be approved.

HOMESTEAD—SOLDIERS' ADDITIONAL—TRANSFER OF RIGHT.

JOHN M. RANKIN.

Where the owner of a soldiers' additional right executes a power of attorney to another to sell any lands he may then own or thereafter acquire under said right, and delivers with it a blank application to enter, signed by himself, having reference to no particular lands but to be filled in as the holder of the power may elect, he thereby sells and assigns and vests in the grantee all his right with full ownership thereof.

Secretary Hitchcock to the Commissioner of the General Land Office.
(W. V. D.) *February 13, 1901.* (J. R. W.)

John M. Rankin appealed from your office decision of January 15, 1901, denying recertification in his name of 1.63 acres residue of certificate of additional right issued November 12, 1877, in the name of Calvin Estes, for one hundred and twenty acres.

July 20, 1877, Calvin Estes, of Fulton county, Arkansas, executed a power of attorney before the county clerk, which, as now recorded in Tehama county, California, appointed N. P. Chipman, of Tehama county, his attorney—

to sell, upon such terms as to him shall seem meet, any lands which I now own either in law or equity and obtained by me as an additional homestead under the provisions of section 2306 of the Revised Statutes of the United States, and to sell any such lands as I may hereafter acquire under said acts, and to receive . . . . for his own use and benefit any moneys or other property the proceeds of the sale of said lands or any interest therein or arising from any contract in relation thereto or recovered for any injury thereto, and . . . . in consideration of the sum of $150 to me in hand paid by the said N. P. Chipman . . . . each and every power contained herein is hereby declared to be irrevocable.

November 12, 1877, there was submitted to the Commissioner of the General Land Office the additional homestead affidavit of Calvin Estes, subscribed and sworn to, July 20, 1877, before the register of the land office, Little Rock, Arkansas, and an application to make an additional

homestead entry, signed by Calvin Estes, which now bears date Marysville, California, January 19, 1878, and the certificate of the then register of the land office, Marysville, California, that it was filed in that office on said date.

Your office decision held:

> The power of attorney to sell the land, which is made irrevocable, is not sufficient evidence of the sale of the excess of the certificate over the land located and sold. In this case there is not, as there should be, filed either the power to locate or a certified copy thereof, or a direct transfer from the soldier.
>
> There is nothing in the record to corroborate the allegation in the bill of sale by Chipman that he located the certificate at Marysville, California, the same having apparently been located by the soldier. For these reasons the application is rejected.

Inspection of the certificate of additional right, which is for one hundred and twenty acres, and its attached papers, shows that the affidavit and application to make the additional entry were attached to the certificate of right at the time it was made, November 12, 1877, as they are now, and that the application was then incomplete, as it bears later date, January 19, 1878, at Marysville, California. The description of lands is clearly in a different writing than the other parts of the application, and from the ink with which Estes signed it. It is thus evident, from an inspection of the papers attached to the certification of additional right, that Estes applied to enter no particular lands, but delivered with his foregoing power of attorney a blank application to be filled up as the holder of the power might select. The holder might have filled it for lands amounting to the full right of one hundred and twenty acres. It is also clear, from the fact that the application itself then contained no description of lands, and the further fact that in the usual course of such transactions at that time this power of attorney was itself blank, that the description of lands and name and description of the attorney in fact were not at that time contained in the power.

Manifestly what Estes and the purchaser had in view was no particular land identified by description, but the right itself, which was to be exercised by the purchaser or holder to his own use and benefit, but in the name of the grantor. The power evidently was intended to apply to Estes's whole right, as it authorized the attorney in fact to sell "any such lands as I may hereafter acquire under said acts."

The case of Webster *v.* Luther, 163 U. S., 331, was decided upon a similar transaction. The power of attorney was similar in form and dated April 28, 1880. The entry of land was not made till April 7, 1887. The court treated it as the sale of the right, and held such transaction was not against the policy of the statute and was a valid one.

It must be held, therefore, that Estes, by the papers executed, sold and assigned his right and vested the grantee of his power with full ownership thereof. N. P. Chipman was grantee of the power. His affidavit is that he was owner of certificate of additional right of one

hundred and twenty acres, made the Marysville location for 118.37 acres, has never sold or used the residue of 1.63 acres, and has sold such residue to John M. Rankin. Such proof should be regarded as sufficient.

Your office decision is reversed.

MINING CLAIM—APPLICATION FOR PATENT—ADVERSE PROCEEDINGS.

LITTLE ANNIE NO. FIVE LODE MINING CLAIM.

Where a claimant makes application for patent under section 2325 of the Revised Statutes for a part only of his mining claim, and at the same time institutes adverse proceedings under section 2326 as to the remainder of the claim, proceedings upon such application for patent can not be delayed in the land department to await the final issue of the adverse proceedings in the court.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 15, 1901.* (E. B., Jr.)

The decision of your office dated October 17, 1900, holds the application of William T. Campbell *et al.* for patent to the Little Annie No. 5 lode mining claim, survey No. 9721, Pueblo, Colorado, land district, for rejection on the ground of failure on the part of claimants to prosecute the application to completion within a reasonable time after the close of the period of publication, whereby all rights obtained by the earlier proceedings were waived. Claimants have appealed to the Department from the said decision, contending that the delay in completing their application is not properly chargeable to them, as the records of the local land office will show.

It appears that the said application was filed January 6, 1896, and that the period of publication of notice thereof ended March 11, 1896. No adverse claim, protest or other objection appears to have been presented against the said application. The claimants commenced adverse proceedings against the application for patent to the Rotten Hole lode claim, and such proceedings were not dismissed until February 8, 1898. It does not appear when they were begun, nor is it material that it should appear in this case. Such proceedings did not involve or embrace any of the ground covered by the application for the Little Annie No. 5, all conflict between that claim and the Rotten Hole having been expressly excluded from the application and published notice for the former. Notwithstanding those proceedings were instituted to determine the right of possession to the ground embraced in the conflict between those locations or claims, they were entirely independent of the Little Annie application for patent, and their pendency furnished no warrant or justification for any stay of proceedings by the land department for the Little Annie No. 5 applica-

tion, nor for any delay therein by the claimants. It is undoubtedly desirable, as a rule, both on the part of the land department and of applicants for patent to mineral lands, that all the ground in a single location or claim to which a claimant has the right of possession should be covered by one proceeding for patent, but when claimants elect, as in this case, to make application for patent under section 2325 of the Revised Statutes for part of the claim only, and to proceed at the same time, as to the remainder of the claim, as adverse claimants under section 2326, their proceedings upon such application cannot be delayed in the land department to await the final issue of the proceedings in court.

In the letter from the local office transmitting the appeal of the claimants from the decision of your office it is reported, apparently at the instance of the claimants to support their contention that they are not responsible for the delay in the prosecution of their application, that the papers in such application were transmitted to your office on May 28, 1898, for consideration in another case there pending, and were not returned to the local office until about July 1, 1900. Since the return of the papers to the local office it appears that claimants have manifested due diligence in the prosecution of their application. All this can not save them, however, from the consequences of their failure to so prosecute their application during the period of more than two years which elapsed between the close of the publication of notice and the transmittal of their papers to your office in May, 1898. The delay during that period is, so far as now appears, without justification or excuse. At the time the papers were transmitted to your office claimants' apparent laches had rendered the application subject to rejection. The subsequent retention of the papers in your office did not operate to excuse previous neglect. Under the decisions of the Department in the cases of Cain *et al. v.* Addenda Mining Co. (29 L. D., 62); P. Wolenberg *et al.* (Id., 302); Barklage *et al. v.* Russell (Id., 401); and many others of like import that might be cited, the said application must stand rejected unless claimants shall be able to show from the records of the local office, or otherwise, to the satisfaction of your office, that the delay to prosecute the application during the period last mentioned is justifiable or excusable. You will allow them sixty days from notice within which to make such showing as they may be able to make in the premises, and in default thereof, or in the event the same shall seem to your office to be insufficient, you will finally reject the application without further notice.

In view of the action taken herein it is not deemed necessary to consider any other matter presented by the appeal.

RAILROAD GRANT—PRE-EMPTION SETTLEMENT—ACT OF APRIL 21, 1876.

L. C. RUSSELL.

Where prior to the act of April 21, 1876, the legal title to lands had passed to a railroad company, such lands are not subject to the provisions of that act.

A pre-emption settlement upon land within the limits of a railroad grant, for which filing was not tendered at the local office until after the definite location of the road, does not except the tract covered thereby from the operation of the grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 19, 1901.* (F. W. C.)

With your office letter of the 28th ultimo was transmitted an application by one L. C. Russell for reinstatement of his preemption filing covering the SW. ¼ of Sec. 29, T. 20 S., R. 7 W., Kansas, under the provisions of the act of April 21, 1876 (19 Stat., 35), and that he be permitted to submit final proof thereon.

This application seems to have been received in your office in January, 1887, and so far as shown no action appears to have been taken thereon until forwarded with your letter now under consideration.

In said letter you report that this tract is within the primary limits of the grant made to aid in the construction of the Atchison, Topeka and Santa Fe railroad and is opposite the portion of road definitely located January 30, 1871; that on February 1, 1871, Russell was permitted to file preemption declaratory statement for this land, in which statement settlement was alleged on January 20, the same year; and that said filing was, on June 29, 1872, canceled under the ruling then in force because the settlement and filing were made after the location in the field of the line of road opposite this land, to wit, on December 26, 1870.

The grant in question was made to the State of Kansas by the act of March 3, 1863 (12 Stat., 772), and there was granted thereby on account of this road—

> every alternate section of land, designated by odd numbers, for ten sections in width on each side of said roads, and each of its branches. But in case it shall appear that the United States have, when the lines or routes of said road and branches are definitely fixed, sold any section or any part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, ... so much land, in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved or otherwise appropriated, or to which the rights of preemption or homestead settlements have attached as aforesaid.

Upon inquiry at your office it is learned that this land was certified to the State for the use and benefit of the Atchison, Topeka and Santa Fe Railroad Company on February 25, 1873, and in your letter

under consideration it is stated that in response to a rule served upon said company it was shown that this land had been sold by the company on October 13, 1884, to one J. B. Brown.

In the case of William E. Inman *v.* Northern Pacific R. R. Co. (28 L. D., 95) it was held that where, prior to the act of April 21, 1876, the legal title to lands had passed to a railroad company such lands are not subject to disposal under said act and that the word "withdrawal" employed in said act must be held to refer to withrawals of lands remaining subject to control and disposition by Congress. It is clear, therefore, that said act can have no application to the land under consideration. Further, it does not appear that this tract was excepted from the operation of the railroad grant, because the preemption settlement by Russell can not be held to have attached to the land until his filing was duly tendered at the local office, which was subsequently to the definite location of the road.

There would seem to be no reason therefore for the confirmation of the title of the purchaser from the railroad company of this land, and the application by Russell for reinstatement of his preemption filing is denied and the papers are herewith returned for the files of your office.

SCHOOL INDEMNITY SELECTIONS—FOREST RESERVATION—INSTRUCTIONS OF MARCH 11, 1899, MODIFIED.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, United States Land Offices, February 21, 1901.

Pursuant to the opinion of the Assistant Attorney-General approved by the Department January 26, 1901, and the decision by the Department in the case of the State of California, decided February 9, 1901, wherein it was held that an indemnity school land selection, on the basis of a surveyed school section within a forest reserve, was such a waiver of the State's right to said school section as to obviate the necessity for a formal relinquishment thereof to the United States, instructions of March 11, 1899 (28 L. D., 195), are modified as follows:

1. Applications for indemnity lands in lieu of school sections sixteen and thirty-six which have been embraced, after survey, within the boundaries of a forest reservation, must designate by specified legal subdivisions the lands in lieu of which indemnity is desired. The mere designation of forty, eighty, or other number of acres, will not be accepted as a sufficient description.

2. The State will be required to file with each list of selections a certificate by the officer, or officers, charged with the care and disposal of such school lands, that the State has not encumbered, sold or disposed of, nor agreed to encumber, sell or dispose of, any of the said

lands, used as bases, and that no part of said lands is in the possession of any third party, under any law of permission of the State. There must also be filed with all lists a certificate from the recorder of deeds, or official custodian of the records of transfers of real estate in the proper county, that no instrument purporting to convey or in any way encumber the title to any of said lands, is on file or of record in his office.

3. All applications pending at the date of the receipt hereof by the respective local land offices must be made to conform to these requirements, and all selections on which final action has not been taken by this office will remain suspended, and the States will be allowed a reasonable time within which to furnish the necessary certificates and otherwise conform with the foregoing requirements.

Approved:

E. A. HITCHCOCK,
Secretary.

RAILROAD LANDS—SECTION 3, ACT OF SEPTEMBER 29, 1890.

HENSON *v.* BULLY.

The period within which the right to purchase railroad lands forfeited by the act of September 29, 1890, could be exercised under the third section of said act, as extended by the act of December 12, 1893, expired January 1, 1897, and by failure to exercise the right of purchase within that period, rights under a homestead entry of record at that date attached absolutely as against such right of purchase; and nothing in the act of February 18, 1897, reviving and extending the right of purchase accorded by said section, can be so construed as to in anywise interfere with any adverse claim which may have attached prior thereto.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 25, 1901.* (E. F. B.)

This case comes before the Department upon the appeal of Ezra Henson, administrator of the estate of Lowell F. Henson, deceased, from the decision of your office of August 14, 1900, dismissing his contest against the homestead entry of Charles Bully for the E. ½ of the NW. ¼ and the E. ½ of the SW. ¼ of Sec. 17, T. 3 S., R. 14 E., The Dalles, Oregon, and rejecting his application to purchase said land under the 3d section of the act of September 29, 1890 (26 Stat., 496).

The land in controversy is a part of the lands forfeited by said act of September 29, 1890. It was entered February 11, 1896, by Charles Bully as a homestead. Ezra Henson, as administrator of the estate of Lowell F. Henson, filed his application, December 20, 1898, to purchase said lands for the heirs of said estate under the 3d section of said act of September 29, 1890, which was rejected because of the homestead entry of Bully. Upon the rejection of his application he filed a

contest, April 29, 1899, against said entry, alleging priority of right in this: that the said Lowell F. Henson settled upon said land in 1884, with the *bona fide* intent of purchasing said land of the Northern Pacific Railroad Company, and that contestant, as administrator of his estate, continued to occupy said land after the death of the said Lowell F. Henson.

Upon the testimony taken at the hearing the local officers recommended that the contest be dismissed, for the reason that, as Lowell F. Henson was a minor at the time of his death, his administrator has no right to purchase the land under said act.

Upon appeal your office by decision of August 14, 1900, affirmed the decision of the local officers, dismissed the contest and rejected appellant's application to purchase. From that action he appeals to the Department.

The material facts shown by the record and as found by the local officers are as follows:

In 1884 Lowell F. Henson, who was then about seventeen years of age, took possession of the tract and built a house thereon, in which he lived up to the time of his death, which occurred October 5, 1888. His improvements consisted of a house, fence and thirty or forty acres in cultivation. The land adjoining was occupied by his father and both tracts were in one inclosure, but were not cultivated in common. Lowell F. Henson owned stock and farming implements and supported himself by his own earnings. He cultivated the land in his own behalf without responsibility to others. At the time of his death he was a minor and was not the head of a family. After his death his father, Ezra F. Henson, who was appointed administrator of his estate October 17, 1888, continued to claim and hold possession of the land until February 11, 1896, when Bully made homestead entry of the tract. When Lowell F. Henson was living on the tract he invited a man named Hamilton to stay on the land with him until he (Hamilton) could get a ranch. After the death of Henson, Hamilton claimed the tract, and the administrator of Henson commenced an action against him for forcible detainer, but, being unsuccessful in the lower courts, he bought him off. With the exception of the claim of Hamilton, the possession of Henson was not disturbed or disputed up to February 11, 1896, when Bully took possession and made his homestead entry. On December 20, 1898, Ezra Henson, as administrator of Lowell F. Henson, filed an application to purchase said land under the third section of the act of September 29, 1890, in behalf of said estate.

The claim of appellant rests upon that portion of the third section of the act of September 29, 1890, which provides that—

where persons may have settled said lands with *bona fide* intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress, they shall be entitled to

purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act.

The period within which the right of purchase might be exercised was extended from time to time, it being extended by the act of December 12, 1893 (28 Stat., 15), to January 1, 1897, covering the period in which Bully's entry was allowed. But while the act gave to persons who at the date of the passage of the act were actual settlers on any of the lands forfeited, and are otherwise qualified, the right to purchase the lands so occupied, not exceeding three hundred and twenty acres to any one person, it did not withhold the lands from settlement during the period allowed for the exercise of the right of purchase, but opened all such lands to settlement and entry subject only to the preference right of purchase if exercised within the time prescribed by the act. (Circular, 12 L. D. 308; James M. Dewar, 19 L. D., 575.)

The right of purchase was not exercised by the estate of Henson during the period extended by the act of December 12, 1893, and hence it expired January 1, 1897. At that date the entry of Bully was of record, and although it was subject to the rights of the estate of Henson if exercised within the period limited by the act, the right of Bully under his entry, as against the estate of Henson, attached absolutely upon the expiration of that period, free from any claim or right of purchase by the estate of Henson.

The right of purchase given by the third section of the act of September 29, 1890, was revived by the act of February 18, 1897 (29 Stat., 535), which extended the time for the exercise of the right to January 1, 1899, but with this 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.

It is contended by appellant that the preferred right of purchase was a continuing right because there was no hiatus between the last two extension acts, the following direction from your office having been given to the local officers by a telegram dated December 31, 1896:

Take no action looking to disposition of any such lands *except* to receive applications or money tendered by persons protected by said section three prior to January first, ninety-seven: said lands are hereby reserved from settlement and disposition pending action by Congress until further orders from this office or Department.

Without passing upon the validity of the action of the Commissioner, a sufficient reply to the contention of appellant is that the right of Bully does not depend upon whether the right of purchase was a continuing one or not, as the right extended was not a preferred right but was made subject to any adverse claim that may have attached to the land prior to the exercise of the right; and further, while the directions to the local officers were sufficient to prevent any disposition of the lands by them until the further order of your office or the

Department, they could not prevent rights from attaching under entries that had previously been allowed.

An expression in the case of Reith *v.* Niles (23 L. D., 415, 416), that "the right to purchase these lands is secured to persons entitled to purchase the same between the dates of September 29, 1890, and January 1, 1897, and that no adverse claim could attach between those dates," may seem to be in conflict with the views herein expressed.

In that case the application to purchase was made July 24, 1891, during the period that the preference right was protected. The case first came before the Department upon the appeal of Niles, a homestead entryman, involving the question of the right of an administrator to purchase under said act. The Department, by decision of December 4, 1894 (19 L. D., 449), held that such right could be exercised by an administrator for the benefit of the estate. When the case was returned to your office the local officers were instructed to notify Reith that he would be allowed sixty days in which to make payment for the land. Failing to respond to such notice, your office, on February 1, 1896, without further action, closed the case and held the homestead entry of Niles intact. The case then came before the Department on the appeal of Reith, in which the only question presented was whether your office could require the applicant to complete his payment within sixty days from the notice given by your office. It was held that the applicant was entitled to the full period prescribed by the act of December 12, 1893, in which to complete his purchase. It was with reference to the facts in that case that it was held that the right of purchase was secured to persons entitled to purchase between the dates of September 29, 1890, and January 1, 1897, and that no adverse claim could attach between those dates.

The homestead entry of Bully was made February 11, 1896, and it was not until December 20, 1898, that this claim of Henson's was asserted, though Henson had full knowledge of the improvements and possession of the homesteader.

The decision of your office is affirmed.

REINSTATEMENT OF CANCELED ENTRIES—INSTRUCTIONS OF APRIL 28, 1899.

INSTRUCTIONS.

The departmental instructions of April 28, 1899, relating to the reinstatement of cash entries canceled for supposed conflict with the Houmas private land grant, do not contemplate that such entries shall be reinstated by the land department of its own motion, and where those having rights under those entries do not assert them, but allow the lands to be appropriated by others under the settlement laws, the presumption arises that they have acquiesced in the cancellation of the entries and abandoned any claim thereunder; and in such cases homestead entries for the lands, if the proofs be satisfactory, should be carried to patent regardless of such former canceled entries.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *February 26, 1901.* (J. R. W.)

The Department is in receipt of your office letter of February 16, 1901, relating to homestead entries pending in your office embracing lands within the formerly claimed limits of the Houmas grant, Louisiana, which homestead entries are in conflict with earlier cash entries, canceled September 18, 1844, for supposed conflict with said grant.

Your office letter, as reason for asking advice of the Department, states that:

> The question as to whether, in view of the decisions above cited, the cash entries should be reinstated, was submitted by this office to the Department, and by departmental instructions of April 28, 1899 (28 L. D., 330), this office was authorized to reinstate the cash entries. . . . .
>
> It seems that when the instructions of April 28, 1899, *supra*, were written the Department was under the impression that applications for reinstatement of the old cash entries were pending in this office. As a matter of fact, however, there are very few or no such applications pending, the only parties before this office being the homestead entrymen, who are waiting and asking action on their entries, for many of which final certificates have been issued. . . . .
>
> It will be seen that the decision of the Department in the case of John Alfred Guedry, above referred to, September 1, 1900, unpublished, does not accord strictly with the general rules laid down in the instructions of April 28, 1899 (28 L. D., 330), and if the ruling laid down in the case of Guedry is to be observed, it is respectfully suggested that where the homestead entries conflict with these old cash entries, and where no application for the reinstatement of the cash entry is pending, it would be proper for this office to act upon the homestead entries without regard to the old cash entries, which have remained canceled, both on the records of this office and on the local office, for more than fifty years. However, as this office has been instructed generally to reinstate the cash entries, I do not deem it proper to patent the homestead entries in conflict with such cash entries without first submitting for your consideration and instructions.

Your office appears to have misapprehended the instructions of April 28, 1899, *supra*. By reference thereto it will be seen that such instructions had reference to your office letter of March 16, 1899, with respect—

> to applications *now pending* before your office for reinstatement of certain cash entries in the New Orleans land district, which were canceled September 13 [18], 1844, for supposed conflict with the Houmas grant.

Said instructions were not intended to apply to such canceled entries generally or without reference to an application for reinstatement, nor, as held in the case of John Alfred Guedry, *supra*, does the fact of complete legal or equitable right to the land at the date of the erroneous cancellation of the entry, September 18, 1844, alone conclusively show that such entry is entitled to be reinstated. The fact that such cancellation was erroneous, because made for an insufficient reason and under a misconstruction by the land department of the extent and boundary of the Houmas grant, was determined March 3, 1884, by the decision of the supreme court in the case of Slidell *v.*

Grandjean (111 U. S., 412). From and after that date there was opportunity for those having rights under these entries to appear and assert them. Where they do not assert them, but without application for reinstatement of the canceled entry allow such lands to be appropriated by others under the settlement laws as public lands, the presumption arises that they have acquiesced in the cancellation of the entry and abandoned any claim thereunder. Where no application is made for reinstatement of the former entry, it was not contemplated by said instructions of April 28, 1899, that the former canceled entry should be reinstated by the land department of its own motion. Where an application for reinstatement is made, or where possession is held or right thereto is asserted by one claiming under the former entry, a case arises in which notice must be given the intervening claimant and the case be heard and determined as the facts may require. The case of John Alfred Guedry, referred to by your office letter, was of that character. It was determined upon the facts disclosed, consistently with legal principles recognized and applied by the courts in similar cases of conflicting rights. The case therefore was not, in the view of the Department, out of harmony or accord with said instructions. Where no claim is asserted under the canceled entry, no proceedings are by said instructions required to be taken looking to reinstatement of the canceled entry. In such cases, the proofs of the homestead claimant being satisfactory to your office, the entry should be carried to patent as in other cases, regardless of the former canceled entry.

PRIVATE CLAIM—RESERVATION—CHARACTER OF LAND.

BACA FLOAT NO. THREE.

The duty of making survey and location of lands selected by the Baca heirs under the act of June 21, 1860, and of investigating and determining, in the first instance, whether the lands were vacant and not mineral at the date of selection, rests upon the surveyor-general; and until such survey, investigation and determination shall have been made, final action by the government can not be had upon the selection.

All lands within the section of country ceded to the United States by the treaty of Guadalupe Hidalgo and the Gadsden treaty, covered by Spanish or Mexican claims, were, by the eighth section of the act of July 22, 1854, and the act of August 4, 1854, reserved from other disposition until the validity or invalidity of such claims was finally determined.

Lands covered by a Spanish or Mexican grant surveyed and located prior to the Gadsden treaty, with respect to which the right of possession and title under the grant were asserted and claimed, according to such survey and location, at the date of the Baca selection of June 17, 1863, under the act of June 21, 1860, were reserved from sale or other disposition by the government, within the meaning of the eighth section of the act of July 22, 1854, and the act of August 4, 1854, and were therefore not subject to selection under said act of June 21, 1860.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 5, 1901.* (A. B. P.)

September 4, 1900, James W. Vroom filed in this Department a petition on behalf of himself and John Watts, claiming that the petitioners are the owners of Baca Float No. 3, situate in the Territory of Arizona, as selected June 17, 1863, and requesting that they be heard upon the matters presented and considered in departmental decisions of July 25, 1899 (29 L. D., 44), and June 30, 1900 (30 L. D., 97).

The petitioners deny the claim of title asserted by other parties under conveyances from John S. Watts or his heirs, and assert that under a conveyance from the heirs of said John S. Watts to the petitioner John Watts, dated October 26, 1899, and a conveyance from said John Watts to the petitioner James W. Vroom, dated December 20, 1899, they are jointly the exclusive owners of said Baca Float No. 3, as selected June 17, 1863.

While asserting that the question of the true ownership of said float as so selected is not a matter within the jurisdiction of the land department, these petitioners insist that they are entitled to be heard upon the controverted questions respecting said float as so selected, notwithstanding the presentation and argument of said questions by other parties heretofore and now asserting claim of ownership under conveyances from said John S. Watts or his heirs.

September 29, 1900, an order was made by this Department directing that the petitioners be notified that they would be allowed until December 1, 1900, within which, after submitting certain preliminary proofs required by said order, to present in writing their claim, contention and argument in the premises, and to serve copies of the same upon opposing claimants, both those claiming under the float and those claiming in opposition thereto, all of whom were to be allowed until and including December 31, 1900, within which to make answer to the claim and contention of the petitioners, should they so desire; whereupon the papers were to be transmitted by your office to this Department for its consideration. In the meantime further action under the departmental decisions of July 25, 1899, and June 30, 1900, was suspended.

Under the said departmental order the petitioner James W. Vroom filed a printed brief of argument in support of the claim and contention of himself and his co-petitioner John Watts, and a brief in answer thereto was filed by counsel for the parties heretofore and now claiming in opposition to the said float.

February 9, 1900, your office transmitted the papers to the Department, and they are now here for consideration. The brief of Vroom is accompanied by certain evidence touching his authority to represent his co-petitioner, Watts, and also touching the heirship of the parties

under whom the petitioners claim. Both briefs appear to have been served as required by the aforesaid departmental order.

The float in question was selected under the act of June 21, 1860 (12 Stat., 71–72), which provided as follows:

> That it shall be lawful for the heirs of Luis Maria Baca, who make claim to the said [same] tract of land as is claimed by the town of Las Begas [Vegas], to select instead of the land claimed by them an equal quantity of vacant land, not mineral, in the Territory of New Mexico, to be located by them in square bodies not exceeding five in number. And it shall be the duty of the surveyor-general of New Mexico to make survey and location of the lands so selected by said heirs of Baca when thereunto required by them: *Provided, however*, That the right hereby granted to said heirs of Baca shall continue in force during three years from the passage of this act, and no longer.

By the departmental decision of July 25, 1899, *supra*, it was held that the owners of the float are bound by the selection of June 17, 1863, and can not take under the subsequent selection of April 30, 1866; that the time with reference to which the character of the land selected, whether vacant and not mineral, is to be determined, is the date of the selection, and not the date of the approval of the survey of the claim; that the duty of investigating and determining, in the first instance, the character of the land selected, whether vacant and not mineral, as of the date mentioned, rests upon the surveyor-general of Arizona; and that such investigation should be conducted and determination made as the work of the survey progresses in the field. Directions were thereupon given for the survey of the claim in accordance with the views thus expressed.

Subsequently a petition was filed in the Department by R. E. Key and others, claiming, as alleged settlers under the public land laws, in opposition to said float and to said selection of June 17, 1863. Among the averments of the petition was one to the effect that large bodies of the lands within the exterior limits of said selection were, at the date thereof, embraced within the claimed limits of two Mexican grants, one known as the Tumacacori and Calabazas grant, and the other as the San Jose De Sonoita grant; and it was contended that as to all lands within the exterior limits of said selection which were also within the claimed limits of either of said Mexican grants, the same were, at the date of said selection, reserved from sale or other disposal by the government, under the provisions of section eight of the act of July 22, 1854 (10 Stat., 308), and, therefore, not subject to selection under the said act of June 21, 1860.

By the departmental decision of June 30, 1900, *supra*, it was held that in so far as the lands in question were covered by the Tumacacori and Calabazas claim, or by the San Jose De Sonoita claim, on June 17, 1863, such lands were at that time in a state of reservation under the aforesaid act of July 22, 1854, and, for that reason, were not vacant lands subject to selection under the Baca grant; that the subsequent

decision of the supreme court holding the Tumacacori and Calabazas claim to be invalid (Faxon *v.* United States, 171 U. S., 244), and the decision of the same court sustaining the San Jose De Sonoita claim in part only (Ely's Admn. *v.* United States, 171 U. S., 220), did not operate to the advantage or benefit of the Baca claimants; and that to the extent the lands in controversy shall be found by the surveyor-general to have been, on June 17, 1863, within the claimed limits of either of said Mexican grants, the same can not be included in the survey of the Baca grant but must be excluded therefrom.

The present petitioners contend that by the official acts of the register and receiver, of the surveyor-general, and of the Commissioner of the General Land Office, done and performed in the year 1864, with respect to the selection of June 17, 1863, all the lands embraced within the limits of the selection were "definitely and finally determined by the government" to be vacant and not mineral; that the title to the selected tract, as an entirety, thereby became vested in the Baca heirs as a complete grant under the act of June 21, 1860; and that their right to a survey of the same, and to a patent or other evidence of title thereto, became absolute. It is accordingly insisted that by the decision of July 25, 1899, *supra*, the Department erred in holding it to be the duty of the surveyor-general, during the progress of the survey directed by that decision to be made, to investigate and determine the known character of the lands, and whether the same were vacant or not, at the date of said selection.

The official acts in the premises, by the several officers mentioned, to which attention is specifically invited, are as follows:

1. The certificates of the register and receiver at Santa Fe, New Mexico, dated March 25, 1864, in which it was in substance stated that the lands embraced in the selection of June 17, 1863, were unsurveyed, and "vacant and not mineral," so far as the records of their office showed.

2. A communication addressed to your office by the surveyor-general of New Mexico, dated April 2, 1864, wherein it was stated:

> I have to acknowledge the receipt, on my return to Santa Fe from Arizona, of your letter of 18th July, 1863. In reply I have to state that there is no evidence in the office of the surveyor-general of New Mexico that the tract of land located by the heirs of Luis Maria Cabeza de Baca, designated as location No. three, contains any mineral, or that it is occupied. There have been no public surveys made in the neighborhood of said tract, and there is no record of or concerning the land in question in the surveyor-general's office, nor—as I believe—in the office of the register or receiver of the land office of New Mexico.
>
> As I am personally unacquainted with that region of country, I cannot certify that the land in question is "vacant and not mineral" or otherwise. Those facts can only be determined by actual examination and survey.

3. A letter addressed by your office to the surveyor-general of

Arizona, April 9, 1864, wherein authority and instructions were given for the survey of the selection of June 17, 1863.

It is insisted that the order of survey thus given, in view of the stated earlier proceedings by the register and receiver and the surveyor-general, amounted to an approval by your office of said selection; that such approval was conclusive, imported a perfect title, and is binding upon the land department; that "it was the final determination of the government that the location, *as a whole*, was vacant and not mineral."

In this connection it is important to note that in the letter of your office of July 18, 1863, referred to by the surveyor-general in his said communication of April 2, 1864, it was stated that before the selection could be approved by your office, it was necessary that a statement from the surveyor-general and register and receiver, that the land selected "is vacant and not mineral," should be furnished.

In your office letter of April 9, 1864, authorizing a survey of the claim, reference was made to certain papers enclosed therewith as showing the selection of June 17, 1863, and the approval thereof by the surveyor-general of New Mexico, as of June 18, 1863. The date given was evidently a mistake. The approval referred to was contained in a certificate of the surveyor-general of even date with the selection, or location as it was sometimes called, and was in these words: "Said location is hereby approved." Nothing was said in the certificate with respect to the character of the lands selected, or as to whether they were vacant or occupied.

At the time the survey was authorized by your office no certificate of the surveyor-general that the lands selected were vacant and not mineral had been furnished. Up to that time, the only statements received from that officer, bearing upon the question of the state or character of the lands, were those contained in his aforesaid communication of April 2, 1864, to the effect that there was no evidence in his office on the subject; that the public surveys had not extended to the neighborhood of the selected lands; that there was not in his office, nor in the office of the register and receiver as he believed, any record of or concerning the lands; that he was personally unacquainted with that region of country, and could not certify that the lands selected were vacant and not mineral, or otherwise; and that "those facts can only be determined by actual examination and survey." It was not stated in the letter authorizing the survey that your office approved the selection. The former proceedings in the premises were apparently accepted as sufficient to justify the order of survey, but that was all. The letter of July 18, 1863, wherein it was held that before the selection could be approved by your office, a statement from the surveyor-general and register and receiver that the selected land "is vacant and not mineral" must be furnished, was not recalled or in any way modified.

In the case of Shaw *v.* Kellogg (170 U. S., 312) the supreme court had under consideration selection No. 4 of the series authorized by said act of June 21, 1860, and with respect to the question now being considered it was there said (pp. 333, 334):

> How was the character of the land to be determined, and by whom? The surveyor-general of New Mexico was directed to make survey and location of the lands selected. Upon that particular officer was cast the specific duty of seeing that the lands selected were such as the Baca heirs were entitled to select. It is not strange that he was the one named; for, in the original act of 1854, which made provision for the examination of these various claims, the duty of such examination was cast upon the same officer, and he was there required "to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico; and, for this purpose, may issue notices, summon witnesses, administer oaths and do and perform all other necessary acts in the premises," and it was upon his report that Congress acted. Further, he was the officer who, by virtue of his duties, was most competent to examine and pass upon the question of the character of the lands selected. We do not mean that Congress thereby created an independent tribunal outside of and apart from the general land department of the government. On the contrary, the act of 1854 provided that he should act under instructions from the Secretary of the Interior, and so undoubtedly in proceeding to make survey and location as required by section 6 of the act of 1860, he was still subject to the control and direction of the land department; but while he was not authorized by this section to act in defiance or independently of the land department he was the particular officer charged with the duty of making survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral. This is in accord with the views of the land department, as appears from the official letter of June 28, 1884, written in response to an application for the right to make mineral locations within the tract, in which the Commissioner, after stating what had taken place, added: "You will see by the foregoing that the land in question was determined, in 1864, by the surveyor-general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed."

In that case it appeared that the selection (No. 4) had been surveyed in November, 1863. December 5, 1863, the surveyor-general certified that "from good and sufficient evidence I am perfectly satisfied that the land" selected and surveyed "is not mineral and is vacant." A like certificate of the same date was furnished by the register and receiver. The survey was approved by the surveyor-general March 18, 1864, and he thereupon forwarded a transcript of the field notes and plat of the survey, with his approval entered thereon, to your office, where they were subsequently received and filed. In the official letter of June 28, 1884, referred to and quoted from by the court in the course of its decision, it was also said:

> In the case of location No. 4, in question, the surveyor-general having first ascertained and determined that the land selected was vacant and non-mineral, surveyed and located it, and approved the plat of the location March 18, 1864, and this approved plat, in the absence of any provision of law for the issuing of patent, became the evidence of title in the owner of the land so located.

In the case now under consideration the order of survey of April 9,

1864, was never executed. The selection (No. 3) still remains unsurveyed, and there has never been an ascertainment and determination by the surveyor-general that the lands selected were vacant and not mineral.

In the decision of July 29, 1899, *supra*, the Department, speaking of the act of 1854, referred to by the court in the Shaw-Kellogg case, and of an act amendatory thereof passed in 1870, and of the subsequent repeal of certain provisions of both the original and amendatory acts, and of the question of the effect of such repeal upon the duties of the surveyor-general in the matter of the survey of the selection in question, said:

> The act of 1854 thus referred to is the act of July 22, 1854 (10 Stat., 308), which, among other things, established the office of surveyor-general of New Mexico, and, in section 8 thereof, which was still in force when the survey in that case was made, defined the powers and duties of that officer as stated by the court. By a later act, to wit, the act of July 15, 1870 (16 Stat., 291, 304), it was provided:
>
> "That it shall be the duty of the surveyor-general of Arizona, under such instructions as may be given by the Secretary of the Interior, to ascertain and report upon the origin, nature, character, and extent of the claims to lands in said Territory, under the laws, usages, and customs of Spain and Mexico; and for this purpose he shall have all the powers conferred, and shall perform all the duties enjoined upon the surveyor-general of New Mexico by the eighth section of an act . . . approved July twenty-second, eighteen hundred and fifty-four."
>
> While by the act of March 3, 1891 (26 Stat., 854, 861), establishing a court for the settlement of unconfirmed private land claims, said section 8 of the act of 1854, and all amendments or extensions thereof (which would include said extension act of July 15, 1870) were repealed, yet there has been no repeal of the specific provision of the act of 1860 placing the duty of surveying and locating the lands selected thereunder upon the surveyor-general. True, the officer named was the surveyor-general of New Mexico, but the Territory of Arizona had not then been formed, and there can be no doubt that the surveyor-general of that Territory subsequently established, within whose present jurisdiction the lands are situated, lawfully succeeds with reference to the claim here in question to the duties imposed by said act upon the surveyor-general of New Mexico.
>
> Nor can there be any doubt that the surveyor-general of Arizona, as an officer of the land department, by virtue of his office and in view of the duties imposed by said act of 1860, possesses the inherent power to examine witnesses, etc., and do and perform all necessary acts incident to the full discharge of the duties thus imposed.

The act of 1860 made it the duty of the surveyor-general to make survey and location of the selected lands. In the Shaw-Kellogg case the supreme court held that while the surveyor-general was not authorized to act—

> in defiance or independently of the land department, he was the particular officer charged with the duty of making the survey and location, and it was for him to say, in the first instance at least, whether the lands so selected, and by him surveyed and located, were lands vacant and non-mineral.

The duty thus enjoined upon the surveyor-general has never been discharged with respect to the selection here in question. There has never been a "final determination by the government that the location,

as a whole, was vacant and not mineral," as contended by the petitioners. In this respect the proceedings had in the present case were materially different from the proceedings in the case of selection No. 4, to which frequent reference is made in the petitioners' brief. In that case the selection was surveyed in November, 1863. The surveyor-general certified in December, 1863, "upon good and sufficient evidence," that the lands selected and surveyed were not mineral and were vacant, and the survey was approved by that officer in March, 1864. As was said in your office letter of June 28, 1884, referred to with approval by the supreme court in Shaw *v.* Kellogg, the land "was determined, in 1864, by the surveyor-general, whose province and duty it was, to be non-mineral; the location was then perfected and the title passed." In the present case the selection has never been surveyed, nor has there ever been an ascertainment and determination by the surveyor-general as to whether the lands selected were vacant and not mineral, or otherwise.

Until there has been a survey of the selection, and a determination by the proper officer of the government as to whether the lands selected were vacant, and whether or not they were known to be mineral, at the date of the selection, final action by the government can not be had in the premises. The surveyor-general of Arizona is the officer whose duty it is to make the survey, and it will be for him to say, in the first instance, whether the lands were vacant and not known to be mineral at the date of the selection. The instructions for the survey, given by the Department in its decision of July 25, 1899, are in accord with these views. There is therefore no error in that decision, as contended.

The petitioners also contend that by the decision of June 30, 1900, the Department erred in holding that in so far as the lands embraced by the selection of June 17, 1863, shall be found by the surveyor-general to have been, at the date of the selection, within the claimed limits of either of the Mexican grant claims known as the Tumacacori and Calabazas grant, and the San Jose De Sonoita grant, such lands were in a state of reservation under the act of July 22, 1854, and for that reason not subject to selection under the act of June 21, 1860.

The record indicates a conflict between the selection and each of said Mexican claims.

The provisions of the act of 1854 which relate to the present controversy are contained in the eighth section. This section, together with a brief history of the act and of the subsequent legislation extending the provisions in question to the Territory of Arizona, were stated in the former decision, as follows:

By articles eight and nine of the treaty of Guadalupe Hidalgo (1848, 9 Stat., 229–30), and article five of the Gadsden treaty (1853, 10 Stat., 1035), it was provided that the property of Mexicans within the territory ceded to the United States by the Repub-

lic of Mexico, should be "inviolably respected," and that they and their heirs and grantees should be permitted "to enjoy with respect to it guarantees equally ample as if the same belonged to citizens of the United States."

With the view to discharging the treaty obligations thus imposed, the Congress, by the eighth section of the act of July 22, 1854 (10 Stat., 308), provided:

"That it shall be the duty of the surveyor-general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico; and, for this purpose, may issue notices, summons witnesses, administer oaths, and do and perform all other necessary acts in the premises. He shall make a full report on all such claims as originated before the cession of the territory to the United States by the treaty of Guadalupe Hidalgo, of eighteen hundred and forty-eight, denoting the various grades of title, with his decision as to the validity or invalidity of each of the same under the laws, usages, and customs of the country before its cession to the United States; and shall also make a report in regard to all pueblos existing in the territory, showing the extent and locality of each, stating the number of inhabitants in the said pueblos, respectively, and the nature of their titles to the land. Such report to be made according to the form which may be prescribed by the Secretary of the Interior; which report shall be laid before Congress for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of eighteen hundred and forty-eight between the United States and Mexico; and, until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government, and shall not be subject to the donations granted by the previous provisions of this act."

By act of August 4, 1854 (10 Stat., 575), it was further declared—

"That, until otherwise provided by law, the territory acquired under the treaty with Mexico commonly known as the Gadsden treaty, be, and the same is hereby incorporated with the Territory of 'New Mexico,' subject to all the laws of said last named Territory."

By act of February 24, 1863 (12 Stat., 664), Arizona was carved out of the Territory of New Mexico, and organized as a new Territory, with its present boundaries, including the western portion of the lands ceded by the Gadsden treaty, wherein the Tumacacori and Calabazas, and San Jose De Sonoita grants are situated. The second section of the act provided for the appointment of a surveyor-general and other officers for the new Territory. It was further provided that the "powers, duties, and the compensation" of said officers—

"shall be such as are conferred upon the same officers by the act organizing the territorial government of New Mexico, which subordinate officers shall be appointed in the same manner and not exceed in number those created by said act; and acts amendatory thereto, together with all legislative enactments of the Territory of New Mexico not inconsistent with the provisions of this act are hereby extended to and continued in force in the said Territory of Arizona until repealed or amended by future legislation."

* * * * * * *

The territory of New Mexico was originally organized under the act of September 9, 1850 (9 Stat., 446), prior to the Gadsden treaty. The lands acquired by the United States under that treaty were, by the act of August 4, 1854, as we have seen, incorporated with the Territory of New Mexico "subject to all the laws" of that Territory, including, of course, the eighth section of the act of July 22, 1854. The last named act, as far as applicable to the Territory of New Mexico, was clearly amendatory of the original organization act of 1850, and to that extent was, therefore, "extended to and continued in force" in the new Territory of Arizona, by the act of February 24, 1863, *supra*, "until repealed or amended by future legislation."

No such repealing or amendatory legislation having been enacted at the time of the Baca selection or location of June 17, 1863, it follows that the provisions of said section eight of the act of July 22, 1854, were in full force and operation throughout the Territory of Arizona at that time.

It is contended by these petitioners that the clause of said section eight of the act of 1854 which provides that "until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government," etc., refers only to such *claims* "as had been filed with and passed upon by the surveyor-general, and by him reported to Congress." As no petition for confirmation was filed with the surveyor-general on behalf of either the Tumacacori and Calabazas claim, or the San Jose De Sonoita claim, until after the Baca selection of June 17, 1863, it is accordingly insisted that there could have been no reservation under said section eight on account of those claims, at the date of said selection.

On this subject the Department, in its former decision, after giving a brief history of each of said Mexican claims, and of the proceedings had with respect thereto before the surveyor-general and the courts, stated and held as follows:

Were the lands within the limits of these Mexican grants "reserved from sale or other disposal by the government," under the eighth section of the act of July 22, 1854, at the date of the Baca selection or location of July [June] 17, 1863?

The manifest purpose of the enactment of this legislation was the adoption of a means whereby effective steps might be taken as early as practicable looking to the discharge of the obligations imposed upon the United States by the treaty of 1848, with respect to property rights of Mexicans within the territory ceded by that treaty. A like purpose is equally manifest with respect to the lands ceded by the treaty of 1853, both in the act of August 4, 1854, whereby such newly-ceded lands were "incorporated with the Territory of New Mexico, subject to all the laws" of that Territory, and in the later act of February 24, 1863, which extended such legislation to the new Territory of Arizona. It was made "the duty of the surveyor-general," under instructions from the Secretary of the Interior, "to ascertain the origin, nature, character, and extent of all claims to lands under the laws, usages, and customs of Spain and Mexico," within the ceded territory, and to make full report on all such *claims* as originated prior to the treaties of 1848 and 1853, which report was to be submitted to Congress for its action with the view to the confirmation of all *bona fide* grants and thus giving effect to the stipulations of said treaties with respect thereto. It was further provided that "until the final action of Congress on such claims, all lands covered thereby" should be "reserved from sale or other disposal by the government."

The matters for investigation and report by the surveyor-general were Spanish or Mexican *claims* to lands, and the reservation for the benefit of such *claims* was to embrace "all lands covered thereby." There is nothing in the act indicative of a purpose on the part of Congress to postpone the effective operation of the reservation in any case to the time of the filing with the surveyor-general of a petition for the confirmation of the claim, or to any other time. Indeed, there is no provision requiring the filing of any such petition with the surveyor-general or elsewhere. The natural and most reasonable interpretation of the language of the statute is that the reservation was to become immediately operative upon all lands within the ceded territory covered at the time by any Spanish or Mexican claim which originated

prior to the treaty of cession. The purpose being that the lands should be reserved until final action could be had on the claim, it was quite as necessary that the reservation should be effective for such purpose before as after the commencement of proceedings under the statute by the surveyor-general. Otherwise the lands might have been disposed of by the government before the commencement of such proceedings and thus the very object of the statute would have been defeated.

It mattered not whether the claim was a valid one. If the lands were covered by a Spanish or Mexican *claim* they were to be reserved for the very purpose of affording an opportunity of investigating and determining the validity or invalidity of the claim. This investigation was to be made in the first instance by the surveyor-general but the action of that officer was not to be final. His report was to be submitted to Congress and there the means of final action were to be provided. To fully meet the purpose of the reservation it was necessary that it should at once become operative whenever and wherever lands were covered by a *claim* such as the statute describes.

The views thus expressed were the result of mature deliberation. They furnish a complete answer to the contention of the petitioners on the subject, and further discussion would therefore accomplish no good purpose. Nothing has been presented which shakes the confidence of the Department in the correctness of the principle announced.

The further contention is made, however, with respect to the San Jose De Sonoita grant, that—

This grant was one of quantity within larger exterior boundaries, and in such cases the United States government succeeded to the right of the Mexican government of locating the quantity granted in such part of the larger tract as it saw fit, and the land other than that necessarily reserved during the examination of the validity of the grant was at the disposal of the government.

In October, 1892, a suit involving the validity of said grant was brought by the United States in the Court of Private Land Claims (established by the act of March 3, 1891, 26 Stat., 854) against certain parties, one of whom claimed title under the grant and the others claimed some interests in the lands. The Court of Private Land Claims rejected the grant on the ground that "the entire proceedings" upon which title was claimed "were without warrant of law and invalid." On appeal to the supreme court the decree below was reversed and the grant was sustained to the extent of one and three-quarter *sitios* (Ely's Administrator *v.* United States, 171 U. S., 220). In the course of its decision, the court, after reaching the conclusion 'that this grant was one which, at the time of the cession of 1853 was recognized by the government of Mexico as valid, and therefore one which it was the duty of this government to respect and enforce," further said:

We pass, therefore, to a consideration of the second question, and that is, the extent of the grant. It is claimed by the appellant that the grant should be sustained to the extent of the outboundaries named in the survey. He insists that the accepted rule of the common law is, that metes and bounds control area; that a survey was in fact made and possession given according to such survey, and that although it now turns out that the area within the survey is largely in excess of the amount applied and paid for, the grant must be held effective for the area within the survey.

We had occasion to examine this question in Ainsa *v.* United States, 161 U. S., 208, 229, and there said:

"So monuments control courses and distances, and courses and distances control quantity, but where there is uncertainty in specific description, the quantity named may be of decisive weight, and necessarily so if the intention to convey only so much and no more is plain."

We think this case comes within the rule thus stated. The defendant, in his answer, alleges that the grant comprises 12,147.69 acres, while counsel for the government say that the measurements given by the surveyor make the area 22,925.87 acres. The amount of land appraised, advertised, sold and auctioned off was one and three quarter sitios (7,591.61 acres). While, of course, any slight discrepancy between the area of the survey and that ostensibly sold might be ignored, yet the difference between the amount which was understood to have been sold and the amount now found to be within the limits of the survey is so great as to suggest the propriety of the application of the rule laid down in Ainsa *v.* United States, *supra.* There can be no doubt from the record of the proceedings that one and three-quarter sitios was all that the purchaser supposed he had purchased, all that the intendant supposed he had sold, and all that was advertised or paid for. The original petition, after stating that there was a place known as San Jose De Sonoita, declared that the petitioner registered "in the aforesaid place two sitios of land," which he desired to have surveyed, and to pay therefor the just price at which it might be valued. The petition, therefore, was not for any tract known by a given name, but for a certain amount of land in such place.

While it thus appears that the court held the grant to be "for a certain amount of land," and not "for any tract known by a given name," and sustained it only as to the amount of land originally applied for and for which payment had been made, it also appears that a tract "largely in excess of the amount applied and paid for" was embraced in the survey of the grant. This survey was made by the Mexican authorities in 1821, and it would seem that possession was given according to such survey. At all events, title was claimed under the grant to the extent of the outboundaries named in the survey. It was insisted that the given metes and bounds should control area, and that the grant should be upheld for the full area within the survey. Thus surveyed, with an assertion of right and title according to the survey, the grant was clearly a *claim to lands* within the meaning of section eight of the act of 1854, to the extent of the outboundaries named in the survey. And so the claim continued until finally reduced in quantity by the supreme court, as has been shown.

This case differs materially from the cases of United States *v.* McLaughlin (127 U. S., 428) and Carr *v.* Quigley (149 U. S., 652), referred to in the brief of the petitioners. The first-named case was a suit brought by the United States against the Central Pacific Railroad Company and others. The object of the suit was to cancel and annul a patent issued to the railroad company for certain lands situate in the State of California, on the ground that the patent was issued without authority of law for the reason that the lands patented were within the outboundaries of a certain Mexican grant claim known as the Moquelamos grant, and were therefore reserved on account of that

grant at the date when the railroad company's right attached under the act of Congress pursuant to which the patent was issued. The claimed reservation in that case was based upon the act of March 3, 1851 (9 Stat., 631), which made provision for the ascertainment and settlement of private land claims in the State of California, through a tribunal established for that purpose. One of the consequences of the passage of that act was, as held in the case of Newhall *v.* Sanger (92 U. S., 761, 763–5), "that no title could be initiated under the laws of the United States to lands covered by a Spanish or Mexican claim, until it was barred by lapse of time or rejected." With respect to the character of the grant in question the court said:

> The Moquelamos grant belongs to that class of grants which may properly be called floats; that is, grants of a certain quantity of land to be located within the limits of a larger area. Mexican grants were of three kinds: (1) grants by specific boundaries, where the donee is entitled to the entire tract, whether it be more or less; (2) grants of quantity, as of one or more leagues within a larger tract described by what are called outside boundaries, where the donee is entitled to the quantity specified, and no more; (3) grants of a certain place or rancho by name, where the donee is entitled to the whole tract according to the boundaries given, or if not given, according to its extent as shown by previous possession. Higueras *v.* United States, 5 Wall., 827, 834. In the first and third kinds, the claim of the grantee extends to the full limits of the boundaries designated in the grant or defined by occupation; but in the second kind, a grant of quantity only, within a larger tract, the grant is really a float, to be located by the consent of the government before it can attach to any specific land, like the land warrants of the United States. A float may be entitled to location either on any public lands in the United States, or only in a particular State or Territory, or within a more circumscribed region or district. Its character remains the same. The present grant is one of this kind.

It was thereupon held that only the float—the quantity of land granted and to be located within the larger area—was actually reserved during the examination of the grant, and that the surplus or remainder of such larger area, over and above the quantity necessary to satisfy the float, was at the disposal of the government as part of the public domain. The case of Carr *v.* Quigley was similiar to the McLaughlin case.

Whatever may have been the character of the San Jose De Sonoita grant as originally made, it certainly was not an unlocated float, of the kind described in the McLaughlin case, at the date of the Baca selection here in question. Its then condition was not that of a mere float to be located "within a larger tract described by what are called outside boundaries," before it could "attach to any specific land, like the land warrants of the United States." The grant had been surveyed and located prior to the cession of 1853, and at the time of the cession, and thereafter, the right of possession and title under the grant were asserted and claimed according to the survey and location. It turned out that the area within the survey was too largely in excess of the amount of land actually purchased and paid for to allow the

application of the common law rule that metes and bounds control area, and it was therefore determined, not that the grant is a float yet to be located, but that the measurements of the original survey and location should be reduced so as to make the area of the tract already located conform to that actually purchased and paid for.

It is instructive to note, in this connection, what was said by the supreme court in the case involving the validity of said grant (171 U. S., 220, 241), upon the question as to how the *real tract granted* might be ascertained and established. We quote as follows:

> Many things may exist by which the real tract granted can be established. In the case before us, if it be possible to locate the central point from which according to the report the survey was made (and we judge from the testimony that it is possible) the actual grant can be established by reducing each measurement therefrom to such an extent as to make the area that of the tract purchased and paid for. If the outboundaries disclose a square or any rectangular figure, the excess of area suggests simply a carelessness of measurement, and can be corrected by a proportionate reduction in each direction. In other cases, the location of the waterway, the configuration of the ground, may be such as to enable a court of equity by its commissioner or master to determine exactly what was intended to pass under the grant.

After a careful consideration of the whole matter the Department finds no reason for disturbing the action taken in either of the decisions complained of. The petition is accordingly denied.

MINING CLAIM—EXPENDITURE—IMPROVEMENTS FOR BENEFIT OF SEVERAL CLAIMS.

ZEPHYR AND OTHER LODE MINING CLAIMS.

Where the same person or company owns several contiguous mining claims capable of being advantageously worked together, and adopts one general system for the purpose of developing them all, the value of the work done and improvements made pursuant to such system, whether done on only one of the claims or outside of all of them, is available toward meeting the requirement of section 2325 of the Revised Statutes relative to expenditure of five hundred dollars for each of such claims.

It is not necessary in order to have its due share of such work or improvements credited to each claim that such claims should all be embraced in the same proceedings for patent. If the mining laws are complied with in other respects such claims may be applied for and entered singly or otherwise, and at different times, without in any way impairing the right to have the value of such share credited to them, respectively, under that section.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 7, 1901.* (E. B., Jr.)

The Department has considered the appeal of Thomas F. Walsh from the decision of your office dated December 1, 1900, in the matter of mineral entry No. 1579, made by him January 9, 1900, for the Zephyr and Divide lode mining claims, survey No. 12876, Montrose, Colorado, land district.

Among the proofs to be submitted with an application for patent to a lode mining claim it is required by section 2325 of the Revised Statutes 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.

To satisfy such requirement in this case there were credited by the surveyor-general to the Zephyr claim certain improvements thereon valued at $265, and to the Divide, likewise, others valued at $370; and as an improvement common to both claims 150 feet of a certain tunnel, the portion credited being valued at $1500. It appearing that other portions of the same tunnel (which was over 1700 feet long at the time of the said survey No. 12876, in October, 1898) had been credited to certain other lode mining claims, also entered by Mr. Walsh, your office declined to allow any part of the value of the said tunnel to be credited toward the required expenditure for either the Zephyr or the Divide claim, and held the entry thereof for cancellation, giving its reasons therefor in the language following:

In case of the Copper Glance lode, *supra*, the Honorable Secretary of the Interior held as follows:

"Labor or improvements intended for the common benefit of several non-contiguous mining claims cannot be apportioned to the different claims in satisfaction of the required expenditure thereon, for the reason that to do so would be to credit each claim with an expenditure made in part for the benefit of other claims not associated therewith, as claims held in common within the meaning of the law.

"The law makes no provision for the apportionment of an improvement made for the common benefit of several non-contiguous mining claims, so as to apply different parts thereof exclusively to the use of different individual claims."

The term "claims held in common within the meaning of the law," as used in said decision, is understood by this office to mean claims contiguous upon the ground, having a common ownership, applied for and entered at the same time and developed by a common system of workings. The various claims held by Mr. Walsh in this vicinity appear to be contiguous upon the ground but can hardly be said to form a group of claims "held in common" for the reason that some of them were applied for and entered years ago by other parties, others having been applied for at various times by Mr. Walsh, and two at least having not yet been surveyed.

It must therefore be held that under the provision of departmental decision cited the said tunnel cannot be applied to the various claims mentioned as a mining improvement meeting the requirements of the statute. Claimant has failed to show that the sum of $500 has been expended in improvements (other than the tunnel) for the development of each of the claims embraced in this entry, and his said mineral entry No. 1579 is therefore held for cancellation.

It appears that the claims in question are members of a group of fifteen lode mining claims owned by Mr. Walsh, which lie so adjacent or contiguous to each other that, taken together, they form one body or tract of land, and that the Zephyr and Divide claims are also immediately contiguous to each other. All of these claims, except two, the Cosmos and Basuto, are embraced in mineral entries, of which those

for the Gertrude and the Una, Nos. 755 and 876, were made in 1883 and 1884, and carried to patent in 1884 and 1886, respectively. At the dates of entry thereof the Gertrude and Una were owned by other parties, Mr. Walsh having acquired title to them since that time. Of the other entered claims, all of which were entered by Mr. Walsh, five are embraced in mineral entry No. 1526, made March 2, 1889; two, the Crucible and Scorifier, in mineral entry No. 1580, made January 9, 1900; two others, the Damon and Pythias, in mineral entry No. 1581, made also January 9, 1900; and the Divide and Zephyr in the entry in question. The claims in entries numbered 1580 and 1581 are those to which, as stated in the decision of your office, are also credited portions of the said tunnel toward satisfying the requirement of section 2325 relative to expenditure.

The said group of claims form a paddle-shaped belt, commencing with the Gertrude on the east, followed immediately by the Una, and extending in a direction west by north for a distance of about one and one-third miles up the eastern slope and directly across the summit of a rugged mountain. From its mouth the tunnel runs nearly south to the Gertrude, distant about four hundred and fifty feet, entering that claim about two hundred and twenty feet from its western end line. After continuing thence in the same direction for about two hundred and twenty-five feet and crossing the supposed lode line of the Gertrude, the tunnel turns at apparently a right angle, and, proceeding in a westerly course through the Gertrude, Una, and other claims of the group, nearly upon the center line thereof, had, on January 10, 1901, entered the Zephyr for about three hundred feet and the Scorifier for about thirty feet, the total length of the tunnel being then not far from 4,000 feet.

At 3,500 feet the cost of the tunnel, according to the evidence, was over $50,000. From affidavits on file, including that of the U. S. deputy mineral surveyor who made the official survey of the claims in question, it appears that the said tunnel is now being run, and has heretofore been run, for the development of all the claims in the said group; that the summit of the range crossed by them is approximately 2,200 feet higher than the mouth of the tunnel; that the purpose is to cut and work thereby the veins of the several members of the group at great depth and provide a common inlet and outlet for working all the claims; and that such tunnel is the most economical and desirable means for their development.

It appears, therefore, that these claims, including the Zephyr and Divide, are contiguous upon the ground, have a common ownership, and are being developed by a common system of working or improvement. While in effect admitting that these three conditions co-exist in this case, the said decision of your office holds that to entitle the several members of a group of claims, such as is here shown, to be

credited under section 2325 with a share in the value of the improvements or workings made for the development of all, a fourth condition must also be present, namely, all the claims must be embraced in the same application and entry.

The Department is unable to find anything in the law itself, or in the decisions of the courts, which warrants the addition of such fourth condition to the other three named; nor is it warranted by the language quoted in your office decision from the decision of the Department in the Copper Glance Lode (29 L. D., 542). It is also clear that no support therefor is found in the provision hereinbefore set out from section 2325. The only other provisions of the mining laws in any way bearing upon the question are those relating to the matter of expenditure in labor or improvements required annually until entry, upon or for the benefit of all mining claims. As, obviously, whatever may be credited as labor or improvements toward meeting the requirement relative to annual expenditure may also be credited toward the expenditure required to be shown by section 2325 as a condition precedent to the entry and patenting of a mining claim, it follows that the provisions of the law relating to annual expenditure, and the decisions of the courts construing or interpreting such provisions, may properly be resorted to to determine what expenditure in labor and improvements may be credited to such a claim or claims under that section.

These provisions relating to annual expenditure are found in section 2324 of the Revised Statutes and the amendment thereto of February 11, 1875 (18 Stat., 315), and read, respectively, as follows:

> On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim. (Sec. 2324, R. S.)
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> That section two thousand three hundred and twenty-four of the Revised Statutes be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. (Act February 11, 1875.)

It is well settled by the decisions of the courts, construing the provisions just quoted, that where, as in the case at bar, the same person or company owns several contiguous mining claims capable of being advantageously worked together, and one general system has been adopted for the purpose of developing them all, the value of the work

done and improvements made annually for their development pursuant to such system, whether done on only one of the claims or outside of all of them, is available toward meeting the requirement as to annual expenditure for the several claims (Mt. Diablo M. & M. Co. *v.* Callison, 5 Saw., 439, 457—17 Fed. Cas., 918, 925; Jupiter M. Co. *v.* Bodie Cons. M. Co., 11 Fed. Rep., 666, 682; Smelting Co. *v.* Kemp, 104 U. S., 636, 653; Jackson *v.* Roby, 109 U. S., 440, 444; Chambers *v.* Harrington, 111 U. S., 350, 353; Book *v.* Justice M. Co., 58 Fed. Rep., 106, 117; Gird *v.* California Oil Co., 60 Fed. Rep., 531, 541; Royston *v.* Miller, 76 Fed. Rep., 50; and Justice Min. Co. *v.* Barclay, 82 Fed. Rep., 554, 560). It follows from what has been said that the value of such work and improvements is also available toward meeting the requirement of section 2325 relative to expenditure of $500 for each of such claims. And this is true, likewise, of all work or improvement of the character above indicated which contributes toward the development of such claims regardless of whether it was done or made for the purpose of annual representation of the claims or not (Emily Lode, 6 L. D., 220; Kirk *et al. v.* Clark *et al.*, 17 L. D., 190; and Clark's Pocket Quartz Mine, 27 L. D., 351).

The law attaches to the availability of such work or improvement for meeting that requirement no such condition as the one suggested by the decision of your office and here under consideration. A mining claim or location which is a member of such a group does not cease to be thereafter a beneficiary of such work or improvement in proceedings for patent thereto simply because, for reasons sufficient to the owner of the group, such claim or location is not embraced in the first proceedings for patent to one or more of the locations in the group, in which part of such work or improvement is duly credited under section 2325. It is immaterial, so far as receiving credit under that section for its due share of the value of the work and improvement is concerned, when the proceedings for patent to such mining claims or locations are commenced by such owner, or whether the proceedings embrace one or more of the locations. These are matters for the owner. His right to have the due share of work or improvement or its value credited under section 2325 to the several members of the group of claims is not in any way dependent upon his embracing them all in one application and entry. If he complies with the mining laws in other respects, he may apply for and enter them singly or in pairs, or otherwise, at his option, without in any way impairing such right.

The decision of your office is reversed accordingly, and you will pass the entry in question to patent if there be no other objection thereto.

MINING CLAIM—INDIAN RESERVATION—EXCEPTED LANDS.

NAVAJO INDIAN RESERVATION.

Lands included in a valid mining location at the date of the executive order of May 17, 1884, setting apart certain territory in Arizona as an Indian reservation, come within the purview of the proviso or excepting clause of said order, and therefore never became a part of the reservation, but remained a part of the public domain, subject, so far as that order is concerned, to the operation of the laws affecting or providing for the disposal of public lands, without regard to what may afterwards have been done in the way of perfecting or maintaining such location. Whatever privilege of going upon or across said reservation may be accorded to persons claiming an interest in such excluded lands under a mining location existing at the date of the order, for the purpose of enabling them to maintain and develop their claims under the mining laws, must also be accorded, on equal terms, to all persons claiming an interest therein under a subsequent relocation under those laws.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, March 8, 1901. (W. C. P.)

The Commissioner of Indian Affairs has made a report as to the facts in relation to mineral claims within the Navajo Indian reservation, and recommendation as to the steps that should be taken in respect thereto, and said report has been referred to me for opinion on the points involved.

By executive order of May 17, 1884, certain described territory in Arizona was set apart as an Indian reservation, being in fact added to the Navajo reservation. That order contained a proviso as follows:

Provided, That any tract or tracts within the region of country described as aforesaid which are settled upon or occupied, or to which valid rights have attached under existing laws of the United States prior to date of this order, are hereby excluded from this reservation.

It is alleged that prior to the date of said order many mineral locations had been made within the region of country described, which were at that date valid claims and under which valid rights had attached to the lands embraced in such locations.

It appears that in most, if not all, such cases of location, the claimants failed to meet the requirements as to annual expenditure necessary to hold possession of a mining claim. Recently, however, work has been resumed on these claims in some instances by the original locators or those claiming under them, in others, by parties claiming under relocations and adversely to the original claimants, and, in still others, by both the original locators and those claiming adversely to them. This renewal of interest in the mineral possibility of this section resulted in attracting to the spot large numbers of prospectors who were compelled to enter the Indian reservation to reach the lands claimed to have been excepted from the order of reservation.

When the Commissioner of Indian Affairs reported the conditions on the reservation he was instructed by departmental letter of May 14, 1900, to direct the agent in charge to notify all persons within that portion of the Navajo reservation set apart by the order of 1884, who claim under a mineral location made prior to said order, that they would be required to furnish proof of such location and that all who failed to furnish such proof within thirty days from receipt of notice would be removed as intruders under section 2149, Revised Statutes.

It seems that before this a letter from one of the mineral claimants asking as to his rights was referred to the Commissioner of the General Land Office, who, in his report of April 27, 1900, said:

> The particular question raised by Mr. Johnson appears to be whether the claimants to mining claims located prior to said reservation can go upon said reservation, without a permit, to work their claims. It would seem that after the reservation was created the mineral claimants believed their rights to be concluded by such reservation and consequently they failed to maintain the annual assessment work required by law but left the claims without any intention of abandoning the same.
>
> I am of the opinion that the locations which were valid at the time said reservation was extended over these lands were excepted and carved out of such reservation as completely as if they had been mentioned in the proclamation. While the question as to annual assessment work is one for the courts (Barklage case, 29 L. D., 401), it is well established that mineral locators who have resumed work prior to relocation of their claims by other persons gives them a valid right to such claims.
>
> This office has no record of the claims referred to in the correspondence submitted, the land being entirely unsurveyed and the notices of locations being filed with the recorder of the mining district or with the county records.
>
> I am of the opinion, however, that under the rulings of the courts, if the locators who had valid claims existing at the date of the proclamation above referred to resumed work upon such claims either before or after the restoration of the surrounding land to the public domain, they acquired vested rights under the U. S. mining laws to the land included in said claims.

In his report of May 18, 1900, upon another letter of inquiry referred to him, the Commissioner of the General Land Office mentioned his report of April 27, and further said:

> In this case the land included in the mining claims was segregated from the Indian reservation, and there was no provision in the proclamation creating such reservation that such land would become a part thereof upon the failure of parties to maintain their claims. But in any event it would require a presentation of all the facts in the case and a decision thereon before it could be determined whether the claims had been actually forfeited, for there is a difference between forfeiture and abandonment, the first being the consequence attached by law to certain facts, the latter the act of the party. In the first intention is immaterial, in the second it is everything. A claim may be abandoned before it is forfeited. Mallet *v.* Uncle Sam G. & S. M. C., 1 Nevada, 188.
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> Perhaps the Indian Office would have been warranted in reporting to the Department the failure of the mineral claimants to continue the annual assessment work with a view to determining whether the claims were actually abandoned and forfeited, and whether the land covered thereby came within the reservation.
>
> I am still of the opinion, therefore, that no such action having been taken, mineral

claimants who can show a right by location or transfer to claims located prior to the reservation should be permitted to resume work upon such claims.

The opinion thus expressed was adhered to in a later report of September 10, 1900, upon a reference of still another letter of inquiry.

With his letter of October 10, 1900, the Commissioner of Indian Affairs transmitted, among other papers, a statement in behalf of parties who had been served with notice to furnish proof of their right to claims within the Navajo reservation, wherein it is asserted, in substance, that by the express terms of the order of May 17, 1884, all tracts which were thus covered by valid mineral locations were absolutely excluded from the reservation and remained a part of the public lands of the United States; that the Indian bureau never acquired any control of such lands; that the original locations had become invalid and of no force because of the failure of the original locators to perform the annual labor required by law; that by reason of such failure the lands became subject to relocation and were located by these claimants while in that condition; that the claims under such relocation alone are now valid and in force, the original claimants and their assigns having lost all right to said land. In submitting the matter the Commissioner of Indian Affairs said:

> In this matter the sole desire of the office has been to keep the Navajo reservation free from intruders. The merits of the claims of the several mining claimants must in the end be adjudicated by the General Land Office or the courts, but until such settlement has been reached those claimants who are unable to show a right by location or transfer to claims located prior to the reservation, should not, in the opinion of this office, be permitted to go upon the reservation. It is apparent that such parties have intruded upon the reservation regardless of the Department's order, as they have had the mining district surveyed and platted. This is evidenced by the blue-print furnished by them.
>
> In transmitting the papers, etc., submitted by Agent Hayzlett, for appropriate action by the Department, it is recommended that this office be instructed to direct said agent to allow no one to be upon the Navajo reservation except the original locators of mining claims located prior to the reservation, or their assigns, until otherwise directed. It is suggested, in order to determine by metes and bounds the tract or tracts excepted from the operations of the executive order of May 17, 1884, that the Commissioner of the General Land Office be directed to cause a survey to be made of said excepted tract or tracts, as shown by the records.

The existing laws of the United States recognize a right to the possession of mineral land under a location thereof made in accordance with local rules and regulations, and hence rights attaching under a valid mineral location thus made come within the proviso of the order creating this reservation, by which any tract or tracts "to which valid rights have attached under existing laws of the United States prior to the date of this order, are hereby excluded from this reservation."

Questions concerning the respective rights of adverse claimants to possession of mineral lands, under locations thereof, are to be determined by the courts (Barklage *v.* Russell, 29 L. D., 401), but for adminis-

trative purposes it is proper and necessary, in a case like the one here presented, for this Department to determine whether, at the date of said executive order, a valid right had attached to any tract within the limits described in said order.

It having been found that a claim coming within the purview of the proviso to said order of reservation had attached to a tract of land, by reason of which such tract was excepted from the reservation, a question naturally arises as to the effect of an abandonment or relinquishment of such claim subsequently to such order. Would the order of reservation attach immediately upon the extinguishment of the claim, or was such a tract effectually and completely excepted from the reservation so that it remained, so far as that order was concerned, a part and parcel of the public domain, without regard to the perfection or completion of the claim which served to prevent the order of reservation taking effect thereon at the date of its issuance? The order itself declares, without limitation or qualification, that such tracts "are hereby excluded from this reservation."

An examination of the pamphlet, entitled "Executive orders relating to Indian Reserves issued prior to April 1, 1890," shows that such orders have not always followed the same form. In many there has been no express saving or excepting clause recognizing or protecting claims to lands embraced in such orders. In some there is a proviso declaring that the order shall not affect any existing valid rights, among which may be mentioned those of March 2, 1881, and June 19, 1883, establishing reservations for the Mission Indians of California, the one of February 11, 1887, creating a reservation for the Jicarilla Apaches of New Mexico, and the one of February 19, 1889, establishing a reservation for the Quillehute Indians of Washington. Others of these orders, issued during the period from 1879 to 1886, contain provisions similar to the one here under consideration, declaring that tracts included within the boundaries described, to which valid rights have attached, are excluded from the reservation. When it is found that an order of March 18, 1879, setting apart certain territory as an Indian reservation, contains a proviso as follows:

> That any tract or tracts of land included within the foregoing described boundaries, the title to which has passed out of the United States government, or to which valid homestead or pre-emption rights have attached under the laws of the United States, are hereby excluded from the reservation hereby made—

and that another order of March 2, 1881, establishing another reservation, contains a proviso as follows:

> That this withdrawal shall not affect any existing valid adverse rights of any party—

it is fair to presume that the change of language was made for a purpose, and that it was supposed and intended that such provisions

should have different meaning. When afterwards, in an order of May 5, 1882, the language made use of in 1879 is again employed, and in an order of June 17, 1883, resort is had to the language used in 1881, the conclusion must be that these changes were made advisedly and for a specific purpose.

If it had been intended, only, that existing claims should be protected, and that the order of reservation should take effect upon all lands within the described boundaries, subject only to the completion and perfection of existing valid claims, the language used in the orders of 1881 and 1883, referred to above, is entirely adequate and appropriate to effectuate that purpose. If, however, it was intended that the order of reservation should never apply or attach to tracts to which valid claims existed at the date thereof, the language of the orders of 1879 and 1882, referred to above, is apposite.

When the order of May 17, 1884, now under consideration, was issued, there were these two forms to serve as precedents. The one contained a clause of exception and the other a saving clause, protecting only the rights of the claimant under an existing claim. The former was chosen. There must have been a purpose and design in this selection. The adoption of that form which, from the language used, imports an intention to do more than merely protect existing claims and the original claimants thereunder, indicates a definite purpose, and the language used should be given its natural and full effect. To do this it must be held that tracts coming within the purview of the proviso or excepting clause of the order never became a part of the reservation but remained and are a part of the public domain, subject, so far as that order is concerned, to the operation of the laws affecting or providing for the disposal of the public lands.

The action of the Executive, in respect of another class of reservations, may be properly referred to in this connection. By section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), the President was authorized to set apart and reserve public land bearing forests and, by proclamation, declare the establishment of such reservations and the limits thereof. A number of such reservations have been established by proclamations issued during the period from September 10, 1891 (27 Stat., 989), up to February 10, 1899 (30 Stat., 1789). Each of such proclamations contained a clause excepting from its operation all land embraced in a valid entry, a lawful filing, or a mining claim duly located. To this point the exception is, in effect, the same as the one in the order of 1884, under consideration. It was, however, thought desirable that private holdings within such forest reservations should be restricted as far as could be done without injury or injustice to existing rights. To secure that result it was deemed necessary to insert a proviso limiting the excepting clause so that it should operate

for the benefit of the then existing claimant only. The proviso thus inserted in the order of September 10, 1891, and substantially in the same form in all subsequent orders, is as follows:

Provided, That this exception shall not continue to apply to any particular tract of land unless the entryman or claimant continues to comply with the law under which the entry, filing or location was made.

It is clear that it was understood that without a proviso, thus limiting and qualifying the excepting clause, that clause would have operated to absolutely exclude the tracts covered by valid claims from the forest reservation. The excepting clause in the order of 1884 is as broad and explicit as that in these proclamations establishing forest reserves.

The effect of that clause was to except from the operation of the order all tracts covered by a claim of the character mentioned therein, and this without regard to what may have afterwards been done in the way of perfecting or maintaining such claim. The tracts thus excluded from the reservation remained a part of the public domain, subject to disposal under the general land laws.

If the land thus excluded is mineral in character, it was and is subject to location as other lands of that character. There is here presented the claims of two classes of claimants, the one class asserting a right to the possession of the land under and by virtue of the original location, and the other asserting a right by relocation after abandonment of all rights under that original location. Neither claimant is seeking title to the land, but is at present only interested in asserting and maintaining his right to the possession thereof. The determination of that right is committed by the mining laws to the courts alone. To adopt the course recommended by the Commissioner of Indian Affairs would be, in effect, to say that no claimant under a relocation has any right as against the original location. That is, this Department would make a decision against one class and in favor of the other, which it has no jurisdiction to do. If it be necessary to go upon or across the Indian reservation to reach the land thus excluded therefrom, then the two classes of claimants should be accorded exactly the same privileges. The making of any distinction in this respect would involve a determination of their respective rights.

Approved:

E. A. HITCHCOCK,
Secretary.

SURVEY—MARSH LANDS—RIPARIAN RIGHTS.

THE PACIFIC LIVE STOCK CO. *v.* ARMACK.

The owners of fractional tracts bordering upon a meander line of a survey shown by the field notes to have been closed upon a marsh, acquire no riparian rights to the lands thus excluded from the survey.

The United States has authority to examine into the correctness of a survey, and to cause lands erroneously omitted from survey to be surveyed and disposed of as public lands.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 11, 1901.* (E. F. B.)

This appeal is filed by the Pacific Live Stock Company from the decision of your office of October 30, 1900, dismissing its protest against the allowance of the final proof of Otto Armack upon his homestead entry for the SW. ¼ of Sec. 25, T. 25 S., R. 32 W., Burns, Oregon.

A subdivisional survey of said township was made by Deputy Surveyor H. C. Perkins in 1879. What is now section 25 is represented upon the plat of said survey as a part of "Malheur Lake." Many of the tracts represented by said plat as bordering on that lake have been patented to the State of Oregon, upon approved selections, as swamp and overflowed lands, among which are the following: Lot 1 of section 23; lots 1, 2, 3 and 4 and SW. ¼ SW. ¼ of section 24, and lot 1 of section 26.

In 1892 a petition was presented to your office by persons who claimed to be settlers upon lands in said township, alleging that since the original survey of 1879 the waters had receded, leaving a considerable body of land between the original meander line and the waters of the lake, and asking that said lands be surveyed as public lands of the United States. Said petition was submitted to the Department and your office was directed to have a survey made of those lands where no meander line had been run, and in townships where the government owned the land adjoining the lake (16 L. D., 256), but in view of the difficulties in making such survey your office was subsequently instructed to have a survey made of all the dry lands between the original meander line and the actual line of the lake, leaving all questions affecting the rights of parties owning lands bordering upon the lake according to the plat of the survey of 1879, to be determined after the approval of the new survey (19 L. D., 439).

In compliance with said instructions a survey was made of the unsurveyed portion of said township, and the approved plat thereof was filed in the local office November 9, 1897. On that day Otto Armack made homestead entry of the SW. ¼ of section 25, T. 25 S., R. 32 E., and submitted final proof thereon March 24, 1900, upon which final

certificate issued. June 15, 1900, the Pacific Live Stock Company filed a protest against the acceptance of said proof, alleging that it is the owner of lot 1 of section 23, and lots 1, 2, 3 and 4, and SW. ¼ SW. ¼ of section 24, and lot 1 of section 26, having purchased said tracts from Jonathan Hayne April 24, 1894, who acquired title to the same through mesne conveyances from the State of Oregon; that protestant is a corporation incorporated by the laws of California and empowered to own and hold lands in Oregon; that said lands adjoin the old meander line of Malheur Lake, established by the survey of 1879, and are, by the plat of survey of 1879, represented as being bordered by and extending to the water line of Malheur Lake; that protestant and its predecessors in interest bought said lands upon the faith of such representations, and it is informed and believes that at the time the old meander line was established it followed the water line of said lake as it then existed; that the land included in the homestead entry of Armack lies between the lands of protestant and the present shore or water line of Malheur Lake and was covered by the waters of said lake as part of the bed thereof continuously until the year 1882, when, by gradual reliction of the waters of said lake, said tract, with other tracts, was left bare, and since said date the waters of said lake have receded entirely from said lands. It alleges that by reason thereof it is the owner of all the lands lying between its lands herein described and the present water or shore line of the lake, and it prays that the entry of Armack be not approved but that the further consideration of the same be postponed and a hearing be had to enable it to offer testimony in support of its allegations.

The protest was rejected by your office for the reason that in 1881, before the government parted with its title to the lands outside of and adjoining the meander line of 1879, the reliction of the waters began, which was due to a well recognized agency, to wit, the cutting of the sand ridge that separated Lake Malheur from Lake Harney; that the reliction was not gradual and imperceptible, but violent and sudden, and that at the time the government parted with the title to the lands bordering on the meander line of the old survey, the purchaser was put on notice that the lands purchased did not abut on and were not contiguous to the waters of the lake and that the waters had receded from them, if they ever touched them. Also, that the field notes of the survey of 1879 did not show the existence of an open body of water on the meander line.

The contention of appellant is that it is the owner of the tract in controversy by virtue of its rights as riparian proprietor, for the reason that the plat of survey of 1879 shows that lot 1 of section 23, lots 1, 2, 3 and 4 and SW. ¼ SW. ¼ of section 24, and lot 1 of section 26, are fractional lots bordering on Lake Malheur, a body of water, as meandered by said survey, and that the meander line of said survey

followed the actual water line as it then existed; that the land in controversy was then covered with the waters of said lake as a part of the bed thereof, and has since been made bare by the gradual reliction and recession of the waters.

The contention of appellant cannot be sustained, because it is based upon an erroneous assumption as to the character of the so-called meander line and as to the location of the land in controversy at the date of survey, with reference to the actual water line.

The field notes of the survey of 1879 show that the deputy surveyor did not extend the lines of survey to a body of water, but closed them upon marsh lands. The south corner common to sections 23 and 24 is a meander corner, but no mention is made in the field notes of a lake at that point. Thence, running east on a true line between sections 24 and 25, the deputy surveyor established the corner to sections 24 and 25 at a point designated as the "margin of Malheur Lake marsh." The east corner to sections 23 and 26 is also established at a point designated in the field notes as the "margin of Malheur marsh." These are meander corners and are also corners of lots owned by protestant.

The line between sections 26 and 35, which was run east from the corner of sections 26, 27, 34 and 35, is thus described in the field notes:

East on a true line bet. Secs. 26 & 35, knowing that it would strike Malheur marsh in less than 80.00 chs.

Margin of Malheur Marsh.

Drove a charred willow post 4 ft. long and 4½ in. in diam. 24 in. into the ground for Cor. to frac. Secs. 26 & 35. Too swampy to dig pits. Tules.

The same designation is given at the points where he established the other meander corners. In no instance does the deputy surveyor designate the points at which he established the meander corners as "Malheur Lake" or show that these corners were established upon the shore line of a body of water, but they are invariably designated as the "margin of Malheur marsh," with the exception of the corner to sections 24 and 25, above mentioned, which is designated as the "margin of Malheur Lake marsh."

The meander lines between these corners are described by the deputy as "the meander lines of Malheur Lake or marsh," but the general description which he gives of the township, and which was noted upon the margin of the plat of survey, shows that the meander was the margin of a swamp and not of a body of water. The following extract is taken from the description of the township noted on the margin of the plat:

There is apparently no open water for some distance south of these meander lines. There would probably be no difficulty in extending this Tp. to its entirety.

What is usually called Malheur Lake is only a vast marsh or tule swamp with comparatively little open water and is susceptible of reclamation by cutting a canal through the peninsula which separates Harney from Malheur Lake.

The protestant seeks to impeach these returns by the affidavit of H. C. Perkins, who made the survey. Perkins swears that in making

the survey he "carefully followed the shore line of the lake and included within the survey all that could be properly called land as in contradistinction from lake." The field notes show beyond all question that the meander lines were not of the waters of a lake but of marsh lands. The location of each meander corner is designated as the margin of a marsh and the field notes in this respect are uniformly consistent. The character of the land south of the meander line is described as a vast marsh or tule swamp. The statement of the deputy surveyor in the summing up of his work, that there is apparently no open water for some distance south of the meander lines and that there would probably be no difficulty in extending the township to its entirety, could not have been thoughtlessly made, but must have described the actual character of the township as it then existed.

A similar question was presented in the case of Niles *v.* Cedar Point Club (175 U. S., 300). In that case certain sections of the township were made fractional by the meander line of what was described in the plat and field notes as "impassable marsh & water." The court, referring to the action of the surveyor in stopping his line at the border of the marsh, said:

> He evidently thought that the marsh was to be treated as a body of water, a conclusion not unwarranted in view of the finding of excessive high water at that time, but a conclusion which other findings show was not correct.

The unsurveyed portion of the township was designated on the plat of survey as "impassable marsh & water." In this case it was designated as "Malheur Lake," but in both cases the marginal field notes inscribed upon the plat showed that the meander line was the margin of a swamp and not of a body of water.

With reference to such a condition the court said:

> Of course, if the fractional sections patented to Margaret Bailey did not border on some body of water, there were no riparian rights, and if the conclusion of the trial court that this marsh was land (for swamp and boggy land is to be treated as land) was correct, then whatever changes may have come to the marsh—whether it became more or less subject to overflow—would not alter the fact that the rights of Margaret Bailey, the patentee, were limited to the very lands which were conveyed to her, and for which she paid, and did not extend over the meander line into the territory north.

Even if the lands of protestant were represented on the plat of survey as bordering on a body of water, the United States would not be deprived of the authority to examine into the correctness of said survey and to cause the lands erroneously omitted from survey to be surveyed and disposed of as public lands of the United States, if that examination demonstrates that there was no body of water which would have prevented the extension of the township section or subdivisional lines. John McClennen *et al.* (29 L. D., 514).

No reason appears for allowing a hearing upon said protest, and the decision of your office dismissing the same is affirmed.

HOMESTEAD—MARRIED WOMAN—ACT OF JUNE 6, 1900.

HASTINGS AND DAKOTA RY. CO. *v.* BUCKENTIN.

The act of June 6, 1900, removed the disqualification resulting from marriage, but the right of a woman who had settled upon public land and thereafter married, to complete entry of such land under the homestead laws, is subject to all the requirements of those laws as to residence; and while said act was retroactive in the matter of removing the disqualification resulting from marriage, it did not revive a claim initiated prior to its passage, by a single woman, and lost by reason of actual abandonment of the land.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 11, 1901.* (F. W. C.)

The Hastings and Dakota Railway Company has appealed from your office decision of November 22, 1900, holding for cancellation its indemnity selection made October 29, 1891, covering the NE. ¼ of Sec. 21, T. 123 N., R. 43 W., Marshall land district, Minnesota, with a view to allowing the homestead application of Mary Buckentin, formerly Mary Dablow, covering said tract.

The homestead claimant, then Mary Dablow, on August 14, 1894, tendered a homestead application for this land, in support of which she alleged settlement upon and continuous residence on the land for a period long prior to the railroad selection. Said application was forwarded to your office on August 16, 1894, under instructions, without action thereon by the local officers. Thereafter, on January 26, 1897, Carl Buckentin tendered a homestead application for this land, which was rejected for conflict with the railroad selection; from which action he duly appealed.

Your office on December 12, 1899, upon consideration of the application by Mary Dablow in connection with the showing filed in support thereof, ordered a hearing to determine the respective rights of herself and the company in the premises. The evidence submitted at said hearing, which was held on January 23, 1900, shows that Mary Dablow, with her parents and the other members of the family, took up an actual residence upon the land in the year 1880, at which time the applicant was about ten years of age. Her father had exhausted his homestead right, but together with his family he continued to live upon the land and improved the same to considerable value. Prior to his death he gave the improvements which he had placed upon this tract to his daughter, Mary Dablow, who became 21 years of age October 14, 1891, just fifteen days prior to the selection of this land by the railroad company. At the time of said selection she was residing upon the land and her residence continued thereon until on April 10, 1895, when she was married to Carl Buckentin, who was then and has ever since been county treasurer. Upon her marriage she removed

from the land to the town of Morris, the county seat, where she has ever since resided with her husband. Since her marriage her mother, with five children, has continued to live upon the land, keeping up the improvements and cropping the tract each year. Her mother was also shown to be not qualified to make entry of the land, being the owner of 320 acres of land.

Upon this showing the local officers recommended the rejection of the homestead application by Mary Dablow, but, upon appeal, your office, by decision of November 22nd last, held that in view of the amendatory act of June 6, 1900 (31 Stat., 683), Mary Buckentin, formerly Mary Dablow, should be permitted to complete entry of this land; from which decision the railway company has appealed to this Department.

After her marriage, on April 10, 1895, and prior to the act of June 6, 1900, the present applicant could not have been permitted to make entry of this land under the homestead laws, she having by her marriage disqualified herself from making such entry. (Brown *v.* Cagle, 30 L. D., 8.)

By the said act of June 6, 1900, it was provided that—

> Where an unmarried woman who has heretofore settled, or may hereafter settle, upon a tract of public land, improved, established, and maintained a *bona fide* residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, and has married, or shall hereafter marry, before making entry of said land, or before making application to enter said land, she shall not on account of her marriage forfeit her right to make entry and receive patent for the land: *Provided*, that she does not abandon her residence on said land, and is otherwise qualified to make homestead entry: *Provided further*, that the man whom she marries is not, at the time of their marriage, claiming a separate tract of land under the homestead law.

This act merely removed the disqualification resulting from marriage, but the right of a woman who had settled upon public land and thereafter married, to complete entry of such land under the homestead laws, is subject to all the requirements of those laws in the matter of residence. While said act was retroactive in the matter of removing the disqualification resulting from marriage, it did not revive a claim initiated long prior to its passage by a single woman and lost by reason of actual abandonment of the land. While it is true that, being disqualified, the present claimant did not have a claim to abandon prior to the passage of the act of June 6, 1900, yet whatever right was initiated by her settlement and residence upon this land prior to her marriage in 1895 was clearly abandoned and lost by her removal from the land and residence elsewhere for more than five years prior to the passage of said act. As an evidence that she did not consider that she had a valid claim to this land, or that the same had been maintained, her husband, on January 26, 1897, nearly two years after their marriage, tendered a homestead application for

said land. He is not shown to have ever resided upon this land, and his application was properly rejected for conflict with the pending selection; which action your office affirmed, and from which he did not appeal.

The facts and circumstances of the case considered, it is the opinion of this Department that the former claim asserted to this land by Mary Dablow is not affected by the act of June 6, 1900, and that the said claim should be and is accordingly rejected.

Your office decision is accordingly reversed.

CORRECTION OF SURVEY—LANDS ERRONEOUSLY OMITTED FROM SURVEY.

JOHN MCCLENNEN ET AL.

The United States does not, by the approval of a survey, part with its title to lands that were erroneously omitted from said survey.

The power to make and correct surveys of the public lands belongs exclusively to the political department of the government; and the Department of the Interior is the proper tribunal to determine whether lands were, at the date of survey, part of a lake or were public lands erroneously omitted from survey.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 11, 1901.* (E. F. B.)

With your letter of January 15, 1901, you transmitted to the Department the papers pertaining to and including returns of survey of parts of sections 1, 2, 11, 12, 13 and 14, in township 96 N., R. 35 W., Iowa, executed by M. P. McCoy, examiner of surveys, in pursuance of directions contained in the decision of the Department of February 17, 1900 (29 L. D., 514), upon the application of John McClennen *et al.* Also the returns of survey of part of section 3, in township 96 N., R. 35 W., and parts of sections 22, 23, 26, 27, 34 and 35, in township 97 N., R. 35 W., Iowa, executed by the said M. P. McCoy under instructions issued upon the application of J. C. Chapman *et al.*, pursuant to directions contained in the letter of the Department of February 28, 1900 (unreported).

You state that in compliance with instructions contained in said decision of February 17, 1900, the local officers retained in their office for thirty days copies of the unapproved plats of survey, giving notice to all parties in interest that said plats were there for the purpose of inspection, in order that they may have an opportunity to file any objections they might have to the approval of said surveys, and that at the expiration of thirty days the local officers reported that no objections to the approval of said plats of survey had been filed after due service of notice. They, however, transmitted a petition signed E. B. Evans, attorney for J. C. Chapman and Clay county, requesting

that the surveys in said townships 96 and 97 be extended over the lands represented on the plat as Lake Trumbull and Round Lake, which you considered an objection to the approval of the plat, and you transmit it with the papers requesting instructions as to whether or not said surveys shall be approved by your office with a view to filing them in the local office to the end that the land may be disposed of as public land of the United States.

The plat of survey of the lands in township 96 N., R. 35 W., covers parts of sections 1, 2, 11, 12, 13 and 14. On the plat of the original survey of 1856 said lands are represented as being covered by a body of water known as Lost Island Lake. The returns of the survey under consideration show that the original meander lines do not approximate the true meander of the lake but traverse high, rolling prairie, from five to twenty feet above the level of the swamp, except near the outlet of the lake, where the swamp extends as much as half a mile outside the said original meanders, and the character of the land, as shown by said returns, indicates that there has been no material change in the lake since such original survey. Thus the conclusion reached that this original survey was erroneous in that it did not include all the public lands in said townships subject to survey is sustained. You report that no objections have been filed against the approval of the survey of the lands in this township bordering on Lost Island Lake and that said survey has been executed in strict accordance with the instructions.

The only objection to the approval of the plat of survey of the lands in townships 96 and 97, R. 35 W., bordering on Round and Trumbull lakes, reported with your letter, is contained in a petition filed by W. W. Cornwall, swamp-land agent of the county of Clay, and J. C. Chapman, who request that the lines of survey be extended over said alleged bodies of water for the reason that the land embraced within the meander lines shown by the plat of survey is swamp and overflowed land which passed to the State of Iowa under the swamp-land grant.

No objection to the survey is made by any one claiming as a riparian proprietor. The protestants, although they are owners of lands bordering on the meander line, do not claim under such right, but, on the contrary, deny that there are any riparian rights in the owners of lands bordering on the meander line of lakes or ponds in Iowa. They deny that there is a permanent body of water that prevents the extension of the lines of survey, and, hence, they protest against the meandering of Round and Trumbull lakes, as such, when in fact as they allege the meander line is upon a body of swamp and overflowed land that was acquired by the State under the swamp land grant, which inured to the county of Clay by virtue of the act of the legislature of Iowa, approved January 13, 1853, granting all the swamp and over-

flowed lands acquired under said grant to the counties, respectively, in which such lands are situated.

With reference to this and similar claims, the governor of the State of Iowa has addressed a letter to this Department, under date of January 30, 1901, in which he says:

> I am advised that a number of parties are seeking to have re-surveys made of portions of the area of this State that were originally meandered as lakes. I write to say that this State lays claim to all meandered lakebeds, and in behalf of the State I desire to make formal objection to any re-survey of these lands, unless requested by the governor of the State or some person duly appointed and authorized to act. This does not apply to any particular tract, but to all portions of the State originally meandered.

By letter of February 26, 1901, he objects to the approval of these particular surveys upon the ground that the original surveys were correctly made and the bodies of water which were meandered at the time were in fact lakes and the shores of the same were correctly meandered by the original township survey; that upon the approval of said survey the title to the beds of the lakes, as meandered by said survey, vested in the State of Iowa by virtue of its sovereignty, and the United States has no authority to divest the State of its title to such lake beds by any resurvey thereof; that the grant by the State of Iowa to the several counties in said State, of the swamp and overflowed lands acquired by the State under the swamp-land grant, did not include any part of the beds of lakes to which the State claims title in its sovereign right and which can not be affected by any resurvey of said lands in the interest of the United States or of the several counties, or of any individual who may claim any title to or interest in said lake beds; and that if it is sought to establish the claim that an error was made in the meandering of these lakes by the original township survey, either upon the part of the United States, the counties in which such lakes are situated, or an individual, such attempt raises an issue of fact which can only be determined upon a hearing by the proper tribunal on sufficient notice, and the Department of the Interior is not the proper forum.

The State does not dispute the title of the county to the swamp and overflowed lands that properly come within the grant of September 28, 1850, but it claims to be the owner of the lake-beds in said State, not as grantee of the United States, but by virtue of its sovereignty. Nor does the United States dispute the title of the State to the beds of the lakes and streams in said State that were properly meandered by an approved township survey, or claim any authority to make a resurvey of lands that may have been formed since the survey by the recession or drying up of the waters of such lakes or streams. But the United States does not, by the approval of a survey, part with its title to lands that were erroneously omitted from survey. Such lands are government lands. The power

to make and correct surveys of the public lands belongs exclusively to the political department of the government (Cragin *v.* Powell, 128 U. S., 691). The Secretary of the Interior, being charged with the supervision of the public lands, is the proper tribunal to determine whether the land in question was a part of the lake bed or was public land omitted from the survey (Knight *v.* Land Association, 142 U. S., 161; Rood *v.* Wallace, 79 N. W. Rep., 449). No affidavits have been filed in support of the allegation that the lakes were properly meandered by the original survey, and no reason is shown why the decision of the Department, of February 17, 1900, in the case of John McClennen, directing that the lands omitted from the former surveys be surveyed, should be disturbed.

No question of law is presented by the petition of Chapman and Clay county which does, as held by you, constitute an objection to the approval of this survey in its present form. There is simply a question of fact as to whether Round and Trumbull lakes, as shown by the present survey, are bodies of water of such permanent nature as are required by the manual of instructions to be meandered. If they are, the surveys should be approved.

The petitioners allege that there is not now, and never has been, an acre of the land embraced in said limits that could not be reclaimed and made fit for cultivation; that the melting of the snows and the spring rains in ordinary seasons cause a sheet of shallow water to form over the surface of said land, but during the summer and fall the water will be absorbed and dried up until there will be a continuous growth of weeds, rushes, and heavy slough grass over all the land, much of which can be pastured in the ordinary seasons; that in dry seasons, during the summer and fall, that portion of the land marked on the plat as Round Lake has been completely dry, and that portion marked Trumbull Lake has been so dry that stock could be pastured all over it; that the land is not covered by a lake of water of a permanent nature so far as to be of any use to the general public, but is a menace to the public health. The petition is supported by affidavits.

The returns of survey show that both of said lakes, as now meandered, are permanent bodies of water. In his report the surveyor says:

> It is claimed by some that the Round Lake is a swamp, but I think it is a shallow lake, for the reasons that it has a well defined bank and beach of gravel and sand, and a greater part of the bottom is gravelly and rocky. I sounded the lake in many parts of it and found the water from 3 to 4 ft. deep except near the edges where it gradually ascends to the water's edge. It is the favorite fishing ground for the inhabitants for several miles around. They catch many pickerel and bull head fish in it.

The surveyor reports that six and seven years before his survey Round Lake was thoroughly dry and the land was planted to flax, but before the crop matured the water rose again. He says that since those dry years there are many patches of rushes in both lakes, which is the only reason for claiming that they are swamp.

W. L. Hemphill states in his affidavit, submitted in support of said petition, that he is the owner of swamp lands in township 97 N., R. 34 W., that are exceedingly wet and liable to overflow during the spring of the year; that the natural drain from said lands is into Trumbull Lake; that he has examined the outlet or natural drain from his swamp lands into Trumbull Lake and the natural outlet of Trumbull Lake into the Sioux river, with a view of draining the same, and in his opinion a shallow ditch from 6 to 10 feet, for from two to three miles would completely drain Trumbull Lake and Round Lake into the Sioux river.

In an affidavit signed by E. P. Barringer and four others it is stated that Round and Trumbull lakes are very shallow beds of water and have not well-defined beach banks; that each of said lakes has been entirely dry at different times, and the beds of said lakes have been planted to crops.

These affidavits do not contradict the returns of the surveyor in any material respect, but rather corroborate it. The surveyor states that by running a line of levels along the outlet drain of Trumbull Lake a sufficient fall is found to drain these two lakes, but until they are drained it is impossible to survey them. The mere fact that the lakes can be drained and that in some seasons they are entirely dry does not show that they are not permanent bodies of water. In fact the affidavits submitted by protestants show that their character can only be changed by a process that would result not in the reclamation of swamp land but in the drainage of a body of water from the bed of a lake. The permanent character of the water is shown from the fact that the meander line of the lake as surveyed by McCoy is in many places coincident with the meander line of the survey of 1856, and the surveyor states that it appears to be impossible that the boundaries of these lakes have changed since the original survey was made. The proprietors of lands bordering on these lakes as meandered in 1856 where it is shown by the present survey to be the true meander, have rights which should not be disregarded by the Department. Such persons are evidently satisfied with the surveys and are therefore not protesting against their approval.

No sufficient objections to the approval of said surveys having been filed, and it appearing that they have been executed in accordance with the instructions, you will approve the same, to the end that the lands may be disposed of as public lands.

KELLEY *v.* HASTINGS AND DAKOTA RY. CO.

Departmental decision of October 24, 1900, 30 L. D., 306, recalled by Secretary Hitchcock March 12, 1901, in so far as it ordered the cancellation of the railway company's selection, and directions given,

in view of the fact that it now appears that the land in question was certified to the company during the pendency of the contest by Kelley, that demand be made of the company for reconveyance of the land, based upon said decision of October 24th, and that, in due time, a report be made of the result of the action taken.

INDIAN LANDS—ALLOTMENT—SELECTION.

WILLIE DOLE.

The terms of the agreement of May 20, 1890, with the Iowa tribe of Indians, contemplate a personal selection on the part of a person entitled thereto, or a selection in behalf of one in being or alive at the time, and there is no provision in said agreement for making a selection on behalf of a deceased person.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, March 13, 1901. (C. J. G.)

The Commissioner of Indian Affairs submits a report in the matter of an allotment made in the name of Willie Dole as an Iowa Indian, which you have referred to me for an opinion on the questions therein presented, namely, whether the first or trust patent issued on said allotment should be canceled, or whether the heirs of said Willie Dole are entitled to the land allotted to him.

This case has previously been here upon the question as to whether the Department has authority to cancel a first or trust patent where the record discloses that the allotment upon which such patent issued was improperly allowed. In view of the decision in the case of Lizzie Bergen (30 L. D., 258), wherein it is held that until the issuance of the second or final patent the Department has authority and jurisdiction to investigate and determine as to the legality of an Indian allotment and to cancel the first or trust patent issued thereon if the allotment was erroneously made, the case was returned to the Indian Office for further action, it appearing that neither the heirs of Willie Dole nor other parties claiming an interest under his allotment had been given notice of the allegation that said allotment had been improperly allowed or afforded an opportunity to show cause why the first or trust patent issued thereon should not be canceled.

The allegation, made by a homestead applicant, against the allotment allowed in the name of Willie Dole is that the allottee died before allotments were actually made to the Iowa tribe of Indians, and therefore the same was improperly allowed. From the present report of the Commissioner of Indian Affairs it appears that in pursuance of notice several persons, members of the Iowa tribe of Indians, appeared before the Indian agent at the Sac and Fox Agency and made affidavits in support of the claims of the heirs of Willie Dole. These

affidavits are to the effect that Willie Dole died about March 7, 1891; that he was alive when the agreement of May 20, 1890, was made and signed said agreement; that he was alive when that agreement was ratified by Congress on February 13, 1891, "and was alive and selected his allotment after the allotting agent came among them to give allotments, but that his death occurred before said allotments were approved." Affiants further state that it was the intention of their people to permit all members of the tribe, who were alive at the time of the ratification of the agreement, to receive lands.

It appears that no question is raised as to the date of the death of Willie Dole. The Commissioner of Indian Affairs says that the statement that Dole was alive and selected his allotment after the allotting agent came upon the reservation, taken in connection with the statement that the allottee died about March 7, 1891, is not consistent with the records of his office, which show that the services of said allotting agent commenced April 10, 1891, the instructions issued to him for making the Iowa allotments not having been approved by the Department until March 18, 1891. The Commissioner expresses the opinion, however:

> Doubtless Willie Dole, before his death and after the conclusion of the agreement, had expected the land would be allotted, and possibly had made a selection which he intended to take when the allotting agent should come. As he did not die until nearly a month after the agreement was ratified, during which time he would have had the right to make a selection and to have the same allotted if an allotting agent had been upon the ground, I am inclined to believe his heirs are equitably entitled to the land allotted him.

The agreement with the Iowa tribe of Indians, whereby they ceded certain specified lands to the United States and in which provision is made for allotments to said Indians, was made May 20, 1890 (26 Stat., 753). The said agreement provides, among other things:

> Art. 2. Each and every member of said Iowa tribe of Indians shall be entitled to select and locate upon said reservation or tract of country eighty acres of land which shall be allotted to such Indian in severalty. . . . .
>
> Each member of said tribe of Indians over the age of eighteen years, shall select his or her land, and the father, or if he be dead the mother, shall select the land herein provided for, for each of his or her children who may be under the age of eighteen years, and if both father and mother of a child under eighteen years of age shall be dead, then the nearest of kin, over eighteen years of age and an Iowa Indian, shall select and locate his or her land—or if such person shall be without kindred as aforesaid, then the Commissioner of Indian Affairs, or some one by him authorized, shall select and locate the land of such child.
>
> Art. 3. That the allotments provided for in this act shall be made at the cost of the United States by special agents appointed by the President for such purpose, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and within sixty days after such special agent or agents shall appear upon said reservation and give notice to the acting and recognized chief of said Iowa tribe of Indians, that he is ready to make such allotments; and if any one entitled to an allotment hereunder shall fail to make his or her selection within said period of sixty

days, then such special agent shall proceed at once to make such selection for such person or persons—which shall have the same effect as if made by the person so entitled; and when all of said allotments are made and approved, then the residue of said reservation, except as hereinafter stated, shall, as far as said Iowa Indians are concerned, become public land of the United States.

Art. 4. Upon approval of the allotments provided for herein by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect and declare that the United States does and will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or in case of his or her decease, of his or her heirs or devisees according to the laws of the state or territory where such land is located. . . . .

Art. 10. This agreement shall be in force from and after its approval by the Congress of the United States.

The name of Willie Dole appears among the signatures appended to this agreement. The agreement was ratified by Congress February 13, 1891, provision at the same time being made for the appointment of agents to make allotments, including the pay and expenses of such agents. No other provision is made for the heirs of deceased allottees than that found in article 4 of said agreement. The provisions of said agreement as to the selection and approval of allotments are practically the same as those found in sections 2 and 5 of the act of February 8, 1887 (24 Stat., 388), known as the general allotment act. Said section 2 provides, among other things:

That all allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child.

Section 1 of said act provides, among other things, that—

To each other single person under eighteen years now living, or who may be born prior to the date of the order of the President directing an allotment of the lands embraced in any reservation, one-sixteenth of a section.

On August 21, 1889, the Department addressed the following letter to the Commissioner of Indian Affairs:

I am in receipt of your communication of 20th instant, enclosing letter of Special Agent Hatchett, now engaged in allotting lands to the Yankton Indians, in which he states that he is allotting to all who were living at the date of the allotment act February 8, 1887, or who were born before the date of the order of the President, whether they have since died or not, and asks if this is correct.

You express the opinion that it was not the intention of the act to authorize allotments to members of any class not in being at the time allotments are actually made.

Your opinion is concurred in, and you will so instruct the Special Agent.

The provisions of the act of 1887, above quoted, were carried into sections 8 and 9 of the act of March 2, 1889 (25 Stat., 888), relating to allotments upon the Sioux Indian reservation. On April 15, 1892 (14 L. D., 463), the Commissioner of Indian Affairs requested—

to be advised as to whether allotments should be made to Indians of the Sioux Nation who had died since complying with the provisions of the 13th section of the Sioux act of March 2, 1889 (25 Stat., 888), as to election and filing their applications in the local land office.

In that case—

the special allotting agent advised the Indian Office that two of said applicants had died since complying with the provisions of said act and the parents of said children demanded that said allotments should be made for their use and benefit.

In response to the Commissioner's request, the Department transmitted an opinion of the Assistant Attorney-General, in which it was stated, among other things:

The attention of the Department is called to its communication, dated August 21, 1889, relative to the general allotment act of February 8, 1887 (24 Stat., 388), in which the opinion is expressed that said act did not intend that allotments should be made to members of any class "not in being at the time the allotments are actually made," and the Acting Commissioner requests "to be advised as to whether deceased Indians of the Sioux Nation who belonged to the class herein referred to should have allotments made to them upon the ceded lands of the Sioux Reservation."

After then stating that allotments should be made in such instances, the opinion continued:

Nor is this view in conflict with the departmental decision referred to relative to allotments under the act of 1887. In that case, there had been no selections made, and no applications filed in the local office as required by law, and the Acting Commissioner, in his letter of August 20, 1889, says: "Heads of families and single persons over 18 are required to select for themselves, and to do this must be alive. No provision is made for the selections of persons not alive, and I see nothing in the act which contemplates such selections." In the case presented selections have been made, and it only remains for the Department to carry out the wishes of those authorized to make the same to secure to the heirs of the applicants the use of the lands so selected.

I am therefore of opinion, and so advise you, that where selections of land have been received in the local land office under the provisions of said section thirteen of the act of 1889, and there are no prior valid claims thereto, the same should be duly allotted, and in case of the death of the allottees prior to such approval, patents should issue as required in said section eight.

On August 2, 1893, the Department rendered decision in the case of Florence May Ree (17 L. D., 142), an Indian allottee at the Yankton Agency, South Dakota, upon the question—

as to whether an allotment made in the field shall be confirmed to an allottee who dies between the date of the selection and the approval of the schedule by the Department.

It was said in that case:

The first question propounded came up in connection with allotments upon Sioux lands under the provisions of the act of March 2, 1889 (25 Stat., 888), and was submitted to the Assistant Attoney-General for his opinion. He held that in case of the decease of an allottee after selection and prior to approval thereof the allotment should be confirmed to the heirs of such allottee, and that opinion was adopted by the Department (14 L. D., 463). The provisions of said act of 1889 are the same as to the matter under consideration as those of the general allotment act of February 8, 1887 (24 Stat., 388), and the same rule should govern under both acts. You are advised that the Department holds that when an allottee dies after selection and prior to approval the allotment will upon approval be confirmed to the heirs of such deceased allottee.

The language of the agreement with the Iowa tribe of Indians is, that the members thereof "shall be entitled to select and locate" upon

a specified quantity of land. The right of each and every member of said tribe to an allotment was therefore not fixed by the ratification of said agreement, but only their right to make selection was thus fixed, and the approval of the allotment is contingent upon such selection. The "selection" contemplated by the agreement is evidently one made within a specified time after notice under the supervision of a regularly designated special agent. While authority is given such agent to make selection for an absentee entitled thereto—"which shall have the same effect as if made by the person so entitled"—there is no provision for his making a selection on behalf of a deceased person. The terms of the agreement, which follows the language of the general allotment act, contemplate a personal selection on the part of a person entitled thereto, or a selection in behalf of one in being or alive at the time. In the case under consideration, Willie Dole did not make a selection before he died, as required by the law; in fact, never made any selection at all. Hence, under the rule already laid down by the Department as above, the allotment in his name was improperly allowed, nor could it be confirmed to his heirs, he having failed to make a selection prior to his death, or anyone for him prior thereto.

I am therefore of opinion, and so advise you, that, under the ruling in the case of Lizzie Bergen, *supra*, the patent issued in the name of Willie Dole should be canceled.

Attention is hereby invited to the prayer of the widow of Willie Dole, that in the event of the cancellation of his patent she be allowed compensation for the improvements placed upon the land covered thereby. This is a matter for further investigation and action by the Commissioner of Indian Affairs.

Approved:

E. A. HITCHCOCK,
Secretary.

INDIAN LANDS—ISOLATED TRACT—ACT OF AUGUST 15, 1894.

JOSEPH S. WHITE.

The act of August 15, 1894, opening to settlement and entry certain lands in the Siletz Indian reservation, constitutes the only authority for the disposal of such lands, and provides for their disposal only under the mineral and townsite laws or to actual settlers under the homestead laws; hence said lands are not subject to the provisions of the law relating to the sale of isolated or disconnected tracts.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 18, 1901.* (C. J. G.)

Joseph S. White appeals from your office decision of October 29, 1900, refusing to order into market, as an isolated tract, lot 4 of Sec.

11, and lots 5, 6, and 11 of Sec. 2, T. 8 S., R. 11 W., Oregon City, Oregon, land district.

The authority for the sale of isolated tracts is found in section 2455 of the Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687), which 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.

The applicant contends that the lots in question are isolated tracts because of being surrounded by entries and allotments which were made more than three years prior to the date of his application, July 26, 1900; and that therefore, since they contain in the aggregate less than one quarter section, they are subject to disposal under said section 2455 as amended.

The tracts applied for are a part of the Siletz Indian reservation opened to settlement by the act of August 15, 1894 (28 Stat., 326), which provides:

> The mineral lands shall be disposed of under the laws applicable thereto, and the balance of the land so ceded shall be disposed of until further provided by law under the town-site law and under the provisions of the homestead law: *Provided, however*, That each settler, under and in accordance with the provisions of said homestead laws shall, at the time of making his original entry, pay the sum of fifty cents per acre in addition to the fees now required by law, and at the time of making final proof shall pay the further sum of one dollar per acre, final proof to be made within five years from the date of entry, and three years' actual residence on the land shall be established by such evidence as is now required in homestead proofs as a prerequisite to title or patent.

This act has reference and is limited to certain specified lands in the Siletz reservation, and it provides in specific manner for their disposal. By its terms the ceded lands in said reservation not subject to disposal under the mineral and town-site laws are to be disposed of under the provisions of the homestead laws. It seems clearly to have been intended by the proviso thereto to limit the disposal of such lands to actual settlers under the homestead laws only; and the specific provisions therein made as to such disposal are not consistent with any other view. This act constitutes the only authority for the disposal of these lands, unless the general provisions of section 2455 of the Revised Statutes, as amended by the act of February 26, 1895, can be construed as extending to such lands, thereby repealing to that extent the provisions of the act of August 15, 1894. If the later act can be held to operate as a repeal of the former, it must be by implication only, there

being no express words of repeal in the later act. Repeals by implication are not favored. In Frost *v.* Wenie (157 U. S., 46, 58), cited with approval in United States *v.* Healey (160 U. S., 136, 147), it was said:

> It is well settled that repeals by implication are not to be favored. And where two statutes cover, in whole or in part the same matter, and are not absolutely irreconcilable, the duty of the court—no purpose to repeal being clearly expressed or indicated—is, if possible, to give effect to both. In other words, it must not be supposed that the legislature intended by a statute to repeal a prior one on the same subject, unless the last statute is so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject, and, therefore, to displace the prior statute.

The provisions of section 2455 of the Revised Statutes, as amended by the act of February 26, 1895, are not absolutely irreconcilable with the provisions of the act of August 15, 1894, and it is possible to give effect to the provisions of both acts. In the case of W. D. Harrigan (29 L. D., 153), which was similar in every material respect to the case at bar, the Department held that the land there in question was not subject to the provisions of the amended section 2455, but to disposal under the homestead law only. It must be held therefore that the land here in question is not subject to the provisions of the law relating to the sale of isolated or disconnected tracts. See cases of William C. Quinlan (30 L. D., 268) and State of Utah (30 L. D., 301).

The decision of your office is affirmed.

FOREST RESERVATION—LIEU SELECTION—ACT OF JUNE 4, 1897.

INSTRUCTIONS.

Before any selection under the exchange provisions of the act of June 4, 1897, can be approved, whether the tract relinquished as the basis therefor is covered by an unperfected *bona fide* claim or by a patent, it must be duly determined that the land selected was, at the time of selection, of the character and condition subject thereto, and also that the tract relinquished was, at the same time, subject to the relinquishment. Such determination, however, in any case wherein the tract relinquished is covered by a final certificate, does not call for or require the issuance of a patent for such relinquished tract, but is instead, in effect, a determination that patent shall not issue upon such certificate, that the full legal title to the tract is not to pass out of the government by virtue of the certificate or of the law under which the same was issued, and that whatever right or title had previously passed from the government has been returned to it.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 19, 1901.* (E. B., Jr.)

The Department is in receipt of your letter of the 20th ultimo, asking to be advised whether, in case of a selection under the exchange provisions of the act of June 4, 1897 (30 Stat., 34, 36), in lieu of a tract of

land for which patent has not issued, but which is covered by a final certificate—

a relinquishment can be allowed [accepted] and patent issued for the selected tract, leaving the question of actual compliance with law and the proper issue of final certificate undecided and to be thereafter passed upon in regular order. In other words, can a lieu selection be allowed and patent issued therefor, before the validity of the final certificate on the original entry or claim is finally passed upon by the issue of patent therefor—on the presumption of regularity in the proceedings in the local offices on which the validity of the final certificate depends?

You are advised that before any selection under the said provisions of the act of June 4, 1897, can be approved, whether the tract relinquished as the basis therefor is "covered by an unperfected bona fide claim or by a patent," it must be duly determined that the land selected was, at the time of selection, of the character and condition subject thereto, and also that the tract relinquished was, at the same time, subject to the relinquishment. Such determination, in any case wherein the tract relinquished is covered by a final certificate (which case belongs to the first of the two classes of cases indicated in the statute), does not, however, call for or require the issuance of a patent for such relinquished tract, but is, instead, in effect, a determination that patent shall not issue upon such certificate, and that the full legal title to the tract is not to pass out of the government by virtue of the certificate or of the law under which the same was issued, and that whatever right or title had previously passed from the government has been returned to it.

If, as your letter seems to suggest, an unperfected bona fide claim upon which final certificate has issued must be "finally passed upon by the issue of patent therefor," before the relinquishment thereof and the selection based thereon can be accepted and approved, respectively, it would seem to follow that a similar course must be pursued, as well, in case of such a claim upon which certificate had not issued at the date of the relinquishment and, perhaps, could not issue under the law governing the claim for several years thereafter; in other words, that in all cases of selections based upon relinquishments of unperfected bona fide claims, such claims must be carried to final certificate, and "finally passed upon by the issue of patent therefor," before the selection could be approved.

It will scarcely be seriously contended that the law or good administration thereof requires or justifies any such course.

USE OF TIMBER ON NON-MINERAL PUBLIC LAND—ACT OF MARCH 3, 1901.

INSTRUCTIONS.

Commissioner Hermann to Special Agents of the General Land Office, March 20, 1901.

The act of Congress approved March 3, 1901, entitled "An act to amend chapter five hundred and fifty-nine of the Revised Statutes of the United States," approved March third, eighteen hundred and ninety-one, provides as follows:

That the provisions of chapter five hundred and fifty-nine of the Revised Statutes of the United States, approved March third, eighteen hundred and ninety-one, limiting the use of timber taken from public lands to residents of the State in which such timber is found, for use within said State, shall not apply to the south slope of Pryor Mountains, in the State of Montana, lying south of the Crow reservation, west of the Big Horn river, and east of Sage creek; but within the above described boundaries the provisions of said chapter shall apply equally to the residents of the States of Wyoming and Montana, and to the use of timber taken from the above-described tract in either of the above-named States.

Said act extends to citizens of Montana and Wyoming the privilege of taking timber under the provisions of said act of March 3, 1891, from the tract specified in the State of Montana for use in either of said States.

In taking such timber the rules and regulations prescribed by the circular of February 10, 1900 (29 L. D., 572), containing "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), as extended by the act of February 13, 1893 (27 Stat., 444)," must be observed and the timber must be taken for purposes specified in said circular.

Approved:

E. A. HITCHCOCK,
Secretary.

COMMUTATION OF HOMESTEAD ENTRIES—ACT OF JANUARY 26, 1901.

INSTRUCTIONS.

Commissioner Hermann to registers and receivers, United States Land Offices, March 21, 1901.

Your attention is called to the provisions of the act of Congress of January 26, 1901 (Public No. 22), entitled "An act to allow the commutation of homestead entries in certain cases," which reads as follows:

That the provisions of section twenty-three hundred and one of the Revised Statutes of the United States, as amended, allowing homestead settlers to commute their homestead entries, be, and the same hereby are, extended to all homestead settlers affected by or entitled to the benefits of the provisions of the act entitled "An act

providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose," approved the seventeenth day of May, anno Domini nineteen hundred: *Provided, however*, That in commuting such entries the entryman shall pay the price provided in the law under which original entry was made.

You will observe that this act extends the provisions of Section 2301 U. S. R. S., as amended, allowing homestead settlers to commute their homestead entries to all homestead settlers affected by or entitled to the benefits of the provisions of the Free Homestead Act of May 17, 1900 (31 Stat., 179), and contains the proviso—

That in commuting such entries the entryman shall pay the price provided in the law under which original entry was made.

This proviso is general in its terms and applies to all lands in ceded Indian reservations affected by said act of May 17, 1900.

The following is a list of such ceded Indian reservations, showing the acts under which the respective reservations were opened to homestead entry and the price per acre fixed by statute:

NAME.	STATE.	ACT.	PRICE PER ACRE.
Great Sioux	North and South Dakota.	March 2, 1899, Sec. 21. (25 Stat., 888)	$1.25, $.75 or $.50, according to date land was disposed of.
Ponca	Nebraska	do	Do.
Chippewa	Minnesota	January 14, 1899, Sec. 6. (25 Stat., 642)	$1.25
Sisseton and Wahpeton	North and South Dakota.	March 3, 1891, Sec. 30. (26 Stat., 1038)	$2.50
Fort Berthold	North Dakota	March 3, 1891, Sec. 25. (26 Stat., 1035)	$1.50
Crow	Montana	March 3, 1891, Sec. 34. (26 Stat., 1043)	$1.50
Coeur d'Alene	Idaho	March 3, 1891, Sec. 22. (26 Stat., 1031)	$1.50
Sac and Fox and Iowa	Oklahoma	February 13, 1891, Sec. 7. (26 Stat., 759)	$1.25
Absentee Shawnee, Pottawatomie and Cheyenne and Arapahoe.	do	March 3, 1891, Sec. 16. (26 Stat., 1026)	$1.50
Cherokee, Pawnee and Tonkawa.	do	March 3, 1893, Secs. 10 and 13. (27 Stat., 644)	$2.50, $1.50 and $1.00, according to location.
Kickapoo lands	do	March 3, 1893, Sec. 3. (27 Stat., 563)	$1.50
Yankton Sioux	South Dakota	August 15, 1894. (28 Stat., 319)	$3.75
Nez Perce	Idaho	August 15, 1894. (28 Stat., 326–332)	$3.75
Siletz	Oregon	August 15, 1894. (28 Stat., 323 and 326)	$1.50
Southern Ute	Colorado	February 20, 1895. (28 Stat., 678)	$1.25

Under section 2301, R. S. U. S., as amended by the act of March 3, 1891 (26 Stat., 1095), homestead entries on land in the ceded portion of the Great Sioux reservation in South Dakota, based upon settlement made subsequent to the act of March 3, 1899 (30 Stat., 1102), might have been commuted prior to the act of January 26, 1901, upon payment of $1.25 per acre, including the final homestead commissions, in addition to the Indian price per acre; but the act last referred to is construed to provide a general plan for the commutation of homestead entries on the ceded Indian reservations above named, making the price per acre fixed by the respective laws under which such reservations were opened to homestead entry the price to be paid upon the commutation of such entries, thus superseding the special law affecting the commutation of homestead entries in the Great Sioux reservation in South Dakota, above referred to.

In case of the commutation subsequent to January 26, 1901, of a homestead entry in any of the ceded reservations above named, the entryman will be required to pay the price per acre fixed by the act under which the land entered became subject to homestead entry.

Approved:

E. A. HITCHCOCK,
Secretary.

USE OF TIMBER ON NON-MINERAL PUBLIC LAND—ACT OF MARCH 3, 1901.

INSTRUCTIONS.

Commissioner Hermann to Special Agents of the General Land Office, March 22, 1901.

The act of Congress approved March 3, 1901 (Public No. 160), provides—

> That 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, 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 "Nevada" in said amended act, insert the words "California, Oregon and Washington."

This act extends to residents of the States of California, Oregon and Washington the privilege of taking timber from public lands in said States under the provisions of said act of March 3, 1891.

In taking such timber the rules and regulations contained in the circular of February 10, 1900 (29 L. D., 572), prescribing "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), as extended by the act of February 13, 1893 (27 Stat., 444)," must be observed and the timber must be taken for the purposes specified in said circular.

Approved:

E. A. HITCHCOCK,
Secretary.

CITY OF ENID.

Motion for review of departmental decision of November 23, 1900, 30 L. D., 352, denied by Secretary Hitchcock March 23, 1901.

ABANDONED MILITARY RESERVATION—STATE SELECTION—SECTION 2, ACT OF FEBRUARY 13, 1891.

ROUSE *v.* STATE OF MONTANA.

The certification of lands by the land department, acting within the scope of its authority, deprives the Department of all jurisdiction over them.

The provision in section two of the act of February 13, 1891, for the reversion of the lands granted by said section in the event of non-use, is a condition subsequent, and can be taken advantage of only by the grantor.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *March 27, 1901.* (E. J. H.)

The SE. ¼ of SE. ¼ of Sec. 10, the E. ½ of NE. ¼, and NE. ¼ of SE. ¼ of Sec. 15, T. 2 S., R. 6 E., Bozeman, Montana, land district, are a part of the former Fort Ellis military reservation subject to disposition under section 2 of the act of February 13, 1891 (26 Stat., 747), which provides—

> That there is hereby granted to the State of Montana one section of said reservation, to be selected according to legal sub-divisions so as to embrace the buildings and improvements thereon, to be used by said State as a permanent militia camp-ground, or for other public purpose in the discretion of the State legislature: *Provided*, that whenever the State shall cease to use said lands for public purposes the same shall revert to the United States.

On November 28, 1891, the State of Montana made selection of a section, containing 640 acres, which embraced the lands in question. This selection was approved, subject to the condition named in the act, and on April 26, 1892, said approved selection was certified to the State.

On August 17, 1900, Nelson L. Rouse filed his homestead application for the above-described tracts, which was rejected by the local officers because of the prior selection thereof by the State of Montana. Rouse, at the same time, filed his affidavit of contest against the State's selec-

tion of said tract, alleging therein that the State is not using, and has not for about four years used, any of said lands for encampment, or any other public purpose, and that, under the terms of the grant, the land had reverted to the United States; and he asked a hearing. No hearing was, however, ordered, and Rouse appealed.

On October 4, 1900, your office decision held that, where a grant is made by the government upon conditions, an individual can not attack the title on the ground that the grantee has failed to perform a condition named; that the legal title having passed from the United States, the jurisdiction of the land department over the same has ceased. The rejection of Rouse's application to enter the land was affirmed and his application to contest the State's selection was denied, from which action Rouse has appealed to the Department.

It is well settled that the certification of lands by the land department, acting within the scope of its authority, deprives the Department of all jurisdiction over them. Garriques *v.* Atchison, Topeka and Santa Fe Railroad Company (6 L. D., 543).

The provision in section 2 of the act of February 13, 1891, for reversion of the lands in the event of non-use 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 the grant remains in effect binding upon the government and third parties.

Your office decision rejecting the application by Rouse is affirmed.

JONES *v.* PUTNAM.

Petition for rehearing in this case, in which departmental decisions were rendered October 31, 1898, 27 L. D., 575, and, on motion for review, January 9, 1899, 28 L. D., 11, denied by Secretary Hitchcock March 29, 1901.

RIGHT OF WAY—INDIAN RESERVATION—REGULATIONS OF APRIL 18, 1899, AMENDED.

REGULATIONS.

Acting Secretary Ryan to the Commissioner of Indian Affairs, April 8, 1901.

Paragraph 18 of the regulations issued April 18, 1899 (28 L. D., 457), under the act of March 2, 1899 (30 Stat., 990), is hereby amended as follows:

18.—In filing maps of location for approval under this act, the same should therefore be accompanied by the affidavit of the president or other principal officer of the company, defining the purpose, intent, and ability of the company in the matter of the construction of the proposed road. Further, each map should be accompanied by evidence of the service of an exact copy thereof and the date of such service, as follows:

1.—In the case of lands in any Indian reservation, or reserved for any purpose in connection with the Indian service, upon the agent or other officer in charge.

2.—In the case of lands of one of the Five Civilized Tribes in Indian Territory, upon the principal officer of the tribe and also upon the Indian agent in charge.

3.—In the case of an allotment not within a reservation and not upon lands of one of the Five Civilized Tribes, upon the agent or other officer under whose supervision such allotment falls and upon the allottee or owner, if living upon or in the vicinity of the allotment, and if not living thereon or in that vicinity, upon the person in actual possession of the allotment, and if no person be in actual possession thereof, then by posting in a conspicuous place upon the land a concise notice of the application for the right of way across the same.

4.—In case of an allotment within a reservation or upon lands of one of the Five Civilized Tribes, in addition to the service required by subdivisions 1 or 2 hereof, whichever is applicable, a concise written notice of the application for a right of way across the allotment shall also be served upon the allottee or owner if living upon or in the vicinity of the allotment, and if not living thereon or in that vicinity, upon the person in actual possession of the allotment, and if no person be in actual possession thereof, then by posting in a conspicuous place upon the land, which notice shall recite the fact that a copy of the map of the proposed right of way may be inspected on application to the agent or officer in charge.

5.—When personal service upon an allottee or owner of allotted land is not had, service under subdivisions 3 and 4 hereof shall be accompanied by a certificate of the agent or other officer under whose super-

vision the allotment falls, stating the existence of the specific facts justifying the particular manner of service employed.

This amendment shall take effect immediately, but service had at any time before the expiration of thirty days herefrom in conformity with the original regulations will be deemed sufficient, and thus no confusion need result from the amendment.

INDIAN ALLOTMENT—SECTION 4, ACT OF FEBRUARY 8, 1887.

REGULATIONS.

Secretary Hitchcock to the Commissioner of the General Land Office, April 10, 1901.

In the case of Lizzie Bergen (30 L. D., 258) it was held that the issuance of a first or trust patent under the Indian allotment law is to be likened unto the issuance of a final or patent certificate under the public land laws, leaving the legal title in the United States and placing the equitable title in the Indian allottee; and that until the legal title passes out of the United States by the issuance of the ultimate or final patent, the allotment law is in process of administration, and the Secretary of the Interior possesses authority and jurisdiction, upon appropriate notice, to investigate and determine the legality of the allotment and to take such action as will prevent an improper or unlawful allotment being carried to final patent. Rules governing the administration of section four of the Indian allotment act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 749), were approved June 27, 1899 (28 L. D., 564 and 569). Further rules governing the investigation and cancellation of Indian allotments where first or trust patents have been issued were made in the Lizzie Bergen decision (30 L. D., 258, 267–8).

In the investigation of charges preferred by individuals against allotments where first or trust patents have been issued, the following additional rules will be observed:

1. The charges must be filed in the proper local land office in the form of a duly corroborated affidavit, clearly setting forth the specific grounds for such charge. The local officers will forward the papers to the General Land Office, which will at once give the Indian Office full information thereof.

2. In those cases where the charge involves only such matters as are, by the regulations of June 27, 1899, committed to the determination of the General Land Office, that office will cause a preliminary investigation as to the truth and merits of the charge to be made by a special agent, and the charge will be dismissed unless there appears to be strong probability that it is true and will require a cancellation of the allotment.

3. In those cases where the charge involves only such matters as

are by said regulations committed to the determination of the Indian Office, the papers will be forwarded to that office, where such an investigation shall be made as will enable that office to ascertain the probable truth and merits of the charge, and the charge will be dismissed unless it appears to be sustained to such an extent as to probably require the cancellation of the allotment.

4. In those cases where the charges involve matters of both classes, the preliminary investigation will be conducted by the General Land Office, the Indian Office furnishing any information it may have or be able to obtain in respect to the allotment.

5. Where there is a strong probability that the charge is true and will require a cancellation of the allotment, a hearing shall be had before the proper local land officers, after due notice to all parties. The taking of testimony and other proceedings in such hearings will be in accordance with the rules of practice governing proceedings before local land offices.

6. Persons presenting charges against an Indian allotment must assume and pay the expense of the hearing, if one is ordered, but they can not acquire a preference right to make entry of the land upon cancellation of the allotment. Section 2 of the act of May 14, 1880 (21 Stat., 140), does not apply to proceedings of this character.

7. These regulations shall take effect at once, and it is directed that proceedings in all cases now pending, wherein a hearing has not been had, shall be suspended until the preliminary investigations herein provided for shall have been made.

SOLDIERS' ADDITIONAL HOMESTEAD ENTRY—SECTION 7, ACT OF MARCH 3, 1891.

SIERRA LUMBER COMPANY, TRANSFEREE.

A soldiers' additional homestead entry upon which the final commissions have not been paid and the final receipt has not issued is not within the confirmatory provisions of section seven of the act of March 3, 1891.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 13, 1901.* (G. B. G.)

There are eighty acres of land involved in this case, being the N. ½ of the SW. ¼ of Sec. 27, T. 27 N., R. 6 E., Susanville land district, California. October 1, 1875, James H. Schouten made soldiers' additional entry therefor, based on an original entry theretofore made by him for 110.78 acres of land. At the time of making his additional entry he paid to the receiver at the local land office $6.85, this being the amount of fee due the United States and commissions due to the register and receiver upon the allowance of the entry. He also paid to such receiver, at the same time, the further sum of $38.48 as excess

for the aggregate acreage covered by his original and additional entries over and above one hundred and sixty acres. The receiver's separate receipts for these sums issued to Schouten at the time of payment. But the commissions, payable to registers and receivers upon homestead entries under paragraph 3 of section 2238 of the Revised Statutes, "when the claim is finally established and the certificate therefor issued as the basis of a patent," were not paid or tendered at the time of the entry or subsèquently, and neither the receiver's final receipt nor the register's final certificate of entry has issued.

By sundry mesne conveyance and judicial proceedings whatever rights were acquired by said additional entry passed to and became vested in the Sierra Lumber Company, in so far as such conveyances and proceedings could transfer an interest in government land upon which final payment had not been made.

By direction of your office, March 11, 1890, Schouten was notified that he would be allowed sixty days within which to approximate his entry to one hundred and sixty acres, and the Sierra Lumber Company was advised of this action. The approximation was not made, and, November 7, 1894, your office held the entry for cancellation. The parties in interest had due notice of this action, but did not appeal therefrom, and, on April 15, 1895, the entry was canceled.

February 19, 1900, attorneys for the Sierra Lumber Company addressed a communication to your office, suggesting that under the present rulings of the Department it would seem that the cancellation of said entry was error, and requesting that the entry be reinstated and passed to patent under the confirmatory provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095, 1098–1099). By decision of October 10, 1900, this request was denied by your office, and the company has appealed to the Department.

The appellant relies upon both the body and proviso of section 7 of said act of March 3, 1891, for a confirmation of this entry. So much of said section as is applicable to this case is as follows:

> all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless, upon an investigation by a government agent, fraud on the part of a purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance: *Provided*, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

Under the present practice no final proof as such is required upon a soldiers' additional entry. Upon the presentation of an application at the local office for such an entry, in cases like the present one, where the soldiers' additional right has not been theretofore certified, the rule is that the local officers shall make a proper notation on the records of their office, showing the pendency of the application and the consequent segregation of the land. The application must then be forwarded to your office, where it will be either rejected or authorized. If authorized, the register and receiver will upon notice thereof require the applicant to pay the same fee and commissions as in cases of original homestead entry, and the receiver will issue receipt for the money paid. Then, to complete the transaction, the applicant will pay the usual final commissions on the tract entered, for which the receiver will issue his receipt and the register his final certificate of entry. (See circular of the General Land Office of July 11, 1899, pages 29–30.)

This was not the rule when Schouten's soldiers' additional entry was allowed. The practice was then governed by a circular of your office, addressed to registers and receivers of United States land offices, dated March 28, 1873, the concluding paragraphs of which are as follows:

> Where persons entitled to the privilege shall apply to enter additional land by virtue of the 2d section of the act of June 8, 1872, or the amendatory act of March 3, 1873, you will, in case the party had previously made final proof upon his original homestead entry, issue to the applicant, upon the proper proof of military service, a final certificate of the current number and date, referring thereon to the number of the original entry and the previous final certificate.
>
> In case the party has not made proof on his original homestead entry when he applies for additional land, you will allow him to make the additional entry, and forward the application and other papers, giving them the current number of homestead entries, referring thereon to the original entry; then, when the party makes proof on the original entry, you will issue one final certificate embracing the tracts in both entries, referring thereon to the additional as well as the original entry, so that one patent may issue for the lands in both entries.

At the date of Schouten's application he had not made proof on his original homestead entry. This fact explains why the final commissions on the additional entry were not paid, why final certificate thereon did not issue, and why the entry papers were forwarded to your office. After the application and other papers had been forwarded to your office, as provided by the circular quoted, several questions arose as to the legality of the additional entry, and it was finally canceled, April 15, 1895, as above stated. It is thus not only clear that the final commissions on this entry were never paid, and that "the receiver's receipt upon the final entry" of the tract has never issued, but it is also clear why these things were not done; and it appearing that Schouten's failure to complete this entry was not due to any fault of the land department, as contended on appeal, it must be held that the entry was not confirmed by the act of March 3, 1891.

The cases of Sierra Lumber Co. (22 L. D., 690), and David Walters (24 L. D., 58), cited in support of the appeal, are not controlling. It may be, as contended, that these cases are like the present one, but they are not so stated, and the rulings therein made must be confined to the facts stated. It is said in these cases that the entryman at the time of entry paid all the fees and commissions required by law. This is not true of the present case.

The decision appealed from is affirmed.

LIEU SELECTIONS UNDER THE ACT OF JUNE 4, 1897.

KERN OIL COMPANY ET AL. *v.* CLARKE.

A person making selection under the act of June 4, 1897, who has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, acquires a vested interest therein and is to be regarded as the equitable owner thereof.

The right to a patent under said act, once vested, is, for most purposes, the equivalent of a patent issued; and when in fact issued, the patent relates back to the time when the right to it became fixed, and takes effect as of that date.

Questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

The land department has the jurisdiction and power, either of its own motion or at the instance of third parties, at any time before patent is issued, and after appropriate notice, to institute and carry on such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. But the determination must relate to the time when the selector has done all that is required of him in order to perfect his right to a patent.

The essential requirements to be complied with by a person seeking title to a tract of land in exchange for land covered by a patent in a forest reservation, are:

(1) That he must relinquish to the government the tract in the forest reservation, and submit satisfactory evidence respecting the title thereto;

(2) That he must make selection of the tract desired in exchange for the tract relinquished, and accompany the selection by proof showing the selected land to be of the condition and character subject to selection.

In so far as existing conditions appear from the land office records, no showing by the selector need be made, because the officers of the government must take notice of the public records; but as to conditions the existence or non-existence of which can not be determined by anything appearing upon these records, the required evidence must be furnished by the selector.

See departmental decision, of even date herewith, in the case of the Gray Eagle Oil Company *v.* Clarke, 30 L. D., 570.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 25, 1901.* (A. B. P.)

The act of Congress approved June 4, 1897 (30 Stat., 11, 34–6), among other things, contains various provisions with respect to forest

reservations, established and to be established under the act of March 3, 1891 (26 Stat., 1095, 1103), one of which is the following:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the law respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

By a subsequent act, approved June 6, 1900 (31 Stat., 588, 614), it was declared:

That all selections of land made in lieu of a tract covered by an unperfected bona fide claim, or by a patent, included within a public forest reservation, as provided in the act of June fourth, eighteen hundred and ninety-seven, ... shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry not exceeding in area the tract covered by such claim or patent: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof.

December 14, 1899, C. W. Clarke filed in the local office at Visalia, California, two separate selections of lands, in lieu of an equal quantity of lands of which he had become the owner, covered by a patent from the United States and situate within the limits of a public forest reservation. As these selections were filed before October 1, 1900, they are to be governed by the original act, and a consideration of the amendatory act is not here necessary. One of the selections embraces the N. ½ of the SE. ¼ of Sec. 4, T. 29 S., R. 28 E., M. D. M., and the other the S. ½ of the NE. ¼ of said section 4. That the lands within the forest reservation, in lieu of which the selections were made, were seasonably and properly relinquished to the United States, and that the relinquishment was accompanied by a showing of full and unincumbered title in the selector to the relinquished lands, are matters which are not questioned by protestants or your office. Each selection was by an application made out upon a printed form in which no changes were made other than the filling in of blanks. The form of application so used is as follows:

Act of June 4, 1897 (30 Stat., 36).

SELECTION IN LIEU OF LAND IN THE .... FOREST RESERVE, ... LAND DISTRICT, STATE OF ..... CREATED ..... --; .....

To the REGISTER AND RECEIVER,
United States Land Office,

....., ...

GENTLEMEN: In accordance with the provisions of an act of Congress approved June 4, 1897, entitled "An act making appropriations for sundry civil expenses of

the Government for the fiscal year ending June 30, 1898, and for other purposes," I, ... of ..... County, State of ....., do hereby select and locate the following described tract of ..... land, to wit: .....

.....

.....

In lieu of

.....

.....

The said last mentioned tract is included within the limits of the ..... Forest Reservation in ....., and being the owner, and desiring to select other land in lieu of said tract, I made and executed a deed of reconveyance thereof to the United States on the .... day of ....., 189., as provided by the said Act of June 4, 1897, which said deed has been recorded in the proper county. I therefore ask that a United States patent issue to me for the land hereby selected.

Witness my hand this .... day of ....., 18...

....

Post Office Address ....

The application or selection was accompanied in each instance by an affidavit also made out upon a printed form. Portions of the printed matter in this form were erased and interpolations were made in other portions thereof before the affidavit was verified or filed. The form of affidavit so used, with the erasures shown in small capitals, and the interpolations shown in italics, is as follows:

(Act June 4, 1897.)

AFFIDAVIT OF NON-MINERAL CHARACTER AND NON-OCCUPANCY.

U. S. LAND OFFICE,

.....

.... being duly sworn according to law deposes and says: that he is over the age of 21 years, a citizen of the United States and of the State of ..... and a ..... by ..... and is well acquainted with the character of the following described land and with each and every legal subdivision thereof, to wit:

.....

.....

THAT THERE IS NO OCCUPATION OF SAID LAND ADVERSE TO THE SELECTION THEREOF UNDER THE ACT OF JUNE 4, 1897, BY .... That the tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under the coal or mineral land laws of the United States; *This affidavit is made upon the evidence found upon the surface of the ground. Deponent does not undertake to express any opinion as to what may be under the ground.*

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge, any placer, cement, gravel, or other valuable mineral deposits; THAT NO PORTION OF SAID LAND IS CLAIMED FOR MINING PURPOSES UNDER THE LOCAL CUSTOMS OR RULES OF MINERS OR OTHERWISE; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining

title to mineral land, but with the object of securing said land for agricultural purposes, *so far as deponent knows;* and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof, and that his post-office address is .....

....

February 6, 1900, the Kern Oil Company filed a protest against both selections. The allegations of the protest and of the affidavits accompanying the same, are, in substance and effect, as follows: That the Kern Oil Company and its predecessors in interest were, at the date of the filing of said selections, and have been continuously since that time, in the possession and occupancy of the lands covered thereby, claiming, working, and developing the same under certain placer mining locations, made June 11, 1899, known as the "Fossil" and "June Bug" claims; that said lands are of great value for the deposits of petroleum oil contained therein, were known to be valuable for such deposits when the said selections were filed, and are worthless for agricultural purposes; that the lands lie in one of the greatest mineral oil belts in the State of California, and in the immediate vicinity of other valuable oil mining claims; that the oil-bearing formation underlying the land is flat or horizontal, known as a blanket formation; that Clarke well knew the mineral character of the lands when he selected the same; and that the filing of said selections was an endeavor on his part to fraudulently obtain title to mineral lands under the act of June 4, 1897.

February 12, 1900, J. F. Elwood *et al.* filed separate protests against said selections. Possession and occupancy of the lands for oil mining purposes and their known mineral character, at the date when the selections were filed, as well as the worthlessness of the lands for agricultural purposes, are alleged in these protests substantially as in the former protest, and it is further stated that the lands are worth $250 cash per acre on account of the mineral oils contained in them.

The protests and accompanying affidavits were, in due course of business, forwarded to your office, accompanied by the recommendation of the local officers that a hearing be had thereon.

Additional affidavits were subsequently filed on behalf of the protestants. These relate chiefily to work done on the lands by the mineral claimants after the protests were filed, in the boring of wells and the further development of the mining claims, and are generally to the effect that large quantities of oil have been and are being taken from these claims, and that the lands covered thereby, as well as those in the vicinity thereof, have become and are immensely valuable on account of their oil-bearing character.

By decision of December 18, 1900, your office held that the allegations made in the protests against the selections should be investigated,

and gave directions for a hearing. The principles announced in the decision as a guide for the conduct of the hearing, briefly stated, are:

(1) That rights predicated upon the act of June 4, 1897, do not attach to lands selected thereunder until the selector has done all that he is by the law required to do, and the selection has been approved by the land department;

(2) That in the present case the selections have not yet been approved by the land department, and consequently the lands embraced therein have remained open to occupancy or exploration for minerals, and evidence with respect to their present condition, as to whether vacant or occupied, and with respect to their present character, as to whether known to contain valuable mineral deposits or not, is admissible upon an investigation had for the purpose of determining whether or not the selections shall be approved.

Clarke has appealed to the Department. His principal contentions, substantially stated, are:

(1) That the equitable title to lands selected under the act of June 4, 1897, in lieu of patented lands relinquished, vests at the date of selection, and can not be impaired by subsequent mineral discoveries in the lands;

(2) That lands are vacant and open to settlement, and hence subject to selection under said act, when no other claim thereto is disclosed by the land office records, unless, at the date of selection, they are known to contain minerals to such an extent as to make them more valuable on account thereof than for agricultural purposes;

(3) That the protests do not show the selected lands to have been covered by any other claim of record, or to have been known to be more valuable for mineral than for agricultural purposes, at the date when the selections were filed, and are therefore insufficient to justify a hearing.

The opposing contentions of the protestants, appellees, substantially stated, are:

(1) That all lands selected under said act in lieu of relinquished forest reserve lands covered by patent remain open to exploration under the mining laws until the approval of the selection by the land department, and if at any time after the selection and before its approval, the selected land is discovered to contain valuable mineral deposits, its mineral character will be thereby established and the selection defeated.

(2) That lands are vacant and open to settlement, and therefore subject to selection under said act, only when they are unoccupied by others, are free from other claim of record, and are non-mineral in character;

(3) That the protests in this case show, *prima facie*, that the selected lands were occupied by others claiming possessory title thereto under

mining locations duly made and legally asserted, at the date when the selections were filed; that the lands were then known to be mineral in character; and that petroleum oil in large quantities and of great value has been since developed thereon.

It is admitted by the appellant that by reason of mining developments on the lands since the selections were filed, they are now known to be very valuable for the deposits of mineral oils contained in them, and that the protestants, appellees, are in the possession thereof and are daily extracting large quantities of oil therefrom.

Extensive and elaborate printed briefs on behalf of the contending parties have been filed, and the case has been argued orally with great ability and earnestness by counsel on both sides.

The first general legislation on the subject of forest reservations is found in section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), which reads as follows:

> That the President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof.

By virtue of the authority thus conferred numerous forest reservations have been established in various States and Territories. As was said in the case of F. A. Hyde *et al.* (28 L. D., 284, 266):

> By the establishment of these reservations many claimants and owners of lands within the reservation boundaries were placed in a state of greater or less isolation from market and business centers, and from church, school, and social advantages, and the value of their property for residence and other purposes was thereby impaired. The withdrawal from settlement and other disposition of the surrounding public lands precluded such persons from obtaining the advantages consequent upon the continuing and increasing settlement which was anticipated when their claims were initiated or their title acquired.

It was with the view to relieving the situation thus described and to promoting the objects for which the reservations were established, that the act of June 4, 1897, was passed. Those objects were, as declared in that act, to improve and protect the forests in the reservations for the purpose of securing conditions favorable to a continuous water flow and to a permanent supply of timber for the use and necessities of the citizens of the United States. Manifestly the government would be greatly assisted in accomplishing the objects desired by securing exclusive ownership and control of the lands within the reservations. The act in question contains an offer by the government to exchange any of its lands that are vacant and open to settlement for a like quantity of lands, within a forest reservation, for which a patent has been issued, or to which an unperfected *bona fide* claim has been acquired. If he desires to accept the offered exchange, the owner or claimant of the tract in the forest reservation can relinquish the same to the govern-

ment and select a tract of public land of like quantity in lieu of the tract relinquished. He is to make the selection, and in doing so he is confined to lands which are both vacant and open to settlement. They must not be occupied by others, nor reserved from settlement on account of their known mineral character or otherwise. With these exceptions the field for selection, except when otherwise specially provided, is co-extensive with the limits of the public domain. Further restrictions are imposed by the amendment of June 6, 1900, but they are not applicable to this case.

When do rights under the selection become vested? In the disposition of the public lands of the United States, under the laws relating thereto, it is settled law: (1) That when a party has complied with all the terms and conditions necessary to the securing of title to a particular tract of land, he acquires a vested interest therein, is regarded as the equitable owner thereof, and thereafter the government holds the legal title in trust for him; (2) that the right to a patent once vested, is, for most purposes, equivalent to a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed; and (3) that the conditions with respect to the state or character of the land, as they exist at the time when all the necessary requirements have been complied with by a person seeking title, determine the question whether the land is subject to sale or other disposal, and no change in such conditions, subsequently occurring, can impair or in any manner affect his rights.

The authorities in support of these propositions are numerous. It will be sufficient to refer to a few of them.

In Carroll *v.* Safford (3 How., 441, 461) it was said:

> Now, lands which have been sold by the United States can in no sense be called the property of the United States. They are no more the property of the United States than lands patented. So far as the rights of the purchaser are considered, they are protected under the patent certificate as fully as under the patent. . . . . When sold, the government, until the patent shall issue, holds the mere legal title for the land in trust for the purchaser; and a second purchaser would take the land charged with the trust.

In French *v.* Spencer (21 How., 228) it appeared that a military land warrant had been located on a tract of land, which thereafter, but before the issue of the patent, had been sold by the locator. The act under which the land warrant was issued provided that no claim for military bounty should be assignable or transferable until after the patent had been issued, and that all sales, mortgages, or contracts made prior thereto should be void. It was held that rights under the land warrant vested upon location, that the patent when issued related back to the time of the location, and that the conveyance intermediate the location and patent was valid and carried the title.

In Witherspoon *v.* Duncan (4 Wall., 210, 218) the court held as follows:

In no just sense can lands be said to be public lands after they have been entered at the land office and a certificate of entry obtained. If public lands before entry, after it they are private property. If subject to sale, the government has no power to revoke the entry and withhold the patent. A second sale, if the first was authorized by law, confers no right on the buyer and is a void act. . . . . The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the lands cease to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser who has the equitable title.

In Stark *v.* Starrs *et al.* (6 Wall., 402) the plaintiffs below, Starrs *et al.*, claimed title under a patent based upon an act of Congress of May 23, 1844 (5 Stat., 657), known as the town site act, and Stark, the defendant below, claimed under a patent based upon the act of September 27, 1850 (9 Stat., 496), known as the Oregon donation act. The town site patent was issued December 7, 1860, and the patent under the donation act was issued December 8, 1860. The court, in determining the controversy thus presented, said:

We are clear that the town site act of 1844 was not extended to Oregon until the 17th of July, 1854; and even then that it only operated to exclude lands occupied as town sites, or settled upon for purposes of business or trade, from a donation claim, which had not been previously surveyed. Before the passage of this act the claim of the defendant, Stark, had been surveyed, and the required proof of his settlement and continued occupation and residence made, and such steps had been taken as to perfect his right to a patent. The lands embraced by his claim had then ceased to be the subject of purchase from the United States by any person, natural or artificial. The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as it may be necessary, to cut off intervening claimants.

In Barney *v.* Dolph (97 U. S., 652, 656) it was said:

When the right to a patent once became vested in a settler under the law, it was equivalent, so far as the government was concerned, to a patent actually issued. We so decided in Stark *v.* Starrs, 6 Wall., 402. The execution and delivery of the patent after the right to it is complete are the mere ministerial acts of the officer charged with that duty. An authorized sale by a settler, therefore, after his right to a patent had been fully secured, was, as to the government, a transfer of the ownership of the land.

In Wirth *v.* Branson (98 U. S., 118, 121) it was held:

The rule is well settled, by a long course of decisions, that when public lands have been surveyed and placed in the market, or otherwise opened to private acquisition, a person who complies with all the requisites necessary to entitle him to a patent in a particular lot or tract is to be regarded as the equitable owner thereof, and the land is no longer open to location. The public faith has become pledged to him, and any subsequent grant of the same land to another party is void, unless the first location or entry be vacated and set aside.

This was laid down as a principle in the case of Lytle *et al. v.* The State of Arkansas *et al.* (9 How. 314), and has ever since been adhered to.

In Simmons *v.* Wagner (101 U. S., 260, 261) the court said:

It is well settled that when lands have once been sold by the United States and the purchase-money paid, the lands sold are segregated from the public domain, and are no longer subject to entry. A subsequent sale and grant of the same lands to another person would be absolutely null and void so long as the first sale continued in force. Wirth *v.* Branson, 98 id., 118; Frisbie *v.* Whitney, 9 Wall., 187; Lytle *v.* The State of Arkansas, 9 How., 314. Where the right to a patent has once become vested in a purchaser of public lands, it is equivalent, so far as the government is concerned, to a patent actually issued. The execution and delivery of the patent after the right to it has become complete are the mere ministerial acts of the officers charged with that duty.

The case of Benson Mining and Smelting Company *v.* Alta Mining and Smelting Company (145 U. S., 428) involved a controversy which arose under the provisions of the mining laws. An application for patent was filed under section 2325 of the Revised Statutes, notice of the application was duly posted and published, and in the absence of any adverse claim filed prior to the expiration of the period of publication, the applicant paid the purchase price for the land and did all which the law required him to do in order to secure a patent for his claim. It was sought to defeat his right to a patent on the ground that he had failed to continue the expenditure of $100 in labor and improvements upon his claim each year after the completion of his patent proceedings, in accordance with the requirement of section 2324 of the Revised Statutes, that—

On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year.

In denying this contention, the court said:

It is a general rule, in respect to the sales of real estate, that when the purchaser has paid the full purchase price his equitable rights are complete, and there is nothing left in the vendor but the naked legal title, which he holds in trust for the purchaser. And this general rule of real estate law has been repeatedly applied by this court to the administration of the affairs of the Land Department of the government; and the rule has been uniform, that whenever, in cash sales, the price has been paid, or, in other cases, all the conditions of entry performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the other party, in whom are vested all the rights and obligations of ownership.

Then, after considering a number of authorities on the subject, most of which have been herein referred to, it was further said:

There is no conflict in the rulings of this court upon the question. With one voice they affirm that when the right to a patent exists, the full equitable title has passed to the purchaser with all the benefits, immunities and burdens of ownership, and that no third party can acquire from the government an interest as against him.

In Deffeback *v.* Hawke (115 U. S., 392, 404), after referring to and discussing certain provisions of the statutes relating to the disposal of lands valuable for minerals, the court said:

It is plain, from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of

gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands, except in the States of Michigan, Wisconsin, Minnesota, Missouri and Kansas. We say "land *known* at the time to be *valuable* for its minerals," as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term "mineral" in the sense of the statute is applicable. In the first section of the act of 1866 no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section and re-enacted one of broader import, it is "*valuable* mineral deposits" which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that "lands *valuable* for minerals" shall be reserved from sale, except as otherwise expressly directed, and that "*valuable* mineral deposits" in lands belonging to the United States shall be free and open to exploration and purchase. We also say lands *known* at the time of their sale to be thus valuable, in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler and patented by the government under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We, therefore, use the term *known* to be valuable at the time of sale, to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued.

In Colorado Coal and Iron Company *v.* United States (123 U. S., 307, 328) it was said:

A change in the conditions occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins and 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.

See also Hedrick *v.* Atchinson, etc., R. R. Co. (167 U. S., 673, 679); Widdicombe *v.* Childers (124 U. S., 400).

To the same general effect have been the decisions of the Land Department. In Harnish *v.* Wallace (13 L. D., 108–9) it was held, with respect to an entry made under the pre-emption law, that—

In order to defeat the entry, on the ground of mineral character of the land, it must be shown that mineral was known to exist at the time of the entry, and a discovery of mineral made, as in this case, more than four years after the allowance of the entry, will not warrant its cancellation.

In Rea *et al. v.* Stephenson (15 L. D., 37) it appeared that a claimant under the homestead law had submitted his final proofs, showing compliance with all legal requirements, and had made final entry. It was sought to defeat his entry by showing subsequent discoveries of valuable minerals in the land. In passing upon the case, the Department, after referring to a number of authorities on the subject, held:

From these authorities it is evident that the question of the character of the land must be determined, in the case of a homestead entry, as of the date when the final entry is made, and under the conditions then existing.

In the case of Arthur *v.* Earle (21 L. D., 92–3) the Department said:

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

At any rate, the discovery, having been made after the purchase of said land and the issuance of final certificate to Earle, would not defeat the issuance of patent, even though said land should have been shown to be more valuable for coal than for agricultural purposes, as the conditions existing at the date of final entry determine whether the land should be excluded from homestead entry on account of its alleged mineral character.

In Chormicle *v.* Hiller *et al.* (26 L. D., 9, 14) it was held, with respect to an entry made by the defendant, Hiller, under the timber and stone act of June 3, 1878 (20 Stat., 89), that—

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.

In Reid *et al. v.* Lavallee *et al.* (26 L. D., 100, 102) it was said:

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 the 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. . . . . 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.

See also the cases of Aspen Consolidated Mining Co. *v.* Williams (27 L. D., 1, 14–18), and authorities therein cited, and McCormack *v.* Night Hawk and Nightingale Gold Mining Co. (29 L. D., 373).

These established principles, in the opinion of the Department, are applicable to selections under the act of June 4, 1897. The act clearly contemplates an exchange of equivalents. Such is the unmistakable import of its terms. In the case of the relinquishment of patented lands title is to be given by the government for title received. When an unperfected *bona fide* claim is relinquished, the claimant is to be placed in the same situation with respect to the selected tract that he occupied with respect to the tract relinquished. If a complete title is surrendered, the right to a complete title in return is secured. If only an unperfected claim is surrendered, the same rights are secured with respect to the new claim that were possessed with respect to the claim surrendered.

That the administration of the act in question falls within the jurisdiction of the land department there can be no doubt (Bishop of Nesqually *v.* Gibbon, 158 U. S., 155, 167). Selections under the act are therefore subject to examination by the officers of the land depart-

ment until the issuance of patent. This examination is had for the purpose of ascertaining and declaring whether or not the selector, by compliance with all the necessary requisites, has entitled himself to a patent, and not for the purpose of determining whether or not these officers will consent to the selection. If the examination, whether had at the instance of third parties claiming against the selections, or in *ex parte* proceedings, discloses that the selector has fully complied with all the necessary requisites and has honestly and correctly disclosed the title to the land relinquished and the condition and character of the land selected and that the records of the land department disclose no obstacle to the relinquishment or selection, the duty of the land officers is clear; they must patent the land to the selector and they have no discretion to do otherwise. The rights of the selector, however, attach and take effect at the point of time when he has done all that is incumbent upon him to do in the premises and are not postponed to the time when that fact is ascertained and declared by the land officers.

Selections of lieu lands under this act are essentially different from selections of indemnity lands by railroad land grant companies to supply losses in the place limits of their grants. Most, if not all, of the railroad land grants which contain indemnity provisions require that indemnity lands shall be selected by the Secretary of the Interior, or that the selections shall be made under the direction or subject to the approval of that officer. These railroad indemnity selections have none of the elements of an exchange of land for land. The railroad company surrenders no title and the government receives none. Such are not the provisions and effect of the statute here under consideration. The selection is to be made by the owner or claimant who makes the relinquishment, and the only conditions imposed by the statute are that the tract selected shall be "vacant land open to settlement." The contention that the same principles should govern both classes of selections can not be sustained.

It is further contended that the statutory exception of mineral lands from the operation of the homestead law was vitally changed by the act of March 3, 1891 (26 Stat., 1095). By that act the pre-emption law, which contained a provision excepting from entry or sale thereunder certain classes of lands, including "lands on which are situated any known salines or mines," was repealed. This provision had become, by reference (Sec. 2289, R. S.), a part of the homestead law. The act of 1891 also amended the homestead law by striking out all reference to the pre-emption law, and thus eliminated the provision specifically excepting "lands on which are situated any known salines or mines." The contention is that this change in the statute requires the application of a different rule from that which formerly obtained in the matter of fixing the time with respect to

which the character of lands sought to be acquired under the homestead law, is to be determined; that by analogy the different rule should be applied to selections under the act of June 4, 1897, which are to be made of lands open to settlement, the homestead statute being the chief settlement law; that since the repeal of the pre-emption law and the amendment of the homestead law as stated, the only exception of lands on account of their mineral character from settlement and entry under the latter law is that contained in section 2302 of the Revised Statutes, which declares: "Nor shall any mineral lands be liable to entry and settlement under its provisions;" that the words "mineral lands" are of broader significance than the words "lands on which are situated any known salines or mines," and import the actual, rather than the known, character of lands; and that in view thereof, if lands selected under the act of 1897 are shown, at any time before the selections are approved by the land department, to be mineral in character, it will be thus demonstrated that they were in fact mineral lands when selected, and therefore were not subject to selection, though not known at that time to be valuable for minerals.

The Department is not favorably impressed with this contention. The provision in section 2302 excepting mineral lands from disposal under the homestead law was in force prior to the act of March 3, 1891, the same as it has been since. The repeal of the pre-emption law and the amendment of the homestead law by that act, did not give to the words of this exception any different meaning or force than they had before. While this section had been a part of the general homestead statute, at least ever since the adoption of the Revised Statutes, the supreme court and the Department, in decisions rendered since that time, have repeatedly and uniformly held, as has already been shown, that to exclude lands from the operation of the homestead law, as well as from the pre-emption and townsite laws, on account of their mineral character, they must be *known* to be valuable for minerals and that if not of *known* mineral character at the time when all necessary requirements have been complied with by the person seeking title under the homestead or other law no subsequent discovery of mineral therein will affect or impair his right or title. These repeated and uniform rulings respecting the operative force of the section in question, must be accepted as a construction thereof contrary to the contention of appellees.

Barden *v.* Northern Pacific Railroad Company (154 U. S., 288), cited and relied on by the appellees, was a very different case from the one here under consideration. That case involved the construction of a grant, in the nature of a donation, of a large amount of lands to a railroad company. "All mineral lands," excepting those containing coal and iron, were expressly excluded from the grant, and a like quantity of non-mineral lands was given in lieu thereof. By a joint

resolution subsequently passed by Congress in relation to that and other similar grants, it was declared that such grants should not be "construed as to embrace mineral lands, which in all cases shall be and are reserved exclusively to the United States." In construing the grant, considering the joint resolution as a part of it; considering also the nature and character of the grant, its great magnitude, the circumstances under which it was made, the fact that other lands were given in like quantity in lieu of mineral lands in the place limits; considering the policy of Congress in making its numerous grants in aid of railroads, which had uniformly been to expressly exclude all mineral lands from them, except coal and iron; and considering the previously established rules governing the interpretation of such grants, the court held that the question as to the mineral or non-mineral character of the lands was an open one up to the time of issuing the patent. Manifestly, the principles announced in that case were intended to be controlling only in the administration of railroad land grants, and other land grants of like nature, which are to be strictly construed against the grantee and in favor of the government. In the course of its opinion the court referred with approval to the case of Leavenworth Railroad Company *v.* United States (92 U. S., 733, 739–40), where it was said:

> The rules which govern in the interpretation of legislative grants are so well settled by this court that they hardly need be reasserted. They apply as well to grants of lands to States, to aid in building railroads, as to grants of special privileges to private corporations. In both cases the legislature, prompted by the supposed wants of the public, confers on others the means of securing an object the accomplishment of which it desires to promote, but declines directly to undertake. . . . . This grant . . was made for the purpose of aiding a work of internal improvement, and does not extend beyond the intent it expresses. . . . . This is to be ascertained from the terms employed, the situation of the parties, and the nature of the grant. If these terms are plain and unambiguous, there can be no difficulty in interpreting them; but, if they admit of different meanings—one of extension, and the other of limitation,—they must be accepted in the sense favorable to the grantor.

In another part of the opinion the court said:

> The grant under consideration is one of a public nature. It covers an immense domain, greater in extent than the area of some of our largest States, and must be strictly construed.

It was not intended by the decision in the Barden case to overrule or in any manner interfere with the principles enunciated in numerous earlier decisions, as we have seen, with respect to purchases and entries made under the laws relating generally to the disposal of the public lands. Those principles still prevail in all their original force and effect, and they have been frequently recognized by the supreme court since the decision in the Barden case. See Hedrick *v.* Atchison, etc., Railroad, *supra*, and Shaw *v.* Kellogg (170 U. S., 312).

Shaw *v.* Kellogg is a case which involved the construction of a statute in many respects similar to the one here under consideration.

By act of June 21, 1860 (12 Stat., 71–2), Congress made provision for the adjustment of a dispute between the claimants under two conflicting Mexican grants to a large body of land in the vicinity of Las Vegas, New Mexico. The claimants under the elder grant had signified their willingness to waive all claim to the land in controversy if permitted to take land elsewhere, and the act gave to them—the heirs of Luis Maria Baca—the right "to select, instead of the land claimed by them, an equal quantity of vacant land, not mineral, in the Territory of New Mexico." The selections were to be made within three years and were to be in square bodies not exceeding five in number. They were made within the time limited. Number 4 of the series authorized was involved in the case referred to. Speaking of the time with respect to which rights under the selection became vested, the court said (pp. 332–3):

> The grantees, the Baca heirs, were authorized to select this body of land. They were not at liberty to select lands already occupied by others. The lands must be vacant. Nor were they at liberty to select lands which were then known to contain mineral. Congress did not intend to grant any mines or mineral lands, but with these exceptions their right of selection was coextensive with the limits of New Mexico. We say "lands then known to contain mineral," for it cannot be that Congress intended that the grant should be rendered nugatory by any future discoveries of mineral. The selection was to be made within three years. The title was then to pass, and it would be an insult to the good faith of Congress to suppose that it did not intend that the title when it passed should pass absolutely, and not contingently upon subsequent discoveries. This is in accord with the general rule as to the transfer of title to the public lands of the United States. In cases of homestead, pre-emption or townsite entries, the law excludes mineral lands, but it was never doubted that the title once passed was free from all conditions of subsequent discoveries of mineral.

The two acts, considering, as must be done, that the exception of "mineral lands" from the operation of the homestead law is a part of the act of 1897, are, in effect, the same, with respect to the matter now under consideration. The supreme court held, in the Shaw-Kellogg case, that lands vacant and "not known to contain mineral" at the time of selection, passed under the act of 1860, whether subsequently discovered to be mineral or not. The same rule should be applied to selections under the act of 1897. It would be strange indeed, if by the latter act, Congress intended that one who, accepting the government's offer of exchange, relinquishes a tract to which he has obtained full title in a forest reservation, and in lieu thereof selects a tract of land which at the time is vacant and open to settlement, and does all that is required of him to complete the selection and to perfect the exchange, should thereby acquire only an inchoate right to the selected tract, liable to be defeated by subsequent discoveries of mineral at any time before patent, or before final action upon the selection by the land department. Such a construction would not only tend to defeat the objects for which the act was passed, by discouraging owners of

lands in forest reservations from giving up their titles, but would be against both the letter and spirit of the act. Parties would be slow indeed to relinquish their complete titles if it were once understood that they could obtain only doubtful or contingent rights in return for them. It could not have been the intention of Congress that parties accepting the government's offer of exchange should be embarrassed by any such conditions of doubt and uncertainty.

The Department accordingly holds:

(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof.

(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date.

(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

These principles are in no sense antagonistic to the established doctrine of the jurisdiction and control of the land department over the disposition of the public lands. Undoubtedly such jurisdiction and control exist until patent has been issued. Knight *v.* United States Land Association (142 U. S., 161); Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589); Brown *v.* Hitchcock (173 U. S., 473); Hawley *v.* Diller (178 U. S., 476). This jurisdiction extends to determining the question, whether or not the equitable title has passed; but it has never been held that where such title has once actually vested the land department has the power to destroy it. As said in Michigan Land and Lumber Co. *v.* Rust, *supra:*

> 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; Langdeau *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. 2449; Frasher *v.* O'Connor, 115 U. S., 102; but wherever 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, 13 Pet. 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.
>
> . . . . 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.

See also Cornelius *v.* Kessel (128 U. S., 456); Orchard *v.* Alexander (157 U. S., 372); and Parsons *v.* Venzke (164 U. S., 89). So, too, with respect to selections under the act of 1897. The land department has the jurisdiction and power, at any time before a patent is issued, to institute and carry on, after appropriate notice, such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. But the determination, when had, must relate to the time when, if at all, the selector has done all that is required of him in order to perfect his right to a patent.

What are the essential requirements of a statute respecting the selection of the lieu land with which one seeking title thereto must comply? Upon relinquishing to the government the tract in the forest reservation, he must make selection of the tract desired in exchange therefor. The act so expressly declares. But what showing must he make with respect to the selected tract? The statute authorizes selection only of "vacant land open to settlement." To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land office records, that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation, no showing by the selector in respect thereto need be made for the reason that the officers of the government can and must take notice of the public records. But as to conditions the existence or nonexistence of which can not be determined by anything appearing upon the public records and as to which the officers of the government must depend entirely upon outside evidence, that is, whether the selected tract is occupied by others or known to be valuable for minerals, it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government can not be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. Such an expectation would be impossible of realization. For instance, the Visalia land district, in which the lands in controversy are situated, comprises the greater portion of nine counties in California and embraces an area of over seven million acres. Of this area over five hundred thousand acres of unreserved surveyed public land, scattered throughout the district, were undisposed of at the end of the fiscal year during which the selections in question were filed (see annual report of the Commissioner of the General Land Office for the year ended June 30, 1900). In these respects the Visalia district does not greatly differ from many other land districts wherein selections under the act of 1897 have been, or are likely to be, made. Obviously,

therefore, it could not have been contemplated that the local officers of the various land districts should or could, from personal knowledge, determine the physical conditions pertaining to lands selected under said act. The argument is intensified when applied to the Commissioner of the General Land Office and the Secretary of the Interior.

Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or occupied, and whether at any time known to be valuable for minerals, and if so, whether stripped of their minerals and worked out, are matters not shown by the land office records.

The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

That a non-mineral affidavit should accompany the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or non-occupancy affidavit. Appellant's contention that the word "vacant," as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, can not be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the land department. It frequently occurs that persons desiring to secure title to lands under the homestead law, settle upon and occupy the same, for months and even years, before placing their claims of record. By the act of May 14, 1880 (21 Stat., 140, Sec. 3), such settlers are given the same time to file their claims and place their entries of record as was originally given to settlers under the pre-emption law (Secs. 2264 and 2265, R. S.). But for various causes it frequently occurs that the time is allowed to pass without entry, and the occupancy is continued by the claimants with the hope and expectation of making entry at some future date. And, as was said by the supreme court in Tarpey *v.* Madsen (178 U. S., 215, 221):

> It is a matter of common knowledge that many go on to the public domain, build cabins and establish themselves, temporarily at least, as occupants, but having in view simply prospecting for minerals, hunting, trapping, etc., and with no thought of acquiring title to land. Such occupation is often accompanied by buildings and enclosures for housing and care of stock, and sometimes by cultivation of the soil with a view of providing fresh vegetables. These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation, or compel them to leave. Their possessory rights are recognized as of value and made the subjects of barter and sale.

It is thus seen that mere occupancy of the public lands, while creating no right as against the government (Canfield *v.* United States, 167 U. S., 518; Frisbie *v.* Whitney, 9 Wall., 187; Yosemite Valley Case, 15 Wall., 77), is recognized as creating valuable possessory rights in the individual occupants as against all other persons. Unquestionably Congress has the power to protect rights of the character indicated, and it was evidently the intention to furnish such protection as against persons making selection under the act in question; otherwise the word "vacant," as used in the act, would be meaningless. Its use was not necessary to except from selection lands claimed, appropriated or reserved as shown by the land office records. The words "open to settlement" fully and more appropriately exclude lands in that condition. They are not open to settlement. In the Shaw-Kellogg case, *supra*, the supreme court, referring to the words "vacant land," as used in the act of June 21, 1860, held, as we have seen, that the grantees under that act "were not at liberty to select lands already occupied by others." The Department knows of no reason why the same ruling should not be applied to the act of 1897.

The statement of appellant that the land department has never required selections under the act in question to be accompanied by a showing that the selected land is vacant or unoccupied, is not correct. As early as April, 1898, a printed form of application was prescribed by your office and sent to the various local land offices for use in making selections under this act. This form is as follows, the non-occupancy clause being italicized:

4–643. Perfected Claims.

SELECTION IN LIEU OF LAND IN ..... FOREST RESERVE.

(Act June 4, 1897.)

To the REGISTER AND RECEIVER,
United States Land Office,

....

GENTLEMEN: I am the owner of the .....
..... Meridian, containing ..... acres; that said land is situate and lying within the boundaries of the ..... Forest Reserve; that I desire to relinquish and reconvey said land unto the United States, and in lieu thereof to select the .....
..... land district, State of ....., and containing ..... acres, under the provisions of the Act of June 4, 1897 (30 Stat., 36).

In compliance with the regulations under said act I have made, executed, and caused to be recorded in the proper county and State, a deed of reconveyance to the United States of the tract first above described and situate within said ..... Forest Reserve, and in relation thereto have caused a proper abstract of title to be made and authenticated, both of which are herewith submitted.

There are also submitted certificates from the proper officers showing that the land relinquished, or surrendered, is free from encumbrance of any kind; also that all

taxes thereon, to the present time, have been paid; and *an affidavit showing the lands selected to be non-mineral in character and unoccupied.* I therefore ask that United States patent issue to me for the tract or tracts thus selected.

Dated, ..., ...

The evidence required to accompany the application or selection is here clearly set forth. The selector is required to submit with his application "an affidavit showing the lands selected to be non-mineral in character and unoccupied."

This form of application (4–643) was specifically approved by the Secretary of the Interior in the regulations of May 9, 1899 (28 L. D., 521, 524), and December 18, 1899 (29 L. D., 391, 394). In this respect these regulations have remained unchanged, and they are alike obligatory upon your office, local land offices, and all owners and claimants of lands within the limits of a forest reserve who seek to exchange the same for other lands under said act.

It only remains to apply the stated principles and regulations to the selections here in question. In making these selections the selector used a form of application different from the one prescribed. The printed form of affidavit used by him, however, contained both non-mineral and non-occupancy allegations; but the portions of this form of affidavit whereby it was intended to show "that there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897," and "that no portion of said land is claimed for mining purposes under the local customs and rules of miners or otherwise," were stricken out before the affidavits were verified or filed, and the result is that the selections are not accompanied by any showing whatever respecting the state of vacancy or occupancy of the land at the time of selection. For this reason the affidavits were insufficient and the selections imperfect. The proof presented by the selector did not show that the land was subject to selection, and would not justify the issuance of patent even if no protests had been filed. In this connection, it is worthy of mention that about the time of making the selections here in question, this selector made several other selections, under the act of 1897, of lands in the same general locality, and the examination of the files of your office shows that the non-occupancy clause is employed in the accompanying affidavit in some instances and not in others. While the reason for this difference in the proof presented in support of selections under the same act is not apparent upon the face of the selection papers, they bear unmistakable evidence of the fact that the use and rejection, respectively, of the non-occupancy clause were deliberate and not inadvertent.

In view of the admitted present occupancy and known value of the land for mining purposes, as hereinbefore stated, it is apparent that the required proofs can not now be supplied. The selections are accordingly rejected. The order of your office directing a hearing is hereby vacated.

LIEU SELECTIONS UNDER ACT OF JUNE 4, 1897.

GRAY EAGLE OIL COMPANY *v.* CLARKE.

The act of July 23, 1866, and section 2488, Revised Statutes, changed the manner of identifying swamp lands in California and laid down a rule of evidence by which the character of land shown, by an approved survey made under the authority of the United States, to be swamp and overflowed is conclusively established.

That legislation did not overthrow or restrict the authority of the Secretary of the Interior over surveys of the public lands, and whenever fraud or error exists in connection with the execution or acceptance of a survey he may prevent the disposition of public lands thereunder and take appropriate action to secure a correct survey.

Under the swamp-land grant of September 28, 1850, patent is necessary to pass the full legal title, and if, by the act of July 23, 1866, and section 2488, Revised Statutes, certification is, as to the State of California, substituted for patent, until such certification the land department has jurisdiction to determine whether a tract of land is properly identified as passing under that grant.

It is incumbent upon one wishing to take advantage of the offer of exchange made by the government by the act of June 4, 1897, to submit with his selection proof that the title to relinquished lands, to which he claims full title, has passed out of the United States by some means the full legal equivalent of a patent and is vested in him, and that at the date of selection the selected lands are unoccupied and non-mineral in character. Until such proof is submitted a selector has not done that which converts the offer of exchange into a contract fully executed on his part whereby he secures a vested right in the selected lands.

Ordinarily, as between the government and a selector, he might be permitted to perfect the selection by supplying the necessary proof at a subsequent time, but his rights would be determined as of the date the selection was thus completed. In this case no such proof has been supplied, and it is admitted by the selector that the lands attempted to be selected are now known to contain valuable deposits of mineral oil; hence these selections can not now be perfected.

See departmental decision, of even date herewith, in the case of Kern Oil Company *et al. v.* Clarke, 30 L. D., 550.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 25, 1901.* (W. C. P.)

By two decisions of January 30, 1901, your office rejected the selections of lots 1 and 2 of the SW. ¼, and lots 1 and 2 of the NW. ¼ of Sec. 30, T. 28 S., R. 28 E., M. D. M., California, made December 8, 1899, by C. W. Clarke, under the act of June 4, 1897 (30 Stat., 11, 36), in lieu of certain lands in township 8 S., R. 27 E., M. D. M., California, in the Sierra forest reserve, relinquished by him to the government. By decision of February 11, 1901, your office ordered a hearing to determine Clarke's rights under other selections, termed by him amendatory selections of the same land made January 13, 1900, under the same act but designating other relinquished tracts in the same forest reserve as bases. Clarke has appealed from these decisions.

With each selection of December 8, 1899, is an affidavit as to the character of the land selected. The statements of these affidavits are as follows:

That there is no occupation of said land adverse to the selection thereof under the act of June 4, 1897, by C. W. Clarke, that the tract applied for is agricultural in character and contains no known deposits of coal, or other minerals, and is not subject to entry under the coal or mineral land laws of the United States;

That he has frequently passed over the same and his personal knowledge of said land is such as to enable him to testify understandingly in regard thereto; that there is not to his knowledge, within the limits thereof, any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin or copper, or any deposit of coal; that there is not within the limits of said land, to his knowledge any placer, cement, gravel, or other valuable mineral deposit; that no portion of said land is claimed for mining purposes under the local customs or rules of miners or otherwise; that no portion of said land is worked for mineral during any part of the year by any person or persons; that said land is essentially non-mineral land and that the application therefor is not made for the purpose of fraudulently obtaining title to mineral land, but with the object of securing said land for agricultural purposes; and that the above and foregoing statements as to the character of said land apply to each and every legal subdivision thereof.

February 10, 1900, the Gray Eagle Oil Company filed in the local land office protests against these selections, asserting a right to, and possession of, the lands thus selected under certain mineral locations made prior to the selections and alleging that said lands were not at the date of selection non-mineral in character.

With the papers are other protests filed February 12, and August 25, 1900, by W. H. Mallory and others, and the Mount Diablo Oil Mining and Development Company, respectively, against these selections, the protestants in each instance asserting a claim, under a mining location, to parts of the land selected and asserting in substance that at the date of such mining location the locators had found within the boundaries of such location sands and shale containing petroleum, residuum of petroleum and mineral oil in sufficient quantities to show the value of said location for mineral purposes and to warrant its further development. In the last protest it is further alleged that the protestants and their grantors expended large sums of money in the development and exploration of said selected land, and on or about June 1, 1900, did strike mineral oil therein, and that the land has no value for agricultural purposes.

When the matter was considered in your office it was held by the two decisions of January 30, 1901, that the second selections constituted a waiver of all rights under the first selections and the latter were, therefore, rejected; and by the decision of February 11, 1901, it was held that the protests and affidavits filed by the two classes of claimants, respectively, indicate such a condition of the land involved, both as to its character and occupation at the date of Clarke's second

selections, as to demand further investigation, and for that reason a hearing was ordered to determine the facts:

1. Were the first selections supported by proper bases? Your office decisions of January 30, 1901, answered this question in the negative. The provisions of the act of 1897, under which these selections were presented are as follows:

> That in cases in which a tract covered by an unperfected *bona fide* claim or by a patent is included within the limits of a forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in such cases for making the entry or recording or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

It is not contended that the tracts within the limits of the forest reservation and relinquished as bases for these selections were covered by "an unperfected *bona fide* claim," nor could such a contention be successfully made in view of the facts hereinafter recited (29 L. D., 594, 596). To constitute these tracts proper bases for such selections they must be covered by a "patent." Sometimes an act of Congress operates to pass the fee and in other cases a certification is given the effect of a formal conveyance. In view of this the phrase "tract covered . . . . by a patent" is construed by this Department in F. A. Hyde *et al.* (28 L. D., 284, 290; and see 29 L. D., 594, 596) as including "a tract to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent." The question is then as to whether the full legal title to the land in lieu of which these selections are made had passed out of the United States and beyond the control of the land department by any means which is the full legal equivalent of a patent, and had become vested in the applicant Clarke when he executed his deed of relinquishment. The abstract of title filed with said deed shows but two items: a patent from the State of California to C. W. Clarke, dated October 26, 1899, and the deed from C. W. Clarke and wife to the United States, dated November 16, 1899, both instruments having been filed for record November 28, 1899. The patent from the State refers to the swamp land act of September 28, 1850, and to the fact that the State legislature had provided for the sale of swamp lands, recites that it appears by the certificate of the register of the State land office bearing date October 21, 1899, and issued in accordance with the State law, that the tracts of swamp and overflowed land therein described have been duly and properly surveyed in accordance with law. By a purported survey of this township made in 1883 and accepted by your office in 1897, the tracts relinquished by Clarke were returned as swamp and overflowed. This

is one of the so-called "Benson surveys" which have been the subject of much investigation by your office and this Department. The survey was made under contract, No. 294, of January 3, 1883. The field notes and plats, sometimes called the returns, were approved by the surveyor-general and sent to your office December 17, 1884, for consideration there. A number of surveys made about the same time—this among them—were examined in the field by a special agent of your office who, under date of August 31, 1886, reported that the surveys were fraudulent and the field notes and plats fictitious, whereupon your office on October 28, 1886, rejected said surveys, including the one under consideration. Afterwards the contractors submitted to your office a proposition for a compromise by which it was proposed that said surveys should be corrected. This proposition was accepted and the stipulations formally signed April 13, 1896, it being provided that they should expire April 1, 1897.

With his letter of February 5, 1897, the surveyor-general for California again transmitted to your office the original field notes and plat of survey of this township which had been submitted in 1884 and rejected in 1886. The field notes so transmitted show that the survey to which they pertain was commenced May 17, and completed May 26, 1883. Attached to them is a new certificate of approval by the surveyor-general dated February 5, 1897. There is no other change or correction. The plat bears in addition to the certificate of the surveyor-general, dated December 17, 1884, a new certificate dated February 5, 1897, but otherwise it is not changed. These returns were accepted by your office March 1, 1897, and by letter of that date your office directed the surveyor-general for California to file the triplicate plats in the proper local land office. Thereafter and early in the same month, the Secretary of the Interior directed a further investigation of these surveys. June 21, 1897, while this investigation was being prosecuted the contractors submitted a proposition to the effect that they would correct such surveys or make new ones where necessary. This proposition was accepted by your office the next day, with the approval of the Secretary of the Interior, with some modifications which were promptly assented to by the contractors. Two of these modifications were that the surveys were to meet the approval of the Secretary of the Interior and that the work should be completed and returns made in no event beyond December 1, 1898. The terms of this agreement were never complied with by the contractors and the purported survey of said township was finally rejected by your office March 2, 1899, under instructions from the Secretary of the Interior dated January 26, 1899.

No certificate or patent has been issued to the State of California for any of these lands. All the proceedings ending in the final rejection of the survey were taken and ended long prior to the date of the

patent from the State to Clarke, and hence he purchased from the State with constructive if not actual notice thereof.

By the act of September 28, 1850 (9 Stat., 519), commonly known as the swamp land act, it was provided:

> That to enable the State of Arkansas to construct the necessary levees and drains to reclaim the swamp and overflowed lands therein, the whole of those swamp and overflowed lands, made unfit thereby for cultivation, which shall remain unsold at the passage of this act, shall be, and the same are hereby, granted to said State.

By section two of said act it was provided:

> That it shall be the duty of the Secretary of the Interior, as soon as may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the governor of the State of Arkansas, and at the request of said governor, cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State of Arkansas, subject to the disposal of the legislature thereof.

The fourth section extended the provisions of the act to each of the other States of the Union.

The act of July 23, 1866 (14 Stat., 218), entitled "An act to quiet land titles in California," contained, among other provisions, the following (section 4):

> That in all cases where township surveys have been, or shall hereafter be, made under authority of the United States, and the plats thereof approved, it shall be the duty of the Commissioner of the General Land Office to certify over to the State of California, as swamp and overflowed, all the lands represented as such, upon such approved plats, within one year from the passage of this act, or within one year from the return and approval of such township plats.

This provision is carried into section 2488 of the Revised Statutes, in the following words:

> It shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California, as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23rd day of July, 1866, under the authority of the United States.

The provision of the original section requiring the Commissioner to make such certification within one year from the return and approval of the township plat was omitted from the revision and is therefore repealed (section 5596 Rev. Stat.). There was no attempt to survey this township until after the revision became effective and therefore no right under the repealed provision can be asserted by the State.

The grant made by the act of 1850 "is one *in praesenti* passing the title to the lands as of its date but requiring identification of the lands to render the title perfect." Wright *v.* Roseberry (121 U. S., 488, 509). By that act the lands thus granted were to be identified by lists to be made by the Secretary of the Interior. By the act of 1866, and section 2488, Revised Statutes, the manner of identification in California was changed. A rule of evidence was laid down by which the character of land, which was shown, by an approved survey made

under the authority of the United States, to be swamp and overflowed, was thereby conclusively established. (Tubbs *v.* Wilhoit, 138 U. S., 134, 139; Heath *v.* Wallace, 138 U. S., 573, 579; State of California, 23 L. D., 230.)

It is insisted that under the law as construed by these decisions the title to the tracts in question, which were represented by the survey as swamp and overflowed lands, vested in the State of California upon the approval of said survey, that the failure of the Commissioner of the General Land Office to certify the land to the State does not affect the title thereto and that the subsequent rejection of the survey can not affect or impair that title. The cases cited and relied upon by appellant contained no question as to the effect of a fraudulent or erroneous survey and this fact was adverted to in the decisions. In Wright *v.* Roseberry, supra, the court was careful to say:

> There was no suggestion by either the Commissioner or Secretary of the Interior that the lands were not swamp and overflowed as designated upon the township plat.

In Tubbs *v.* Wilhoit, *supra*, the survey had been made in 1864 and it was contended that the first clause of section 4 of the act of July 23, 1866, hereinbefore quoted, did not apply because the plat had not been approved by the Commissioner of the General Land Office. In respect of this contention the court said (p. 142):

> Until April 17, 1879, it had not been the practice of the land department to require any specific approval by the Commissioner either of surveys of the public lands or of plats of townships in accordance therewith, made by the surveyor-general of the State, before they were deemed so far final as to sanction sales or selections of the lands surveyed and platted. It is true that wherever fraud or error existed in the action of the United States surveyor-general for the State, the power of correction was vested in the commissioner, but where the survey was itself correct and the township plat conformed thereto, they became final and effective when filed in the local land office by that officer.

After quoting from a communication from the Secretary of the Interior to the Commissioner of the General Land Office, dated August 7, 1877, asserting that the Commissioner "has general supervision over all surveys and that authority is exercised whenever error or fraud is alleged on the part of the surveyor-general" and referring to Frasher *v.* O'Connor (115 U. S., 102, 114), as supporting that position, the court said:

> There is no finding, nor even any allegation, that the survey and plat of township four, in the county of San Joaquin were not correct, or that they were disapproved by the land department.

The case at bar differs from those cited in that it involves a question as to the authority and duty of this Department in connection with a survey which has not been made in compliance with the law and regulations governing such matters. The cases cited, in so far as they go, support the proposition that the government is not bound by an

erroneous or fraudulent survey, and they do absolutely and unequivocally sustain the regulations requiring the approval of the Commissioner of the General Land Office to give surveys of the public lands vitality. Those cases did not, however, involve any question as to the powers and duties of the Secretary of the Interior in connection with such surveys. This matter was fully considered, exhaustively discussed, and finally determined in Knight *v.* U. S. Land Association (142 U. S., 161). The court there laid down a preliminary proposition as follows:

> It is a well settled rule of law that the power to make and correct surveys of the public lands belongs exclusively to the political department of the government, and that the action of that department, within the scope of its authority, is unassailable in the courts except by a direct proceeding.

There the Commissioner of the General Land Office had approved a survey known as the Stratton survey, of the pueblo of San Francisco and the Secretary had set such approval and the survey aside and directed another to be made. It was contended that this action of the Secretary was unwarranted because the authority of the land department in the premises had been exhausted by the action of the Commissioner of the General Land Office in approving and confirming the first survey. Speaking of this claim the court said (p. 177):

> 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 appeal was 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.

The court quoted section 441 of the Revised Statutes which charges the Secretary of the Interior with supervision of public business relating to the public lands and sections 453 and 2478 which provide that the Commissioner of the General Land Office "under the direction of the Secretary of the Interior" shall perform all executive duties appertaining to the surveying and sale of the public lands and authorize him "under the direction of the Secretary of the Interior" to enforce and carry into execution the provisions of the title of the Revised Statutes relating to the public lands, and then declared the meaning of said sections as follows (p. 177):

> 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.

After citing various decisions which recognize and assert the right and duty of the Secretary to exercise supervision over matters pertaining to the survey and sale of the public lands in cases involving the administration of laws under which, as the court points out, the powers and duties of the Secretary were practically and to all intents and purposes the same as under sections 441, 453 and 2478, Revised Statutes, it is said:

> It make 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 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 surveying and disposal of the public lands.

The whole matter is so fully and carefully covered in this decision that it is unnecessary to enter upon a discussion of the question here, and it would be useless to attempt to make it more clear. Under this ruling the authority of the Secretary of the Interior is at least as great as was that of the Commissioner of the General Land Office prior to the regulation of April 17, 1879. In Tubbs *v.* Wilhoit, *supra*, the Commissioner is said to have been vested with the power of correction prior to said regulations, which specifically devolved upon him the approval of surveys. A survey of public lands in California, duly made and approved must be considered as conclusively establishing the character of the lands thereby returned as swamp and overflowed. But whenever fraud or error exists in connection with the execution or acceptance of a survey the Secretary of the Interior may prevent the disposition of public lands thereunder. Indeed, when information reaches him indicating the probability of such fraud or error it is his duty to investigate the matter and take such action as may be appropriate under the circumstances developed to secure a correct survey.

The facts developed by the investigation of the survey of the lands here involved, as originally made, demonstrated that it was not executed as required by the regulations and the contract under which it was made, and strongly indicated that the work was not actually done in the field and that the field notes were fictitious and the plats based thereon were absolutely worthless as a survey or as evidence of any fact shown by such field notes or plats. The contractor, instead of attempting to sustain the returns made by him, proposed to go into the field and correct the survey or make a new one, as might be found necessary to meet the requirements. Before the time fixed in this agreement for doing this work had expired and in the absence of an effort to comply with the terms of said agreement by a corrected or new survey, and without any further examination in the field, the

surveys covered by said contract No. 294 were accepted March 1, 1897, by the then Commissioner of the General Land Office upon the eve of his retirement from office. Immediately thereafter inquiry into the matter was instituted by the Secretary of the Interior. Thereupon the contractor, with others in a like condition, submitted a further proposition for perfecting an actual survey of said lands as hereinbefore set forth, which was accepted with the approval of the Secretary. This action was within a reasonable time after the Commissioner's acceptance and undoubtedly operated as a suspension of the survey, approval to which had been given under such unusual circumstances. Thereafter said lands did not have the status of surveyed lands and could not be disposed of as such. While this suspension continued it would have been error for your office to certify any of said lands to the State of California as coming within the terms of the swamp land grant. The contractors having failed to comply with this further agreement, to perfect said survey, the Secretary of the Interior, January 26, 1899, directed that the purported survey of said township be finally rejected, which was accordingly done.

The argument in support of this appeal goes upon the theory that a survey which is once accepted or approved by your office conclusively fixes the character of the tracts returned thereby as swamp and overflowed, so that thereafter there can be no inquiry as to the correctness of the survey, or revocation of its acceptance and approval upon a showing of fraud or mistake in the survey itself or in its approval and acceptance. This theory is wrong and the conclusion resulting therefrom can not be sustained. The surveys contemplated by the act of 1866 and by section 2488, Revised Statutes, are those made under the authority of the United States and necessarily those which are recognized as made and approved in conformity with the law and regulations governing surveys of the public lands. It was not the purpose or effect of that act to overthrow or to restrict the authority and control of the Secretary of the Interior over surveys of the public lands. The intent and purpose of that legislation was to make a survey, which is recognized as made and approved in conformity with law and regulations, conclusive evidence of certain facts shown thereby. The authority of the Secretary of the Interior over public surveys and his duty to insist upon and secure honest and correct surveys is the same whether the land be returned by the surveyor as swamp and overflowed or otherwise. The survey does not convey the title to swamp lands, its only office under the act of 1866 and section 2488, Revised Statutes, in relation to the grant of swamp lands, being to furnish evidence of the character of the lands surveyed, so far as the same are returned as swamp and overflowed, and thus to identify to that extent the tracts coming within the terms of the grant. The general authority of the Secretary of the Interior to require the proper

survey of the public lands is not open to question, and neither the act of 1866 nor section 2488 takes away this authority or makes any exception thereto. In the exercise of that authority, the action of the Commissioner of the General Land Office in accepting the confessedly erroneous, if not fraudulent, survey here in question was set aside and the survey rejected.

There has never been such a survey of this township as would, under the act of 1866 or section 2488, establish the character of the lands in this township and therefore there has never been such an identification of any of the lands therein as swamp and overflowed as would, under any decision of the supreme court, require a certification of such lands to the State or render the title of the State perfect under the swamp land grant.

The rule is that whenever a granting act specifically provides for the issue of a patent the legal title remains in the government until the patent is issued and while so remaining the grant is in process of administration, and the jurisdiction of the land department over the land is not lost. Michigan Land and Lumber Co. *v.* Rust (168 U. S., 589, 592); Brown *v.* Hitchcock (173 U. S., 473). The act of 1850 provides for the issue of a patent upon which the fee simple title shall vest in the State. The act of 1866 and section 2488, Revised Statutes, provide for a certification by the Commissioner of the General Land Office. Whether the act of 1866 and section 2488 dispense with the issuance of a patent, as required by the original granting act, need not be considered here, because even if it be admitted that certification was thereby substituted for a patent as the means of passing the fee simple title, the fact remains that until certification is made the grant is still in process of administration and the jurisdiction of the land department over the land is not lost. It is clear that the administration of the swamp land grant as to the tracts relinquished by Clarke has not proceeded to the point where the jurisdiction of this Department to determine whether they have been properly identified as passing under that grant has been lost. As shown herein the survey relied upon as establishing the title of the State is not a recognized or subsisting survey and furnishes no evidence upon that point and no evidence of any other kind as to the character of said tracts has been submitted.

It follows that these tracts are not covered by a patent or its legal equivalent and that Clarke has no such title thereto as entitles him to claim in respect thereof the privileges or benefits extended by the act of June 4, 1897.

2. Clarke's claim must rest upon the selections of January 13, 1900. No objection is made to the bases for these selections. It is urged, however, that they did not operate to vest any right in Clarke because of their incompleteness resulting from his failure to file therewith any

proof as to the condition and character of the land selected, at the date of their presentation. The act of 1897 describes the land which may be selected under its provisions as "vacant land open to settlement." To be vacant, land must be unoccupied. To be open to settlement, land must, among other things, not be known to contain valuable mineral deposits. Land which is occupied by another or which is known to contain valuable mineral deposits is therefore not subject to selection under said act. It is a general rule that applicants for the public land must show that the land applied for is of the character contemplated by the law under which it is sought. There is no reason why this rule should not obtain in proceedings under the act of 1897 and there is nothing in that act itself relieving the applicant thereunder from making such a showing.

As has been said in various decisions of the Department, this law constitutes a standing offer on the part of the government for an exchange of lands. In this offer the lands to be exchanged are described. Those to be relinquished by the individual must be within a forest reservation and those to be taken by him must be vacant and open to settlement. It is incumbent upon one who wishes to take advantage of this standing offer to bring himself within the terms thereof, not only as to the land he proposes to relinquish but also as to that which he proposes to take in exchange. It is his duty to inform himself as to the character and condition of the land he proposes to select and to honestly disclose the facts thus ascertained. The local land officers with whom the papers are to be filed, can not reasonably be expected to have a personal knowledge of the condition and character of all the public lands within their district. Much less can the land officers at Washington be expected to have a personal knowledge thereof. Neither can the public survey be relied on to disclose the character of the land as developed and known at the date of selection when, as in this case, the survey was made more than forty years before. Every consideration based upon the wise administration of this law supports the wisdom of a regulation requiring the selector to submit proof showing the land selected to be subject to such selection. In a brief filed in behalf of the appellant it is admitted that an affidavit to the effect that the land was vacant and open to settlement or one showing that the land was unoccupied, and contained no known minerals or that it contained no valid mining claim based upon an actual discovery of mineral, would be consistent with the language of the act of 1897 and that the requirement of such an affidavit would be reasonable and proper, but it is insisted that no such affidavit was required by the rules or regulations in force at the time these selections were made. This contention can not be sustained. The form of application prepared by your office for selections of lands in lieu of tracts covered by a patent in a forest reserve and

specifically adopted as form 4–643 in the regulations of May 9, 1899 (28 L. D., 521, 524), and December 18, 1899 (29 L. D., 391, 394), requires the selector to accompany his application with "an affidavit showing the land selected to be non-mineral in character and unoccupied." It is thus clearly made incumbent upon one seeking to take advantage of the offer made by this law to establish the fact that the land he selects is of the character contemplated by the law. Until this fact is established his proffer of exchange is not complete. Until then he has not made out a case which shows upon the face of the papers that he has so far complied with the conditions of the act of 1897 as to convert the offer of exchange contained in said act into a contract fully executed upon his part. To lodge in an applicant for exchange of lands under this law a vested right as against the government or third parties, it must be made to appear that the land sought to be acquired by him is of the character contemplated by that law. This selector recognized this duty on his part and with his selections of December 8, 1899, filed the requisite affidavits as hereinbefore set forth. It is probable that he went upon the theory that new affidavits were not necessary to the second selections. This was a mistake. The first selections were never effective to vest any right in him. While the affidavits filed with them may have properly set forth the condition and character of the land at that time, December 8, 1899, it does not follow that the condition and character of the land were the same on January 13, 1900, the date of the second selections. No new affidavit or paper was filed with the second selections containing any statement as to the condition or character of the land. The necessity for requiring the selector to make proof of the condition and character of the land at the time of selection is forcibly illustrated in this case. Prior to that time mineral oil had been discovered in the near vicinity of this land, and the lands in that neighborhood were being generally prospected and explored in an effort to find mineral oil therein in paying quantity. To that end wells were being drilled or bored hundreds of feet into the earth at great cost, and in this manner the area or extent of the oil deposit was being ascertained and the mineral character of specific tracts made known. The known character of the land in that vicinity was therefore undergoing a change and tracts not known to contain mineral deposits at any given time were liable within thirty days thereafter to become known to be valuable for such deposits.

Ordinarily, as between the government and the selector, there would seem to be no good ground for refusing to permit him to submit the necessary proof at a time subsequent to the date of the attempted selection; but since this proof is essential to complete a selection so as to constitute it a contract fully executed on the selector's part, his rights would have to be determined as of the date when the selection

is thus completed. No attempt or offer to cure the defect and complete the selections in question has been made, and it is now asserted by the mineral claimant, and fully admitted by the selector, that the land in question has been demonstrated to contain valuable deposits of petroleum. Indeed, in a petition filed in this case January 18, 1901, it is said by the selector and others claiming under him, in speaking of those particular lands and selections:

> That after said selections were made by Clarke, the Gray Eagle Oil Company—the protestants in the above cases—unlawfully and against the objections of the selector and claimant, Clarke, entered upon such lands and bored wells thereon, and several months thereafter found petroleum oil in large and valuable quantities on parts of said selected lands, and are now, against the objections of these petitioners, engaged in taking away and disposing of such oil product and in appropriating the proceeds of the same to their own use and benefit.

It is thus made evident that these lands are not now subject to selection in lieu of lands in a forest reservation, and that further delay in the disposition of these selections to afford an opportunity to file an affidavit showing that they are vacant and open to settlement, would be of no benefit to the selector.

Furthermore, the lands are not now and have not been since February 21, 1900, subject to such selection. By telegram of that date, your office directed the local officers at Visalia to "suspend from disposition until further orders" certain townships therein specified, one of them being township 28 south, range 28 east, in which these lands are situated. As said in the instructions of March 6, 1900 (29 L. D., 578, 580): "In every instance the land selected *must at the time of selection* be of the character subject to selection." This order of suspension would, so long as it remains in force, prevent a selection of these lands.

It would be an act of injustice to all parties concerned to order a hearing to determine whether the land in question was, on January 13, 1900, subject to selection under the act of 1897, when, as pointed out herein, the selections of that date were imperfect and can not now, because of the present known and admitted character of the land, be perfected.

Your office decision of February 11, 1901, ordering a hearing in those cases is therefore set aside, and for the reason herein given Clarke's selections of December 8, 1899, and January 13, 1900, are rejected.

LIEU SELECTIONS UNDER ACT OF JUNE 4, 1897.

KERN OIL COMPANY *v.* CLOTFELTER.

Under the exchange provisions of the act of June 4, 1897, C., the owner of lands covered by a patent from the United States and situate within the limits of a public forest reservation, filed in the Visalia, California, local land office, a relinquishment to the United States of his lands in the forest reservation, accompanied by evidence of his full and unincumbered title thereto, and at the same time made selection, by appropriate application in writing, of a like area of public lands in the Visalia land district desired in exchange for the lands relinquished, accompanying the selection by an affidavit declaring the selected lands to be unoccupied and non-mineral. Shortly thereafter K. Company and others filed sworn and corroborated protests against the selection, alleging that the selected lands, at the time of their selection, were occupied by protestants under the placer mining laws and were then known to be valuable for their deposits of petroleum or mineral oil. The selection has not been carried to patent. *Held:*

1. The land department has jurisdiction and power, either on its own motion or at the instance of third parties, at any time before a patent is issued upon a selection made under the exchange provisions of said act and after appropriate notice, to institute and carry on such proceedings as may be necessary to enable it to determine whether the selected lands were at the time of their selection in the condition and of the character subject to selection.
2. Lands chiefly valuable on account of the deposits of petroleum or mineral oil found therein are mineral in character and not subject to selection under said act.
3. The protests of K. Company and others require that a hearing be ordered to determine the condition and character of the lands selected.
4. The inquiry will be directed to the conditions existing and known at the time when the selection was made, and no consideration will be given to any change subsequently occurring or to any discovery or development of mineral thereafter made.
5. The evidence bearing upon the character of the selected lands will not be restricted to the discovery or development of mineral therein and to their geological formation but may extend to the discovery and development of mineral in adjacent lands and to their geological formation.

The cases of Union Oil Company, 25 L. D., 351; Kern Oil Company *et al. v.* Clarke, 30 L. D., 550; and Gray Eagle Oil Company *v.* Clarke, 30 L. D., 570, cited and followed.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 8, 1901.* (A. B. P.)

January 5, 1900, Jacob Rene Clotfelter filed in the local office at Visalia, California, two separate selections of lands in lieu of an equal quantity of lands of which he had become the owner, covered by a patent from the United States and situate within the limits of a public forest reservation. These selections were made under the act of June 4, 1897 (30 Stat., 11, 36), which provides as follows:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or owner thereof may, if he desires to do so, relinquish the tract to the government, and may select in lieu thereof a tract of vacant land open to settlement not exceeding in area the tract covered by his claim or patent; and no charge shall be made in

such cases for making the entry of record or issuing the patent to cover the tract selected: *Provided further*, That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

One of the selections embraces the W. ½ of the NE. ¼ of Sec. 32, T. 28 S., R. 28 E., M. D. M., and the other the NE. ¼ of the NE. ¼ of said section 32, and the SE. ¼ of the SE. ¼ of Sec. 24, T. 28 S., R. 27 E., M. D. M. The record shows that the lands within the forest reservation, in lieu of which the selections were made, were subject to relinquishment and were regularly relinquished to the United States, and that the relinquishment was accompanied by a properly authenticated showing of full and unincumbered title in the selector to the relinquished lands. There is no suggestion that the lands selected were not subject to selection so far as the then existing conditions appear from the land office records. Each selection was by an application made out upon the printed form specially prepared for making selections of lands in lieu of lands covered by patent in a forest reservation and adopted as form 4–643 in the official regulations of May 9, 1899 (28 L. D., 521, 524), and December 18, 1899 (29 L. D., 391, 394), and in which the evidence required to be submitted by the selector is specifically set forth. The selection in each instance was accompanied by an affidavit to the effect that the selected lands were non-mineral in character and unoccupied at the date of selection.

The act of June 4, 1897, was amended by an act approved June 6, 1900 (31 Stat., 588, 614), but as the selections here in question are to be governed by the original act, the amendment is not material.

February 6, 1900, the Kern Oil Company filed a protest against both selections, in so far as they embrace lands in the NE. ¼ of Sec. 32, T. 28 S., R. 28 E.

February 23, 1900, W. T. Sesnon filed a protest against the selection which embraces the SE. ¼ of the SE. ¼ of Sec. 24, T. 28 S., R. 27 E. These protests, which are under oath and accompanied by corroborating affidavits, charge, in substance and effect, that all of the lands so selected were at the time of their selection occupied by the protestants under certain placer mining locations which were at that time being worked and developed by the protestants, and that at that time all of said lands were known to be valuable for their deposits of petroleum or mineral oil. The protests also state that the lands are still occupied by protestants, and that additional discoveries of oil have been made therein since the date of said selections.

By decision of March 10, 1901, your office considered said selections in connection with the protests, and directed that a hearing be had to determine the character of the selected lands. In the course of said decision it was held, in substance, that the character of lands selected under the act of June 4, 1897, is an open question until the selections

have been approved by the land department, and that if at any time prior to such approval the selected lands should be found to contain valuable minerals the selections would be thereby defeated. These principles were announced as a guide for the conduct of the hearing.

Clotfelter has appealed to the Department. Numerous errors are assigned in the appeal, but it is not necessary that they should be stated in detail. Lands chiefly valuable on account of deposits of petroleum or mineral oil found therein are mineral lands and are subject to disposition under the mining laws (Union Oil Co., 25 L. D., 351). In the recent case of Kern Oil Co. *v.* Clarke (30 L. D., 550), questions similar to those here presented were considered and decided by the Department. It was held in that case:

(1) That where a person making selection under the act of June 4, 1897, has complied with all the terms and conditions necessary to entitle him to a patent to the selected land, he acquires a vested interest therein and is to be regarded as the equitable owner thereof;

(2) That the right to a patent under the act, once vested, is, for most purposes, the equivalent of a patent issued, and when in fact issued, the patent relates back to the time when the right to it became fixed and takes effect as of that date;

(3) That questions respecting the class and character of the selected lands are to be determined by the conditions existing at the time when all requirements necessary to obtaining title have been complied with by the selector, and no change in such conditions, subsequently occurring, can affect his rights.

* * * * * * *

The land department has the jurisdiction and power, at any time before a patent is issued, to institute and carry on, after appropriate notice, such proceedings as may be necessary to enable it to determine whether the selected lands were of the requisite class and character, and whether the selection was in other respects regular and in conformity with the requirements of the act. But the determination, when had, must relate to the time when, if at all, the selector has done all that is required of him in order to perfect his right to a patent.

And upon the question as to what is required to be done by a person making selection under said act, the Department stated and held as follows:

What are the essential requirements of the statute respecting the selection of the lieu land with which one seeking title thereto must comply? Upon relinquishing to the government the tract in the forest reservation, he must make selection of the tract desired in exchange therefor. The act so expressly declares. But what showing must he make with respect to the selected tract? The statute authorizes selection only of "vacant land open to settlement." To be vacant, the land must not be occupied by others. To be open to settlement, it must not be known to be valuable for minerals, or reserved from settlement for any other reason. In so far as the existing conditions appear from the land office records, that is, whether the selected tract is of lands to which the settlement laws have been extended, and whether the same is free from record appropriation, claim, or reservation, no showing by the selector in respect thereto need be made, for the reason that the officers of the government can and must take notice of the public records. But as to conditions the existence or non-existence of which can not be determined by anything appearing upon the public records and as to which the officers of the government must depend entirely upon outside evidence, that is, whether the selected tract is occupied by

others and known to be valuable for minerals, it is manifestly necessary that the required evidence should be furnished by the selector. The officers of the government can not be expected to know whether land selected under the act is vacant and not known to be valuable for minerals, and in these respects subject to selection. Such an expectation would be impossible of realization. For instance, the Visalia land district, in which the lands in controversy are situated, comprises the greater portion of nine counties in California and embraces an area of over seven million acres. Of this area over five hundred thousand acres of unreserved surveyed public land, scattered throughout the district, were undisposed of at the end of the fiscal year during which the selections in question were filed (see annual report of the Commissioner of the General Land Office for the year ended June 30, 1900). In these respects the Visalia district does not greatly differ from many other land districts wherein selections under the act of 1897 have been, or are likely to be, made. Obviously, therefore, it could not have been contemplated that the local officers of the various land districts should or could, from personal knowledge, determine the physical conditions pertaining to lands selected under said act. The argument is intensified when applied to the Commissioner of the General Land Office and the Secretary of the Interior.

Nor can selections be lawfully accepted until there is a showing that the selected land is vacant and not known to be valuable for minerals. No other lands are subject to selection, and no selection can be regarded as complete until these essential conditions are made to appear. They do not appear from the public surveys. In this case the lands were surveyed in 1854. Whether since that date they have been continuously, or at any time, vacant, or occupied, and whether at any time known to be valuable for minerals, and if so, whether stripped of their minerals and worked out, are matters not shown by the land office records.

The right to a patent is not acquired in any case until the proofs are such that patent could be issued upon them if nothing were shown to the contrary. As long as anything remains undone which it is essential should be done by the selector in order to entitle him to a patent, the right thereto does not vest.

That a non-mineral affidavit should accompany the selection is not seriously questioned by appellant. It is just as essential that it should be accompanied by a vacancy or non-occupancy affidavit. Appellant's contention that the word "vacant," as used in the statute, means public lands which are not shown by the records of the local office or General Land Office to be claimed, appropriated, or reserved, can not be accepted. Portions of the public lands may be occupied, and for that reason be not subject to selection, and yet there be no mention of their occupancy in the records of the land department.

See also the case of Gray Eagle Oil Company *v.* Clarke (30 L. D., 570), wherein the Department, speaking upon the same subject, said:

As has been said in various decisions of the Department, this law constitutes a standing offer on the part of the government for an exchange of lands. In this offer the lands to be exchanged are described. Those to be relinquished by the individual must be within a forest reservation and those to be taken by him must be vacant and open to settlement. It is incumbent upon one who wishes to take advantage of this standing offer to bring himself within the terms thereof, not only as to the land he proposes to relinquish but also as to that which he proposes to take in exchange. It is his duty to inform himself as to the character and condition of the land he proposes to select and to honestly disclose the facts thus ascertained. . . . . Every consideration based upon the wise administration of this law supports the wisdom of a regulation requiring the selector to submit proof showing the land selected to be subject to such selection. . . . . Until this fact is established his proffer of exchange is not complete. Until then he has not made out a case which shows upon the face of the papers that he has so far complied with the conditions of

the act of 1897 as to convert the offer of exchange contained in said act into a contract fully executed upon his part. To lodge in an applicant for exchange of lands under this law a vested right as against the government or third parties, it must be made to appear that the land sought to be acquired by him is of the character contemplated by that law.

Applying to the selections here in question the principles announced in the cases referred to, it appears from the face of the papers that Clotfelter, in making the selections, fully complied with all the requisites necessary to the vesting of rights thereunder. He made seasonable and proper relinquishment of lands covered by a patent in a forest reservation, and made selection of the tracts desired in exchange therefor. The land office records disclosed no obstacle to the selections, and Clotfelter submitted with each selection an affidavit alleging the selected lands to be non-mineral in character and unoccupied. If there were nothing to the contrary he would be entitled to a patent from the government embracing the selected lands. But it is in substance alleged that the selected lands were both occupied and known to be valuable for minerals at the time of their selection. If either allegation is true the lands were not subject to selection, and the selections can not be carried to patent. The protests therefore require and justify investigation to determine the condition and character of the lands selected.

You are accordingly directed to cause a hearing to be had upon said protests, at which the protestants will be required to take the burden of proof. The evidence bearing upon the mineral character of the lands selected should not be restricted to mineral discoveries or development upon these lands and to their geological formation, but may extend to the discovery and development of mineral on adjacent lands, and to their geological formation. The inquiry respecting both the occupancy and character of the selected lands will be directed to the conditions existing and known at the time (January 5, 1900) when Clotfelter filed the selections and submitted the requisite proofs in support thereof. No consideration will be given to any changes subsequently occurring or to any mineral discoveries or development subsequently made.

Because these selections and protests have been pending in your office over a year, and because it is admitted that oil is now being extracted from the selected lands in large quantities by the protestants, to the exclusion of the lieu land claimants, thereby impairing the value of the lands to the latter, if their claim should finally prevail, it is directed that all further proceedings in your office and in the local office, affecting these selections, be conducted with as little delay as may be consistent with due consideration of the interests of the respective parties.

Subject to the modification herein indicated, the decision of your office ordering a hearing upon said protests is affirmed.

RIGHT OF WAY—INDIAN RESERVATION—ACTS OF MARCH 3, 1901, AND FEBRUARY 15, 1901.

OPINION.

The provisions of the acts of March 3, 1901, and February 15, 1901, relating to rights of way for telephone and telegraph lines through Indian reservations, are not necessarily repugnant, and both may, without inconsistency or conflict, be given effect.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, March 23, 1901. (J. H. F.)

I am in receipt, by your reference, of a letter from the Commissioner of Indian Affairs and accompanying draft of regulations prepared by him under the act of March 3, 1901 (31 Stat., 1058, 1083), authorizing the Secretary of the Interior to grant rights of way through Indian lands for the purpose of constructing, operating and maintaining telephone and telegraph lines and offices, and with reference to which you invite my attention to the act of February 15, 1901 (31 Stat., 790), entitled "An act relating to rights of way through certain parks, reservations and other public lands," and request to be advised as to which of the two acts mentioned governs as to rights of way through "Indian reservations," and that, if necessary, the draft of regulations prepared and transmitted by the Indian Office be changed or modified to conform to such views as I might find it necessary to express in relation thereto.

Upon examination of the two acts in question, I am of opinion that the provisions therein contained, relating to rights of way for telephone and telegraph lines through Indian reservations, are not necessarily repugnant or in conflict. Certain conditions are prescribed in each act, under which right of way for telephone and telegraph purposes through Indian reservations may be obtained, but the method of procedure and the terms and conditions imposed, under the respective acts, are separate and distinct and the nature and character of the rights acquired thereunder are entirely different.

The act of February 15, 1901, *supra*, authorizes the Secretary of the Interior, under general regulations to be fixed by him, "to permit the use of rights of way" through any of the reservations of the United States, including Indian reservations, for telephone, telegraph, and other purposes therein specified, upon approval of the chief officer of the Department under whose supervision such reservation falls and upon a finding by him that such permission is not incompatible with the public interests; and it is expressly provided therein that any permission given by the Secretary to use a right of way provided for in

said act may be revoked by him or his successor in his discretion, and that such permission "shall not be held to confer any right or easement or interest in, to or over any public land reservation or park."

It will be noted that the nature or character of the right acquired by those who obtain rights of way through Indian reservations, under the provisions of this act, is only that of a mere license or permission to use the same, when not incompatible with public interest, for the purposes therein specified, and that such license or permission is to be given and exercised without compensation to or annual tax for the benefit of the Indians, and is revocable at any time under the direction of the Secretary or his successor.

In determining the question involved it must be further noted that the act of March 3, 1901, *supra*, expressly provides that the grant of a right of way for telephone and telegraph lines and offices, under the provisions of that act, and as therein authorized to be granted by the Secretary of the Interior, shall confer upon the grantee a right "in the nature of an easement," and a right of way of the character therein provided for is only authorized to be granted through an Indian reservation upon payment by the grantee of proper compensation to the Indians, and, where such lines are not subject to State or Territorial taxation, the payment of an annual tax is also exacted for the benefit of the Indians interested.

In the light of these considerations, it is clearly apparent that the purposes of the two acts are separate and distinct; that the nature and extent of the rights authorized to be acquired thereunder, respectively, are materially different, and that the provisions of both acts, relative to rights of way through Indian reservations, may, without inconsistency or conflict, be given effect. The act which governs in any particular case is dependent upon the nature and extent of the rights desired to be acquired by the applicant. If the applicant desires to obtain a permanent right of way, in the nature of an easement, the act of March 3, 1901, *supra*, controls; whereas, if only a mere temporary license or permission to use a right of way, revocable at the pleasure of the Secretary or his successor, is desired, the act of February 15, 1901, *supra*, governs.

In view of the opinion herein expressed, I do not find it necessary to modify the draft of regulations relating to the act of March 3, 1901, prepared and transmitted by the Indian Office, as I assume it will be desired that separate regulations should be prepared under the act of February 15, 1901, *supra*.

Approved:

E. A. HITCHCOCK,
Secretary.

FOREST RESERVES—PARAGRAPH 21 OF RULES AND REGULATIONS OF APRIL 4, 1900, AMENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 10, 1901.

Paragraph 21 of the Rules and Regulations Governing Forest Reserves, issued April 4, 1900, was amended March 19, 1901, so as to read as follows:

FREE USE OF TIMBER AND STONE.

21. The law provides that—

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located.

This provision is limited to persons resident in the State or Territory where the forest reservation is located who have not a sufficient supply of timber or stone on their own claims or lands for the purposes enumerated, or for necessary use in developing the mineral or other natural resources of the lands owned or occupied by them. Such persons, therefore, are permitted to take timber and stone from public lands in the forest reservations under the terms of the law above quoted, strictly for their individual use on their own claims or lands owned or occupied by them within the State or Territory where such reservation is located, but not for sale or disposal, or use on other lands, or by other persons; provided, however, that the provisions of this paragraph shall not apply to companies or corporations. Before any timber or stone can be taken hereunder from the forest reserves, the person entitled thereto must first make application to the forest supervisor in charge of the reservation, or part of reservation, setting forth his residence and post-office address, designating the location, amount, and value of the timber or stone proposed to be taken, the place where, and the purpose for which the said timber or stone will be used, stating, in case the application is for timber, what sawmill or other agent, if any, will be employed to do the cutting, removing, and sawing, and pledging that no more shall be cut from the reservation than he actually needs for bona fide use on his own land or claim; and that none shall be sold, disposed of, nor used on any other than his own land or claim; and guaranteeing to remove and safely dispose of all tops, brush, and refuse cutting beyond danger of fire therefrom. Upon receipt of the application, the supervisor will immediately make investigation of the facts in the case and transmit the application, with report and recommendation, to the superintendent in charge. If, in his judgment, the

application be meritorious, and no injury to the forest cover will result from the removal of such timber or stone, he will thereupon approve such application, giving the party permission to remove the timber or stone under the supervision of a forest officer: *Provided*, That where the stumpage value of the timber exceeds one hundred dollars, permission must be obtained from the Department, and for this purpose the superintendent, in all such cases, will submit the application to the Commissioner of the General Land Office, with his recommendation thereon. In case the application be approved, the superintendent will be notified and the cutting will be allowed, under supervision, as in cases where the amount involved is less than one hundred dollars. Every forest supervisor having charge and supervision of the cutting of timber under the foregoing regulations will submit quarterly reports to the superintendent in charge of the reservation, who will promptly forward them to the Commissioner of the General Land Office for transmission to the Department, in order that the Secretary of the Interior may be advised of the quantity of timber cut and whether the privilege granted is being abused. These reports should show the names of the persons who have applied, during the quarter, for permission to cut timber free of charge, the kind of timber applied for, the quantity, the stumpage value of the same, and the purpose for which the applicant desired to use it.

BINGER HERMANN,
Commissioner.

Approved, April 10, 1901.
E. A. HITCHCOCK,
Secretary.

RAILROAD GRANT—ACT OF MARCH 3, 1875.

UTAH AND CALIFORNIA RAILWAY COMPANY ET AL.

Rights secured under the act of March 3, 1875, by the approval of maps of location of a line of railroad do not become forfeited merely by failure to construct and operate a railroad along such line of location within the period named in the fourth section of that act; but where those claiming under such approval have filed written consent to the approval of conflicting maps of location, the latter maps may also be approved.

Maps of location over unsurveyed lands will be accepted for information only and will not be approved.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 24, 1901.* (F. W. C.)

With your office letter of the 23rd instant were forwarded articles of incorporation and proofs of organization filed by the Utah and California Railway Company and the Utah, Nevada and California Railroad Company, together with maps of location filed by said companies,

respectively, and in said letter it is recommended that the articles of incorporation filed by the last-mentioned company be accepted and filed, and that the map of location showing the second section of road, filed by said company, be approved under the provisions of the act of March 3, 1875 (18 Stat., 482), so far as the same crosses surveyed public land.

On May 3 and June 7, 1890, this Department approved four maps of location filed by the Oregon Short Line and Utah Northern Railway Company, showing its line of route as surveyed and located from the Utah-Nevada boundary line near the seventh standard parallel by way of Cloverdale Junction to a point near Pioche, Nevada, a distance of 70.53 miles. Said company at an expense of several hundred thousand dollars graded nearly the entire line of its road as shown upon said maps, constructed tunnels and did other work preliminary to the occupation and operation of a railroad upon said located line. It became financially embarrassed and all of its property, including that above described, was purchased at foreclosure sale by the Oregon Short Line Railroad Company, a corporation organized under the laws of the State of Utah. The work of construction along this line was discontinued in 1890 or 1891 and was not resumed until during the present month, when the Utah, Nevada and California Railroad Company entered upon the construction of the line of road and is now actively proceeding therewith from the Utah-Nevada line toward Cloverdale Junction, Nevada.

The Utah, Nevada and California Railroad Company was incorporated in February, 1899, under the laws of the State of Nevada. Its articles of incorporation and proofs of organization as submitted have been examined by your office and found to be satisfactory, and it is shown to be entitled to acquire a right of way and to construct and operate a railroad in the State of Nevada. Its maps of location, filed as before stated, show two sections of located road, beginning at the Utah-Nevada State line and following the old line located by the Oregon Short Line and Utah Northern Railway Company to Cloverdale Junction, which maps your office finds fully conform to the regulations governing the filing of such maps. It is proceeding with the construction of the road along said line of location, with the consent of the Oregon Short Line Railroad Company and the Oregon Short Line and Utah Northern Railway Company; indeed it is an auxiliary to these companies.

That the rights secured by the approval of the maps of location of the Oregon Short Line and Utah Northern Railway Company, in May and June, 1890, have not become forfeited merely by the failure of that company to construct and operate a railroad along said line of location within the period named in the fourth section of the act of March 3, 1875, *supra*, is clearly settled by a long line of decisions (see United

States *v.* Northern Pacific Ry. Co., 177 U. S., 435, and cases therein cited; also Spokane and Palouse Ry. Co., 26 L. D., 224), but as those claiming under said location have filed written consent to the approval of the maps of location filed by the Utah, Nevada and California Railroad Company, there is no reason why that company's maps may not be approved. Montana Railway Co. (21 L. D., 250); Franklin F. Noxon *et al.* (27 L. D., 585).

I have therefore accepted for filing the articles of incorporation and due proofs of organization submitted by the Utah, Nevada and California Railroad Company, and have approved its map showing the second section of the located road, so far as the same crosses surveyed public lands. As to the unsurveyed lands the maps will be received for information only. The map showing the first section covers only unsurveyed land.

It but remains to determine the rights of the Utah and California Railway Company. That company was organized under the laws of the State of Utah, and on June 20, 1896, asked approval, under the provisions of the act of March 3, 1875, *supra*, of four certain maps of location, the line shown thereon being identical with that shown upon the approved maps of location filed by the Oregon Short Line and Utah Northern Railway Company, before referred to, and thereupon said last-mentioned company filed a protest against the approval of said maps. The articles of incorporation of the Utah and California Railway Company did not at the time of filing said maps authorize it to operate a railroad outside of the State of Utah, and it was not until January 2, 1901, that by an amendment of its articles of incorporation it became empowered to construct a line of road in Nevada, even if it could acquire authority so to do from the State of Utah alone.

In January of the present year, a hearing was ordered by your office at the Carson City, Nevada, land office, which resulted in a decision by the register and receiver of that office holding that all rights secured by the approval of the maps of location filed by the Oregon Short Line and Utah Northern Railway Company in 1890 had become forfeited by its failure to construct such line of road within the time named in the act of March 3, 1875. That decision can not be sustained. The land department can not declare and enforce a forfeiture of this sort. Following the decision of said local officers the Utah and California Railway Company made an ineffectual attempt to take and hold possession of the grade constructed by the Oregon Short Line and Utah Northern Railway Company. It did some work thereon but not enough to amount to more that a colorable attempt to construct a railroad.

At the oral hearing had today in this matter it was not claimed, nor does it seem that it could be, that there was any authority, under the laws of Nevada, before about the middle of last month for the con-

struction and operation by a Utah corporation of a railroad wholly within the State of Nevada. It is represented that at the time named a law was enacted in that State whereby such authority was given to corporations of other States upon their compliance with certain named conditions, and it is admitted that these conditions were not complied with by the Utah and California Railway Company, prior to the 8th instant. No certified copy of this act is presented nor is a copy presented in any form which entitles it to recognition. This company therefore can not even now be held or recognized as entitled to acquire a right of way within the State of Nevada, and this Department must refuse to accept for filing its articles of incorporation and proofs of organization. Even if the recent Nevada statute were now before the Department and were shown to go as far as is claimed, the Utah, Nevada and California Railroad Company would be entitled to precedence, because, first, its application was the first to be presented in a perfected form showing a right in the company to acquire a right of way in Nevada; second, it is shown to have actively commenced construction of the line of road before the time when the other company claims to have complied with the recent Nevada statute; third, the obstacle which the outstanding Oregon Short Line and Utah Northern right of way presents to the granting of another right of way over the same ground has been removed as to the Utah, Nevada and California company by the written consent of the holder filed in this proceeding; and, fourth, the existing grade and tunnels on this ground placed there by the Oregon Short Line and Utah Northern company at enormous cost gives its auxiliary company the stronger claim to recognition as between the two new companies, even if they are both willing and able to enter upon the actual construction and operation of a railroad upon said line of location.

The Utah and California Railway Company's maps are therefore herewith returned without approval.

RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

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

The stipulation entered into between the Northern Pacific Railroad Company and the St. Paul, Minneapolis and Manitoba Railway Company, whereby the latter company consented and agreed that the former company should be adjudged the owner of certain lands theretofore selected by both companies, within the conflicting indemnity limits of their respective grants, the superior right to which had been held to be in the Manitoba company but which lands had not been certified or patented, and the decree of the United States circuit court rendered by consent of said companies in pursuance of such stipulation, in legal effect operated as a waiver and relinquishment by the Manitoba company of all claim to said lands, under its grant, as against the government.

A certified copy of such decree having been filed in the General Land Office, it is the duty of the Department to take cognizance of the legal effect thereof in so far as the same pertains to the claim theretofore asserted to said lands by the Manitoba company and the consequent effect of the elimination of such claim upon conflicting claims asserted thereto by a settler and the Northern Pacific company, respectively, and if the facts shown, in the absence of the claim theretofore asserted by the Manitoba company, would otherwise bring the conflicting claims of such settler and the Northern Pacific company within the purview of the act of July 1, 1898, such conflicting claims should be adjusted in accordance with the provisions of that act.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *April 26, 1901.* (J. H. F.)

This case is before the Department on appeal by John A. N. Stromberg from your office decision of May 14, 1900, rejecting his homestead application which accompanied his election to retain, under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), the NE. ¼ of SW. ¼ and lots 1 and 2 of Sec. 23, T. 132 N., R. 40 W., St. Cloud, Minnesota, land district.

The land involved is situated within the indemnity limits of the grant for the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba railway and is also within the first indemnity limits of the grant to the Northern Pacific Railroad Company, but was not included in the withdrawals ordered on account of the latter grant in 1870 and was excepted from the operation of the withdrawals ordered for both grants in 1872 by reason of a then existing pre-emption filing thereon, under which filing, however, entry was never perfected.

In 1883 the Northern Pacific Railroad Company applied to make indemnity selection of the land in question, but its application was rejected by reason of failure to specify the lands lost in place as a basis for such selection, from which action the company appealed.

May 5, 1865, the St. Paul, Minneapolis and Manitoba Railroad Company applied to select the same land, specifying a satisfactory basis therefor, which application was also rejected by reason of the pendency of the Northern Pacific Railroad Company's prior application, and appeal was taken from such rejection. August 27, 1887, Stromberg applied to make homestead entry of said land. His application was rejected by reason of conflict with the pending indemnity selections, and he appealed.

Upon consideration of the respective appeals, your office, by decision of July 26, 1894, held that the Northern Pacific Railroad Company had acquired no right to the land involved by its selection made in 1883, in the absence of any specification of a proper basis therefor, rejected Stromberg's homestead application, and awarded the land to the St. Paul, Minneapolis and Manitoba Railway Company under its selection in 1885. Stromberg failed to appeal from your office decision, after due notice thereof, and the Northern Pacific company appealed

to the Department, which by decision of March 24, 1896 (not reported), affirmed the action of your office in so far as the rights of that company were involved, and approved the selection made by the Manitoba company.

July 29, 1899, the local officers transmitted Stromberg's election to retain the land hereinbefore described under the provisions of the act of July 1, 1898, *supra*, accompanied by his application to make homestead entry thereof, in support of which he alleged that he settled and established his residence upon the land in 1887, and ever since that date had cultivated and improved the same and continuously resided thereon with his family. By your office decision, from which the appeal herein was perfected, said application was rejected, upon the ground that the land involved having been awarded to the Manitoba company by departmental decision of October 24, 1896, *supra*, the conflicting claims to the land involved were not subject to adjustment under the act of July 1, 1898.

In support of his appeal, Stromberg set forth that in an action before the United States Circuit Court for the District of Minnesota, wherein the Northern Pacific Railroad Company was plaintiff and the St. Paul, Minneapolis and Manitoba Railway Company *et al.* were defendants, the land in controversy, under date of May 24, 1898, was decreed by said court to the Northern Pacific company; and in view of this statement, the Department, November 28, 1900, returned the appeal and accompanying papers to your office with direction that the matter of said decree be investigated, and in connection therewith it was suggested that in the event it should be found that such decree had been entered and had become final, the conflicting claims to the land asserted, respectively, by Stromberg under his continued settlement and residence and by the Northern Pacific Railroad Company under its grant, might then be subject to adjustment under the act of 1898, *supra*.

March 18, 1901, you returned the appeal and other papers in the case to the Department, accompanied by a certified copy of the decree of the United States Circuit Court in the case mentioned, which, in response to your request therefor, was filed in your office February 25, 1901, by resident attorneys of the Northern Pacific Railway Company, successor of the Northern Pacific Railroad Company.

In their letter submitting a copy of the decree, the attorneys of the Northern Pacific company call attention to the fact that the decree in question was entered by consent, under a stipulation of counsel for the Manitoba company and the Northern Pacific company, which, it is alleged, involved many complex questions wholly outside the rights of said companies under their respective granting acts. Attention is further directed to the fact that the claim of the Northern Pacific company was finally rejected by the Department in 1896; that the company

has no claim to the land now pending before your office or the Department, and it is contended, therefore, that the provisions of the act of July 1, 1898, *supra*, are not applicable to a proper disposition of the case at bar. In this contention your office, by report which accompanied the return of the papers, concurs.

Upon examination of the papers transmitted, the Department is of opinion that the stipulation referred to and the decree of the United States Circuit Court based thereon, in legal effect were tantamount to a relinquishment by the Manitoba company of all claim to the land in controversy, under its grant, as against the government. The cause, in which the decree was entered, involved a considerable quantity of land which was then in controversy between the Manitoba company and the Northern Pacific company under their respective grants, and by the terms of the stipulation hereinbefore mentioned it was agreed by and between the two companies that about 25,270 acres of the lands thus involved, which had been patented or conveyed by the State of Minnesota to the Manitoba company or its predecessor in 1877 or prior thereto (a schedule of which lands was thereto attached, marked "Exhibit B"), should be awarded and confirmed to the Manitoba company, and that the balance of the lands in controversy in the cause, being lands patented to the Manitoba company in 1889 or subsequently thereto, and lands not yet patented (a schedule of which was thereto attached, marked "Exhibit A"), should be awarded and confirmed to the Northern Pacific company; and it was further therein agreed that a decree, by consent, should be entered in the cause whereby the Northern Pacific company should be decreed to be the owner of all the lands described in schedule "A," which includes the land involved in the case at bar, and that the Manitoba company should be decreed to have no right, title, or interest in and to the lands described in said last-mentioned schedule or any part thereof. This stipulation was filed in the cause May 24, 1898, and in pursuance thereof the court, on the same day, entered a decree therein, the Manitoba company consenting thereto, whereby it was adjudged and decreed that the Northern Pacific company, under and by virtue of the act of July 2, 1864, *supra*, and the acts and joint resolutions of Congress amendatory thereof and supplemental thereto, had acquired and become the owner of all the lands described in schedule "A" hereinbefore mentioned, and that the Manitoba company had no lawful right, title, or claim in or to any of said lands; that all certificates, patents, or conveyances theretofore executed by the President or other officer of the United States or by the governor or other officer of the State of Minnesota purporting to certify or convey any of said lands to the Manitoba company or for its use and benefit were wholly unauthorized; that the right, title, and interest of the Northern Pacific company in and to all of said lands remained, in equity, unaffected and unimpaired by or on account

of any such certificate, patent, or conveyance; and that any and all legal title to any of said lands acquired by the Manitoba company, under or by reason of any such certificate, patent, or conveyance, was thereby, in virtue of such decree, transferred to and vested in the Northern Pacific company.

Whatever may have been the considerations passing between the two companies in the adjustment of their respective claims to the lands involved in said suit, it must be noted that one of the results thereby attained was that the Manitoba company, both by the terms of the stipulation and of the decree, expressly waived and relinquished all right, title, and claim, under its grant, to any of the lands described in schedule "A" attached to and made a part of said stipulation and decree, and, whatever may have been the legal affect of said decree in so far as the same purported to operate as a transfer to the Northern Pacific company of the legal title to lands theretofore certified, patented, or conveyed to the Manitoba company, it evidently did not operate and could not operate, as a transfer of the title to lands which had not been certified or patented to the Manitoba company or for its benefit. On the contrary, by the terms of the decree, the right and title therein and thereby confirmed to the Northern Pacific company was expressly adjudged to have been acquired under and by virtue of its granting act, and the Manitoba company, by its own voluntary stipulation, was adjudged and decreed to have no right, title, or claim in and to any of said lands. The decree may be final as between the parties thereto, and it is alleged by Stromberg that a copy thereof has been recorded in the county wherein the land is situate. But the United States not having been made a party to the suit in question and not having parted with the legal title to the land in controversy, is not bound by the terms of the decree. The decree could not confirm in the Northern Pacific company, as against the government, the title which the government still retained. A certified copy of said decree having been filed in your office, it is the duty of the Department to take cognizance of the legal effect thereof in so far as the same pertains to the claim of the Manitoba company heretofore asserted to the land in question and involved in the case at bar and the consequent effect of the elimination of such claim upon the conflicting claims thereto asserted, respectively, by Stromberg and the Northern Pacific company. The exact date of the commencement of the suit in the circuit court is not shown, but the decree hereinbefore mentioned was rendered May 24, 1898, and it is evident that the action had been pending for a considerable time prior thereto. It is, therefore, apparent from the record now before the Department that the Manitoba company, prior to the passage of the act of July 1, 1898, had, in effect, waived and relinquished all claim to the land in controversy, as against the government, under its grant, and it is also

apparent that, although the claim of the Northern Pacific company thereto had been rejected by the Department in 1896, yet the latter company, on and prior to January 1, 1898, and ever since then, was and had been asserting and maintaining before the United States court a claim to said land under and by virtue of its grant and its previously attempted selection of the land thereunder. The record also shows that Stromberg, notwithstanding the rejection of his application to make homestead entry in 1895, has never abandoned the land, but has ever since continued to maintain his settlement and residence thereon. These facts, in the absence of the selection of record by the Manitoba company, would appear to bring the conflicting claims of Stromberg and of the Northern Pacific company to the land in question within the purview of both the spirit and letter of the provisions contained in the act of July 1, 1898, and to render the same subject to adjustment thereunder.

You are therefore directed to call upon the Manitoba company to show cause, within a time specified, why its selection should not be canceled, and in the event a showing is made by the company relative thereto, you will readjudicate the case in accordance with the views hereinbefore expressed; and in default of such showing its selection should be canceled and the conflicting claims of Stromberg and the Northern Pacific company adjusted in accordance with the regulations prescribed under the act of July 1, 1898 (28 L. D., 103; 29 L. D., 316, 387).

The decision appealed from is modified accordingly.

RIGHT OF WAY—STATION GROUNDS—SEC. 2, ACT OF MARCH 2, 1899.

OPINION.

The act of March 2, 1899, prescribes limitations as to the width and length of station grounds to be taken thereunder, and a map of station grounds which shows a disregard of these limitations can not be legally approved.

Assistant Attorney-General Van Devanter to the Secretary of the Interior, May 2, 1901. (W. C. P.)

I am in receipt of your request for opinion whether the plat of station grounds for the Western Oklahoma Railway Company at Ardmore, Indian Territory, can be legally approved under the provisions of the act of March 2, 1899 (30 Stat., 990), under which said plat is filed.

Section two of said act describes the right of way granted by section one as follows:

That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, machine shops, side tracks,

turn-outs, and water stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one continuous length of ten miles of road.

The plat submitted here shows an irregularly shaped tract about 2,000 feet in length but in some places much in excess of and in others much less than 100 feet in width, but not exceeding in area, it is stated, the quantity that would be contained in a rectangular tract 100 feet wide by 2,000 feet long. The Indian inspector in submitting the matter says:

> It would appear that the only question in connection with the plat of this station ground is whether or not the land might be taken in any desired shape so that the aggregate area is not in excess of the area authorized by the act.

In the general right of way act of March 3, 1875 (18 Stat., 482), provision is made for station grounds "not to exceed in amount twenty acres for each station," while in many special acts the companies are given "all necessary grounds" for station purposes. There is in these acts no indication of an intention to prescribe any restrictions as to the form of station grounds, that matter being left to the discretion of the land department. About the time of the passage of the act under consideration, many acts for rights of way through Indian lands were passed which disclose a different policy. In these acts three different forms are used in describing grounds for station purposes. One (act of March 1, 1899, 30 Stat., 918) is ground adjacent to the right of way "not to exceed in amount three hundred feet in width and three thousand feet in length for each station;" another (act of March 2, 1899, under consideration) is ground adjacent to the right of way "not to exceed one hundred feet in width by a length of two thousand feet;" and still another (act of March 3, 1899, 30 Stat., 1368), is "a strip of land one hundred feet in width with a length of two thousand feet." If it had not been intended to provide restrictions as to the form of the ground to be taken some expression would have been used similar to that in the act of March 3, 1875, or if the matter both as to form and quantity was to be left to the determination of this Department, the provision would have been as in other acts for "all necessary ground." Instead, the provision is for ground, that is, a parcel, tract or strip, of the specified dimensions, leaving the discretion of this Department to be exercised inside the limits thus prescribed.

I am of opinion that this act prescribes limitations as to the width and length of station grounds which may not be disregarded, and that, therefore, the map submitted can not be legally approved under the provisions thereof.

Approved:

THOS. RYAN,

Acting Secretary.

FORT FETTERMAN MILITARY RESERVATION—RIGHT TO PURCHASE PASTURE AND GRAZING LAND.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 8, 1901.

Register and Receiver, Douglas, Wyoming.

SIRS: Your attention is called to the act of March 3, 1901 (31 Stat., 1085), copy herewith, entitled "An act granting homesteaders on the abandoned Fort Fetterman Military Reservation in Wyoming the right to purchase one quarter section of public land on said reservation as pasture or grazing land."

You will be guided by the following instructions in your disposition of cases arising under this act:

1. The act is applicable only to the Fort Fetterman post reserve, in townships 32 and 33 north, ranges 71, 72, and 73 west.

2. The right of purchase is limited to persons who have made homestead entry within said reservation prior to the passage of said act.

3. Persons desiring to avail themselves of the provisions of said act will be required to file applications therefor, describing the lands sought to be purchased, and to publish notice of their intention to submit proof in support of such applications as required by the act of March 3, 1879, in preemption and homestead cases. The application to purchase must in every instance show: (a) That the applicant, prior to March 3, 1901, has exercised the right of homestead entry on land within the said reservation, the number and date of such entry, the description of the land covered thereby, and that such entry is still subsisting; (b) that the land applied for is not settled upon, occupied, or improved, and is not valuable for coal or minerals; that the land is suitable for pasture or grazing purposes; its location relative to sources of water supply, and the causes which it is claimed render it unfit for cultivation and homestead; and that the land sought to be purchased, with the land on which the applicant so exercised the right of homestead entry before March 3, 1901, does not exceed in the aggregate 320 acres.

4. Should any adverse claimant appear or protest be filed against the applicant's right to purchase, the proceedings thereon will be conducted in accordance with the Rules of Practice in similar cases.

5. On the submission of such proof, you will forward the same to this office for consideration, after having made due notation on your records. If the entryman has heretofore submitted final proof on his original homestead entry showing due compliance with law thereunder, and the proof submitted under his application to purchase is found satisfactory, you will then be directed to permit the applicant to make payment for the land involved, and upon his making payment

you will issue to him cash certificate and receipt of current number and date, noting thereupon and upon the abstracts the fact that the purchase is allowed under and in accordance with the provisions of the act of March 3, 1901. If, however, it be found by this office, upon an examination of the application for the right to purchase, that the entryman has not yet submitted final proof on his homestead, said application will be held to await the completion of the original homestead entry. If it then be found that the said applicant has shown due compliance with law under the said homestead entry and his application is otherwise satisfactory, he will be allowed to complete his purchase by making payment for the land.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved:
THOS. RYAN,
Acting Secretary.

RAILROAD GRANT—ADJUSTMENT—ACT OF JULY 1, 1898.

JOHNSON *v.* NORTHERN PACIFIC RY. CO.

Conflicting claims to lands excepted from the grant to the Northern Pacific Railroad Company by reason of a withdrawal made prior to the grant are not subject to adjustment under the provisions of the act of July 1, 1898.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 8, 1901.* (F. W. C.)

The Department is in receipt of your office letter of the 30th ultimo, making report in the matter of the conflicting claims to the NW. ¼ of Sec. 25, T. 52 N., R. 14 W., Duluth land district, Minnesota.

From said report it appears that this tract is within the primary limits of the grant made to aid in the construction of the Northern Pacific railroad and is opposite the portion thereof definitely located July 6, 1882. It fell to the east of the terminal limit of said grant erroneously fixed at Duluth in accordance with departmental decision of July 27, 1896 (23 L. D., 204), and for that reason Charles H. Johnson was permitted to make homestead entry of the land on June 12, 1897.

Following the decision of the supreme court in the case of the United States *v.* Northern Pacific R. R. Co. (177 U. S., 435), which fixed the eastern terminus of the Northern Pacific land grant at Ashland, in the state of Wisconsin, Johnson elected to retain this tract as against the company under the provisions of the act of July 1, 1898 (30 Stat., 597, 620), and thereupon the said tract was included in a list submitted to and approved by this Department on January 11, last, and the Northern Pacific Railway Company, successor in interest to the Northern Pacific Railroad Company, was invited to relinquish its claim to this land under the provisions of said act.

Responding thereto a showing was filed by the railway company evidencing a sale of this land to Frederick Weyerheuser and John A. Humbird on April 14, 1900. Thereupon Johnson and his wife executed a relinquishment releasing, quit-claiming and relinquishing to the United States all their right, title and interest in and to the above described land, under said homestead, with a view to transferring their claim to other land, as provided for in the act of 1898. This relinquishment was forwarded for the consideration of this Department by your office letter of March 29, last, the matter being considered in departmental decision of April 8, last, not reported, in which it was held that—

> In view of the showing filed by the company it is clear that it can not be required to relinquish this land under said act of July 1, 1898, supra, and in response to your office letter of the 29th ultimo, you are informed that this Department sees no objection to the acceptance of the relinquishment executed by Johnson and his wife.

It further appears that upon the establishment of the limit of the withdrawal of May 26, 1864, for the Lake Superior and Mississippi railroad, under the grant made by the act of May 5, 1864, this land was included within the limits of said withdrawal and, as a consequence, was excepted from the Northern Pacific grant. See Northern Pacific Ry. Co. *v.* Rooney (30 L. D., 403).

Paragraph 9 of the regulations issued under the act of July 1, 1898, *supra*, approved February 14, 1899 (28 L. D., 103, 107), in defining what are the claims coming within the provisions of said act, states that—

> The railroad claim is one which arises from the definite location of the line of railroad if the land is within the primary limits of the grants, or which arises from a lieu selection if the land is within the indemnity limits, and is one which, in the absence of all individual claims, would enable the railroad claimant to obtain full title to the land.

It is clear that in the absence of the claim made to this land by Johnson under his homestead entry the company would not be able to obtain any title to the land, the same having been excepted from its grant by reason of the withdrawal made prior to the grant on account of the Lake Superior and Mississippi railroad grant, and conflicting claims to this land are therefore clearly not subject to adjustment under the provisions of said act. Departmental decision of April 8, last, is hereby recalled and vacated and the relinquishment by Johnson of his claim to this land under the act of 1898, is rejected.

You are directed to make an immediate examination of the tracts submitted for and approved by this Department for relinquishment under said act, and as to the lands included within said withdrawal of May 26, 1864, said approval is revoked. You will advise the company at once of such revocation and take no further steps toward the adjustment of conflicting claims to such land under the provisions of the act of July 1, 1898.

SOLDIERS' ADDITIONAL HOMESTEAD—ASSIGNMENT.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 8, 1901.

Registers and Receivers, United States Land Offices.

GENTLEMEN:

To prevent confusion and provide a uniform rule for the transfer and assignment of soldiers' additional rights, recertified to owners and bona fide purchasers under the act of Congress of August 18, 1894 (28 Stat., 372, 397–398), and official circular of October 16, 1894, (19 L. D., 302), the following additional instructions are hereby promulgated:

1. The assignment may be written or printed upon a separate sheet or sheets of paper to be securely attached to the certificate.

2. Each assignment must be attested by two witnesses and duly acknowledged before some officer authorized to take acknowledgments of deeds in the county or district wherein the assignment is made, who shall certify that the assignor is well known to such officer, that he is the identical person to whom the soldiers' additional right was recertified, and who executes the assignment thereof.

3. The following forms are prescribed for use in making assignments. These forms, or others containing the substantial matter thereof, will be accepted as a compliance with these instructions:

[Form No. 1.]

ASSIGNMENT BY FIRST OWNER UNDER RECERTIFICATION.

For value received, I —— ——, of ——, in the ——, and ——, assignee of the original beneficiary, to whom the foregoing and attached certificate was, upon the —— day of ——, 190—, issued by the Commissioner of the General Land Office under section 2306 of the Revised Statutes of the United States, and the same —— ——, to whom as a bona fide purchaser and owner thereof, such original certificate was, upon the —— day of ——, 190—, recertified by the Commissioner of the General Land Office, under the act of Congress of August 18, 1894, and official circular of the General Land Office, dated October 16, 1894, do hereby sell and assign unto —— ——, of ——, in the ——, and ——, and to his heirs and assigns forever, the said certificate and the right of entry and location thereby secured, and authorize him to locate the said certificate and to enter lands therewith and to receive a patent for any land so located or entered.

—— —— [L. S.]

Attest:

—— ——

—— ——

[Two witnesses.]

[Form No. 2.]

ACKNOWLEDGMENT OF FORM NO. 1.

——— ———
——— ——— } *ss.*

On this —— day of ———, 190—, before me personally came ——— ———, to me well known, and acknowledged the foregoing assignment to be his act and deed; and I certify that the said ——— ———, is the identical person to whom the within certificate was recertified upon the —— day of ———, 190—, and who executed the foregoing assignment thereof. And I further certify that the said certificate, at the time of making the foregoing assignment, was attached to said assignment and was presented by and was in the possession of him, the said ——— ———.

——— ———
——— ———

[Form No. 3.]

ASSIGNMENT BY ASSIGNEE OF FIRST OWNER.

For value received, I, ——— ———, to whom the foregoing and attached certificate and right of entry and location thereby secured were assigned, do hereby sell and assign unto ——— ———, of ———, in the ———, and ———, and to his heirs and assigns forever, the said certificate and right of entry and location, and authorize him to locate the said certificate and to enter lands therewith and to receive a patent for any lands so located or entered.

——— ——— [L. S.]

Attest:

——— ———
——— ———

[Form No. 4.]

ACKNOWLEDGMENT OF FORM NO. 3.

On this ——— day of ———, 190—, before me personally came ——— ———, to me well known, and acknowledged the foregoing assignment to be his act and deed; and I certify that the said ——— ———, is the identical person to whom the foregoing and attached certificate and right of entry and location thereby secured were, on the ——— day of ———, 190—, heretofore assigned. And I further certify that the said certificate, at the time of making the foregoing assignment, was attached to said assignment, and was presented by and in the possession of him, the said ——— ———.

——— ———
——— ———

4. Subsequent assignments may follow Form No. 3 above.

5. You will allow locations or entries in the name of the assignee when substantial compliance with the foregoing instructions is shown.

BINGER HERMANN,
Commissioner.

Approved:
THOS. RYAN,
Acting Secretary.

INDIAN LANDS—ALLOTMENT—CITIZENSHIP.

ENUXIS BUCKLAND.

Children born of a white man, a citizen of the United States, and an Indian woman, his wife, follow the status of the father in the matter of citizenship, and are therefore not entitled to allotments under section four, act of February 8, 1887, as amended by the act of February 28, 1891.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 9, 1901.* (C. J. G.)

Enuxis Buckland appeals from your office decision of September 20, 1900, rejecting, upon the recommendation of the Commissioner of Indian Affairs, Indian allotment applications Nos. 150 and 207, filed by her for her minor children Alfred and Roland Buckland, covering, respectively, the S. ½ SW. ¼ and S. ½ SE. ¼, Sec. 19, T. 21 N., R. 8 E., and the SW. ¼ SW. ¼., Sec. 20, the W. ½ NW. ¼ and NW. ¼ SW. ¼, Sec. 29, T. 21 N., R. 8 E., Helena, Montana, land district.

These applications were made under the fourth section of the act of February 8, 1887 (24 Stat., 388), amended by the act of February 28, 1891 (26 Stat., 794), which provides in part—

> That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations.

The said recommendation of the Commissioner of Indian Affairs was based upon the report of a special allotting agent, from which it appears that the applicant is a full-blooded Indian of the Piegan tribe; that she is married to a white man, a citizen of the United States, and has resided with her husband on his homestead for twenty-five years; and that the said minor children are the offspring of such marriage. These matters are admitted by the applicant.

In the case of Ulin *v.* Colby *et al.* (24 L. D., 311), it is held (syllabus):

> Children born of a white man, a citizen of the United States, and an Indian woman, his wife, follow the status of the father in the matter of citizenship, and are therefore not entitled to allotments under section 4, act of February 8, 1887, as amended by the act of February 28, 1891.

In Keith *v.* United States *et al.* (58 Pac. Rep., 507), it is said:

> The question was presented in *Ex parte* Reynolds, 5 Dill. 394, Fed. Cas. No. 11,719, and it was there concluded that, the Indians being free persons, the common-law rule that the offspring of free persons follows the condition of the father prevails in determining the status of the offspring of a white man, a citizen of the United States, and an Indian woman. This case was cited in the opinion of Asst. Atty. Gen.

Shields to the Secretary of the Interior, November 27, 1891 (13 Land Dec. 685), and the rule reannounced in the declaration that "children of such parents are therefore by birth not Indians, but citizens of the United States, and consequently not entitled to allotments under the act of March 2, 1889," which provided for allotments to the members of the tribe to which this woman belonged.

Applications for allotments made under the fourth section of the act of February 8, 1887, must necessarily be on the theory that the applicants are Indians. Under the rule announced in the cases cited the minor children of Enuxis Buckland are not Indians but citizens of the United States, and so not entitled to allotments under said section.

The acts of August 9, 1888 (25 Stat., 392), and June 7, 1897 (30 Stat., 62, 90), contain provisions protecting the rights and titles of Indian women married to white men and of the children born of marriages between such persons. The second section of the first named act provides:

> That every Indian woman . . . who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges and immunities of any such citizen, being a married woman: *Provided*, That nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein.

And the following provision is found in the act of June 7, 1897:

> 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.

But these acts refer exclusively to tribal property. The applicant herein is not asking that her minor children be given any share in tribal property but that they be given allotments out of the public domain; consequently said acts have no application here.

No reason appearing for disturbing the conclusion reached by your office, the same is affirmed.

FINAL PROOF—SCHOOL SECTIONS—NOTICE.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 15, 1901.

Registers and Receivers,
United States Land Offices,

SIRS: In all cases of notice of intention to submit final proof on entries for lands embraced in sections that have been granted or

reserved to the State or Territory for school purposes, you will require the entryman in the published notice to specially cite the State or Territory, and serve a copy of such notice, either personally or by registered mail, on the proper State or Territorial authorities, and furnish evidence of such service prior to or at the time of the submission of proof, as in other cases of adverse claims.

Very respectfully, BINGER HERMANN,
Commissioner.

Approved:
THOS. RYAN,
Acting Secretary.

HASTINGS AND DAKOTA RY. CO. *v.* BUCKENTIN.

Motion for review of departmental decision of March 11, 1901, 30 L. D., 521, denied by Acting Secretary Ryan May 21, 1901.

SCHOOL LANDS—FOREST RESERVATION—LIEU SELECTION.

DUNN ET AL. *v.* STATE OF CALIFORNIA.

All applications for indemnity lands in lieu of school sections embraced, after survey, within a forest reservation, "must designate by specified legal subdivisions the lands in lieu of which indemnity is desired," and applications which do not conform to this requirement can not be accepted.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 25, 1901.* (A. B. P.)

July 3, 1900, M. H. Dunn and eight other persons filed their joint protest against the approval of school indemnity selection No. 6625, presented by the State of California September 6, 1898, and embracing, with other lands, the NE. ¼ of the SW. ¼, the S. ½ of the SW. ¼, and lot one of Sec. 23, T. 3 N., R. 16 W., Los Angeles land district. By the protest and accompanying affidavits it is alleged, in substance and effect, that the lands described are oil-producing lands, more valuable for their minerals than for agricultural purposes, and therefore not subject to indemnity school selection.

August 28, 1900, your office dismissed the protest as insufficient to warrant a hearing, and the protestants have appealed to the Department.

As originally presented, the selection embraced, in addition to the subdivisions already mentioned, the NW. ¼ of the NW. ¼ and the S. ½ of the NW. ¼ of said section 23, T. 3 N., R. 16 W., and covered, in the aggregate, 275.28 acres of land. The land in lieu of which the selection was made is described as "275.28 acres of Sec. 16, T. 9 N.,

R. 26 W., S. B. Meridian." It appears that said section 16 was embraced, after survey, within the boundaries of a public forest reservation known as the "Pine Mountain and Zaca Lake Forest Reserve," which was created by proclamation of March 2, 1898 (30 Stat., 1767), under the act of March 3, 1891 (26 Stat., 1095, 1103), and modified and enlarged by proclamation of June 29, 1898 (30 Stat., 1776).

February 9, 1901, your office rejected the selection to the extent of the lands described therein as the NW. ¼ of the NW. ¼ and the S. ½ of the NW. ¼ of said section 23, for reasons not material here.

In a circular of instructions approved by this Department December 19, 1893 (17 L. D., 576), it was stated, among other things, that indemnity selections based upon school sections included, after survey, within forest reservations would not be allowed under any circumstances, and that all such selections on file at the time should be rejected.

By departmental decision of December 27, 1894, in the case of State of California (19 L. D., 585), it was held that there was no authority for school indemnity selections in lieu of surveyed school sections included, after survey, within the boundaries of a forest reservation, and in the concluding part of the decision it was stated that the instructions of December 19, 1893, would be adhered to. Upon a motion for review, however, the Department, by decision of January 30, 1899 (28 L. D., 57), after mature consideration of the subject, held that where a forest reservation includes within its limits school sections surveyed prior to the creation of the reservation, the State, under the authority of the first proviso to section 2275 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), may select other lands in lieu of such sections, and that the selection, when perfected, will operate as a waiver by the State of its right to the tract in lieu of which the selection is made. The departmental decision of December 27, 1894, *supra*, was thereupon recalled and vacated, and it was directed that the instructions of December 19, 1883, *supra*, be amended to conform to the views expressed in the later decision. Following that decision, instructions were issued by your office, as approved by the Department, March 11, 1899 (28 L. D., 195), wherein, among other things, it was provided as follows:

1. Applications for indemnity lands in lieu of school sections sixteen and thirty-six which have been embraced, after survey, within the boundaries of a forest reservation, must designate by specified *legal subdivisions* the lands in lieu of which indemnity is desired. The mere designation of forty, eighty, or other number of acres, will not be accepted as a sufficient description.

* * * * * * *

4. All applications pending at date of the receipt hereof by the respective local land offices must be made to conform to the foregoing requirements, and for that purpose a reasonable time will be allowed for amendment.

In an opinion by the Assistant Attorney-General approved by the Secretary of the Interior January 26, 1901 (30 L. D., 438), it was held (syllabus) that—

A selection authorized by the State of lands in lieu of sections sixteen and thirty-six in a forest reservation, where the right of the State to said sections has attached under its school grant prior to the establishment of the reservation, is such a waiver of its right to said sections as to obviate the necessity for the formal relinquishment thereof to the United States, as required by circular instructions of March 11, 1899.

The instructions of March 11, 1899, in the particulars referred to in said opinion, were subsequently modified to conform to the views therein expressed (see 30 L. D., 491), but no change was made in the provisions quoted above requiring the designation by specified legal subdivisions, of the lands in a forest reservation in lieu of which selection is made, or in those requiring pending selections to be made to conform to such requirement.

The selection here in question was presented September 6, 1898. It appears to have been accepted by the local officers October 14, 1898, and the filing fees collected, notwithstanding the then existing explicit instructions to the contrary, contained in the departmental regulations of December 19, 1893, and in the decision of December 27, 1894, as aforesaid.

Under the departmental decision of January 30, 1899, *supra*, and the instructions issued in pursuance thereof March 11, 1899, *supra*, the selection is clearly defective, in that it does not conform to paragraph 1 of said instructions, which requires the designation, "by specified *legal subdivisions*," of the lands in lieu of which the selection is made.

Your office has never notified the State that it would be allowed to amend the selection by submitting a proper basis, but has apparently treated the selection as free from objection other than as alleged in certain protests by conflicting claimants to the selected lands. The plain and positive requirements of the instructions of March 11, 1899, and February 21, 1901, that all applications for indemnity lands in lieu of school sections embraced, after survey, within a forest reservation, "must designate by specified *legal subdivisions* the lands in lieu of which indemnity is desired," and that all pending applications must be made to conform to said requirements, have apparently been disregarded. These instructions, having been specifically approved by the Department, as shown, are alike binding upon your office, local land offices, and all States seeking indemnity for school sections embraced, after survey, within a forest reservation; and it is absolutely essential to the validity of selections made in lieu of such sections that said instructions should be strictly complied with.

It needs no argument to show that neither a selection by the State nor the approval thereof by the land department can operate as a

waiver by the State or as a reinvestment in the United States, of the title to any lands, unless those lands are described in such manner that they can be identified. To say that they consist of a certain number of acres of a designated section, as was done in this case, does not describe, or furnish any means of identifying, the lands intended to be surrendered by the State. Unless the selection here in question shall be amended, therefore, so as to conform to the requirements of the instructions aforesaid, it can not be accepted.

You are accordingly directed to notify the State that it will be allowed a reasonable time, to be fixed by your office, within which to "designate by *legal subdivisions*" a sufficient basis for the selection in so far as it has not already been rejected for other reasons. If a proper basis shall be furnished, as required, accompanied by a satisfactory showing that the selected lands are not mineral, you will retransmit the record to this Department for the consideration of the pending protest and of such other matters as may properly come before it. If the selection shall not be amended as required, it will be finally rejected by your office.

RESERVATION—SOLDIERS' ADDITIONAL ENTRY.

J. M. LONGNECKER (ON REVIEW).

Lands which for a long period of time have been with the knowledge and acquiescence of the government included within the limits of a reservoir used as a feeder of a canal, in the maintenance and operation of which the government is interested, are not "unappropriated public lands" and are therefore not subject to soldiers' additional homestead entry.

A question as to the reservation and appropriation of public land, there being power to so reserve or appropriate it, is one of fact rather than of mere form.

In the administration of the public land laws the land department may, and in a proper case should, recognize and protect equitable rights acquired through a long-continued occupancy of public land with the knowledge and consent of the government.

Acting Secretary Ryan to the Commissioner of the General Land Office,
(W. V. D.) *May 29, 1901.* (J. R. W.)

Counsel for J. M. Longnecker filed a motion for review of departmental decision of July 19, 1900 (30 L. D., 186), denying his application to enter the S. ½ SW. ¼, Sec. 3, T. 6 S., R. 3 E., 1st P. M., Ohio, as a soldiers' additional homestead, under section 2306 of the Revised Statutes.

The motion, seasonably filed, has been long pending for convenience of the parties, for oral argument and preparation of briefs.

No error is alleged as to any matter of fact in said decision. The substance of the contention in the motion is that, insomuch as no express statutory grant of right to the State to appropriate public

lands for purposes of a canal feeder reservoir, nor yet any express executive order withdrawing said land from sale, can be pointed out, therefore, of necessity, the land is unappropriated and, under the public land laws, is subject to appropriation under the homestead laws, and that the government has no property interest in the canal.

That the United States has an interest in the operation and maintenance of the canal admits of no question. It is the same interest as that reserved by Congress in land grant railways, which is defined to be "the free use of the road, and not the active service of the company in transportation." Lake Superior and Miss. R. R. Co. *v.* United States, 93 U. S., 442. That this interest is not an ownership of, or property in, the canal itself is immaterial. Nor is it material that the State has not undertaken and is not bound to maintain and operate the canal. Walsh *v.* Columbus, Hocking Valley and Athens R. R. Co., 176 U. S., 469. Nor is it material that improved methods of transportation render the further maintenance of the canal of doubtful utility. So long as the canal is maintained that interest exists.

The right to enter public lands is not a vested one in any particular land. It is an offer by the government of a privilege, not a contract. Yosemite Valley case, 15 Wall., 77. The right, or privilege, to purchase extends only to lands subject to sale and not to those appropriated. Spaulding *v.* Chandler, 160 U. S., 394; Wilcox *v.* Jackson, 13 Pet., 498.

The last cited authorities show that there must be authority of law for an appropriation of lands to either an individual or a public purpose, and without such authority no appropriation can be made. That such authority existed for the land department to reserve these lands to the uses of the canal admits of no serious question. The power to make such a reservation or appropriation arises by necessary implication from the grant itself. It is a general proposition that with a grant or franchise go, by implication, all such powers as are necessary to the exercise of the grant. In Werling *v.* Ingersoll, 181 U. S., 131, it was held:

> When Congress, under the act of 1827, granted the alternate sections to the State throughout the whole length of the public domain, in aid of the construction of the canal, it also granted by a plain implication the right of way through the reserved sections, for it can not be presumed the government was granting all these alternate sections to the State for the purpose avowed, and yet meant to withhold the right to pass through the sections reserved to the United States along the route of the proposed canal. But the implication would not extend to the ninety feet on each side. It would extend to the *land necessary to be used for the canal* of the width contemplated, and that had been asserted in an act of the general assembly in 1825, and was subsequently reiterated in another act of that body (1829).

There can be no question of the power. It was incident to the general purpose. A reservoir and works for storing and serving water

to the canal are as essential to its maintenance and operation as are water stations and machine shops to the operation of a railroad.

Where such reservoir and works should be located, their special character and extent, and what lands should be taken, in the very nature of the case are questions that must necessarily be determined by the authority constructing the canal, into the determination of which the topography of the country, its hydrographic and other features, must enter and to some extent control. The State was that authority. Subject to approval of such appropriation by the United States, where public lands were affected, these powers were granted to the State and its officers by necessary implication as incidental to the general purpose. The fact that the reservoir was built, that it is maintained, that these lands are beneath its waters, are conlusive proof of the exercise of the power, and are notice of that fact to all the world.

This occurred almost sixty years before the application of Longnecker, and no right of his existed in the land or was affected. The United States, as owner, and the State were the only parties concerned. It did not concern the applicant. The appropriation was good as against a subsequent applicant to enter the land. In Tarpey *v.* Madsen, 178 U. S., 215, the court held:

> It must be remembered that mere occupation of the public lands gives no right as against the government . . . . These occupants are not in the eye of the law considered as technically trespassers. No individual can interfere with their occupation or compel them to leave. Their possessory rights are recognized as of value and are made the subjects of barter and sale. Lamb *v.* Davenport, 18 Wall., 307. In that case the court said: . . . . "and though these rights or claims rested on no statute, or any positive promise, the general recognition of them by the government, and its disposition to protect the meritorious actual settlers, who were the pioneers of emigration in the new territories, gave a well understood value to these claims."

In United States *v.* Chaves, 159 U. S., 452, the court held:

> We do not wish to be understood as undervaluing the fact of a possession so long and uninterrupted as disclosed in this case [from 1833]. Without going at length into the subject it may be safely said that by the weight of authority, as well as the preponderance of opinion, it is the general rule of American law that a grant will be presumed upon proof of an adverse, exclusive and uninterrupted possession for twenty years, and that such rule will be applied as a *presumptio juris et de jure*, whenever, by possibility, a right may be acquired, in any manner known to the law.

Sixty years or more ago, at a time when the State of Ohio was sparsely populated, and vast tracts of public domain lay open to any purchaser at the minimum price, the State, at great expenditure of money, made these lands an essential part of a great public work, deemed then to be of such public concern that the United States made a large grant to aid its construction, and reserved to itself an interest

in its operation and maintenance for its own use and convenience. The land is still an integral part of that public work. That work is still maintained. It has been an efficient factor in the development of the industries, prosperity and social evolution of the region it traversed and served. Its practical importance has declined by improved means of railway transportation, but it has not been abandoned. Whether it shall be abandoned, obviously rests in the determination of the State of Ohio, on consideration of public interest, not in the will of the applicant upon his consideration of personal profit.

It can not be contended that the United States has not known of, and has not acquiesced in, the appropriation of the land. It is noted on the books of the General Land Office. But, if it were not so, a public work of this character, once greatly more important and useful than now, is part of national and state history. But the knowledge and acquiescence of the land department were not constructive merely and do not rest on mere inference. It was actual. In 1890 application was made by one M. D. Shaw to have section 7, township 6 south, range 4 east, advertised and sold as an isolated tract. That land is in the same situation and is now covered by similar applications of Mr. Longnecker as the land in question. The order for such sale was made by the then Commissioner of the General Land Office, and, on the protest of the State, was December 31, 1890, revoked.

Previously, in 1886, one John C. Turpen attempted to make private cash entry of these same lands, and his applications were denied, the decision stating that the lands appeared to be within the said reservoir. John C. Turpen, 5 L. D., 25, and motion for review was denied, 5 L. D., 183.

A question of reservation and appropriation of public lands, there being power to make it, is one of fact rather than of mere form. State of Minnesota, 22 L. D., 388; Spaulding *v.* Chandler, 160 U. S., 394, 404. In the latter case it was said:

> If the reservation was free from objection by the Government, it was as effectual as though the particular tract to be used was specifically designated by boundaries in the treaty itself. The reservation thus created stood precisely in the same category as other Indian reservations, whether established for general or limited uses, and whether made by the direct authority of Congress in the ratification of a treaty or indirectly through the medium of a duly authorized executive officer.

The history of the case shows a sufficient reservation in fact. But if it did not, a presumption of such reservation must from the facts, at this length of time, arise. United States *v.* Chaves, *supra*. It is not questioned by the United States, and cannot be questioned by one having no vested interests in the lands at the time of their appropriation. After their appropriation, no interest can be acquired until the lands are restored to entry.

But if this were not the case, it does not follow that the applicant

has a right to select these lands regardless of public interest, and to the destruction of the public work of which these lands now form an integral and essential part. Such would not be the case where such use of public land has been made innocently by a private party. In administration of the public land laws the land department may, and in a proper case should, recognize and protect equitable rights arising from accident, mistake, or fraud, as courts would do between a private owner and one to whom, with his permissive silence, an equity had arisen. When there is an equity in favor of a third person in the actual occupancy of public land, the Secretary of the Interior may refuse the application of another to enter the same land, and hold the title in the general government until the person in possession can obtain title, either under the provisions of existing law, or seek a relief by special act of Congress. In the case of Williams *v.* United States (138 U. S., 514), the court say (p. 524):

> 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.

The principle announced in this case has been adverted to and approved frequently since, and was reinforced in Knight *v.* U. S. Land Association (142 U. S., 161). It was there held that:

> In the 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 on 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.

It is most strenuously insisted by counsel, however, that the department is wrong in assuming that the State of Ohio has any equities to be protected. This canal was built many years ago when close business methods were not followed, when the public lands were of small value. The Board of Public Works may have been mistaken as to their powers, or as to the fact that title to these lands had not been acquired and remained in the United States. With acquiescence of the government the status of these lands has remained unchanged for a period of sixty years.

The State having been in peaceable possession of these lands for this term of years, exercising control over them, and having placed an improvement on them at great cost, the Department can not but say there is an equity in favor of the State as against Longnecker.

The motion is therefore denied. The departmental decision is adhered to.

PRIVATE CLAIM—ACTS OF JUNE 2, 1858, AND MARCH 2, 1889.

VICTOR H. PROVENSAL.

The special provisions of the act of June 2, 1858, relating to the location of surveyor-general's certificates of location upon lands subject to sale at private entry, are in no wise affected by the general provisions of the act of March 2, 1889, restricting the sale of public lands at private entry to the State of Missouri.

The case of McDonogh School Fund, 11 L. D., 378, overruled.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 5, 1901.* (A. S. T.)

On March 9, 1901, Victor H. Provensal applied to locate, with the surveyor-general's certificate of location, No. 987-B, for 32.18 acres, issued January 9, 1901, under the act of June 2, 1858, the SE. ¼ of the NE. ¼ of Sec. 35, T. 4 S., R. 5 E., St. Helena Meridian, New Orleans, Louisiana.

Said application was rejected by the local officers at New Orleans, and from their action Provensal appealed to your office, where, on April 20, 1901, a decision was rendered affirming the action of the local officers, and from that decision he has appealed to this Department.

Section three of the act of June 2, 1858 (11 Stat., 294), provides that—

where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same in whole or in part remains unsatisfied, to issue to the claimant or his legal representatives a certificate of location for a quantity of land equal to that so confirmed and unclassified; which certificate may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: *Provided,* That such location shall conform to legal divisions and subdivisions.

By section one of the act of March 2, 1889 (25 Stat., 854), it is provided that "From and after the passage of this act no public lands of the United States, except those in the State of Missouri, shall be subject to private entry."

Your said decision is based on the ground that the last-mentioned act had the effect to repeal that portion of the act of June 2, 1858, which allowed private entries upon such surveyor-general's certificates, except as to public lands in the State of Missouri. Said act of March 2, 1889, does not expressly repeal the former statute, and the rule that repeal by implication is not favored, requires that before such implication shall be adopted, it must appear that the two statutes are so at variance as to be absolutely irreconcilable with each other, that the later statute is clearly hostile to the former, and that the two cannot stand together by a fair and reasonable construction of both.

It is insisted in behalf of the applicant that the act of June 2, 1858, was a special act, passed for the benefit of the holders of such certificates of location, that it was remedial in its nature, and intended to invest, and did invest, the owners of confirmed private land claims holding such certificates with the right to locate the same upon any of the public lands of the United States, subject to private entry, and that the act of March 2, 1889, was a general statute, and was not intended to divest the holders of such certificates of location of the rights vested in them by the act of June 2, 1858, but was merely intended to prevent the speculation in public lands resulting from unlimited cash entries or purchases, and this seems to have been the view of said statute taken by this Department in the case of Wheeler *v.* The Bessy Heirs (21 L. D., 518), wherein it is said that:

> Under said former policy [before March 2, 1889] any person who was, or who had declared his intention to become, a citizen could buy as much land as he could raise money to pay for and secure title by "private entry" or "private cash entry." In this way non-resident speculators were absorbing numberless tracts of land, and holding them from cultivation, hoping to realize the "unearned increment" which would acrue from the labor of others in developing the country. This practice was against the policy of Congress, which encouraged actual settlers in good faith and residents. Therefore Congress put a stop to it. *The act of March 2, 1889, had no other purpose. It disturbed no bona fide rights, whether vested or inchoate.* It simply said that from and after its date the practice of selling "offered" land to private persons for cash should be discontinued.

The same view seems to have been adopted in the case of the State of Michigan (22 L. D., 657), wherein it was said (syllabus):

> The general provisions of the act of March 2, 1889, restricting the sale of public lands at private entry to the State of Missouri, did not contemplate the nullification of the special right conferred by the act of March 2, 1855, upon states to locate swamp indemnity certificates on lands that were, at the date of said act, subject to entry at one dollar and twenty-five cents per acre.

And in the case of Yocum *v.* Keystone Lumber Company (22 L. D., 458), it was held that the right of a purchaser from a railroad company of lands within its indemnity limits to purchase such lands from the government, under the act of March 3, 1887, where the lands had been forfeited, was not defeated by the act of March 2, 1889.

The act of December 13, 1894 (28 Stat., 594), provides:

> That in addition to the benefits now given by law to all unsatisfied military bounty land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued shall be receivable at the rate of one dollar and twenty-five cents per acre, in payment or part payment for any lands entered under the desert land law of March third, eighteen hundred and eighty-seven, ... the timber culture law of March third, eighteen hundred and seventy-three, ... the timber and stone law of June third, eighteen hundred and seventy-eight, ... or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past.

In your said decision you say, in substance, that Congress construed the act of March 2, 1889, to repeal that portion of the act of June 2, 1858, which permitted private entries based upon surveyor-general's certificates of location, and you quote from the report of a Senate committee on the bill (act of December 13, 1894) tending to show that said committee so understood the effect of the act of March 2, 1889, and your said decision proceeds upon the theory that because Congress so understood the effect of the statute, the act of December 13, 1894, was passed extending to the holders of such certificates certain benefits, in lieu of those taken away by the act of March 2, 1889.

The language of the act of December 13, 1894, is that "*in addition* to the benefits now given by law . . . . under any act of Congress," certain other benefits were given, not *in lieu* of those heretofore given by the act of 1858, and taken away by the repeal of said act. And said Senate committee, in the report quoted in your decision, states that "it had been at all times the intention of Congress to make them [such certificates of location] good for the location of unoccupied public land subject to private entry at $1.25 an acre," and so it appears that the committee understood that it had never been the intention of Congress to repeal that portion of the act of June 2, 1858, which made such certificates good for that purpose.

The act of June 2, 1858, was a special act, passed for the benefit of a specified class of persons; it gave to them certain rights, and it was not the purpose and intention of the act of March 2, 1889, to deprive them of these rights.

In the case of Tracy *v.* Tuffly (134 U. S., 206), it was held that "without express words of repeal, a previous statute will be held to be modified by a subsequent one, *if the latter was plainly intended to cover the whole subject embraced by both*, and to prescribe the only rules in relation to that subject which are to govern."

The subject of the third section of the act of June 2, 1858, was confirmed and unsatisfied private land claims, and the sole object of Congress in enacting said statute was to provide a just and proper indemnity to persons holding such claims. While the subject embraced in the first section of the act of March 2, 1889, was private cash entries on the public lands, and the sole object of that section was to prohibit such entries, and so neither the subject embraced in the former statute nor the object and purpose for which it was enacted was considered by Congress in the passage of the latter act, it had no reference to confirmed and unsatisfied private land claims, and neither provided any method for satisfying such claims, nor in any way changed, altered, or abolished the rules prescribed for that purpose by the former statute.

These confirmed and unsatisfied private land claims were the subject of the act of December 13, 1894, *supra*, and the object and purpose of that act, as plainly expressed by the act itself, were to extend to the

holders of such claims certain benefits "*in addition*" to the benefits then given them by law, and even if Congress had understood at that time that the act of 1889 had the effect to repeal the former statute, such construction by Congress would not have given that effect to the act of 1889.

In the case of the United States *v.* Claflin (97 U. S., 546), it was held that a recital in a statute that a former statute was repealed or superseded is not conclusive, the question being a judicial one.

On the same principle, it was held in the case of the District of Columbia *v.* Hutton (143 U. S., 18), that the recognition of a statute as a subsisting law by Congress, when, as a matter of fact, it has been repealed, does not affect its status. But, as before pointed out, it does not appear that Congress, in passing the act of 1894, understood that it had been the intention of the act of 1889 to repeal the former act. On the contrary, the report of the committee quoted in your said office decision expressly states that "it had been at all times the intention of Congress to make them [such certificates of location] good for the location of unoccupied public land subject to entry at $1.25 an acre." Therefore, to have said that Congress by the act of 1889 repealed the act of 1858, was to say that Congress did what it did not intend to do, and took away from the holders of such certificates the rights which it, at all times, intended them to have. The case of McDonogh School Fund (11 L. D., 378) was not followed in the departmental decisions hereinbefore cited and is now overruled.

It is therefore held that the provisions of the act of June 2, 1858, are not affected by the act of March 2, 1889, and that under said provisions this application should be allowed, if otherwise without objection.

Your said decision is accordingly reversed.

WAGON ROAD GRANT—ACT OF MARCH 3, 1887.

HOLT *v.* WALKER.

The provisions of the act of March 3, 1887, apply only to land grants for railroad purposes and can not be invoked for the protection of a purchaser under a wagon road grant.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 10, 1901.* (F. W. C.)

Samuel D. Holt has appealed from your office decision of January 25, last, rejecting his application to make purchase, under the provisions of section 5 of the act of March 3, 1887 (24 Stat., 556), of the NE. ¼ of SE. ¼, Sec. 11, T. 18 S., R. 3 W., Roseburg land district, Oregon.

In the contest of the California and Oregon Land Company *v.* Albert Walker, involving this tract, it was held in departmental decision of December 6, last, not reported, that said tract was excepted from the operation of the grant made by the act of July 2, 1864 (13 Stat., 355), to aid in the construction of a wagon road from Eugene City, Oregon, to the eastern boundary of said State.

Albert Walker was permitted by the local officers to make homestead entry of this land on December 28, 1897, and against said entry Samuel D. Holt initiated a contest on December 6, 1898, alleging that he was the owner of the land through mesne conveyances by the Oregon Central Military Road Company, and formally applied to purchase the tract under the provisions of section 5 of the act of March 3, 1887, *supra*.

Hearing was held upon said contest and upon the record made your office decision of January 25, last, as before stated, rejected the application to purchase made by Holt, holding that the provisions of the act of March 3, 1887, can not be invoked for the protection of a purchaser under a wagon road grant. Said holding is in conformity with the decision of this Department in the case of King *v.* The Eastern Oregon Land Company (23 L. D., 579). The appeal under consideration seeks a reversal of the decision announced in the King case.

After careful consideration of said appeal the Department adheres to the position taken in the King case and therefore affirms your office decision rejecting the application by Holt.

REGULATIONS UNDER THE ACT OF MARCH 2, 1901 (31 STAT., 950), EXTENDING THE PROVISIONS OF THE ACT OF JULY 1, 1898 (30 STAT., 597, 620), TO CERTAIN CLAIMS TO LANDS WITHIN THE INDEMNITY LIMITS OF THE NORTHERN PACIFIC LAND GRANT.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 15, 1901.

The act of March 2, 1901, reads as follows:

That the provisions of the Act of July first, eighteen hundred and ninety-eight, appearing in thirtieth Statutes at Large, at pages six hundred and twenty, six hundred and twenty-one, and six hundred and twenty-two, providing a plan for the adjustment by the land department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, are hereby extended and made applicable to all instances where lands in odd-numbered sections within the indemnity limits of the grant to said company were patented to settlers under the public-land laws in pursuance of applications presented to or proceedings initiated in, the local land office at a time when the land was embraced in a pending indemnity selection made by said company in conformity with the regulations of the land department, which indemnity selection has not since been waived or abandoned.

1. As far as applicable, and as hereby supplemented, the regulations of February 14, 1899 (28 L. D., 103), under the act of July 1, 1898, will be followed in the adjustment of claims under the new act.

2. The fact that conflicting claims to any tract come within the terms

of the new act may be brought to the attention of the Commissioner of the General Land Office by either the individual claimant or the railroad company, but there must be such a showing of the present ownership under the patent, whether by the patentee or his transferee, as will enable the Commissioner of the General Land Office to notify the present individual claimant of his option, as provided by paragraph 18 of said regulations, except where he waives notice under paragraph 22 thereof, and a failure of the individual claimant to exercise such option within sixty days after the time of receiving such notice will be deemed an election on his part to retain the land patented, which fact shall be stated in the notice.

3. It being "the provisions of the act of" July 1, 1898, which are extended to the instances named in the new act, it follows that to bring conflicting claims to any tract within this extension of the act of July 1, 1898, all the following conditions must concur:

a. The land involved must be a portion of an odd-numbered section within the indemnity limits of the Northern Pacific land grant;

b. It must have been settled upon under the public land laws prior to January 1, 1898;

c. It must have been selected by the company as indemnity in accordance with then existing regulations prior to January 1, 1898;

d. It must have been patented to the settler prior to July 1, 1898, in pursuance of an application presented to, or of proceedings initiated in, the local land office at a time when the land was embraced in such a pending indemnity selection; and

e. Such indemnity selection must not have been waived or abandoned.

4. An indemnity selection will be held to have been waived or abandoned, (*a*) where the basis assigned therefor has been used or designated in the selection of other lands; (*b*) where the selection has been formally withdrawn or relinquished or where its rejection has been acquiesced in, but the mere failure of the company to appeal from an adverse decision by the Commissioner of the General Land Office rendered in conformity to an existing departmental decision adverse to the company upon a like state of facts, will not be considered such an acquiescence.

5. Care must be exercised to prevent enlarging the quantity of land to which the railroad company is entitled under laws enacted prior to July 1, 1898, and in this connection attention is invited to subdivision "C" of the regulations of February 14, 1899.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved:
E. A. HITCHCOCK,
Secretary.

RULES OF PRACTICE 17, 44 AND 91 AMENDED, AND RULE 8½ ESTABLISHED.

INSTRUCTIONS.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 17, 1901.* (E. F. B.)

The Department is in receipt of your letter of April 17, 1901, requesting instructions as to the construction and application of rules 17 and 44 of practice, the particular question presented being, whether rule 17, as amended to take effect July 1, 1898 (26 L. D., 710), applies to final decisions or only to such motions, proceedings, orders, and decisions as are interlocutory in character. In reply, your attention is directed to the fact that rule 17, as amended, is applicable to exactly the same motions, proceedings, orders, and decisions to which it was applicable before its amendment. The amendment changed the manner in which service of notice should be made, but not the proceedings in which the notice is to be given. Both before and since the amendment, rule 17 was intended to apply to all motions, proceedings, orders, and decisions, whether interlocutory or final, notice of which is required to be given.

Rules 17 and 44 should, therefore, be construed together, in order that the purpose contemplated by the change of the former may be effective in every stage of a proceeding where notice is required.

In order that these rules may clearly indicate the course to be pursued, rule 17 will be further amended by striking out the word "interlocutory," which shall also be stricken from the sub-title preceding said rule, and rule 44 will be amended by striking out the words "through the mail to their last known address" and by inserting in place thereof the words "as provided in rule 17."

Consideration has also been given to the suggestion contained in your office letter of the 8th instant, in the matter of the amendment of certain of the rules of practice, and herewith you will find copies of rules 17 and 44, as above amended; rule 91, as amended of this date, and a rule to be numbered 8½, to be preceded by a sub-title, as indicated.

NOTICE OF PROCEEDINGS.

Rule 17.—Notice of 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 to the land; and in all those contest cases where notice of contest is given by registered mail under Rule 14, and the return of the registry 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. See Rule 8½.

Rule 44.—After hearing in a contest case has been had and closed the register and receiver will in writing notify the parties in interest of the conclusions to which they have arrived, and that thirty days are allowed for appeal from their decision to the Commissioner, the notice to be served personally or by registered letter, as provided in Rule 17. See Rule 8½.

Rule 91.—The appellee may file a written argument in his behalf within thirty days from service of the argument of the appellant, where the latter files an argument within the time allotted by Rule 89; otherwise, within thirty days from the expiration of the time so allotted to appellant.

This rule (91) as thus amended will take effect September 1, 1901.

HOW TRANSFEREES AND ENCUMBRANCERS MAY ENTITLE THEMSELVES TO NOTICE OF CONTEST OR OTHER PROCEEDINGS.

8½. Transferees and encumbrancers of land, the title to which is claimed or is in process of acquisition under any public land law, shall, upon filing notice of the transfer or encumbrance in the district land office, become entitled to receive and be given the same notice of any contest or other proceeding thereafter had affecting such land which is required to be given the original claimant. Every such notice of a transfer or encumbrance must be forthwith noted upon the records of the district land office and be promptly reported to the General Land Office where like notation thereof will be made.

HOMESTEAD RIGHTS OF SOLDIERS AND SAILORS OF THE SPANISH WAR AND THE PHILIPPINE INSURRECTION—ACT OF MARCH 1, 1901.

INSTRUCTIONS.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., June 21, 1901.

Registers and Receivers, United States Land Offices.

GENTLEMEN: Your attention is called to the provisions of the act of Congress of March 1, 1901 (31 Stat., 847), entitled "An act providing that entrymen under the homestead laws, who have served in the United States Army, Navy, or Marine Corps during the Spanish war or the Philippine insurrection, shall have certain service deducted from the time required to perfect title under homestead laws, and for other purposes," a copy of which is hereto attached.

Section 2304, Revised Statutes, is amended by this act so as to include within its provisions every private soldier and officer who has served

in the Army of the United States during the Spanish war, or who has served, is serving, or shall have served in the said Army during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged; and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the Spanish war, or who has served, is serving, or shall have served in the said forces during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged.

Section 2305, Revised Statutes, is amended by adding thereto a proviso that in every case in which a settler on the public land of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine during the war with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, or his or their legal representatives, to make final proof upon and receive government patent for said land; and that, upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children, or his or their legal representatives, that the applicant for patent is the widow, if unmarried; or in case of her death or marriage, his orphan children, or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States, as hereinbefore described, the patent for such land shall issue.

In cases of entries and filings hereunder you will be governed by the instructions on pages 22 and 23, and the first and third paragraphs on page 24, circular of July 11, 1899.

In case of widows applying to make proof under section 2305, Revised Statutes, as amended, the prescribed evidence of the military service of the husband must be furnished, with affidavit of widowhood, giving date of husband's death. If she proves up, title passes to her.

In case of minor orphan children, or the soldier's or their legal representatives, applying to make proof, in addition to the prescribed evidence of military service of the soldier, proof of the death of the soldier, with date of death, and death or remarriage of the mother must be furnished. Evidence of death may be the testimony of two witnesses, or a physician's certificate, duly attested, or other satis-

factory evidence. Evidence of marriage may be a certified copy of the marriage certificate, or of the record of the same, or testimony of two witnesses to the marriage ceremony. If the minor orphan children make the proof, the title will vest in them, but if the legal representatives of the soldier prove up, patent will issue to them in their official capacity.

Very respectfully,

BINGER HERMANN,
Commissioner.

Approved June 21, 1901:
E. A. HITCHCOCK,
Secretary.

[31 Stat., 847.]

An Act Providing that entrymen under the homestead laws, who have served in the United States Army, Navy, or Marine Corps during the Spanish war or the Philippine insurrection, shall have certain service deducted from the time required to perfect title under homestead 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 sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes be, and the same are hereby, amended to read 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 thirteenth, 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, and every private soldier and officer who has served in the Army of the United States during the Spanish war, or who has served, is serving, or shall have served in the said Army during the suppression of the the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged; and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the Spanish war, or who has served, is serving, or shall have served in the said forces during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged, 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:" *Provided*, That in every case in which a settler on the public lands of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the war with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make final proof upon and receive Government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue.

Approved, March 1, 1901.

SWAMP LANDS—ACT OF SEPTEMBER 28, 1850.

STATE OF LOUISIANA.

The allowance of an entry under general laws providing for the disposal of the public lands, the final approval thereof for patenting, and the issue of patent thereon, is an adjudication by the land department that the lands entered are of the character and class subject to such entry, and necessarily determines that they had not been previously granted or otherwise appropriated.

Any question as to the character of lands claimed by the State under the swamp land act of September 28, 1850, which lands are covered by patents issued prior to any claim thereto by the State, is subject to inquiry only in the courts and by judicial proceedings.

Secretary Hitchcock to the Commissioner of the General Land Office,
(W. V. D.) *June 21, 1901.* (F. W. C.)

The State of Louisiana has appealed from your office decision of December 26, 1899, adhered to on review February 6, 1901, rejecting its claim under the act of September 28, 1850 (9 Stat., 519), to certain described lands as swamp and overflowed lands within the meaning of that act.

Said act 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 thereof 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.

The State of Louisiana adopted the field notes on file in the surveyor-general's office as the basis for adjusting its grant of swamp and overflowed lands, and the surveyor-general of that State regularly reported lists of swamp and overflowed lands in each of the townships in which the lands under consideration lie, but said lists do not include the lands in question.

These lists bear date from October 7, 1850, to December 20, 1872.

After the making and reporting of said lists by the surveyor-general, and after March 3, 1857, the United States made disposition of the lands in question, by sale, location, or under homestead entry, and the patent of the United States has long ago issued to those making purchase, location or entry of these lands.

In May and June, 1886, after the patenting of the lands as aforesaid, the State of Louisiana filed in your office certain lists of lands, including those here in question, which it is claimed are swamp and overflowed lands within the meaning of the act of 1850, as shown by the field notes of survey on file.

Your office decision held, in effect, that as the disposal of these lands was after the report by the surveyor-general of lists of swamp and overflowed lands in the townships in which they lie, and prior to the assertion of claim thereto in 1886, the lands were properly disposed of, and by the issue of the patent of the United States to the entryman it was necessarily determined that the lands were not of the character granted to the State by the act of September 28, 1850.

The appeal by the State raises many questions not necessary to be considered in disposing of its claim to these lands.

The allowance of an entry under general laws providing for the disposal of the public lands, the final approval thereof for patenting, and the issue of a patent thereon, is an adjudication by the land department that the lands entered are of the character and class subject to such entry, and necessarily determines that they had not been previously granted or otherwise appropriated.

In the case of Rogers Locomotive Works *v.* Emigrant Co., (164 U. S., 559) the lands involved had been certified to the State under a grant made in aid of the construction of a railroad, and it was held (page 574 of the opinion of the court)—

> 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.

Under the act of 1850 the determination of what were swamp and overflowed lands was entrusted to the Secretary of the Interior. The lands in question have never been identified as swamp and overflowed lands by the Secretary of the Interior, nor have they been reported by

the surveyor-general of the State, under the plan adopted, as lands shown to be swamp and overflowed by the field notes of survey.

There was no reason, therefore, to notify the State of the adjudication had upon the entries made of these lands; and as patents have long ago issued upon said entries, any further question as to the character of these lands is subject to inquiry only in the courts and by judicial proceedings.

The claim asserted to these lands by the list filed in 1886, after the patenting of the lands, must necessarily be denied.

Your office decision is accordingly affirmed.

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