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DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JANUARY 1, 1893, TO JUNE 30, 1893.

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

MINING CLAIM—DISCOVERY—LOCATION.

POPLAR CREEK CONSOLIDATED QUARTZ MINE.

A discovery of mineral must be treated as an entirety, and the proper basis of but one location, and therefore, not susceptible of sub-division for the purpose of two locations having a common end line that bisects the discovery shaft.

Secretary Noble to the Commissioner of the General Land Office, January 3, 1893.

On December 19, 1890, J. F. Bigelow made mineral entry No. 267 for the Poplar Creek Consolidated Quartz Mine, Marysville, California, comprising the Pine Nut and Gorilla locations, both made on January 5, 1888, and thereafter purchased by him.

You held the entry for cancellation on April 15, 1892, deciding that both the locations in question were based upon one discovery. Bigelow has appealed from your judgment to this Department.

It appears from the plat and field notes that the south end line of the Pine Nut location forms the north end line of the Gorilla location. These locations were made, as we have seen, on the same day—one by D. M. Bull and the other by Joseph Braden, the latter transferring his claim to the former a few days later for a consideration stated to be one dollar, and Bull transferred by deed both the locations to Bigelow and others.

Neither of the location notices recites that the maker thereof has discovered a vein or lode, but each states that the locator—

> hereby gives notice that he claims . . . . . fifteen hundred (1,500) feet in length by a width of three hundred (300) feet on each side of the center of that certain vein or ledge of quartz containing gold and other metals, situated on the south side of Poplar Valley, Quartz township, Plumas county, State of California.

Then follows a description of each.

The only account of any discovery is found in the field notes of survey, and there it is stated that:

> The improvements on the claim consist of a shaft on the lode at the line between the two locations, which is about sixty feet in depth, and a tunnel which has been driven towards the shaft, a distance of two hundred and twenty-five feet . . . . .

The whole cost and value of the improvements, in my opinion, amount to $2,000. All the improvements on this claim have been made by Mr. Bigelow, the applicant for patent, but $1,200 has been expended by him on these improvements since his purchase of the Pine Nut and Gorilla locations. These improvements are for the development of both locations, although the principal work is on the Pine Nut location.

It is further stated that "the ledge, as developed, shows a thickness of from six to ten feet; is not easily traced upon the surface."

Good faith is required of those who locate lands for minerals and make entry thereof, and no valid location can be made unless there has first been an actual discovery.

Section 2320 of the Revised Statutes provides that all mining claims, located after the 10th day of May, 1872, 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 that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. These located claims shall extend no more than three hundred feet on each side of the middle of the vein at the surface.

The law evidently contemplates that the discoverer shall have a right to locate his claim to the exclusion of others, and, if the discovery is made by two parties, but one location can be made by them, for it is but a single discovery. No man, nor set of men, being rational, would discover a vein or lode and so describe the location as to make one of the end lines run through the center of the discovery shaft, thus leaving territory not located in which it was demonstrated ore existed, and which might have been included in the description.

There was but one discovery made upon which both these locations were based. Both Bull and Braden may have discovered the vein or lode, but each could not claim the discovery as his own. It was one discovery made by two men, and only entitled the two, or either of them, to make one location. If the law could be so construed as to allow two locations in a case like this, it would also have to be held that one discovery would entitle the discoverers to make four locations, placing one-fourth of the discovery to the credit of each. The law is not susceptible of any such a construction. A discovery is a whole, and may not be divided and parceled out among the discoverers.

Attorneys for appellant have cited the case of Larkin *v.* Upton (144 U. S., 20,) as authority for holding that the one discovery shaft was sufficient for two locations, but an examination of that case fails to convince me that it is decisive of the question at issue. In that case it is held that the top or apex of a vein must be within the boundaries of the claim, in order to enable the locator to perfect his location and obtain title. It was also held that this apex is not necessarily a point, but may be a line of great length, and if this be true, and a portion of it can be found within the limits of a claim, that is sufficient discovery to entitle the locator to obtain title. In that case there was a patented

claim, and its south end line formed the north end line of the claim in question, and the question arose as to whether there had been a discovery on the south claim. The discovery shaft in that case was sunk by the claimants of the unpatented claim very near, if not on the boundary line between the claims, and the owners of the patented claim asserted that the discovery was made on their side of the line. The jury below rendered a special finding, to the effect that the vein or lode was discovered south of the line and within the limits of the unpatented claim, and that the top or apex of such vein was not within the limits of the patented claim, and the supreme court affirmed the court below in its judgment that there was a valid discovery. In that case there were adverse interests, and the only question decided was as to whom the benefit of a discovery inured, while in the case at bar no discovery has been made on either of the locations, except in one shaft, and it is not a question here as to which of these locators is entitled to the benefit of the discovery, but as to whether the two locators by combining may initiate two claims. In that case one claim had been located on a discovery made doubtless at some distance from the boundary line and had been patented, while in this a right is sought to be initiated to claim two locations upon but a single discovery. It is a plain attempt to evade the law and secure a mineral claim, three thousand feet in length, where the law would allow but one thousand five hundred feet.

A single discovery should not be construed into two discoveries, in order to support two locations, by merely running an imaginary line through the discovery point.

Your judgment is accordingly affirmed.

RAILROAD LANDS—ACT OF JANUARY 13, 1881.

TURNER *v.* SOUTHERN PACIFIC R. R. CO.

The right of purchase accorded by the act of January 13, 1881, can not be exercised by one who is qualified to take the land in question under the timber culture law, where said land is subject to such appropriation.

Secretary Noble to the Commissioner of the General Land Office, January 3, 1893.

This controversy involves the E. ½ of the NE. ¼, the NW. ¼ of the NE. ¼, and the NE. ¼ of the NW. ¼ of Sec. 31, T. 6 N., R. 4 W., S. B. M., Los Angeles land district, California.

You report that said land is within the limits of the indemnity withdrawal made in 1867, for the benefit of the Southern Pacific Railroad Company, under the grant of July 27, 1866 (14 Stat., 292), which withdrawal was revoked by departmental order of August 15, 1887, (6 L. D.,

93), and the lands embraced therein restored to the public domain, and that said lands were opened to entry on the 7th of October, 1887.

On said 7th of October, 1887, the Southern Pacific Railroad Company filed its indemnity selection No. 29, which embraced the whole of said section 31. On the same day, Robert Turner made application to purchase the land under the act of January 13, 1881, (21 Stat., 315).

The local officers transmitted both these applications to your office for instructions, and on the 16th of June, 1888, you held Turner's application for allowance, and the railroad's selection for cancellation. The company appealed to the Department, and on the 19th of September, 1890, it was held that the record failed to disclose whether Turner's application to purchase, or the company's application to select, was first filed, but as the company's selection had been received and recorded, its rights could not be summarily disposed of upon ex-parte affidavits. A hearing was therefore ordered, for the purpose of giving Turner an opportunity to offer testimony in support of his allegations, and the company to submit evidence in support of its selection.

Such hearing took place before the local officers on the 18th of December, 1890, and their decision was rendered on the 22d of May, 1891. From the testimony, they found that Turner lived on the land from January 1, 1887, until after the date of his application to purchase; that he had improvements of considerable value thereon, which he had purchased in large part from a former occupant; that the land was practically devoid of timber, and clearly subject to entry under the timber culture law; that the selection of the railroad company was filed as early as ten o'clock, a. m., October 7, 1887, and the application of Turner about noon of the same day. They concluded that Turner was not qualified to enter the land under the law governing his application, and that the selection by the Southern Pacific Railroad Company was a valid one.

This decision was reversed by you on the 25th of November, 1891, and an appeal by the company from your decision, again brings the case to the Department.

It was only persons who were not authorized to enter the land under the homestead, pre-emption, or timber culture laws of the United States, who were authorized to purchase it under the act of January 13, 1881. The provisions of that act were as follows:

That all persons who shall have settled and made valuable and permanent improvements upon any odd-numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved, may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the pre-emption, homestead, or timber culture acts of the United States, shall be permitted, at any time within three months after such restoration, and under such rules and regulations as the Commissioner of the General Land Office may prescribe, to

purchase not to exceed one hundred and sixty acres in extent of the same by legal subdivisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor..

As to the amount of timber upon the section which embraces the land in question, only two witnesses testified. One was Turner, the claimant, and the other was Swarthout, one of his corroborating witnesses. In answer to the question: How much timber and what kind of timber is there growing on this whole section of land? his answer was: There are about ten or twelve trees; three of them are cottonwood, and the rest willows; all are of a scrubby nature. He further testified that there were no other trees growing on the section.

Harley Swarthout, his corroborating witness, in his testimony, in answer to the question: Is there any timber on section 31? answered: "There are a few scattering trees; can't tell the number; a few cottonwoods and some willows; most of them have been set out by people, I think." This being all the evidence in the case on the subject of timber upon the section, I think the local officers were justified in saying: "It is also clear, from the testimony, that the land is such as may be entered under the timber culture act."

The evidence shows that Turner had exercised his rights under the homestead law, and that he had moved from his patented homestead to the land in question, which prevented him from acquiring it under the pre-emption law. It appears, however, that he was qualified to take land under the timber culture law, and that this land was subject to entry under such law.

In the 7th paragraph of the circular of instructions, issued by your office, and approved by the Department, in connection with the act of January 13, 1881, (5 L. D., 165), it was said, if the applicant "is qualified to make either a homestead, pre-emption, or timber culture entry, and the land is subject to the entry he is qualified to make, then he is not allowed to make an entry under this act." In the case of Benjamin H. Eaton (8 L. D., 344), it was held that "A purchaser under said act must show actual settlement on the land, and that he is not entitled to acquire title under the pre-emption, homestead, or timber culture law."

In view of the provisions of the law quoted, and the circular and decision cited, and the showing made by the evidence in the case, that Turner was qualified to make timber-culture entry, and that the land in question was subject to such entry it is clear that he was not qualified to purchase the land under the act of January 13, 1881. This renders a further consideration of the case, and of the questions raised, unnecessary. The decision appealed from is reversed, and the selection by the Southern Pacific Railroad Company will be allowed to remain in force, unless there are objections thereto, other than Turner's claim.

HOMESTEAD CONTEST—RELINQUISHMENT.

CHATTEN *v.* WALKER.

The execution of a relinquishment is not in itself sufficient to warrant the cancellation of an entry, but may be properly considered with other facts in determining the *bona fides* of the entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 4, 1893.

The land involved in this appeal is lots 3 and 4, and E. ½, SW. ¼, Sec. 30, T. 21 S., R. 10 W., Larned, Kansas, land district.

It is shown by the record that Henry A. Walker made homestead entry of said land July 31, 1888. On March 19, 1889, Edgar L. Chatten filed an affidavit of contest, alleging that the claimant—

has wholly abandoned said tract; that said tract is not settled upon and cultivated by said party as required by law, and that the same is held for speculative purposes, and that the said Henry A. Walker has attempted at different times to sell said tract of land and has relinquished the same.

A hearing was had; the testimony of the contestant having been taken by deposition, and that of the claimant submitted before the local officers, and as a result thereof they found in favor of the contestant. Claimant appealed and you by letter of December 3, 1891, affirmed their decision, whereupon he prosecutes this appeal, assigning as error, substantially that your decision is against the law and evidence.

When this case was called for trial, on June 4, 1889, the attorney for contestant, made a demand on the defendant for an inspection and permission to take a copy of his receiver's duplicate receipt for his homestead entry No. 10789, dated July 31, 1888, for the land above described, together with all writings endorsed on the back thereof. This demand was stated to be for the purpose of using the receipt and the endorsements thereon as evidence. This was objected to and refused by the defendant. The local officers, in passing upon the demand held that—

The execution of a relinquishment does not constitute a cause of action and a production of the receipt showing that a relinquishment had been executed would be immaterial, therefore the application is denied.

The contestant then applied for and secured a continuance to take depositions, by which it is shown by Charles H. Moore

that on or about March 12, 1889, he prepared and acknowledged a relinquishment of the land embraced in Walker's homestead; he thinks the relinquishment was written on the back of the receipt but is not certain; he did not give any reason for relinquishing it; I gave it to him.

On cross-examination, he says:

I never saw the land; I will not testify positively as to what piece of land he relinquished; do not remember the numbers.

Q. Did not Chatten tell you that the object in bringing this contest was because defendant owed the firm of Chatten Brothers and that the sole object was to force Walker to pay the defendant?

A. A party who, I think, was the younger Chatten told me after the contest was brought that they thought they had him in a place that this might effect a settlement with him.. He told me that Walker owed them some money.

A. J. Blackwood, an attorney, on direct examination testified:

I took Brown's acknowledgment to a deed about March 18, 1889; did not prepare it nor do I know to whom it was made; Brown and Walker came to my office about that date, and Brown handed me a deed which he acknowledged before me, and I returned it to him. The deed was for Illinois land and from the conversation I gathered that there was a trade pending between Walker and Brown; that is, Walker was trading his homestead for the Illinois land. Brown did not deliver the deed in my presence, nor did I see any relinquishment of a homestead.

I do not remember the conversation in full but my mind was impressed with the fact that they were trading as before stated.

On cross-examination he testified that one of the Chattens—Edgar—wanted him to see if he could fix up a claim that they—Chatten Brothers—had against Walker. He also told of a conversation he had with them about this deed, but says he gave them but little satisfaction.

When the case was again called at the local office, plaintiff offered in evidence a certified copy of a deposition of Wm. Brown, said to have been taken in a case entitled "Lafayette Holmes *v.* Sheldon Stoddard *et al.*, which deposition" it is said by counsel, "relates largely to the matters at issue in this case." He also renewed his motion to require the defendant to produce his receiver's receipt.

On defendant's objecting to these the register held that the copy of depositions was "irregular and incompetent but under rule 41, of the rules of practice, can not be excluded from the record," and on the motion held that either party may demand of the opposite an inspection of any paper thought to be material: "the party may consent or refuse, but in the event of his refusal to comply with the demand all sworn testimony in relation to the same may be taken as true." Here the contestant rested, when defendant moved "that this case be dismissed on the ground that plaintiff has not introduced evidence sufficient to constitute a cause of action."

The register denied this motion, and required the defendant to submit testimony in defense. This ruling was excepted to, is preserved in the record and is now urged here.

I do not think the register erred in overruling this motion. It seems to me there was sufficient testimony offered to require the defendant to be put upon his proof. While it is true that the fact of the execution of a relinquishment is not of itself sufficient to warrant the cancellation of an entry, yet it may be considered with other facts to show the *bona fides* of the entryman.

But I can not concur with your judgment on the facts.

The evidence on behalf of the defendant shows that he had about forty acres under cultivation; about one hundred fenced, a good house and other improvements of the value of about $600; that he had lived with his family continuously on the land; that he was largely in debt and among others of his creditors was the firm of Chatten Brothers,

of which the contestant is a member; that negotiations had been pending for some time by which he hoped to pay them, but that they had failed. The defendant admits that he executed a relinquishment to the land as the result of a trade he was trying to make with one Brown, and that Brown had executed a deed to him or his wife, for some land in Illinois; that in addition to the Illinois land Brown was to pay the claim of Chatten Brothers; that Brown took the relinquishment to the local office to see if he could make an entry on the land, when he was informed of this contest; he then returned the relinquishment to the defendant and the trade was dropped. This is not sufficient to sustain the charges in this case. Blank *v.* Center, 11 L. D., 597.

I can not conclude from these facts that there was any intention on the part of the entryman to hold the land for speculative purposes. On the contrary, I am impressed with his good faith in holding the land and improving it under the adverse circumstances, and I do not think the fact that he tried to dispose of it for the sole purpose of effecting a composition with his creditors, should be construed as a lack of good faith.

Your judgment is therefore reversed.

RES JUDICATA—MINERAL LAND—PREFERENCE RIGHT.

DORNEN *v.* VAUGHN.

An order of cancellation is final as to the rights of the entryman in the absence of appeal, and no right under the cancelled entry can be subsequently asserted as against the intervening adverse claim of another.

The preferred right of entry accorded a successful contestant by the act of May 14, 1880, may properly extend to an agricultural claimant who successfully contests a mineral claim, and clears the record thereof.

A *bona fide* pre-emption claim, lawfully initiated prior to the repeal of the pre-emption law, is protected by the terms of the repealing statute.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 5, 1893.

On May 3, 1882, Mary Dornen made homestead entry (No. 3578) for lot 2, or W. ½ of SW. ¼ and W. ½ of SE. ¼ of SW. ¼ of Sec. 18, T. 12 N., R. 83, M. D. M., containing 99.71 acres, at Sacramento, California.

By your letter of November 16, 1882, said entry was held for cancellation as to the SW. ¼ of SW. ¼, and the W. ½ of SE. ¼ of SW. ¼ of said section, as being mineral in character and subject to disposal only under the mining acts of Congress, and sixty days were allowed for appeal. No appeal was taken, and said entry was cancelled as to said mineral part by your letter of May 14, 1883.

On June 29, 1888, Charles F. Vaughn filed a petition to be allowed to show the non-mineral character of said last mentioned tract. He also applied to file a pre-emption declaratory statement therefor.

A hearing was ordered on said petition for October 11, 1888, when Vaughn appeared with his witnesses. Valentine, the mineral claimant, also appeared by counsel. Said Dornen also appeared with witnesses, and filed an affidavit, in which she asked leave to offer evidence in aid of the efforts of said Vaughn to show the non-mineral character of said land and claimed the right to have her said homestead entry restored so as to cover said tract. A compromise was effected between Vaughn and the mineral claimant, and the latter withdrew from the contest.

The local officers held that the tract was agricultural, and that Vaughn should be permitted to enter the same under the agricultural laws.

By your letter of July 24, 1889, their decision was sustained so far as it adjudged the land to be agricultural, and the case was closed as between Vaughn and the mineral claimant. A hearing was ordered to determine the rights of Mary Dornen, and she and Vaughn appeared on October 15, 1889, and submitted testimony.

On January 20, 1890, the local officers held—

1. That the order of cancellation of H. E. 3578, in so far as tract in controversy is included, remains in force. 2. That upon payment of legal fees and commissions, Charles F. Vaughn be allowed to enter said tract under the agricultural laws of the United States.

Their decision was affirmed by your letter of December 10, 1891. An appeal now brings the case before me.

The grounds of appeal are specified as follows:

Appellant excepts to the rulings appealed from for the reason that the homestead of appellant was, when made, a valid and subsisting entry, subject only to the claims of the government thereto as mineral land, and that when the claim of the government as mineral land was shown to be without foundation, her right thereto sprang into full vigor.

For the further reason that her cultivation of a part of the land embraced in the entry was a sufficient compliance with the law as to continuity of claim, and cultivation, coupled with the undisputed fact that she always claimed it.

For the further reason that there is in the record no evidence of abandonment; and no evidence that she slept upon her rights; but on the contrary abundant evidence that if she had attempted at an earlier day to disprove the mineral she would have failed by reason of the strong miners' organizations always ready to step in and prove anything with reference to such matters.

When the appellant failed to appeal from the decision of November 16, 1882, holding her entry for cancellation for the tract in controversy, she acquiesced in that decision, and it became final as to her said right to the land. The question of her said right became *res judicata*, and she is barred from asserting any further right to the land under the entry, even if said decision was erroneous, in order to defeat an intervening adverse claim. Wesley A. Cook (4 L. D., 187); Macbride *v.* Stockwell (11 L. D., 416); Wells on Res Adjudicata, Chap. 1, Sec. 6.

The judgment in favor of Vaughn in his contest did not have the effect to vacate the former judgment against her, which still remained of record. These two judgments were rendered in separate and distinct

contests, and between different parties. The judgment against her settled her right to the land at the time it was rendered, and continued in force against her until set aside. It appears that she so regarded it by applying to make final proof for her north forty at different times.

When Vaughn brought his contest to determine the character of the land, and the mineral claimant, after the admission of testimony, withdrew from the contest, and the local officers decided that the land was agricultural, from which no appeal was taken, the land became vacant public land, open to entry by the first legal applicant. At that time Vaughn had applied to file a declaratory statement, and the appellant had applied to have her original entry restored. Both parties claimed possession and made improvements on the land.

By the decision of this Department rendered April 20, 1872, in the case of John B. Hill, pre-emption claimant, against certain mineral affiants, the character of the E. ½ and SW. ¼ of SW. ¼ of said section 18, was adjudged to be mineral.

The same tract was again held to be mineral in your said decision of November 16, 1882, in which the entry of Mary Dornen was held for cancellation as to the part embracing said tract.

Vaughn's contest and declaratory statement embraced only the SW. ¼ of the SW. ¼ of said Sec. 18, or twenty acres less than said tract embraced in the canceled part of Mary Dornen's entry adjudged mineral, as above stated.

At the time of the hearing on Vaughn's contest, S. D. Valentine had located a lode claim designated as the "88 mine" on a part of the forty acres contested by Vaughn, and Valentine was then the only claimant on record of any part of said land. Vaughn therefore had to clear the land of the mineral character imposed upon it by said decisions and also clear it from said lode claim. This he successfully accomplished by his contest.

The government, through its proper officers, had decided that this tract was mineral land in two decisions, with an interval of ten years between them against two separate claimants, and, therefore, was interested as a party adversely to the contest initiated by Vaughn, while Valentine was adverse claimant to a part of said tract.

The second section of the act of May 14, 1880, (21 Stat., 140), gives a preference right of entry to any person who has "contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber culture entry."

In Fraser *v.* Ringgold, (3 L. D., 69), it was held that a desert land entry was a "pre-emption entry" within the meaning of the above statute. Measured by the definition established in that case, a mineral entry is also a "pre-emption" within the broad meaning of the term. In Ringsdorf *v.* The State of Iowa (4 L. D., 497), the above act was held to apply to a contest against a swamp land selection by the State of Iowa.

In Bunger *v.* Dawes (9 L. D., 329), an entry of Kansas Indian trust land was held to be a "pre-emption" within the meaning of said act, and the successful contestant entitled to a preference right of entry. In McGee *v.* Ortley (14 L. D., 523) a location of Sioux half-breed scrip was held to be a "pre-emption," and the successful contestant entitled to a preference right of entry. The said act is a remedial and beneficial statute, and such statutes "have always been taken and expounded by equity; *ultra* the strict letter, but not, it is well and wisely said, *contra* the letter." (Dwarris on Stat., 623).

The different land laws which provide for the purchase of public lands by individuals form a general land law system and should be construed *in pari materia* so far as can be done consistently, and the rulings of the Department in relation thereto should be harmonious and uniform so far as possible. The purchase by a mineral claimant of public land under the mineral laws is a "pre emption" in as true a sense as other forms of purchase which have been so held in the cases above cited. The act of May 14, 1880, rewards one who has successfully contested an entry of the class therein specified, by giving him a preference right to enter within a specified period. This is the benefit conferred by the act, and in equity it applies to Vaughn in this case, who seeks to pre-empt the land in question, and has successfully shown its agricultural character in his contest.

On the one hand the appellant slept upon her rights, if she had any, from the date of the partial cancellation of her entry in 1882 until October 11, 1888, or nearly six years. On the other hand, Vaughn has used due diligence in prosecuting his contest and settling upon and improving the land, and his application is prior in time to hers. The law does not favor the negligent, but the diligent. The excuse made for the appellant's delay, that she could not have succeeded if she had brought her application, earlier because the miners would have sworn her out of court, can hardly be accepted in the absence of any attempt on her part to prove its truth by a contest, and in view of the fact that Vaughn's attempt was successful in his contest.

The pre-emption laws have been repealed by the act of March 3, 1891, (26 Stat., 1095). The tender by Vaughn of a declaratory statement before the passage of the act, in connection with his settlement, residence and improvements upon said land, constituted a "*bona fide* claim lawfully initiated before the passage" of said act, within the meaning of the fourth section thereof, and said claim "may be perfected upon due compliance with law," as if said act had not been passed.

Your judgment is affirmed.

CONFLICTING SETTLEMENT CLAIMS—NOTICE.

MILES *v.* WALLER.

A claim based on settlement upon, and improvement of a tract, with residence upon a contiguous tract relates back to the date when residence is established upon said contiguous tract.

The notice of claim given by settlement and improvements extends only to the quarter section upon which they are situated as defined by the public surveys.

A written notice of a settlement claim is of no validity in the absence of the settlement and residence required by law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 6, 1893.

I have considered the case arising upon the appeal of Frank M. Miles from your decision of March 3, 1892, in the case of said Miles against John Waller, involving the NW. ¼ of the SW. ¼ of Sec. 28, T. 34 N., R. 37 E., Spokane land district Washington.

Two surveys of the township were made. The first was never accepted; the second was made in June, 1888, approved by the surveyor-general, and accepted by you, some time within a year thereafter—the exact date not being shown by any of the records transmitted with the case.

When the land office opened, on the morning of June 23, 1890, both parties named were in waiting to make a homestead entry—Miles of the NE. ¼ of the NE. ¼ of Sec. 32, the E. ½ of the SE. ¼ of Sec. 29, and the NW. ¼ of the SW. ¼ of Sec. 28, said township and range, and Waller of the SW. ¼ of the NW. ¼, and the N. ½ of the SW. ¼ of Sec. 28. It will be seen that the two conflict as to the NW. ¼ of the SW. ¼ of Sec. 28.

A hearing to determine their respective rights was held on July 8, 1890.

The local officers decided in favor of Waller. Miles appealed to your office, and you affirmed their decision. Miles now appeals to the Department.

The question is complicated by certain transaction between the defendant, Waller, and one Floyd Lawson. Both were at one time (prior to the survey of the township) desirous of obtaining the SW. ¼ of the NW. ¼ of Sec. 28 (the forty-acre tract lying directly north of the one in controversy). Being on amicable terms, they discussed the matter of making joint entry of the same when it should become subject to entry, but learned that there was no provision of law that would permit such joint entry. Thereupon, Lawson withdrew all claim to said tract. Waller moved thereto from the forty-acre tract next west of it (the SE. ¼ of the NE. ¼ of Sec. 29); and Lawson—when he made entry, after survey—included the tract which Waller had thus moved from and abandoned.

Counsel for contestant alleges that your decision was in error

In holding that Lawson's legal settlement ever extended to the forty acres in dispute;

In holding that Lawson did or could give his possession and settlement to said tract to Waller;

In holding by implication that Waller's alleged rights in and to the forty in dispute related back to the alleged settlement thereon by Lawson in 1883.

Your letter, in its statement of the case, uses the expression that Lawson "gave his possession and settlement of said tract to Waller;" but it is not clear that your decision is based upon that assertion. It will be conceded that Waller's right to the tract, if any, must be founded upon and date from *his own* settlement thereon.

He further alleges that you were in error—

In not holding that the attempt of Lawson and Waller to hold a forty-acre tract of surveyed land jointly, upon which neither had his residence, was illegal, and could not serve to make the forty in conflict contiguous to the remainder of Waller's claim whereon were his residence and improvements.

The parties named learned, upon inquiry of other persons better versed than themselves in land law, that such joint entry would be illegal, and made no attempt to carry their project into effect. It will be conceded that this merely contemplated joint entry and could not make the forty in conflict contiguous to the remainder of Waller's claim. Nor do I understand that your decision so held.

Counsel claims that you were in error—

In not holding that Waller's original settlement claim was made up of non-contiguous tracts, the forty in dispute being isolated from the other tracts upon which his residence, cultivation and improvements were made.

It will be conceded that Waller's right to this forty-acre tract can not relate back of the date when the remainder of his claim upon which his residence and improvements were located, became contiguous thereto.

Admitting the positions assumed by the contestant, as above set forth, to be substantially correct, it remains to be decided which was the prior settler on the forty-acre tract in controversy.

According to the contestant's testimony, the defendant abandoned the SE. ¼ of the NE. ¼ of Sec. 29 (which was a part of his original claim), and removed to the SW. ¼ of the NW. ¼ of Sec. 28 (which was not a part of his original claim), on April 20, 1890. The forty-acres in controversy was contiguous to this, and from that date forward was subject to settlement and entry by him in connection with the remainder of his claim—unless some one had initiated a claim prior to that date, or afterward established a right which related back to a period prior to that time.

For years before April 20, 1890, the defendant had been improving the tract in controversy; and these improvements were upon it at the date of his removal to the tract north of and adjacent to it, and continued until the date of simultaneous application to enter. Defendant

testifies that he broke four acres of the tract in contest in the fall of 1886; that he put it into crop in the spring of 1887; that he plowed and cropped more in subsequent years; that he fenced in nearly the whole of it. This is corroborated by witnesses Overman, Lawson and Rice.

It is clear that his claim to the tract in controversy, based upon settlement and improvement of the same, with residence upon a contiguous forty-acre tract, could relate back to the date of his establishment of residence upon such contiguous tract—April 20, 1890,—unless some prior claim had attached.

The next question to be considered is, whether the contestant had initiated any claim to the tract in controversy prior to April 20, 1890.

The contestant, Miles, originally claimed as his homestead the NE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 32, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 29, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 29. Upon the last mentioned forty-acre tract he built a house in 1883, and resided therein until after the second survey (in 1888). He then concluded to drop the forty upon which he had been residing, and claim the forty in contest—upon which the defendant had been for some years cultivating in part, and improving, as hereinbefore set forth. But he did not settle upon or in any manner improve the tract. At the date of his application to enter—indeed, at the date of the hearing—he had no improvements upon it, unless it were a small amount of fencing. He claims to have enclosed a piece in the southwest corner, "from one and one-half to two rods square." The United States deputy surveyor, however, does not think the fence comes any further than to the line of the disputed tract. If any of the fence is on the land, it is the result of the fact that the new survey does not coincide precisely with the old, and so the fence that contestant *intended* to build on the line upon resurvey proves to be a rod or two over it, upon land unclaimed by him at the time he built it. A fence put up by mistake on what was supposed by all concerned to be the line between two claims would certainly not be such an "improvement" as would give its builder a right to the land on which it has been mistakenly built.

It appears, therefore, that on June 23, 1890, when the two parties presented their applications to enter the tract in controversy, Waller had improved and cultivated it, and had been residing upon the adjacent forty-acre tract, which he included as a part of his entry, for more than two months, while Miles had never cultivated any part of it, and had no improvements upon it, unless one corner of his fencing had been (unintentionally and by mistake) built so as to include a square rod or two of one corner of it; while his residence, cultivation, and improvements, were not only on another quarter-section, but another section.

It may be added that the notice of claim given by settlement and improvements, extends only to the quarter-section upon which they are situated, as defined by the public surveys. L. R. Hall (5 L. D., 141);

Reynolds *v.* Cole (ib., 555) Union Pac. R. R. Co. *v.* Simmons (6 L. D., 172); Hemsworth *v.* Holland (7 L. D., 76); Pooler *v.* Johnson (13 L. D., 134); Shearer *v.* Rhone (ib., 480).

Immediately after the (second) survey Miles sent a written notice to Waller, informing him that *he* claimed the NW. ¼ of the SW. ¼ of Sec. 28, T. 34 N., R. 37 E.,—the tract in controversy. But such written notification is of no validity in the absence of the settlement and residence required by law.

Your judgment in favor of Waller is sustained, and your decision that his entry be held intact is affirmed.

INDIAN OCCUPANCY—SETTLEMENT RIGHT—ALLOTMENT.

LONG JIM *v.* ROBINSON ET AL. AND CULTUS JIM ET AL. *v.* CHAPPELLE ET AL.

Lands actually included within Indian occupancy are not subject to settlement; and a general order opening an Indian reservation does not operate to confer upon claimants under the settlement laws any right to settle upon, or enter, lands that are excluded from such appropriation by reason of Indian occupancy.

The provision contained in the agreement of July 7, 1883, for the protection of "all other Indians living on the Columbia reservation" extends to Indians then living on said reservation but not represented in the negotiation of said agreement; and the failure of such Indians to elect within one year whether they would stay on said reservation, or remove to the Colville reservation, as provided in the act of Congress ratifying said agreement, will not defeat their right to receive allotments in accordance with said agreement.

Secretary Noble to the Commissioner of the General Land Office, January 6, 1893.

On the 9th day of July, 1892, you considered the above entitled cases on appeal of the Indians, and as the facts and legal questions involved are so nearly alike in them, you treated them as one case.

The record shows that on the 28th day of November, 1890, Chelan Bob (an Indian) filed in the local land office at Waterville, Washington, his application for the NW. ¼, N. ½ SW. ¼, and lots 1, 2 and 3, of Sec. 20, T. 27 N., R. 23 E., W. M., containing 337.60 acres.

On December 1, 1890, Cultus Jim (an Indian) filed in said local land office, his application for the SE. ¼ SE. ¼, of Sec. 19, the S. ½ SW. ¼ and lot 4, of Sec. 20, and lots 2 and 3 of Sec. 29 of the same township and range, containing 209.40 acres.

On the same day Long Jim filed in said office his application for the NE. ¼, NE. ¼ SE. ¼, and lot 1, of Sec. 11, W. ½, Sec. 12, lot 1, of Sec. 14 and lots 1 and 2 of Sec. 13, T. 27 N., R. 22 E., W. M., containing 525.30 acres.

All of the land filed for by Long Jim, except eighty acres, all filed

for by Cultus Jim, except forty acres, and all of that filed for by Chelan Bob, is claimed adversely to said Indians by white settlers, as follows:

February, 1889, A. W. La Chappelle made homestead entry for the NE. ¼ SW. ¼, and lots 3 and 4, of said section 20, and lots 2 and 3 of said section 29 of T. 27 N.,R. 23 E.

March 15, 1889, C. H. Ambercrombie made homestead entry for the E. ½ NW. ¼ and lots 1 and 2 of said section 20, T. 27 N., R. 23 E.

July 5, 1890, Charles A. Barron made homestead entry covering the NW. ¼ NW. ¼ of said section 20, SW. ¼ SW. ¼ of Sec. 17, and the S. ½ SE. ¼ of Sec. 18, T. 27 N., R. 23 E.

July 14, 1890, Enos B. Peaslee made homestead entry for lot 1, NE. ¼ SE. ¼ and the S. ½ NE. ¼ of said Sec. 11, T. 27 N., R. 22 E.

July 16, 1890, Harrison Williams made homestead entry for the E. ½ SE. ¼ of said Sec. 19, and the W. ½ of the SW. ¼ of said Sec. 20.

October 17, 1890, Thomas R. Gibson made homestead entry for the E. ½ of the SW. ¼, NW. ¼ SW. ¼ and the SW. ¼ SE. ¼, of said section 12, T. 27 N., R. 22 E.

On the 10th day of January, 1891, W. F. Allender made an affidavit that he acted as the agent for Long Jim in making his application and that the land embraced in Gibson's entry was inadvertently included in said application, and on the same day said entry was commuted to cash entry No. 77.

September 17, 1889, Julius Larabee filed his declaratory statement for the NW. ¼ NE. ¼, E. ½ NE. ¼ of said Sec. 19, and the SW. ¼ NW. ¼ of said section 20, and on January 19, 1891, Edson E. Larabee made homestead entry for the same tract.

Christopher Robinson (date not given) made homestead application for the SW. ¼ SW. ¼ of said section 12, and lots 1, 2, and 3, of said section 13, T. 27 N., R. 22 E.

Under instructions from you, a hearing was had before the register and receiver at Waterville, Washington, within whose district the land in controversy is situated, to determine the matter of these claims for allotments. At the time set for the trial all the parties appeared before the local officers and submitted their testimony.

On the 13th day of April, 1891, the register and receiver found in favor of the several homestead entrymen and recommended that the applications of Chelan Bob, Cultus Jim and Long Jim to take the lands in controversy under the Moses treaty, should be denied.

From their decision the Indian claimants appealed.

On the 9th day of July, 1892, you reversed the judgment of the local officers, and held that said Indian applicants are entitled to have allotments of lands made to them in severalty in quantities and manner provided in the agreement of July 7, 1883, and that the right of said several white claimants is subordinate and subject to the prior superior right of said Indians.

An appeal by the white entrymen from your judgment brings the controversy here for determination.

All of the land in controversy was formerly embraced in the Columbian Indian reservation and these Indian claimants are seeking to avail themselves of the benefits of an agreement dated July 7, 1883, signed by the Secretary of the Interior and Commissioner of Indian Affairs, on the part of the government, and on the part of the Indians by Chiefs Moses, Tonasket and Sar-Sarp-Kin. (See Report of the Commissioner of Indian Affairs for 1883, pp. LIX., LXX. and LXXI.) Said agreement provided, among other things, that the government would,—

> secure to Chief Moses and his people, as well as to all other Indians who may go on to the Colville reservation and engage in farming, equal rights and protection. . . . . That until he and his people are located permanently on the Colville reservation his status shall remain as now. . . . . All other Indians now living on the Columbia reservation shall be entitled to six hundred and forty acres, or one square mile of land, to each head of a family or male adult, in the possession and ownership of which they shall be guaranteed and protected. Or should they move on to the Colville reservation within two years, they will be provided with such farming implements as may be required, provided they surrender all rights to the Columbia reservation.

This agreement was accepted, ratified and confirmed by the act of Congress approved on the 4th day of July, 1884 (23 Stat., pp. 79 and 80), with the proviso:

> That the Indians now residing on said Columbia reservation shall elect within one year from the passage of this act whether they will remain upon said reservation on the terms therein stipulated or remove to the Colville reservation: *And provided further*, that in case said Indians so elect to remain on said Columbia reservation the Secretary of the Interior shall cause the quantity of land therein stipulated to be allowed them to be selected in as compact form as possible, the same when so selected to be held for the exclusive use and occupation of said Indians, and the remainder of said reservation to be thereupon restored to the public domain, and shall be disposed of to actual settlers under the homestead laws only, etc.

At the time said agreement was made, and at the time it was so ratified by Congress, it appears there was a band of Indians, numbering some forty or fifty persons, who resided upon, and near to, the north bank of the Chelan river and Chelan lake; which Indians recognized Eno-mo-sit-za as their chief; that about the time said agreement was made said chief was taken sick and died; they were claimed by Moses as part of his people and so treated by the government; it further appears that these Indian applicants are members of Eno-mo-sit-za's band, and they claim that said band owed no allegiance to Chief Moses, and that Moses had no right or authority to negotiate for the sale of the lands occupied by them. Long Jim—one of these applicants—is a son of the late Chief Eno-mo-sit-za, and as such claims to be the legitimate chief of said band. The testimony clearly shows that this band, for upwards of thirty-five years, have occupied the country along the north shore of Lake Chelan, and the west bank of the Columbia river, as far north as the Methon river, to an undefined distance westward; that since his father's death Long Jim, or as he is called by the Indians, "In-amache Jim," has been recognized by these Chelan Indians as their chief; that

Sar-sarp-kin, Moses and Long Jim's father were chiefs over different portions of the country, and that Jim and his band regarded said chiefs as equals. Jim's father was sick when the agreement of July 7, 1883, was entered into, and died shortly afterwards, thereupon Long Jim succeeded him as chief of said band. The testimony fails to show that the Chelan Indians were followers of Chief Moses, or that he was authorized to act for them in making said agreement. As to the occupancy of the lands in question by these Indians, it is clearly shown that many of them have lived all their lives upon the land they now claim. Long Jim testified that he was thirty-eight years old, a married man, and was born, and had all his life, lived upon the land claimed by him. Chelan Bob and Cultus Jim are married men; they have part of the land embraced in their respective claims fenced in common; they have cultivated a part of said lands for many years, and long before La Chappelle or any other white man made any claim to said lands. These Indians have raised stock, grass, small grain and vegetables on their claims. They belong to Long Jim's band, and have persistently held to their homes; claiming all the time that Moses had no right or authority to act for them in any respect.

These Indian applicants, and others of the band, have not received anything from the government under the Moses agreement, or otherwise; they have clung to the homes of their ancestors and managed to secure their own living by raising stock and tilling the soil independent of government assistance.

This band, which was at one time an independent tribe, inhabiting and occupying a large scope of territory along the Columbia and Chelan rivers, has had its occupancy narrowed down, from time to time, until it seems to be limited to the tracts on which some parts of the improvements of the individual members of the band are located. This controversy involves the question as to whether these Indians have any legal rights in or to the lands in controversy that the white settler is bound to respect. If the filing and entries of the white claimants were made in violation of law or the instructions of the Land Department, made pursuant to law, then said filing and entries must be canceled, and if this be done then it practically leaves the claims of the Indians *ex parte* to be settled between them and the government.

On the 31st day of May, 1884, the Department approved a circular issued by the Commissioner of the General Land Office in which it was said: (See 3 L. D., 371.)

> Information having been received from the War Department of attempts of white men to dispossess non-reservation Indians along the Columbia River and other places within the Military Department of the Columbia of the land they have for years occupied and cultivated, and similar information having been received from other sources in reference to other localities where land is occupied by Indians who are making efforts to support themselves by their own labor, you are hereby instructed to peremptorily refuse all entries and filings attempted to be made by others than the Indian occupants upon lands in the possession of Indians who have made improvements of any value whatever thereon.

In order that the homes and improvements of such Indians may be protected, as intended by these instructions, you are directed to ascertain by whatever means may be at your command whether any lands in your district are occupied by Indian inhabitants, and the locality of their possession and improvements as near as may be, and to allow no entries of filings upon such lands. When the fact of Indian occupancy is denied or doubtful, the proper investigation will be ordered prior to the allowance of adverse claims. Where lands are unsurveyed no appropriation will be allowed within the region of Indian settlements until the surveys have been made and the land occupied by Indians ascertained and defined.

These instructions were re-issued on the 26th day of October, 1887, (See 6 L. D., 341) in which it was said:

The foregoing instructions apply to every land district and to all lands occupied by Indian inhabitants in any part of the public land States and Territories of the United States.

It has been officially represented that these instructions are disregarded, and that public land entries have been allowed upon lands on which Indian inhabitants have their homes and improvements, and in some cases where the Indians have so resided for a number of years, cultivating the soil and making the land their permanent homes. The allowance of such entries is a violation of the instructions of this Department, and an act of inhumanity to a defenseless people, and provocative of violence and disturbance.

You are enjoined and commanded to strictly obey and follow the instructions of the above circular and to permit no entries upon lands in the possession, occupation and use of Indian inhabitants, or covered by their homes and improvements and you will exercise every care and precaution to prevent the inadvertent allowance of any such entries. It is presumed that you know or can ascertain the localities of Indian possession and occupancy in your respective districts, and you will make it your duty to do so, and will avail yourselves of all information furnished you by officers of the Indian service.

Surveyors-general will instruct their deputies to carefully and fully note all Indian occupations in their returns of surveys hereafter made or reported, and the same must be expressed upon the plats of survey.

The substance of these instructions is repeated in the general circular of your office approved February 6, 1892, on page 65.

In the case of Mission Indians *v.* Walsh, on review, (13 L. D., 269), it was held that land subject to Indian occupancy can not be taken under the settlement laws, and that an executive order creating a reservation that excludes the major portion of such land from the boundaries thereof does not operate to confer settlement rights that could not otherwise be obtained.

These circulars seem in spirit and letter to completely cover the cases at bar, and if it were not for the executive order of May 1, 1886, restoring the lands to the public domain there would be no question but what the filing and entries in question were illegal and void *ab initio*. The ruling in the Walsh case, *supra*, covers this point wherein it holds that the legal effect of an executive order, restoring lands theretofore withdrawn, is that it does not operate to confer any settlement rights that could not otherwise be obtained. In other words such order does not confer upon claimants under the pre-emption and homestead laws, any right to settle on, file upon, or enter such lands as are excluded

from such filing, entry or settlement, by reason of its occupation by Indian claimants.

Inasmuch as there is no question of the occupancy of the land in controversy by these Indians long prior to and at the time the filing, settlements or entries of these claimants were made, it follows that they must be canceled, in so far as they conflict with these Indians' claims, which you are directed to cause to be done.

The only remaining question is whether these Indian applicants can avail themselves of the benefits of the agreement of July 7, 1883, between Chief Moses, and the Secretary of the Interior which was confirmed by the act of Congress of July 4, 1884, *supra*. While these Indians were not parties to that agreement in the sense that they were represented in making it in person or by any one authorized to act for them, yet if they were in the position or occupied such a relation as to be included in its terms, I can see no legal reason, as between them and the United States for the government withholding from them the full benefits it agreed to bestow upon them. That agreement was the solemn obligation of the United States made by its executive branch and ratified by Congress. Good faith and fair dealing demands that the government perform its agreement in letter and in spirit.

It is a familiar and fundamental principle in the construction of contracts, that the facts and surrounding circumstances attending the execution of a contract may be taken into consideration in construing it.

In connection with this agreement it appears that certain chiefs, among them Moses, professedly representing different tribes of Indians assumed to act for their people and in so far as their people's rights were concerned, their acts were binding. At the same time it appears now as a fact that these Indians were then on the land and claiming to have, and entitled in all fairness to the same rights to it as Moses and his co-contractors had and claimed; the Secretary and Congress knew that it was altogether likely that there were "other Indians," than those represented by the chiefs present when the agreement was made, upon the reservation, whose rights should be carefully guarded and protected by the government. It was evidently the purpose of the Secretary and Congress to provide for this contingency in the agreement wherein it provides that—

> All other Indians now living on the Columbia reservation shall be entitled to 640 acres, or one square mile of land, to each head of family or male adult, in the possession and ownership of which they shall be guaranteed and protected.

This amounts to an absolute guaranty of the government, to the extent named, of the right to, and possession of, the lands in the possession of these Indian applicants, as they come clearly under the head of "other Indians" living on the Columbia reservation.

The act of July 4, 1884, *supra*, provided that the Indians then living on said reservation should elect within one year from the passage of the act whether they would remain on said reservation on the terms therein

stipulated or remove to the Colville reservation; and in case said Indians so elected to remain on said reservation the Secretary of the Interior was to cause the quantity of land stipulated to be allowed to them to be selected and held for the exclusive use and occupation of said Indians.

The register and receiver based their judgment against the Indian claimants principally upon the fact that they had failed to elect, within one year as to whether they would go on the Colville reservation or take their allotments under the act of July 4, 1884, *supra*. The proviso in said act requiring the election to be made in one year is "that Sar-sarp-kin and the Indians now residing on the Columbia reservation shall elect, within one year from the passage of this act, whether they will remain upon said reservation on the terms therein stipulated, or remove to the Colville reservation." This evidently refers to Sar-sarp-kin and the Indians represented by him who were directly represented by him in making the agreement and can not be held as binding on these Indian applicants because they were not parties to nor represented in making said agreement.

It appears that in the spring of 1885 a special agent was sent to said reservation to ascertain whether the Indians would remain on it or remove to the Colville reservation. It further appears that on July 23, 1885, said agent submitted a report of a trip to Lake Chelan pertaining to allotments of lands to the Indians near said lake, and on the Columbia reservation. His report shows that some of the Indians objected to having surveys made; among those objecting was a young chief "Winnemesche" or Chelan Jim, as he was more frequently called. Said agent and this chief together with about twenty-five male adults of his tribe had a conference upon the subject of their taking allotments on the Columbia reservation. Said conference lasted more than two days during which time the agent represented to the Indians the great advantage of their taking allotments, to which the chief who acted as spokesman for his band, replied in substance, that the Great Spirit gave the lands which they were then living upon to his ancestors who were buried where they had always lived; that his people had always lived at peace with the whites and had in no instance committed any wrong against the life or property of their white neighbors; that they had never asked or received anything from the government, and that all they asked was that they might be allowed, in the future as in the past, to settle in peace upon the lands of their birthplace, and that the Great Spirit would be displeased if he or his people took the course advised by the agent.

The matter drifted along and it seems these Indians were removed to the Colville reservation by the aid of the military authorities, and three of the Indians were put in the agency jail for alleged insubordination, and kept there until released to attend the hearing below. Charges against the Indians representing them to be drunken, worth-

less and dangerous characters, denials of the same; counter-charges of collusion among the whites to wrongfully deprive the Indians of their rights, appear to have been made from time to time before the Indian Office; all of which resulted in divers investigations and conflicting reports of the officers charged therewith. The last two of these reports, as appears, from the letter of the Commissioner of Indian Affairs to you, dated January 21, 1892; one of Special Agent Litchfield, dated January 24, 1891, and one of Inspector Gardner, dated March 9, 1891, both find that these Indian applicants are entitled to the land they claim.

The record in the case, after it was appealed to you, was submitted by you to the Indian Office and upon examination of it, the Commissioner expresses the opinion that to allow these entries made by white men "to stand and the lands covered thereby to pass to patent, would be an act of injustice to an ignorant people, one that would be calculated to provoke violence and disturbance."

After a full and elaborate discussion and consideration of the record and facts in the case, you held:

> That said Indian applicants are entitled to have allotments of lands made to them in severalty in quantities and manner provided in the agreement of July 7, 1883, and that the right of said several white claimants above named to the land claimed by them, is subordinate and subject to the prior and superior right of said Indians.

After a careful examination of the testimony and record in the case, I am satisfied that your judgment is correct, and it is accordingly affirmed.

CONTEST—PROCEEDINGS BY THE GOVERNMENT—RESIDENCE.

GIBBS *v.* KENNY.

Proceedings on the adverse report of a special agent, are no bar to a subsequent contest against the entry in question on grounds presented by said report, where such proceedings are abandoned without a hearing therein.

Residence can not be acquired nor maintained by going upon or visiting a claim solely for the purpose of complying with the letter of the law. The act of going upon the land, and the occupancy thereof, must concur with the intent to make it a permanent home to the exclusion of one elsewhere.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 6, 1893.

Stephen Kenny has appealed from your decision of March 3, 1892, holding for cancellation his homestead entry for the E. ½ of the NE. ¼ and E. ½ of the SE. ¼ of Sec. 3, T. 42 N., R. 10 E., Del Norte land district, Colorado.

The entry was made May 6, 1884. In summer of 1887 an examina-

tion was made by E. S. Bruce, a special agent of your office, which resulted in an adverse report on November 21, 1887. On December 23, same year, you held the entry for cancellation. The entryman asked for a hearing, and by letter of January 23, 1888, the local officers were directed to inform him that it was granted. By reason of delays that need not be set forth in detail, a hearing was never had; but Special Agent Wells was directed to look into the matter. He reported that one of the witnesses named in Agent Bruce's report, George O. Simons, was dead; that another witness, James Green, he was unable to find; that the third witness, E. L. Jones, could only testify as to the appearance of the land as to improvement and cultivation, but knew nothing of the facts as to residence. He added that in his opinion, from inquiry in the neighborhood and from the affidavits of certain witnesses, the entryman had complied with the law. Thereupon you, on October 10, 1889, revoked the order for a hearing, and directed that the entry remain intact.

On May 17, 1890, he submitted final proof, when he was confronted by George A. Gibbs, whose counsel cross examined him and one of his witnesses. Final certificate, however, was issued May 20, 1890. On June 12, same year, Gibbs filed formal protest against the entry, alleging that the entryman had not maintained residence upon the land as required by law; that the only improvements on the tract were a small log cabin worth not to exceed thirty dollars, and a well sunk for the purpose of watering stock.

A hearing was ordered by your letter of July 5, 1890; which, after due notice, was had before the local officers on August 20, 1890—both parties appearing in person and submitting testimony.

As the result of the trial, the local officers found—

> That he did not reside there (i. e., on his homestead entry) continuously, to the exclusion of a home elsewhere, but while maintaining such a residence on this land as he thought would enable him to acquire title thereto under the homestead law, his real home, and what his neighbors understood to be his abiding place, was at his larger house on his adjoining land, where he kept his farming implements, his domestic animals, lodged and boarded his help, and where he stayed a great portion of the time himself.

They therefore recommended the cancellation of his entry. He appealed to your office, and you affirmed the judgment of the local officers. He now appeals to the Department.

The appellant contends that your action revoking the order for a hearing on the charges preferred by Special Agent Bruce and directing that the entry remain intact—

> Constitutes an adjudication, and is a bar to any subsequent contest covering the same charges, notwithstanding the finding may be based upon evidence taken by a special agent instead of the local officers . . . . . Upon this point of *res judicata* we invite a careful examination of the following decisions, to wit: Parker *v.* Gamble (3 L. D., 390); Reeves *v.* Emblen (8 L. D., 444); Mead *v.* Cushman (10 L. D., 253); Busch *v.* Devine (12 L. D., 317); McAllister *v.* Arnold (12 L. D., 520). In the last

case above cited, the proceedings which were held to be a bar to the contest were based upon a special agent's report. We therefore ask that the contest be dismissed upon this ground above.

In the first four cases cited by the appellant, *there had been a hearing;* they were therefore widely different from the case at bar. In the last case, to which appellant directs special attention, it is true that "the proceedings which were held to be a bar to the contest were *based upon* a special agent's report"—but those "proceedings" consisted of a hearing "commencing September 4, 1885, and continuing nearly two months, during which time thirty-six witnesses were examined, and testimony taken, covering about one thousand manuscript pages." None of the cases cited afford any support for the contention that any action taken by your office on a special agent's report, where no hearing has been had, is a bar to a contest thereafter on the same or any other allegation.

Appellant contends that the contest was initiated from a revengeful motive because the entryman refused to let the contestant have water from his land. While this fact, if shown, might cause contestant's testimony to be scrutinized with unusual care, yet if failure to comply with the requirements of the law is clearly shown, "the contestant's motive in attacking the entry . . . . is not material to the entryman's defense." Wazuzer *v.* Kropitzky, syllabus, 5 L. D., 296.)

Counsel also contends that "the only issue is that of residence;" that "it is expressly found as a fact by the local officers, that Kenny established his actual, *bona fide* residence on this land in November, 1884;" and that "the burden is upon the contestant to show an abandonment of that residence—to show when and how this log house on the homestead ceased to be Kenny's legal home." If the appellant insists upon abiding by the express finding of the local officers, their finding as to the *kind* of residence established by the defendant is that it was "*such* residence . . . . . as he thought would enable him to acquire title thereto." But—

residence can not be acquired or maintained by going upon or visiting a claim solely for the purpose of complying with the letter of the law, with a view of thereby acquiring title to the land; but the act of going upon and the occupancy of the land must concur with the intent to make it a permanent home to the exclusion of one elsewhere. (Dayton *v.* Dayton, on review, 8 L. D., 248; Mary Campbell, on review, ib., 331.)

I have carefully examined the testimony taken at the hearing; I concur in the finding of facts and the conclusions of law contained in the opinions of the local officers and of yourself; and your decision is therefore affirmed.

RELINQUISHMENT—REINSTATEMENT.

SHORT *v.* FLETCHER.

A relinquishment procured from the entryman while he is so intoxicated as to be incapacitated for the transaction of business is not his voluntary act; and an entry canceled thereunder must be reinstated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 9, 1893.

On May 9, 1889, Aaron Short made homestead entry (No. 857) of the SE. ¼, Sec. 2, T., 17 N., R. 7 W., at Kingfisher, Oklahoma Territory.

On June 25, 1889, he relinquished his entry, and the same was canceled by the local officers.

On the same day George W. Fletcher made homestead entry (No. 2583) of said land.

On July 9, 1889, said Short filed in the local office an affidavit of contest against Fletcher's entry, alleging—

That the said George W. Fletcher made his entry in fraud. That he procured by fraud, (or) caused to be procured, affiant's relinquishment to his H. E. No. 857, made by affiant upon said tract. That said relinquishment was procured by fraud and misrepresentation, and while affiant was under the influence of intoxicating liquors to such an extent as to incapacitate him from transacting business. That affiant has valuable improvements upon said tract, and is an actual settler residing thereon. That the entry of said Fletcher is fraudulent, and made for speculative purposes; and this affiant has no knowledge or recollection of executing a relinquishment of his entry.

The affiant further asked that "his H. E. No. 857 for said tract be reinstated and the H. E. No. 2583 of said defendant be cancelled."

A hearing was ordered for November 13, 1889, when the parties appeared and submitted testimony. On January 22, 1890 the local officers found that "every material allegation of plaintiff's complaint has been sustained by a preponderance of testimony; and the decision of this office is that the entry of George W. Fletcher for said tract of land be cancelled and that the entry of plaintiff Aaron Short for said land be reinstated."

On appeal you affirmed their decision by letter of January 26, 1892, holding "that at the time Short executed and filed his relinquishment he was not in a condition to know what he was doing."

An appeal now brings the case to this Department.

It is contended that said decision is contrary to law, and to the testimony in the case. The testimony establishes the fact that there was a preconcerted plan between certain parties who wished to locate a townsite on Short's land, to get him drunk, and while drunk, to secure a relinquishment from him, and then get a soldier to enter the land who could make final proof in a year's time, and who was then to convey forty or eighty acres of said land for said townsite. This scheme was

carried out so far that Short was made drunk, and while drunk his relinquishment was obtained and filed in the local office, and Fletcher, who had been previously selected as the soldier to enter the land, did enter it on the same day the relinquishment was filed. Short's intoxication was so complete as to incapacitate him from doing business. It has been held by this Department that a relinquishment obtained from one who was drunk at the time could not be considered as a voluntary act, but as obtained fraudulently, and that an entry canceled on account of such relinquishment should be reinstated. Duncan *v.* Campbell (2 L. D., 325); O'Connor *v.* Stewart (15 L. D., 555).

In Pitt *v.* Smith (3 Camp. Cas., 33) Lord Ellenborough held that "there was no agreement if the defendant was intoxicated in the manner supposed. He had not an agreeing mind. Intoxication is good evidence upon a plea of *non est factum* to a deed, of *non concessit* to a grant, and of *non assumpsit* to a promise." This decision has been followed by both English and American text writers and Courts. (See the authorities collected in American and English Encyclopedia of Law, Vol. 11, p. 774.) This principle is especially applicable where the action of the intoxicated person is greatly to his disadvantage, and his intoxication has been procured for the purpose of taking advantage of him.

Your judgment is affirmed.

DORMAN *v.* MCCOMBS.

Motion for the review of departmental decision of June 28, 1892, 14 L. D., 700, denied by Secretary Noble, January 9, 1893.

PRACTICE—NOTICE—SERVICE BY PUBLICATION.

JARDEE *v.* CANNON.

Publication of notice is not authorized on an affidavit that fails to show what effort has been made to secure personal service; and such defect can not be cured by additional affidavits filed after the issuance of notice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 9, 1893.

On August 23, 1884, George W. Cannon made timber-culture entry (No. 2437) of the SE. ¼ of Sec. 32, T. 31, R. 18 W., at Valentine, Nebraska.

On December 18, 1889, John Jardee filed an affidavit of contest, alleging that—

Prior to the year 1888, there had been ten acres broken and cultivated; and during the year 1888 the whole ten acres were planted to cuttings and seeds, but were not cultivated; in the year 1889 the said land was not cultivated, and at the present time there is not to exceed one acre of tree ground on said land, and said defects have not been cured at the present time.

The foregoing affidavit was sworn to on December 13, 1889, before J. W. Davenport, a notary public, of Rock county, Nebraska.

At the same date he made the following affidavit before the same notary public:

State of Nebraska } ss.
Rock County }

Personally appeared before me John Jardee of Rock county, State of Nebraska, who, upon oath, says that after due inquiry he cannot find the present residence of George W. Cannon, and when last heard from he was in Sioux City, Iowa.

(Signed) JOHN JARDEE.

Sworn to and subscribed before me this 13th day of December A. D., 1889.

(Signed) J. H. DAVENPORT,
Notary Public.

Upon this affidavit solely, so far as appears, the local officers, on January 30, 1890, gave a notice by publication, summoning the parties to appear at the local office on March 22, 1890, and before said Davenport at his office in Newport, Nebraska, on March 18, 1890, to offer testimony concerning said alleged failure.

The contestant appeared before said notary, but the claimant failed to appear. The contestant and two other witnesses testified in his behalf to the alleged failure.

On June 10, 1890, and before the local officers had rendered their decision, the claimant filed a motion to dismiss the contest—

for the reason that he never received notice of the initiation of the same, though his place of residence was well known to contestant, and could have been known by enquiry of persons living in the vicinity of the land in controversy, and particularly of D. B. Bennett, who was employed by claimant to do the work upon his claim, and with whom claimant corresponded from time to time.

On August 9, 1890, the local officers made their judgment in which they held that the contestant had sustained his allegations, and recommended the cancellation of said entry, and overruled said motion.

On appeal you sustained their decision on the merits, by your letter of February 29, 1892, but failed to pass definitely upon the question of jurisdiction raised by said motion.

An appeal now brings the case before me.

The specifications assign ten separate grounds of error in your decision, of which it is only necessary to consider the seventh. It is as follows:

Error in not setting aside service by publication for want of evidence of due diligence to obtain personal service.

Rule 11, Rules of Practice, provides that—

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

The affiant in the present case does not state "what effort has been made to get personal service," except that "after due enquiry he cannot find the present residence of George W. Cannon, and when

last heard from he was in Sioux City, Iowa." He is not the proper judge of what is "due enquiry." He should state the facts relating to his enquiry, that the proper officers may determine whether he has used due diligence or not. It does not appear in said affidavit that he enquired in the vicinity of the land, or where, or when, or to what extent his enquiries were made.

In Musser *v.* Parker (13 L. D., 240) an affidavit like the one in this case was held insufficient. In that case it is said—"It is apparent, following the practice, that the affidavit, unsupported by other evidence, is insufficient, and whatever other evidence the local officers may have had, there is none before me."

In the present case it does not even appear that the contestant was present in person before the local officers before the notice was issued, or that any "other evidence" than said affidavit was received by them.

Affidavits were filed by the contestant after the notice was issued for the purpose of curing the defect in the first affidavit, but such showing was too late. Burgess *v.* Pope's Heirs (9 L. D., 218).

In the present case the timber-culture application and the receipt of the claimant both state that his residence is "Bassett, Nebraska."

The jurisdiction of the local officers depended upon the service of notice according to "the rules established," as provided by the third section of the timber-culture act of June 14, 1878 (20 Stat., 113).

The claimant has not had his day in court, and is not legally bound by the proceedings had in the case, and they are therefore set aside. Either a new notice for a re-hearing must be issued within thirty days after service of notice of this decision upon the contestant, or the contest must be dismissed, as the contestant may elect. Michael Howard (15 L. D. 506).

Your judgment is modified accordingly.

CONFIRMATION—CHANGE OF VENUE—LOCAL OFFICER.

EMBLEN *v.* WEED.

The sale of an undivided interest in the land covered by an entry prior to March 1, 1888, does not bring said entry within the confirmatory provisions of section 7, act of March 3, 1891.

There is no statutory provision nor departmental regulation providing for a change of venue in proceedings before a local office.

The interest of a local officer in the subject matter involved in a contest does not preclude nor excuse such officer from taking part in the determination of the case.

Secretary Noble to the Commissioner of the General Land Office, January 9, 1893.

On the 28th of May, 1891, you rendered a decision in this case, near the conclusion of which you said "no appeal from this decision to the Honorable Secretary will be allowed." A motion for review of that de-

cision being made, you denied the same on the 29th of July, 1891. This was followed by an application for *certiorari*, which was granted by the Department, on the 23d of December, 1891 (13 L. D., 722). The case is now before me in response to the direction contained in said writ.

In the application therefor, the errors complained of in your decisions of May 28 and July 29, 1891, were duly enumerated and specified, and an elaborate argument in support of said application, and to show the existence of such errors, was filed by the counsel for Emblen. A lengthy answer thereto was filed by the counsel for Weed. Since the granting of said writ no additional papers have been filed by either party, and I have therefore considered the case upon the record as then made up.

From this record I learn that George F. Weed made pre-emption cash entry for the SE. ¼ of Sec. 22, T. 2 N., R. 48 W., Denver land district, Colorado, on the 19th of September, 1885, having made settlement upon said land on the 18th of February of that year, and filed his declaratory statement therefor on the 26th of that month.

On the 4th of October, 1888, George F. Emblen filed an affidavit of contest, alleging that said cash entry had been secured by false and fraudulent representations; that prior to such entry Weed had never become a *bona fide* resident upon said land, or resided thereon in good faith; that he had caused and allowed said land to be built upon as a townsite, and used the same for the purposes of trade, prior to date of said entry.

You ordered a hearing before the local officers to determine the truth of these charges, and at the conclusion of the contestant's evidence, the claimant moved that the case be dismissed, on the ground that the contestant had failed to prove his charges. This motion was granted, and the contest dismissed. An appeal was taken to your office, and on the 20th of February, 1890, you reversed the decision of the local officers, and held said entry for cancellation.

Weed then moved for a review or reconsideration of your decision, and asked if that motion was not granted, that a rehearing before the local officers be ordered. The mayor and board of trustees of the town of Yuma, Colorado, which town was built upon said land, also petitioned that a hearing of the case before the local officers be granted, and that said petitioners be allowed to intervene and be made parties defendant.

A. F. Meyer, and several other residents of the town of Yuma, also applied to be made parties defendant, and prayed that a rehearing be granted, and that they be allowed to defend for themselves and for the benefit of all other residents of said town in interest. They alleged that they were residents of Yuma, Colorado; that the principal portion of said town, and nearly all the valuable improvements thereof were situated upon the land in controversy, and that said applicants were owners of valuable improvements upon said land; that the value of the per-

manent improvements of said town is about three hundred thousand dollars, and about six hundred people resided in said town. They also alleged that Weed had fully complied with the law in good faith, and that long prior to the initiation of contest by Emblen, they had purchased from Weed the land upon which their improvements had been made.

After considering these several motions, petitions, and applications, you decided on the 18th of June, 1890, that the petition of the mayor and board of trustees of the town of Yuma, and the application of Meyer and others, did not show sufficient cause for rehearing, but that as the entryman had offered no testimony when he made his motion to dismiss the contest, that his entry ought not to be canceled without first allowing him an opportunity to rebut the proof offered by the contestant. You, therefore, modified your decision of February 20, 1890, and remanded the case to the local office for further hearing, directing that testimony be first offered in behalf of the defence, and after that the contestant be allowed to introduce evidence in rebuttal. You also ordered that said mayor and board of trustees, together with Meyer, and any other parties who might file a statement in the local office showing their interest under said entry, shall be allowed to intervene and defend at such further hearing. The local officers were directed to give due notice to all parties in interest of the time set for such hearing.

On the 23d of June, 1890, the local officers at Denver notified all parties of the order for rehearing, but before such hearing took place, the Akron land district was formed and the land involved coming within the boundaries of that district, all papers and letters in the matter were transferred to the land office therein. This was prior to the 1st of August, 1890, and on that date the local officers at Akron issued notice for said Emblen and Weed to appear at their office on the 16th of September, 1890, and submit testimony, as allowed by your letter of June 18, 1890.

Upon the application of Weed, made prior to the 16th of September, the testimony of several of his witnesses was taken by commissioners duly appointed for that purpose. On the 16th of September, the day fixed for the hearing before the Akron local officers, neither Emblen nor his attorney appeared, but the attorney had mailed at Denver, the day previous, a letter addressed to said local officers, containing an application for a continuance for forty days, to enable Emblen to secure the deposition of a witness, and also an affidavit embodying a protest against a further hearing in said case by the local officers of the Akron office. In this paper it was alleged that Weed, by his motion to dismiss the contest at the close of contestant's testimony at the first hearing, forfeited his right to submit further testimony; that your letter ordering the rehearing directed it to take place at the Denver office; that Mr. Reed, the receiver at the Akron office, was interested in the result of said contest, being the owner of a portion of said land by title

derived from Weed, and was prejudiced against the contestant and biased in favor of the claimant, and he therefore prayed for a change of venue and that the further hearing be had before some disinterested officer to be designated by your office.

The local officers denied the application for a change of venue, took the testimony of Weed and his witnesses, and allowed Emblen ten days within which to file interrogatories relative to the deposition of his absent witness. Upon being advised by the local officers of their action, Emblen sought to appeal therefrom, but the local officers refused to allow an appeal, claiming that their action was interlocutory and not appealable.

On the 4th of November, 1890, the local officers rendered their joint decision in the case, in which they said: "We find the preponderance of testimony in favor of claimant's good faith in acquiring title to this land, and dismiss the contest."

An appeal from that decision was taken to your office, and on the 28th of May, 1891, you approved and affirmed the decision of the local officers, and held that inasmuch as Emblen had relinquished all preference right to make entry for the land, and had declined to pay the costs of the contest, except so far as the testimony on his part was concerned, that he was a protestant and not a contestant, and was therefore not entitled to the right of appeal from your decision to the Department.

In answer to a motion made by Emblen for a review of that decision, the counsel for Weed moved that his entry be confirmed under section seven of the act of March 3, 1891 (26 Stat., 1095), it appearing that after final entry and prior to March 1, 1888, Weed had sold and conveyed a large portion of said land to *bona fide* purchasers, for valuable considerations.

In your decision of Emblen's motion for review, dated July 29, 1891, you denied said motion and after referring to the evidence in the case in reference to conveyances by Weed, you said:

> It appears from the foregoing evidence of conveyances that prior to the first of March, 1888, Weed had conveyed for valuable consideration, by warranty deed, his entire interest in one quarter of the land in dispute, viz: Forty acres, and by another warranty deed one-half of an undivided interest in all the remainder of the land herein, viz., in one hundred and twenty acres, and that as late as May 26, 1891, there was no recorded reconveyance to Weed of any of the lands so formerly transferred by him. It is therefore to be held, by reason of these sales, the evidence being satisfactory, that the title to the land is complete and confirmed by section 7, of the act of Congress hereinbefore mentioned, and will pass to patent, and this independent of the fact that the entry is sustained on its merits, and entitled to patent on that ground.

In deciding Emblen's application for *certiorari*, the only question before the Department was as to whether he was or was not entitled to the right of appeal from your decision of April 28, 1891, wherein you had held that he was a protestant and not a contestant, because he had relinquished his preference right to make entry for the land, and had

declined to pay the costs of the contest, except under rule 55 of the rules of practice. In deciding that question the Department said:

Prior to the passage of the act of May 14, 1880, the preference right of entry was unknown, but it was not then claimed that a contestant was not a party in interest, and that he had no right of appeal. A distinction was recognized between a contestant and a protestant before that act became a law. A person who charged a default against an entryman, and produced evidence in support of such charge, and paid the costs of taking testimony upon his own direct and cross-examination, as required by rule 55, was a contestant, and entitled to the right of appeal, while a person who simply charged a default and furnished the information upon which it was based, but paid no part of the costs of the proceedings which resulted from such charge, was a protestant, without interest in the case, and without the right of appeal.

Under the circumstances of this case, it was held that your decision denied Emblen a right to which he was entitled.

With the entire record now before me, other questions are presented for consideration. That the entry of Weed was confirmed by section seven of the act of March 3, 1891, is earnestly denied by the counsel for Emblen. In his position upon this question, he is sustained by the Department, it having been held in Bradbury *v.* Dickinson (14 L. D., 1), that the sale of an undivided interest in the lands covered by an entry, prior to March 1, 1888, does not bring said entry within the confirmatory provisions of section 7, of said act. The case must therefore be considered and decided upon its merits.

Upon the evidence submitted at the two hearings, I have no hesitancy in finding that Weed made his settlement and filing in good faith, and that he complied with the law as to residence and improvements. I am also satisfied that he did not cause and allow said land to be built upon as a town site, and use the same for the purposes of trade, prior to his entry, as charged by Emblen.

Upon this point the evidence is, that prior to Weed's filing the Burlington Railroad crossed a corner of said tract, and the company had a watering tank thereon. It afterwards built a passenger and freight depot upon the land comprising its right of way, which, in accordance with the act of March 3, 1875 (18 Stat., 482) was a strip one hundred feet in width each side of the central line of said road. Upon this land the company allowed certain persons to erect buildings, within which they carried on business of different kinds. An attempt was made to show that portions of some of these buildings extended upon the land of Weed, but the evidence did not establish that fact, while it was clearly shown that he refused to allow the erection of any buildings upon his land prior to his cash entry. He testified that he took the land for farming purposes only expecting that the town would be built upon land some four or five miles distant. After he made his entry, and obtained his final certificate, there was such a demand for lots that he sold a portion of the tract to the Lincoln Land Company, and the town of Yuma was afterwards located thereon. His sale to the land company was in January, 1886.

This disposes of the case upon its merits, leaving for consideration only the question raised by Emblen, that the receiver at the Akron land office being a lot owner in the town of Yuma, had a property interest involved in said proceedings, acquired through the defendant, and was therefore disqualified to act in the case.

This question was raised upon the trial, was insisted upon before you, and is made the principal ground upon which a reversal of your decision is asked, in the appeal to the Department.

That a judge having a pecuniary interest in a case on trial, is thereby incapacitated for sitting in the cause, is well established both by statute and decisions. With local land officers, however, the case is somewhat different. The law and the rules and regulations of the Department require each of them to take part in the consideration of all cases in which the land in dispute is situated in the district for which they are officers. There are no provisions for a change of venue, or for the calling in of any other officer to sit in a particular case. Both must take part in considering the evidence, and upon the termination of a contest, Rule 51 of the Rules of Practice requires them to render a report and opinion in the case.

In the case at bar, therefore, Emblen demanded what could not be granted under the law and the regulations of the Department. The receiver at Akron was required to take part in determining the case. Nothing but ceasing to be such officer would relieve him from such duty under our present rules. The question raised, therefore, can be decided in only one way, and that is against the correctness of the position of Emblen.

It does not appear that Emblen was in any way damaged by the receiver taking part in the decision of the case. It is not claimed that evidence offered by him was improperly rejected, or that evidence objected to by him was improperly received. In fact, local officers are not permitted to thus pass upon the competency or incompetency of evidence. They must receive all that is submitted, and transmit it to your office for consideration. It is there examined, whether the decision of the local officers is appealed from or not. In this case there was an appeal, and able arguments were filed. After examining the whole record, you decided that Emblen had failed to establish the charges made by him against Weed and his entry, and dismissed his contest. I have now carefully examined the whole record, and find that upon the testimony submitted, no local officers could have reasonably reached a different conclusion than that announced by those who heard this case. I am therefore clearly of the opinion that their recommendation that Emblen's contest be dismissed, was correct. Except as to the particulars mentioned in the Departmental decision of December 23, 1891, granting the writ of *certiorari* in the case, and as to the questions herein stated, your decisions of May 28, and July 29, 1891, are affirmed.

CONTESTANT—ACT OF MAY 14, 1880, AMENDED.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., January 9, 1893.

REGISTERS AND RECEIVERS,
United States District Land Offices:

GENTLEMEN: I have to call your attention to the act of Congress approved July 26, 1892 (pamphlet statutes, page 270, entitled "An act to amend section two of an act approved May 14, 1880, being 'An act for the relief of settlers on public lands,'" a copy of which is hereto annexed.

This act of July 26, 1892, amends section two of the act of May 14, 1880 (21 Stat., 140), by adding thereto a second proviso which reads as follows, viz:

Provided further, That should any such person who has initiated a contest die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States, may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred.

In other respects, the said section two remains unchanged. The act of July 26, 1892, does not affect in any manner the fee of $1.00 required to be paid to the register by pre-existing law, nor the requirement of the act of August 4, 1886 (24 Stat., 439), that such fee shall be deposited and accounted for, as other fees. See circular of November 12, 1891.

The second proviso added to said section two by the act of July 26, 1892, changed the rule which previously prevailed in cases of contests involving any pre-emption, homestead, or timber culture entry, for the abatement of the contest in case of the death of the contestant before the final termination thereof. It provides that the heirs of the deceased contestant, who are citizens of the United States may continue the prosecution of the contest under such rules and regulations as the Secretary of the Interior may prescribe, and that said heirs shall be entitled to the same rights thereunder that contestant would have been if his death had not occurred.

In any such cases, therefore, on the death of the contestant being suggested on the record, you will recognize the rights of the contestant's heirs who are citizens of the United States, if any there be, to prosecute the case under the rules and regulations heretofore provided for the prosecution of contests, and contained in the rules of practice and Departmental decisions, with which you are presumed to be acquainted, and in all subsequent proceedings, treat them as parties. Should they succeed in the contest, they will be required to pay the

$1.00 fee prescribed for the register, and on their doing so, will be entitled to notice and the right of entry, as the contestant would have been, if his death had not occurred.

As indicating the views of the Department, in reference to the rights of heirs entitled to make entry under the general laws, you are referred to Departmental decisions in Tauer *v.* The heirs of Walter A. Mann, 4 L. D., 433; Sharrar *v.* Teachman *et al.*, 5 L. D., 422, and Tobias Beckner, 6 L. D., 134.

The new rule provided by the act of July 26, 1892, as above, will be applicable to all cases in which the death of the contestant occurred, or may occur, after that date, and before the final termination of the contest.

Very respectfully,

M. M. ROSE,
Acting Commissioner.

Approved,
JOHN W. NOBLE,
Secretary.
JANUARY 9, 1893.

AN ACT to amend Section two of an act approved May fourteenth, eighteen hundred and eighty, being "An act for the relief of settlers on public lands."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section two of an act approved May fourteenth, eighteen hundred and eighty, entitled "An act for the relief of settlers on public lands," be, and the same is hereby, amended so as to read as follows:

SEC. 2. In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided,* That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant and not to be reported: *Provided further,* That should any such person who has initiated a contest die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States, may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred.

Approved July 26, 1892.

SUSPENDED ENTRY—DESERT LAND CONTEST.

VRADENBURG *v.* ORR.

During the pendency of a departmental order suspending a desert land entry the local, and General Land Offices are without jurisdiction to hear and determine a contest against said entry; and, an application to contest an entry so suspended should not be allowed, but held subject to the result of the proceedings instituted by the government.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 9, 1893.

The land involved in this appeal is Sec. 10, T. 25 S., R. 25 E., M. D. M., Visalia, California, land district.

The record shows that Thomas B. Orr made desert land entry on said tract May 17, 1877. On September 12, 1877, my predecessor Secretary Schurz, directed you to suspend all entries made in the Visalia land district, under the act of March 3, 1877, and to cause an investigation to be made before the local officers as to the character of each of the tracts entered. This suspension was not revoked until January 12, 1891. (See United States *v.* Haggin, 12 L. D., 34.)

On April 13, 1886, Luther C. Vradenburg filed an uncorroborated affidavit of contest that—

> Thomas B. Orr has not conducted any water thereon or made any effort to do so. That said tract of land is good, agricultural land and will produce an agricultural crop without irrigation annually except in years of extreme drouth. That natural grasses grew in abundance thereon without irrigation and at the present time, the grass on said land is over one foot high and affiant further states upon his information and belief that good crops of wheat can be raised on said land without irrigation.

Notice of this contest was served on Orr personally and the hearing was had before the local officers. On the day set for hearing Emile Chauvin, appellee in this case, made a motion to be allowed to appear and defend, setting up that Orr transferred all his right in said land under his said entry to him and one Juan L. Noriega for a valuable consideration on June 5, 1877, and that said Noriega on June 11, 1884, sold and transferred to this appellee all his right, in said land acquired under the former transfer. This motion was granted over the objection of contestant. The testimony was taken before the local officers, who decided that it did not show the land to be non-desert in character. Contestant appealed, and you by letter of April 29, 1891, affirmed their decision as to the character of the land, but held—

> In view of the fact that it appears from the testimony of the defense that defendant has failed to comply with the law (by conducting water on the land and thus reclaiming it) from date of his entry to the initiation of this contest, your decision dismissing said contest for this reason is hereby reversed and said entry held for cancellation.

The transferee filed a motion for review and reconsideration of your said decision, and on consideration thereof, you by letter of July 30, 1891, sustained the motion, reversed your former judgment, and held that,—

> the order of suspension of said entries had the effect of holding all proceedings in *statu quo* from the date such order was promulgated until the same was revoked,

and ordered that the defendant be allowed three years from service on him of your decision, exclusive of the time which elapsed between May 17, (the date of the entry) and September 28, (the date of the order of suspension) in which to reclaim the land and offer final proof. From

both of said judgments the contestant prosecutes this appeal alleging that you erred in said decisions (1) in holding that defendant was excused from the reclamation during the period that the entries were under suspension; (2) in not holding that the transfer by Orr to Chauvin was void; (3) in not holding that said transfer was void for the reason that Chauvin made desert entry on other lands and held still others as transferee; (4) in holding said land to be desert in character, and (5) in not ordering the cancellation of said entry and giving preference right of entry to contestant.

In the meantime there had been presented to the local officers the following applications to enter and contest, which I copy from your letter of April 29, 1891.

On July 22, 1887, Samuel DeBow, Thomas E. Taggart and W. J. Carlisle filed contest affidavits against said entry, in which they each substantially allege that Orr has not reclaimed the said land nor any part of it; that his said entry was fraudulently made and that the land mentioned therein is not desert. Subsequently, on August 26, 1887, you rejected said affidavits to contest "on the ground that said entry was suspended in 1877." Each of said parties filed, on September 19, 1887, an appeal from your action rejecting his application to contest. December 5, 1887, each of the last mentioned parties applied to make homestead entries for certain portions of said tract; DeBow sought to enter the NW. ¼, Taggart the NE. ¼ and Carlisle the SE. ¼.

Accompanying said application to enter was the affidavit of each setting forth that said land is not desert within the meaning of the law. On the day following, (December 6, 1887) you rejected said applications on the ground that the land sought to be entered was covered by said desert land entry and on the same day each of said parties appealed to this office from your said action rejecting their applications and asked that a hearing be ordered. April 24, 1888, said parties again applied to make homestead entry in the same manner for land they sought to enter December 5, 1887, and you again rejected their applications from which action they appealed and asked that a hearing be ordered, etc.

April 4, 1888, Jacob S. Middleton filed his contest affidavit against said entry, charging that the tract is not desert within the meaning of the law. Accompanying his said affidavit is his application to make timber culture entry for NE. ¼ of said section. On the next day (April 15, 1888) you rejected said application to enter for the reason that the tract was covered by said desert land entry and you refused to issue citations on said affidavit of contest because the desert land entry was suspended. April 5, 1888, Middleton appealed therefrom to this office.

April 9, 1888, Louis LaCour and Eugene F. LaCour each filed affidavits of contests against said desert land entry, alleging substantially the same grounds as stated by Middleton.

Accompanying their affidavits were applications to make homestead entry respectively for SW. ¼ and SE. ¼. Said applications to contest and enter were on the same day rejected by you for the reasons heretofore mentioned, whereupon an appeal was taken to this office.

Harry Jackins likewise made application to contest said desert land entry and also to make homestead entry for the NW. ¼.

May 29, 1888. Joseph B. Gyle also made application to contest said desert land entry and to make homestead entry for the SW. ¼.

It appears that the same rulings and proceedings were had upon Jackins' and Gyle's applications as were had upon the several applications heretofore mentioned.

In addition to these I find in the record the homestead application of Teresa Panero for the SW. ¼ of said section, presented May 19, 1891, and rejected for the same reason given above. On June 18, following, she filed an affidavit and "petition" in which she alleges that she has continuously resided on said land since September 28, 1886; that she has a dwelling-house twelve by twenty-four; has five acres fenced and planted in fruit trees, vines, etc., together with some other improvements, all of the value of a little over $800; and she asks that her application may be received and filed under the rule announced in John H. Reed (6 L. D., 563), and Henry Gauger (10 L. D., 221). The local officers refused to consider this "petition" "for the reason that the homestead application of Panero was rejected and due notice has been given of her right of appeal." On October 19, 1891, she appealed.

I also find that John L. Wasson made homestead application May 13, 1891, for the E. ½ of SE. ¼ of said section, which was rejected for the same reasons, and he took exactly the same course at the same time as did Panero. He swears that he has a good dwelling-house, barn, well and two or three acres in cultivation; that his improvements are worth $500; that he has resided upon the land for three and a half years with his family.

Under the doctrine announced in the recent case of Adams *v.* Farrington (15 L. D., 234), an action arising in the same local office and almost identical with the one at bar in all respects, I think, the register and receiver and yourself were without jurisdiction to hear and determine this case, while this entry was under suspension by the government. The contest should not have been allowed, but should have been held subject to the result of the proceedings instituted by the government. (See Adams *v.* Farrington, *supra*, and authorities cited there.)

The hearing of the contest being unwarranted, the case should be remanded to the local office for hearing *de novo*. With that end in view, I return to you the entire record with directions to instruct the register and receiver to order a hearing and notify the parties to the contest of the time and place thereof, and give the fullest latitude to them in their endeavor to establish the charges made against this entry, and the character of the land at the date of the entry.

In view of the determination I have announced, it is unnecessary, at this time, to decide the rights of the several applicants to enter portions of the land in controversy, any further than to say that the applications of Panero and Wasson should have been received and placed on file, subject to the result of this contest.

Your judgment is thus modified.

MOTION FOR REVIEW—APPEAL—NOTICE.

GREGG *v.* LAKEY.

Failure to serve the opposite party with notice of a motion to dismiss an appeal, does not deprive the Department of its authority to dismiss said appeal for want of jurisdiction.

A motion for review on the ground of newly discovered evidence can not be granted, where such evidence is first discovered and offered by another as the basis of a contest.

Secretary Noble to the Commissioner of the General Land Office, January 10, 1893.

This is a motion to review departmental decision of May 11, 1892, (unreported) which dismissed the appeal of Amy Gregg from your decision of March 26, 1891, rejecting her amended application to contest the soldiers' additional homestead entries of Harlem Cole and Simon Lakey, made at Helena, Montana.

Said amended application was filed February 27, 1891, and was rejected by you because it joined in one application a contest against two distinct additional entries, made by different parties and for different land.

On June 8, 1891, the contestant appealed from your decision, and filed therewith a dismissal of said contest against the entry of Cole.

S. B. Pinney, of Fargo, North Dakota, appears of record as the attorney for said Cole and Lakey.

By letter dated November 10, 1891, he forwarded a motion to dismiss said appeal, because it showed no evidence of service of notice upon the opposite party.

By departmental decision of May 11, 1892, it was held that—

There is no evidence of service of said appeal upon defendant or his counsel, as required by the rules of practice, and it is therefore dismissed.

Notice of the appeal was not served on the opposite party as required by Rules 86 and 93, Rules of Practice.

The motion for review is based upon two principal grounds.

The first is as follows:

Because the motion of S. B. Pinney to dismiss Gregg's appeal of June 4, 1891, was not served upon Gregg, nor any one representing her.

There is no evidence that said motion to dismiss was served upon the opposite party. But this fact does not confer jurisdiction upon the Department to entertain an appeal which has not been served as required by the rules. The Department will dismiss such an appeal upon its own motion. Huntoon *v.* Devereux (10 L. D., 408); Bundy *v.* Fremont Townsite (Ibid, 595); Charles A. Parker (11 L. D., 375).

The failure to serve the motion to dismiss does not cure the defective appeal, or deprive the Department of its authority to dismiss the appeal for want of jurisdiction. The appeal was properly dismissed.

Said motion for review is mainly based upon the fact that there is newly discovered evidence filed in the case by said Gregg, which was not before the Department when its former decision was made, which shows that Simon Lakey, in whose name said additional entry was made, never had any interest in the same; that his certificate of additional right was procured by fraudulently personating his uncle, as the soldier entitled thereto; that he never was a party to the case; and that said Pinney had no right to represent him or to demand notice of said appeal.

These are serious charges which call for investigation, but there is record evidence that substantially the same charges were made by Ezra M. Robords in his application to contest said entry forwarded by the local officers on September 1, 1891, whose application antedates the motion for review and who first called the attention of the Department to this evidence. This is therefore more properly evidence newly discovered by Robords than by Gregg. This evidence filed after the departmental decision does not make that decision erroneous, especially as it was based upon want of jurisdiction, and not upon the merits of the case.

The motion must be denied.

DESERT LAND ENTRY—RECLAIMED TRACT.

CAMPBELL *v.* SUTTER.

A claimant under the desert land act will not be permitted to include within his entry a tract known by him to be already reclaimed by another, who is asserting a right thereto.

First Assistant Secretary Chandler to the Commissioner of General Land Office, January 11, 1893.

On the 16th of April, 1890, Charles Sutter made desert land entry for the E. ½ of the NE. ¼ of Sec. 22, and the W. ½ of the NW. ¼ of Sec. 23, T. 1 N., R. 18 E., Hailey land district, Idaho.

On the 18th of the same month, Daniel B. Campbell filed an affidavit of contest against said entry, alleging that a portion of said land had been reclaimed, and was not desert in character; that water was conducted upon said land in 1889, and a large crop of garden vegetables and alfalfa raised by such irrigation; that the land was settled upon and occupied by Henry Harpham, and had been since March, 1889.

A hearing took place in May, 1890, and resulted in a decision by the local officers, which I quote in full:

> The land involved in this contest had for a year or more prior to Sutter's entry been in the possession of, and claimed by one, Henry Harpham.
>
> In April of this year, 1890, negotiations had been carried on between Harpham and Sutter, looking to a purchase by Sutter of Harpham's improvements upon this, and his right to other lands adjoining.

Contestant Campbell, however, made the first purchase of Harpham, but Sutter, hearing of the sale, entered the land in contest. It seems that both contestant and defendant wished to enter under the *desert* act this land and the adjoining land, which had been covered by Harpham's entries, and that this case grew out of their desires in that respect. It is alleged that a portion of the land covered by Sutter's entry has been reclaimed, and the evidence is clear, that from three to seven acres was cleared by Harpham in 1889, and crop raised thereon by artificial irrigation. The question therefore presents itself,—should this fact cause the cancellation of the whole entry? The cultivated land referred to is on the north-west forty, that is the NE. ¼ of the NE. ¼ of Sec. 22. All the balance of the tract is desert and unreclaimed.

Under all the circumstances of this case, we are disposed to recommend that the NE. ¼ of the NE. ¼ of Sec. 22, T. 1 N., R. 18 E., be canceled, and that the remainder of the entry stand intact.

From that decision Campbell appealed, claiming that the local officers erred in not recommending the cancellation of the entire entry. On the 8th of February, 1892, you rendered a decision upon this appeal, in which you set aside the decision of the local officers, so far as it related to the NE. ¼ of the NE. ¼ of Sec. 22, and dismissed the contest. An appeal from your decision brings the case to the Department.

In the case of Rivers *v.* Burbank, decided by Secretary Teller on the 7th of February, 1883, (9 C. L. O., 238), it was held that lands that have been reclaimed from a desert state, and are now producing crops by means of irrigating ditches, etc., are not subject to entry under the desert land law. The same rule was followed in Taylor *v.* Rogers (14 L. D., 194).

From the testimony in this case, it appears that Henry Harpham constructed a ditch from Wood River to the land in question, the capacity of which was one thousand inches at the river, and fifty inches at the land, and its length about a mile and a quarter. He erected upon the land a house with two rooms, built a corral of poles, and had eight or ten acres fenced, and poles and posts upon the land to fence fifteen or twenty acres more.

On the 18th of April, 1890, he sold for $300 to Daniel B. Campbell, his said water right, which he described as a water right to nine hundred inches of water under a four-inch pressure of the water of Wood River, the water to be conveyed to sections 22, 23 and 26, T. 1, N., R, 18 E., by means of a ditch, and to be used for agricultural and domestic purposes, which water right was located by said Harpham July 3, 1888, and duly recorded. Also all the improvements on said land, "consisting in part of the house, poles, posts, and fences thereon, and all other improvements connected with, and belonging to his said homestead settlement." A quit claim deed executed by Harpham, evidences this sale.

Sutter was fully aware of Harpham's water right, ditch, and improvements, and had had some negotiations with him in reference to purchasing the same. During their last interview, Harpham informed him that he had about completed a sale thereof to Campbell. This was on the 14th of April, and being at that time informed by a son-in-law

of Harpham that the land upon which the building and fence were situated had never been entered, he proceeded to the land office and made entry therefor. He admits that he then knew that Campbell was about to purchase the improvements upon the land.

The evidence shows that at the time of the hearing there was water running in the ditch, and that the year previous, vegetables and a crop of alfalfa had been raised upon a portion of the land, which was watered by the ditch. An inch of water was said to be sufficient to properly irrigate an acre of land in that vicinity. The water right being for nine hundred inches, and the capacity of the ditch at the land being more than sufficient to afford one inch of water to each acre in the NE. ¼ of the NE. ¼ of section 22, I am disposed to hold, with the local officers, that that subdivision was sufficiently reclaimed from a desert state to render it not subject to entry under the desert land laws.

Had Sutter had no knowledge of the situation of the land, and finding it vacant upon the records of the land office, had made entry therefor, the equities, if not the legal rights of the parties would have been decidedly different. As it was, he knew that Harpham had expended a large amount of money in making the ditch to, and the improvements upon the land, and he knew that Campbell was to pay a good price for such improvements. By his entry, he sought to deprive Harpham of any recompense for his labor, and Campbell of any benefit from his purchase and payment.

Sutter seems to have been satisfied with the decision of the local officers, as he took no appeal therefrom. That decision canceled his entry, so far as it related to the NE. ¼ of the NE. ¼ of section 22, and allowed it to remain intact as to the remainder of the land. In view of the fact of his acquiescence in such decision, and of the partial, if not complete, reclamation of that subdivision of said section, and of all the facts and circumstances of this case, I think the conclusion reached by the register and receiver was correct. The decision appealed from, so far as it conflicts therewith, is therefore reversed.

TIMBER CULTURE ENTRY—DEVOID OF TIMBER.

NICHOLS *v.* GEDDES.

The departmental ruling in force at the date of the allowance of a timber culture entry must determine whether the land embraced therein is "devoid of timber within the meaning of the statute."

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 11, 1893.

On the 16th of May, 1885, George Geddes made timber culture entry for the NE. ¼ of the NW. ¼ of Sec. 21, T. 16 S., R. 1 E., S. B. M., Los Angeles land district, California.

On the 9th of May, 1889, R. G. Nicholas filed an affidavit of contest, alleging that the land was not subject to entry under the timber culture law, not being naturally devoid of timber, and that the entryman had not complied with the provisions of the law under which his entry was made.

The local officers rendered a decision in the case on the 20th of January, 1890, in which they held that the evidence failed to show that the entryman had failed to comply with the timber culture law, and although the section was not devoid of timber, the land was not excepted from entry under the rulings of the Department in force at the time the entry was made. They recommended that the contest be dismissed.

On the 16th of January, 1892, you decided that the plaintiff had failed to sustain his charges against the entryman, in the matter of plowing, planting and cultivating trees, but that the amount of natural timber on the section was such as to render the land not subject to timber culture entry. You therefore reversed the decision of the local officers, and held the entry for cancellation. Geddes moved for a review of said decision, which motion was denied by you on the 25th of March, 1892. The case is brought to the Department by an appeal from both of your decisions.

The evidence in the case shows that the section contains scattered clumps of live oak, elder, sycamore, and willows. Most of them are small in size, partaking of the character of brush. To this extent, therefore, the section was not devoid of timber, and under the rule of the Department, which was laid down in the decision in the case of James Spencer (6 L. D., 217), the land in question would not be subject to entry under the timber culture law. That decision, however, was rendered on the 11th of October, 1887, and after alluding to the rules of the Department then in existence, as laid down in the case of Blenkner *v.* Sloggy (2 L. D., 267), and of Bartch *v.* Kennedy (3 L. D., 437), concluded by saying:

> The former ruling on this subject will not be allowed to prevail longer. Timber culture entries made after the date of this decision must be made of land, in the language of the statute, "devoid of timber." Entries allowed under the former ruling, in which the law in other respects has been complied with, will not be affected by the ruling as herein announced.

The entry in the case at bar was made two years and a half before the decision in the Spencer case was rendered. Both the local officers and your office found that the contestant had failed to show that Geddes had not complied with the provisions of the timber culture law. His entry, therefore, is governed by the departmental rulings which prevailed prior to the Spencer decision. In the case of Blenkner *v.* Sloggy this rule was stated as follows:

> The question as to whether land is devoid of timber should not be determined by the exact number of trees growing thereon, but rather by ascertaining whether na-

ture has provided what in time will become an adequate supply for the wants of the people likely to reside on the section in question.

In the case of Bartch *v.* Kennedy (3 L. D., 437), this rule was so broadened as to be stated thus:

> The amount of timber required at final proof, should be taken as a guide in determining whether land is excluded from timber culture entry, on account of the natural growth of timber existing thereon.

That decision was rendered on the 3d of March, 1885, two months and a half prior to the entry of Geddes. The rule therein stated remained in force until the decision in the Spencer case, two years and a half later, wherein it was held that the presence of a natural growth of timber on a section precludes timber culture entry therein.

That rule, however, did not long remain in force, as in the case of L. W. Willis, reported on page 772 of the same volume in which the Spencer decision appears, it was stated that the extreme views expressed in the Spencer case "cannot be supported hereafter." In the case of James Hair (8 L. D., 467), it was remarked:

> The interpretation given in the Spencer case to the words "devoid of timber" is illiberal, technical, and too *literal* to conform to the spirit of the act which ought not to be defeated by "sticking in the bark."

In the Hair case it was held that the words "prairie land or land devoid of timber" within the spirit of the act, meant land *practically* so, and that no arbitrary rule could be formulated for the government of every case.

I think that under the rule of the Department which prevailed when the entry was made, it was properly allowed, and that the conclusion reached by the local officers was correct. The decision appealed from is therefore reversed.

CONTEST—REJECTED APPLICATION TO ENTER—RELINQUISHMENT.

SWANSON *v.* SIMMONS.

An application to enter land covered by the claim of another is not recognized as the initiation of a contest against said claim.

No right is secured by an application to enter land included within the entry of another; and, where an appeal is taken from the rejection of such an application, a subsequent relinquishment of the record entry will not inure to the benefit of the applicant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 11, 1893.

On the 17th of August, 1891, Alex Swanson applied at the Oklahoma City land office, Oklahoma Territory, to make homestead entry for the SE. ¼ of the NW. ¼, and lots 3, 4 and 6, Sec. 6, T. 11 N., R. 4 W., in said land district. His application was rejected for the reason

that Jeff D. Brown had made homestead entry for said land on the 29th of April, 1889, which entry was still intact.

From such action of the local land officers, Swanson appealed to your office, alleging that he had reason to believe that the entry of Brown was illegal and void, and that in making it he violated the statute opening said Territory to settlement; that said Brown had procured one, S. F. Stenson to initiate a contest against the same on the 30th of January, 1891, for the purpose of deterring others from contesting his said illegal entry.

On the 29th of September, 1891, the entry of Brown was canceled by relinquishment, and on the same day William J. Simmons made homestead entry for the land. Subsequently he filed a protest against the allowance of Swanson's rejected application, setting forth the fact that he had purchased the improvements of Brown upon the land, and procured his relinquishment, paying $1500 therefor. That he was an actual resident upon the land at the time he made his entry, having purchased the improvements, and went into possession thereof four days prior to the date of the relinquishment.

Swanson then filed additional specifications of error in connection with his appeal, urging that an investigation should be made upon his charge of the collusive contest of Stenson, and insisting that his application to enter the land should have been accorded priority of right the instant Brown's relinquishment became of record.

On the 21st of March, 1892, you rendered a decision in the case, in which you sustained the action of the local officers in rejecting the application of Swanson to make entry for the land, and allowed the entry of Simmons to remain intact. An appeal from your decision brings the case to the Department. In the notice of appeal, the errors in your decision are stated as follows:

> First.—For the reason that the application of this appellant showed that the homestead entry of Jeff D. Brown was void in its inception.
>
> Second.—That upon a showing that an entry is void the applicant has the first right of entry.
>
> Third.—That the applicant's application was pending at the date of the relinquishment of Jeff D. Brown, and he therefore being the first legal applicant for the land, his application should have been placed of record.

His first specification of error is disposed of by the statement that his application to enter the land made no showing whatever as to the entry of Brown. It was simply an application to make homestead entry for the land, accompanied by the usual affidavits, and the entry of Brown was in no manner alluded to therein. In his appeal to your office, from the action of the local officers, he alluded to Brown's entry, but his statements therein cannot be regarded as a "showing" of the matters alleged.

His "second" proposition is a correct one, in a case where a party institutes a contest against an entry which is charged, and shown to be void, after the entryman has had due notice of the charge, and an

opportunity to defend his entry. His proposition, however, has no application to this case, as an application to enter land covered by the claim of another, is not recognized as the initiation of a contest against said claim. Hyde, *et al. v.* Warren *et al.* (15 L. D., 415).

In the case of Maggie Laird (13 L. D., 502), it was held that "an application to enter land covered by the existing entry of another, confers no right upon the applicant; and if rejected, and appeal taken from such action, it is not a pending application that will attach on the cancellation of the previous entry, as the appeal does not operate to save or create rights not secured by the application itself."

This disposes of Swanson's third and last proposition, or specification of error in your decision. In his appeal, he seems to have been laboring under the impression that his case came within the rule that "an application to enter is equivalent to an actual entry, so far as the rights of the applicant are concerned, and while pending, withdraws the land from any other disposition," but in the case of Goodale *v.* Olney (13 L. D., 498), it was held that that rule included only cases in which the application was improperly refused, and did not apply where the land was not subject to entry, and no right of the applicant was denied.

In the case at bar, the land was covered by the entry of Brown at the time Swanson presented his application. It was therefore not subject to his entry, and his application was properly rejected, and by its rejection he was deprived of no right. The decision appealed from is affirmed.

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

NAWRATH *v.* LYONS ET AL.

The General Land Office has no jurisdiction over an entry confirmed by section 7, act of March 3, 1891, except to pass the same to patent as required by said act.

Secretary Noble to the Commissioner of the General Land Office, January 13, 1893.

With your letter of December 17, 1892, was transmitted the record in the case of Ferdinand Nawrath *v.* Thomas Lyons and Angus Campbell, involving the pre-emption cash entries made by said Lyons and Campbell for land within the Las Cruces land district, New Mexico.

On February 20, 1882, Lyons filed declaratory statement No. 261 for the SE. ¼ of Sec. 2, T. 19 S., R. 19 W., alleging settlement January 16, 1882, and the same day Campbell filed declaratory statement No. 262, for the SW. ¼ of the same section, alleging settlement January 15, 1882. They both made proof and cash entries upon their filings November 22, 1882.

On July 30, 1885, due to failure to properly note the entries by Lyons and Campbell upon the local office records, Ferdinand Nawrath was

erroneously permitted to file pre-emption declaratory statement No. 2382, for the S. ½ of the SW. ¼ and the S. ½ of the SE. ¼ of said section 2, thus conflicting with each of said entries as to eighty acres.

When advised of the conflict, Nawrath filed contest against said entries, alleging failure to comply with the law as to residence and improvements, upon which hearing was had, January 24, 1887, the local officers deciding in favor of the entrymen.

Upon appeal, your decision of May 28, 1892, reversed that of the local office, and held the entries by Lyons and Campbell for cancellation. From this decision an appeal was taken, which you find, in the letter of transmittal, was filed out of time.

This paper, in addition to urging error in your decision, also presents grounds for the confirmation of the entries under the 7th section of the act of March 3, 1891 (26 Stat., 1095), and has since been supplemented by abstracts of title showing the conveyance and mortgage of the lands.

From these papers, it appears that Thomas Lyons and wife, and Angus Campbell, by deeds made July 6, 1884, sold and conveyed each of said tracts embraced in their entries to the Lyons and Campbell Ranch and Cattle Company, which deeds were recorded July 8, 1885, and said company, by mortgage executed January 1, 1885, mortgaged all its property, including these lands, to the Farmers Loan and Trust Company of New York to secure an issue of bonds to the amount of $600,000, to run for thirty years, with interest at eight per cent payable semi-annually, and said mortgage appears to be yet outstanding.

This showing has all been made since your decision, although that was made more than a year after the passage of the confirmatory act. It would seem, however, from this showing, that these entries were confirmed by the act referred to, and, if this be so, you were without jurisdiction in the matter, except to pass the same to patent as required by said act.

The regularity of the appeal from your decision need not therefore be considered, and the entire record as now made is herewith returned for the disposition of the entries under the circular of May 8, 1891 (12 L. D., 450).

CONFIRMATION—PROCEEDINGS BY THE GOVERNMENT—NOTICE.

UNITED STATES *v.* LAWRENCE ET AL.

An entry canceled by a decision that becomes final prior to the act of March 3, 1891, is not confirmed by section 7 of said act.

Where a party applies for a hearing in support of an entry, and the application is allowed, notice of the time and place fixed therefor is sufficient if given by registered letter.

In proceedings by the government against an entry, the local officers and special agent are under no obligation to examine court records to ascertain the interests of transferees.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 16, 1893.

On February 23, 1886, final certificate No. 3056 was issued to Wade K. Lawrence on his Osage entry, made October 28, 1885, for the SW. ¼ of Sec. 23, T. 34 S., R. 13 W., Larned, Kansas.

Upon a report of Special Agent Clark S. Rowe, showing that the entry was made entirely for speculation, and that the entryman never settled upon the land, your office, on March 26, 1887, held the same for cancellation.

On May 26, 1887, the entryman, through his attorney, A. W. Ballard, filed an application for a hearing. This was supported by affidavits, tending to show that he had complied with the law as to residence and improvements. It was also shown that he had sold the land on September 21, 1886, to George W. Hayes, for the consideration of $700. Hayes, the transferee, also joined in the application for a hearing.

On December 23, 1887, you allowed the application; and directed that the local officers confer with the special agent as to the date for the hearing.

The hearing was set for February 15, 1888; neither claimant nor transferee appeared, either in person or by attorney, but evidence was introduced in behalf of the government. It not appearing that Hayes, the transferee, had received notice, the hearing was continued to April 2, 1888. The parties again made default, and again the case was continued, this time to September 4, 1888, at which time no appearance was made by said Hayes, although notice had been issued. The case was thereupon closed, and the register and receiver recommended the entry for cancellation.

According to the recitals in your office letter of September 11, 1890, notice of this action was served upon the attorney for the claimant, also upon J. H. Hoag and John Moffatt, mortgagees of record. The facts found by the register and receiver justified a judgment of cancellation, and the time allowed for appeal having fully expired, and no further action taken thereon, your office, on September 11, 1890, canceled the entry, and notice thereof was sent by registered letter, on October 8, following, to claimant and his attorney, A. W. Ballard, and to J. H. Hoag and John Moffatt (mortgagees) and George W. Hayes, transferee of record.

It appears that James H. Hoag brought suit in the district court of Barber county, to forclose a mortgage on the land for $487.10; judgment for that amount was obtained on October 4, 1888, and after due notice the land was sold at sheriff's sale, May 24, 1889, for the sum of $260, and J. B. Watkins became the purchaser, and seven days thereafter (May 31) he received the sheriff's deed for the land.

On September 2, 1891, Watkins filed his application to have the en-

try reinstated and passed to patent, under section 7 of the act of March 3, 1891 (26 Stat., 1095).

By your decision of December 11, 1891, you rejected his application, and he has appealed to this Department.

It is insisted that there has been no final cancellation of this entry, for the reason that there was no legal service upon the entryman and the several transferees.

It is seen that Watkins purchased the land May 24, 1889. If, at that time, or at any time prior to the act of March 3, 1891, the entry in question had been canceled by a decision that became final, then it can not be confirmed. James Ross, 12 L. D., 446; R. M. Chrisinger, idem., 610; Niels C. E. Jorgenson, 13 L. D., 33; George Hague, idem., 388.

The statement of facts found by the register and receiver upon which the entry was finally canceled is not denied; nor is it contended that the judgment of cancellation was not warranted from the facts then disclosed.

It is insisted, however, that there was no service "warranted by any rule of practice known to the law," and therefore the judgment of the local officers was a nullity.

The entry was first held for cancellation (March 26, 1887,) on the report of a special agent. Claimant and transferee then applied for a hearing, and the application was allowed and the hearing ordered. It was not necessary then, nor was it the practice, to issue a regular notice and have it served on them personally or by publication as in ordinary contest proceedings. It was sufficient to notify them of the hearing "by registered letter, through the mail, to the last known address," as per Practice Rule 17.

In the circular of October 11, 1884 (3 L. D., 140), it is said: "Notices of hearings and decisions in cases when hearings are ordered on behalf of the government will be registered as a matter of evidence."

Their application for hearing having been allowed, and they duly notified by registered letter of the time and place thereof, the service was complete, and the findings of the local officers, on questions of fact unappealed from, became final.

Neither Moffatt nor Hoag advised the local office by notice or otherwise of their interest in the land, but it appears that the special agent by some means was informed of their interest, and they were notified (October 8, 1890,) of the judgment of cancellation, as above seen. At that time, however, Hoag, the first mortgagee, had foreclosed his mortgage and the land had been sold by the sheriff to Mr. Watkins.

It does not appear, nor is it claimed, that the local officers or the special agent had been advised of the foreclosure proceedings or of Watkins' purchase at the sheriff's sale. They were not required to search the records of the district court in order to ascertain who might have an interest in the land, so that notice might be given of any proceedings against the entry, and Watkins failed to give notice of his

interest, and is not in a position to complain. Van Brunt *v.* Hammon *et al.* 9 L. D., 561; John J. Dean, 10 L. D., 446.

The application for reinstating and confirming the entry was properly rejected, and the decision appealed from is affirmed.

FORFEITED RAILROAD LANDS—PRE-EMPTION.

EMERICK *v.* BOWLUS ET AL.

Lands embraced within the forfeiture act of September 29, 1890, are by said act taken out of the operation of the pre-emption law; and settlers on such lands are limited by the amendatory act of February 18, 1891, to six months from the promulgation of instructions within which to make due claim on said lands under the homestead law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 16, 1893.

On July 26, 1883, Michael Emerick filed declaratory statement No. 4934, for the N. ½ of the NW. ¼ of Sec. 22, and the S. ½ of the SW. ¼ of Sec. 15, T. 5 N., R. 36 E., La Grande, Oregon.

The tract in the odd-numbered section was within the limits of the withdrawal for the benefit of the Northern Pacific Railroad Company, and Emerick accompanied his declaratory statement with an affidavit stating that prior to and at the date of the withdrawal (August 13, 1870,) the land in the odd section (15) was settled upon and claimed by one J. Willard, and offered to prove the same "on making final proof."

For reasons hereinafter given, you erroneously notified the register and receiver that there was no claim of record for the land, but, acting upon the affidavit accompanying his application, you ordered a hearing to determine the status of the land (in Sec. 15) on August 13, 1870, the date of the withdrawal.

Lewis Bowlus appeared at the hearing in behalf of the company's claim.

The register and receiver decided, February 11, 1884, that at the date of the withdrawal no one had made settlement upon or claimed the land in said section 15, and that the "pre-emption claim (of Emerick) be modified so as to exclude said tract." He appealed from that finding.

Pending legislation looking to the forfeiture of the grant, your office held the case in abeyance.

In the meantime, the act of September 29, 1890 (26 Stat., 496), was passed. By that act, the grant to said company was forfeited as to the portion thereof covering the land in said section 15.

On November 15, 1890, in reply to the inquiry of J. C. Bowner, Mr. Emerick's attorney, you informed him that the testimony theretofore presented in the case did not warrant an award of the land (in section

15) to his client, notwithstanding the forfeiture, and that, in the event the local officers allowed Emerick to publish notice of intention to make proof, a special notice should be given to Lewis Bowlus (co-defendant with the company), claiming settlement and improvements upon the land.

On July 31, 1891, the register and receiver transmitted to your office Emerick's application to make final proof for the land covered by his filing. His application, which was sworn to and corroborated by two witnesses, stated that he had continuously occupied the land since he filed on the same (July 26, 1883); that he had made improvements thereon of the value of $500, consisting of a house, one story, sixteen by twenty feet; two stables, sixteen by sixteen feet, and out-buildings; that the land was all under fence, and about twenty-five acres in cultivation; that he caused notice to be published for taking final proof at the local office, on January 22, 1884, and appeared there with witnesses at the time advertised, and one Lewis Bowlus appeared and protested, on the grounds that the land in section 15 belonged to the Northern Pacific Railroad Company; that said Bowlus abandoned all claim to the land in 1886; that he had three different times since 1884 forwarded his application to make final proof, and his applications had been refused on account of the contest of said Bowlus.

In the meantime, and on March 20, 1891, James F. Cradick was allowed to make homestead entry for the SW. ¼ of said section 15, being thus in conflict with Emerick's filing as to the S. ½ of the quarter section, and, on October 20, of that year, Cradick filed his motion to intervene in the matter of Emerick's application to make final proof.

Cradick's motion was supported by his affidavit, stating that he purchased the S. ½ of the SW. ¼ of said section 15, from Lewis Bowlus, in February, 1885, and that he settled upon and made valuable improvements thereon, with the intention of purchasing the same from the Northern Pacific Railroad Company. Bowlus also filed his affidavit, stating that he sold the land at said time to Cradick.

On October 23, 1891, you considered Emerick's application to make proof under his filing and rejected the same, from which judgment an appeal brings the case to this Department.

An examination of the testimony taken at the hearing shows that the land in section 15 was not excepted from the withdrawal, and such was your judgment as above shown. Is was therefore not subject to Emerick's filing.

The land in section 15, being within the withdrawal for the benefit of said company, and afterwards forfeited by the act of 1890 (*supra*), was by that act taken out of the operation of the pre-emption law. Under the 2d section of that act, as amended by the act of February 18, 1891 (26 Stat., 764), settlers on the forfeited lands were limited to six months, from the date of the promulgation of the instructions thereunder, within which to make "due claim on said lands under the homestead law."

The six months allowed by the amended act expired August 3, 1891, and Emerick having made no claim to the land in section 15, other than that in his filing, the same became subject to Cradick's entry, made March 20, 1891.

The abstracts of declaratory statements on file in your office show Emerick's filing as first above described; but, in posting the same upon your tract books, there was a misdescription as to the range. The filing was posted as being for the N. ½ of the NW. ¼ of Sec. 22 and the S. ½ of the SW. ¼ of Sec. 15, T. 5 N., R. "35" E., instead of the corresponding numbers in range 36, the correct one.

It appears that James Still (not Henry Still) made pre-emption cash entry No. 1232, on December 1, 1882, for the NW. ¼ of Sec. 22, T. 5 N., R. 35 E., and his entry has (presumably) long since passed to patent, and your tract books, erroneously showing as above seen that Emerick's filing covered the N. ½ of the NW. ¼ of that section, you by letter ("G") of May 16, 1884, canceled his filing by reason of the supposed conflict, and, in the decision appealed from, you rejected his application to make proof for the eighty acres in section 22, because of Still's cash entry—thus basing your judgment in that respect upon a palpable error of fact, which your office only was responsible for.

It appears that after the appeal herein was taken, one George Gelse, on July 7, 1892, was permitted to make homestead entry No. 6056 for the N. ½ of the NW. ¼ of Sec. 22, T. 5 N., R. 36 E., being part of the land covered by Emerick's filing.

The judgment of your office of May 16, 1884, canceling Emerick's filing for its supposed conflict with Still's entry, was erroneous. The judgment appealed from, rejecting his application to make final proof for the land in Sec. 22, "on account of conflict with cash entry No. 1232 of Henry (James) Still" was also erroneous. Said judgments are therefore set aside.

You will cause Gelse to be notified that he will be given sixty days in which to show cause why his entry should not be canceled, and Emerick permitted to make proof for the land covered thereby.

The decision appealed from is modified.

MINERAL LAND—AGRICULTURAL CLAIMANT.

THOMAS *v.* THOMASSON.

Proof of mining upon a tract that has been adjudicated as mineral, and the subsequent abandonment of such operations as no longer profitable, leaves with a mineral claimant the burden of proof to show the present mineral character of the tract.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 17, 1893.

On February 10, 1885, Francis M. Thomasson filed his pre-emption declaratory statement for lots 3, 6 and 7 of Sec. 22, T. 16 N., R. 8 E., M. D. M., at Sacramento, California.

On March 17, 1890, he was allowed to make pre-emption cash entry for said tract.

Said entry was erroneously allowed, inasmuch as Reuben Thomas had filed, in September, 1888, a protest against the application of said Thomasson, and a petition that the same be set aside.

Said petition was duly corroborated, and further alleged that said land had been adjudicated to be mineral in character by the Commissioner of the General Land Office by his letter of August 27, 1874, which affirmed the decision of the local officers rendered August 22, 1872, to that effect, in the case of James Wear *v.* Mineral Claimants and Applicants. That he was one of said claimants and applicants, and that the contrary character of said land had never been shown. That himself and another had, on November 26, 1886, located said lot No. 6 as a mining claim, designated as "The Union No. 2 Placer Mine" containing 22.99 acres. That he had expended a large amount of money to protect his mining rights, and had done all that the law required to prevent its being entered as agricultural land, and was desirous of perfecting his claim thereto.

A hearing was ordered on said allegation for July 30, 1890, before a justice of the peace, when the parties appeared and submitted testimony.

In your letter of May 15, 1890, ordering said hearing you state that—"The records of this office show that after a hearing duly held in the case of James Wear *v.* Reuben Thomas et al., the N. ½ and SE. ¼ of SW. ¼, which embraces said lot No. 6, was adjudged mineral by office letter "N" of August 27, 1874." You further state—"The land having been adjudged mineral by this office, no entry under the agricultural laws should have been allowed until the agricultural character of the land had been first established at a hearing held to determine its character." It does not appear that such a hearing had ever been applied for.

On July 28, 1891, the local officers found that said lots 3 and 7 were agricultural; also—

> That said lot 6, although a portion thereof was at one time valuable as mineral land, is no longer valuable as such, the gold-bearing channel or lead therein contained having been entirely worked out, but has an actual value as agricultural land, and should be so declared, and treated as such.

This decision was affirmed by your letter of March 31, 1892, and said office decision of August 27, 1874, was revoked as far as it affects said lots.

An appeal now brings the case before me.

The land in dispute was adjudicated to be mineral in character by the local officers in the case of Wear *v.* Thomas on August 22, 1872, which was affirmed, on appeal, by your office on August 27, 1874. No appeal from the latter decision was taken, and it became final. The mineral character so impressed upon the land would continue until said

former decision should be set aside, or new proof should be furnished which would show the character of the land. The burden of proof would be upon the agricultural claimant attacking its mineral character to show that it was no longer mineral. Dornen *v.* Vaughn (16 L. D., 8). This land was first adjudged mineral more than twenty years ago, and was then, doubtless, properly so adjudged. But the evidence shows that mining operations on the land were abandoned several years later, for the reason that they did not pay,—the gold had apparently all been washed out.

In Richards *v.* Dower (81 Cal., 44, 54) it is said—"There are large areas where placer mining was formerly conducted successfully, which now, after being exhausted of their gold, are held and occupied as farming and grazing lands under patents from the United States." Where land has been mined over and abandoned, "there is not a strong *prima facie* case in favor of its still being mineral land within the meaning of the law." Cutting *v.* Reininghaus (7 L. D., 265).

Thomas did not locate his present mining claim till November 26, 1886, or fourteen years after the first decision was made that the land was mineral, or nearly two years after Thomasson had filed his declaratory statement, and he did not file his protest against Thomasson's application till September, 1888.

Under these circumstances proof that the land had been mined over, exhausted of its minerals, and abandoned years ago, was a sufficient rebuttal of its previous mineral character. There could be no better test of its non mineral character than a trial by actual mining, and an abandonment of the land, because it would no longer pay the mining expenses. The burden of proof upon these facts shifted upon the present mineral claimant to show that at the date of the hearing the land was more valuable for mineral than for agricultural purposes by the actual production of mineral as a present fact. Peirano *v.* Pendola (10 L. D., 536); Berry *v.* Central Pac. R. R. Co. (15 L. D., 463). This the mineral claimant has failed to prove. He has not shown the production of any mineral whatever from the tract since his claim was located. The land has a positive value for agricultural purposes.

The former decision that the land was mineral in 1872 did not necessarily make it mineral in 1885, when Thomasson filed his declaratory statement, but put the burden of proof upon him to show that it had then ceased to be mineral; and inasmuch as he had proved that fact, he has thereby also established the fact that the land was then of the character which rendered it subject to pre-emption by him.

Thomas does not stand upon any specific claim to the land which was in existence and adjudicated in 1872, but upon a new mineral claim initiated after the land had been abandoned for its mineral products under former claims, and after the initiation of Thomasson's agricultural claim. The filing of the latter's declaratory statement, followed by his declaratory settlement, residence and improvements on

said land, constitute a "*bona fide* claim lawfully initiated" within the meaning of those terms, as used in the fourth section of the act of March 3, 1891 (26 Stat., 1095). His claim may now be perfected, therefore, in the same manner as if said act had not been passed.

Your judgment is affirmed.

SCHOOL LAND—INDEMNITY SELECTION.

GREGG ET AL *v.* STATE OF COLORADO.

The selection of school indemnity is an acknowledgment on the part of the State that it has no title to the basis; and the pendency of such selection is sufficient to charge a purchaser from the State with notice of such defective title.

Secretary Noble to the Commissioner of the General Land Office, January 17, 1893.

With your letter of October 10, 1892, you transmit a communication from the register of the state board of land commissioners of the State of Colorado, with reference to the decision of the Department of August 5, 1892, in the case of Gregg *et al. v.* Colorado (15 L. D., 151), to which reference is made, showing how the State and its lessees are affected by said decision, and asking if the decision may not be changed or modified, so as to protect the interest of the State and its assignees. He states that by reason of information contained in a letter from your office, under date of February 8, 1884, and supposing the title of the State to said section sixteen to be perfect, the State leased the W. ½ of said section to a Mr. Lay for five years, which terminated in December, 1890, and that the E. ½ of said section is under lease to Robert Grant, which will not expire until February 24, 1894. He further states that, on July 29, 1889, the right of way, one hundred feet wide, was granted through a part of said section to the Bessemer Ditch Company, and, on May 3, 1890, the State sold the entire W. ½ of said section to Edward H. Minchen.

I can see no reason for modifying or changing the decision of August 5, 1892, holding that the State acquired no title to said section, and that it was only entitled to lands in lieu thereof. If the State acquired no title to said section, it could convey none, and the Department is powerless to cure the defective title which the State has attempted to convey.

Although the State exercised acts of ownership over the sixteenth section prior to and on February 24, 1890, on that day it made indemnity selections in lieu of said section sixteen. Up to that date the State had not attempted to part with its title, but, in less than three months after selecting indemnity in lieu thereof, and while these indemnity selections were pending for approval, it sold the W. ½ of the

said section to Minchen. Although the State may have been misled by the action of your office prior to the date of selecting indemnity land in lieu of said section sixteen, at the date of the sale to Minchen it was claiming that said section was lost to the State by reason of its reservation for other purposes, and its action in making indemnity selections therefor was an acknowledgment that it had no title to the basis. If the State had no title to the sixteenth section, it could convey none to a transferee, even though he might be an innocent purchaser, but the fact that at the date of the purchase a list of indemnity selections, in lieu of said section, was pending for approval would be sufficient to charge a purchaser with notice of the defect of title.

I am satisfied that the Department is powerless to grant relief in the premises, and I therefore return the papers for file in your office.

HOMESTEAD—SETTLEMENT RIGHTS—FINAL PROOF.

AKERS *v.* RUUD.

The right of a settler to enter the land covered by his improvements is not defeated by the fact that prior to survey he incorrectly designated the land actually included within his claim.

In view of the amendment of Rule 53 of Practice, final proof submitted prior thereto, and during the pendency of a contest, may be considered where due notice has been given.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 18, 1893.

The land involved in this controversy is lot 7, in Sec. 4, T. 24 N., R. 22 E., W. M., North Yakima, Washington, land district.

The record shows that Ole Ruud made homestead entry of lots 6, 7, 10 and 11, of said section, township and range, May 12, 1890, (the day on which the plat of said township was filed in the local office) alleging settlement May 12, 1883.

He published notice to make final proof before the county clerk of Douglas County, July 14, 1890.

On June 7, 1890, Benjamin F. Akers filed an affidavit of contest, alleging that he resided on the NE. ¼ of SE. ¼, lots 7, 8 and 9, of said section 4; that he made settlement thereon about April 10, 1884, and had resided there ever since and improved the same; that he made application to enter the same May 28, 1890, and the same was rejected as to said lot 7, for the reason that Ruud had made homestead entry of the same; "that said land was not settled upon, improved or cultivated at any time prior to or at the time affiant made settlement thereon by said Ole Ruud or any other person," and asked for a hearing to determine the rights of the parties to said lot 7. The testimony was taken before the county auditor of Douglas county, beginning July 21, 1890.

The final proof was taken as per advertised notice July 14, and on July 23d, Ruud made final entry.

On consideration of the testimony taken at the hearing the local officers decided that Akers had the superior right to lot 7, and recommended that Ruud's entry be canceled as to said lot and that Akers be allowed to perfect his "homestead filing" on the same.

A motion was made for a review, which was overruled when Ruud appealed, and you, by letter of March 5, 1892, reversed the judgment and decided that Ruud had the superior right to said lot 7, whereupon Akers prosecutes this appeal, assigning as error substantially that your decision is against the law and the evidence.

An examination of the plat of this township shows that section 4, contains 765.42 acres, it being on the north side of the township, and when it was surveyed the excess over six hundred and forty acres was thrown on the north side of the section and numbered as lots 1, 2, 3 and 4. This necessitated, for the purpose of accurate description, the numbering of the other "forties" in the north half of the section as lots, and they were numbered from 5 to 12 inclusive.

Ruud went to this locality in May, 1883, and before the township in question was surveyed. During that summer there was a survey made which, however, proved to be unauthorized and was not approved. But Ruud made his selection according to this survey of what he considered "the four center forties" of the section, and broke some ground on lot 7. He continued to improve it by breaking more ground from year to year, and fenced it together with the rest of his claim. Akers joined him in building the line fence between lots 7 and 8. Lot 8 is owned and improved by Akers, but he has no improvements on 7.

Akers claims that Ruud pointed out to him lot 7 with other land, as not being within his claim, and admits that Ruud claimed the "four center forties." I do not think, however, the evidence bears out his assertion that Ruud told him to take lot 7, but I am of the opinion that it was lot 2, lying immediately north of lot 7, that Ruud pointed out to him.

When the land was finally surveyed and approved it was found that the section extended south so that the technical "four center forties" of this section would not include lots 6 and 7. Therefore when Ruud made his entry he did not take the "four center forties," but he did take the identical land that he had always claimed and had improved. It seems to me that it would be a great injustice to now say that Ruud should be confined to the land he had orally described in ignorance of what was or would be the accurate description, and thus force him to abandon his improvements. So far as the evidence shows Akers never made any claim to this lot until it was discovered, when the township plat was approved, that it was not one of the "four center forties." The "notice of trespass" served on Ruud seems to be the first intimation he had of the intention of Akers to claim this lot 7. Finding no error in your decision, it is affirmed.

The question raised by the appeal having been disposed of, it remains to consider the action of the local officers in approving the final proof and permitting final entry. Under the rule as it then existed this was clearly erroneous. Subsequently, however, rule 53, has been amended (14 L. D., 250), permitting the entryman to make final proof pending contest, and the practice has been since this amendment where due notice has been given and the proof is satisfactory, to approve the same, notwithstanding the irregularity. (Smith *v.* Chapin, 14 L. D., 411.) You are therefore directed to examine the proof of Ruud, and if found satisfactory and regular, you will approve the same.

CONTESTANT—PROCEEDINGS BY THE GOVERNMENT.

IVERSON *v.* ROBINSON.

The services of a contestant will not be accepted during the prosecution of proceedings by the government.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 19, 1893.

On May 18, 1874, Alfred B. Robinson made timber culture entry No. 149 for the SE. ¼ of Sec. 22, T. 94 N., R. 60 W., Yankton, South Dakota.

On December 14, 1882, Frank E. Stevens initiated a contest against said entry, and after trial, and finding of the register and receiver in favor of Robinson, you affirmed their action on December 1, 1884. Your judgment became final because the appeal taken therefrom to the Department was dismissed (4 L. D., 551, and 5 L. D., 111).

On July 27, 1887, Robinson made final proof, and on July 29, 1887, the register and receiver rejected it for the reason that it was not offered within the statutory period of thirteen years, being made seventy days after the expiration of that time.

On August 27, 1887, Robinson appealed to you from the action of the register and receiver rejecting his proof, and on September 23, 1887 following, the entry was placed in the hands of a special agent of your office for investigation, presumably, to determine whether he had complied with the timber culture law, and what excuse he had to offer for not submitting his proof within the thirteen years allowed by law. On April 28, 1890, on the report of said special agent, the entry was relieved from suspension.

On October 7, 1891, Erick Iverson filed an affidavit of contest against said entry, alleging substantially that final proof was not submitted within the period allowed by law; that no timber of any consequence was growing on the land; that the land has not been properly cultivated, but has been abandoned, and that the default still existed.

The register and receiver rejected his application to contest, for the reason that Robinson's appeal from the rejection of his proof was still pending before you, and on October 15, 1891, Iverson appealed from their judgment to you and on January 26, 1892, you affirmed their decision. Thereupon he brings the case before me on appeal from your judgment.

You have not yet acted on Robinson's appeal, but have suspended action thereon awaiting action in the Iverson case.

After considering the record, I am of the opinion that the conclusions in your judgment are correct, for the reason that the investigation conducted by the Department through the special agent, and the investigation by the register and receiver, which led to the rejection of Robinson's proof, the correctness of which still is pending before you, practically raise the same questions that are raised by the proposed contest, and that which has been passed upon by the Department or is being passed upon, will not be allowed to be again brought before it by a contestant.

It was decided in the case of McAllister *v.* Arnold *et al.* 12 L. D., 520, that—"It is as much the duty of this Department to protect those shown to have complied with the law, against useless contests and harassments, as it is to cancel entries in the hands of those shown not to have complied with the law." It was also stated (syllabus)—"A contest will not be allowed where the grounds alleged therein have been made the subject of investigation and final decision by the Department."

Having thus undertaken the investigation of Robinson's entry the government during the prosecution of the proceedings will not accept the services of contestant. Besides, the allegations made in the contest affidavit are practically the same as were passed on and determined by the register and receiver, and which are yet to be passed on by you. State of Oregon, (13 L. D., 259); United States *v.* Child (13 L. D., 553).

There is no error in the conclusions reached in your judgment refusing to allow the contest. Said judgment is accordingly affirmed.

SCRIMSHER *v.* STATE OF CALIFORNIA.*

The departmental decision of July 14, 1892, 15 L. D., 55, revoked on review by Secretary Noble, January 19, 1893.

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*This action rests on the discovery of an error in the facts as found in the first decision, and hence, does not affect the rule announced therein.

PRACTICE—MOTION FOR REVIEW—APPEAL.

SOMMER *v.* BARLOW ET AL.

One who does not appeal from a decision of the Commissioner, but files a motion for review out of time, is not in a position to thereafter complain of a departmental decision that holds the action below final.

There is no rule nor regulation that requires the General Land Office to notify parties, or their attorneys, that the record in a case has been sent to the Department on appeal.

Secretary Noble to the Commissioner of the General Land Office, January 19, 1893.

On the 25th of October, 1892, you transmitted a motion on the part of Thomas J. Moores, for a review of the decision of the Department, rendered on the 19th of August, 1892, in the case of Christian F. Sommer against Lucian H. Barlow and the said Moores. The land involved in the controversy is the NW. ¼ of Sec. 27, T. 12 N., R. 3 W., Oklahoma City land district, Oklahoma.

Samuel L. Beidler made homestead entry for the tract on the 24th of April, 1889. On the 31st of May, following, Christian F. Sommer filed an affidavit of contest, alleging that Beidler was not a qualified entryman, and on the 27th of June, Lucian H. Barlow filed an affidavit of contest, alleging that both Beidler and Sommer had violated the President's proclamation, by entering upon and occupying land in the Territory prior to the hour of noon on the 22d of April, 1889.

On the 28th of October, 1889, the entry of Beidler was canceled by relinquishment, and at the same time Sommer applied to make homestead entry for the land. His application was rejected, because the applicant was in Oklahoma before the 22d of April, 1889. From this action by the local officers he appealed.

On the 29th of October, Barlow filed a second affidavit against the entry of Beidler, alleging abandonment and relinquishment. On the 27th of the following month the local officers allowed James H. Carter to make homestead entry for the land, subject to the right of Sommer.

On the 21st of July, 1890, you ordered a hearing before the local officers to determine the rights of all the parties. At the time of the hearing, the affidavit filed by Barlow on the 27th of June, 1889, against Beidler and Sommer, was dismissed on motion of Carter, on the ground that it did not state a cause of action. He then moved that the affidavit filed by Barlow on the 29th of October, 1889, be dismissed, for the reason that the entry of Beidler was canceled prior to the filing of such affidavit. This motion was granted, and Barlow appealed from both decisions.

On the 22d of December, 1890, Carter's entry was canceled by relinquishment, and on the same day Welleston H. Belcher made homestead entry for the land. Belcher's entry was canceled by relinquishment on

the 20th of May, 1891, on which day Thomas J. Moores applied to make entry for the tract. His application was rejected, and he appealed.

The hearing before the local officers, ordered by you, resulted in a decision in which they held that when Sommer presented his application to make homestead entry for the land, on the 28th of October, 1889, he was a qualified entryman; that the relinquishment of Beidler resulted from Sommer's contest, and he being the first applicant to make entry, they recommended that the entry of Belcher be canceled, and the entry of Sommer allowed. Belcher moved for a rehearing, but his motion was overruled, for the reason that he relinquished his entry prior to the decision of said motion.

In a decision rendered by you on the 22d of July, 1891, you affirmed the decision of the local officers rendered after the hearing before them. This disposed of Sommer's appeal from their original action rejecting his application to make entry for the land. You also approved the action of the local officers in rejecting the application of Moores to enter the tract, and deemed it unnecessary to consider the appeals of Barlow, as the awarding of the land to Sommer disposed of all questions raised thereby.

Barlow appealed, and Moores filed a motion for review of your decision. The motion and affidavits in support thereof, were not transmitted to your office until after you had forwarded the record in the case to the Department, upon the appeal of Barlow, and such motion was therefore never considered by you. The papers were transmitted to the Department, and in the departmental decision, of which a review is now asked, it was held that inasmuch as the motion was not filed in your office within the time required by the Rules of Practice, and as Moores did not appeal from your decision, your action was conclusive upon him. The appeal of Barlow was then considered, and your decision in the case affirmed.

The grounds upon which a review of departmental decision of August 19, 1892, is asked, are that said decision was rendered upon a misunderstanding of the condition of the record in the cause, or a misapprehension of the rights of the petitioner, whereby it is alleged the petitioner has been grievously wronged.

With the motion for review, copies of a large number of affidavits are filed, the affiants nearly all testifying that Sommer was in the Territory of Oklahoma prior to the 22d of April, 1889; that he was there at twelve o'clock, noon, on that day, and that he made settlement on the land in question immediately after that hour, and in violation of the statute and the President's Proclamation.

That question cannot properly be determined upon ex-parte affidavits, on a motion for review, but should be settled by contest. So far as appears, the entry of Sommer has never been contested, and a contest could not therefore be prevented, upon the ground that he had already defended his entry against the same, or similar charges.

In the argument upon the motion before me, it is claimed that in the decision complained of, the motion of Moores for a review of your decision was not considered, nor the appeal filed by him from the rejection by the local officers of his application to enter said tract. In answer to this, it is only necessary to say that neither of those questions were before the Department for its consideration. Motions for a review of a decision are addressed to the court rendering the same. If the judgment of an appellate court upon the question is desired, it is obtained by appeal, and not by motion for review. As to his appeal from the action of the local officers, it was addressed to your office, where it had been considered and decided, and no appeal from your decision had been taken.

Complaint is also made that you did not notify Moores, or his attorney, of the fact that you transmitted the record in the case to the Department on the 16th of December, 1891, upon the appeal of Barlow. To this complaint is added:

That he was entitled to notice of this action, is unquestioned; and that by the failure to serve the same, his rights have been jeopardized, his title called into question, and a decision adverse to his interests secured, appears upon the face of the record.

The rules and regulations of the Department require you to transmit the record in all cases where appeals from your decisions are taken, and allowed by you, to the Department, but I am not aware of any rule or regulation which requires you to notify the parties or their attorneys that you have performed your duty in that respect. Most certainly you are not required to notify a party who has taken no appeal from your decision.

While, in the motion before me, Moores makes a showing which, if made by a contestant, would require the entryman to satisfactorily defend his entry, or submit to its cancellation, he does not make a showing which entitles him to have the decision complained of reviewed and reversed. His motion is accordingly denied.

MINERAL CLAIM—AGRICULTURAL ENTRY.

McINTYRE *v.* YOKUM.

The adverse possession and occupancy of a mineral claimant will not defeat an agricultural entry where the land is subsequently shown to be non-mineral in character.

Secretary Noble to the Commissioner of the General Land Office, January 19, 1893.

William McIntyre has filed a motion for review of the decision of the Department of June 21, 1892, in the case of William McIntyre *v.* A. J. Yokum, alleging the following grounds of error:

1. Because you held that the adverse possession and occupation of McIntyre was not sufficient to except the land from Yokum's entry.

2. Because you held that the case of Bullard *v.* Flanagan was not a precedent for allowing to a claimant under an agricultural system of law credit for his time while claiming the land under the mineral law.

The material question in this case is, whether the adverse possession and occupation of land as a mineral claim will be sufficient as the initiation of a settlement claim under the pre-emption or homestead laws after the land has been held to be agricultural land.

In this case Yokum, on March 2, 1881, made homestead entry of lots 3 and 4 and the S. ½ of the NW. ¼ of Sec. 4, T. 22 N., R. 3 E., Marysville, California. On March 8, 1881, McIntyre was allowed to make mineral entry of said lot 4, the tract in controversy, and Yokum contested said entry, and upon said contest it was held that the land was not mineral, but agricultural land, and said entry was canceled.

Upon the offering of final proof by Yokum on his homestead entry, McIntyre filed a contest against Yokum's entry, alleging priority of settlement as to said lot 4. Upon this contest it was held that the adverse possession of McIntyre of lot 4 under his mineral entry was not sufficient to defeat the entry of Yokum as agricultural land, it being held upon the contest of Yokum that the land was not mineral in character.

I see no error in the decision, nor is the case of Bullard *v.* Flanagan, 11 L. D., 515, authority for the proposition contended for by contestant, which is to the effect that the possession of land under a mining claim is such occupation and settlement as will defeat an adverse claimant under the homestead or pre-emption law, whose settlement was made prior to the cancellation of the mineral entry.

In brief, the testimony showed that McIntyre's occupancy and possession of lot 4 up to the time of the cancellation of his entry was under the mining laws. Yokum's residence and other improvements were upon lot 3, but his settlement extended to all parts of the claim embraced in his entry. This commenced in 1881 and was continued and existed at the date that McIntyre's entry was canceled upon Yokum's contest.

No error is assigned as to the finding of facts, and the alleged errors of law not being sufficient, the motion is denied.

TIMBER CULTURE ENTRY—EXCESSIVE ACREAGE.

KOONTZ *v.* PITTMAN.

A timber culture entry attacked on account of excessive acreage may be permitted to stand, where, prior to the day fixed for trial, the relinquishment of another timber culture entry in the same section leaves the entry under attack no longer objectionable on account of the area embraced therein.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, January 21, 1893.

On May 27, 1889, William S. Pittman made timber culture entry (No. 11,627), embracing lots 1, 2 and 3, of Sec. 6, T. 25 S., R. 31 W., containing 93.70 acres, at Garden City, Kansas. Said section contained only 458.54 acres, of which one-fourth would embrace 114.635 acres.

It appears that on September 6, 1887, James Mackin had made timber culture entry (No. 9655) for lots 5 and 6 of said section, containing 77.24 acres.

On January 13, 1890, Mervin G. Koontz filed an affidavit of contest against Pittman's entry, alleging—

> That the said entry of the said William S. Pittman was illegal and void at its inception, and always has been, for the reason that said entryman attempted to appropriate more than one quarter section of land in said section 6, township 25, range 31. The said entry of William S. Pittman covers 93.70 acres of said land when there was a prior entry of one James Mackin made September 6, 1887, No. 9655, covering lots 5 and 6, amounting to 77.24 acres of land of said section 6, township 25, range 31, and that said entry of said William S. Pittman was not made in accordance with the laws of the United States relating to timber culture entries, and he has attempted fraudulently and falsely to appropriate more land in said section than was subject to timber culture entry, and without paying the government price therefor, and the same is not permitted to be done. That affiant desires to enter said land under the homestead law.

A hearing upon said charges was ordered for April 12, 1890, at the local office, when and where the parties appeared and the counsel for the contestant filed the following motion:

> Comes now the plaintiff in the above entitled action and moves the Hon. Register and Receiver to take judicial knowledge of the records and files of the U. S. Land Office at Garden City, Kansas, and from them to ascertain the facts set out in the plaintiff's affidavit of contest in this case, and to render judgment against defendant therein, and to declare the entry of said defendant canceled.

On April 16, 1890, the defendant filed a brief and argument in answer to said motion.

On May 20, 1890, the local officers found that the entry of Mackin "was canceled by relinquishment after date of service of notice of contest in this case;" but that the entry of Pittman contained more land than he was allowed by law to enter as a timber claim, inasmuch as the first section of the act of June 14, 1878 (20 Stat., 113) provides "that not more than one-quarter of any section shall be thus granted." That the entry of Pittman was "illegal and void for the reason that the number of acres in said lots 1, 2 and 3, with the number of acres in said Mackin's entry for lots 5 and 6, aggregate more than one-quarter of said section 6." They held, therefore, that Pittman's entry should be canceled.

On appeal you held, in letter of February 3, 1892, that—

> Mackin having entered 77.24 acres, there remained subject to further timber culture entry in said section 37.39 acres to be taken as near as may be in the full amount, but according to legal subdivisions. . . . . The entry of Pittman of 93.70 acres during the time of Mackin's entry of record was *prima facie* void only as to the excess over 37.39 acres, and immediately after being made was subject to cancellation by this office to the extent of such excess (Legan *v.* Thomas *et al.*, 4 L. D., 441, and citing 101 U. S., 260) after inspection of its records and due notice to Pittman; and until such action, and final judgment, said entry of Pittman remained as an appropriation of all the land covered thereby. In view of the fact that prior to trial and before any judgment upon the validity of Pittman's entry was an-

nounced, Mackin had legally relinquished all right and claim to the land covered by his own timber culture entry, thereby clearing the records of the apparent objection against Pittman's entry, an abatement by cancellation of the excess in the entry of Pittman is rendered unnecessary. An entry, though made when the land was not subject to appropriation, on the removal of the bar may be allowed to stand intact. (Schrotberger *v.* Arnold, 6 L. D., 425) The timber culture entry of Pittman, for 93.70 acres of land being by legal subdivisions, and, since the relinquishment of Mackin, not being in excess of the amount of land (114.635 acres) permitted by law to be taken in the fractional section in question, will stand and remain intact.

An appeal now brings the case before me.

I think the law applicable to the case is correctly stated in your decision.

Your judgment is affirmed.

RAILROAD GRANT—ACT OF FORFEITURE—INDEMNITY.

NEW ORLEANS AND PACIFIC RY. CO. *v.* PERKINS.

The outstanding certification of lands to the State under the grant of June 3, 1856, did not prevent reinvestment of title in the United States by the forfeiting act of July 14, 1870, and is therefore no bar to the selection of such lands as indemnity after the passage of said act.

Secretary Noble to the Commissioner of the General Land Office, January 21, 1893.

I have considered the case of the New Orleans Pacific Railway Company *v.* William Perkins, involving the NE. ¼ of Sec. 19, T. 5 S., R. 1 E., New Orleans land district, Louisiana.

The land is within the indemnity limits of said railway. The company selected it as indemnity December 28, 1883.

At the hearing had in the case, the testimony showed that Perkins settled about the 1st of June, 1888.

Your decision rejects the company's claim, on the ground that at the date of its selection of the tract, the title thereto was vested in the State of Louisiana, by certification.

The Department held, in the case of said company against Sancier (14 L. D., 328), that the outstanding certification did not constitute a title in the State, nor prevent the reinvestment of the title in the United States, by force of the forfeiting act of 1870. The certificate was therefore no bar to the selection by the company; and as the settlement of the homestead claimant was subsequent to the selection, there is nothing before me tending to invalidate such selection.

Your decision is therefore reversed, and the company's selection will remain intact upon the records.

RIGHT OF WAY—UNSURVEYED LANDS.

CŒUR D'ALENE RY. AND NAVIGATION CO.

The survey of the exterior lines of a former Indian reservation does not remove the lands included therein from the category of unsurveyed lands, and an application therefore, for a railroad right of way across such lands will not be approved.

Acting Secretary Chandler to the Commissioner of the General Land Office, January 25, 1893.

I have at hand the letter of the 12th instant from your office enclosing a map of the definite location of a section of the line of road of the Cœur d'Alene Railway and Navigation Company, filed for the purpose of securing the benefits of the right of way railroad act of March 3, 1875.

It is stated in the letter that the land covered by "the location falls within the old Cœur d'Alene Indian reservation, now restored, but unsurveyed except as to the exterior lines," and it is recommended that "as the points established enable the company to definitely locate the route," the map be approved.

In reply I have to state that the map has been examined and the line of route thereon is found to be, in its entirety, on unsurveyed lands. The fact of the survey of the exterior lines referred to, does not remove the lands involved from the category of unsurveyed lands. The map is not therefore subject to approval and is herewith returned.

WINANS *v.* BEIDLER.

Motion for review of departmental decision of September 5, 1892, 15 L. D., 266, denied by Secretary Noble, January 25, 1893.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

CRISWELL *v.* WADDINGHAM ET AL.

The right of a grantee of a railroad company to purchase under section 5, act of March 3, 1887, is not defeated by an application to enter, pending at the passage of said act, but subsequently abandoned.

Acting Secretary Chandler to the Commissioner of the General Land Office, January 31, 1893.

The SW. ¼ of Sec. 29, T. 2 S., R. 67 W., Denver, Colorado, is within the limits of the grant to the Union Pacific Railway Company.

It appears that on May 23, 1885, John Daniels applied to make preemption filing for said tract, and, on March 1, 1886, Louis Drumm applied to make homestead entry thereof.

The local officers having rejected said applications by reason of the railroad grant, an appeal was taken, and your office, on February 8, 1887, decided adversely to the company.

On appeal, the Department decided (September 13, 1888,) that certain filings, made in the year 1866, were of record and *prima facie* valid at the date (August 20, 1869,) when the right of the company attached under its grant, and, because of that fact, the land "was excepted from the operation of the grant, and the company has no valid claim thereto."

It appears that after the said departmental decision was promulgated, Daniels, being disqualified from the right of pre-emption under Sec. 2260 of the Revised Statutes, did not further prosecute his claim, and, for some reasons not explained, Drumm also failed to further prosecute his claim.

On July 2, 1889, Richard M. Criswell made homestead entry of the land, and, on May 15, 1890, he offered commutation proof, and on the same day he paid $400 for the land, and final certificate No. 15,344 was duly issued therefor.

In the meantime, July 19, 1889, Elizabeth Daniels, and John Daniels, as "attorney in fact for Wilson Waddingham," gave notice of intention to establish their claim to the land, under the 5th section of the act of March 3, 1887 (24 Stat., 556), said proof to be taken before the register or receiver, on September 13, 1889. The notice to make proof was signed by Elizabeth Daniels, claimant, Wilson Waddingham, claimant, and John Daniels, attorney in fact for Wilson Waddingham, claimant. Notice was duly published, and the proof was taken on the day fixed.

The exhibits made and the oral testimony taken established the fact that, on May 29, 1878, John Evans, as trustee of said company, for the consideration of $1,280, conveyed to Wilson Waddingham, among other lands, the S. ½ of Sec. 29, in said township. Waddingham conveyed one-half of his interest in the S. ½ of said Sec. 29 to John Daniels, and the latter, on January 16, 1885, conveyed said undivided half to his wife, Elizabeth Daniels.

It was shown that at date of said sale to Waddingham (May 29, 1878), no one had ever resided upon or occupied the land, or any part of it, and that no one settled upon the land subsequent to December 1, 1882, and prior to March 3, 1887. It was shown that Waddingham declared his intention to become a citizen, December 7, 1876, and took out final papers June 14, 1888, and John Daniels, husband of Elizabeth Daniels, declared his intention to become a citizen May 23, 1885.

The register and receiver decided that Mr. Waddingham and Mrs. Daniels were *bona fide* purchasers from the railroad company, but rejected their proof because the lands sought to be purchased were not government lands, but belonged to the railway company.

On appeal, you, by your decision of October 13, 1891, reversed that action, and held that the proofs submitted by Waddingham and Daniels

satisfactorily establish their right to purchase the land under the 5th section of said act, and that they should be permitted to make final entry without further proofs. You also held Criswell's entry of the land for cancellation, and his appeal from that judgment brings the case to the Department.

There are numerous grounds of error assigned, which summed up may be stated as follows:

1. Error in holding that proof under the 5th section of the act of March 3, 1887, can be made by an attorney in fact.

2. Error in considering a proof, when the record shows that the homestead entryman was living on the land and had no opportunity to cross-examine the witnesses, or to examine any exhibits made.

3. Error in holding that the act of March 3, 1887, can operate and embrace this tract of land.

As above seen, Criswell made commutation proof May 15, 1890. His proof showed that he first moved to the land July 8, 1889. It does not appear that he was present when the proof was taken to show the right of Waddingham and Daniels, as grantees of the company, to purchase the land; nor does it appear that he was specially notified of the time and place of taking that proof.

There is no averment or showing made that he has any claim to the land, except that growing out of his homestead entry, and no specific denial that the purchase was made from the company as above set forth, and no sufficient reasons for requiring the grantees of the company to make proof anew.

When Criswell first settled on the land, the deed from the trustees of the company to Waddingham and from the latter to the subsequent transferees were of record in the recorder's office of the county in which the land is situated, as shown by certified transcripts of the records, and Criswell knew, or might have known, that the company had then sold the land.

The fact that Drumm's application to enter the land was pending at the date of the passage of the act does not, *ipso facto*, prevent such land from being subject to the provisions of the act. His application could only have had that effect had he subsequently prosecuted his claim in compliance with law, but having abandoned his claim, no one else can set up such claim in order to defeat the right of purchase under the act.

It satisfactorily appears that Waddingham and Mrs. Daniels are grantees of the railroad company; that they are citizens of the United States; that the land was of the numbered sections prescribed in the grant, was excepted therefrom, and sold by the company as part of the grant, and was coterminous with the constructed parts of the road.

Under the 5th section of said act, the rights of the grantees, under the facts above given, are superior to those of Criswell, and they will be allowed to make final entry on the proofs already made, and Criswell's entry will be canceled.

The decision appealed from is affirmed.

PATENT—SALE—MISDESCRIPTION OF LAND.

JOHNSON *v.* CLARK.

An entry will not be allowed to embrace a tract actually sold by the government to another in accordance with the claim of such purchaser, but not described in the patent subsequently issued to him.

Acting Secretary Chandler to the Commissioner of the General Land Office, January 31, 1893.

On June 21, 1887, Almas L. Clark made homestead entry No. 12,661, for the NE. fractional quarter, the N. ½ of the SE. ¼, and the SW. ¼ of the SE. ¼, Sec. 6, T. 20 N., R. 16 W., Harrison, Arkansas.

By your decision of March 8, 1892, you held his entry for cancellation as to the NE. ¼ fractional quarter of said section, and he has appealed from that judgment.

This is the second time this case has been before the Department. Your office first held the entry for cancellation as to said tract, on April 24, 1889, because of the conflict therewith of cash entry, No. 6161, made by Thomas Terry, March 21, 1853, upon which patent was issued March 1, 1885. Upon appeal, the Department decided, August 28, 1890, that there was a mistake in both the entry and patent of Terry, and it was accordingly directed that Clark's entry be reinstated, and a hearing be had to determine the rights of the respective claimants to the land.

Mary F. Johnson, claiming title to the land, as transferee under Terry's patent, was present at the hearing, and contested Clark's claim to the land.

The register and receiver found that the land intended to be entered by Thomas Terry was the NE. fractional quarter of Sec. 6, instead of the N. ½ of the NW. fractional quarter of said section, as described in his patent.

In the decision appealed from you concurred in that finding, and construed the description in the patent to be for the NE. fractional quarter of said Sec. 6, and accordingly held Clark's entry for cancellation as to that tract.

Terry's patent was issued for "the north fractional half of the northwest fractional quarter (south bank of White River) of section six, in township twenty north of range sixteen west, in district of lands subject to sale at Batesville, Arkansas, containing forty-one and eighty-six hundredths of an acre."

A careful examination of the official plats shows that there is no such tract of land in said section six as the north half of the northwest fractional quarter.

It appears that there are two separate surveys, one south and one north of White river—both surveys closing on the river, which was meandered. The land in controversy is north of and within the bend

of White river, and is represented by a plat approved May 21, 1852. The land south of White river is represented by the plat approved August 4, 1841. Both of these surveys have lands represented by a township marked 20 north, range 16 west. Section six of the township of that number south of the river has no lands the description of which corresponds to the land in controversy. Section six of the township north of the river has a tract of land bordering on the river in the northeast quarter covering an area of 41.86 acres. It is the only tract in the section of that acreage, and corresponds to the exact number of acres covered by Terry's patent.

The register and receiver reported to your office that Terry's application for the land was not on file in the local office.

The description of the land as shown in the patent follows the description in the final certificate, the expression "south bank of White river," as written in the face of the patent, is found in brackets on the margin of the certificate. In the face of the final receipt, the land is described as in the patent. except that it is designated as being on "left bank of White river." The land being in the bend of the river, which at that point runs almost due west, was described as being on the "south bank of White river." It is south of the river at that point, but north of the river in its general trend to the southeast, and therefore on the left bank.

You concur in the finding of the local officers that the land in controversy is the identical tract intended to be entered by Terry; that it was so regarded by Mr. Terry, during his lifetime, and by his heirs and grantees after his death. I have examined the testimony taken at the hearing, and concur in that finding.

While there is no land in said section six corresponding to the description in the patent, yet, from the facts above given, it is seen that the land intended to be conveyed by the patent is the identical land in controversy, and can not possibly be any other tract, there being no northwest fractional part in that section.

Clark's entry will therefore be canceled as to the northeast fractional quarter of said section six, and the decision appealed from is accordingly affirmed.

RAILROAD GRANT—ADJUSTMENT.

MOBILE AND GIRARD R. R. CO.

Instructions with respect to the adjustment of the grant to the Mobile and Girard railroad company under the act of September 29, 1890.

Secretary Noble to the Commissioner of the General Land Office, February 1, 1893.

I have considered the matter of the adjustment of the grant for the Mobile and Girard Railroad Company, under the act of September 29, 1890 (26 Stat., 496), as presented in your report of October 25, 1892.

The 8th section of said act provides:

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

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

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

The matters preliminary to the adjustment of this grant were considered in departmental decision of February 7, 1891 (12 L. D., 117), in which it was held that the above section constitutes a legislative limitation upon the grant made by the act of June 3, 1856 (11 Stat., 17), to aid in the construction of the Mobile and Girard Railroad, and that the company is entitled only to the quantity of lands earned by the construction of the road from Girard to Troy, a distance of eighty-four miles, which, upon examination, you report to be 302,233.79 acres.

It appears, however, that during the years 1860 and 1861 this entire grant from Girard to Mobile was practically adjusted: that is, all available lands within the limits of the grant were certified to the State on account thereof, in all amounting to 504,167.11 acres.

Under the terms of the adjustment provided for in the section before quoted, the lands to be allotted the company are to include the lands sold or otherwise disposed of by the company, not to exceed the total amount earned, and "shall not include any lands upon which there were bona fide pre-emptors, or homestead claims, on the first day of January, eighteen hundred and ninety, arising or asserted by actual occupation of the land under color of the laws of the United States."

It is therefore first necessary to identify the excluded lands, and then

to allot to the company, from the sold lands, an amount equal to the quantity earned by the construction before referred to.

To this end, you were instructed to publish a notice requiring the claimants under the laws of the United States to come forward, within ninety days, and make known their claims, by filing necessary papers to establish the same, and to call upon the company to file a statement, properly certified to, of the lands sold, conveyed, or otherwise disposed of by the company, the date of each sale or disposition to be given, and the name of the transferee.

It is upon the result of this notice and call that your report is made, and therefrom it appears that 572 persons asserted claims under the homestead laws, alleging settlement prior to or on January 1, 1890, said applications aggregating 78,988.14 acres.

The showings made before the local officers and your office evidence the following sales or dispositions by the company, viz:

To Abram Edwards	74,203.98
" Joshua V. Thompson	118,807.29
" James A. Carney	19,578.49
" numerous persons	16,233.50
" claims not reported by company	720.49
" sales reported, but no claim presented	13,108.51
" Van Kirk Construction Company	262,994.49
	505,646.75
Less duplication in Edwards and other sales	1,479.64
Total sales	504,167.11

As all the lands certified on account of the grant were sold or disposed of by the company, the homestead applications necessarily conflicted with a sale or disposition, and numerous protests were filed against said applications by claimants under sales made by the company, but, as the grant can be fully satisfied without including any of the lands claimed in these applications, a consideration of said protests is unnecessary.

The reported sales and dispositions largely exceed the amount earned, after deducting all the lands claimed by the homestead applicants, and it would be necessary to decide between the several claimants under the sales and dispositions made by the company, in order to allot the lands on account of the grant, were it not for the agreement entered into between the large purchasers to *pro rate* as between themselves the lands according to their several holdings, and to abide by the decision of this Department upon the small holdings under sales made by the company.

As to these small holdings you report that:

There are more than 450 individual purchasers from the company (designated as minor sales, per lists No. 6 and 7 aggregating 29,342.01 acres) in whose favor, I be-

lieve, an exception to the rule above stated should be made, for the reason that they purchased these small tracts, paying the market price therefor, for the purpose of occupation, cultivation and a home; while those who purchased large quantities in bulk, as Edwards, Thompson, Carney, and the Van Kirk Company did so purely for speculative purposes, and paying therefor a nominal price compared with the individual purchasers, and for the further reason that the average acreage per capita of these minor purchasers is sixty, and to apply the principle of pro-rating to them would reduce the amount of nine-tenths of these purchasers below the quantity contained in the least official subdivision of a section. I am, therefore, of the opinion that all of these purchasers of the class above mentioned, should be protected to the extent of one hundred and sixty acres, the amount which they each would be entitled under the provision of the eighth section, if they were asserting their rights as settlers under the homestead or pre-emption laws. It seems to me that a much stronger reason exists why they should be protected to the extent above stated then mere squatters on lands owned at the time by the company, for they are not only settlers upon the lands prior to January 1, 1890, but all had long before that time purchased from the company, at full value, the small holdings now claimed, and have made it their homes since such purchase; many of whom have valuable improvements thereon. It was just this class of purchasers. I am led to believe, that Congress intended to protect to the full extent of their holdings.

I approve of this recommendation, and all such holdings should be included in the allotment to the company, unless they conflict with the applications of those claiming on January 1, 1890.

From a careful review of the section in question, I am of the opinion that its effect is to confirm to the company an amount of land equal to that earned by the building of the road from Girard to Troy, or 302,233.79 acres, and, as the large purchasers have agreed to pro-rate the amount remaining, after deducting the small holdings, the interests of the United States are in no wise prejudiced. Without passing upon the validity of any of these claims, you are directed to make due call upon the purchasers to make selection of their respective amounts under their agreement within thirty days, in order to identify the lands that will be patented to the Company.

As it appears that the sales made by the company conflict, directions should be given to prevent duplications in the matter of the selections, and to avoid conflicts with the claims presented under the homestead laws. Upon receipt thereof, you will be enabled to allot the lands to the company, and upon the approval of that allotment by this Department, the grant, and all claimants thereunder, will be fully satisfied, and the remaining lands within the grant may then be restored under the terms of the forfeiture act.

Much time has already elapsed since the passage of the forfeiture act, and the interests of the public demand a speedy restoration of the lands not confirmed to the company and its purchasers.

OKLAHOMA TOWNSITES—PROBATE JUDGE—TRUSTEE.

CHOCTAW CITY TOWNSITE.

The provisions of section 17, act of March 3, 1891, do not change nor repeal the acts of May 2, 1890, and May 14, 1890, so far as relates to townsite entries within the limits of lands opened to settlement on April 22, 1889, and the only manner, therefore, in which townsites can be entered therein, is through the medium of a board of trustees.

Secretary Noble to the Commissioner of the General Land Office, February 1, 1893.

I have considered the appeal of Seymour A. Stewart, probate judge of Oklahoma county, Oklahoma Territory, from your decision of September 10, 1892, holding for cancellation cash entry No. 628, made by said Stewart as probate judge, for the E. ½ of SE. ¼ of Sec. 23, T. 12 N., R. 1 W., Oklahoma, in trust for the use and benefit of the occupants thereof, as the townsite of Choctaw City, according to their respective interests, as provided in section 2387, Revised Statutes.

The tract of land in question is located within the limits of the lands opened to settlement by proclamation of the President on April 22, 1889.

In your decision you say:

Inasmuch as the act of May 14, 1890, (26 Stat., 109) is the only townsite law applicable to that portion of Oklahoma within which the above described tract of land lies, the entry before me is illegal and is, therefore, hereby held for cancellation.

The appeal is based upon the ground of error in holding that the act of May 14, 1890, is the only townsite law applicable to the portion of Oklahoma in which the town of Choctaw City is located, and that you failed to give legal effect to the act of March 3, 1891.

The act of March 2, 1889, (25 Stat., 980–1004) opening the Oklahoma lands to settlement, provided that:

The Secretary of the Interior may, after said proclamation, and not before, permit entry of said lands for townsites under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight, of the Revised Statutes, but no such entry shall embrace more than one half section of land.

Said section 2387, Revised Statutes, provides that if a town is unincorporated the judge of the county court may make townsite entry for the benefit of the parties in interest, but upon the opening of Oklahoma lands on April 22, 1889, there was no such officer as judge of the county court or probate judge, in existence in said Territory, to file such application, hence applications to make townsite entries were filed by unauthorized parties selected by the settlers upon the tracts chosen as townsites; said applications, however, were not acted upon by the Land Department.

This condition of affairs continued until May 2, 1890, when Congress passed 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." (26 Stat., 81).

The 9th section of said act provides:

That the judicial power of said Territory shall be vested in a supreme court, district courts, probate courts, and justices of the peace.

This is the first recognition of the office of probate judge in said Territory, and by the act of the territorial legislature, which took effect December 25, 1890, judges of probate were given authority to make entries of the public lands for townsite purposes.

Section 22 of the above cited act of May 2, 1890, provides:

That the provision of title thirty-two, chapter eight of the Revised Statutes of the United States, relating to "reservation and sale of townsites on the public lands" shall apply to the lands open, or to be opened to settlement in the Territory of Oklahoma, except those opened to settlement by the proclamation of the President on the twenty-second day of April, eighteen hundred and eighty-nine.

No argument would seem to be necessary to sustain the proposition, that unless further legislation has provided a means by which a probate judge may act as an entryman of land for townsite purposes within the limits of the lands designated in the proclamation of the President above referred to, such officer can not thus act. Has there been such legislation?

The contention of appellant is, that such legislation was enacted by the second proviso to section 17 of the act of March 3, 1891, (26 Stat., 989–1026), which is as follows:

That in addition to the jurisdiction granted to the probate courts and the judges thereof in Oklahoma Territory by Legislative enactments, which enactments are hereby ratified, the probate judges of said Territory are hereby granted such jurisdiction in townsite matters, and under such regulations as are provided by the laws of the State of Kansas.

By reference to the act of May 2, 1890, above cited, and which fixed the boundaries of Oklahoma Territory, it will be seen that said Territory embraced a vast area of country in addition to that opened to settlement by proclamation of the President April 22, 1889, which tract has been expressly reserved from the operation of the townsite laws, under which a judge of the county, or the probate judge, might make entry.

There was, however, no intention on the part of Congress to leave the lands open to settlement April 22, 1889, without the advantages of legislation allowing townsite entries, hence Congress, on May 14, 1890, (26 Stat., 109) passed an act which provided:

That so much of the public lands situated in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as townsites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven, of the Revised Statutes, as near as may be.

When we recall the fact that the only lands open to settlement on May 14, 1890, were those opened by proclamation of the President on April 22, 1889, and the Public Land strip opened to settlement on May 2, 1890, it will be seen that the jurisdiction of said trustees was limited to these two bodies of land.

By the wording of the act of May 2, 1890, Congress gave probate judges, or judges of the county, jurisdiction in townsite entries, so far as the Public Land strip was concerned, and the granting of similar or concurrent jurisdiction to trustees by the act of May 14, 1890, did not deprive the probate judges of the authority to thus act, but as has been before stated, this authority was not extended to probate judges within the limits of the lands opened to settlement on April 22, 1889.

If authority has been given to any officer or person, other than the trustees above provided for, within the limits of the lands last mentioned, to act in the matter of entering townsites, it has been accomplished wholly by the proviso to section 17 of the act of March 3, 1891, above cited, and to accomplish this it must be held that the portion of the act of May 2, 1890, which provided, in effect, that probate judges cannot thus act, and the act of May 14, 1890, providing that such entries could be made by trustees only, have been repealed.

There is no reference in the act of March 3, 1891, to the act of May 2, 1890, or the act of May 14, 1890; there are no words of repeal employed, and if repeal is accomplished, it is wholly by implication.

The supreme court, in the case of McCool *v.* Smith (1 Black, 459) says:

> A repeal by implication is not favored. The leaning of the courts is against the doctrine, if it be possible to reconcile the two acts of the legislature together.

Endlich in his Commentary on the interpretation of statutes, page 280, thus states the rule:

> It is a reasonable presumption that the legislature did not intend to keep really contradictory enactments in the statute-book, or to effect so important a measure as the repeal of a law, without expressing an intention to do so. Such an interpretation, therefore, is not to be adopted unless it be inevitable. Any reasonable construction which offers an escape from it is more likely to be in consonance with the real intention. Hence it is, a rule founded in reason as well as in abundant authority, that, in order to give an act not covering the entire ground of an earlier one, nor clearly intended as a substitute for it the effect of repealing it, the implication of an intention to repeal must necessarily flow from the language used, disclosing a repugnancy between its provisions and those of the earlier law, so positive as to be irreconcilable by any fair, strict or liberal, construction of it, which would, without destroying its evident intent and meaning, find for it a reasonable field of operation, preserving, at the same time, the force of the earlier law, and construing both together in harmony with the whole course of legislation upon the subject.

Is there an irreconcilable repugnancy between the act of March 3, 1891, and the acts of May 2, 1890, and May 14, 1890?

We must recall the fact that the organic act of May 2, 1890, recognizes the office of probate judge, and extended the federal townsite laws to all lands opened, or to be opened, to settlement in that Territory, except those opened to settlement April 22, 1889; also that the

authority of probate judges to act in townsite matters was conferred by the act of the territorial legislature, which took effect December 25, 1890. We must also recall the fact that by the act of March 3, 1891, other vast tracts of land in said Territory were to be opened to settlement, and that the Public Land strip had already been opened. It was entirely competent for Congress to extend, or to change the manner in which the jurisdiction of the probate judges should be exercised, and to ratify the acts of the Territorial Legislature granting jurisdiction to said officers.

It is true that the first section of chapter 85 of the Statutes of Oklahoma (page 1170) provides that:

> Whenever any portion of the public lands of the United States have been, or shall be, settled upon and occupied as a townsite . . . . if not incorporated, then for the judge of the probate court of the county in which such town may be situated to enter at the proper land office the land so settled upon and occupied, etc.

But it cannot be presumed that the territorial legislature intended its act to extend to, or to embrace, lands which had been, by express act of Congress, excepted from the jurisdiction of the officers named, but if such was the intention of the legislature, it would have no effect as against the positive enactment of Congress, excluding the jurisdiction of said officers from the lands in question; there were, however, lands upon which the legislation by the territorial legislature could take effect, and it was competent for Congress to ratify such legislation, but if this legislation could not, by reason of existing law, extend to certain lands, it will not do to assume that the ratifying act of Congress imparted life to the same, unless such intention was clearly expressed in the language used in said act. There was no such intention expressed.

Various tracts of the lands opened to settlement April 22, 1889, having been occupied as townsites, and there being no law under which they could be entered, in view of the act of May 2, 1890, Congress, by act of May 14, 1890, provided a board of trustees as a medium through which entries could be made; this was a special act, applicable only to a limited area of land, and the later act of March 3, 1891, recognizing and extending the jurisdiction of probate judges in townsite matters over other and different bodies of land, is perfectly consistent and harmonious with said special act, and the act of May 2, 1890. All three remain in full force and effect within the respective limits so clearly defined in said acts.

It must, therefore, be held that there has been no change or repeal of the acts of May 2, 1890, and May 14, 1890, so far as relates to townsite entries within the limits of the lands opened to settlement on April 22, 1889, and that the only manner in which townsites can be entered therein, is through the medium of a board of trustees.

Your decision is therefore affirmed.

GRAY *v.* WHITEHOUSE.

Motion for review of departmental decision of October 10, 1892, 15 L. D., 352, denied by Secretary Noble, February 1, 1893.

CONFIRMATION SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* BULLEN.

The pendency of an application to contest an entry at the date of the passage of the act of March 3, 1891, does not defeat confirmation of said entry for the benefit of a transferee.

A claim of prior Indian occupancy set up to defeat confirmation under the body of said section can not be entertained for such purpose, where the entry was not made in violation of any departmental regulation, and such claim is not asserted for a term of years, and then, not until after the passage of said confirmatory act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 1, 1893.

The land involved in this controversy is lots 1 and 2, Sec. 28, and lot 1, Sec. 29, T. 49, R. 13, Ashland, Wisconsin, land district.

Joseph A. Bullen made pre-emption cash entry of said tract, February 9, 1854, and on February 18, following, sold and transferred the same to one George L. Becker, who, on December 19, 1854, sold and transferred it to William W. Corcoran and others. I shall go into the history of the case only so far as it is necessary to present the question before me. The case has been before the department before. (Joseph A. Bullen, 8 L. D., 301.) By that decision it was determined that while the entry was under investigation by the government at the instance of the Hon. Secretary of War, the contests offered by John A. Bardon and Frank W. Gage should not be entertained, but my predecessor directed—

that you cause a special agent of the government to make thorough inquiry and examination into all the facts and take such steps to protect the public interests, as appear to be requisite and proper. The special agent should be directed to make full report to your office, in regard to the present value of the land, its situation and circumstances and all material facts.

On January 10, 1891, Frank Lemiux presented an "Indian allotment application," under the act of February 8, 1887 (24 Stat., 388), for lots 1 and 2 of said tract alleging residence thereon for "thirty years and more." It is shown by affidavits that Lemiux is a member of the Fond du Lac band of Chippewa Indians; that he settled upon said land in 1849 and has lived there ever since. His application was rejected because of "cash entry made by J. A. Bullen, February 9, 1854." Lemiux appealed.

On May 16, 1891, one of your special agents reported that he had been unable to find any evidence of fraud and from an examination of

the exhibits accompanying his report, I am satisfied as to the correctness of his conclusion. It is also shown by his report that the land in controversy is now a part of the city of Superior, Wisconsin, that it has been platted into lots and blocks, streets and alleys, and the lots been sold "to about 400 purchasers."

On July 3, 1891, the acting Secretary of War, in reply to your letter of May 21, 1891, advised you that after further examination of the case, his department "has no evidence or argument to submit in the premises, or objection to the issue of a patent in due course to the land in dispute."

On May 1, 1891, counsel "for estate of W. W. Corcoran *et al.* lot owners" in the city of Superior, filed a motion for the confirmation of the Bullen entry under the act of March 3, 1891.

By letter of September 22, 1891, you considered the case in all its features and decided that the entry of Bullen should be approved for patent in accordance with section 7, of said act. Both Lemiux and Bardon appealed; the former assigning as error your action in not considering his rights under his said application; error in some of your findings of fact, and finally in not ordering a hearing to determine whether Lemiux occupied the land prior to the initiation of Bullen's claim; while the latter in a number of specifications, alleges, substantially, that you erred in holding that the Bullen entry should be confirmed for patent under said act of March 3, 1891.

It is unnecessary to discuss many of the alleged errors raised by the appeals, for the reason that the Bullen entry is unquestionably confirmed by the act of March 3, 1891 (26 Stat., 1095). The seventh section of said act provides, among other things, that—

all entries made under the pre-emption, homestead, desert-land, or timber-culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona fide purchasers or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the land department of such sale or incumbrance.

Prior to the final entry by Bullen there were no adverse claims existing; it was sold prior to March, 1888, and after final entry for valuable consideration, and upon an investigation ordered by the government, no fraud upon the part of the purchaser has been found. Under these circumstances the entry of Bullen must be confirmed. (Witcher *v.* Conklin, 14 L. B., 349; United States *v.* Gilbert *et al.*, id. 651).

This being the fact, it was not error on your part to refuse to consider the alleged rights of either of the appellants. (Sheppard *v.* Ekdahl, 13 L. D., 537.)

It is insisted by counsel for Lemiux that his alleged prior occupancy of a part of said land should give him the right now to enter it under

the said act of February 3, 1887, *supra*. It will be observed that he comes here with an application to enter land that had passed to a cash entry about thirty-seven years before. The most that could be done under ordinary circumstances would be to allow him to contest the entry. But in view of the act of March 3, 1891, he would not be in any better condition to contest the entry than other persons. In other words he would have been required to establish his right to the land by a contest, but inasmuch as the entry is confirmed under the act of Congress a contest can not now be ordered.

The case of Tom and Louis *v.* McCarthy (13 L. D., 578), is cited as an authority by counsel for not allowing this entry. There is a wide distinction between the two cases. There McCarty made his homestead entry on the land occupied by the Indians after the issuance of the circular of October 26, 1887 (6 L. D., 341). By that circular local officers were directed not to permit entries upon lands occupied by Indian inhabitants. No such regulation existed when the entry of Bullen was made. Again, the Indians Tom and Louis, proceeded at once to assert their rights, while in the case at bar the Indian has rested for thirty-seven years, suffered an entry to be made; the land to be transferred to innocent purchasers and a thriving city to be located thereon years before he attempted to make any claim. His laches is great. I see no error in your judgment, it is therefore affirmed and you will pass the entry to patent, under the rule.

RAILROAD GRANT—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. *v.* PLUMB.

The possession of land, accompanied with valuable improvements thereon, at date of definite location, by one duly qualified to assert a right thereto under the settlement laws, operates to defeat the grant, and the fact that the claim subsequently set up by such occupant is not under said laws, in no manner affects his rights in the premises.

Secretary Noble to the Commissioner of the General Land Office, February 1, 1893.

I have considered the appeal by the Northern Pacific Railroad Company, from your decision of November 6, 1891, rejecting its claim to the NW. ¼ of the NW. ¼, Sec. 17, T. 2 S., R. 5 E., Bozeman land district, Montana, included in the desert land entry No. 159 by Byron Plumb, made May 4, 1883, upon which he made proof and final certificate No. 71 issued July 6, 1886.

This tract is within the primary limits of the grant for said company as shown by the map of definite location filed July 6, 1882, and was also included within the limits of the withdrawal of February 21, 1872, upon the filing of the map of general route.

It was listed by the company on account of its grant, but such list was rejected by the local officers, December 21, 1886,

for the reason that said tract of land is covered with declaratory statement No. 474, made by William H. Caughman, March 26, 1869, alleging settlement March 1, 1869, further covered with desert land entry No. 159 made by Byron Plumb May 4, 1883, who made final desert land entry No. 71 July 6, 1886.

Upon appeal said list and the entry by Plumb were considered together by your letter of November 19, 1890, in which it was held that the unexpired pre-emption filings of record at the date of the filing of the map of general route served to except the land in question from the effect of the withdrawal made thereon, but, as there was nothing then before you to show the status of the land at the date of the definite location of the road, a hearing was ordered for that purpose.

The showing made at that hearing not being deemed sufficient, a further hearing was ordered. Upon this testimony you held that the land was excepted from the grant, from which holding the company appeals.

The only question raised by the appeal is as to whether the occupancy shown by Plumb was sufficient to defeat the grant.

It appears that in 1881 Plumb took possession of the tract in question, together with an adjoining forty acre tract, upon which he resided. In the spring of 1882 he broke the entire tract in question and enclosed it with a fence, and has since had possession of and improved the land. He had never exercised the pre-emption right, and was therefore duly qualified to claim the land under his settlement right. In 1886 he contracted to purchase the adjoining forty acres, upon which he had resided, from the company, and at the hearing it was sought to show that he also claimed the land in question under the grant at the date of the definite location of the road, but the testimony will not warrant such a finding.

Being in possession of the land in question at the date of the definite location of the road with valuable improvements thereon, and duly qualified to assert a right thereto under the settlement laws, he had such a right to the land as served to defeat the grant, and the fact that the claim subsequently asserted by him was under a different law from those providing for settlement can in no wise affect his rights in the premises.

Being excepted from the grant by reason of his settlement, Plumb was at liberty to seek title from the government under any law under which such lands might be taken.

The attempted listing by the company will therefore stand rejected, and your decision is accordingly affirmed.

HITTLE *v.* RHEA.

Motion for rehearing in the case decided by the Department August 25, 1892, 15 L. D., 223, denied by Secretary Noble, February 1, 1893.

OKLAHOMA TOWNSITE—SECTION 37, ACT OF MARCH 3, 1891.

WATONGA TOWNSITE.

In view of the provisions contained in the territorial act, an entry of a townsite in Oklahoma under section 37, act of March 3, 1891, should not be allowed in the absence of due showing that a majority of the lot occupants, or owners, desire such action to be taken.

An entry however, allowed without such showing may stand, where it subsequently appears that no resident of the town objects to said entry, but that the action taken meets with the approval of the lot owners and residents.

The personal qualifications, as an entryman, of one who makes a townsite entry under said act can not be taken into consideration, as he acts only as the agent of the parties entitled to perfect their claims to lots within said townsite.

The allegation that some of the lot claimants entered the Territory prior to the time fixed therefor, and hence are not entitled to perfect their claims, should not be considered in connection with a townsite entry under said section, but left for subsequent consideration in the adjustment of individual claims.

Secretary Noble to the Commissioner of the General Land Office, February 1, 1893.

I have considered the case of Amos A. Ewing, county judge of county "C," Oklahoma, who made entry for the S. ½ of Sec. 19, T. 16 N., R. 11 W., as the townsite of Watonga, in trust for the several use and benefit of the occupants thereof.

By order of the head of this Department, dated March 25, 1892, said tract of land was reserved as the county seat of said county "C," under the provisions of section 37 of the act of March 3, 1891, (26 Stat., 989).

Amos A. Ewing, as probate judge of the county, gave notice of his intention to submit final proof and make cash entry of said land as a townsite, on May 26, 1892, and appeared on that day submitted proof, and final entry was allowed.

At the same time, William G. Johnson appeared and filed a protest against the allowance of an entry by Ewing, alleging various grounds of objection, among them the following:

1st. Said Ewing, as probate judge, aforesaid, has no right or authority of law to make said proof of said township in trust for said occupants thereof.

2d. There never was a request made by a majority of the occupants by petition, or otherwise, asking said Ewing, as said judge, to prove up said tract as a townsite for the occupants thereof in trust, as is by law required.

4th. That said A. A. Ewing is, and has been, speculating in lots in said townsite, and has bought an adverse right to that of this protestant for, and to lot No. 15 in block No. 48, in said town, and is a "sooner," and did enter the C. and A. country prior to twelve o'clock, noon, of April 19, 1892, in violation of the President's proclamation, of date April 12, 1892, opening said C. and A. country to settlement, and has personally appointed a townsite commission for said town, to wit, one, ——— Snodgrass, one Ross and one ——— ———, who are and have been assuming the duties of such townsite commission by surveying said townsite, all of which acts and things are wrong, unjust and unlawful. That many persons have made claim for lots in said townsite through said probate judge, who are "sooners" and speculators, and some of whom said probate judge knew to have no right to any por-

tion of said townsite, and some of whom are speculating in town lots therein, to the knowledge of said probate judge, who are friends and henchmen of said probate judge.

5th. That said protestant has laid claim to, and improved, lot 4, block 20, and lot 15, block 48, of said townsite.

6th. That it is the desire and wish of a great majority of the bona fide occupants of said townsite to prove up the same through their corporate authority, when so incorporated, and not that said probate judge shall prove up said tract.

All of which facts protestant is ready and willing to prove at any time a hearing may be ordered so as to give protestant two days' notice thereof, and protestant asks for an opportunity to prove said allegations.

These charges were corroborated by W. S. Pratt.

On the filing of the protest, which was before the final proof was submitted, Ewing moved to dismiss the protest, on the ground that, "the objections are not well taken, and that there are not sufficient grounds to order a hearing, or to allow attorney for protestant the right to cross-examine the witnesses produced in said proof."

The local officers sustained this motion and dismissed the protest, and refused to allow the protestant to cross-examine the witnesses in support of the application to make entry.

Johnson appealed, but you sustained this action, and the case is before me on appeal from your decision.

The first important question to be determined is this: if we admit that the charges can be sustained, are they sufficient to defeat the entry?

Johnson asserts that Ewing had no right to make the entry in question.

Section 37, of the act of March 3, 1891, (26 Stat., 989–1026) provides:

That as soon as the county lines are designated by the Secretary he shall reserve not to exceed one-half section of land in each county, to be located near the center of said county, for county seat purposes, to be entered under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes.

Section 2387, Revised Statutes is as follows:

Whenever any portion of the public lands have been or may be settled upon and occupied as a townsite, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

Section 1 of Chapter 85 of the Statutes of Oklahoma (page 1170) is as follows:

Whenever any portion of the public lands of the United States have been or shall be settled upon and occupied as a townsite, and therefore not subject to private entry under the agricultural pre-emption laws, it shall be lawful and the duty when-

ever requested by a majority of the occupants or owners of the lots within the limits of the town, for the corporate authorities of the town if incorporated, and if not incorporated then for the judge of the probate court of the county in which such town may be situated, to enter at the proper land office the land so settled upon and occupied, and hold the same in trust for the several use and benefit of the occupants thereof and those holding by deed or otherwise, according to their respective interests.

The other sections of the Oklahoma act point out the manner in which the trust shall be executed, provide for the settlement of conflicting claims by the courts of the Territory, etc.

It will be observed that the federal statute provides that "the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated."

The territorial statute provides, in effect, that before an entry shall be made by the probate judge or the corporate authorities, he or they, as the case may be, shall be requested to take such action by a majority of the occupants or owners of the lots within the limits of the town, in other words, the territorial act clearly contemplates that before an entry is made a majority of the citizens, or those interested, shall indicate their desire that such action shall be taken. The entry is to be made for the benefit of the occupants of the town, and they have a right to elect by whom the entry shall be made in accordance with the statute. There is no conflict in the territorial act with the spirit and intent of the federal statute, the former simply provides the machinery for carrying the latter into effect.

In the proof submitted in support of the entry in question, there is nothing to show that a majority, or any number of the occupants of the town, requested the probate judge to make the entry.

It appears, however, that since said entry was allowed, a large number of persons have filed affidavits, alleging that they are occupants and residents of Watonga and vicinity, and that they desire the entry to be made by the probate judge for the use and benefit of the occupants of the town. One affidavit to this effect is signed by sixty-six persons, and in addition there are numerous single affidavits filed to the same effect. Among the parties making these affidavits are the register of deeds for the county, three county commissioners, the county clerk, the county sheriff and others.

It also appears that the protestant Johnson is not, nor never has been, a resident of the town of Watonga, and there appears to be no resident of said town who is objecting to the entry made by the probate judge.

It is alleged by Johnson that Ewing is a "sooner," that he entered within the limits of the lands opened to settlement prior to the time fixed by the President in his proclamation. There is no evidence to sustain this charge, but if we admit that it is true, the fact would not dis-

qualify him from making the townsite entry, as the agent only, of those parties who are, under the law, entitled to perfect their claims to the lots within the townsite. In making the entry, he acts as the agent merely of others, and his personal qualifications or disqualifications as an entryman of public lands are not to be taken into consideration.

It is also alleged that many of the persons who claim lots are disqualified from perfecting title to same by reason of entering the Territory prior to the time fixed by the President in his proclamation.

This is a question that this Department cannot consider in connection with this entry. If parties are disqualified to make entries, it is but reasonable to assume that their claims will be contested, in which event, the case will go before the proper courts of the Territory for determination, and it must be assumed that the officers of the courts, who are also federal officers, will properly perform their duty, and if it is found that these claimants are disqualified by reason of violating the law, and the terms of the President's Proclamation, that these claims will be rejected, as they would be if they were before this Department for consideration.

While there have been irregularities in the manner of making the entry under consideration, as heretofore pointed out, I do not think they justify the rejection of the proof, and the cancellation of the entry, in view of the fact that so far as the record shows, it is the unanimous desire of the residents of the town that the entry should be allowed to stand. If the protestant Johnson had any rights in the premises, the law clearly pointed out the way in which he could assert the same in the courts of the Territory.

For the reasons given, I do not think the local officers erred in dismissing the protest.

Your action is therefore affirmed.

In this connection, however, I desire to say, that you will at once instruct the local officers in Oklahoma, in future not to allow an entry under section 2387, R. S., until they are satisfied that a majority of the occupants or owners of the lots within the town desire that such action be taken, and the same instructions should be given to local officers in all states and territories, where the provisions of the state or territorial law in that respect, are similar to those of Oklahoma

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PRE-EMPTION FILING—SECTION 2260 R. S.

CALLSEN *v.* BROWN.

A settler who removes from land of his own to another tract and makes homestead entry thereof, may subsequently relinquish such entry and make pre-emption filing for the same land, where such action is taken in good faith and not for the purpose of evading the provisions of section 2260 R. S.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 1, 1893.

I have considered the case of Theodore Callsen *v.* James Brown, on appeal by the former, from your decision of February 24, 1892, dismissing his protest against the final proof of the latter, on his pre-emption filing for the NW. ¼, Sec. 27, T. 8 N., R. 7 W., Oregon City land district, Oregon.

It appears that Brown made homestead entry for this land on August 4, 1885, which was held for cancellation by your predecessor, on April 15, 1887. On April 9, 1888, he filed a relinquishment in the local office, and secured the cancellation of the entry, and immediately filed a pre-emption declaratory statement therefor.

On February 23, 1889, Callsen made homestead entry for the tract. Brown gave notice of his intention to offer final proof on November 26, 1889; Callsen appeared and protested this proof, and cross-examined Brown and his witnesses, but offered no testimony. The proof was accepted by the local officers, and Callsen appealed from their judgment. Upon consideration of the case you affirmed their ruling, allowing Callsen's entry, however, to stand subject to the superior rights of Brown. Thereupon, Callsen appealed the case to the Department.

The testimony clearly shows that in 1885, when Brown set up a claim to the tract in dispute, and at the time he submitted his final proof, he was the owner of another tract of land just how much is not shown, which he had rented to one Twilight in 1885. After renting the land, he was for a short time in the town of Knappa, before he went on the land in controversy, but he made his home on his farm, and had no other home.

It is not shown how it occurred that the homestead entry was held for cancellation; there does not appear to have been any contest, nor is it disclosed that any action was taken, except that it was "held for cancellation," and a hearing was ordered.

It is claimed by counsel for Callsen, that while Brown could move from land of his own, and make homestead entry, that when he relinquished the homestead, he relinquished all rights acquired by it, and that it was as if it had never existed, and thus cutting it out of the record, would leave him as if he had filed the pre-emption at first. I can readily see that a person should not be allowed to make a pre-emption filing when a homestead entry was fraudulently made, simply to work out a pretended change of residence, that is, where the homestead entry was made only as a means to reach a pre-emption filing. Time would not remove such a fraud. If primarily the entry was made to evade the inhibition of the second clause of section 2260, R. S., it would not matter whether it stood a year or a day, it would remain a fraud and should not be allowed to defeat the statute. Fraud is never presumed, however; it must be proven, and in the case at bar, the protestant has

failed to show by even circumstances that Brown at the time he made his homestead entry, had any thought of relinquishing it, or that it was made in bad faith, and to evade the statute. If he settled on this land in good faith, to make a home there, he, in law as well as fact, changed his residence from the former place, and to all intents and purposes became a resident on this land. His removal "from his residence on his own land" would in fact as well as in law, be complete.

Then when the homestead entry was canceled, he made his filing, but he did not then live on his own land, nor have to remove from it. The fact that the entry was held for cancellation when he filed his relinquishment, is a circumstance in his favor, as it tends to show that the relinquishment was induced by the action of your office, rather than being his original intention.

He had made considerable improvement on the land. He had a house of sawed lumber, with door and three windows, barn sixteen by sixteen feet, second house (as an addition), some land "slashed," some cleared and fenced; total value estimated at $500 or $600, and this improvement had been made, and his pre-emption filing was on record, when Callsen went upon the land. There is no evidence that Callsen has done anything on the land, so the equity in the case is with Brown.

Having fully considered the case, I do not find that you erred in finding in favor of Brown, your decision is therefore affirmed.

PRACTICE—REVIEW—RULE 78.

WILCOX *v.* BIBLE ET AL.

The provisions of Rule 78 of Practice requiring a motion for review to be accompanied by an affidavit that such motion is made in good faith and not for the purpose of delay, will be enforced with a reasonable degree of strictness when invoked by the adverse party.

Secretary Noble to the Commissioner of the General Land Office, February 3, 1893.

The attorneys for Nelson Wilcox have filed a motion for a review of the departmental decision dated August 26, 1892, in the case of said Wilcox *v.* Benton Bible and James Vandeventer *et al.*, transferees, involving the S. ½ and the NW. ¼ of the SW. ¼ and the SW. ¼ of the SE. ¼ of Sec. 21, T. 33 N., R. 48 W., 6th p. m., Chadron, Nebraska.

The motion is as follows:

Comes now the contestant and moves the Honorable Secretary for a review of the record in the above entitled action because the late order made therein is contrary to law, as applied to the evidence in this case and because the findings are not supported by the facts.

SPRAGUE AND FISHER,
Attorneys for contestant.

On December 2, 1892, Burdett, Thompson and Law, attorneys for the claimant, filed a motion to dismiss said motion for review as follows:

Now comes the claimant aforesaid, by Burdett, Thompson and Law, his attorneys, who appear specially for that purpose, and move and ask the Honorable Secretary of the Interior to dismiss and deny said motion for review and reconsideration, upon the following grounds:—

1. Rule 78 of the Rules of Practice declares as follows:

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

No such affidavit accompanied the motion in question.

We, therefore, insist that said motion for review and reconsideration be denied and dismissed.

2. An allegation that a decision is contrary to the law or contrary to the evidence, is not sufficient to sustain a motion for review.

Such is the allegation of the motion in question.

Rule 78 of the Rules of Practice requires that motions for rehearing and review must be accompanied by an affidavit showing that the motion is made in good faith and not for the purpose of delay. There is no such affidavit filed in connection with this motion. By the motion to dismiss the Department is called upon by one of the parties litigant to enforce one of its plain, well understood rules of practice. Under such circumstances the rule will be enforced within a reasonable degree of strictness. The motion for review is therefore dismissed.

PRACTICE—MOTION TO DISMISS—REHEARING.

SNIDER *v.* WRIGHT.

Where the contestant, in proceedings before a commissioner under Rule 35 of Practice, submits the testimony of his witnesses, and the defendant files a motion to dismiss the contest for want of sufficient evidence, and submits no testimony except his own, he is not thereafter entitled to a further hearing for the purpose of submitting additional testimony, in the event that his motion to dismiss is overruled by the local office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 3, 1893.

Louis T. Wright has appealed from your decision of February 8, 1892, holding for cancellation his homestead entry for the SE. ¼ of Sec. 13, T. 1 N., R. 43, Denver land district, Colorado.

The testimony was taken, under rule 35, before W. R. Hays, notary public, at Wray, Colorado.

After the contestant had submitted his testimony it appears of record that counsel for the defendant filed the following motion:

That the register and receiver dismiss this contest, for the reason that the witnesses are all relatives of the contestant, and the evidence is not sufficient for the cancellation of the entry, and the contest is speculative, and the attorney has failed

to find (file?) any power of attorney or authority to try said case as by the Rules of Practice required—the attorney of record in said case not being present or participating in the trial.

To this motion counsel for the contestant objected.

Counsel for the defendant, evidently expecting that when the record of proceedings was transmitted by the notary public to the local officers, the latter would sustain his motion, took the testimony of the defendant only, but when the record reached the register and receiver they overruled the motion to dismiss, examined the testimony taken, and found that the defendant had not resided upon his claim in good faith as required by the homestead law.

He then applied to the local officers for a rehearing, on the ground that on the trial he stood ready to offer the testimony of witnesses; but his attorney feeling satisfied that the testimony offered by the contestant was not sufficient to warrant the contest being sustained, he advised claimant not to offer the testimony of witnesses, thereby leaving the testimony of claimant alone and unsupported and claimant further alleges under oath that he could procure certain witnesses named, who would support his own testimony produced at the former hearing.

The register and receiver held that, under the circumstances above set forth, the defendant had waived all rights, and refused to grant a rehearing. Thereupon the defendant appealed to your office; and your decision of February 18, 1892, affirmed that of the local officers.

The first question for consideration is, whether by taking the testimony of the defendant, his counsel practically waived his motion to dismiss.

In my opinion, under the circumstances above set forth, the defendant must be considered as having had his day in court.

The present counsel for defendant expresses his opinion that the former attorney was in error, in this respect, but contends that the defendant ought now to be allowed to introduce the testimony of his witnesses, "in order that the Department may have all the facts in the case to justly determine the issues involved." But the fact that the defendant's attorney at the hearing did not conduct the case as skillfully as it might have been conducted affords no ground for a rehearing (Cobby *v.* Fox, on review, 10 L. D., 483). "A new trial will not be granted because, through the inadvertence of his counsel, a party has not had the advantage of the whole evidence of his case." (Myer's Federal Decisions, Vol. 26, Sec. 2521).

The testimony of the entryman has been taken; and it may safely be presumed, unless a contrary showing is made, that no witness knows more about the facts regarding his residence than he, or would state them more fully to his advantage. Hence their evidence would be merely cumulative, and as such would furnish no grounds for a rehearing. (See Caledonia Mining Co. *v.* Rowen, on review, 2 L. D., 719, and many cases since.)

Moreover, a rehearing will not be granted where the applicant, relying upon the erroneous advice of counsel upon a purely technical ground, failed to submit testimony when the case came up for trial before the local office (Dixon *v.* Sutherland, 7 L. D., 312).

The case must be decided on the testimony heretofore taken.

From the entryman's own testimony it appears that from the date of entry, April 5, 1887, for about eleven months, he resided on the land; he paid one Murdock for breaking about eight acres of the tract; he then bought an interest in a stock of merchandise at Laird, a village within about two miles of the land, and thereafter remained at Laird the most of the time; a few household goods were left at the house on the claim, but he boarded and slept at Laird; between March, 1888, and the hearing, October 31, 1889, he returned to the claim occasionally; during the ten months of 1889 preceding the hearing he had "been there about thirty times"—he thinks; "slept there about twenty nights, and was there at other times looking after the improvements;" from April, 1888, until the hearing, he thinks he ate about twenty meals on the claim—six or seven of these having been eaten during the first ten months of 1889, prior to the hearing; he kept some provisions in the house, but the bread he took there with him.

I concur in the conclusion arrived at by the local officers and your office, that the entryman did not maintain residence on the land from April, 1888, until October 31, 1889 (the date of hearing); and therefore affirm your decision.

SWAMP GRANT—ADJUSTMENT—FIELD NOTES OF SURVEY.

STATE OF ARKANSAS.

In the adjustment of the swamp grant on field notes of survey, the report of a State locating agent can not be accepted as showing the swampy character of land where the field notes fail to clearly show such fact, nor can a certificate of the surveyor general, based on such report be considered in determining the character of the land.

Where the survey is made prior to the grant and the field notes do not clearly show the land to be of the character granted, the submission of a claim by the State based on such field notes, will not preclude a hearing, on due showing made, to ascertain the true character of the land.

Secretary Noble to the Commissioner of the General Land Office, February 3, 1893.

On October 20, 1890, Thomas G. Riley, agent for the State of Arkansas, filed a list of eight hundred and seventy-three tracts of alleged swamp lands, being a compilation from the Champagnolle district list, dated August 22, 1857, and from Washington district list, dated November 6, 1858, now in the Camden, Arkansas, land district.

Having examined the field notes, on file in your office, you on February 16, 1892, decided:

1. That said tracts to the number of fifty-eight are found to be swamp land, within the meaning of the act of September 28, 1850.

2. That tracts to the number of one hundred and thirty (described in the decision) have been found to be non-swampy within the meaning of the act.

3. Tracts to the number of four hundred and forty are found to be doubtful in character.

4. The claim of the State to two hundred and forty-two tracts has heretofore been rejected; and

5. Three tracts have been patented to the State.

You held for rejection the claim of the State to the one hundred and thirty tracts found from the field notes to be non-swampy in character, and Mr. Riley, as agent of the State, has appealed from that part of the decision, and insists that the field notes of survey relating to the lands described in said list show *conclusively* their swampy character. Error is alleged:

1. In not finding said tracts to have been of swampy character at the date of the grant.

2. In not holding the certificate of the United States surveyor-general for the district of Arkansas, dated November 6, 1858, covering these tracts, to be conclusive of their character as swamp lands, said certificate showing said tracts to have been found of swampy character.

The certificate referred to in the second specification of error reads as follows:

I, Henry M. Rector, surveyor-general of the State of Arkansas, do hereby certify that the foregoing list is a correct transcript from the original lists of swamp land selections, made by the State locating agent, and filed in this office by the governor of the State of Arkansas on the 7th April, May 10th, June 26th, July 3d, July 26th, and September 8th, 1858. Of which every tract has been carefully examined by the plats and field notes on file in this office, and where the field notes do not positively indicate the character of the lands, the report of the locating agent is admitted.

From these evidences I consider the lands in the above list marked E. No. 6 to be of the character contemplated by the act of Congress of 28th September, 1850.

If the field notes of the public survey do not conclusively show the swampy character of the land embraced in the one hundred and thirty tracts, it is clear that the mere report of the State locating agent can not be accepted for that purpose; and the certificates of the surveyor-general in the above form can have no weight in the proper determination of the character of the land.

The appeal is accompanied by extracts from the field notes, with diagrams, prepared by your office. Opposite each one of the one hundred and thirty rejected tracts is an extract from the field notes, showing the character of the land. Some of these extracts read as follows: "Part rolling and second-rate, and part pine flats;" "Pine and oak plats, unfit for cultivation;" "Land level and second-rate;" "Land level and rich;" "Land third-rate;" "Land poor pine barrens," etc.

Basing your decision as to the character of the land upon the description given in the field notes, you held the one hundred and thirty tracts to be non-swampy within the meaning of the swamp land act, and, accordingly, rejected the claim of the State.

It appears that the State agrees to accept as final and conclusive, in determining the character of such lands, the original field notes of the official survey, and the resurvey of such lands by the United States in all cases where such field notes show *conclusively* the naturally wet, swampy, or overflowed, or the naturally non-wet, non-swampy, or non-overflowed character of the lands. (See departmental decision, February 10, 1890, miscellaneous press copy-book, No. 192, page 52.)

In pursuance of this agreement and mode of adjustment, the State filed a list, including the said one hundred and thirty tracts, assuming by that act that the field notes would give sufficient evidence of the swampy character of the several tracts to justify their certification to the State.

On a careful examination of the extracts from the field notes, I am satisfied they do not show such tracts, or any of them, to be either swamp lands, or so wet as to be rendered thereby unfit for cultivation.

I think it may be fairly determined from many of the descriptions that several of the tracts are conclusively shown to be dry, as may be instanced from such descriptions as these—viz: "Land rolling, third-rate;" "Land rolling;" "Land hilly," etc.

It may be admitted that the field notes in all cases do not *conclusively* show the land to be non-swampy in character; nor is such showing necessary to justify rejecting the claim of the State.

The burden of proof is upon the State when the field notes of survey do not *prima facie* show the land to be of the character granted. Nita *v.* State of Wisconsin, 9 L. D., 385.

And if there is a doubt whether lands claimed by the States pass under the grant, the decision must be against the grantee. United States *v.* Gratiot, 14 Peters, 526; Irvine *v.* Marshall, 20 How., 558; State of Louisiana, 5 L. D., 514.

The act of 1850 granted the swamp and overflowed lands to the several States therein mentioned; the ascertainment of the specific tracts granted is a question of fact to be settled by the Secretary of the Interior. The State having submitted the said list, upon the evidence contained in the field notes of the official survey, and such evidence not showing the tracts to be of the character of land contemplated by the act, the claim of the State, upon the showing made, must be rejected.

It appears that the several tracts were surveyed before the passage of the swamp land act. The field notes were therefore made without any reference to said act. It may be possible that some of the rejected tracts are really of a swampy character and the field notes fail to so describe them. In such case, the State should not be estopped from establishing their true character, because it has once submitted its claim

upon what was assumed to be a conclusive showing in the official field notes. But to entitle the State to such a hearing, corroborated affidavits as a basis therefor should be filed, showing the tracts, herein rejected, or any one of them, to have been of the character contemplated in the grant.

The decision appealed from is affirmed.

RAILROAD GRANT—SETTLEMENT RIGHT.

NEW ORLEANS PACIFIC RY. CO. *v.* DAIGLE.

A hearing will not be ordered as between a railroad company and a settler to determine the facts as to an alleged settlement right, where such settler has submitted final proof that establishes a *prima facie* case in support of his claim, and no showing to the contrary is made by the company.

Secretary Noble to the Commissioner of the General Land Office, February 3, 1893.

The attorney for the New Orleans Pacific Railway Company has filed a motion for review of departmental decision of April 16, 1892, in the case of said company *v.* Theogene Daigle, involving the NE. ¼ of Sec. 5 T. 8 S., R. 3 E., La. Mer., New Orleans land district.

Said decision states simply that the facts in this case are similar in all important particulars to those in the case of said Company *v.* Charlot *et al.* (14 L. D., 365), and that for the reasons given in the decision in that case, your decision adverse to railroad company was affirmed. The error assigned as a basis for this motion is, in holding that the facts bring this case within the decision in the Charlot case. The difference in the two cases, it is claimed, lies in the fact that there has been no hearing in this case to establish the truth of the allegations as to the date of Daigle's settlement.

It seems this land is within the indemnity limits of that portion of the grant to the New Orleans Baton Rouge and Vicksburg Railroad Company, which was confirmed to the New Orleans Pacific Railway Company by act of February 8, 1887 (24 Stat., 391), and was selected by said company December 28, 1883. This tract was in the list of lands certified to the State of Louisiana in 1861, under the act of June 3, 1856 (11 Stat., 18). On May 7, 1885, Daigle applied to make homestead entry for said tract, and with such application filed his affidavit, alleging that he settled upon said tract January 4, 1869, and was still residing thereon. It was held in your office that the outstanding title of the State, by virtue of the certification of 1861, excepted said tract from the grant of 1887, to the New Orleans Pacific Railway Company, and that, therefore, Daigle's claim to the land should be allowed without putting him to the expense and trouble of a hearing to establish the truth of

allegations as to settlement and residence. The effect of the forfeiting act of July 14, 1870, (16 Stat., 370), upon lands theretofore certified to the State, as this tract was, was considered in the case of New Orleans Pacific Railway Company (14 L. D., 321), and that of said company *v.* Sancier (Id., 328), and it was then held that title to such land was reinvested in the United States by said act, and under the rule laid down there, this tract must be held to have been subject to selection at the date of the company's application in 1883, unless it came within some one of the exceptions specified in the act of February 8, 1887. This case differs, however, from those last referred to because here there are allegations made, which, if properly established, would show that this tract was excepted from said grant to the New Orleans Pacific Railway Company, and therefore the contention that this case is governed by those, cannot be sustained. There is force in the allegation, made in this motion for review, that this case is not controlled by the decision in the Charlot case, upon which the departmental decision complained of is based. In that case, a hearing had taken place, and the allegations as to settlement and residence had been duly proven, while here no such action has been had. This difference in the two cases seems to have been overlooked when the decision complained of was rendered.

The further fact appears in this case, however, that, on March 12, 1892, Daigle, after due notice for that purpose, submitted final proof in support of his entry, showing settlement on said land in 1869, continuous residence since that time, and improvements of the value of $1500, which proof was approved, and final certificate issued May 17, 1892. Notwithstanding this condition of the record, the motion for review, filed May 12, 1892, contains no denial of the claim of settlement made by Daigle, nor has said company at any time asserted that he was not a settler on said land, as alleged by him.

It would seem unnecessary to order a hearing to give the company a chance to disprove Daigle's allegations, when it has not asserted its ability to do so, but has at all times carefully refrained from making counter allegations. As the record now stands, there is a strong prima facie showing in support of Daigle's claim, and until that showing shall be attacked as untrue by the adverse claimant, no hearing should be had. For the reasons herein stated, the motion under consideration must be, and is hereby, denied.

CONTEST—DECISION OF REGISTER AND RECEIVER.

MENZEL *v.* VALEAR.

The register and receiver may not substitute their own knowledge of the facts in a case, derived from a personal inspection of the premises, for the evidence submitted by the parties, but should use the information thus acquired to better understand and apply the testimony of the witnesses.

The judgment of the register and receiver as to the facts of the case is entitled to especial consideration, and the fact that they personally inspect the premises, prior to reaching a conclusion, adds to the value of their decision.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 4, 1893.

On August 3, 1881, Tobias Valear made timber culture entry (No. 2134) of the SE. ¼ of Sec. 18, T. 151 N., R. 47 W., at Crookston, Minnesota.

On July 27, 1889, Amelia Menzel filed an affidavit of contest against said entry, alleging—

That contest was initiated against said entry by this affiant on April 22, 1886. That contest was heard by said office July 23, 1886, and is now pending before the Hon. Secretary of the Interior. That since said April 22, 1886, said Tobias Valear has failed and neglected to plant or cultivate or cause to be planted or cultivated more than one hundred trees, tree seeds, or cuttings on said tract, and that there are now standing and growing on said tract not more than 150 trees, the cultivation of which has been wholly and entirely neglected from April 22, 1886, and that at least one half of said trees are now dead or in a dying condition.

It appears that the first affidavit of contest alleged failure on the part of the claimant to plant on said land trees, seeds or cuttings, as by law required, and that there were none on said tract at the date of making said affidavit. After a hearing upon those allegations the local officers found in favor of the claimant, and recommended the dismissal of the contest. On appeal you affirmed their action by letter of August 9, 1888. On appeal to this Department your judgment was affirmed by decision of January 30, 1890 (unreported), in which it was held that the claimant had complied with the law, and acted in good faith, and said contest was dismissed.

Inasmuch as the present contest affidavit was filed before the final determination of the first contest, the local officers did not issue notice until February 18, 1890, in which they ordered a hearing for April 24, 1890, at the local office, when the parties appeared and submitted testimony.

On May 26, 1890, the register and receiver held that the entry should be cancelled. On appeal you reversed their judgment, by letter of February 9, 1892, and dismissed the contest. An appeal now brings the case again to this Department.

The departmental decision of January 30, 1890, covered the time from the date of the entry "up to the close of the hearing in July, 1886," or nearly the whole of the first five years of the entry. The second

contest affidavit, filed July 27, 1889, covers the three years immediately following those covered by the first contest, or the sixth, seventh, and eighth years of the entry.

The evidence in the case is very conflicting. If that submitted by the contestant is true, the land is overrun with grass and weeds, showing a lack of cultivation, and far less than the required number of trees. If the testimony given on behalf of the claimant is true, he has substantially complied with the law, although his witnesses admit that the tree patch is grassy and weedy to some extent.

Under these circumstances the contestant made a motion that the register and receiver "personally examine the tract in dispute at as early a date as is convenient for them so to do, with a view of determining the real condition thereof." This motion was subsequently, as stated by those officers in their joint opinion, "assented to by the attorney for the claimant."

Under this agreement the local officers, after the evidence was submitted, made a personal examination of the land, and "found the condition of the tract about as set forth in the testimony for the contestant." They state the conclusion at which they arrived as follows: "If we considered the testimony on the part of the claimant true, we should render our decision in his favor, the preponderance of evidence being so; but we do not, and therefore recommend that T. C. No. 2134, be canceled."

The evidence in the case was taken before the local officers, who saw the demeanor of the witnesses in giving their testimony. Their testimony as to the condition of the land was so conflicting and irreconcilable, that both parties agreed that the local officers should personally inspect the land "with a view of determining the real condition thereof."

While from an inspection of this character the register and receiver would know the facts, yet they may not substitute their own views and judgment for the evidence offered upon the trial. They may, however, call their examination and observation of the premises to their aid in determining the credibility of the witnesses; who is most worthy of credit and to enable them to better understand and apply the evidence.

The examination of the premises by the register and receiver at the request of the litigants should be treated as and have the same weight as, the viewing of the premises by a jury had the case been upon trial before one. While there is authority that their view of the premises may be taken as evidence (Nelson and wife *v.* Chicago, Milwaukee and Northwestern Railway Company, 48 Wisconsin, 516), yet, I think it is pretty well settled that the jury who view the premises shall only use the information which they acquire thereby to better understand and comprehend the testimony of the witnesses and enable them more intelligently to apply it to the issues in the case.

Close *v.* Samn, 27 Ia., 503;

Davis *v.* Hudson, 29 Minn., 41;
Wright *v.* Carpenter, 49 Cal., 609.

Applying this rule to this case upon the conflicting evidence found in the record, I think the judgment of the register and receiver is entitled to special consideration, and their personal view of the premises should count as of real value. I am satisfied under the circumstances of this case, that their decision should be followed.

Kelly *v.* Halvorson, 6 L. D., 225;
Morfey *v.* Barrows, 4 L. D., 135.

Your decision is therefore reversed.

PRACTICE—EVIDENCE—DEPOSITION.

McCOY *v.* STOCKING.

The local office may properly refuse to issue a commission to take depositions, where the applicant does not file the requisite affidavit as the basis for such action.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 4, 1893.

I have considered the case of William T. McCoy *v.* Albert M. Stocking on the appeal of the latter from your judgment of January 26, 1892, affirming the finding of the register and receiver, and holding for cancellation his timber culture entry No. 4712 for the SW. ¼ of Sec. 22, T. 110 N., R. 61 W., Huron, South Dakota.

The entry in question was made June 8, 1880, and on June 17, 1889, the contest was initiated by McCoy. Service of notice was made on November 1, 1889. On December 3, attorney for the claimant gave notice to contestant that he would apply, after the expiration of ten days, for an order to take the claimant's deposition at his residence in Cleveland, Ohio, and that of Charles D. Crouch, at Pierre, South Dakota. On the 16th day of December a commission was issued to take the deposition of the former.

The 23rd day of December following was designated as the day of trial, and on that day contestant and his attorney appeared with witnesses, and contestee appeared by his attorney, and witnesses were introduced and examined in behalf of both parties. At the conclusion of the trial, the testimony of claimant not having arrived, the attorneys for both parties stipulated in writing that the case should be held open for thirty days, in order that his evidence might be received. At this time the attorney for claimant moved that a commission issue to take the deposition of Charles D. Crouch. The motion was resisted by contestant, for the reason that the claimant had had ample time within which to file an application to take the deposition of said Crouch, and his objection was sustained by the register and receiver, and the commission was not issued. The deposition of claimant arrived within the

thirty days, and the register and receiver, after considering the evidence, found against the entry, and recommended its cancellation.

The case was appealed to you, and affirmed as aforesaid and the entry held for cancellation. Contestee has now appealed from your judgment to the Department, claiming that it "is contrary to the evidence submitted in this case," and is "contrary to the law applicable to this case;" and that your erred

in sustaining the rulings of the local land office, wherein and whereby, after an extension of time for thirty days had been given and the case held open for the receipt of the deposition of the claimant, for that length of time, the local officers refused to allow the claimant to procure the testimony of a very important and material witness by the name of Crouch, thereby preventing a full and fair investigation of all the evidence in this case.

Depositions under rule 23, Rules of Practice (4 L. D., 37), may be taken and used in the local land office, but when a party desires to have a deposition taken for any of the causes named under said rule, he must make affidavit before the register and receiver, setting forth one or more of said causes, and that the testimony of the witness is material. He must file the interrogatories to be propounded to the witness, state his name and residence and serve a copy of the interrogatories on the opposing party or his attorney.

In the record before me I fail to find that any such affidavit was ever made. In fact, no affidavit of any character appears to have been made, and since the parties did not stipulate in writing that Crouch's deposition should be taken, as provided by rule 33, of the Rules of Practice, *supra*, it follows that you committed no error in affirming the action of the register and receiver in refusing to issue a commission to take said deposition.

Your judgment on the merits of the case is found to contain a very satisfactory statement of the facts in the case, and since no errors of law appear, said judgment must be and is hereby affirmed.

HOMESTEAD APPLICATION—PRELIMINARY AFFIDAVIT.

OLSON *v.* AHERN.

No right is acquired, as against an intervening adverse claim, by a homestead application based on a preliminary affidavit executed before a clerk of court, where the applicant has not theretofore established his residence on the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 6, 1893.

Lawrence Ahern has appealed from your decision of January 23, 1892, holding for cancellation his homestead entry for the NE. ¼ of Sec. 24, T. 20 N., R. 35 E., Spokane Falls land district, Washington.

The entry was made on May 21, 1888.

On June 11, 1888, John H. Olson filed affidavit of contest, alleging that he was the prior settler; that he had held the land under a pre-emption filing since 1884, and that he offered his application to homestead the land before Ahern made his entry.

A hearing was had, as the result of which the register and receiver found that the contestant had established the better right to the land.

On appeal you affirmed their decision.

From the record in the case it appears that Olson filed pre-emption declaratory statement for the tract on December 6, 1884. He dug or had dug a well eleven feet deep during that month, but failed to reach water. In the spring of 1885 he began the basement of a house, and broke two acres of land. In the spring of 1887 he planted one acre of the land thus broken to potatoes, and during the year broke two or three acres more. In August, 1887, he put up a "box" house, twelve by fourteen feet, with a door and window. In February, 1888, he made some repairs to the house; in April he set out some ornamental trees; and in May or June planted three acres to potatoes, and did some more breaking. These improvements he values at about one hundred and fifty dollars.

When he made his preemption filing he was residing, with his family, at Ritzville, Washington. In 1886, he alleges, his children were sick with scarlet fever for several months; his wife was also sick. In December, 1886, he moved his family to his timber-culture claim, about three miles from Ritzville, and about the same distance from his pre-emption claim. He states that when he built his house, in the fall of 1887, he intended to establish his residence therein; he took a stove, some chairs and cooking utensils to the house—but on his return to his timber-culture claim carried them thither with him. He was "at the land" two or three days at this time; but it is not shown that he slept upon it. He was upon the tract again a part of a day in February, 1888. On April, 10, same year, he went to the land, and claims that he then established residence there, for the purpose of enabling him to make a homestead entry before a clerk of the court; but his family remained on his timber-culture claim—as he alleges, because of sickness. At that time he took with him some cooking utensils, and ate his dinner there; but did not sleep there that night. His children were sick with measles for six or eight weeks. When they recovered, he moved his family to the pre-emption claim; but they were there only two or three days; he remained about a week. Five days before the hearing the family again moved to the land; but he still remains on the timber-culture claim. He explains that this is for the purpose of enabling his children, aged respectively eleven, nine, and two years, to attend school at Ritzville.

On April 11, 1888, he applied to make homestead entry of the tract, before the judge and *ex officio* clerk of the probate court of Adams county, Washington, claiming to have established residence on the

same. The application was duly presented at the local office on April 17, 1888; but was returned because of a vacancy in the office of the receiver.

Ahern first went to and examined the land between the 7th and the 10th of April, 1888. On the 10th he ascertained that Olson's filing had expired by legal limitation. He at once went to the local land office; but his application to enter was refused because of the vacancy in the office of the receiver.

May 21, 1888, was the first day on which business was transacted in the local office after the vacancy in the office of receiver was filled. The office opened at ten o'clock; and he was one among the first to hand in his papers.

On the same date, Olson's attorney appeared at the local office for the purpose of filing his papers. Said attorney was ex register of the Walla Walla land office, and thus had the means of knowing better than others how to proceed—besides being, because of that fact, to some extent a privileged person. Instead of taking his place in line with the numerous other applicants who were awaiting the opening of the office to the public, he entered it in a privileged manner, went behind the counter, and transacted his business before other applicants were admitted. The application, however, was temporarily laid aside. Meanwhile, Ahern, who had taken his place in the line, reached the counter, passed in his papers, and his entry was placed of record.

Later in the day the local officers took up Olson's papers, and on examining them, rejected his application because of Ahern's prior entry.

Ahern, on August 7, 1888, built a house, eight by ten feet, and broke half an acre. He had not yet established residence in the house at the date of the hearing, nearly five months after entry. Under the regulations of the Department, he had six months after entry in which to establish residence.

In view of the facts herein set forth, you hold that "the equities are all with Olson," and direct that Ahern's entry be held subject thereto.

The principal ground of your decision appears to be that "though it is quite doubtful" whether Olson "was qualified to make the affidavit provided for in section 2294, R. S., on April 11, 1888, he did subsequently establish a residence on the land with his family in the latter part of May or forepart of June, 1888, long prior to any act of settlement on the part of" Ahern.

It is clearly shown by the record, and set forth in your decision, that Olson's affidavit was executed before the clerk of the probate court of Adams county, at a date (April 11, 1888,) when he had not yet established residence upon the land. This might possibly have been cured by the establishment of residence at a later date, prior to the initiation of any adverse claim. But before he established residence ("in the latter part of May or fore part of June, 1888"), Ahern had initiated an adverse claim by his homestead entry (filed May 21, 1888).

Neither under his pre-emption declaratory statement of December 6, 1884, (which had long previously expired), nor under his homestead affidavit of April 11, 1888 (made before a clerk of the probate court without residence on the tract), nor on the ground of his establishment of residence in the latter part of May or the fore part of June, 1888, (after the initiation of an adverse claim), can Olson maintain a legal right to the land.

I am not strongly impressed with regard to his equities, inasmuch as his improvements are very meager, and made without compliance with the law as to residence.

Your decision in his favor is therefore reversed; and Ahern's entry will remain intact, subject to compliance with the Homestead law.

MINING CLAIM—PUBLICATION—ADVERSE CLAIM.

LEDGER LODE.

The period within which an adverse claim may be filed is limited to the sixty days of publication required by the statute.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 7, 1893.

This is an appeal by Thomas E. Brady and Michael Foley from your decision dated November 13, 1891, in the case of the Ledger Lode claim, Helena, Montana.

On March 28, Charles H. Tolliver filed an application for said claim and publication thereof began April 7, 1891, in a weekly newspaper. On June 8, 1891, the appellants presented their application to adverse the said Ledger application.

The register and receiver rejected such application as out of time and on appeal you, by said decision of November 13, 1891, affirmed their action.

The pending appeal is taken from this judgment.

The appellants' case proceeds upon the theory that although presented after the expiration of the statutory period of sixty days, during which adverse mining claims are required to be filed, Sec. 2325, R. S., their "adverse" was in time because it was offered before the last publication of the Ledger application in a weekly newspaper.

This contention is disposed of adversely to the appellant by the ruling in the case of Miner *v.* Mariott *et al.* (2 L. D., 709), wherein it was held that the construction of Sec. 2325, which allowed sixty-three days the time covered by ten insertions in a weekly paper, within which to file an adverse claim, is erroneous and will not be followed in the future.

Your judgment is affirmed.

NATURALIZATION—RECORD EVIDENCE.

GILMORE *v.* PALLETT.

Naturalization of the father during the minority of the son inures to the benefit of the latter, under section 2172 R. S., and makes him a citizen.

Where the record relied upon to show naturalization fails to disclose a specific judgment of the court admitting the applicant to citizenship, but does show that the requisite oath was administered, the proof of naturalization may be accepted, as the oath when taken confers the rights of citizenship, and amounts to a favorable judgment on the application of the alien.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 7, 1893.

On January 9, 1884, Eva Gilmore filed pre-emption declaratory statement No. 8294 for the N. ½ of the NW. ¼, the SE. ¼ of the NW. ¼, and lot 3, the NE. ¼, Sec. 10, T. 9 N., R. 10 E., M. D. M., Sacramento, California, which was canceled by relinquishment October 22, 1887.

On October 22, 1886, Elmer M. Bell made homestead entry for said land, which he relinquished March 21, 1888.

On the day Bell filed his relinquishment, William H. Pallett, defendant herein, filed declaratory statement No. 9760 for the same land, alleging settlement thereon March 17, 1888. He purchased Bell's improvements for $5.00.

On May 31, 1888, the said Eva Gilmore made homestead entry No. 5294 for the same land, claiming settlement from January, 1884.

After due notice, Pallett offered final proof, June 14, 1889, and Miss Gilmore appeared by attorney and contested Pallett's right to the land.

The register and receiver decided that Pallett "has fully complied with all the requirements of the law, and that Eva Gilmore has totally failed so to do."

On appeal, you, by your decision of March 8, 1892, affirmed that decision, and held Gilmore's entry for cancellation, from which judgment a further appeal brings the case to this Department.

I have examined the testimony and find the same substantially set forth in the decision appealed from. Pallett's residence upon the land was practically continuous, and his improvements and cultivation amply demonstrate his good faith.

It is insisted, however, that he is not a qualified pre-emptor; that he is an alien, and has never declared his intention to become a citizen of the United States. This is met by Pallett's sworn statement, in which he says that he was born in Hertfordshire, England, in the year 1838; that he came to America with his father, Thomas Pallett, in the year 1840, and settled in Iowa, where they resided until the year 1848, when his father removed to Wisconsin, where he lived until the year 1881, when he removed to New Mexico; thence he (claimant) moved to California, in the year 1885; that he claims citizenship by reason of the naturalization of his father; that when he arrived at his majority he exercised the rights of a voter.

Under section 2172 of the Revised Statutes of the United States, the naturalization of the father inures to the benefit of his minor children, and the sole question is, whether the father, Thomas Pallett, was naturalized during the minority of his son, the claimant.

The evidence relating to such naturalization is contained in the following, being copies of certificates and affidavits presented in the record:

STATE OF IOWA, } ss.
Lee County, }

District Court, May Term, A. D., 1847, Thomas Pallett of said county, being duly sworn, deposes and says, that he does renounce and abjure all allegiance and fidelity to every Foreign King, Prince, Power, Potentate, State of Sovereignty, and particularly Victoria, Queen of Great Britain, of whom he has heretofore been a subject, and that he will support the Constitution ot the United States of America, and faithfully demean himself as a citizen thereof. He prays the court to be admitted a citizen thereof.

(Signed)

THOMAS PALLETT.

Sworn and subscribed before me, at Fort Madison, this 31st day of May, A. D. 1847. } R. W.

R. W. ALLRIGHT, Clk. D. C.

STATE OF IOWA, } ss.
Lee County, }

I, Eli Stoddard, a citizen of the United States of America, being duly sworn, upon my solemn oath, do depose and say, That I have known the said Thomas Pallett for five years last past, that he has resided within the jurisdiction of the United States for five years last past, and for the last year in this State; that he has sustained a good character as to honesty, and being well disposed to the Constitution and Government of the United States.

ELI STODDARD.

Sworn and subscribed before me, this 31st day of May, A. D. 1847.

R. W. ALLRIGHT, Clk. D. C.

STATE OF IOWA, } ss.
Lee County, }

I, R. W. Allright, Clerk of this District Court in and for the County of Lee and State aforesaid, do hereby certify that the foregoing is a true copy of the naturalization papers of Thomas Pallett as filed in my office.

(SEAL.) (Witness my hand and the seal of said Court hereto affixed at Fort Madison, this 11th day of January A. D. 1848.

R. W. ALLRIGHT,
Clk. D. C.

U. S. LAND OFFICE, SACRAMENTO, CALA.,
June 25th, 1889.

I, Selden Hetzel, Register of the United States Land Office, hereby certify that the above and foregoing is a full, true and correct copy of the original instrument introduced in evidence in the foregoing matter.

SELDEN HETZEL,
Register.

It will be noticed that there is no certified copy of any record or judgment showing that Thomas Pallett was admitted as a citizen of the United States. But the oath that he did take, as above shown, is such as is required by the second division of section 2165 of the Re-

vised Statutes, admitting aliens to full citizenship, after having formally declared their intention to become such.

Such being the state of the records, can it be determined therefrom that Thomas Pallett was naturalized by the district court of Lee county, Iowa?

This question is answered in the affirmative, on nearly the same state of facts, in the case of Campbell *v.* Gordon and wife (6 Cranch, 176–2 U. S., 357), where it is said:

> But if the oath be administered and nothing appears to the contrary, it must be presumed that the court, before whom the oath was taken, was satisfied as to the character of the applicant. The oath, when taken, confers upon him the rights of a citizen, and amounts to a judgment of the court for his admission to those rights.

See also John Skelton, 4 L. D., 107.

It thus appears that claimant is a citizen of the United States, and having complied with the pre-emption law, as above shown, is entitled to patent on payment for the land.

The judgment appealed from is affirmed.

NORTHERN PACIFIC R. R. CO. *v.* SMALLEY.

Motion for review of departmental decision of July 11, 1892, 15 L. D., 36, denied by Acting Secretary Chandler February 7, 1893.

PATENT—APPLICATION TO VACATE.

LITTLE NELL LODE.

An application for action looking toward the vacation of a patent should not be considered in the absence of due notice to the patentee or his attorney.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 8, 1893.

I am in receipt of your letter dated January 23, 1893, transmitting the papers in the appeal by claimants of mineral entry No. 245, made January 21, 1887, at Deadwood, Dakota, by John O'Connell *et al.* for the "Little Nell" lode claim, in the case of Lead City Townsite, South Dakota, *v.* mineral claimants, from your decisions of June 5 and December 2, 1891, holding said entry for cancellation.

You report that "through inadvertence . . . . said Little Nell was patented on November 16, 1892, and the patent forwarded to the local office;" that afterwards the register and receiver were directed to return the patent, or, if it had been delivered, to request its surrender by the parties holding the same, on the ground that it was issued by mistake, and that on December 23, 1892, the local officers reported that said patent had been delivered December 15, 1892, and that their request for its return had not been complied with. With said papers is

a petition of the townsite claimants, through their attorneys, requesting that suit be instituted by the United States for the annulment of said patent, which you recommended should be done.

It appears that in said letter of transmittal "Messrs. Curtis & Burdett" were the attorneys for the appellant, and there is no proof of service of said petition upon said attorneys or their patentee. Said petition is accordingly returned, and you are directed to notify the counsel of said petitioner that due proof of service upon said patentee or his counsel must be furnished before the same will be considered on its merits.

MINING CLAIM—AMENDED SURVEY—DEPOSIT.

VANDERBILT LODE.

Where an amended survey is required the entryman should be informed thereof and that if he fails to comply with such requirement within a designated period the entry will be canceled.

It rests within the discretion of the surveyor general to regulate the amount required as a deposit to cover the expenses of office work on a mineral survey, and it will not be assumed in the absence of any showing that the sum required is unreasonable.

Acting Secretary Chandler to the Commissioner of the General Land Office, February 8, 1893.

I have considered the appeal of Jo David Brashear applicant for patent for the Vanderbilt lode, survey 695, Nogal Mining District, New Mexico.

It appears that by letter of December 23, 1891, to the United States surveyor-general at Santa Fe, New Mexico, you required the applicant to have the survey of the Vanderbilt lode amended so as to exclude some territory shown to be in conflict with surrounding claims, in accordance with the requirements of circular of December 4, 1884, and you ordered that—

After due notice to the claimant and the deposit of a sum sufficient to pay the necessary expense, you will cause the survey of the Vanderbilt lode to be so amended that the western end of the lode line will not extend beyond where the same intersects the eastern side line of said survey 495, and also show the area in conflict with said survey 694.

A copy of this order was served on the attorney for the applicant January 4, 1892, and the surveyor-general notified him that—

Upon proper application and deposit the order for the amended survey will be issued. As the plats will all have to be made over the usual deposit of $35 will be required.

On April 29, 1892, the surveyor-general reported his action to you and said: "No action so far has been taken by the parties in interest with regard to the amended survey required."

By letter of May 19, 1892, you directed the register and receiver at Roswell, New Mexico, that "said mineral entry No. 8, is hereby held for cancellation," whereupon he prosecutes this appeal. The error in your action relied on by the appellant is in requiring him to make the deposit demanded when, as he alleges, the "additional expense is required on account of alleged errors in the work of the surveyor-general, and his deputies, over which the applicant had no control and was in no way responsible for." The requirements of your said letter of December 23, 1891, were in accordance with the circular of December 4, 1884 (3 L. D., 540). But no time was given either by you or the surveyor-general within which the claimant should make application for an amended survey, and make the required deposit; neither was he notified that in the event of failure to do so that his entry would be canceled. I think this was erroneous and that he should have been informed that his entry would be canceled, if he failed to comply with the order within the time limited. (Senator Mill Site, 7 L. D., 475.)

It is a matter in the discretion of the surveyor-general to regulate the amount required to be deposited to cover the expenses of the office work in making the corrections required and I can not assume in the absence of any showing that the sum required in this instance was unreasonable.

You will therefore give the claimant sixty days within which to comply with your order and in the event of his failing to do so, said entry will be canceled.

Your judgment is thus modified.

PRACTICE—MOTION FOR CONTINUANCE.

BUCKLIN *v.* MCEACHRAN.

An affidavit filed as the basis of an application for continuance on the ground of absent witnesses, should show that proper diligence had been exercised to procure their attendance and that their absence was without the consent or procurement of the applicant.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 9, 1893.

William McEachran made homestead entry for the SW. ¼ of Sec. 2, T. 124 N., R. 76 W., at the Aberdeen land district, South Dakota, on the 16th of March, 1886.

On the 1st of April, 1890, Walter Bucklin filed affidavit of contest against said entry, alleging abandonment and change of residence on the part of the entryman, and that he had not settled upon and cultivated the land, as required by law.

The local officers thereupon ordered that the testimony in the case be taken by J. W. Blair, a notary public at Bangor, about twelve miles

from the land, on the 5th of July, 1890, and that the hearing be held at their office on the 8th of that month.

The contestant, with his attorney and witnesses, appeared on the day set for taking testimony. An attorney appeared for the claimant, and filed an affidavit, made by a brother of the claimant's wife, asking for a continuance until September, on the ground that the claimant was out of the State, and his wife was sick and unable to be present at that time, and that both were material witnesses in the case.

The contestant filed an affidavit against a continuance, to which claimant's counsel objected, and refused to proceed with the case until the local officers had passed upon the question then involved.

The testimony on the part of the contestant was then submitted, and forwarded by the notary to the local officers, who on the 19th of August, 1890, rendered a decision, in which they recommended the cancellation of the homestead entry of McEachran. This decision was affirmed by you on the 26th day of February, 1892, and the case is brought to the Department by an appeal from your judgment. The only error complained of in your decision, and specified in the notice of appeal, is, that you erred in refusing to grant continuance under the showing made, and permit the claimant to appear at a later date.

Rule 20, of the Rules of Practice, provides that a postponement of a hearing to a day to be fixed by the register and receiver, may be allowed on the day of trial, on account of the absence of material witnesses, when the party asking for the continuance makes an affidavit before the register and receiver, showing that one or more of the witnesses in his behalf is absent without his procurement or consent; the name and residence of each witness; the facts to which they would testify if present; the materiality of the evidence; the exercise of proper diligence to procure the attendance of the absent witnesses; and that affiant believes that said witnesses can be had at the time to which it is sought to have the trial postponed.

In the case of Coughlin *v.* Donan (5 L. D., 142), it was held that an affidavit for continuance, might be executed before the day set for hearing, and before some officer other than the register or receiver.

In Bradford *v.* Aleshire (15 L. D., 238), it was held that an affidavit for an order for publication of notice of hearing might be made by any person who possessed the requisite information, notwithstanding Rule 11 required that such affidavit should be made by the contestant only. Applying that rule to this case, would lead to the conclusion that an affidavit for continuance might be made by some person other than the *party* asking for it, provided the necessary showing was made.

The difficulty in such case, however, would be to show that the witnesses were not absent by the procurement or consent of the party to the suit, and more especially would that be so, when, as in this case, the absent witnesses were the defendent in the case, and his wife. It was held in the case of Smith *v.* Smart (7 L. D., 63), that an affidavit

for continuance, based on the ground of absent witnesses, should show that the absence of the witnesses is not by the consent or procurement of the applicant, and set forth facts showing the exercise of proper diligence to secure the attendance of such witnesses.

A notary public has no authority to grant a continuance extending beyond the time set for the examination of the testimony at the local office, and therefore the continuance asked for in this case, could not have been granted by Blair, had the affidavit presented, shown that McEachran was entiled to a postponement.

Motions for continuance are addressed to the sound discretion of the local officers, and when the motion in this case came before the register and receiver, they held that the notary did not err in proceeding to take the testimony in the case, notwithstanding such motion. You approved their action and the only question before me is: Did they abuse their discretion in so holding, and you err in affirming their act?

My conclusion is, that while the affidavit for continuance gave the name and residence of the absent witnesses, and the facts to which they would testify if present, and the materiality of their evidence, it did not show that proper diligence had been exercised to procure their attendance, or that their absence was without the consent or procurement of McEachran. He was notified of the hearing, and made no effort to be present, but remained at his blacksmith shop, in a distant State, at work at his trade. Had he been kept at home by the sickness of his wife, his absence might have been excused, but she was at Bowdle, some twenty miles distant from the land, while he was at Spokane Falls, in the State of Washington. The showing made in support of the motion for continuance was not sufficient, and the application was properly denied. The decision appealed from is accordingly affirmed.

HOMESTEAD ENTRY—TIMBER LAND.

HOXIE *v.* PECKINPAH.

The provisions of the timber and stone act of June 3, 1878, do not exclude from homestead entry lands that are subject to sale under said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 9, 1893.

On July 14, 1890, Thaddeus E. Peckinpah made homestead entry of the SE. ¼ of Sec. 34, T. 7 S., R. 23 E., Stockton land district, California.

On January 28, 1891, he made commutation cash entry of the same. His proof showed continuous residence by himself and his wife (he had no other family) for more than a year preceding; about five acres cleared, three of four acres of which had been cropped; a frame dwell-

ing house fourteen by twenty-six feet, with three rooms, three doors and four windows, carpeted and supplied with the ordinary furniture of a farm house; also a frame barn twelve by thirty feet. Total value of house and barn $375 or $400.

On March 9, 1892, John C. Hoxie filed affidavit of contest against the entry, alleging in substance, that the land was chiefly valuable for the timber upon it, that it is of little or no value for agricultural purposes, and that therefore it was not subject to entry under the homestead law.

On April 19, 1892, you rejected the application to contest on the ground that "the charge against the entry is not deemed sufficient to warrant its investigation, there being nothing in the homestead laws prohibiting the entry of such land under said laws."

The applicant appeals, reiterating his contention that "land which is unfit for cultivation and chiefly valuable for its timber is subject to entry as timber-land"—and therefore is not subject to homestead entry.

In this he is in error. There is nothing in the timber and stone act (20 Stats., 89), which makes land of this character subject to entry exclusively under the timber and stone act; this is clearly manifest from the language of the act the first section of which expressly declares, "that nothing herein contained shall defeat or impair any *bona fide* claim under any law of the United States, or authorize the sale of the improvements of any *bona fide* settler." This recognizes the possibility of the existence of a "*bona fide* claim" and a "*bona fide* settler," on timber land, under some other law.

In the case of Hughes *v.* Tipton (2 L. D., 334,) the Department held:

The settlement laws unquestionably authorize agricultural claims to lands covered by timber . . . The existence of a valid settlement is therefore fatal to the timber-claim, notwithstanding the land may be non-agricultural. The act evidently discriminates in favor of a *bona fide* settler, irrespective of the character of the *land*.

The doctrine above enunciated has since been reiterated by the Department in the cases of Rowland *v.* Clemens (2 L. D., 633); Porter *v.* Throop (6 L. D., 691); Wright *v.* Larson (7 L. D., 555); Daniel R. McIntosh (8 L. D., 641); State of California *v.* Sevoy (9 L. D., 139); John W. Setchell (9 L. D., 573); George H. Hegeman (11 L. D., 7); Tenny *v.* Johnson *et al.* (11 L. D., 145).

In the case above cited the Department has held (*inter alia*) that settlements on land chiefly valuable for timber should be closely scrutinized; and that "the character of the land may, in connection with other facts in the case, affect the question of the settler's good faith" (Porter *v.* Throop, *supra*). But in the case at bar the applicant to contest relies solely upon the character of the land, contending that it is not subject to homestead entry, and not connecting it with any "other facts in the case" to show bad faith on the part of the homestead entryman. On its face the homestead proof appears to be sufficient; and the burden

of showing bad faith on the part of the entryman is on the applicant to contest. (Porter *v.* Throop, *supra*). In my opinion he makes no such showing.

Your decision rejecting the application to contest is therefore affirmed.

STONE LAND—ACT OF AUGUST 4, 1892.

JOSEPH H. HARPER ET AL.

Lands reserved for the benefit of public schools or donated to any State are not subject to placer entry under the act of August 4, 1892.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 9, 1893.

I have considered the appeal of Joseph H. Harper *et al.* from your decision of May 17, 1892, rejecting their application to enter certain lands as a placer claim, in section 36, Tp. 3, R. 8 W., Helena land district, Montana.

It appears that they located what is known as the North Western placer claim, January 6, 1886, and on October 26, 1891, made application for patent on the same, alleging that the land was valuable for its deposits of stone of a silicious formation, possessing special property as a fire rock.

The local officers rejected said application under the decision of the Department as rendered in the case of Conlin *v.* Kelly (12 L. D., 1), whereupon the claimant appealed; you affirmed the judgment of the register and receiver as aforesaid, and the claimant again appealed.

The only question that seems to be raised in this case, is whether the land embraced in said mineral claim is patentable under the mineral laws.

At the date your decision was rendered the ruling of the Department followed that laid down in the Conlin *v.* Kelly case, and I do not find anything in the character of the stone found in this land that would make it an exception to the rule established in that case, but on August 4, 1892 (27 Stat., 348), since your decision, an act was approved entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws." The first section of this act provides:

That any person authorized to enter lands under the mining laws of the United States, may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of public schools or donated to any State, shall not be subject to entry under this act.

Since the land under consideration is of the character covered by said proviso, it is not subject to entry under the provisions of said act. See section 1946, Rev. Stat.

Your decision is therefore affirmed.

PRACTICE—APPEAL—SECOND CONTESTANT.

ADAMSON *v.* BLACKMORE.

Failure to appeal from the rejection of an application to enter does not defeat the right of the applicant where the requisite notice in writing of such adverse action is not given the applicant.

An affidavit of contest filed during the pendency of proceedings by another against the entry in question, confers no right, in the event that the entry is canceled as the result of the prior proceedings, as against the intervening application to enter filed by a third party after the cancellation of the entry under attack.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 11, 1893.

Americus Bendelari made homestead entry for the E. ½ of the SW. ¼ and lots 6 and 7, of Sec. 6, T. 10 N., R. 36 W., North Platte land district, Nebraska, on the 27th of November, 1886.

On the 13th of April, 1888, Ella Adamson filed an affidavit of contest against said entry, alleging abandonment. As a result of her contest, the entry was canceled on the 18th of January, 1890.

After the local officers had rendered their decision in the case, recommending the cancellation of the entry, and forwarded the record to your office, William C. Blackmore filed a second contest affidavit against Bendelari's entry, alleging the same grounds of default alleged and established by Miss Adamson.

Miss Adamson was notified of her preference right to make entry for the land, but having in the meantime married, she had ceased to be a qualified homesteader. Her father, David Adamson, thereupon, on the 8th of February, 1890, filed application to make homestead entry for the land. The local officers rejected his application, for the reason that his daughter's preference right had not then expired, and that there was a second contest on file.

Adamson then filed the waiver or relinquishment of his daughter's preference right of entry, whereupon the local officers informed Blackmore that the first contestant having waived her preference right to enter the land, he had such preference right as a second contestant. Within thirty days thereafter he made homestead entry for the land.

Adamson then instituted contest against the entry of Blackmore, alleging that a preference right of entry was improperly allowed him; that his entry was not made in good faith, but for speculative purposes; and that his (Adamson's) entry should have been allowed, he having been the first legal applicant for the land after the cancellation of the entry of Bendelari.

The hearing which followed, resulted in a decision by the local officers in favor of Blackmore, which was reversed by you on the 29th of February, 1892. An appeal from your decision brings the case to the Department.

In the case of Cleveland *v.* Banes (4 L D., 534), it was held that on the cancellation of an entry after contest, the land is open to settlement or entry, subject only to the preference right of the successful contestant.

In the case of Armenag Simonian (13 L. D., 696), it was held that an affidavit of contest filed in the local office, does not secure any preference right of entry to the contestant, in the event that the entry under attack is canceled on the prior contest of another.

Your decision was based upon the rules laid down in the two cases cited, and in his argument upon the appeal before me, the counsel for Blackmore attempts to escape the force of those rulings by insisting that Adamson waived any rights conferred by his application to enter the land, by failing to appeal from the adverse decision of the local officers upon his application. In support of his position, he cites Rule 67, of the Rules of Practice, which provides that "The party aggrieved will be allowed thirty days from receipt of notice, in which to file his appeal in the local land office." In this connection Rule 66 becomes of considerable importance. Its provisions are as follows:

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

1. The register and receiver will endorse upon every rejected application the date when presented, and their reason for rejecting it.

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

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

The character of the notice to be given is provided for in Rule 17, which says: "Notice of interlocutory motions, proceedings, orders, and decisions shall be in writing, and may be served personally, or by registered letter through the mail to the last known address of the party."

In Elliott *v.* Noel (4 L. D., 73), it was held that a "motion to dismiss an appeal, because not filed in time, will not be entertained where it appears that the appellant did not have written notice of the adverse decision." The question was discussed in the case of Churchill *v.* Seeley (4 L. D., 589), and upon page 591 it was said: "It is, however, insisted on behalf of Seeley that Churchill was notified personally by the register, and that such notice is sufficient under the rules. I do not so consider it." Rule 17, and the case of Elliott *v.* Noel, are cited in support of this position.

In Turner *v.* Bumgardner (5 L. D., 377), it was held that information as to the right of appeal not having been given under Rule 66 of Practice, the right of the rejected applicant to be subsequently heard is recognized. I deem it unnecessary to multiply authorities in support of this proposition.

In the case at bar, there is no proof, charge, or intimation, that Adamson was ever notified in writing, by the local officers, that the applica-

tion presented by him on the 8th of February, 1890, to make homestead entry for the land in question, had been rejected by them.

As the record shows no such notice to him as is required by Rule 17, his appeal, from the final decision of the local officers in the case, was in time to save all rights secured by his original application to make entry for the land.

After the cancellation of the entry of Bendelari, the land was subject to entry by the first legal applicant, and such entry could only be defeated by the exercise by the successful contestant of her preference right, within the time limited by law. In this case, Adamson was such first legal applicant, and his entry should have been allowed by the local officers. The land being subject to entry, and he being a qualified entryman, his application was equivalent to an actual entry, so far as his rights are concerned. He might have appealed from the action of the local officers in rejecting his application, but he was not bound to do so, in order to protect his rights, until he was legally notified of their action. His contest proceedings against the entry of Blackmore cut no figure in the case whatever, and need only be alluded to to complete the history of the transaction, and explain the manner in which the case comes before the Department.

The homestead entry of Blackmore having been improperly allowed, will be canceled, and Adamson will be permitted to make entry for the land, as of the date of his original application. The decision appealed from is affirmed.

PRE-EMPTION CLAIM—AGREEMENT TO CONVEY.

TAGG *v.* JENSEN.

An agreement to convey any part of a pre-emption claim to another, made prior to final proof, will defeat the exercise of the pre-emption right.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 11, 1893.

On September 10, 1889, Elizabeth Tagg filed her pre-emption declaratory statement for the NW. ¼ of the SW. ¼, Sec. 35, and the NW. ¼ of the SE. ¼, and the E. ½ of the SE. ¼, Sec. 34, T. 6 N., R. 10 W., Oregon City, Oregon, alleging settlement three days prior thereto.

On the 11th day of December, of the same year, Sofus Jensen filed his pre-emption declaratory statement for the W. ½ of the SE. ¼, Sec. 34, same township and range, and the N. ½ of the NE. ¼ and the NE. ¼ of the NW. ¼, Sec. 3, T. 5, same range.

Their claims conflict as to the NW. ¼ of the SE. ¼ of said Sec. 34, and the settlement of this conflict is all that is involved in this controversy.

June 7, 1890, Jensen gave notice of his intention to make proof, and the testimony was ordered to be taken before the clerk of Clatsop

county, July 29, 1890, at which time Elizabeth Tagg appeared and protested against the allowance of his proof as to said disputed forty acres, on the grounds (1st) of her prior right thereto; (2) that Jensen was not intending to appropriate the tract to his exclusive use and benefit; (3) that he had not resided on and cultivated the land as required by law; and (4) that his claim was in excess of the amount allowed by law.

Trial was had, and, on August 23, 1890, the local officers found in favor of Tagg, and Jensen appealed, and by your letter of April 16, 1892, now before me on appeal by Tagg, you reversed the action of the register and receiver, and awarded the tract in dispute to Jensen, because, as you find, he was the prior settler upon the land.

I have carefully examined the whole record, and am unable to concur in your judgment.

The material parts of the evidence are, I think, on the whole, very fairly stated in your decision, and it shows that Larson supplied nearly all the funds necessary for the improvements, cost of filing, etc., and Jensen says this was done under an agreement between him and Larsen that they were to help each other in *both* their claims, and that this agreement constituted the partnership between him and Larsen, alluded to by the witnesses for contestant.

After reading carefully all the testimony, I am forced to the conclusion that this explanation of the agreement or partnership between the claimant and Larsen does not explain the real agreement, but is rather a subterfuge by which he expects to escape the penalty of the law—that is, the forfeiture of his claim. It does not appear that Larsen had any claim of record, or that he intended to make any settlement, or other movement towards asserting any claim on his part. On the contrary, he was all the time working at his trade (shoemaker), at Astoria, and, before the hearing and without attempting to assert any claim to government land, he left the country and went to British America. Further, Jensen says, that upon talking with the land officers, he learned for the first time that such a partnership as he had with Larsen would defeat his claim, and he thereupon immediately dissolved the partnership.

Now, if his partnership had been such a one as he pretends it was—namely, a mutual agreement that they should assist each other in furnishing means, etc., to perfect their separate claims—such an agreement was not in violation of law, and there was no occasion for dissolving it, and it is very improbable that he was advised by any one in connection with the land office that he would be compelled to do so.

But if his agreement was, as contended by the witnesses for the contestant, that they were to be partners in the ownership of the land in controversy, this would be in violation of the statute, and it is quite probable that the clerk, or one of the local officers, should have so informed him.

I think all the evidence clearly points to the fact that he and Larsen undertook to get title to this land through his filing, and that they were to be equal owners when the title was perfected.

The evasive manner in which he answered, when confronted with his own admissions as to the interest of Larsen, the dissolution of the agreement, the disappearance of Larsen from the country, and the failure of Jensen to have his testimony produced at the hearing, all point in this direction. Added to this, the testimony of several witnesses to the admissions of Jensen himself and the statements of Larsen in Jensen's presence and hearing of their mutual interest in the land, leave no doubt in my mind that there was an understanding and agreement that they were both to share in the land when title was procured from the government.

The case of Aldrich *v.* Anderson, cited by you in support of your decision, was practically overruled in the case of Molinari *v.* Scolary, 15 L. D., 201, and the law as now construed by this Department is that any agreement to convey any part of an entry or claim to another, made prior to final proof, will defeat the claim, and the evidence in this case satisfies me that such an agreement was made with Larsen, and was still subsisting on December 21st, when Elizabeth Tagg moved into and took possession of the house and improvements on her claim.

Entertaining this view of the evidence, it is not necessary to discuss the question of the alleged settlement of Tagg in September, when she purchased the improvements of a former settler. She was not a citizen at that date, but this defect was cured prior to the assertion of any claim on the part of Jensen, or any one else, and, when cured, in the absence of an adverse claimant, it relates back to the date of the initiation of the claim.

Your decision is reversed, and the protest of Tagg is sustained, and you will direct that the filing of Jensen be canceled.

TIMBER CULTURE ENTRY—COMMUTATION.

CUMMINGS *v.* RUDY.

The requirements of the timber culture law call for irrigation of the land, if trees can not be grown without irrigation.

The right to commute a timber culture entry under the act of March 3, 1891, is limited to persons who for a period of four years have, in good faith, complied with the requirements of the timber culture law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 11, 1893.

On May 25, 1883, Frank H. Rudy made timber culture entry (No. 189), of the S. ½ of the SE. ¼ and the NW. ¼ of the SE. ¼ and the SE. ¼ of the SW. ¼ of Sec. 32, T. 2 N., R. 1 W., at Salt Lake City, Utah.

On March 24, 1890, Minnie Cummings filed an affidavit of contest against said entry, alleging—

> That said Rudy has totally failed to comply with the timber culture law, that there are absolutely no trees, slips cuttings or tree seeds planted or growing on said land, no ditching or water for irrigation, and little or no breaking thereon.

A hearing was ordered for May 28, 1890, at the local office, when the parties appeared and submitted testimony.

On August 15, 1890, the local officers rendered their opinion "that the contestant has established a valid adverse claim; that the entry should be canceled with preference right to the contestant. We so recommend."

On appeal, by letter of March 3, 1892, you affirmed their decision, and held said entry for cancellation. An appeal now brings the case to this Department.

The testimony covers seven years of the entry, and shows that the land intended for tree culture is "largely clay and strongly alkali," and that nothing has grown thereon "except a very sparse growth of grease wood and salt weed." Tree seeds and cuttings have been repeatedly planted, but regularly died, and there were none living at the date of the hearing. There was no reasonable ground to suppose that they would grow without artificial irrigation, which has never been applied to the land. The contestee himself admitted that "all that land has a kind of a bad nature—it is a kind of a clay ground."

In speaking of the tree seeds and cuttings planted, he testified,—"I have not managed to get any of them to grow; I thought it was on account of the drought and the nature of the ground." The evidence does not show that these years were exceptionally dry for that locality, hence, it must be attributed to "the nature of the ground," which would not grow anything without artificial irrigation. The land selected is naturally unfitted for the growth of timber, and its arid character must have been known to the entryman when he made the selection. As he made no effort to reclaim the land by irrigation, or in any way fit it for the cultivation and growth of timber, he has not complied with the law, Sampson *v.* Lawrence (8 L. D., 511).

The act of March 3, 1891, (26 Stat., 1093), does not relieve the claimant from cultivating "the quantity and character" of trees mentioned in the timber culture act of 1878. Samuel C. Donaldson (14 L. D., 434). Inasmuch as the claimant has failed to comply with the laws in this respect, he is not entitled to commute his entry under the fourth proviso to the first section of the act of March 3, 1891, which only allows that privilege to an entryman "who has for a period of four years, in good faith, complied with the provisions of said laws."

Your judgment is affirmed.

MINING CLAIM—PLACER LOCATION—HOMESTEAD.

PIRU OIL COMPANY.

A placer location made in accordance with law operates to exclude the land embraced therein from other appropriation; and a homestead entry irregularly allowed for such land does not impair the rights of the mineral claimant.

An entry, though irregularly allowed for land not subject thereto, should not be canceled without giving the entryman an opportunity to be heard in defense of his claim.

Secretary Noble to the Commissioner of the General Land Office, February 13, 1893.

On July 1, 1891, the Piru Oil Company filed in the land office at Los Angeles, California, its application for a patent for four contiguous mining claims held in common, and known as the "Piru Oil Mine," lot No. 41, containing 160 acres the "Roblarcito Oil Mine," lot No. 42, containing 159.96 acres, the "Santa Clara Oil Mine," lot No. 43, containing 159.87 acres, and the "San Francisco Oil Mine," lot No. 44, containing 159.97 acres, located in the Camulos Petroleum mining district, county of Ventura, California, in T. 4 N., R. 18 W., S. B. M.

These several claims were located August 1, 1877, and notices thereof were duly recorded, and the Piru Oil Company, a corporation organized under the laws of California, is the assignee, by mesne conveyances, of the original locators. The notice of said application was duly published sixty-three days, from July 10, 1891, to September 11, 1891, in the "Santa Paula Chronicle," a weekly newspaper published in said county.

On September 22, 1891, said company, in the absence of any adverse claim, was allowed to make mineral entry No. 123, embracing the area contained in said four mines, consolidated into the "Piru Oil Company Mining Claim," containing 639.80 acres, and received final certificate and receipt therefor.

The papers were transmitted to your office, and by letter of February 6, 1892, you called for additional evidence upon certain points, and also stated that—

> A portion of the land is adversely claimed by Joseph W. Lockwood under his homestead application No. 3508, made August 20, 1887, prior to the mineral claimants' application. Mineral claimants are therefore allowed thirty days from notice hereof to show cause why the mineral entry should not be canceled to the extent of the conflict with said homestead entry.

On February 23, 1892, said company filed a motion to reconsider your action, on the ground, *inter alia*, that when Lockwood made his said homestead application on August 20, 1887, the local officers overlooked the regulations relating to mining claims, and without authority of law allowed said entry "without having first ordered a hearing to determine the character of the land." Said motion also stated that

> the records of the General Land Office show that the mining claims embraced in said mineral entry were surveyed by the order of the U. S. Surveyor General for Cali-

fornia on Nov. 19, 1881, and by said survey were duly segregated as mineral lands, and a plat of the township in which said mining claims were situated, showing such segregation, was filed in the U. S. land office on Nov. 25, 1881, and thereafter no entry of the land covered by said survey could legally be made under the laws providing for the sale of agricultural land, except in the manner provided in the U. S. mining laws and the regulations thereunder.

By your letter of March 12, 1892, you denied said motion.

On April 8, 1892, the said company filed an application for a hearing to show that said Lockwood had never resided upon the land embraced in his homestead application, or placed any improvements thereon, and that his said entry should be cancelled.

By letter of April 21, 1892, you denied this motion, saying—"These are not the questions at issue. The questions relate to the discovery of mineral within the limits of each location, and the sufficiency of the improvements," and you held the mineral entry for cancellation.

On May 11, 1892, the said company filed a motion for the reconsideration of decision of April 21, 1892, and asked for further time to furnish the evidence required in support of the said mineral entry, and submitted that the homestead claimant should have been called upon to show cause why his entry should not be cancelled to the extent of the conflict with the mineral locations, instead of the reverse action that was taken.

By letter of May 18, 1892, you denied this motion.

An appeal has been taken to this Department from your decisions of April 21, 1892, and May 18, 1892.

Since the date of the appeal the additional evidence called for has been filed, showing that the company has complied with the law as to discovery of mineral upon each location, and improvements thereon. The only question for consideration is, therefore, what is the effect upon the rights of the mineral claimants of the allowance of said homestead entry.

As already stated, these four mineral claims were located August 1, 1877.

Section 2322 of the Revised Statutes defines the rights of the locators of lode locations as follows:

> 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 or assigns, ... 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 their locations, etc.

Section 2329 applies this provision of the law to "placer claims as follows:

> 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.

The original locators, by virtue of their locations, and compliance with the law, acquired a "possessory title" to the land embraced in their locations, and an exclusive right of possession and enjoyment" thereof. Such right and title in them excluded the acquirement of any right or title to the land by others.

In the case of Chapman *v.* Toy Long (4 Saw., 28, 34), it is said—

> But under the mining laws of the United States now in force, the locator of a mining claim, as to the right of the possession of the premises and to appropriate the minerals therein, becomes and is the assignee of the United States so long as the law remains in force, and he complies with the conditions imposed by it. Until Congress withdraws this license by a repeal of the law, the right of the locator to the possession of his claim and to appropriate to his own use the mineral deposits therein is full and complete, and he need not take any steps to purchase the land or obtain a patent for it. That is a matter left to his own option or sense of self interest.

This doctrine is cited with approval in Wolfley *v.* Lebanon Mining Co. (4 Col., 112, 119).

In Noyes *v.* Mantle (127 U. S., 348, 351), the court, in speaking of the rights of the locators under said section 2322 who have complied with the law, say—

> The claim was thenceforth their property. They needed only a patent of the United States to render their title perfect, and that they could obtain at any time upon proof of what they had done in locating the claim, and of subsequent expenditures to a specified amount in developing it. Until the patent issued, the government held the title in trust for the locators or their vendees. The ground itself was not afterwards open to sale.

In Dahl *v.* Raunheim (132 U. S., 260, 262), in which the rights of a locator of a placer claim were involved, who had not received a patent, the court say—

> But it appears that he has complied with all the proceedings essential for the issue of such a patent. He is therefore the equitable owner of the mining ground, and the government holds the premises in trust for him to be delivered upon the payments specified. We accordingly treat him, in so far as the questions involved in this case are concerned, as though the patent had been delivered to him.

It follows that the location of these claims and the record of the notices of such location upon the records of the mining district within which the land is located, and the compliance of the locators with the law, was notice to all who should attempt to make a homestead entry upon said land, that it was already appropriated as mineral land, to the exclusion of all others. When the surveyor general filed the township plat on November 25, 1881, showing such appropriation, that action was notice to the local officers that said land was so appropriated. They therefore had no right to allow the homestead entry of said Lockwood on August 20, 1887. By the allowance of said entry, under such circumstances, Lockwood acquired no right to the land embraced in his entry, and he must be held to have known that he acquired no right thereto, and that the mineral claimants were divested of none of their rights thereby. Fort Maginnis (1 L. D., 552).

Section 2325 provides how "a patent for any land claimed and located for valuable deposits may be obtained." It expressly provides that when the applicant has complied with the requirements of the mineral laws it shall be assumed that he "is entitled to a patent" upon the payment of five dollars an acre, "and that no adverse claim exists; and thereafter no objection from the 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." When the claim is a "placer" it is provided by section 2333, Revised Statutes, that it shall be paid for at the rate of two dollars and fifty cents an acre.

The homestead entryman has not asked to be heard as to the character of the land. He has never attacked its mineral character. He has never made any objection to the issuance of a patent to the mineral claimants. As he has kept silent all these years, when if he had any objection he should have made it by initiating a contest against the mineral claimants, it must now be presumed that as he has made no objection he had no objection to make. Houghton *v.* McDermott (15 L. D., 509); Anderson *v.* The Amador and Sacramento Canal Co. (10 L. D., 572).

Inasmuch, however, as said homestead entry still remains of record, though irregularly allowed, I am of the opinion that it should not be cancelled without first giving said Lockwood notice that such action is contemplated, and an opportunity to be heard in support of the validity thereof. You will therefore cause notice to be given him that he will be allowed thirty days notice hereof within which to show cause why his entry should not be cancelled, and will thereafter take such steps as may be proper and necessary to a final adjudication of the rights of the respective claimants.

Your judgment is modified accordingly.

PRACTICE—NOTICE OF CONTEST—APPEARANCE.

CHESLEY *v.* RICE.

Notice of contest by registered letter to the defendant, who is a resident of the State in which the land is situated, does not confer jurisdiction upon the local office.

An appearance for the purpose of objecting to the sufficiency of the notice does not confer jurisdiction upon the local office; nor is such objection waived by subsequent participation in the trial.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 13, 1893.

On October 1, 1886, Stephen Rice made timber culture entry (No. 10,134) of the NW. ¼ of Sec. 11, T. 17 S., R. 20 W., at Wa-Keeney, Kansas.

On October 2, 1889, William J. Chesley filed an affidavit of contest against said entry, alleging—

That said Stephen Rice wholly failed during and since third year of entry to break, plow, or cultivate any part of said land, or to cause the same to be done, and wholly failed, during and since third year of said entry, to plant five acres of said land, or any part thereof, with trees, seeds, or cuttings, or to cause the same to be done; that said failure still exists.

The local officers thereupon issued a notice summoning the parties to appear at their office on November 20, 1891, to respond and furnish testimony concerning said alleged failure. Said notice was served upon said Rice, by mailing a copy thereof in a registered letter, addressed to Newton, Kansas, his "last known post-office address," on October 4, 1889, which notice was received by said Rice on October 8, 1889.

On the day appointed for the hearing the contestant appeared in person and by attorney. The contestee made special appearance by attorneys only, for the purpose of filing a written motion to dismiss the case, which motion was filed, and specified the following reasons therefor:—

1. That no service, as required by the rules of practice has been made, or attempted to be made, on defendant.
2. For the reason that the contest affidavit in this case was sworn to before the attorney of contestant

Said motion was overruled by the local officers, to which action the attorneys for contestee duly excepted.

Thereupon an affidavit was filed on behalf of contestee, made by his agent, showing that "owing to sickness of himself and wife he is unable to be present at this time and testify in his own behalf;" that if present he would testify to certain detailed acts of cultivation of said tract; that he had made said entry in good faith; and asking that said case be continued to December 30, 1889, when it was believed that he could be present and testify. Whereupon the contestant admitted that contestee, if present, would testify to the statements set forth in said affidavit, and the case was held for trial and testimony was submitted.

On January 20, 1890, the local officers held that said entry should be cancelled.

On appeal, by your letter of January 25, 1892, to the register and receiver, you decided that

no legal notice having been given defendant, so as to clothe you with any jurisdiction in the premises, your decision is vacated and set aside, and affidavit of contest returned for proceedings *de novo*, within thirty days, in default of which proceedings contest will be dismissed.

An appeal now brings the case before me.

The specifications of error are as follows:

1. Error of law in holding contestee's appearance special and not general.
2. Error of law in holding that contestee's motion and affidavit for a continuance was not a general appearance.

The notice of contest and hearing must be served personally "in all cases when possible, if the party to be served is resident in the state or territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served." Rule 9, Rules of Practice. If this rule be not complied with, the local officers acquire no jurisdiction to hear and determine the contest. Driscoll *v.* Johnson (11 L. D., 604); Farrier *v.* Falk (13 L. D. 546).

The contestee was a resident of Kansas, the State in which the land in dispute is situated, and that fact was known to the contestant, as he mailed the notice of contest to the contestee at Newton, Kansas.

The attorneys for the contestee entered a special appearance for the purpose of contesting the jurisdiction of the local officers. This action did not confer jurisdiction upon that tribunal. Branner *v.* Chapman (11 Kan., 118); William W. Waterhouse (9 L. D., 131); Davison *v.* Beattie (14 L. D., 689); Harkness *v.* Hyde (98 U. S., 476).

Neither did the attorneys for Rice waive the illegality in the service of said notice by making the motion for a continuance, and afterwards participating in the trial. In Harkness *v.* Hyde, *supra*, the principle is clearly stated, as follows:

> Illegality in a proceeding by which jurisdiction is to be obtained is in no case waived by the appearance of the defendant for the purpose of calling the attention of the court to such irregularity; nor is the objection waived when being urged it is overruled, and the defendant is thereby compelled to answer. He is not considered as abandoning his objection because he does not submit to further proceedings without contestation. It is only when he pleads to the merits in the first instance, without insisting upon the illegality, that the objection is deemed to be waived.

Your judgment is affirmed.

PRACTICE—NOTICE—STONE LAND—SETTLEMENT RIGHT.

CLARK ET AL. *v.* ERVIN.

A stipulated postponement to a day certain waives all objection as to notice of the time fixed for trial.

Land chiefly valuable for the building stone it contains is not by such fact excluded from entry under the settlement laws.

Prior to the act of August 4, 1892, there was no authority for a placer location on land chiefly valuable for a deposit of common building stone, and a location of such character will not defeat a subsequent settlement claim initiated prior to the passage of said act.

Secretary Noble to the Commissioner of the General Land Office, February 13, 1893.

On January 16, 1893, I directed you to return the record in the case of M. S. K. Clark and William Elmendorf *v.* Robert N. Ervin for further consideration. I am now in receipt of said record and the unpromulgated judgment of the Department dated January 9, 1893.

The record shows that the land in question, to wit: the NE. ¼ of Sec. 14, T. 1 N., R. 7 E., Rapid City, South Dakota, was located as a stone placer claim on May 27, 1889. Subsequently Clark and Elmendorf became possessed of the whole tract by purchase. On November 12, 1889, Robert N. Ervin settled on the tract, soon after filed his pre-emption declaratory statement therefor, and on April 15, 1890, advertised that he would make final proof and payment for the land on June 14, 1890. Clark and Elmendorf protested against his proof, alleging that the ground was only valuable for the stone it contained.

A trial was had between the parties on June 19, 1890, Thereafter the register and receiver rejected the proof of Ervin, and recommended that his filing be cancelled, holding that the tract was chiefly valuable for the stone it contained.

On November 19, 1890, you considered the case on appeal, affirmed the finding of the register and receiver, and held "that the value of the tract is for its minerals only, and therefore subject to disposal under the U. S. mining laws."

Ervin appealed from your judgment to this Department, contending that you erred in holding that the tract was more valuable for its stone than for agriculture, and that you should have refused to consider the evidence in the record, because taken irregularly and without due notice to claimant.

The last named contention is untenable, for the record shows that he stipulated in writing that the trial should be postponed until June 19, and on that day he appeared and submitted proof, etc.

Even if there was any irregularity about the trial being held when it was, and none is shown, he waived all objections thereto by entering into said stipulation.

The proof shows that this tract is more valuable for the building stone it contains than it is for agricultural purposes. Still I do not think that this showing is at all important in arriving at the rights of the parties in this case. The tract here in question is not shown to be mineral land, hence it may properly be entered under the settlement laws.

It might also, since August 4, 1892, be entered under the placer law, since the act of that date (27 Stat., 348), provides that land chiefly valuable for building stone may be entered under the placer laws. It does not follow, however, that land chiefly valuable for building stone shall be considered as mineral land, or that such land may not also be entered under the homestead law, or that it might not have been entered under the pre-emption law prior to its repeal. It then becomes a question of the priority of the claims.

The tract was located as a placer claim on May 27, 1889, which was several months prior to the initiation of Ervin's pre-emption claim. It follows, I think, that if the placer location was a valid one, the claim of Ervin must be rejected. After a legal mineral location has been

made, a claim may not be initiated for the same land under the settlement laws, unless on proof furnished it is shown that the location is invalid, or that the ground is not mineral, or that no discovery has been made; in other words, the mineral claim must be disposed of before an entry can be made under the homestead law.

In this case I find that no law existed allowing land chiefly valuable for common building stone to be entered under the placer law prior to August 4, 1892. Conlin *v.* Kelly (12 L. D., 1.)

Since the claim of Ervin was initiated long before this act of August 4, 1892, *supra*, was passed, he is entitled to the land, if he has in good faith complied with the pre-emption law, because the placer location was illegal, the tract not being subject at that time to such location. The land was therefore public land at the date of Ervin's settlement, and filing, and while it is shown to be chiefly valuable for building stone found on portions of it, it still has considerable value for agricultural purposes, and is worth, according to the evidence, at least $5 per acre for that purpose.

The proof fails to show that Ervin has not acted in good faith. In fact, it is shown that he established residence on the tract on November 12, 1889, and has never abandoned it. He built a house, the materials alone of which cost $75. He furnished his house with all necessary furnishings for sleeping and cooking and eating. He was occasionally absent for a few days to earn money upon which to maintain himself. He has never been away as much as ten nights altogether after his residence was established until after his final proof was made; he was on the land every day in November after making settlement on the 12th, and when working in town invariably went to his home after his work was finished. He kept two horses on the land, and while he did not cultivate the land extensively, he made efforts to have it plowed. He did have three acres plowed, and paid one Boomer $20 for plowing five acres. The cultivation by Ervin is shown to have been but meagre, but his other improvements, and his continuous residence on the tract indicate a bona fide intention on his part to take this land as a home to the exclusion of one elsewhere.

Your judgment is therefore reversed, and you are directed to approve the proof of Ervin.

The departmental decision of January 9, 1893, recalled by letter of January 16, 1893, is modified as herein stated, and the claim of the mineral locators is rejected for the reasons herein given.

PRACTICE—CERTIORARI—APPEAL.

PRICE *v.* SCHAUB.

An application for certiorari should be made under oath, and the affidavit in such case should, in effect, set forth the verity of the allegations relied upon as the basis of the application.

The General Land Office has no jurisdiction to dismiss an appeal from its action, where such appeal is received and its filing noted of record.

Secretary Noble to the Commissioner of the General Land Office, February 14, 1893.

On the 29th of November, 1892, you transmitted to the Department a petition for certiorari, filed by the attorneys for Isaac W. Price, in the case of said Price against Charles W. Schaub, involving land in the Grand Island land district, Nebraska.

You rendered a decision in the case on the 2d of April, 1892, in which you canceled the homestead entry of Price, and accepted the pre-emption final proof of Schaub.

An appeal from your decision was filed in your office by the attorneys for Price, on the 8th of June, 1892. On the 15th of July, in a letter addressed to you, the attorneys for Schaub called attention to the fact that said appeal was not filed "within the time fixed by the Rules of Practice," and asked that it be dismissed.

On the 24th of October, 1892, you informed the register and receiver at Grand Island, that "the said appeal not having been filed within the time prescribed under Rule 86 of Practice, is accordingly rejected." You directed them to notify Price, or his attorney, thereof, and that he was allowed twenty days within which to file an application for certiorari, under Rules 83 and 84 of Rules of Practice.

Such application is now before me, together with a motion to dismiss the same. The reasons for asking a dismissal of the application are stated as follows:

1. Said petition is not verified, as required by Rule 84.

2. No sufficient ground is stated, requiring the Secretary to interpose in this case.

Rule 84, of the Rules of Practice, provides that "Applications to the Secretary under the preceding rule, shall be made in writing, under oath, and shall fully and specifically set forth the grounds upon which the application is made."

In the case before me, the application is in writing, and fully and specifically sets forth the grounds upon which it is made. The only oath connected with it is the affidavit of one of the attorneys, in which he says "that the foregoing petition is made in good faith, and not for the purpose of delay." The affidavit makes no allusion to the statements contained in the application, and in no respect certifies to their truth. It is simply the affidavit required by Rule 78, in the case of

motions for rehearing or review, and does not meet the requirements of Rule 84. A compliance with that Rule would require an "oath," such as is attached to a verified pleading in courts, that "the statements therein contained are true, to the knowledge of deponent, except as to the matters therein stated upon information and belief, and as to those matters, deponent believes them to be true."

In the case of Peterson *v.* Fort (11 L. D., 238), there was no affidavit attached to the petition, and the application for certiorari was for that reason denied. In the case of Northern Pacific Railroad Company *v.* Dalton, decided by the Department July 20, 1892, (Press Copy Book 248, page 477), the affidavit was similar to the one in the case before me. The application was also subject to the objection of not setting forth the grounds upon which it was made. For these reasons it was dismissed.

The case before me, however, differs somewhat from those cited. An attempt to verify the application was made, and the grounds upon which the application is based, are fully and specifically set forth, but the application does not comply with the rules, and the motion to dismiss the same is sustained.

The Rules of Practice were adopted for the government of proceedings in the Department and subordinate offices in land cases, but before they were approved, it was expressly stated that "None of the foregoing rules shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law."

An appeal was taken on June 8, 1892, from your decision, and the date of its receipt stamped upon the notice, and the fact of its filing minuted upon your office records. It is now pending before me.

Under the decisions of the Department, you had no authority to dismiss the same. In the case of the St. Paul, Minneapolis and Manitoba Railway Company, *et al. v.* Vannest (5 L. D., 205), it was held that "though the General Land Office may refuse to receive an appeal from its decision, not filed in time, it has no authority to dismiss such appeal, if it is received without objection." In the case of John M. Walker, *et al.* (5 L. D., 504), it was held that the General Land Office has no jurisdiction over a case after appeal therein. In announcing that conclusion, it was said:

> I can see no good reason for departing from the rule that an appeal places a case beyond your jurisdiction. It has been followed for many years in the practice of this Department, and is, in my opinion, in conformity with the practice of courts.

In a very late case, that of Grinnell *v.* Wright (15 L. D., 252), the Department again expressed its views upon this subject. In that case, an appeal from your decision was filed on the 14th of June, 1890. On the 2d of August, of that year, a motion to dismiss said appeal was filed, which you proceeded to consider and decide. In commenting upon those facts, it was said:

This you had no authority to do, and your judgment upon the question, having been rendered in a case which was not then before you, is a nullity, as being without jurisdiction. In such cases, jurisdiction can neither be assumed by a court, nor conferred by stipulation of the parties in interest.

To the same effect was the decision in the case of William Galloway (12 L. D., 80); Henry *v.* Stanton (Ibid, 390); Stenoien *v.* Northern Pacific Railroad Company (Ibid, 495) and Bennett *v.* Cravens (Ibid, 647).

You will accordingly transmit to this Department all the papers in this case, in order that such action may be had as may seem right and proper in the premises.

TOWNSITE—ADDITIONAL ENTRY—PREFERENCE RIGHT.

HARPER *v.* GRAND JUNCTION (ON REVIEW.)

An additional townsite entry cannot be allowed to embrace a non-contiguous tract of land.

The extension of the corporate limits of a town to include land that cannot be taken under the townsite laws, and is not occupied for purposes of trade and business, or laid out in streets and blocks, does not operate to segregate such land from the public domain.

An applicant for a pre-emption right who appeals from the rejection of his filing is not entitled to a preference right as a successful contestant where the prosecution of his appeal results, on examination of the records, in the cancellation of a prior townsite entry.

Secretary Noble to the Commissioner of the General Land Office, February 14, 1893.

On January 6, 1890, John Harper applied to file his pre-emption declaratory statement for the E. ½ of the SW. ¼ of Sec. 13, T. 1 S., R. 1 W., Montrose, Colorado.

It was rejected by the register and receiver because it was claimed by them to be within the limits of the additional townsite entry of the town of Grand Junction. He appealed from their finding to you, and on August 3, 1890, after considering the case, you held the townsite entry for cancellation, and held "that although the townsite entry should be cancelled in respect to the tract in dispute, yet said tract does not thereby become subject to the entry." You also stated that

The land applied for by Mr. Harper is distant at the nearest point one quarter of a mile from any part of the land covered by the townsite entries, and therefore the additional townsite entry of this land does not come within the requirements of the section of the above act quoted as acting (being) an entry of contiguous tracts.

The act referred to in the above is the act of March 3, 1877, (19 Stat., 392) which provides that towns that have made or may make entry for less than the maximum quantity of land allowed by law may make additional entries of "contiguous tracts which may be occupied for town purposes," etc.

John Harper appealed from your judgment to this Department, asserting substantially that you had erred in holding that he was not entitled to file on the land.

On July 29, 1892, (15 L. D., 124) the case was considered by the Department, and your judgment affirmed. It was stated

that this tract is not in fact laid out in lots, blocks, streets, and alleys, or used as a town for purposes of trade or commerce, although in fact included within the corporate limits of the town by the certificate of incorporation of the town or city of Grand Junction.

By this affirmance of your judgment, the Department found that the tract in question was non-contiguous to the tract included in the townsite entry, and that it was therefore right for you to have cancelled the townsite entry made as an additional one under the act of March 3, 1877, *supra*, including this land. It was further held that said tract was not subject to Harper's filing, not because the townsite company had or could have any legal claim to it, but because it was included within the corporate limits of the town.

Harper has now filed a motion for review of departmental judgment in so far as it holds that the land is not subject to entry, alleging error as follows:

1. In not considering the question of Harper's preference right as the successful contestant under the act of May 14, 1880.

2. In not considering the effect of the act of March 3, 1877 as amending the provision of the pre-emption law prohibiting entries of lands within the limits of incorporated towns.

3. In affirming that portion of the decision of the Commissioner of the General Land Office which proposes to sell said tract at public auction under Sec. 2455 of the Revised Statutes of the United States.

I do not believe that the judgment of the Department is correct in holding that the tract in question is not subject to filing or entry.

It is well settled by the rulings of the Department that two entries cannot stand at the same time for the same tract, and it has been held that an entry, though not a legal one, will segregate a tract to such an extent that it may not be entered by another until the first illegal entry shall be set aside or declared illegal, and so, if the town of Grand Junction had an entry of the tract or an application to enter it, of course it could not be entered by another or be held subject to the filing of Harper until the claim had been disposed of; but in this case the town site has been disposed of by your judgment affirmed by the Department. The tract, then, at this time is not claimed by the townsite, and the fact that the corporate authorities, in their enthusiasm at a time when they did assert a claim, caused the corporate line to be run around this tract will not segregate it. No claim is now asserted to the tract by the townsite company, and if it can be allowed to extend its corporate limits so as to segregate this tract from the public domain, then it can so extend the limits to include a thousand acres of government land adjoining this tract, and thereby prevent its disposal

under the homestead law. The corporate authorities of a town located on the public land may extend the limit of their corporation at will, but the Department, under the law, will determine how much land the corporation is entitled to.

In the case of this townsite, an original entry has been made under the townsite law; new territory can only be added thereto from public lands contiguous to the original entry, and this tract is not contiguous. It follows not only that the townsite *is* asserting no claim, but that under the law it *can* assert none to this tract.

Having this status in the case, can it be said that the act of extending the corporate limits alone is sufficient to segregate the land? I think not; nor am I at a loss for a precedent in this view. In the case of Lewis *et al. v.* Townsite of Seattle *et al.* decided October 26, 1881 (1 L. D., 497) it was held (syllabus) that—

> Land within the incorporated limits of a town, which it is not entitled to enter by reason of its population, and which is not actually settled upon, inhabited, improved, and used for business and municipal purposes, is subject to pre-emption claim by virtue of section 1, act of March 3, 1877.

Your judgment, and the judgment of this Department, are undoubtedly correct in holding for cancellation the townsite additional entry for the tract in question. It was also proper for the register and receiver to reject the application of Harper made on January 6, 1890, for at that time the tract was covered by the townsite entry. Hastings and Dakota R. R. Co. *v.* Whitney (132 U. S., 357); Maggie Laird (13 L. D., 502); Goodale *v.* Olney, on review, (13 L. D., 498).

When the claims of the townsite were adjudicated and the entry cancelled, the tract should have been held subject to disposal to the first legal applicant.

It is claimed that Harper should be accorded a preference right to enter the tract, because of being a successful contestant; but an examination of the record does not bear out that contention. He has not been a contestant in any sense of the word. He merely offered his application to make a pre-emption filing on the land, and appealed from its rejection, and your action in cancelling the townsite entry was taken because of what was shown by your own records. Besides a letter found in the record, written by Harper on April 7, 1890, shows that he did not consider himself a contestant. It states that "my claim is based strictly upon the construction of the point of law contained in Sec. 4, Chap. 113, Vol. 1, Sup. R. S., and Sec. 2389, R. S., and is not of the nature of a contest."

No motion for review has been filed by the townsite company.

In conclusion, I hold that the tract is public land, subject to entry, and direct that you allow the first legal application therefor since the cancellation of the additional townsite entry. To this extent the former judgment of the Department is modified.

ENTRY—CANCELLATION—ATTORNEY.

FAULKNER *v.* MILLER.

A prima facie valid timber culture entry (made by a married woman) while of record segregates the land covered thereby, and precludes the allowance of application to enter the land so appropriated.

An entry should not be canceled on the ground of fraud in the absence of clear and convincing proof.

The answer of an attorney will be stricken from the files where it contains scurrilous and impertinent matter.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 14, 1893.

On February 14, 1887, Miranda Wilson made timber culture entry (No. 124) of the E. ½ of the SE. ¼ and the S. ½ of the NE. ¼, Sec. 22, T. 15 N., R. 120 W., at Evanston, Wyoming.

On November 18, 1887, Charles Faulkner tendered his application (No. 310) for a homestead entry of said tract, but the same was rejected "because at the time the said tract was covered by timber culture entry No. 124."

On December 29, 1887, Miranda Wilson relinquished her said timber culture entry, and August Miller thereupon made timber culture entry (No. 153) of said tract.

Afterwards, upon the same day, the rejection of Faulkner's application was endorsed thereon, and he was allowed thirty days in which to appeal.

Faulkner appealed, and by letter of June 6, 1890, a hearing was ordered to determine the rights of the parties, which was held on October 13, 1890. On November 28, 1890, the local officers found from the evidence that at the time the timber culture entry of Miranda Wilson was made "she was a married woman and living with her husband, therefore her entry was invalid." They further find "that the action of the officers in receiving Miller's entry was erroneous, and that as soon as the relinquishment of Mrs. Wilson's T. C. E. was filed, the next in order was the homestead application of Mr. Faulkner." They recommended that the entry of Miller be cancelled, and that the application of Faulkner be received.

On appeal, by letter of March 15, 1892, you held that—

> There is nothing on the face of the papers of Mrs. Wilson's timber culture entry to show that she was a married woman, and while such entry remained of record, notwithstanding it was illegally made, no other entry of the land could legally be allowed. Faulkner gained no priority of right to enter the land by the filing of his application to enter it. (Maggie Laird, 13 L. D., 502.)

You further held that Miller made his entry "at the solicitation of Mr. Wilson and for his interest, or, perhaps, for the use and benefit of himself and Mr. and Mrs. Wilson." You therefore affirmed the decision

of the local officers, held the entry of Miller for cancellation, and directed that Faulkner be allowed to make homestead entry of the land.

An appeal now brings the case before me.

Inasmuch as it did not appear upon the face of the papers of the timber culture entry of Miranda Wilson that she was a married woman, her entry was *prima facie* valid, and so long as it remained upon the records it had the effect to segregate the land. "An entry which is voidable only segregates the land covered thereby while it remains of record." Leary *v.* Manuel (12 L. D., 345); Hastings, etc., Railroad Company *v.* Whitney (132 U. S., 357, 361).

The entry of a married woman is valid if she is the head of a family. Theresa Landry (13 L. D., 539). This is especially true in a timber culture entry where no residence is required upon the claim.

The action of the local officers in rejecting the application of Charles Faulkner to make homestead entry of said tract, tendered on November 18, 1887, when the land was already segregated by the entry of said Wilson, was proper and legal, as the land was not then legally liable to disposal. Holmes *v.* Hockett (14 L. D., 127); Maggie Laird (13 L. D., 502).

Their action in receiving Miller's timber culture entry on December 29, 1887, after the relinquishment of Wilson's entry was filed, was also proper and legal, as he appears to have been the first legal applicant for the land after the same was relinquished, and thus made subject to entry.

The only remaining question is that of the good faith of Miller in making his entry.

The evidence shows that Miller has expended from $1000 to $1500 on this claim, in ditching, fencing, planting trees, etc., all indicating good faith on his part. He swears that he made the entry for his own interest solely, and Mr. and Mrs. Wilson both testified that they had no present or prospective interest therein. The local officers, however, concluded that from the appearance of the parties at the trial, and the interest therein manifested by Wilson, "that Miller's entry was made for Wilson and Miller." And you state your opinion that said entry was made "perhaps for the use and benefit of himself and Mr. and Mrs. Wilson."

And upon this contingency as a foundation you base your decision affirming the action of the local officers.

Fraud is to be proved by evidence, and not to be presumed in the face of the direct evidence of the parties, and from appearances, which may be entirely fallacious. The facts upon which this fraud is presumed are entirely consistent with good faith on the part of Miller. His good faith is not impeached by any evidence adduced upon the trial, and his entry should remain in tact.

Your judgment is reversed.

A motion has been made to strike from the files the answer of William Hinton, attorney for Charles Faulkner, to the appeal taken from the decision of the local officers on behalf of Miller by his attorney, J. H. Ryckman. This answer characterizes Ryckman in a scurrilous and impertinent manner with "insulting epithets and vulgar vituperation," showing that the draftsman "forgets the dignity of his profession, the courtesy which should characterize his conduct towards his associates, and the duty he owes the Department." Such conduct calls for rebuke. The answer will therefore be stricken from the files and returned to its author. Ware *v.* Judson (9 L. D., 130).

OKLAHOMA LANDS—SETTLEMENT RIGHT.

SOUTH OKLAHOMA *v.* COUCH ET AL.

A settlement right within Oklahoma cannot be secured through occupation of land prior to the time fixed by the President's proclamation for opening the lands in said Territory to settlement and entry.

One who is rightfully in said Territory prior to the opening thereof cannot take advantage of his presence therein to secure a settlement claim in advance of others.

Secretary Noble to the Commissioner of the General Land Office, February 14, 1893.

I have considered the case of South Oklahoma Townsite Claimants *v.* Meshack H. Couch, homestead entryman, and Thomas Wright, Edward Orme, Kate Mitchell and Nathan N. Miller, contestants, involving the NW. ¼ of Sec. 4, T. 11 N., R. 3 W., Oklahoma City, Oklahoma.

On July 11, 1892, you rendered a decision in the case, in which you held the homestead entry of Couch for said tract for cancellation, dismissed the application of the townsite claimants to enter the land, dismissed the contests of Wright, Mitchell, and Miller, and awarded the land to Edward Orme, contestant and homestead claimant.

All the parties whose claims were rejected by you, have appealed.

The record has been carefully examined. Much of the testimony is irrelevant, and is more or less conflicting, but I am satisfied that the findings of the local officers, and your findings, are fully justified by the evidence as presented.

It appears that the entryman Couch entered the Indian country, now known as Oklahoma, in 1881. In 1884, he entered upon the tract in controversy, and surveyed the same, but was removed therefrom by the military authorities of the government. He was in the vicinity of the land prior to noon on April 22, 1889, and immediately after 12 o'clock took possession of, or entered upon the tract in question.

Couch asserts that his occupation of the land in 1884, was a legal segregation of the same, and that he is a qualified homestead entryman.

No argument will be advanced to sustain a proposition so self-evident and fundamental as the one, that this land was not subject to entry or disposal under the public land laws until so proclaimed by the President of the United States, under the provisions of the act of Congress, approved March 2, 1889, and hence, that Couch could obtain no rights to the same prior to that date. It is also a fundamental principle, too well established to be further discussed, that his unlawful entry within the limits of the Territory opened to settlement, prior to 12 o'clock, noon, on April 22, 1889, disqualified him as a homestead entryman or claimant.

Thomas Wright appears to have entered the Territory in February, 1889, and was employed, with his teams, in hauling freight for the military authorities in the vicinity of the land in dispute. It is no doubt just to concede that he was lawfully within the Territory.

It is earnestly contended in his behalf that it was his intention to leave the Territory prior to 12 o'clock, noon, of April 22, 1889, go to the border, and thus place himself on an equal footing with others who were waiting to enter when the signal was given, and to make the race for a claim in company with the eager crowd of claim seekers; but that he was prevented from doing so by the military authorities, who refused to allow him to go to the border, but detained him within the limits of the Territory; and hence, that he should not be denied the privilege of asserting a claim to the tract in question.

The following is his own statement on this point:

As I remember when I went to freighting it was in March about the latter part, and I worked on a freighting until a few days before the opening of the country, I don't know whether it was two days and a half or three. I was loaded with government freight, drove out to the stockade, drew my hay and corn, and tied it on behind my wagon, and I got on to my team and drove out into the road from the stockade; old man Pugsley came up to me, and he says they pressed my teams into the service, and he says I told them I had trail wagons and that I couldn't turn around in the timber, and that you had two single teams, and he says they will be here after you in a minute, well says I they can't get my teams, and he says well they will just take soldiers and put on them if you don't do it.

About that time Captain Rogers rode up with some soldiers with him and officers, says he, I want them teams, says I, Captain you can't get my teams, I am loaded for Reno with government freight, He says I don't want no talk about it, just you go on and haul wood and brush and water, I don't want no talk about it, well there was quite a crowd. My son was back a little ways with his team, hadn't moved out, and he drove right up behind my team, and Captain Sommers saw us standing there and the crowd around, the Quartermaster, Captain Rogers told me if I didn't go he would put soldiers on my teams, Capt. Sommers came up and he says Tom they have got a right to take your teams and do anything they want with them and don't make no trouble with them go back and unload that freight and go to hauling, Capt. Rogers says, now when you unload you report at Capt. Sommers up at his house. I reported to Capt. Sommers up at his house up east of the railroad, he sent me to Company F., says tell them you are there to haul wood, water and brush and whatever they want, and the sergeant got a lot of men out of company some ten or twelve some with axes and I heard him tell him not to cut any green timber to get dead timber, and not to cut any green timber. And I was to go

and haul it, the soldiers cut the wood and loaded it I was only to drive the team, and I went wherever they told me, and we hauled from that bend east of the road the railroad and west of it, to south of the claim I now live on on the Joe Couch claim, I think we cut some brush on the claim that I now live on and some wood, but principally off of the Joe Couch ¼. Going down I crossed about the center of this Thornton ¼ and crossed a corner of mine where I went under the bank, and when I loaded we had heavy loads and this is a very steep bench on my place there that I have now, for a half a mile or more going down empty we could go down the hill but coming back loaded we kept along that bench to where we could get up the hill to where there was a dim road that led to a ford in there, we came up that ford road, till we struck the Reno road, about 70 or 100 yards north of the claim that I now live on, I was there a few minutes before 12 o'clock. The tire was loose on my right hind wheel, I wedged it and knocked it and put it on. A man by the name of Kay, Taylor Kay, drove up to me in a spring wagon or buggy like, and he says I want you men to see that I have taken that claim, I laughed at him and I says you are pretty early are you not, he says I want you to see my trunk yonder and that stake, says I, Yes we saw it, saw you when you staked it, he looked up and see the soldiers and the people all here on the track yet here at the depot, as he turned his horses I couldn't understand what he said, but he put back to this trunk and stake, and threw it in the buggy or wagon, I see him turn north then, right towards the Adams grove, I was a noticing him, my son says, Dad there they come look yonder they are coming and I looked up and see them all coming whipping through the bottom scattered out over the bottom here, so I jerked out a stake and staked the claim that I was then on, and I looked up toward Asa Jones claim the north-east corner of that place, and I see 15 or 20 running for the Adams Grove on that place, and I looked down this way and I didn't see any body on the quarter that I am now on, I run across that and staked my stake on it, but the first stake that I drove I don't think I got on it quite it was still on this Adams quarter, after I drove that stake, I went and found the corner stone, and I set a stake up at the corner stone, by looking at this corner stone and sighting across the corner I was afraid that stake wasn't on it, I went then and drove one where my house now stands. I told my son and the soldiers to go on with the wood and load it and brush that I had on top of it, and come by the stockade and throw my bedding and cooking utensils and horse feed and everything in the wagon and come on down.

In reply to the following direct question by his counsel,

Now then you may state why you did not go to the line and make the race after noon; on April 22, 1889.

he replied:

Why, Capt. Rogers rode down with some soldiers and said he had to have my teams to haul wood and brush and water, I told him I wanted to go out and come in from the line, that I was a poor man and did not own a foot of land on earth and that I wanted to take a claim, that I had a big family, and he would not let me go.

In my opinion, the showing made by Wright, does not justify the contention made in his behalf.

It is by no means clear that the military officers had any authority or power to detain him against his will, and there is no satisfactory evidence that they attempted to do so.

The most that can be said is, that they took possession of his team for the purpose of hauling wood, etc.; the soldiers loaded the wagons, and the most that Wright did was to drive the team. This was at least some days prior to the opening, and there is nothing to show that it was impossible for Wright, on the evening prior to the opening, or

on the morning of the day of the opening, to withdraw to the border, and thus place himself on an equality with other seekers.

He appears to have been conveniently near to the tract in question at 12 o'clock, noon, the hour of opening the lands to settlement, and immediately took advantage of his situation to assert a claim to the tract.

Even if we should admit, for the sake of the argument, that Wright was under duress on the 22d of April, I cannot concede, that under the law, he would be a qualified claimant of the land.

By the terms of the proclamation of the President, dated March 23, 1889, it was known to the world that these lands would be opened to settlement on April 22, following, and the conditions upon which claims could be asserted, were also made known. There is no pretense, but that for weeks after the proclamation was issued, Wright was at full liberty to go out of the limits of the Territory. If he elected to remain therein, he must take the consequences of his action, and it must be held, that he could not take advantage of his presence near the land, to anticipate the settlement of others.

I can see no justice in the townsite claim, the evidence fails to show that there has ever been a bona fide townsite settlement on the tract.

So far as the record shows, Orme seems to be a qualified homestead claimant, and was the first legal settler upon the tract.

Your decision is affirmed.

SMITH *v.* BUCKLEY.

Motion for review of departmental decision of September 14, 1892, 15 L. D., 321, denied by Secretary Noble, February 14, 1893.

PRACTICE—RULE TO SHOW CAUSE—AMENDMENT.

SEVERY *v.* BICKFORD (ON REVIEW.)

A party who elects to appeal from a ruling of the local office requiring the amendment of an application for a hearing, under a rule to show cause, instead of complying with said order, is bound by such election, and is not entitled, after adverse action on his appeal, to ask consideration, on review, of evidence he neglected or refused to furnish within the period designated in the rule.

Secretary Noble to the Commissioner of the General Land Office, February 15, 1893.

Calvin L. Severy has filed a motion for review of departmental decision of October 11, 1892 (15 L. D., 358), in the case of said Severy against Harvey L. Bickford, involving the NE. ¼ of the SW. ¼, and Lots 12, 18, and 19, of Sec. 33, T. 13 N., R. 7 W., Oklahoma land district.

Bickford contested and secured the cancellation of the homestead entry of one Baum. Within thirty days after receipt of notice of the cancellation he applied to enter the land; but the local officers rejected the application, because they had previously allowed Severy to make entry of the same, subject to his preference right (in accordance with the then prevailing practice, which has since been changed—Allen *v.* Price, 15 L. D., 424). Bickford appealed to your office, and you directed the local officers to notify Severy that he would be allowed sixty days within which to show why his entry should not be canceled, and Bickford's application placed of record. Such notice was duly served on Severy; and on May 7, 1891, filed in the local office a request "that the register and receiver name a day upon which he may show cause why his homestead entry" should not be canceled. The registered endorses upon this that "the cause would be set for hearing whenever, within the time allowed, entryman shall have filed application for a hearing, *stating specific causes why* the entry of Bickford" should not be allowed. Severy took no further steps in the matter, nor did he comply with the order allowing him to show cause. The local officers so reported to you; and on October 12, 1891, you directed them to note the cancellation of Severy's entry, and place Bickford's application of record—further allowing Severy sixty days in which to appeal, and Bickford thirty days in which to make payment.

From this action of your office Severy appealed to the Department, which sustained your action.

The grounds of Severy's motion for review are as follows:

(1). Error in holding that Severy was bound to allege specific causes why his entry should not be canceled.

(2). Error in holding that the grounds assigned by Severy at the time of his appeal came too late.

(3). Error in not considering the affidavits filed on appeal by Severy.

By a perusal of the opinion heretofore rendered, it will be seen that the first of the above allegations of error was the second of those assigned on appeal from your office. It was fully and carefully considered; and the appeal offers no new fact or argument tending to change the opinion of the Department.

This ground of error being held to be of no validity, the two that follow must fall with it. The ruling of the local officers was, that he might amend his application by alleging some specific reason why Bickford's entry should be canceled. He chose not to amend, but appealed instead. He is now bound by his election, and can not, in law or in equity in the face of the record he has made for himself, after having wilfully or negligently disobeyed the rule of the land department to show such cause within a given time, now come in on a motion for review, and ask a consideration of evidence he then refused or neglected to furnish.

Counsel for the contestant alleges in his arguments, however, that—

> Such refusal to make the allegations demanded was not contumacy nor wanton carelessness, but was merely a legitimate method of testing his rights on a doubtful question of law.

Such being the case, he *has* tested it, the Department has rendered its decision, and the motion now filed furnishes no reason why that decision should be disturbed.

INDIAN HOMESTEAD—WIDOW—PROOF OF MARRIAGE.

STRAIN *v.* HOSTOTLAS.

The widow of an Indian homesteader is entitled to complete the entry where the evidence shows that she left her former home on the reservation and lived on the land with her husband prior to his death, and thereafter continued to reside upon said land and cultivate the same.

Proof of marriage accepted where the evidence shows that the parties agreed to live together as husband and wife and thereafter lived in such relation.

Rule 24, of equitable adjudication is applicable to an Indian homestead entry in which final proof is not made within the statutory period.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 15, 1893.

On the 18th of November, 1878, Alonzo Hostotlas, an Indian, entered the E. ½ of the NE. ¼ of Sec. 13, T. 17 N., R. 1 W., Humboldt land district, California, under the homestead laws, as modified by section 15, of the act of March 3, 1875, (18 Stat., 402–420).

On the 26th of March, 1889, Winfield S. Strain made homestead entry for the same land. On the 5th of June, of that year, Jane Hostotlas, as the widow of Alonzo, filed notice of her intention to make final proof for the land. Strain appealed from the action of the local officers in allowing her notice to be published, and in deciding his appeal, on the 9th of January, 1890, you held that his entry was improperly allowed.

The widow again gave notice of her intention to make final proof, naming March 17, 1890, as the date for that purpose, and the judge of the superior court of Del Norte county, California, as the officer before whom the proof would be made. Strain filed an affidavit against the allowance of her final proof, alleging that she was not the widow of Alonzo, and had no right nor interest in the said land.

The testimony was taken before the officer named, and submitted to the local officers, who, on the 26th of January, 1891, approved the final proof of the widow, and dismissed the protest of Strain. An appeal was taken to your office, and on the 17th of March, 1892, you approved the action of the local officers, and held the entry of Strain for cancellation. A further appeal brings the case to the Department.

About the facts of this case there is no dispute. At the time Hostotlas made entry for the land, he established the fact that he was a qualified entryman under the homestead law, and the act of March 3, 1875. He resided upon the land continuously until the 30th of January, 1889, when he died. On the 12th of March, of that year, his father made his mark to a written instrument, by which he assigned all his interest in the land in question to Strain. No consideration was named in the writing, and none was ever paid by Strain.

Up to the time of his death, Alonzo Hostotlas paid taxes upon the land. After that event they were paid by Jane. Until about 1884, an Indian woman by the name of "Mary" lived with Hostotlas on the land. He had bought her, "Indian style," and they had two children, both of whom died. About 1884, she left him, and went to live with a half-breed, known as "Crazy George."

After that Hostotlas went to "Jane", and told her he wanted to marry her "the same as white people marry," and that if he should die, she would get everything he had. She answered that "if you will no get drunk, I will live with you." What occurred between them previous to their commencing to live together, is detailed by her as follows:

Q. When you married Lon, did he tell you that he had another woman?
A. No.
Q. What did he say about that?
A. He said he was tired of cooking, when he first came to see me.
Q. What else did he say?
A. When he come to die I could live on ranch.
Q. What did you tell him—you said you would go and live with him?
A. Yes.
Q. Did you tell him you would be his wife?
A. Yes.
Q. Who was present at that time, any one else hear that talk?
A. Frank and Joe both heard it.

On her cross-examination, she testified that she had, prior to going to live with Lon, lived with an Indian named "Joe." In reference to this she said:

Q. How long did you live with Joe?
A. I don't count.
Q. How many winters?
A. I never count. I just stay with him; sometimes I stay with him.
Q. He buy you?
A. No.
Q. Lon buy you?
A. Yes.
Q. That the way Lon marry you, he buy you?
A. Yes; I marry as his wife.
Q. He buy you for wife?
A. Yes. He pay my brother.

Indian Frank testified that he saw Lon and Jane married. That Lon came where they were, and told Jane that he wanted to marry her the

same as white people marry. He then bargained for her. If anything was paid, it was to her brother, Mike. That there were present at the time, besides Lon and Jane, himself and Mike and Joe. Before concluding his testimony, he said that no money was paid for Jane, but that she went to live with Lon upon his promise to marry her the same as white people marry, and saying, "If I die you get everything."

There is a great amount of Indian, and other testimony in the case. Several witnesses testify that Hostotlas always spoke of Jane as his wife, and he had introduced her to some of them as such. While living with Mary he used to refer to her as "his woman," and no witness had ever heard him speak of her as "his wife." It was shown that Mary was alive at the time of the hearing, and Joe, with whom Jane had formerly lived, was a witness upon the trial. There was no evidence in the case that Lon was ever married to Mary, or that Jane was ever the wife of Joe. Neither was it shown that Lon and Jane were ever united in wedlock by any formal ceremony.

Under these circumstances, the counsel for Strain, in their appeal to the Department, insist that Hostotlas and Jane could not contract a legal marriage with each other, and that you erred in holding that Jane was the widow of Alonzo, and not holding that Jane, if married at all, was the wife of the Indian "Joe."

At the time Hostotlas made his entry, he filed his own affidavit, stating that he was an Indian, formerly of the Smith river tribe; that he was born in the United States, was over twenty-one years of age, and had abandoned his relations with the tribe of which he was formerly a member, and had adopted the habits and pursuits of civilized life. James Whiting and James K. Valentine made oath to the same facts. I regard this as "satisfactory proof" upon that point. As regards Jane, there is no direct "proof" upon this question, but the evidence shows that she left her former home upon the Klamath Indian reservation, and lived for several years with Hostotlas upon this land as his wife, before his death, and continued to reside upon and cultivate it after his demise. Under these circumstances, I think the widow of an Indian entryman should be allowed to complete his entry.

The remaining question is: Was Jane the legal wife of Alonzo Hostotlas? Section 55, of the Civil Code of California, answers the question "What constitutes marriage"? as follows:

> Marriage is a personal relation arising out of a civil contract, to which the consent of parties, capable of making it, is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties or obligations.

In Graham *v.* Bennett (2 Cal., 503), the court held that "marriage is a civil contract, and no form is necessary for its solemnization. Where parties are able to contract, an open avowal of the intention, and an assumption of the relative duties which it imposes, are sufficient to render it valid and binding."

In reference to the proof of marriage, the court, in the case of the People *v.* Anderson (26 Cal., 129), said:

Proof that a man and woman had cohabited together for a long time as husband and wife, had mingled in society as such, is admissible for the purpose of proving a marriage, and in the absence of evidence to the contrary, conclusive as such, in all cases, except in actions of *crim. con.*, divorce, indictments for bigamy, and like cases, where the marriage is the foundation of the claim to be enforced.

The Supreme Court of the United States, in the case of Meister *v.* Moore (96 U. S., 76), discussed at considerable length, the subject of the solemnization of marriages, and quoted with approval the language used by Judge Cooley, of the supreme court of Michigan, in the case of Hutchins *v.* Kimmell (31 Mich., 126), wherein it was said:

Whatever the form of ceremony, or even if all ceremony was dispensed with, if the parties agreed presently to take each other for husband and wife, and from that time lived together professedly in that relation, proof of these facts would be sufficient to constitute proof of a marriage binding upon the parties, and which would subject them and others to legal penalties for a disregard of its obligations. This has become the settled doctrine of the American courts; the few cases of dissent, being borne down by the great weight of authority in favor of the rule as we have stated it.

In view of the facts of the case at bar, and the rulings of the State and United State courts herein cited, I have no hesitancy in holding that "Jane" and Alonzo Hostotlas were legally married, and that as his widow, she has the right to complete his entry.

The conclusion reached by you in your decision of March 17, 1892, that under the circumstances of this case, it is a proper one to be referred to the board of equitable adjudication, under Rule 24, is approved by the Department, and it is disposed of accordingly.

RESIDENCE—CONFIRMATION—REINSTATEMENT.

GARTLAND *v.* MARSH.

A settler is not entitled to claim credit under a homestead entry for residence during a period he held the land under a prior pre-emption claim, that was subsequently perfected and the tract in question eliminated therefrom.

An incumbrancer whose right is acquired after the cancellation of the final certificate cannot, as a *bona fide* purchaser, invoke the confirmatory provisions of the act of March 3, 1891, as he is charged with record notice of the cancellation.

An entry having been canceled on relinquishment, prior to the issuance of final certificate, and the land entered by another, cannot be reinstated on the application of a transferee, who alleges that the relinquishment was in fraud of his rights, in the absence of evidence showing that the intervening entryman was a party to such fraud.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 15, 1893.

This appeal is brought by Peter J. Gartland from the decision of your office of September 1, 1889, holding for cancellation homestead

entry made by said Gartland, April 28, 1888, for the W. ½ of the NE. ¼ and the N. ½ of the NW. ¼ of Sec. 28, T. 139 N., R. 58 W., Fargo, Dakota.

From the record in this case, it appears that on July 5, 1878, Lucius D. Marsh made homestead entry of the W. ½ of the NE. ¼ of said section, and on July 12, 1879, he made additional homestead entry under the act of March 3, 1879 (20 Stat., 472), for the N. ½ of the NW. ¼ of the section, and made proof upon both entries November 20, 1880, and received final certificate for the same. In his final proof he claimed credit for residence on the land from May 1874, alleging that he had resided thereon since that date, under a pre-emption filing for the NE. ¼ of the section.

Upon investigation of his homestead proof, it was found that his claim to residence since 1874 was under a pre-emption filing for the NE. ¼ of said section, upon which he made cash entry, July 3, 1878, as to the E. ½ of said NE. ¼. On July 5, 1878, two days after making cash entry of the E. ½ of the NE. ¼ embraced in his pre-emption filing, he made homestead entry of the W. ½ of said quarter section.

Your office, on March 14, 1881, held that he was not entitled to credit for residence upon the W. ½ of the NE. ¼ of said section, during the period that it was embraced in his pre-emption filing, and his final homestead certificate was therefore canceled, and he was required to show continued residence under his homestead entry from the date of his original entry, July 5, 1878.

On November 26, 1883, Marsh again submitted proof, which was transmitted to the Commissioner by the local officers, without taking action thereon, and upon this proof your office directed that final certificate issue upon payment of final commissions.

No action seems to have been taken by the local officers, as directed by said letter, and, on October 27, 1885, Assistant Commissioner Stockslager, by letter of that date, called the attention of the register and receiver to the matter, and directed them to make a report thereon.

In response to this letter, the local officers, on November 3, 1885, reported that Marsh was notified January 21, 1884, "that upon payment of final commissions, final certificate would be issued" on both homestead entries, and that no response had been received from the entryman; whereupon Assistant Commissioner Stockslager withdrew permission to perfect entry upon the proof submitted, without additional evidence as to residence and cultivation.

April 2, 1886, the receiver reported that Marsh had been notified January 2d of the same year of the action of your office in the rejection as aforesaid of his proof, and, on April 12, 1886, the decision, by letter of that date, was "considered final, and the case closed."

No further action was taken in the premises until April 24, 1888 (two years subsequent), when both entries (original and additional) were relinquished by Marsh and canceled upon the records, and on the

same day Peter J. Gartland, appellant herein, made homestead entry No. 17,800, for the same.

January 29, 1889, the register transmitted to your office the motion of Omar L. Rosenkrans (claiming to be the owner of the land by purchase from Marsh) for the reinstatement of Marsh's entry and the cancellation of Gartland's.

In said motion (verified) Rosenkrans alleges that on February 10, 1881 (three months after receipt of final certificate), Marsh made and delivered to Mary D. Fuller a first mortgage on said tract for $500.00; that on November 17, 1881 (about a year after receipt of final certificate), Marsh made and delivered to him (Rosenkrans) a second mortgage for $672.49; that on March 15, 1886, he purchased the Fuller mortgage, paying therefor $568.38, and that on the 26th of April, of the same year, he procured from Marsh a quit claim deed for the tract. He also filed an abstract of title, showing these several transactions.

He further shows in said motion, that on April 28, 1888 (two years subsequent to the quit claim deed aforesaid), Marsh relinquished his said entry, and on the same day Gartland made entry thereof—all of which was in fraud of the rights of Rosenkrans; that he never had notice of any defect in the claim of Marsh to the land until the filing of Marsh's relinquishment and Gartland's entry; that he knows nothing of the whereabouts of Marsh, he having left Dakota for Alaska the night after his relinquishment.

From the foregoing statement of facts, it is apparent that it was error to cancel the entry of Gartland and to reinstate the entry of Marsh upon the motion of Rosenkrans, without evidence showing that Gartland was a party to the alleged fraud upon Rosenkrans, and that the relinquishment of Marsh was the result of a confederation between Gartland and Marsh to defraud Rosenkrans.

It appears that Marsh offered final proof prior to the expiration of the statutory period, claiming residence upon the W. ½ of the NE. ¼ of the section from 1874, while it was embraced in his pre-emption filing for the NE. ¼. But it was found that on July 3d, two days before he made homestead entry, he made cash entry of the E. ½ of the NE. ¼ and relinquished the remainder, and, hence, he could not claim credit for residence upon said tract under his homestead entry for the same period that he claimed to reside on it under his pre-emption filing. (Samuel J. Haynes, 12 L. D., 645.)

The Commissioner therefore properly canceled the final certificate, leaving the entry intact, with the right to submit proof after the expiration of the statutory period.

The cancellation of the final certificate was made March 14, 1881, and it was not until September 1, 1890, that the entry of March was reinstated and the entry of Gartland canceled. Therefore, when the mortgage was executed to Rosenkrans by Marsh, and when he purchased the mortgage of Fuller, no final certificate was in existence, but the status

of the entry was merely that of an entry of record, upon which final proof had not been made, and before the entry had been reinstated an adverse claim had attached, to wit, the entry of Gartland, made April 28, 1888, and at a time when the land was free from all claim of record.

The entry was therefore not confirmed by the act of March 3, 1891, for the reason that no certificate had been issued, and Rosenkrans, having purchased the Fuller mortgage after the cancellation of the certificate, and the second mortgage and deed to himself having been executed after that time, he could not be considered a *bona fide* purchaser or incumbrancer, as he was charged with record notice of the cancellation of the certificate. Nor could he defeat the claim of Gartland by showing that Marsh had complied with the law, so as to entitle him to final certificate upon the proof submitted in 1883, unless he shows that the relinquishment of entry by Marsh and the entry of the tract by Gartland were made with notice of the claim of Rosenkrans and in fraud of his rights.

While the rights of a *bona fide* purchaser or incumbrancer after certification may be protected, notwithstanding a subsequent relinquishment by the entryman, yet, if an entry is relinquished prior to the issuance of final certificate and a *bona fide* entry of the land is subsequently made by another, the claim of such incumbrancer will not be protected as against the rights of the subsequent *bona fide* entryman.

In this case a hearing should be ordered to determine whether Gartland was a party to the alleged fraud upon Rosenkrans, or whether his entry was *bona fide* and without knowledge of said alleged fraudulent conduct. If the former, the entry of Gartland will remain canceled and Rosenkrans will be allowed to perfect the entry of Marsh upon the proof submitted, if such proof authorizes the issuance of final certificate, or to submit proof showing that Marsh had complied with the law and was entitled to final certificate. If it be shown at the hearing that Gartland was not a party to the alleged fraud, but made his entry *bona fide*, it should be reinstated and the entry of Marsh canceled.

IRA M. BOND.

Motion for review of departmental decision of August 26, 1892, 15 L. D., 228, denied by Secretary Noble, February 15, 1893.

RAILROAD GRANT—SETTLEMENT RIGHT—COAL LAND.

BROWNFIELD *v.* NORTHERN PACIFIC R. R. CO.

A temporary settlement on known coal land abandoned shortly thereafter without any substantial improvements, and under which no right or color of right is acquired under the settlement laws, does not operate to exclude the land from the grant to this company.

Secretary Noble to the Commissioner of the General Land Office, February 15, 1893.

I have considered the case of Curtis D. Brownfield *v.* The Northern Pacific Railroad Company, involving lots 2 and 3 of Sec. 29, T. 23 N., R. 6 E., Olympia land district, Washington.

The land is within the limits of the withdrawal for the benefit of the Northern Pacific Railroad Company, main line, under the act of July 2, 1864 (13 Stat., 365), which became effective August 13, 1870. It is also within the limits of the withdrawal made August 15, 1873, for the Cascade branch line; also of the withdrawal made July 11, 1879, for the amended branch line. The main line has been constructed to New Tacoma, about two townships south of the land in controversy. The branch line opposite the land was definitely located March 26, 1884. Upon the final location of the branch line of the road, the tract fell within its primary (granted) limits.

The township plat was filed in the local office on August 5, 1873.

It is admitted by all parties that the land in controversy is coal-land.

On June 21, 1881, Curtis D. Brownfield filed application to purchase the land described, as coal-land, under section 2347 of the Revised Statutes.

The register, by letter of August 12, 1881, notified Mr. Brownfield that his application was rejected, "because the land applied for is reserved for the benefit of the Northern Pacific Railroad Company."

From this rejection of his application Brownfield appealed to your office; and on November 17, 1883, you ordered a hearing to determine the status of the land at the date of withdrawal. The hearing was held on February 6, 1884. On April 2, 1884, the register and receiver decided, from the testimony taken, that—

> This land was vacant public land at the date of the withdrawal made in favor of said road, August 15, 1873, for the branch line, and that no valid claim could attach to it since that time; and that the application of Curtis D. Brownfield to purchase the same should be rejected.

From this decision Brownfield appealed to your office; and on October 31, 1884, you decided that—

> There was such a claim to the tracts, on August 13, 1870, August 15, 1873, and June 11, 1879, as to except the same from the withdrawals of said dates; and therefore that said tracts were subject to entry upon July 13, 1891—the date Brownfield made his application.

From this decision the company appeals to the Department, contending that at the date or the withdrawals there was no such claim as served to except the land from the grant.

The portion of the testimony bearing directly upon the question of the occupation of land at the dates named is in substance as follows:

Witness Richard Richards testified that he had lived in Washington (then a Territory) since 1869; then in 1869 he and one Ed. A. Boblet went up the Cedar River; that on their way home they saw a large piece of coal; witness continued:

I said to Boblet, "There is something by the river that I want." We went up the river and found more coal; and we located there . . . . . The land was unsurveyed, but I had a claim on what I called the north side of the river . . . . . Boblet took one on the south side . . . . . In regard to claiming and getting title to this land, our intention was to take it any way we could acquire it; I hardly knew how, but our intention was to get it just as the government would let us have it . . . . . The value of this land was the coal that was on it; we wouldn't have selected it for anything else . . . . . We gave up the claims from the first to about the 10th or 12th of September . . . . . I told Boblet I did not want to give up the claim; he wanted to give them up; I said, "I do not want to stay here without you; if you want to give them up, it is all right. In coming down home we saw McAllister; . . . . . we stopped and talked with him; we both said, "McAllister, we give you our interest in the Cedar River coal mine" . . . . . Then we went on down home. That was between the first and the tenth of September, 1870 . . . . . Boblet had a house commenced—a log house—three or four rounds high, I would not be positive . . . . . We had slashed down considerable.

As Boblet was not a witness at the hearing—not being in that part of the country—the above was the most direct testimony obtainable as to his claim.

The remainder of the testimony taken at the hearing relates to the settlement and occupancy of the several subsequent claimants—which it will not be necessary to consider.

In the case of the Northern Pacific Railroad Company *v.* Collins, decided by me on May 7, 1892 (14 L. D., 484), to which the case at bar is similar in all essential respects, it was held that such a claim as that of Boblet's herein set forth—a "mere temporary settlement and squatter's claim on known coal land, which he shortly afterwards abandoned without having made any substantial improvement, and to which no right or color of right attached under the law by virtue of said settlement"—did not constitute such a claim or right as excepted the tract from the grant to the railroad company.

Your decision appealed from is therefore reversed.

PRACTICE—NOTICE—DEATH OF DEFENDANT.

RUCKELSHAUSEN *v.* DOUGLAS.

The death of a defendant suspends action in a case until his heirs, or personal representatives, are substituted as defendants, or brought into court by proper order and legal notice, or voluntarily appear.

In such a case the proceedings should not be dismissed, but discontinued until after due notice to the heirs at law or successors in interest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 15, 1893.

On the 18th of April, 1886, James S. Douglas made homestead entry for the NW. ¼ of Sec. 1, T. 5 S., R. 9 E., Tucson land district, Arizona. He made final proof on the 8th of May, of the same year, showing that he had resided upon and cultivated the land from January, 1877, and that the value of his improvements was $1,500. Final certificate was issued on the 14th of May, 1886.

On the 2d of November, 1887, John Ruckelshausen filed affidavit of contest against said entry, alleging that Douglas had sold, or agreed to sell, part of the land before making final proof.

Notice for a hearing, to be held on the 16th of April, 1888, was issued, and personally served upon Douglas on the 14th of March. On the 4th of April he died, leaving a widow and five children, three of whom were minors. William H. Sutherland was appointed administrator of his estate, on the 28th of April, 1888.

On the 14th of February, 1889, a new notice of hearing was served upon Sutherland, the testimony to be taken before the clerk of the district court of Pinal county, Arizona, on the 26th of February, the hearing to be at the local office, on the 5th of March, 1889. Notice of this hearing was also published in a newspaper, but no affidavit was made that the widow and heirs of Douglas were not residents of the State or Territory where the land was situated.

On the 26th of February, 1889, the contestant and his witnesses appeared before the officer appointed to take the testimony. The administrator, accompanied by counsel, also appeared, and objected to the taking of testimony, on the ground that no personal service had been made upon the persons interested in the land in contest, although they were residents of the Territory in which the land was situated. Sutherland's affidavit to this effect was filed. Counsel for contestant objected to the affidavit, and the officer appointed to take the testimony held that under his instruction the testimony should then be taken. There was no appearance on the part of Mrs. Douglas, or any of the heirs of the deceased entryman.

The testimony being certified to the local officers, they dismissed the contest on the 10th of May, 1890, for want of jurisdiction, holding that the parties in interest had not been properly notified of the hearing.

An appeal was taken to your office, and on the 5th of February, 1892, you informed said local officers that: "In view of the failure to serve notice of the hearing, as required by the Rules of Practice, your decision, dismissing the contest for want of jurisdiction, is sustained." A further appeal brings the case to the Department.

Among the several errors in your decision, specified in the notice of appeal, it is claimed that you erred "In not holding that, personal service having been obtained on the entryman before his death, jurisdiction attached; and it became the duty of the heirs and legal representatives to enter their appearance if they desired to do so."

This position is not tenable. The death of a defendant suspends the action, until his heirs or personal representatives are substituted as defendants, or brought into court by proper order and legal notice, or voluntarily appear in the case. In this case, contest having been initiated prior to the death of Douglas, the cause of action survived him, but the jurisdiction obtained by service upon him, terminated with his life.

This question has been passed upon repeatedly by the Department. In many of the cases, the contest was initiated after the death of the entryman. The rule in such cases was laid down in Driscoll *v.* Johnson (11 L. D., 604) as follows: "Where the entryman dies prior to the service of notice, his heirs and successors in interest should be made parties to the action, and duly served with notice thereof." This is repeated in York *v.* Wilkins (13 L. D., 371).

In Allphin *v.* Wade (11 L. D., 306), it was held that "where a claimant dies during the pendency of adverse proceedings in the local office, such proceedings should be discontinued, and the heirs at law and successors in interest of the deceased, duly notified of their right to appear and be heard in the premises."

This is the course which should have been pursued in the case at bar. Instead of dismissing the contest, the local officers should have discontinued the proceedings, until the heirs at law and successors in interest of Douglas had been duly notified.

The local officers not having pursued this course, it would have been good practice on your part to have remanded the case for new service of notice and new hearing.

Under the decisions of the Department in the case of Dixon *v.* Bell (12 L. D., 510), and Hanscom *v.* Sines, et al. (15 L. D., 27), the case is so remanded, with directions that you order a further hearing, after proper service upon the proper parties. The decision appealed from is modified accordingly.

JOHNSON *v.* CRAWFORD.

Motion for review of departmental decision of September 21, 1892, 15 L. D., 302, denied by Secretary Noble, February 15, 1893.

RIGHT OF WAY—CANAL—UNSURVEYED LAND.

ARROWHEAD RESERVOIR CO.

A map showing the location of a canal will not be approved under the act of March 3, 1891, where the initial and terminal points are on unsurveyed land, and the projected line for the greater part traverses land in the same condition, and the portion thereof on surveyed land cannot be utilized independently of the remainder.

Acting Secretary Chandler to the Commissioner of the General Land Office, January 31, 1893.

I am in receipt of your letter of January 18, 1893, transmitting the articles of incorporation of The Arrowhead Reservoir Company, a corporation organized under the laws of Kentucky, for the purpose of doing business in California, also proof of the organization of said company, with a copy of the laws of Kentucky relating to corporations, together with a certificate of the Secretary of State of California, that it has complied with the law of California, relating to foreign corporations doing business in that State, and that one, Adolph Wood, of San Bernardino county, of said State, has been selected as a person upon whom service of process may be made. With the papers is also filed a map, and field notes in duplicate, of a canal, located by it in T. 2 N., R. 3 W., Los Angeles land district, California.

The map and field notes evidence care and skill in the survey and noting, and the map is in compliance with law and the regulations, in so far as it could be made, under the circumstances. The initial and terminal points are both in unsurveyed land, and neither is therefore referred to any established corner of a government survey, as required by the regulations of the department. The line of the canal starting, as by the map, in the portal of a tunnel, runs to station 90+57, where it enters surveyed land, north line of Sec. 10, T. 2, N., R. 3 W., and making two curves it leaves the section on the north line at station 98+90, showing only 833 ft of the line in surveyed land; it then runs on unsurveyed land to station 149+45, where it enters the SW. ¼ of section 4 of said township and range, running in a general southwest course it leaves the surveyed land 310 feet east of the quarter section corner between sections 5 and 8, at station 216+90; thence it runs on unsurveyed land over one and a half miles and enters a tunnel. The engineer seems to have intended only to map these two parts of the canal that are on surveyed land. The length of the canal is not given, but the parts for which right of way is asked are 1.435 miles in length. It is apparent from the map that these parts are but a small portion of the entire canal.

In the case of the Inyo Canal Company (15 L. D., 245), a similar condition confronted me. One of its canals was partly on unsurveyed land. The map of this was returned without my signature. In this I followed the ruling in the case of the Santa Cruz Water Storage Com-

pany (13 L. D., 660), and the case of the Tintic Range Railway Company (15 L. D., 88). Sections 18 to 21 inclusive, of the act of March 3, 1891, are similar in their provisions to the act of March 3, 1875, (18 Stat., 482), relating to the right of way to railroad companies.

The law provides for the filing of maps within twelve months after the location of ten miles of the canal, "if upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States", etc.

You say in your letter that, "A right of way over unsurveyed lands is not asked", and you recommend the approval of the papers and maps, as they satisfy the requirements of your office.

To approve this map would grant the right of way over two pieces of land, separated by unsurveyed land, and to reach either the canal must be constructed across government land. This they probably intend doing under sections 2339 and 2340, R. S. If so, these sections are as applicable to surveyed as unsurveyed lands, and approval of this map would be useless.

If this map should be approved, as it stands, when the government surveys are made of these lands, no distances would appear on the map, from where the canal line would cross the section and half section lines to the adjacent corners, as required by the regulations of the Department and the map filed with the local officers would furnish little or no accurate information to the local officers or to entrymen when the lands are opened to entry.

This canal is an entirety, and the parts here presented cannot be utilized standing alone. In the Inyo Canal Company case it had two branches to its canal, one of which was on surveyed lands and could be utilized independently of the other. The map as to this canal was approved, but the case at bar is a different case from that, and I do not see my way clear to approve the map.

The papers, certificates of incorporation, etc., are in all respects in conformity to law and departmental regulations, they are approved, and may be placed on file. The map I return herewith without approval.

TIMBER CULTURE ENTRY—FINAL PROOF—ADMINISTRATOR.

JOHN A. SABIN.

The administrator of the estate of a deceased timber culture entryman, may submit final proof for the benefit of the heirs, and the patent in such case should issue in the name of the "heirs of the entryman."

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 2, 1893.

December 23, 1878, Mary Adams made timber-culture entry for the SW. ¼ of Sec. 2, T. 120 N., R. 48 W., Fargo, North Dakota. Some time after making her entry (exact date not shown), but prior to making

final proof, she died, intestate, leaving as her only heir a daughter, Anna D. Sabin, the wife of John A. Sabin.

August 20, 1884, letters of administration in the estate of said decedent and entryman were issued to John A. Sabin, husband, as aforesaid, of her daughter and heir.

August 21, 1891, said John A. Sabin, as such administrator, submitted final proof on said entry under section 2 of the act of June 14, 1878 (20 Stat., 113), which provides that in case of the death of the entryman, the heirs or legal representatives may make proof.

The register favored the acceptance of the proof, but the receiver being of the opinion that proof must be made by the daughter, the matter was referred to your office, and, by your letter of November 25, 1891, you concurred in the opinion of the receiver and rejected her final proof.

The proof as submitted shows a full compliance with the law, and I see no good reason for refusing to accept it.

In your said opinion you hold that the administrator of a decedent's estate is not a legal representative within the meaning of the statute (20 Stats., 113), and cite Bone *v.* Dickerson's heirs (8 L. D., 452) to support your position.

I do not so construe that decision. That case holds that a devisee or "testamentary heir" is a legal representative and as such entitled to notice of contest (see top page 445). This is all that is decided in Bone *v.* Dickerson's heirs.

As I view it, Congress had some purpose in providing if the entryman be dead "his or her heirs or legal representatives" should submit proof, showing a compliance with the law. Unless the terms "heirs or legal representatives," are used tautologically, or are to be treated as synonymous or interchangeable terms, then the executor or administrator of the decedent's estate, may be treated as "legal representatives" thereof for the purpose of submitting the necessary proof to entitle the heirs to acquire title. What purpose could Congress have had in mind in treating the "legal representatives" as heirs, when it provided that the "heirs" or legal representatives might submit proof, or that either one or the other might do so?

It is patent to my mind that Congress wished to preserve the decedent's estate, if the law had been complied with, as an inheritance for his heirs, that they might reap the benefit of his toil, and expenditure upon the land, and left it for the heirs or legal representatives to submit the necessary proof to show a compliance with the law.

While there may be cases where the administrator should not be treated as the "legal representative" of the estate, yet in this class of cases I think it is an equitable rule, good law and fair justice to hold, to prevent the lapsing of an estate, where the law has been fully complied with, that the term "legal representatives" should apply to an administrator or executor, and that where competent proof is submitted by

either the heirs or the legal representatives, the law is satisfied. Such a construction does no violence to the law and is, as I view it, in the interest of natural justice, preventing prolonged delay and unnecessary expense. Nobody's rights will be disturbed, nor the government defrauded.

Proof of compliance with the law has been shown, and patent, when issued, will be in the name of "the heirs of Mary Adams," the entryman.

Your decision is reversed.

TIMBER CULTURE ENTRY—FINAL PROOF—DEVISEE.

MOORE *v.* PHELPS.

The devisee of a deceased timber culture entryman may submit final proof.

Secretary Noble to the Commissioner of the General Land Office, February 3, 1893.

I have considered the appeal of M. J. Moore from your decision of January 25, 1892, allowing Rosetta C. Phelps, the devisee named in the will of Albert E. Moore, deceased, to make final proof upon the timber-culture entry of said Albert E. Moore, for the NE. ¼ of Sec. 14, T. 124 N., R. 60 W., Aberdeen, South Dakota.

In this case proof was made by Rosetta C. Phelps, as devisee of the deceased entryman, to whom final certificate was issued. Subsequently, the local officers transmitted an agreement between the devisee and M. J. Moore, the executor of the estate of Albert E. Moore, in which it was stipulated that the proof made by said devisee shall be considered as though made by the executor for the benefit of the heirs of the deceased.

It appearing that Rosetta C. Phelps was named in the will of said Albert E. Moore, as sole devisee of all of his rights pertaining to said timber-culture entry, you held that final proof might be made by said devisee, and that patent should issue thereon, if no objection is found against the entry upon final examination.

Under the timber-culture act of June 14, 1878, (20 Stat., 113), the final proof may be made by the heirs or legal representatives.

I do not think it material whether the final proof is made by the beneficiaries under the law, or by the executor or administrator for their benefit. Ex parte John A. Sabin, 16 L. D., 149.

Your decision is affirmed.

PRACTICE—NOTICE—ATTORNEY—HEARING.

JOHNSON ET AL. *v.* MCKEURLEY.

Notice of the time and place fixed for a hearing to one of the contestant's attorneys is due notice to the contestant; and notice of the same character of the dismissal of the contest is also sufficient notice of such action to said party.

A hearing under contest proceedings against a final entry can only be ordered by direction of the Commissioner of the General Land Office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 16, 1893.

On the 30th of April, 1889, John H. McKeurley made homestead entry for the NW. ¼ of Sec. 22, T. 12 N., R. 2 W., Guthrie land district, Oklahoma, which entry was contested by Lyman Johnson on the 29th of May, 1889. In his contest affidavit he alleged that the entryman was in the Oklahoma country during the period prohibited by the President's proclamation.

At the time of filing his affidavit of contest, Johnson filed notice that Bevans and Rowe were authorized to appear as his attorneys, and represent all his interests in the action. Said attorneys also filed notice of their appearance for Johnson in the case.

Before a hearing was appointed, the Oklahoma land district was established, and the lands in question being embraced therein, the papers were transferred to that office. The local officers at said office set the 10th of March, 1891, as the date for a hearing in the case, and notified Bevans and Earl (a law firm which had succeeded that of Bevans and Rowe) of the time and place of such hearing. The notice was received by Mr. Bevans, who was the senior member of both said firms. He made a copy thereof, and mailed both to Johnson, instructing him to have the copy served upon McKeurley.

On the 10th of March, 1891, the day set for the hearing, there was no appearance made by or for Johnson, and the local officers dismissed his contest. Notice of this action was sent by registered letter to Bevans and Earl, at Guthrie, but returned unclaimed.

After the dismissal of Johnson's contest against his entry, McKeurley gave notice, by publication, of his intention to make final proof in support of his claim, before the register and receiver, at Oklahoma, on the 28th of April, 1891. Such proof was duly made, and upon it was endorsed, by the local officers, the following: "Suspended ten days to await action of contestant to file corroboration of contest." Under date of May 8, 1891, a further endorsement is made thereon as follows: "Corroboration not filed; proof approved, and certificate No. 186 issued."

The final proof showed that McKeurley had upon the tract a house, sixteen by eighteen feet, a well, eighty acres fenced and had cultivated and raised crops on thirty-five acres during the seasons of 1889 and 1890. The value of his improvements was placed at $400.

On the 27th of May, 1891, Jasper Sipes filed affidavit of contest against the entry of McKeurley, charging in substance the same matters alleged by Johnson. Two days later, Johnson applied to have his contest against said entry reinstated, and on the 19th of June, 1891, Sipes filed protest against granting Johnson's application.

On the 18th of June, 1891, G. W. Overstreet filed his affidavit, alleging that he was the transferee and owner of said land, and asked to be made a party defendant.

The local officers transmitted all the papers in the case to your office, on the 20th of June, 1891, for your examination and orders. In their letter of transmittal they say:

> It is due to this office that we explain that Bevans and Rowe were practicing attorneys at Guthrie. They dissolved, and Bevans and Earl succeeded the firm. Bevans attended to all the business for both the old and new firm at this office, and acting under the impression that service on either of the members of the old firm was good, we directed the notices to Bevans and Earl, and Bevans received same through the firm. It seems that he was unable to deliver the same to Johnson, who had changed his postoffice address without notice to said attorney.

On the 8th of January, 1892, you rendered a decision in the case, in which you reinstated the contest of Johnson, held that the contest of Sipes was subject thereto, and denied him the right of appeal from your decision. You suspended the final proof of McKeurley, and remanded the case for a hearing on Johnson's allegations, after valid notice to all parties in interest, of the time and place thereof, including the transferee, who was allowed to defend the entry involved in the same manner as if he were the entryman.

You suspended action on those orders for twenty days, to enable Sipes to apply for a writ of certiorari. He made such application, which was granted on the 13th of May, 1892. In pursuance of the direction therein contained, you transmitted to the Department the record in the case, on the 2d of June, 1892. Subsequent to that date, to wit, on the 2d of December, 1892, you forwarded to the Department a motion made by William E. Earl, attorney for Lyman Johnson, for the dismissal of the application of Jasper Sipes for a writ of certiorari in the case. As said motion was not filed in the local office until the 26th of September, 1892, four months and a half after the application for cerciorari had been granted by the Department, it is difficult to understand what object the attorney had in view in filing the same.

When the application for certiorari was before the Department, it was opposed by Dudley and Michener, attorneys for Isaac G. Denny, who then claimed to be transferee and owner of the tract, and among the papers filed by them, were certified copies of four deeds. The first was executed by John H. McKeurley and wife, and dated June 9, 1891. The second was dated June 22, the third June 24, and the fourth, which conveyed the land to Denny, bears date July 29, 1891. He asks that the application of Sipes be denied, the contest of Johnson be dismissed,

and that patent be issued to him as holder of the final receipt, and owner of the tract in dispute.

Of the fact that the contest of Johnson was properly initiated, there is no question, nor is there any question that upon the day his affidavit of contest was filed, he also filed authority for Bevans and Rowe to appear as his attorneys and represent all his interests in the action. This was on the 29th of May, 1889, and on that day said attorneys entered their appearance for Johnson, "in compliance with above authority."

On the 12th of May, 1891, he filed his appointment of Howe and St. John as his attorneys in the case, "hereby annulling and revoking all former warrants of attorney filed by me." On the same day Howe and St. John entered their appearance as his attorneys, and filed a motion to set aside his default, and for the reinstatement of his contest. Notice of this motion was accepted by the attorneys for the entryman on said 29th of May.

On the 11th of June, 1891, he authorized W. E. Earl to appear for him in the case, and revoked all other authorities given. This was filed on the 13th of June, and on that day Earl filed a motion similar to that already filed by Howe and St. John. On the same day the attorneys for the entryman accepted service of such motion.

I find no other appointments of attorneys signed by Johnson, but in the record is an affidavit made by S. B. Bevans, who was the head of the firm of Bevans and Rowe, and also that of Bevans and Earl, who states that during the month of December, 1889, or early in January, 1890, Johnson called upon him at the office of Bevans and Earl, in the city of Guthrie. He then introduced the gentlemen, and explained to Earl that Johnson was a client of his, and to Johnson that Earl was his present partner. The nature of the business was explained, and the new firm retained in place of the old. The details of this interview are given in the affidavit of Bevans, and denied in affidavits made by Earl and Johnson. The firm of Bevans and Earl was formed on the 15th of October, 1889, and dissolved on or about the 5th of July, 1890.

The local officers, having knowledge of the fact that the firm of Bevans and Rowe had been succeeded by the firm of Bevans and Earl, and that Mr. Bevans attended to all the business of both said firms before their office, directed the notice of the hearing in the case of Johnson's contest against McKeurley's entry, to the last named firm. Was this a notice to Johnson?

Upon this question the Rules of Practice of the General Land Office and the Department of the Interior, provide as follows:

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

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

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

From the 29th of May, 1889, until the 29th of May, 1891, Mr. Bevans was one of the attorneys authorized to appear for Johnson in the case, and represent all his interests therein. Notice of the hearing, although directed by the local officers to Bevans and Earl, was received by Bevans, and by him sent to Johnson, at the post office where he believed his client would receive it. It seems, however, that Johnson changed his residence more frequently than he did his attorneys, and the notice failed to reach him. Not hearing from Johnson, Bevans inquired of the entryman if he had been served with notice of the hearing, and being answered in the negative, he informed him as to the day set therefor, and the entryman, accompanied by counsel, was present at the time and place.

In the case of Clark *v.* Shuff et al. (7 L. D., 252), it was held that "notice to plaintiff's attorney of the day fixed for hearing, is legal notice to the plaintiff; and his failure to appear, either in person or by counsel, on the day so fixed, justifies a dismissal of the contest." The case of George Premo (9 L. D., 70), was that of a successful contestant, and it was therein held that notice of the preference right of entry given to his attorney, was notice to him, and that he must exercise the right within the time allowed therefor, or lose it. The case of Thomas C. Cook (10 L. D., 324), was similar to that of Premo, and it was therein held that "notice of the cancellation of an entry given to the attorney of the successful contestant is notice to the contestant, and he is bound thereby." See also Moody *v.* Kirkland (11 L. D., 394); Nichols *v.* Gillette (12 L. D., 388); and Holloway's Heirs *v.* Lewis (13 L. D., 265). The last named case distinctly holds that notice to one of the attorneys for a party is notice to such party.

Under the Rules of Practice quoted, and the decisions cited, I think it must be held that notice of the hearing on Johnson's contest, and of the dismissal of said contest, were duly served upon Johnson's attorney, and that Johnson was bound thereby. It follows, therefore, that his contest was properly dismissed by the local officers, and improperly reinstated by you, in your decision of January 8, 1892.

This leaves for consideration the rights of Sipes, the would-be contestant, as against Denny, the transferee.

When McKeurley gave notice of his intention to submit final proof in support of his claim to the land in question, it concluded with this statement:

> Any person who desires to protest against the allowance of such proof, or who knows of any substantial reason, under the law and the regulations of the Interior Department, why such proof should not be allowed, will be given an opportunity at the above mentioned time and place to cross-examine the witnesses of said claimant, and to offer evidence in rebuttal of that submitted by claimant.

That notice was signed by the register, and was published for six successive weeks in the Oklahoma City Times, and posted in the land office as required. In his protest against the reinstatement of the con-

test of Johnson, Sipes urges that Johnson's application should not be granted, because he failed to appear in response to that notice. In his argument he says:

> This notice is intended to subserve some purpose; what is it, if not to warn the world of the action of the entryman, and estop those who fail to take advantage of their opportunity.

While Sipes is anxious that the doctrine of estoppel should be applied to Johnson, he desires to escape the workings of that rule. McKeurley's notice was as much a warning to Sipes, as to Johnson and "the world," yet he allowed him to make final proof without protest, and to pay his money and secure final certificate without a suggestion of wrong. After final certificate, McKeurley had a right to sell the land, but of course the purchaser took no greater interest therein than the entryman possessed. The act of March 3, 1891 (26 Stat., 1095) afforded protection to all purchasers or incumbrancers after final certificate, in all cases where the purchase or incumbrance was made prior to the 1st of March, 1888. That act, however, affords no relief to Denny, and, under the rulings of the Department, he must defend the entry of McKeurley until patent is secured.

The case being one in which final certificate has issued, it comes under Rule 5 of the Rules of Practice, which is as follows:

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

In the case of Ravezza *v.* Binum (10 L. D., 694), where the local officers had ordered a hearing after final certificate, it was held that no rights could be secured under proceedings based on such an order.

My disposition of the case renders it necessary for you to pass upon the application of Sipes to contest the entry of McKeurley, under the Rule of Practice quoted, and the record will be returned to your office for that purpose.

Your decision of January 8, 1892, is set aside, and the final proof of McKeurley will be allowed to remain intact, subject to the contest of Sipes, should you order a hearing upon his application.

HOMESTEAD CONTEST—CONFIRMATION OF ENTRY.

WALLACE *v.* SWENSON.

The execution of a mortgage on the land, and a contract to sell the standing timber thereon, prior to final proof, do not defeat confirmation under section 7, act of March 3, 1891, of an entry made in good faith.

Failure on the part of the entryman to comply with the law, and knowledge of this fact by his immediate transferee, will not defeat confirmation of the entry for the protection of subsequent *bona fide* purchasers.

A homestead entry is confirmed under the body of said section, though the entryman did not, at the date of the entry, occupy the status of a citizen, but the facts with reference thereto were made known to the local office on submission of final proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 16, 1893.

On November 12, 1885, Swen Swenson made homestead entry (final certificate No. 118) at Bayfield, Wisconsin, for the E. ½ of the NE. ¼ and the E. ½ of the SE. ¼, Sec. 14, T. 48 N., R. 12 W.

It appears from the record that on March 9, 1883, said Swenson filed his soldier's declaratory statement (No. 63) for said land. He served as a private in Co. K, 2nd regiment of cavalry, Minnesota volunteers, from December 23, 1863, to May 4, 1866, in the military service of the United States, when he was honorably discharged.

On March 16, 1885, as there was no adverse claimant, he was allowed to file his application (No. 756) to enter said land under the act of June 8, 1872, (17 Stat., 333), re-enacted as Sec. 2304 of the Revised Statutes. His final proof was taken on November 10, 1885, before the clerk of the circuit court at Superior, Douglass county, Wisconsin, when he made affidavit that he commenced his actual residence on said land about July 12, 1883, and had resided there continuously thereafter; that he had built a good log house sixteen by twenty feet, a stable twenty by twenty feet, dug a well twenty-five feet deep, cleared six acres of land, and had raised crops in 1883, 1884 and 1885; and valued his improvements at $400. "That he was born on board of a ship en route from Sweden to the United States, and within one hundred miles of the American shore, in the year 1850, that he does now, and always has considered himself a native born citizen of the United States." He also made affidavit that he gave a mortgage on the land on April 28, 1885, to Luther Mendenhall, of Duluth, Minnesota, to get money with which to support himself. His final proof was approved and final certificate and receipt issued, as already stated.

By letter of May 16, 1888, and of June 12, 1890, you directed the local officers to notify the claimant that he had failed to show sufficient residence, and that he would be required to take out final naturalization papers. On June 20, 1890, the local officers mailed a notice to Swenson, to his last known post-office address, by registered letter, but the same was not received by him.

On December 18, 1890, James S. Wallace filed an affidavit of contest against said entry, charging that at its date said—

Swenson was not a citizen of the United States, nor had he declared his intention to become a citizen; that said party is not now a citizen, nor has he declared his intention to become a citizen; that he has wholly failed to comply with the requirements of the homestead law as to residence upon and cultivation of said tract of land; that he has wholly disposed of his rights in and to said tract aforesaid November 4, 1887.

The affidavit was rejected by the local officers for the reason that the land was already held for cancellation by you.

On January 15, 1891, the said Wallace appealed from said action, and on April 29, 1891, filed an amendatory affidavit of contest, alleging, in addition to the allegations of said first affidavit, that said land was valuable for its pine timber and—

That April 28, 1885, the said Swen Swenson mortgaged said tract of land to Luther Mendenhall, of Duluth, Minnesota, that said mortgage was duly recorded in the records of Douglass county, Wisconsin, May 1, 1885; that upon the 25th day of September, 1885, nearly two months before said claimant made his final proof No. 118 for said claim, he, under the name of Samuel Tillman, mortgaged said tract again to Nils Owen for the sum of $500, which mortgage was recorded; . . . . that he on the 11th day of November, 1885, entered into a contract with said Nils Owen, whereby he sold to the said Owen the standing timber then on said claim, which contract was recorded, and that this affiant has good reason to believe that said Owen was well acquainted with the facts that Swenson and Tillman were one and the same person, and that Swenson had never resided upon said land.

By letter of November 9, 1891, you decided that—

Proceedings were not instituted by the government or by Wallace until after the expiration of more than two years from the issuance of the receiver's final receipt, and therefore the entry should be confirmed under the proviso to the 7th section of the act of March 3, 1891. Moreover, the land was transferred prior to March 1, 1888, for a valuable consideration. No fraud has been found against the purchaser and the transferees appear to be bona fide, and it would seem that for this reason, also, the entry would have to pass to patent, and I so hold.

An appeal now brings the case before me.

It does not appear that said Swenson has had notice of any of the contest proceedings against him, or whether he is in the country, or is alive or dead.

It is contended by the appellant that there was error in your decision in holding that said entry is confirmed by the seventh section of the act of March 3, 1891, (26 Stat., 1095) for reasons, substantially, as follows:

1. That the entryman was an alien at the time of his entry.

2. That he had not complied with the law as to residence upon said land.

3. That the transferees derive title, through intermediate conveyances, from said Owen, who was acquainted with all the facts, and they must be held cognizant of all the defects in the title.

The papers show that the two mortgages made by the entryman prior to his entry were afterwards paid and satisfied upon the records. They do not necessarily show bad faith on the part of the entryman. Murdock *v.* Ferguson (13 L. D., 198). The mortgage to Mendenhall was mentioned by Swenson in his final proof and thus brought to the attention of the local officers, who must have held that it was made in good faith. The existence of these mortgages and of said contract is not such an illegality as prevents the confirmation of the entry.

The transferees who claim that said entry is confirmed derive title from a warranty deed of said Swenson to said Owen of said tract made November 4, 1887, and recorded November 9, 1887, about two years after the issuance of final certificate and receipt to Swenson. It further appears that said Owen and his wife transferred said land on November 9, 1887, to Dennis Foley, by deed recorded November 10, 1887.

Although it is charged by the affiant in his second affidavit of contest that "he has good reason to believe" that said Owen was acquainted with all the facts in the case, he makes no such charge against Foley, his transferee. As the sale to Foley was made prior to March 1, 1888, it must be presumed to have been made in good faith, in the absence of any charge to the contrary. Instructions (12 L. D., 450, 452). United States *v.* Gilbert (14 L. D., 651). If there was failure on the part of the entryman to comply with the law, and if this was known to his immediate transferee, Owen, this fact would not defeat confirmation of the entry for the protection of subsequent transferees in good faith. Peterson *v.* Cameron (13 L. D., 581).

It appears that said Foley transferred the land to George Wetherby by deed executed January 31, 1888, and recorded March 28, 1888. "The delivery of the deed is presumed to have been made on the day of its date." United States *v.* Le Baron (19 How., 73, 75). Wetherby, therefore, must be presumed to have been the sole owner of the land on March 1, 1888.

Wetherby transferred three-fourths of said tract to Edwin W. Bangs by deed executed November 5, 1890, who appears to have been the owner thereof at the date of the passage of the act of March 3, 1891, and still the owner. The other one fourth was transferred by several intermediate conveyances, and appears to be now owned by John S. Harquell.

No charge is made against the good faith of any of these transfers, except against the first one to Owen, and the entry therefore must be confirmed for the protection of the present owners, if susceptible of confirmation. Jesse W. Finch *et al.* (14 L. D., 573); Shepherd *v.* Ekdahl (13 L. D., 537).

The charge that Swenson had not complied with the law as to residence on said land and cultivation thereof, if true, would be no bar to the confirmation of said entry. Axford *v.* Shanks (12 L. D., 250); on review (13 L. D., 292). In the latter case it is said: "Neither illegality nor contests prevented the confirmation of the entries specifically described. They were absolutely confirmed in the furtherance of a specific purpose by Congress, viz.: the relief of a certain class of purchasers." See also Harnish *v.* Wallace (13 L. D., 108). Such illegality in an entry is insufficient to bar confirmation.

The main charge is that Swenson was an alien at the date of his entry. Assuming that he was an alien, as charged, his certificate that he was honorably discharged from the military service of the United States, as already stated, shows that he could have been admitted a

citizen of the United States "upon his petition, without any previous declaration of his intention to become such," (Sec. 2166, Rev. Stat.) and upon such petition he would only have been required to prove one year's previous residence within the United States. His honorably discharge, therefore, supplied the omission of "any previous declaration of his intention to become" a citizen, and was equivalent thereto. He had a right to enter said land, therefore, under section 2289 of the Revised Statutes, as if he had "filed his declaration" to become a citizen. At the time of his final entry, however, he was required to be a citizen. (Sec. 2291)

The above facts bring this case within the ruling made in the case of George De Shane *et al.* (12 L. D., 637) where the entry was held confirmed, although illegal, for the reason that the entryman was not a citizen, the land having been purchased in good faith prior to March 1, 1888, and there having been no adverse claim at the date of the entry The entryman in the present case did not attempt to conceal the fact of his birth en route to this country when he made his final proof. If the local officers had notified him that he must acquire full citizenship before completing his entry, he would doubtless have complied with the law; but they accepted his final proof without apparent objection, perhaps considering, as he swears he did, that he was a citizen. He practiced no fraud upon the local officers as to his citizenship, making affidavit that he "always has considered himself a native born citizen of the United States." The rule is "that the leaning, in questions of citizenship, should always be in favor of the claimant of it." Boyd *v.* Thayer (143 U. S., 125, 169).

The question of the entryman's citizenship was brought to the attention of the local officers. They passed upon the question and allowed the entry. They may have erred in so doing. He certainly acquired the inchoate status of a citizen. The entry thus allowed was not a nullity, even if the entryman was not a full citizen. Hastings, &c., Railroad Co. *v.* Whitney (132 U. S., 357, 363).

I am of the opinion that the charges made by the contestant in his two affidavits of contest are not sufficient to prevent the confirmation of this entry.

Your judgment is affirmed.

OKLAHOMA LANDS—MILITARY BOUNTY LAND WARRANT.

GEORGE E. GAGE.

Under section 21, act of May 2, 1890, the right to locate military bounty land warrants can not be exercised on lands in Oklahoma. Commutation under said section can only be made by the payment of $1.25 per acre in cash.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 17, 1893.

I have considered the appeal of George E. Gage from your judgment of April 2, 1892, holding for cancellation his certification of location of

two military bounty land warrants on the S. ½ of the SW. ¼ and Lots 3 and 4 of Sec. 33, T. 16 N., of R. 7 W., Kingfisher, Oklahoma Territory.

Your judgment holds that section 21 of the act of May 2, 1890 (26 Stat., 81), does not afford the right to locate military bounty land warrants on lands in Oklahoma Territory, but that commutation can only be made under that section by the payment of $1.25 per acre in cash.

You are correct in thus holding, for the land having been purchased from the Indians, it was the policy of Congress as expressed in the eighteenth section of said act to reimburse the government for the said outlay.

Your judgment is affirmed.

PRE-EMPTION SETTLEMENT—UNSURVEYED LAND—FINAL PROOF.

HARBIN *v.* SKELLEY.

The administrator of a deceased pre-emptor may file declaratory statement and submit final proof for the benefit of the heirs where the settler dies prior to the survey of the land.

The case of Buxton *v.* Traver, 130 U. S., 232, cited and distinguished.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 18, 1893.

Wilburn S. Harbin has appealed from your decision of March 10, 1892, dismissing his protest against the pre-emption entry of Lawrence Skelley, administrator of the estate of William Skelley, deceased, for the S. ½ of the SE. ¼ of Sec. 9, and the SW. ¼ of the SW. ¼ and Lot 5 of Sec. 10, T. 6 S., R. 92 W., Glenwood Springs land district, Colorado.

This case was submitted upon an agreed statement of facts, the material parts of which are as follows:

1. That the said William Skelley, in his lifetime and on or about the 15th day of May, 1882, settled under the pre-emption laws of the United States upon a certain tract of land which, by conforming under the rule when the survey of Twp. 6 S., R. 92 W., was made, would embrace the land in question.

2. That said settlement as made was valid and in good faith under said laws, and that at the time thereof and ever since up to the time of his death he was a qualified pre-emptor.

3. That said decedent remained in possession of the land he settled upon as aforesaid in good faith from the time of his settlement up to the time of his death.

4. That he expended in time and money in improving the said lands the sum of $800 to $1,000, in building a house, an irrigation ditch, fencing, clearing, and cultivating the said lands, but the contestant does not admit that at this time the said building and fences and other improvements are of that value.

5. That the said William Skelley departed this life at or near Canon Creek, in said Garfield county, on or about the 27th day of December, A. D. 1886, leaving no last will or testament.

6. That decedent left him surviving Thomas Skelley, a minor son, his sole and only heir at law.

* * * * * * *

11. That the final proofs as made are substantially true, except as to the time of decedent's death, which was on December 27, 1886, as above stated.

12. That at no time since the death of decedent has said heir resided upon or improved said lands or any part thereof, nor has the said administrator nor other person except this contestant.

On April 6, 1888, four days after the filing of the township plat in the local office, Lawrence Skelley, who had taken out letters of administration, filed pre-emption declaratory statement for the tract in favor of the minor heir of the settler, and made final proof upon the same, January 23, 1891, when William S. Harbin, who had filed declaratory statement for the same tract December 8, 1890, alleging settlement November 24, preceding, appeared and protested against the allowance of said proof. The decision of the local officers rejecting the proof was reversed by you, and the controlling question presented by the appeal of Harbin from your decision is, whether a pre-emption claim can be perfected in favor of the heirs of a qualified pre-emptor who settled upon unsurveyed land and died prior to survey.

Occupancy and improvement of the public land with a view to pre-emption, whether upon surveyed or unsurveyed land, confers no vested right, but only a preference over others, which is protected against all, save the United States. Until the land has been sold and final certificate issued, the title to the land remains unaffected, and it is subject to the same disposition and control of the government as before occupancy.

A settler upon surveyed lands, even after the filing of a declaratory statement, has no vested right in the land, but only a right to purchase it as against all others, except the United States, who has not an equal or superior right when the land is offered for sale, and this inchoate right to purchase as against the claims of others is acquired equally as well by a settler upon unsurveyed lands, the only difference being that the filing of his claim must be postponed until the survey of the land.

It must also be remembered that the pre-emption right of purchase is based upon settlement and improvement, and that the filing of a declaratory statement is not a condition precedent to the right of pre-emption, but only a protection against subsequent settlers. A failure to file such statement will not defeat the right of purchase, because it may be filed at any time before purchase. Johnson *v.* Towsley, 13 Wall., 72.

Keeping in view these well established principles, let us see what rights were conferred by the acts authorizing settlement with a view to pre-emption upon unsurveyed lands.

The act of 1843 extended the pre-emption privileges to unoffered lands, and further provided that:

Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the

estate of such party, or one of his heirs, to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned.

At that date a pre-emption claim could only be initiated by settlement on surveyed lands. This constituted the pre-emption claim referred to in the act of 1843 (Sec. 2269 Revised Statutes). Subsequently, the act of March 3, 1863 (10 Stat., 244), extended the provisions of the pre-emption law of September 4, 1841, to all lands in the State of California, "whether surveyed or unsurveyed," but provided that no settlement should be authorized upon unsurveyed lands, unless made within one year from the passage of the act.

Settlement upon unsurveyed land with a view to pre-emption was authorized in the territories of New Mexico, Kansas, and Nebraska, by the act of July 22, 1854 (10 Stat., 308), and this privilege was extended to Minnesota by the act of August 4, 1854 (10 Stat., 576). The act of May 30, 1862 (12 Stat., 409), extended the privilege to California, and provided for the time within which declaratory statements should be filed, where settlement was made on unsurveyed lands.

The act of June 2, 1862 (12 Stat., 413), extended the pre-emption privilege to "all the lands belonging to the United States to which the Indian title has been or shall be extinguished," and provided that "such land shall be subject to the operation of the pre-emption act of September 4, 1841." It then provided:

> That when unsurveyed lands are claimed by pre-emption, notice of the specific tracts claimed shall be filed within six months after the survey has been made in the field; and on failure to file such notice, or to pay for the tract claimed within twelve months from the filing of such notice, the parties claiming such lands shall forfeit all right thereto, provided said notices may be filed with the surveyor general, and to be noted by him on the township plats, until other arrangments have been made by law for that purpose. (12 Stat., 413.)

This provision, as incorporated in the Revised Statutes (Sec. 2266) followed the act of May 30, 1862, *supra*, which is as follows:

> In regard to settlements which are authorized upon unsurveyed lands, the pre-emption claimant shall be in all cases required to file his declaratory statement within three months from the date of the receipt at the district land office of the approved plat of the township embracing such pre-emption settlement.

It will be seen from the foregoing that it was the intention of Congress to confer upon the settler on unsurveyed land the same inchoate right to complete and perfect his pre-emption claim as was given to settlers upon surveyed lands. In neither case was there a vested right, nor did the settlement in any manner affect the right of the government to control and dispose of the land as it might choose, but in both cases there was an inchoate right initiated by settlement, which, if followed up by residence and improvement and by the filing of a declaratory statement, would entitle him to the preference right as against all the world, save the United States, to purchase said land, if it should be

offered for sale. It is true, the government makes no contract with the settler upon unsurveyed lands that it will sell the land, nor does it make such a contract with the settler upon surveyed lands. In both cases the initial act of settlement must be followed by compliance with the pre-emption law up to the time of the actual purchase. The only difference, in case of a settler upon unsurveyed lands, is that he must await the pleasure of the government to make survey before he can make his purchase. The right to initiate a pre-emption claim upon the public lands in advance of the surveys was authorized because of the delay of the government in making the surveys, and the evident purpose was to confer upon such settlers all the rights that were conferred upon settlers on surveyed lands, if they were willing to await the action of the government in making the survey.

This is also made manifest by the act of March 3, 1873, providing for the adjustment of pre-emption claims, where settlement was made by two settlers upon a tract of land which, by survey, was shown to be upon the same legal subdivision, and by the several acts recognizing the right of settlers upon school sections prior to survey.

The same purpose is shown in the act of May 14, 1880, allowing the initiating of a homestead right by settlement upon the public lands in advance of the surveys, which provides:

> That any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

So in all other acts the rights of a settler upon unsurveyed lands are as fully recognized and protected as those of settlers upon surveyed lands.

Seeing, then, that a settler upon unsurveyed lands with a view to pre-emption is by virtue of such settlement "entitled to claim the benefit of the pre-emption law," if he follows such settlement by all the necessary acts up to the date of purchase, is it not apparent that the provisions of the act of 1843 (Sec. 2269 R. S.) must be construed in *pari materia* with all other acts extending the pre-emption laws over the public lands of the United States, whether surveyed or unsurveyed?

If so construed, the administrator of a deceased settler upon unsurveyed lands who dies prior to survey would be entitled to file all the necessary papers, and do and perform all necessary acts essential to establishing and perfecting such pre-emption claim in favor of the heir of such settler.

It is urged that the decision of the supreme court, in the case of Buxton *v.* Traver (130 U. S., 232), holds that there is no right in the administrator of a settler upon unsurveyed lands to perfect the title in favor of the heirs, which is decisive of the question presented by this

appeal. While it is true that expressions are used in the opinion indicating that no right was initiated by settlement upon unsurveyed lands which could be perfected by the administrator in favor of the heirs when the settler died before survey, yet from a careful examination of the case it will be seen that the only question involved in the case was, whether the settlement of Traver created such an estate in the land as would descend to his heirs, and thus prevent Mrs. Traver from making entry of the land in her own right, free from any trust or charge. The question of priority of right that might have arisen between a pre-emptor and administrator of the estate, if he had offered within due time to complete the entry in favor of the heirs before the land office, was not involved.

This was a suit brought by the children of Oscar Traver, praying that Hattie L. Traver, his widow, may be charged and decreed to hold as trustee for plaintiff an undivided interest in a certain tract of land. It appears from the record in the case that Traver settled upon a tract of unsurveyed land in California in 1870, and continued to occupy it with his family and to cultivate and improve it up to 1877, when he died intestate, leaving surviving him his widow, Hattie L. Traver, the defendant, and two minor daughters, plaintiffs in the suit. It appears that the approved plat of the township was not filed in the local office until July 1, 1878, and that Hattie L. Traver filed in her own name a pre-emption declaratory statement for the tract, July 16, 1878, upon which she made final proof and received patent for the land in her own right. No attempt was made to complete the entry in favor of the heirs. At the date when Mrs. Traver filed her declaratory statement, the land was subject to entry, and she was a qualified pre-emptor. No administrator had been appointed for the estate, and she was under no legal obligation to take out letters of administration, nor did she take upon herself any trust that would impose upon her the duty of entering the land for the benefit of the heirs of Traver. There was no reason why she could not enter the land in her own right as any other qualified pre-emptor, and by her filing she acquired the pre-emptive right to purchase the land, and the title thus acquired was free from any trust or charge. This was the sole question decided by the court, whatever reason may have been given for the decision.

It was well known to Congress that the tide of emigration was far in advance of the public surveys, and that the demands of the settlers could only be satisfied by extending the pre-emption laws to all public lands of the United States, whether surveyed or unsurveyed. When we consider that the purpose of Congress in thus extending the law to unsurveyed lands, and inviting settlement upon them in advance of the public surveys, was to build up the country and establish homes, and that in response to this invitation many thousands of pioneers have settled upon such lands years in advance of the surveys, and devoted the best portion of their lives in making comfortable homes for their

families, and that many are now living upon such lands awaiting the public surveys to enable them to perfect their titles, it would seem to be a harsh and unreasonable construction of the law to hold that, in the event of the death of such settler before survey, his children would have no right to file the necessary papers within the prescribed period to perfect their title to said land, but that they should be deprived of the fruits of his and their labors and privations, and turned homeless from the land their fathers had been invited to settle upon and had improved, and a stranger allowed to appropriate their improvements.

I can not believe that the court intended to hold that the administrator could not complete the pre-emptive claim of a settler upon unsurveyed lands who died prior to survey, if he performed all the necessary acts within due time after the survey, but that its mind was simply directed to the question of the validity of the title of Traver, which she took free from any charge or trust in favor of the heirs, they having taken no steps to perfect their title in the manner and within the time prescribed by law after the survey of the land.

Your decision dismissing the protest of Harbin and returning for allowance the final proof of the administrator of Skelley, is affirmed.

DESERT LAND ENTRY—SUSPENDED ENTRY—ASSIGNMENT.

SHARP *v.* HARVEY.*

The period of time covered by the departmental order of January 12, 1877, suspending Visalia desert land entries should be excluded from the time accorded by the statute for reclamation and submission of final proof.

Prior to April 15, 1880, the assignment of a desert land entry was recognized under departmental regulations, and the right of an assignee under an assignment made prior to said date, cannot be defeated by a subsequent relinquishment of the entry executed by the entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 28, 1892.

On the 11th of June, 1877, Thomas H. Harvey made desert land entry for the NE. ¼, and the W. ½ of Sec. 18, T. 17 S., R. 24 E., M. D. M., Visalia land district, California, which entry, together with numerous others of a similar character, was suspended by the Secretary of the Interior on the 12th of September, of that year.

On the 2d of February, 1885, Anna Sharp filed affidavit of contest against said entry, alleging "that the said land is not desert land, but is susceptible of raising a cereal crop annually without irrigation."

A hearing was set for the 11th of March, 1885, notice of which was served by publication, although the record makes no such showing as is required by Rule 11, of the Rules of Practice, to authorize such serv-

* Not reported in Vol. 14.

ice. There is no affidavit or "other evidence" showing that Harvey was not a resident of the county, or that any effort whatever had been made to get personal service upon him.

At the date fixed for the hearing, Miss Sharp asked to amend her affidavit of contest by adding failure on the part of the entryman to comply with the law under which his entry was made. An attorney by the name of W. S. Powell objected to the allowance of the amendment, and the local officers refused to allow it, and made this entry in the record:

> The register and receiver refuse to allow a contest to be initiated in order to show that the land in contest has not been reclaimed under the desert land law, but are willing to hear and consider the evidence under the original affidavit.

The counsel for the contestant excepted to such ruling of the register and receiver, and the hearing was then continued to the 23d of April, 1885, by consent of all parties.

During the progress of the trial, on the 23d of April, Mr. W. S. Powell objected to a question asked by the counsel for the contestant, whereupon the last named counsel protested against the local officers considering the objection "on the ground that W. S. Powell has no authority as counsel for claimant to make any objection as such in this contest." In support of his protest, he produced and offered in evidence an affidavit of John Buhler, sworn to that day before the register, in which he stated that he was well acquainted with the land in contest, and with Harvey, the entryman, and "that on the 18th day of April, 1885, he had a conversation concerning said entry with said Harvey, in which Harvey stated in positive terms that he had not authorized W. S. Powell, or any other person, to represent him any way concerning his desert entry, and whatever said Powell did in regard to said entry was, and is, without his (Harvey's) consent, sanction or authority."

The register directed the witness to answer the question, and the trial proceeded. When the cross-examination of the witness was reached, the counsel for the contestant protested against the first question asked by Powell being answered, on the ground that Harvey had no standing in the contest, having failed to appear in person, or by counsel duly authorized, and on the further ground that he had no interest in the land, for the reason that only two days after his entry, he had bargained, sold and conveyed said lands to one, Peter Van Valer, and in support of said protest, he then offered in evidence a duly certified copy of a deed, which was received and marked exhibit "B."

At this point, the record contains this statement: "Persons representing the defence, are allowed to make their defense."

At the conclusion of the contestant's evidence, she consented that the further hearing be postponed until the 4th of May, 1885. On that day her attorney offered in evidence an affidavit of Thomas H. Harvey, subscribed and sworn to by him on the 28th of April, in which he

stated that neither W. S. Powell, nor Peter Van Valer, or any other person had been authorized, either directly or indirectly, to appear for him, or in his behalf in said matter. Also an affidavit by said Harvey, executed the same day, in which he made oath that he had never assigned his certificate for his desert land entry made on the 11th of June, 1877, to any person at any time, "but I do not know where the same now is." Said attorney also presented an instrument duly signed and acknowledged by said Harvey, executed on the said 28th day of April, 1885, in which, after describing himself and his entry for the land in question, he said:

> Do hereby abandon and relinquish all my right, title and interest in, and to, said land, under or by virtue of said entry No. 316; and I do hereby direct J. D. Hyde, register of the United States land office, to cancel said entry and declare the same forfeited."

These several instruments were received in evidence and marked as exhibits in the case, and the contestant then objected to the taking of any further evidence in the contest.

Powell then stated that he appeared directly as the attorney for Peter Van Valer, who, as the contestant had shown, was the only party in interest, and "indirectly" as the attorney for Harvey, at the instance and request of Van Valer, and he moved to strike out all the *ex-parte* evidence offered in the case, and also moved to dismiss the case, for the reason that no personal service of notice of contest was made upon said Harvey, although the *ex-parte* affidavits showed that he was a resident of the county in which the lands were situated, upon whom personal service could have been made.

Counsel for the contestant objected to the local officers entertaining any motion made in the case by W. S. Powell, for the reasons that he was not authorized to appear for Harvey, who had abandoned and relinquished his entry; that Van Valer had no standing in the case, having no valid claim to the land whatever claim he had being fraudulent, having been procured two days after the entry; that Harvey had appeared in the case by making the affidavits referred to; that Harvey had sworn, and the records of the land office showed, that Harvey had never assigned his certificate of entry to Van Valer, or to any other person.

The register and receiver ruled that,

> It appearing that Peter Van Valer had some interest in the land in contest, by reason of a conveyance to him by the desert land man, Thomas H. Harvey, he (Van Valer) will be allowed to controvert the allegations of the complaint, to wit, that said land is not desert land.

To this ruling the contestant excepted, and gave notice that she would appeal from said ruling to your office. Testimony on the part of Van Valer was then submitted, and on the 16th of May, 1885, the register and receiver united in a decision, dismissing the contest of Sharp. Her appeal from that decision is dated June 13, 1885. It was

received and filed in the local office on the 18th of that month, and forwarded to your office on the 24th. On the 14th of February, 1891, the local officers made inquiry of your office as to the status of the case, stating that the last entry on their records showed that the papers in the case had been transmitted to your office on the 24th of June, 1885. You answered their inquiry on the 13th of March, 1891, and on the 25th of that month, rendered a decision in the case, affirming that of the local officers. An appeal from your decision brings the case to the Department.

The entry in question was suspended from the 12th of September, 1877, to the 12th of January, 1891, and in United States *v.* Haggin (12 L. D., 34), it was said,

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

Under this ruling, only three months of the entryman's three years, within which he must reclaim the land and make proof and payment, had expired at the time of the hearing, and the local officers, if they had jurisdiction to make any order in the case, were justified in refusing to allow the amendments sought to be made by the contestant to her affidavit of contest.

Your circular of instructions to registers and receivers, of March 12, 1877, (4 C. L. O., 22), under the desert land act of March 3, 1877, (19 Stat., 377), recognized the right of assignment of a desert land entry, and that the assignee might make the proof required of the entryman, and become entitled to a patent in his own name. These instructions were not revoked until April 15, 1880, when the Department, in the case of S. W. Downey, (7 C. L. O., 26), ruled that desert land entries were not assignable.

Long prior to the 15th of April, 1880, Van Valer became the assignee, in effect, of the entry of Harvey. After the 13th of June, 1877, the date of the deed from Harvey to Van Valer, the former ceased to have any interest in the entry, or the land covered thereby, and his pretended relinquishment, executed on the 28th of April, 1885, could neither deprive Van Valer of his rights in the land, nor confer any rights therein upon Shaw.

Prior to the contest and hearing, there was nothing in the record of the local office, or your office, showing that any party except Harvey had any interest in the entry, or the land. At the hearing, it was made to appear that Harvey was a resident of the county wherein the the land was situated, while it also appeared that the only service of notice of such hearing was by publication. The question of jurisdiction, however, was not raised in the case until the last day of the hearing, and came too late to be effective, as a "general appearance" by a party to a proceeding, in which the court has jurisdiction of the sub-

ject matter, will justify a determination of the questions involved, upon their merits.

So far as the charge contained in the contest affidavit of Sharp was concerned, "that the said land is not desert land, but is susceptible of raising a cereal crop annually without irrigation," it mattered not to her whether Harvey or Van Valer was the real party in interest on the other side. She was allowed to present all the proof she desired upon that proposition, and the local officers, and your office found against her. By the evidence produced by her, it was shown that Van Valer had an interest in the land, and I think the local officers were then justified in allowing him to present his proof.

I have examined all the evidence submitted, and my conclusion is, that Sharp did not establish, by a preponderance thereof, the truth of her charge. The decision appealed from is therefore affirmed.

DESERT LAND—PRICE—INITIAL PAYMENT—REPAYMENT.

GEORGE W. CRANE.

The price of desert land entered since the amendatory act of March 3, 1891, is one dollar and twenty-five cents per acre, without regard to its situation with relation to railroad limits, and when the initial payment has been made, under such an entry, on a double minimum basis, credit for the excess may be allowed on final proof and payment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 20, 1893.

I have considered the appeal of George W. Crane from your decision of June 30, 1892, rejecting his application for repayment of excess of purchase money, twenty-five cents per acre, on desert-land entry for W. ½ of Sec. 26, T. 13 N., R. 24 E., North Yakima land district, Washington.

It appears that said entry was made September 22, 1891, and falls within the granted limits of the branch line of the Northern Pacific Railroad. Under date of January 13, 1892, (14 L. D., 74) this Department decided that without regard to location of the land in relation to railroad limits, only $1.25 per acre was required to acquire title to lands under the desert land laws, as amended by the act of March 3, 1891 (26 Stat., 1095), therefore in all desert land entries initiated since the passage of said act of 1891, the price of such lands is $1.25 per acre and consequently the initial payment is only twenty-five cents per acre.

In the case at bar the entryman made an initial payment of fifty cents per acre, but as the entry was made subsequent to the passage of the act of 1891, only half of that amount was required and the entryman now seeks the repayment of the excess of twenty-five cents per acre.

Under date of February 2, 1892, it appears that the following circular

letter of instructions was issued by your office and sent to the local officers in each land district for their information and guidance:

Registers and Receivers
United States Land Offices,
Gentlemen:

Under date of January 13, 1892, the Hon. Secretary of the Interior, in considering the question of the price of desert lands under the act of March 3, 1891, sums up as follows: 'After a careful consideration of this matter, I have concluded that the amount of money to be paid in acquiring title to desert lands under said act of March 3, 1877, as amended by the act of March 3, 1891, is one dollar and twenty-five cents per acre without regard to the situation of the land in relation to the limits of railroad grants.'

In all desert land entries initiated since the passage of the act of March 3, 1891, the price of lands included therein is one dollar and twenty-five cents per acre, without regard to railroad limits, and consequently will necessitate an initial payment of twenty-five cents per acre only. Where parties have initiated a claim since that date and have made an initial payment of fifty cents per acre, you are authorized to accept a balance of seventy-five cents per acre upon their submitting final proof. See Adler case (9 L. D., 429).

Entries initiated prior to March 3, 1891, will be governed by the regulations then in force, and if within railroad limits must be paid for at the rate of two dollars and fifty cents per acre.

Respectfully,

W. M. STONE,
Assistant Commissioner.

The case at bar clearly falls within the rule laid down in the above circular and therefore when final proof and payment is made by the appellant, credit for the excess paid may be allowed.

Your decision is accordingly affirmed.

CONFLICTING ENTRIES—AMENDMENT.

FRANK S. GARRED.

In the absence of any adverse claim an entry may be so amended as to avoid conflict with the subsequent entry of another, though the entry as amended will embrace land not originally applied for, where the parties have acted in good faith and were misled by error in the local office.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 21, 1893.

I have considered the case of the United States *v.* Frank S. Garred involving the S. ½ of NE. ¼, Sec. 23, T. 25 N., R. 27 E., Waterville land district, Washington.

It appears that on November 19, 1887, William C. Campbell made entry of the above tract in connection with the N. ½ of SE. ¼ of said section, under the timber culture laws; that on April 4, 1891, said Garred also made entry of the first described tract in connection with the N. ½ of NE. ¼ of said section under the homestead law; that on

October 16, 1891, you suspended said homestead entry for conflict with the timber culture entry to the extent of the eighty acres first described and so advised the local officers, whereupon they reported that the records of that office showed the timber entry to be for the SE. ¼ of said section and as the homestead was for the NE. ¼ no conflict appeared.

Under date of November 9, 1891, it appears that you held the homestead entry of Garred for cancellation to the extent of the eighty acres in conflict, with the usual right of appeal or in the event of there being an error or mistake made by Campbell in describing the land he intended to enter, an application to amend would be considered.

Campbell filed affidavit asking to be allowed to amend his entry and under date of April 16, 1892, you rejected the application on the ground that it was not shown that any mistake had been made in describing the land in the original application, whereupon Garred appealed.

It is shown that Garred settled upon the land in conflict, built a good house and barn thereon, broken and fenced forty acres of the land at a cost of over $500, It is also established that Campbell has all his improvements upon the SE. ¼ of said section and asks that the amendment be allowed in order that that Garred may secure his home and improvements.

It also appears that on or about June 1, 1890, the register of the local office called upon Campbell to send to the district land office his duplicate receipt, alleging that the tracts therein described as S. ½ of NE. ¼ and N. ½ of SE. ¼ did not agree with the description of his entry as shown by the records of the local office which gave the entry as the SE. ¼ of section 23, of said township. The local officers changed the description in said duplicate receipt to agree with their records and returned the same to Campbell who accepted the change made, supposing that his original papers agreed with the records of the local office. He has broken, cultivated and planted ten acres of trees as required by law on said SE. ¼ designated by the local officers; Since said change was made the NE. ¼ of said section was entered as a homestead, and the homesteader has made valuable improvements on the S. ½ of NE. ¼ without any knowledge that the land was covered by the timber-culture entry. Furthermore, the timber-culture entryman made no protest against said homestead from the fact that he supposed since the change that his entry was confined to the SE. ¼ and therefore there was no conflict.

In the case of Mathias Florey (4 L. D., 112), it was held that where through error the entry was recorded for land not included in the application and that the land applied for on account of such error was covered by subsequent filings, that the entry should be allowed to stand as recorded.

The case at bar is in nearly every respect a parallel case. It is true that if the amendment is made Campbell will not get part of the land

described in his original application, yet, in order to avoid conflict with the homesteader who has valuable improvements and his home upon the land, he is willing and desirous to amend his entry to embrace the adjoining tract of vacant land. As the matter appears to be one solely between the entryman and the government, no one will be injured by the amendment and both the parties in interest relieved of the conflict caused through no fault of either entryman, I think the amendment may be very properly allowed.

In view of the foregoing and the fact that Garred and Campbell have both evidently acted in good faith and were misled by reason of the error on the part of the local officers, your decision is reversed, the amendment allowed, and the homestead entry, so far as this conflict is concerned, will remain intact.

TIMBER LAND ENTRY—ADVERSE CLAIM.

SHATTUCK *v.* ROSEMYRE.

A timber land applicant who submits final proof and pays the purchase price, but subsequently acquiesces in a ruling of the local office that holds his right subject to that of another, and thereupon withdraws the money paid, does not retain any right to the land that can be enforced as against the intervening adverse entry of another.

Secretary Noble to the Commissioner of the General Land Office, February 21, 1893.

On the 27th of October, 1892, you transmitted, on the part of Clinton K. Shattuck, a motion for review of the decision rendered by the Department on the 6th of August, 1892, in the case of said Shattuck against James V. Rosemyre. (Unreported.)

The land involved in the controversy is the SE. ¼ of the NW. ¼ of Sec. 7, T. 9 N., R. 19 W., S. B. M., Los Angeles land district, California.

On the 16th of December, 1885, Rosemyre filed an application in the local office to purchase the SW. ¼ of the NE. ¼, and the SE. ¼ of the NW. ¼ of said section, under the act of June 3, 1878, (20 Stat., 89). Notice, signed by the register, was thereupon given by publication and posting, that, "all persons holding any adverse claim thereto are required to present the same at this office within sixty days from the first publication of this notice."

Prior to the application of Rosemyre to purchase the land described by him, one, Ramon Feliz had filed pre-emption declaratory statement for the whole of the NE. ¼ of said section, which included one of the forty-acre subdivisions applied for by Rosemyre.

On the 1st of March, 1886, no adverse claims to the land included in Rosemyre's application having been filed in the local office, he furnished to the register of the land office satisfactory evidence of the

facts required to be established by him by section three of said act, and tendered payment as therein required.

Instead of issuing to him the certificate and receipt provided for by said act, the local officers made the following endorsement on his proof: "Testimony held, pending expiration of D. S. on tract applied for."

On the 28th of August, 1886, he addressed a letter to the register of the land office at Los Angeles, in which he said:

> As you decline to accept my timber claim on Sec. 7, T. 9 N., R. 19 W., you will please to return me the money I forwarded through Mr. A. C. Maude, as payment for same. Should Ramon Feliz not be found, and his pre-emption lapse by time, I claim the first right to the lands under my timber application. You will please forward the money by express to Bakersfield, care of A. C. Maude, and oblige.

This letter is signed by Rosemyre, and upon it is written: "Check for $210 returned to Rosemyre, care of A. C. Maude, September 3, 1886. B."

Upon the proof filed by Rosemyre, underneath the statement that it was held, pending expiration of D. S. on tract applied for, is written in pencil: "Money returned September 3, 1886."

The next proceeding connected with the land in section seven, as disclosed by the record in the case, is the homestead entry of Shattuck, made on the 13th of February, 1888, for the S. ½ of the NW. ¼, and the N. ½ of the SW. ¼ of said section, which included one of the forty-acre subdivisions which Rosemyre had applied to purchase.

On the 30th of April, 1888, the receiver acknowledged the receipt of $200 from Rosemyre, in full, for the eighty acres which he had applied to purchase in 1885, and the register issued to him a certificate, stating that he had "this day purchased" said land.

On the 25th of August, 1888, Shattuck initiated a contest against the cash entry of Rosemyre, so far as the same related to the forty-acre tract embraced in his homestead entry, alleging that Rosemyre had not complied with the act of June 3, 1878, that the land being more valuable for agricultural purposes than for its timber, was not subject to entry under said law, and that his rights under his homestead entry were superior to those of Rosemyre.

A hearing followed, resulting in a decision by the local officers in favor of Shattuck. Upon appeal, that decision was reversed by you on the 29th of June, 1891, and your decision was formally affirmed by the Department on the 6th of August, 1892. The motion before me asks for a review of said departmental decision, and a reversal of your decision of June 29, 1891. Eight alleged incorrect statements of fact and twelve erroneous conclusions of law in your decision are specified in the motion papers.

The act of Congress, approved June 3, 1878, provided for the sale at the rate of $2.50 per acre of unoffered timber lands unfit for cultivation, in the States of California, Oregon, Nevada, and Washington Territory.

The third section of said act required that the register should post in his office a notice of the claimant's application for a period of sixty days, and furnish to the applicant a copy of the same for publication in a newspaper, for a like period of time; and that, after the expiration of sixty days, the claimant should furnish to the register satisfactory proof of compliance with the requirements of said act, make the necessary payments, and enter the land.

In a circular issued by your office, addressed to district land officers in the States and Territory to which the law applied, under date of May 1, 1880, (7 C. L. O., 52), you called their attention to the fact that many persons had taken the preliminary steps towards securing land under said law, up to the point of making proof and payment, but had failed in the last essential particular. In effect, they had withdrawn the land from market upon the records, by making the application, sworn statement, and publication, and then denuded the land of its timber, rendering it valueless. You informed the local officers that proof and payment should be made within a reasonable time after the expiration of sixty days from the date of first publication of notice of application, and instructed them to notify each claimant under said act, that he is required to make the necessary proof and payment within ninety days from date of his original application.

In a letter of instructions issued by you on the 19th of August, 1884, addressed to the register and receiver at Humboldt, California, (3 L. D., 84), you called particular attention to the circular of May 1, 1880, and informed said officers that they would in future be governed strictly by the instructions contained in said circular, which required proof and payment to be made "after the expiration of the sixty days of publication and within ninety days from date of original application."

In the general circular issued by your office on the 1st of March, 1884, on page 33, it was distinctly stated that the proof to be presented by applicants might be "taken before the register and receiver, or any officer in the district in which the land lies, authorized to administer oaths and using an official seal."

The next circular issued on the subject, was under date of May 21, 1887 (6 L. D., 114), wherein local officers were instructed to insist upon the proof and payment being made after sixty, and within ninety days from date of original application and publication, and stated that the published notice must state the time and place when, and name the officer before whom, the party intends to offer proof, which proof must be made before the register or receiver.

These instructions remained in force until September 5, 1889, when the ninety days regulation was dispensed with, and the registers instructed to fix the date for making proof and payment in the notices furnished by them, at a reasonable time after due publication, (9 L. D., 384).

Neither the law, nor any instructions issued in pursuance of its pro-

visions, prior to those of May 21, 1887, required the notice to be published to state the time and place when proof would be offered, or the officer before whom it would be made. Rosemyre was only required to comply with the provisions of the law, and with the regulations in force at the time his application and proof were made.

In his letter to the register of August 28, 1886, in which he demanded a return of the money paid by him, Rosemyre gave notice that should Feliz not be found, and his pre-emption lapse by time, he claimed the first right to the land under his timber application. There being no statutory provisions for any such notice, no rights were secured by such statement.

So far as appears by the record, the receipt and final certificate issued by the register and receiver to Rosemyre on the 30th of April, 1888, were issued without any new notice, or any showing made by him at that time. The Department held in the case of Sven P. Janssen (12 L. D., 561), that where payment was not made at the time fixed for the completion of the entry, the applicant might be permitted on new notice, and in the absence of adverse claims, to complete the purchase. This is not such a case, as it seems that payment was tendered at the time the proof was made, but the Janssen case seems to lay down the rule that certificate cannot be issued at a time subsequent to that of making proof, without new notice, and in the event of adverse claims.

I have given the law under which Rosemyre's application was made, the regulations of the General Land Office issued in pursuance of said law, and the facts disclosed by the record of the case, careful consideration.

My conclusion is, that Rosemyre complied with the provisions of the law, and with the regulations of the Land Office then in force, in making his application, proof, and payment. That by yielding to the ruling of the local officers in withholding receipt and certificate, without appeal, and in demanding and securing the return of the purchase price of the land, he abandoned all claim to any land included in his application, notwithstanding his notice in his letter to the register. That the land for which Shattuck made homestead entry, was subject to such entry at the time the same was made, and that no portion of the land covered thereby can be taken from him without notice, and an opportunity to defend his entry. That the receipt and certificate issued by the local officers to Rosemyre on the 30th of April, 1888, was unauthorized, and conferred upon him no rights in the land in controversy, superior to the adverse claims of Shattuck.

It follows, therefore, that the final certificate issued to Rosemyre must be canceled, and the entry of Shattuck allowed to remain intact. Departmental decision of August 6, 1892, is modified accordingly, and your decision of June 29, 1891, so far as it conflicts with the conclusions herein expressed, is reversed.

HOMESTEAD ENTRY—GUARDIAN—APPEAL.

SARAH J. CAMPBELL.

The validity of a guardian's appointment, and the acts of the guardian thereunder, are not matters that can be assailed collaterally in proceedings before the Department.

The right to be heard on appeal from adverse action taken on a homestead entry can only be exercised by, or on behalf, of the actual successor in interest in case of the entryman's death.

Secretary Noble to the Commissioner of the General Land Office, February 21, 1893.

This is an application by Hugh Lambert asking that the papers relating to cash entry No. 465 for land in the Durango, Colorado, land district, be certified to this Department for consideration.

It appears that Sarah J. Campbell filed her pre-emption declaratory statement October 4, 1880; that February 9, 1881, William H. Lambert made his homestead entry; that said filing and entry being in conflict, Campbell and Wm. H. Lambert entered into an agreement whereby each agreed to relinquish one "forty"; that Campbell complied with this agreement and on July 5, 1890, made cash entry for her claim so diminished; that Wm. H. Lambert failing to relinquish, as he had agreed to, his homestead entry conflicted with Campbell's cash entry to the extent of the land here in question. This land is described by the plat of December 22, 1891, as lot 5, Sec. 4, and lot 7, Sec. 3, T. 35 N., R. 9 W., Durango, Colorado.

By decision dated March 26, 1892, you canceled Lambert's homestead entry to the extent of the tracts described. Appeal from this decision was taken by Hugh Lambert claiming as father and sole heir of Wm. H. Lambert, deceased. By decision dated September 9, 1892, you denied said appeal. Thereupon the said Hugh Lambert filed the pending application.

It is set out in your decision of September 9, 1892, that Wm. H. Lambert died "leaving a wife who was divorced from him in 1886," and that with the papers before you was "a certificate from the county court . . . appointing Irene A. Lambert as guardian for Minnie Lambert, minor heir of William H. Lambert, deceased." You, accordingly, hold that under "the homestead law the right to the land entered, upon the death of the entryman inures to the widow, then to the minor child or children;" and that as "no one but her duly appointed guardian had any right to appeal from the decision of March 26, 1892" the said appeal of Hugh Lambert can not be entertained.

The material allegations contained in the application are, that said Minnie Lambert was not born in wedlock and consequently is without right of inheritance; that Irene Lambert her guardian, is a daughter of said Sarah J. Campbell, now deceased, and that in the interest of Campbell's estate, she took no appeal from your said decision.

Thus the motion is based solely upon allegations to the effect that the court erred in appointing Irene Lambert guardian, as aforesaid, and that she, from interested motives, neglected her duty.

It was shown by the certificate of the court, which of course imports verity; that Irene Lambert was the duly appointed guardian of the entryman's minor child. Hence neither the validity of such appointment nor the acts of the guardian thereunder are matters that can be assailed collaterally in a proceeding before this Department. So far as now appears the said Irene Lambert is still guardian as aforesaid.

It follows, as you have well held, that by the terms of the homestead law, she alone is, in the premises, entitled to be heard on appeal.

The application is denied.

MINING CLAIM—PUBLICATION OF NOTICE.

BRETELL *v.* SWIFT.

The register of the local office may properly exercise his official discretion in designating the newspaper nearest the claim for the publication of the notice of a mineral application.

Secretary Noble to the Commissioner of the General Land Office, February 21, 1893.

The appeal and other papers in this case have been certified to this Department in accordance with departmental decision of June 28, 1892, (Bretell *v.* Swift, 14 L. D., 697) to which reference is made for a statement of the facts.

The appeal is based upon alleged error in your decision of February 4, 1892, relative to the publication of the notice of the application for a patent, in which you held that—

> The publication of said notice was not made in a newspaper "published nearest to such claim," as required by Sec. 2325, R. S., and paragraph 34 of mining circular.

Said section requires the register, upon the filing of the application for a mineral patent to "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."

It is contended on behalf of Bretell that the publication must be in a newspaper of general circulation that is "published nearest the land, geographically measured," according to the instruction of April 21, 1885 (Mining Circular, p. 43), and that the publication in this case was not made in such a newspaper. The instructions referred to relate to "final proof notices" in homestead and pre-emption entries under the act of March 3, 1879 (20 Stat., 472), and are in addition to the instructions contained in the circular of July 31, 1884 (3 L. D., 52).

In Tomay *v.* Stewart (1 L. D., 570) it was held in relation to the publication required by said section 2325 as follows:

> The purpose of the required publication is to notify persons holding adverse claims of the application for patent, and thus give them opportunity to protect their interests. The register may, therefore, exercise his official judgment as to whether or not a certain publication is such newspaper within the meaning of the law; and if it is not, he may designate another which will effect the object of the publication. But an arbitrary order manifestly in violation of the statute and showing an unreasonable departure from its requirement would not be tolerated.

In Erie Lode *v.* Cameron Lode (10 L. D., 655, 657), the above doctrine is reaffirmed.

The register of the local office at Rapid City, South Dakota, in his letter of January 18, 1892, gives the reason why the notice in the present case was published in the Deadwood Weekly Pioneer, instead of a Lead City newspaper, as follows:

> Although in an air line Lead City may be a little nearer to the claim than Deadwood, a mountain intervenes between the claim and Lead City, and communication beween the claim and Deadwood is much easier and quicker than between Lead City and the claim; that in fact greater publicity was secured by publication in the Deadwood Pioneer; that it is the oldest paper in the Black Hills, and probably has the largest circulation.

In view of this statement I am of the opinion that the register did not exceed the official discretion vested in him by ordering said publication in the Deadwood Pioneer.

By a second affidavit filed May 25, 1891, said Bretell alleges that the notice of said application was only posted on said claim "on the door of the tunnel of the Sulphur Lode." It is contended on his behalf that such posting was not "in a conspicuous place on the land," as is required by said section 2325. There are affidavits and counter affidavits upon this point. On the one side it is said that the door of the tunnel "is the usual place in such workings for the posting of a notice of application for patent," and that in this case it was the most suitable and conspicuous place on the land. On the other side it is said that the door was several feet under ground, where it could not be readily discerned.

The United States deputy mineral surveyor, who assisted in posting the notice, makes affidavit—

> That this notice was posted on the door of the tunnel, not exceeding ten feet under cover, and in the most conspicuous place on the claim. That this tunnel is the principal improvement on the claim, is about on a level with the road, near the end line of the claim, and can easily be seen from the road. That the notice was posted on the door of the tunnel as a safe sheltered place; that it was easily seen from the road, and in affiant's judgment no better place could have been chosen that would so well combine safety, security, conspicuity and publicity for the posting of the notice.

The usual proof of the posting of the notice on the claim was made to the satisfaction of the local officers.

The concurring action of these several officers should not be overturned unless clearly wrong. Inasmuch, however, as the affidavits relating to the posting of said notice on the land have not been passed upon by you, they are returned for your consideration, without the expression of any opinion on my part as to the validity of said posting.

Your judgment is reversed.

PRACTICE—REHEARING—RULE 72.

GROTHJAN *v.* JOHNSON.

The Commissioner of the General Land Office is without authority under Rule 72 of Practice to consider a showing made for a rehearing, where the application and showing thereunder has been considered by the Department and the application denied.

Secretary Noble to the Commissioner of the General Land Office, February 21, 1893.

On November 30, 1892, counsel for Louise C. Grothjan filed an application for a writ of certiorari in the case of said Grothjan *v.* Joseph L. Johnson, involving the SW. ¼, Sec. 14, T. 9 S., R. 5 W., Boise City, Idaho.

On motion for review, in the above mentioned case, (15 L. D., 195) filed May 21, 1892, certain affidavits were filed here, in which it was claimed by counsel there was a showing sufficient, in the exercise of the discretionary power, under Rule 72, (Rules of Practice) to order a rehearing in the case, on the ground of newly discovered evidence. On that point the Department decided that:

"The affidavits filed in support of this ground of the motion, do not show any newly discovered evidence."

When the case was returned to you for action, counsel for Grothjan filed a motion before you, entitled "Motion for Review," in which they

Ask that, in promulgating said decision of the Secretary, you will carefully examine so much of said motion of May 21, 1892, as asked for a rehearing, together with the affidavits in support of the same, in connection with the entire record, and that you will order a rehearing."

You decided on September 12, 1892, that you were without jurisdiction in the matter, because the Secretary had distinctly passed upon the affidavits, and had held that no sufficient reason was shown for a rehearing, and therefore declined to entertain the application. They filed an appeal from your decision, claiming that by my said decision it was held that their:

Motion did not come within the Rules of Practice Nos. 76 to 80, governing reviews and rehearings, but he (the Secretary) expressly declined to act upon our suggestion that he should order a rehearing under Rule 72, on the express ground that that was a matter for the exclusive consideration of the Commissioner. The effect of said action of September 12, 1892, is to deny to our client the proper consideration of her affidavits, as they can only be considered under Rule 72.

This appeal you declined to forward to the Department. Thereupon counsel file this application, claiming that injustice will be done the plaintiff if the existing decisions are allowed to stand, and they insist "that the Commissioner be instructed that he has the power to examine and pass upon the question of ordering a new hearing under Rule 72, and that he be directed to pass upon our within motion to that effect."

In construing Rule 72, in that decision, it was said:

> From the language used, it is quite evident that this Rule does not apply to proceedings before this Department, but is confined to the Commissioner of the General Land Office.

This interpretation of the rule was only intended to apply to such instances where the showing was originally made before the Commissioner, and not where, as in this case, the affidavits are first presented for consideration in this Department, and passed upon by it. It would surely be an anomalous situation, to say the least, that would clothe the inferior tribunal with authority to again consider and pass upon the decision of the superior, by piece meal, as is insisted upon by this motion. It would be doing violence to every principle of the doctrine of *res adjudicata*.

The motion is denied.

BAKER ET AL. *v.* BIGGS.

Motion for review of departmental decision of July 13, 1892, 15 L. D., 41, denied by Secretary Noble, February 21, 1893.

MINING CLAIM—MILL SITE—HOMESTEAD.

ADAMS ET AL. *v.* SIMMONS.*

The rights and equities growing out of the location of a mill site and the erection of a mill thereon exclude the land from subsequent homestead appropriation, though the claim for the mill site is irregularly asserted and requires amendment.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 17, 1892.

On the 11th of October, 1888, Anen Simmons made homestead entry for the NE. ¼ of the NE. ¼, and S. ½ of the NE. ¼ of Sec. 25, T. 14 N., R. 70 W., and the NW. ¼ of the NW. ¼, or lot 1, of Sec. 30, T. 14 N., R. 69 W., Cheyenne land district, Wyoming, alleging settlement in November, 1881.

On the 2d of June, 1890, he gave due notice of his intention to make final proof on the 12th of July of that year, on which date James Adams, Horace E. Adams and John L. Morgan, each filed a protest against the acceptance of said proof.

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* Not reported in Vol. 15.

The hearing which followed these protests, resulted in a decision by the local officers on the 22d of December, 1890, in which they recite the facts established by the evidence, and cite the law applicable thereto, and conclude by saying:

The protests filed by James Adams, Horace E. Adams and John L. Morgan are dismissed, subject to appeal to the Commissioner of the General Land Office, within the time allowed by law.

The protestants availed themselves of their right in that respect, and by a joint appeal, took the case to your office. On the 21st of December, 1891, you rendered a decision in the case, which you concluded by saying:

As a preponderance of the evidence in the case at bar shows that it would not pay to mine the lodes aforesaid, and that the land is more valuable for agricultural purposes, your decision is affirmed to the extent of dismissing said protests and mineral applications will not be allowed to be made for this land.

The millsite in lot 1, section 30, T. 14 N.,R. 69 W., as far as based upon mining claims in conflict with the NE. ¼ of the NE. ¼, and S. ½ of the NE. ¼ of Sec. 25, and upon the Jay Eye See and Texarkana lodes are held invalid.

Upon due consideration, I am of the opinion that there are such rights and equities growing out of the location and building of the mill on the Lenox millsite, prior to Simmon's entry as to warrant the holding of H. E. No. 2132 for cancellation as to the tract included in said millsite. It is so held.

James Adams, who has apparently acted in good faith, will be allowed thirty days' time from notice hereof in which to change his location of the Lenox millsite, so as to claim the same under the last clause of section 2337, U. S. Revised Statutes.

The protestants unite in a joint appeal from your decision to the Department.

The facts which induced the conclusion reached by you, and announced in your decision, are stated therein, and an examination of the record in this case inclines me to concur in the conclusion reached by you.

Finding no error in the decision appealed from it is hereby affirmed.

BRADFORD *v.* ALESHIRE.

Motion for review of departmental decision of August 27, 1892, 15 L. D., 238, denied by Secretary Noble, February 21, 1893.

SUCCESSFUL CONTESTANT—ACT OF JUNE 15, 1880—CONFIRMATION.

MURPHY *v.* MENNIS ET AL.

The preferred right of a successful contestant cannot be defeated by an application to purchase the land under the act of July 15, 1880.

The transferee of a homesteader, who made cash entry under the act of June 15, 1880, in the face of a contest, does not occupy the status of a *bona fide* purchaser under section 7, act of March 3, 1891, where he has full knowledge of the asserted adverse claim of the contestant and his preferred right of entry.

Secretary Noble to the Commissioner of the General Land Office, February 21, 1893.

This motion is filed by Charles L. Mennis and Henry C. Hand, transferee, for review of the decision of the Department of November 23, 1891, awarding to Edwin L. Murphy the preference right as a successful contestant to make entry of lots 1 and 2, Sec. 2, T. 26 S., R. 12 W., Larned, Kansas.

The tracts in controversy are embraced in the cash entry of Mennis, made December 15, 1885, under the act of June 15, 1880, which was sold and transferred to Henry C. Hand January 1, 1886, and the question presented by the motion for review is, whether said entry is confirmed by the 7th section of the act of March 3, 1891 (26 Stat., 1095).

It appears from the record that Mennis made homestead entry of this tract, May 10, 1879, and Murphy filed affidavit of contest against the entry, April 12, 1883, charging abandonment, etc.

On the day set for the hearing, the local officers dismissed the contest, because of defective service, and Hand filed a contest against said entry, but, upon the appeal of Murphy, you held that the contest was not defective, and directed the local officers to proceed with the hearing.

On the day set for the hearing, Mennis applied to make proof and purchase under the act of June 15, 1880, and Hand then filed a waiver of all rights under his contest, and the papers were forwarded to your office for action thereon.

On July 9, 1885, you directed the local officers to allow Mennis to make cash entry under the act of June 15, 1880, whereupon Murphy, on October 2, 1885, filed in the local office a protest against your action allowing said entry, and also an appeal therefrom. Pending said appeal, to wit, on December 15, 1885, the local officers allowed Mennis to purchase the land under the act of June 15, 1880, and issued final certificate.

On January 13, 1886, you dismissed Murphy's protest and appeal; but, on February 24, 1886, upon an application filed by Murphy for reconsideration, you discovered that your decisions of July 9, 1885, and January 13, 1886, were rendered upon a mistake of fact, and you re-

voked said decisions in your letter of February 24, 1886, to the local officers, in which you stated:

> I find that the action of this office of July 9, 1885, and January 13, 1886, in refusing to consider the protest of E. L. Murphy against C. L. C. Mennis being allowed to purchase under the act of June 15, 1880, the land covered by the latter's homestead entry No. 4925, on the ground that Murphy filed waiver of all right to said tract by virtue of his contest, so far as the same affected the right of Mennis to make such purchase, was erroneous in that it now appears that such waiver was the waiver filed by H. C. Hand, the prior contestant.

On May 14, 1886, in passing upon Murphy's protest, you held that Mennis was not entitled to purchase, and directed the trial upon Murphy's contest to proceed, which decision was affirmed by the Department on appeal, holding that the right of purchase remains suspended pending the determination of the contest.

A hearing was thereafter had upon the contest of Murphy, and the local officers recommended that the homestead entry of Mennis, as well as the cash entry which had been erroneously allowed, be canceled, and that Murphy should be allowed the preference right of entry, which decision was, on June 12, 1890, affirmed by your office, and said entries held for cancellation.

On November 23, 1891, the Department, upon the appeal of Mennis, modified your decision, and directed that the cash entry of Mennis should stand suspended, and that if Murphy applied to make entry within the statutory period, the homestead and cash entry of Mennis should be canceled; otherwise to remain intact.

Mennis and Hand, transferee, ask that said decision may be reviewed, because of error in not holding that the cash entry of Mennis, made December 15, 1885, and transferred to Henry C. Hand, a *bona fide* purchaser, prior to January 1, 1886, comes within the confirmatory provisions of the 7th section of the act of March 3, 1891 (26 Stat., 1095).

The final certificate purchased by Hand was issued upon an entry made under the act of June 15, 1880, which authorized the purchase by cash entry of lands theretofore entered under the homestead law, irrespective of the validity of the entry, or failure to comply with the homestead law, provided the land was subject to homestead entry. Such right, however, was subject to the superior right of a contestant to show the invalidity of the entry, and thereby secure a preference right to enter the land as against the right to purchase under the act of June 15, 1880.

When Mennis declined to defend his homestead entry, which was attacked by the contest of Murphy, and applied to purchase under the act of June 15, 1880, he virtually admitted the charges alleged in the affidavit of contest, and Murphy's preference right to enter the land as a successful contestant, conferred by the 2d section of the act of May 14, 1880, was practically secured, and could not be taken away by an application to purchase under the act of June 15, 1880. Friese *v.* Hobson, 4 L. D., 580.

The right of Murphy, as an adverse claimant, does not depend upon an undetermined contest against the entry under which the purchaser claims title, but under a contest against a homestead entry which had been practically determined, and the rights of the parties fixed, on July 26, 1884, when Mennis abandoned the defense to his entry and applied to purchase under the act of June 15, 1880.

But, furthermore, the decision of July 9, 1885, allowing Mennis to make cash entry, and the decision of January 13, 1886, dismissing the appeal and protest of Murphy, were the result of a mistake, it being stated in said decisions that Murphy had filed a waiver of his right to enter the tract by virtue of his contest, so far as it affected the right of Mennis to purchase; whereas the waiver referred to was the waiver filed by Hand, the second contestant.

The Commissioner not only had the authority, but it was his duty, even of his own motion, to revoke and set aside said decisions, as he did by his decision of February 24, 1886, and to reinstate Murphy in all his rights as a contestant, which decision was affirmed by the Department. The cash entry was therefore virtually canceled, and no right could be acquired thereunder that was not subject to the rights of Murphy as an adverse claimant, which became complete upon the formal and final cancellation of the homestead entry of Mennis by your decision of June 12, 1890.

But, independently of this, Hand was not a *bona fide* purchaser, because he had full knowledge of the appeal and protest of Murphy and of his preference right to enter the land as a contestant, which could not be defeated by a purchase under the act of June 15, 1880.

Whether Murphy filed his appeal in time can make no difference. The purchaser had notice of the proceedings by which Murphy asserted a right to make entry in preference to the right of Mennis, or his assignee, to purchase, which were pending and of record when Hand applied to purchase.

The motion for review is therefore denied.

RAFFERTY *v.* TEMPLETON.*

The departmental decision of May 5, 1892, 14 L. D., 468, reversed on review, by Secretary Noble, February 21, 1893.

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*This action rests on the discovery of error in the facts as found in the first decision, and does not affect the legal conclusion announced therein.

MINING CLAIM—LODE—PLACER LOCATION.

SILVER QUEEN LODE.

A lode claim intersected by a prior placer location can not be allowed to include ground not contiguous to that containing the discovery.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 23, 1893.

This is an appeal by A. J. Sterling and Wm. J. Roberts from your decision of May 19, 1892, in the case of their mineral entry No. 3623, made December 31, 1891, for the Silver Queen and three other lode claims in the Leadville, Colorado, land district.

It appears from said decision wherein the facts are sufficiently stated that the lode line of the Silver Queen claim is intersected by the Arizona placer application filed prior to the Silver Queen location, and the latter claim is thus divided into two non-contiguous parts, to wit, the southeasterly and northeasterly, which contain respectively about two hundred and five hundred feet. The Silver Queen discovery being located upon the southeasterly of said portions you find that the claimant's "right to the Silver Queen lode claim does not therefore extend beyond the point where the lode line intersects the east side line of the Arizona placer and passes within it," and accordingly hold said entry for cancellation as to said northeasterly portion, that is, for so much of the Silver Queen Lode "as lies north of the point where the lode line first intersects and passes within the easterly limits of said Arizona placer."

Where two veins intersect, the junior location has, by the provision of section 2336, R. S. "the right of way through the space of intersection for the purposes of the convenient working of the mine."

In the case of intersecting lode claims therefore, an entry based upon the subsequent location might be allowed for non-contiguous portions of ground.

But there is no provision of law giving to lode claimants such right of way through an intersecting placer claim. The entry here in question can therefore not be sustained for the Silver Queen lode claim so as to make it include ground not contiguous to that containing its discovery.

The surface right is, of course, simply an adjunct to the lode claim. Engineer Mining and Developing Company (8 L. D., 361). It follows as you have well held that the Silver Queen lode claim ends at the point where the lode in its onward course or strike, from the point of discovery intersects the exterior boundary of the ground reserved by the application for the Arizona placer. Correction Lode, 15 L. D., 67.

Your judgment as hereinbefore outlined is affirmed.

PRACTICE—NOTICE OF DECISION—ADDITIONAL ENTRY.

DOUGHERTY *v.* BUCK.

A motion to dismiss an appeal because not taken in time can not be sustained, where it appears that the notice of the decision did not contain a copy of the same, and that the appeal was subsequently taken within the required time from the receipt of such copy.

The fact that an entry is not properly made of record in the local office can not prejudice the claim of one who has fully complied with the law.

The right to make an additional homestead entry under the act of March 3, 1879, is limited to those who by existing laws were restricted to an entry of eighty acres.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 24, 1893.

William Dougherty has appealed from your decision of November 2, 1891, holding for cancellation his additional homestead entry for the W. ½ of the SW. ¼ (not SE. ¼, as you have it), Sec. 27, T. 16 S., R. 1 W., Los Angeles, California.

The record presents the following facts:

The land was embraced in the grant to the Texas Pacific Railroad Company, but was restored to the public domain by act of February 28, 1885.

August 17, 1876, Dougherty made pre-emption filing for the E. ½ of SE. ¼, Sec. 28, same township and range, which he transmuted to homestead entry October 5, 1878, and for which he received patent February 1, 1882. This tract adjoins the land in controversy on the west and is the basis for this additional entry. He made his application for such entry April 22, 1885, under the act of March 3, 1879 (20 Stat., 472).

The local officers rejected his application, on the ground that his original entry was transmuted from a pre-emption filing to a homestead entry, and that he not having been limited to eighty acres in his pre-emption claim, did not come within the remedy of the act. He appealed, and, by letter of May 18, 1885, your office reversed their action, and returned the papers, with instructions to the local officers to allow the applicant to "complete his entry."

The register and receiver notified the attorney of Dougherty of the action of your predecessor (that his application had been allowed), and that final receipt would issue thereon "on receipt of fees." His attorney advised him that no fees were required, and Dougherty paid no further attention to the matter, but continued to use and occupy the land, in connection with his original homestead.

This was the status of the tract until August 15, 1887, when Elijah Buck filed his pre-emption declaratory statement for the land alleging settlement on the 2d of the same month. He built a house and moved on to the tract, and cultivated a garden, and was in possession on February 4, 1889, when, after due notice, he offered final proof.

Dougherty appeared and protested, generally, against the acceptance of Buck's proof.

Trial was had, and, on September 5, 1889, the register and receiver found in favor of protestant, and that the pre-emption filing of Buck was erroneously allowed, and recommended its cancellation, and by your said decision their action was reversed and the additional homestead entry of Dougherty held for cancellation.

The act of March 3, 1879, under which Dougherty additional entry was allowed, is as follows:

That from and after the passage of this act the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any railroad or military road, shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler, and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land grant, and who by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made. And any person so making additional entry of eighty acres, or new entry after the surrender and cancellation of his original entry, shall be permitted so to do without payment of fees and commissions; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five years' residence and cultivation required by law: *Provided*, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein in at least one year.

It will be observed that, while no fees are required to be paid by the applicant for additional entry, yet by the proviso such entryman was required actually to occupy, reside upon, and cultivate the land for one year before patent could issue.

A compliance with this requirement is doubtless what was meant in your office letter of May 18, 1885, directing the local officers to allow Dougherty to "*complete* his entry."

But the act of May 6, 1886 (24 Stat., 22), dispensed with the necessity of cultivation, residence, and occupation of the additional entry when the entryman had made final proof under his original entry; so that at the time Buck settled upon the land (August, 1887,) Dougherty had fully complied with all the requirements of the law then existing. The fact that his entry was not properly entered upon the tract books of the local office can not be allowed to prejudice the rights of the entryman, who had fully complied with the law before the initiation of Buck's claim.

The latter could not have been ignorant of Dougherty's claim, for he (Dougherty) was in the actual possession of the land when Buck settled upon it, and he shows by his own testimony that he knew of

such claim on the part of Dougherty, for he excuses himself for his meager cultivation by the fact that Dougherty forbade him to cultivate it.

There are some questions of practice raised by the record; one, a motion by counsel for Buck to dismiss Dougherty's appeal from your decision, because not taken in time. But it is shown that the notice to Dougherty of your decision did not contain a copy of the same. By your order he was subsequently served with a copy of the decision adverse to him, and his appeal is within the required time from the reception of such copy, and the motion must be denied.

It is, however, alleged by counsel for Buck that his entry affidavit is imperfect, although he does not designate in what particular it is defective.

On examination, I find that it contains no allegation that he was not a soldier or a sailor in the Union army. This fact should be alleged, or made to appear somewhere on the record, for by the statute of June 8, 1872 (Sec. 2304 R. S.), the restrictions as to entries within railroad limits were removed as to soldiers, sailors, and marines, who had served for ninety days, etc., and the act under which he made his additional entry provides only for the relief of those "who by existing laws have been restricted to eighty acres."

If Dougherty had been a soldier for ninety days, etc., he was not restricted to eighty acres when he made his original entry, and, if he chose to be satisfied with that amount, when the law allowed him one hundred and sixty acres, he can have no relief under the statute invoked.

The record does not show positively that he was or was not a soldier, though the inference would seem to be that he was not, because in his final proof on original entry he shows that he has resided upon the land the full five years. You will therefore require him to make satisfactory proof by affidavit, or otherwise, that he had not served ninety days as a soldier, etc. If such proof is made within a reasonable time to be by you designated, Buck's filing will be canceled, and patent will issue to Dougherty for the land in controversy. In the event of his failure to furnish such proof, his additional homestead entry will be canceled, and the proof of Buck accepted.

NORTHERN PACIFIC R. R. CO. *v.* STEVENS.

Motion for review of departmental decision of December 8, 1892, 15 L. D., 544, denied by Secretary Noble, February 25, 1893.

ORDER OF WITHDRAWAL—FOREST RESERVATION.

BATTLEMENT MESA FOREST RESERVE.

Lands embraced within a temporary order of withdrawal issued by the Department, with a view to creating a forest reservation under the act of March 3, 1891, are by such order excluded from settlement and entry, pending final action by the President in the matter of establishing such reservation.

Secretary Noble to the Commissioner of the General Land Office, February 25, 1893.

I am in receipt of your letter of January 23, 1893, transmitting a letter from J. Dempster Smith, Esq., in relation to the Battlement Mesa Forest Reserve, in Colorado.

The questions involved may be stated as follows:

On March 23, 1892, certain lands in Colorado were reserved by order of the head of this Department, pending an examination with a view to creating a timber reserve under the act of Congress approved March 3, 1891, (26 Stat., 1095).

Under date of December 24, 1892, the President of the United States issued a proclamation creating said timber reserve, which embraced most of the lands withdrawn March 23, 1892. Said proclamation concludes 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.

It is represented that subsequent to the date of withdrawal, March 23, 1892, certain parties made settlement and tendered filings or entries for a portion of the lands thus withdrawn, and the question arises as to the proper construction to be put upon the concluding portions of the President's proclamation, above cited, so far as this class of cases is involved; and the further question arises as to the status of the claims of those parties who, in disregard of the order of withdrawal, made settlement, location, entry or filing upon those lands which were restored to entry after the President's proclamation was issued.

In your letter you say:

> It appears to me that the rights of such persons should not be passed upon or prejudiced by official expressions of opinion, in advance of the presentation of the actual cases for action in regular course.

This, no doubt, is, in general, the correct rule, and is in accordance with the practice of the Department, and each case must be determined upon its merits.

It would seem, however, to be proper to indicate a general principle which should govern in cases where the settlement or entry was initiated, or attempted to be initiated, subsequent to the date of withdrawal.

I consider the proposition, that the head of this Department has the authority to withdraw these lands, both under the power and authority conferred upon him by general law, as well as by the act of March 3, 1891, too well established to require discussion.

It is also equally well established, that while such withdrawal is in force and effect, no party can obtain any rights, under the public land laws, as against the government, by entry or settlement upon said lands.

It follows, that any settlement or entry or filing or location, initiated subsequent to said withdrawal, cannot be considered a legal entry, a lawful filing, or valid settlement or location, as said terms are used in the President's proclamation, upon the lands finally reserved.

Under date of January 11, 1893, you transmitted a printed copy of the President's proclamation to the local officers, and in your instructions to them, said:

> This proclamation supersedes office letter of March 23, 1892, to you, making a temporary withdrawal of lands for the proposed "Grand Mesa Forest Reserve," the name of the proposed reservation, and the boundaries thereof having been changed, as indicated in the proclamation.
>
> You will make the proper notations on your records for the lands lying in your district, affected thereby.

I am of the opinion that this should be interpreted as an order of restoration of said lands.

There is no reason why the reservation should exist after the proclamation was issued, and while the order is vague and indefinite, I think it should be held to operate as a restoration of the lands to entry.

The second question above mentioned, arises in connection with these lands.

In the case of Wolsey *v.* Chapman (101 U. S., 755), the court say:

> The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork, until the differences were settled, either by Congress or judicial decision. For that purpose, an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and, as we held in Riley *v.* Wells, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

In the present instance, the order of withdrawal was issued pending the determination of the location of the boundaries of the permanent reserve to be established in accordance with the act of Congress. Said order was issued, and all orders of a similar character, are issued upon the theory that the withdrawal is for the benefit of the people at large, and not in the interest of any class or corporation, and it should be respected by all.

To hold that rights can be initiated while lands are in a state of reservation, would simply be inviting a violation and disregard of the order.

Therefore, in adjusting this class of claims, it should be held that no valid rights were acquired by means of settlement, location, entry or filing, initiated subsequent to the withdrawal of the lands, pending the location of the final boundaries of a forest reserve, created in accordance with the act of March 3, 1891.

Should it occur in future that lands which have been withdrawn, as in the case now under consideration, are not embraced in the permanent reserve, they should be restored to entry by proper notice, at the time of the promulgation of the President's proclamation.

RIGHT OF WAY—CANAL—UNSURVEYED LAND.

CACHE VALLEY CANAL COMPANY.

The right of way for a canal that passes over surveyed and unsurveyed land may be approved for the portion on surveyed land, where that part of the canal can be utilized independently of the remainder.

Section 2339 and 2340 R. S., are not repealed by the act of March 3, 1891, and priority of possession in the use of water on unsurveyed land on the part of canal owners is protected by the provisions of said sections, although the right of way over such land can not be approved under the terms of said act.

Secretary Noble to the Commissioner of the General Land Office, February 25 1893.

I am in receipt of your letter of February 1, 1893, transmitting the articles of incorporation of The Cache Valley Canal Company, a coporation organized under the laws of the Territory of Utah, for the purpose of doing business in Idaho, together with a certificate of organization; also certified copy of the certificate of the Secretary of State of the State of Idaho, that said company has complied with the constitution and laws of Idaho, relating to corporations, and that it has named B. McCaffrey, of Bingham county, Idaho, the county in which its canals and reservoirs are located, as a person upon whom service of process may be made; also a copy of the laws of Utah Territory relating to corporations. It files with these papers a set of maps, in duplicate, showing its canals and reservcirs, with supplemental map, showing two of the reservoirs on an enlarged scale, said map being in duplicate; also field notes in duplicate, duly verified by the engineer.

The canals are in three divisions. Map No. 1 shows first the Spring creek branch, the initial point of which is in the bank of Spring creek, nine hundred feet east and four hundred and twenty-five feet south of the N. W. corner of Sec. 18, T. 9 S., R. 42 E. This canal runs in a north-westerly course. Station 20 + 32.7 is on the range line between

ranges 41 and 42 E., one thousand and sixty-three feet north of the corner common to sections 12, 13, 7 and 18, T. 9 S., of said ranges. This part of the canal is 1.273 miles in length, and flows its water into Soda creek. It is seventeen feet wide. What is called the "Main" canal takes its water out of Soda creek at the terminus of the former canal at a point 757.5 feet west and 3,904 feet north of said corner common to section 12, 13, 7 and 18. Thence it runs in a westerly direction conforming to the contour of the land to a point 1,040 feet east of the N. W. corner of S. W. quarter of section 1 T. 9 S., R. 40 E. Boise meridian a distance of 10.071 miles, its width is twenty-five feet. The point of terminus of this canal is the initial point of what is called the "North branch" and "South branch." Each branch is seventeen feet wide.

The north branch, a short distance from the initial point turns north and passes into T. 8 S., 1142 feet west of the S. E. corner of section 34 of said Tp. and continuing north to near the centre of section 15 of this Tp. it turns westward and terminates in the SW. ¼ of NE. ¼ Sect. 15 T 8. R. 39, a distance of 15.448 miles.

The south branch begins as stated above and bears in a south-westerly course into section 23 T 9 S R 40 E. when it turns in a westerly course and terminates in the west line of section 19 of said township and range 1323 feet south of the quarter section corner on said line, the length being 8.318 miles.

This canal is represented on map No. 3, it is shown by said map that the canal from this point passes onto unsurveyed lands, and turning northward runs diagonally across T. 9 S R 39 E. which township has not been subdivided, it crosses the north line of said Tp. and there is about two miles of canal on surveyed land.

The secretary of the company files an affidavit, stating among other things, that a large portion of the land affected, is government land; that these canals are all completed, and are carrying water throughout their entire length; that when the surveys were made, the company was not aware that maps could not be approved on unsurveyed land, under the act of March 3, 1891 (26 Stat., 1095). That the south branch canal takes water from Soda creek, and carries it to a point in the west line of section 19, T. 9 S., R. 40 E., which said point is 1323 feet south of the quarter section corner on said line. This point he asks to have made the terminus of the south branch, and withdraws the application for the portion over, and across the unsurveyed township. This canal thus applied for, begins at station 531 + 76 and ends at station 972 + 37, a distance of 44,061 feet, being 8.344 miles. In addition to this, he asks that the small portion of the canal at the end of the survey, as laid down on the map, and which is also on surveyed land, be approved. There are between two and three miles of this piece, and it is dependent on the portion of the canal on unsurveyed land.

In the case of the Inyo Canal Company (15 L. D., 245), the maps

showed a canal having two branches, one on surveyed, the other principally on unsurveyed land. As the branch on surveyed land could be utilized, independently of that on unsurveyed land, it was approved; the other branch was not approved. In the Santa Cruz Water Storage Company case, (13 L. D., 660) where the reservoir site was partly on unsurveyed land, and a portion on the Calabasas and Buena Vista grants, the map was returned without approval. The reservoir being an entirety, it could not be used independently of the unsurveyed land.

The only material difference between the act granting right of way for canals and ditches, and the act of March 3, 1875, (18 Stat., 482) relating to the right of way for railroads, is that the applicant for the former must file a map within twelve months after locating "ten" miles of ditch or canal, while the latter has the same length of time after locating "twenty" miles of railroad, same being in each case upon surveyed land. In the case of the Tintic Range Railway Company (15 L. D., 88), the map was returned without my signature because it was partly on unsurveyed land. It was said in that case:

> Map No. 1. shows that the road it embraces, passes over alternate tracts of surveyed and unsurveyed lands, extending over the latter class for thirty-one of the 84.42 miles submitted. Map No. 2 embraces more than fifty constructed miles of road over unsurveyed lands, leaving but about fifteen miles over surveyed lands.
>
> I do not consider it to be good practice to accept these maps in face of the determination expressed in the above letter, of March last, even if the approval in terms is made to attach to surveyed lands alone.

When the line of a proposed railroad or canal runs over and across lands, such that the unsurveyed tracts cut the line into broken parcels, none of which can be utilized standing alone, it is impracticable to approve a map of such road or canal over the pieces or parts which happen to fall on surveyed land. This is especially true in a case like the Tintic Range Railway, where the application, affidavits and certificates treat the line as an entirety from terminus to terminus, without regard to the class of land it passes over.

The regulations of this Department require that a canal or ditch be surveyed; that the initial point and terminus be marked and referred to some established corner of the public survey, or a monument established by a government surveyor, of which record is made. This of itself excludes a map of a survey on which the initial point, which in case of a canal or ditch is the point of inflow, is on unsurveyed land, and so of the terminus.

If broken parts, here and there, along a line are to be approved, because they happen to be on surveyed land, they would have to be definitely fixed at their termini, that their location could be determined, each as an independent canal or ditch; this would make a series of short canals or ditches only, the first of which if, the headgate or inflow should be on surveyed land, could have water, independent of the unapproved portions. This practice would be impracticable, and certainly was not in the contemplation of Congress.

The reason for granting fifty feet on each side of a ditch or canal, was that dikes and berme banks might be constructed and protected after construction. Under the provisions of section 2339, Revised Statutes rights of way may be secured for a ditch or canal, but the adjoining proprietor may, with propriety, claim to the water edge, hence, it would seem to be important that rights of way, under the act of March 3, 1891, should be granted where the same can be done consistently with law, and departmental regulations. The length of a canal is immaterial; it may be less than ten miles.

In the case at bar, the "South Branch" takes its water from the inflow, at the initial point on surveyed land, and it continues 8,344 miles over surveyed lands; here, at a point 1323 feet south of the quarter section corner on the west line of section 19, township 9 south, range 40 east, it leaves the surveyed land. The company asks that the map of this canal, so fixed and determined by its initial and terminal points, the latter point being the terminal, be approved, and it withdraws its application for that portion on the unsurveyed land.

While it has been held, as we have seen, that a railroad or canal partly on unsurveyed land could not be approved, we have also seen the difference between those so refused, and a case where a portion of the line may be utilized independently of the part on unsurveyed land. Taking this eight and one-third miles alone, as if the survey had stopped on the line of surveyed land, it is complete, and the map is complete, independently of what follows, and I cannot see any good reason why said map, as to so much of said canal, may not be approved as the "South Branch." It is also asked that the portion on surveyed land in T. 8 S., R. 39 E. be approved, but for the reasons above given it cannot be approved, as it does not fall within the conditions requisite to approval, as above laid down.

There is shown on map No. 2 two small reservoirs, platted to a scale of two thousand feet to the inch, and a supplemental map in duplicate is filed, showing them on a scale five hundred feet to the inch. Reservoir in sections 1 and 2, T. 9 S., R. 40 E.; the initial point of this reservoir is N. 64° 59′ W., 311.3 feet from station 583 + 12 of the north canal, in the S. E. ¼ of the NW. ¼, Sec. 2, T. 9 S., R. 40 E. Station 35 + 25 is S. 56° 30′ W., two hundred and fifty feet from the quarter section corner between sections 1 and 2 of said town and range; the area of the reservoir is about one hundred acres.

The other reservoir shown on this map is in section 34, T. 8 R. 40. Station 33 + 10 is at the south end of the dam site, which point is referred to the corner common to sections 27, 28, 33, and 34; it is S. 55° 39′ W., one thousand nine hundred and seventy-four feet from said corner. This dam is one hundred and forty-seven feet in length, the north end being referred to station 662 + 95 of the north canal; the reservoir contains about 125 acres. On the supplemental maps the distances from where the meander line crosses the section lines are given.

There are two reservoirs on map No. 3, which very nearly join each other; they are in sections 26, 34 and 35, in T. 8 S., R. 39 E. They are surveyed as one and so treated.

Station 81 + 34 is on the west line of section 26, 805 feet north of the quarter section corner between 25 and 26, to which corner the survey is referred in the field notes.

The reservoir will overflow the middle corner of Sec. 26, the ¼ corner between 26 and 35, and the ¼ corner between 34 and 35. The meander line is run around both reservoirs as one, which is not objectionable, but the distance from an adjacent corner of the public survey to the point where the meander line cuts the section and quarter-section lines is in no case given; this is required by the regulations, and has been the uniform rule of practice.

Sections 2339 and 2340, R. S., secures the company, however, in its rights in said unapproved portion of said canal and reservoir, as these sections are not repealed or amended by the act of March 3, 1891. The first of said sections secures the right of the party who has priority of possession, in the use of water for mining, agriculture or manufacturing, etc., while the second provides that "All patents granted, or preemptions or homesteads allowed shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs, used in connection with such water rights as may have been acquired under, or recognized by the preceding section."

The 19th section of the act of March 3, 1891, provides for the filing of maps, when the canal, ditch or reservoir is located on unsurveyed land, "within twelve months after the survey thereof by the United States." As this reservoir is on surveyed land, the survey thereof may be completed and mapped, and such map be filed *de novo*, at any time, for consideration.

The corporation papers, organization, etc., are in conformity to law and the regulations of the Department, and are approved, and will be placed on file.

Map No. 1, embracing the "Spring Creek" branch, and also what is designated as the "Main" canal, and map No. 2, embracing the "North" branch canal, and the two small reservoirs and the supplemental map, appear to be in conformity with law and the regulations of the Department, and they are approved, subject to all existing valid rights.

Map No. 3, embracing the "South" branch, for the reasons herein given, is approved, as to that part of said canal from the initial point to the west line of section 19, T. 9 S., R. 40 W., where it leaves the surveyed land, which point is fixed as its terminal; as to the canal on the unsurveyed land, the small parcel in T. 8, S., R. 39 E., and said reservoir, it is not approved.

The survey appears to have been carefully made and noted, the variation of the magnetic meridian being noted as 17° East.

PRACTICE—EVIDENCE—STIPULATION.

MOLEN *v.* BARTLETT (ON REVIEW).

A stipulation of an attorney of record as to matters of evidence is binding upon his client in the absence of misconduct on the part of the prevailing party.

Secretary Noble to the Commissioner of the General Land Office, February 25, 1893.

I have considered the "motion for a rehearing and review" filed by counsel for the defendant in the case of James W. Molen *v.* Enoch Bartlett (15 L. D., 337), wherein the homestead entry of said Bartlett was ordered canceled for the S. ½ of SE. ¼ and S. ½ of SW. ¼ of Sec. 33, T. 5 N., R. 38 E., Blackfoot, Idaho, land district.

It was found in that case that Bartlett made homestead entry of said tract May 28, 1889, his affidavit having been made the preceding day before the clerk of the court for Bingham county, and contained the statement that he was then residing on the land, as required by Sec. 2294 Revised Statutes. On July 29, 1889, Molen filed affidavit of contest, alleging that the statements in said affidavit were untrue, and that Bartlett had not then established his residence on said land. Notice of contest was served on Bartlett July 30, 1889. At the hearing a stipulation signed by the attorneys for the parties was made a part of the record, which reads as follows:

It is hereby stipulated and agreed that at the date of Enoch Bartlett's filing, before Joseph A. Clark, deputy clerk, at Eagle Rock on the 27th day of May, 1889, the said Bartlett had no improvements on the land, and that he, nor any member of his family resided on the land, and that no actual residence or settlement was made on the place or land until the 11th day of August, 1889.

This statement was corroborated by Bartlett's son who, under oath, says "the house was not completed so that it was habitable until the 11th day of August, when his father 'bought his grub and began living there.'"

The local officers decided the case in favor of the claimant and you affirmed their decision. On appeal your judgment was reversed.

The grounds of the motion before me are:

First: On the grounds of newly discovered evidence;

Second: On the ground that the record is wrong;

Third: On the grounds that the stipulation by his attorney appearing in the record that his residence was established on his homestead August 11th, 1889, was made without his knowledge and consent and prejudiced his case and is not true.

Counsel for Molen have filed a motion to dismiss Bartlett's motion for the reasons—(1) That the motion for review was not filed within thirty days from date of notice of my decision; (2) That the motion for rehearing is not based on newly discovered evidence; (3) That the

defendant is bound by the stipulation, and (4) That the affidavits are insufficient.

It appears from your letter of transmittal that "attorneys of this city representing both parties were notified of your (my) said decision October 18, 1892." Defendant's motion was filed in the local office December 1, 1892. It will therefore be seen that the motion for review was not filed within thirty days as required by rule 87 (Rules of Practice). But this rule makes an exception of motions for a rehearing on the grounds of newly discovered evidence and the time within which they shall be filed is not limited. Therefore the motion will be considered only as one for a rehearing.

Accompanying the motion are the affidavits of the claimant, his two sons and one Teeples. The claimant swears that the stipulation referred to was not submitted to him, that he was not consulted about it and had no knowledge of it "and that the same was and is not true." The truth of this stipulation has not been questioned until now, and it is certainly against the policy of the law and the practice of courts to permit litigants to dispute the stipulations of counsel, as to the evidence during the progress of the trial.

In the case of Kirkpatrick *v.* Brinkman (11 L. D., 71), it was said:

> The client is ordinarily bound by the admission of his attorney and a stipulation as to matters of evidence to be considered in the trial of the case is peculiarly within the province of attorneys of record, and their action therein is binding upon their clients unless the prevailing party is guilty of misconduct.

There is no charge that there was any unfair or misleading conduct on the part of the plaintiff, hence this case certainly falls within the rule quoted above.

Aside from this, however, the attorneys who tried the case and made this stipulation present their affidavits. The attorney for Bartlett swears "that all such stipulations made by me as such attorney, I am sure were submitted to my client before making and filing in the record," while the attorney for the plaintiff swears that Bartlett was present when the stipulation "was prepared and submitted," and that the statement that he was not consulted or advised about it he believes to be untrue.

The affidavits do not in my opinion present any newly discovered evidence that would change the result, even if the witnesses were permitted to deny the statements contained in the stipulation.

The motion to dismiss is therefore sustained.

HOMESTEAD—APPLICATION TO ENTER—SETTLEMENT RIGHT.

HALL ET AL. *v.* STONE.

An application to enter land which is not subject to entry at the time the application is made confers no rights upon the applicant.

A homesteader who claims priority of right by virtue of an alleged settlement must comply with the settlement laws, and cannot defer the establishment and maintenance of residence until the allowance of his application to enter.

The case of Rice *v.* Lenzshek, 13 L. D., 154, cited and distinguished.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 27, 1893.

On the 15th of December, 1868, William F. Stone made homestead entry at Topeka, Kansas, for twenty-six and one-quarter acres of land, and on the 28th of April, 1882, you issued a certificate stating that under the provisions of section 2306, of the Revised Statutes of the United States, he was entitled to an additional homestead entry of not exceeding one hundred and thirty-three and three-quarter acres.

On the 6th of October, 1884, John W. Fordney presented said certificate at the local land office at Marquette, Michigan, and applied to make entry for the SW. ¼ of Sec. 31, T. 48 N., R. 39 W., under power of attorney from Stone. His application was rejected for the reason that the land was a part of an odd numbered section within the twenty miles granted limit of the Marquette and Ontonagon Railroad, under the act of March 3, 1865, (13 Stat., 520), and had been withdrawn for said road on the 28th of April, 1865, which withdrawal was continued for the Houghton and Ontonagon Railroad, on the 1st of May, 1871. An appeal was taken from the action of the local officers.

The withdrawals mentioned, were revoked on the 15th of August, 1887, (6 L. D., 92), and the lands became subject to settlement from that date, but not to filings or entries until October 10, of that year.

The application of Stone was renewed on the said 10th of October, reference being made to his former application and appeal, and on the same day William Hall presented his pre-emption declaratory statement for the land, alleging settlement on the 13th of September. On the 14th of October, James McRandle applied to make homestead entry for the land, alleging settlement September 7, 1887.

A hearing was ordered to determine the rights of the parties, which resulted in a decision by the local officers, on the 2d of August, 1889, in favor of Stone. Hall and McRandle both appealed, and on the 16th of November, 1891, you reversed the decision of the local officers, rejected the application of Stone, and awarded the tract to McRandle. Stone appealed from your decision, and Hall moved for its review and reversal. You denied his motion on the 25th of March, 1892, and he then appealed from your decision of November 16, 1891. The case is therefore before the Department upon the appeals of Stone and Hall,

the former asking that your decision be reversed, and the latter asking that it be affirmed so far as it relates to the application of Stone, and reversed wherein it awarded the tract to McRandle.

The local officers found that the application of Stone, made in 1884, was an appropriation of the land, and that his right to hold it absolutely, attached at the earliest moment when the land became subject to entry. That rule only applies to land which is subject to entry at the time the application is made. It does not apply where the land is not subject to entry, and where no right of the applicant is denied by a rejection of the application. In other words, an application to enter land which is not subject to entry at the time the application is made, confers no rights upon the applicant. Goodale *v.* Olney (13 L. D., 498); William Ray Durfee (15 L. D., 91); Nester, *et al. v.* Torgeson, *et al.* (15 L. D., 482).

The rights of Stone, therefore, are not affected by his application to enter, made on the 6th of October, 1884, but must depend upon his application of October 10, 1887. The settlement rights of both Hall and McRandle having attached prior to that date, his application was properly rejected by you, and your decision of November 16, 1891, in that respect is affirmed.

This leaves only the rights of Hall and McRandle for consideration. When Hall filed his pre-emption declaratory statement, on the 10th of October, 1887, he alleged settlement on the 13th of September, of that year. At that time he had not declared his intention to become a citizen of the United States, and did not make such declaration until September 16, 1887. He admits that when he went upon the land he saw the house or cabin of McRandle, but did not see him. The existence of the house, however, was sufficient to put him upon inquiry, and the fact that he was the first to make a record claim for the land, could not deprive the prior settler of his rights therein, provided he afterwards complied with the settlement laws.

McRandle's application to enter the land, was made four days after Hall's pre-emption filing, but his settlement was several days prior to that of Hall. He went upon the land on the 5th of September, and commenced the erection of his house on the 7th, and slept therein three or four nights between the 7th of September and the 10th of October, while Hall does not claim to have been upon the land prior to the 13th of September.

The rights of a homesteader formerly depended upon his entry, while those of a pre-emptor dated from his settlement, he being allowed three months for filing his claim, after making settlement. By the third section of the act of May 14, 1880, (21 Stat., 140), a homesteader was allowed the same time to file his homestead application and perfect his original entry as was allowed to settlers under the pre-emption laws to put their claims on record, "and his rights shall relate back to the date of settlement, the same as if he settled under the pre-emption laws."

After perfecting his entry, a homesteader is allowed six months within which to establish his residence upon the land. Such time, however, dates from the allowance of his entry, and not from his application to enter. Rice *v.* Lenzshek (13 L. D., 154).

In the case at bar, McRandle made his application to enter, within three months after making settlement upon the land. This preserved his settlement rights, but did not relieve him from further compliance with the settlement laws. In other words, he could not base his rights to the land upon his prior settlement, and then await the final allowance of his application to enter, before establishing residence on the land. He must rely either upon his settlement rights, or upon his rights secured by his application to enter. If he relies upon his settlement, he must comply with the settlement laws, and if upon his application to enter, he may govern himself accordingly, but a compliance with the homestead law in the matter of establishing residence, will not keep alive rights initiated by settlement, but not followed by residence within a reasonable time.

In this case, the settlement of Hall was followed by actual residence and improvements upon the land, to the exclusion of a home elsewhere, while the settlement of McRandle was followed by his absence from the land from October 10, 1887, until some time in 1889.

Had McRandle's application to enter the land been made prior to the filing of Hall's declaratory statement, this absence would not have affected his rights, as he was not bound to reside upon the land, or to make any compliance with the homestead law, until his entry had been allowed. An application to enter initiates a right under the homestead law that relates back to the initial act, and cuts off all intervening claims. Rice *v.* Lenzshek (13 L. D., 154).

In the case last cited, Lenzshek filed his application to make homestead entry for the land on the 10th of October, 1887, but his entry was not allowed until the 14th of December, 1888. Between those dates, to wit, on the 28th of April, 1888, Rice filed his pre-emption declaratory statement, alleging settlement on the 23d of that month. His settlement was followed by residence upon the land, while Lenzshek resided in a distant part of the State, until January 9, 1889. Having applied to enter the land before Rice filed or settled upon it, and having established his residence thereon within six months after the allowance of his entry, the land was awarded to him, notwithstanding Rice was the prior settler and resident thereon.

Counsel for McRandle claim that this rule awards the land in controversy to their client, and not to Hall. The facts and circumstances of the two cases are essentially different. Lenzshek's application to enter the land was prior to the settlement or filing of Rice. He based his claim upon his application to enter, and he complied with the homestead law. McRandle's application to enter being subsequent to the settlement and filing of Hall, based his claim upon his prior settlement,

but he did not comply with the settlement laws. He sought the benefit of two laws, while complying with the provisions of but one. This cannot be awarded him. Under the law with which he complied, his application to enter was the initial act, and its allowance would relate back to that act, and cut off all intervening claims. It could not, however, affect claims which originated prior to his application, and which had been kept alive by compliance with the law under which they were initiated.

It follows, therefore, that the prior settlement rights of McRandle, without compliance with the settlement laws, cannot prevail against the subsequent settlement rights of Hall, who has fully complied with said laws. That part of the decision appealed from, which awarded the land to McRandle, is accordingly reversed.

DONATION CLAIM—HEIRS—HOMESTEAD.

COON *v.* FREEL'S HEIRS.

There is no right existing either in the parents, or their children (as orphan heirs), to initiate a donation claim where the death of the parents occurs before they reach the State.

An adverse right existing at the date of the act of August 6, 1888, defeats the confirmation of a donation claim thereunder.

The illegal possession of land will not defeat the right of another to make homestead entry thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, February 28, 1893.

George W. Houck, assignee of the heirs of Amos E. and Elizabeth Freel, has appealed from your decision of December 7, 1891, rejecting his application to re-instate the donation claim of said heirs, involving the SE. ¼ of the SE. ¼ and lots 7 and 8 of Sec. 6, and the W. ½ of the NE. ¼ of Sec. 7, T. 15 S., R. 5 W., Roseburg land district, Oregon.

Said donation claim was filed in April, 1859; certificate (No. 1568) issued August 24, 1870; and the entry was canceled December 20, 1887.

The land lies within the limits of the grant to the Oregon and California Railroad Company, the right of which to lands in the odd-numbered sections opposite the line of said road attached upon its definite location on March 26, 1870. But as the land in controversy was at that date included in the donation claim above mentioned, your decision held that the land was excepted from the operation of the grant. The railroad company has not appealed from your decision, which has, therefore, become final against it.

Houck, claiming to be the assignee of the heirs of Freel, has appealed from your decision, alleging that you were in error—

In holding that the donation claim of Amos E. Freel and Elizabeth Freel was invalid.

In holding that the claim of the heirs of Amos E. Freel and Elizabeth Freel was invalid.

The reason given by you for canceling the claim was that the parents did not live to reach Oregon, and consequently could not initiate a donation claim.

The fact of their death before reaching Oregon the appellant does not deny. Such being the accepted fact, you were correct in holding that no donation claim could be initiated, either by the parents or by their children (John Newsome, 9 L. D., 234).

The appellant further alleges that you were in error—

In not holding that the donation entry of the Freel heirs was confirmed by the act of August 6, 1888.

By a perusal of said act (25 Stat., 359), it will be seen that it confirmed claims that were

set off to orphans by the surveyor general of the Territory, or the register and receiver of the proper local land office, and certificates were issued for such claims, and the claimants, their heirs or assigns, have since occupied and improved such claims, and there are no adverse claims thereto.

In the case at bar, there was, at the date of the confirmatory act, an adverse claim—to wit, the homestead entry of Leonard S. Coon, made June 15, 1888—which you hold to be such an adverse claim as would except the land from the confirmatory provision of said act."

The appellant, however, seeks to avoid your conclusion in this respect by the contention that said homestead entry is not a valid claim, "having been made with the full knowledge of the appellant's possession of the land, and of the appellant's belief that his title was good."

The donation entry having been canceled December 20, 1887, possession of the land, based on said donation entry, after that date, was without warrant in any subsisting law. I am not aware of any law or decision that holds a homestead entry to be invalid because the tract covered thereby was at the date of such entry in the illegal possession of another party.

There are other allegations of error, but they are substantially covered by those already discussed herein.

Your decision is affirmed.

PATENT—CHIPPEWA SCRIP LOCATION—ACT OF JUNE 8, 1872.

CHARLES H. MOORE ET AL.

The issuance of a patent for land which was a part of the public domain, or the fee to which was in the United States, *prima facie* passes the title, whether such patent may be valid, or voidable, and precludes the further exercise of departmental jurisdiction over the land until such patent may be surrendered, or vacated by judicial action.

The right of purchase accorded by the act of June 8, 1872, to holders under Chippewa half breed scrip locations is restricted to locations made prior to the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 1, 1893.

On February 9, 1874, C. C. Clements, attorney in fact, located Chippewa half breed scrip No. 317, issued to Antonie LaPierre, upon the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼ of Sec. 23 R. and R. No. 5, and scrip No. 322 issued to Antonie Bagage, upon the S. ½ of the SE. ¼ of Sec. 23, T. 1 N., R. 1 W., R. and R. No. 4, and patents issued for the tracts embraced in these locations on January 25, 1875. The tracts are situated at Salt Lake City, Utah.

On August 22, 1888, Charles H. Moore applied to make homestead entry for the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼ and the S. ½ of the SE. ¼ of Sec. 23, T. 1 N., of R. 1 W.

William E. Richardson also applied to enter under the homestead law the SE. ¼ of the SE. ¼ of said Sec. 23.

The application of Moore was rejected by the register and receiver because the land was covered by the scrip locations. He appealed to you on the alleged ground that said scrip locations are fraudulent, and the patents issued thereon are void on their face, citing Parker *v.* Duff (47 Cal., 554) and Pugsley *v.* Brown, United States Circuit Court, (25 Fed. Rep., 688).

The application of Richardson being rejected, he appealed to you.

On July 31, 1890, citing section 2368 of the Revised Statutes and the circular of instructions of March 29, 1875, (Book No. 18, L. & R., p. 214), you held that the respective purchasers holding under said patents, where their holdings were in good faith, should be allowed to purchase at $2.50 per acre the tracts under the section of the Revised Statutes above referred to, upon the surrender of the patents accompanied by deeds of relinquishment to the United States, together with a certificate of the recorder having charge of the records of the county wherein the tracts are situated to the effect that said deeds of relinquishment have been duly recorded by him, and that the records show no other conveyance or encumbrance on said lands, and that the records show the title to said tracts to be in the parties making such deeds.

You did not pass on the appeals of Moore and Richardson, but sus-

pended action thereon and directed the register and receiver to ascertain who were the bona fide holders of the tracts in question and notify them, with the other parties in interest, of your said ruling, and that they would be allowed sixty days within which to take such action as they might see proper.

On August 4, 1890, you approved the action of the local land officers in rejecting the application of Richardson.

In February, 1889, Frank A. Day applied to purchase the SE. ¼ of the SE. ¼ of said Sec. 23, T. 1 N., R. 1 W., under the provisions of section 2368 of the Revised Statutes at $1.25 per acre. The register and receiver rejected his application. He appealed to you, and on August 4, 1890, you affirmed their action and cited for the guidance of the register and receiver and interested parties your letter of July 31, 1890, in the matter of the application of Charles H. Moore.

In response to the opportunity to make a showing afforded by you to the holders of the land under said patents, J. E. William Maack, who claimed through mesne conveyance under these patents 5.742 acres of land, being a part of the SW. ¼ of the SE. ¼ of Sec. 23 patented to Antonie Bagage, and 2.631 acres of land, being a part of the NE. ¼ of the SE. ¼ of the same section, patented to Antonie La Pierre, applied to purchase said tracts under the act of June 8, 1872 (Sec. 2368, R. S.).

A portion of the tracts patented has been subdivided into lots, and there are a large number of holders—probably one hundred.

James I. Neff, Martin L. Fogel *et al.*, claiming other portions of said tract have also applied to purchase from the government. The patents have been surrendered, abstracts of title furnished, the price of the land tendered and deeds made out to the United States. These deeds appear to have been duly recorded in the county where the land is situated.

Charles H. Moore, the homestead applicant, filed a protest in your office, in which he objects to these parties being allowed to purchase, alleging that "no part of said tract is subject to purchase under said act of June 8, 1872," (Sec. 2368, R. S.) and that "protestant has a prior, valid, subsisting claim to all of said land under the homestead laws of the United States." He argues that the act in question permits the purchase of such lands only as had been located prior to June 8, 1872, when the act was approved, and that the act only authorizes the purchase of lands that were subject under existing law to the locations made, and that this particular land was not so subject; because outside of the reservation of the Chippewa Indians, and yet located by Chippewa half breed scrip. He therefore asks that all of said applications to purchase be denied.

On October 22, 1891, you considered the case, rejected the homestead applications for said land and held "that the present holders in good faith of the land in question may perfect their titles under such claims upon compliance with the terms of said act."

Charles H. Moore and William E. Richardson have appealed from your judgment, alleging substantially the same causes therefor as are contained in the protest theretofore filed.

Your judgment is correct in affirming the finding of the register and receiver in rejecting the homestead applications of Moore and Richardson, for the land at the time said applications were made was not public land, and hence not subject to entry and not subject to the jurisdiction of the land department.

It is contended that the patents were void on their face because they referred to the act under which the scrip was located, and it is contended that said act did not authorize the location of said scrip in Utah. Even if they were illegally issued and the parties thereto are satisfied with the transaction, no one else can question it. The United States owned the land, and the land department, having jurisdiction over it, is presumed to have considered all the questions, and its judgment, followed by the issuance of the patents, may not be set aside nor the patents invalidated except by the act of the holders themselves surrendering them for the purpose of correction, or by a court of competent jurisdiction. At the time these applications were made, no such surrender had been made, and no court had vacated said patents; hence the applications under the homestead law were properly rejected.

The right of a homestead application, if it attaches at all, must attach at the time it is made. Maggie Laird (13 L. D., 502); Goodale *v.* Olney, on review, (13 L. D., 498).

The land officers had jurisdiction to issue these patents, the United States owned the land, and there appears to have been no prior application therefor; hence these patents were not void, although they might be avoided by a proper suit filed by the United States, if the United States had an interest in so doing, or if it was under obligations to any one to do so.

A clear distinction should be kept between a patent that is void and one that is voidable only. On this subject the supreme court, speaking through Justice Miller, in the case of the United States *v.* Schurz (102 U. S., 378), said—

> It is argued with much plausibility that the relator was not entitled to land by the laws of the United States, because it was not subject to homestead entry, and that the patent is, therefore, void, and the law will not require the Secretary to do a vain thing by delivering it, which may at the same time embarrass the rights of others in regard to the same land.
>
> We are not pretending to say that if the patent is absolutely void, so that no right could possibly accrue to the plaintiff under it, the suggestion would not be a sound one.
>
> But the distinction between a void and a voidable instrument, though sometimes a very nice one, is still a well-recognized distinction, on which valuable rights often depend, and the case before us is one to which we think it clearly applicable. To the officers of the Land Department, among whom we include the Secretary of the Interior, is confided, as we have already said, the administration of the laws con-

cerning the sale of the public domain. The land in the present case had been surveyed, and, under their control, the land in that district generally had been opened to pre-emption, homestead entry and sale. The question whether any particular tract belonging to the government was open to sale, pre-emption, or homestead right, is in every instance a question of law as applied to the facts for the determination of those officers. Their decision of such questions and of conflicting claims to the same land by different parties is judicial in its character.

It is clear that the right and the duty of deciding, all such questions belong to those officers, and the statutes have provided for original and appellate hearings in that department before the successive officers of higher grade up to the Secretary. They have, therefore, jurisdiction of such cases, and provision is made for the correction of errors in the exercise of that jurisdiction. When their decision of such a question is finally made and recorded in the shape of a patent, how can it be said that the instrument is absolutely void for such errors as these? If a patent should issue for land in the State of Massachusetts, where the government never had any, it would be absolutely void. If it should issue for land once owned by the government, but long before sold and conveyed by patent to another who held possession, it might be held void in a court of law on the production of the senior patent. But such is not the case before us. Here the question is whether this land had been withdrawn from the control of the Land Department by certain acts of other persons, which include it within the limits on an incorporated town. The whole question is one of disputed law and disputed facts. It was a question for the land officers to consider and decide before they determined to issue McBride's patent. It was within their jurisdiction to do so. If they decided erroneously, the patent may be voidable, but not absolutely void. The mode of avoiding it, if voidable, is not by arbitrarily withholding it, but by judicial proceedings to set it aside, or correct it if only partly wrong. It was within the province of those officers to sell the land and to decide to whom and upon what price it should be sold; and when, in accordance with their decision, it was sold, the money paid for it, and the grant carried into effect by a duly-executed patent, that instrument carried with it the title of the United States to the land.

This Department fully considered the question here presented in the case of John P. S. Voght (9 L. D., 114) and there cited numerous authorities to sustain its ruling that—

The officers of the Land Department act within the general scope of their authority in issuing patents for lands that were prior thereto a part of the public domain, though in particular instances their action may be unwarranted.

The issuance of a patent for land which was a part of the public domain, or the fee to which was in the United States, prima facie passes the title, whether such patent is a valid or void instrument without authority, and precludes the further exercise of departmental jurisdiction over the land until such patent is vacated by judicial action.

An applicant for land covered by outstanding patent should initiate his claim thereto by proceedings looking toward the vacation of said patent.

I have quoted the syllabus in the above case because it sums up the ruling made in the case.

Were it not for the surrender of these patents, this proceeding would properly close here; but said surrender, and the conveyance of said property to the United States reinvests it with jurisdiction over the land. Title gives jurisdiction. Juniata Lode (13 L. D., 715).

I come now to the consideration of the applications to purchase under the act of June 8, 1872, *supra*.

Said act is as follows—

The Secretary of the Interior is 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 30, 1854, at such price per acre as he deems equitable and proper, but not at a less price than $1.25 per acre, and the owners and holders of such claims in good faith are also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned; but it must be shown to the satisfaction of the Secretary of the Interior that such claims were held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same.

Does this section give the right to holders under a location made after the act was passed? I think not, and for this reason I am of the opinion that said applications must be denied.

In order to ascertain the true meaning of the act of 1872, *supra*, the reasons and the purpose of the statute, derived from the then existing state of things, will first be considered. Smythe *v.* Fiske (3 Wall., 374).

On April 20, 1871, the Secretary of the Interior directed you to "suspend all Chippewa scrip locations or personal applications not yet patented, made by any Chippewa mixed bloods under the second article of the treaty of September 30, 1854, with the Chippewas." (Copp's Land Laws, 1st Ed., p. 711.) While this order was still in existence on December 20, 1871, by resolution the House of Representatives requested the Department to communicate to that body certain information in relation to the issuance and location of said scrip. (Chip. Scrip Report, p. 3.) The information was given on March 12, 1872, (Ibid., 3.) At page 50 of the report submitted a copy of a letter from the Secretary of the Interior to the Commissioner of Indian Affairs dated April 21, 1871, states why the order of 1871 *supra*, was made. The letter is as follows—

Great uncertainty seems to exist in reference to the identity of the parties entitled to the land and land scrip provided for under the treaties above referred to (September 30, 1854, October 2, 1863, and April 12, 1864), and much complaint has been made to me in reference to the frauds practiced and now contemplated under the foregoing treaties.

The Secretary's report to Congress further showed that patents had issued for lands located with both valid and invalid scrip, without as well as within the ceded territory (pages 244–259).

The act of June 8, 1872, was passed, therefore, with a full knowledge of the condition of the locations, and patents issued thereon outside of the ceded lands and with a knowledge that these locations were illegal, and to save the title to those innocent holders who had purchased these lands after location, Congress had passed the act in question. This act is based upon the knowledge that the scrip locations made outside of the ceded lands were illegal, and was passed to afford a means by which bona fide holders who had nothing to do with making these locations might gain titles by buying direct from the government. It could not have been intended, knowing that the scrip could not be

legally located outside of the ceded lands, that it might be so thereafter located and the land sold and the purchasers allowed to buy from the government as would be the case if the present applications should be allowed.

The Department had at one time before the passage of the act of 1872 recognized the right of a holder of this scrip to locate it any where in the United States, and Congress recognizing this construction to be incorrect, but with a view of the equities of these holders, made the act of 1872 broad enough to afford them relief, provided they could show to the satisfaction of the Secretary of the Interior that such claims were held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same.

How could it be said that one is a holder in good faith whose rights were sought to be acquired long after the passage of the act of 1872, and long after the time when the scrip locations were held to be locatable only on the ceded lands from the Chippewas?

The act of 1872 was not intended, in my judgment, to help those who, in violation of the rules and law, located scrip outside of the ceded lands after 1872. That act dealt with the present condition only. For these reasons the applications to purchase are denied.

Since the deeds in this case were executed by the owners but have not been accepted by the government, and since the patents were delivered to you for the purpose of correcting errors and giving the patentees better titles than they now have, and since, as has been herein decided, such errors cannot be corrected and such parties cannot purchase their tracts under the act of June 8, 1872, you will therefore return to said several claimants the deeds made by them, their abstracts of title, and the patents you now hold. These instruments have never been accepted by the government, and should now be returned in order that these applicants may be placed in statu quo.

Your judgment is accordingly affirmed.

PRE-EMPTION ENTRY—CONFIRMATION.

UNITED STATES *v.* PULLEN.

A pre-emptive right can not be acquired by one who enters upon and uses the land for purposes of business only, and who attempts to secure the status of a settler in fraud of the possessory right of an Indian tribe; nor is an entry of such character within the confirmatory operation of section 7, act of March 3, 1893.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 1, 1893.

The land involved in this entry is lot 6, Sec. 21, SW. ¼ of SW. ¼ of Sec. 22; lots 4 and 5, Sec. 21, lot 1, Sec. 27, and lots 1, 2 and 3, Sec. 28, T. 28 N., R. 15 W., Seattle, Washington, land district.

The record in this case shows that Daniel Pullen filed pre-emption declaratory statement, July 8, 1882 on lots 4 and 5, Sec. 21, lot 1, Sec. 27, and lots 1, 2 and 3, Sec. 28, of said township and range, alleging settlement March 1, 1880. After due notice he submitted final proof and made cash entry July 9, 1883. He made timber land entry November 5, 1883, for lot 6, Sec. 21, and the SW. ¼ of SW. ¼, Sec. 22, said township and range, alleging that the land was unfit for agricultural purposes and chiefly valuable for its timber.

On September 10, 1884, the Indian agent at the Neah Bay, Washington agency, directed the attention of the Commissioner of Indian Affairs to the fact that there was situated on said land the Indian village of the Quillehute Indians, and had been occupied by them as such from time immemorial. He requested that the entries be canceled. Upon this information being communicated to your office by the Indian Commissioner, you ordered the entries to be investigated by a special agent. This order was issued on October 7, 1884. It is not necessary to recite the correspondence that passed subsequently between you and the Commissioner of Indian Affairs on the subject, the delays of the special agent in making the examination caused by deaths, resignations and the inaccessibility of the land. Suffice it to say that the Indian Service was persistent and untiring in its efforts for a thorough examination of the entries. (See Report of the Commissioner of Indian Affairs 1885, page 188; 1887 page 209; 1889, page 285). The result of the investigation was that on October 12, 1887, you directed the entries to be canceled, and Pullen was allowed sixty days within which to apply for a hearing. This you did on the report of the special agent, dated August 27, 1887.

Application was made for a hearing by Pullen and granted December 3, 1887. The matter was again delayed for various reasons until November 6, 1890, when the testimony was begun at Port Townsend, before United States commissioner, afterwards before a notary on the land, and finally finished before the local officers December 15. Due notice of this hearing had been served personally on the claimant, his wife and the Washington Fur Company. As a result of this hearing the receiver held that the entries should be held for cancellation; the timber entry "for the double reason that the land is suitable for agricultural purposes and was used by the Indians in connection with their village on lot 1, of section 28. That the pre-emption cash entry should be canceled solely for the reason that the tract was occupied by the Indians prior to the time that Mr. Pullen made his settlement and improvements on the land."

Pullen appealed, and you by letter of September 22, 1891, reversed the decision of the receiver, holding that the pre-emption cash entry was confirmed under section 7 of the act of March 3, 1891, as "a period of more than two years had intervened between the issuance of the final receipt and the initiation of any proceeding on the part of the gov-

ernment," and in regard to the timber land, you held that it was chiefly valuable for timber and unfit for cultivation in its natural state. You therefore ordered that the entries be relieved from suspension and approved for patent. Of this action you notified the Commissioner of Indian Affairs, and he, on September 25, 1891, addressed me a communication regarding this matter and recommended that I

cause the Commissioner of the General Land Office to certify the proceedings in this case to the Department, and to suspend further action thereon until the Secretary of the Interior shall pass upon the same,—proper notice to be given to the defendant,—Pullen, and if you concur in the views herein expressed, that you reverse the decision of the General Land Office in this case, and cancel Mr. Pullen's said entries, to the end that the Indians may enjoy the use and occupation of these lands to which they are justly and legally entitled.

The record was therefore forwarded to this Department, as directed by letter dated November 5, 1891.

By a treaty confirmed and promulgated March 8, 1859 (12 Stat., 971), between the United States and the tribes of the Qui-nai-elt and Quil-leh-ute Indians, the lands herein involved were ceded to the United States. By the second article of said treaty, it was stipulated that—

There shall, however, be reserved, for the use and occupation of the tribes and bands aforesaid, a tract or tracts of land sufficient for their wants within the Territory of Washington, to be selected by the President of the United States, and hereafter surveyed or located and set apart for their exclusive use, and no white man shall be permitted to reside thereon, without permission of the tribe and of the superintendent of Indian affairs or Indian agent. And the said tribes and bands agree to remove to and settle upon the same within one year after the ratification of this treaty, or sooner if the means are furnished them. In the mean time it shall be lawful for them to reside upon any lands not in the actual claim and occupation of citizens of the United States, and upon any lands claimed or occupied, if with the permission of the owner or claimant

And the third article provided—

The right of taking fish at all usual and accustomed grounds and stations is secured to said Indians in common with all citizens of the Territory, and of erecting temporary houses for the purpose of curing the same; together with the privilege of hunting, gathering roots and berries and pasturing their horses on all open and unclaimed lands.

By executive order of November 4, 1873, a reservation was set apart for the Indians in accordance with said treaty. The reservation had been selected sometime before, but these Indians were never removed thereon.

Counsel for defendant insists that by reason of this treaty the land in dispute became subject to entry, notwithstanding the actual presence of the Indians. This might be true if it is found that the entries under consideration were *bona fide* under the law, so that so far as this point is concerned in this case it rests entirely upon the facts. However, I will say that the Indians claim they never made any such treaty and Superintendent Milroy, under date of October 1, 1882, in his report on these Indians says:

But one of the four tribes that have been made parties to the Quinaielt treaty is on the reservation. The Quilintes, Hohs, and Quits reside at different points and dis-

tances on the coast north of the reservation, and say they never agreed to sell their country, nor did they, to their knowledge, sign any treaty disposing of their right to it. That they were present at the time the treaty with them is alleged to have been made, but that the paper that they signed was explained to them to be an agreement to keep the peace with citizens of the United States, and to accord them the same rights to come into their country and trade for furs, etc., as had previously been accorded to the Hudson Bay Company, and that the presents and payments in goods that they then received, and have been since receiving, were believed by them to be in consideration of their observance of that agreement. They therefore refuse to leave their homes and localities in which they then and still reside, and move on the reservation which they (Quillutes, Hohs and Quits) regard as the homes and the property of the Quinaielts.

(Reports of Commissioner of Indian Affairs, 1872, 339.)

I might further add that the government has continued to recognize the right of the Indians to this land. It established a school there in 1884 and the same has been maintained ever since. In 1889, twenty-six of the houses belonging to the Indians were destroyed by fire. The agent at Neah Bay was sent there by the Commissioner with funds to assist them in rebuilding. He purchased 55,100 feet of lumber for them, furnished them with windows, doors, nails, hinges, butts, etc., and they built new houses on the land, under direction of the Indian bureau.

The land in controversy, included in the pre-emption entry, is situated on the Pacific ocean at the point where the Quillehute river empties into the same. The land is irregular in shape and except on the east side, is entirely surrounded by water. A portion of it has been occupied by the Quillehute Indians, a small fish-eating tribe, from a time when the memory of man runneth not to the contrary. The census of the tribe taken every year from 1872 to 1892, inclusive, shows an average population for those years, of a fraction over two hundred and sixty-five. The survey of the land was approved May 29, 1882, but the presence of this Indian village was not noted.

The testimony is quite voluminous and, in some particulars, conflicting, but all the witnesses agree that there has always been an Indian village on lot 1, in section 28. The first white man of whom there is any record who visited the place was the witness James, who went there in 1854 to assist in saving the "Southerner" that had been wrecked at that point. He was there nine weeks. The Indians were friendly and rendered valuable services in rescuing the passengers, mails, and cargo from the wrecked vessel. At that time there was a village, occupied by the tribe. The witness Swan was there in July, 1861, and visited the Indians in their houses. He was the first white man to ascend the Quillehute river and visit their houses up there. The witness Thompson, was there in 1867. He also testifies that there was a village there. The witness Balch was there in 1870. He found Indians at the village, and testifies that they had gardens under cultivation in a rude way. Up to this time there was no white man living in that vicinity. The village was located on the hill which slopes down to the beach. These witnesses also testify that they found a

rude sort of a fortress or stronghold on lot 3, in that section that had formerly been used by them during their wars with other tribes, when they were a strong and powerful nation, but at that time it was abandoned. I gather from the testimony that the male portion of these Indians spent their time sealing during the months of March, April and May. They hunted up the river early in June and went whaling in the same month, and continued at that during July. I understand those excursions were of short duration, two or three days at a time, when they would return to the village. In October they would go up the river again for salmon fishing, staying three or four weeks. It seems that those who were unable to join these expeditions, including the squaws, went up the river in the spring, planted potatoes and gathered roots. They had houses up there for their use during these journeys. In the fall the potatoes were gathered and taken to the village, where all their products were taken. During the winter months they all lived in the village spending their time at their annual feast and dancing. It seems that the village was never entirely vacated at any season, but the aged and infirm and others always remained there. This village is now known as Lapush.

As to Pullen's occupancy of the land, it is shown that he passed over it first in 1870. In 1875 he had a small house for trade on his own account. He denies that he did any trading at all prior to 1880, but I think it is shown that he did a small business in this way with the Indians though it is not apparent that he had any stock for that purpose.

His trading stock consisted of vegetables that he raised on the prairie. He did not stay there continuously until after 1880, but was there about one-half of the time. Balch says that during the time he was there, from April, 1879, to February, 1880, trading with the Indians for a man named Gallick, Pullen had a house there for trade on his own account, but he lived seven miles distant on the prairie. It seems that in 1880, he built a building on lot 1, in Sec. 28, which he used as a store and residence. He then became storekeeper for Baxter and Co., and continued as such until that firm was succeeded by the Washington Fur company, in 1885. He has been employed in the same capacity by this company ever since, doing business in the same building. The opinion of the witnesses generally on behalf of the government is that this building was put up and owned by Baxter and Co. Pullen denies this, and says the building was his own. I think, however, that it is clearly deducible from the testimony that that firm and subsequently the corporation owned the building. The testimony of the chief "Jimmy," who is thirty-five years old, and that of "Addie Sox," I think is entitled to some weight, and particularly as the story they tell is not denied by Pullen. Briefly, it is as follows:

Daniel first came to this place to get a piece of land on the prairie; said he was going to build a house there; I helped him to build the road and helped him to plow. Eph Pullen was down here at Lapush and had a little store which was blown down by wind and he bought an Indian house for a store and then went up

on the prairie and then Pullen came down to the Indian village and bought an Indian house to make a store on the hill. He sold that house; he then went up to Neah Bay and came back with Mr. Baxter. He and Dan came down to my house; "when Dan was going from my house he was going to keep a store at Lapush; Dan said he was going to keep a store there; he did not want anything else, that all he wanted to come there for to make a store at Lapush." Gallick told me to make a store there; said he did not want this land only to keep store; Dan said he did not want the land only to keep store.

I asked Howeattle whether he wished Gallick or Mr. Baxter to keep store here. Howeattle said let Baxter build a store below the hill where the store is now standing; "he did not want to build a store on the hill because he afraid Baxter he get the land, so Baxter built a store below the hill where Howeattle told him to make a store; so all the Indians told Baxter to build a store; they did not want him to build on the hill. Then he keep store—one here—after that house was finished." I had a garden back of the hill where the old Indians had a garden long before and Dan Pullen saw me fix up the fence; he came there and told me to stop; "this land is mine." He said he would give me $6; my wife was working with me and Pullen said: "If I stop keeping store you get this land back," and I said "all right." When Pullen bought that piece of land from me he said he got land from Washington. I got an Indian house and Pullen said "I got this land from Washington," and he wanted to get this house that I had just bought and paid me $10 for it; he told me again that he got all this land and said "Jimmy, you go tell Taylor to get off; to take his house off," and said again to me "You go tell Albert to get off." Albert's house belonged to Howeattle and when he died he gave it to Albert; so he told them to pull the house down, and Albert and Taylor said "No;" . . . "I do not want to pull my house down; this is my grandfather's house." Pullen gave me $6, and told me to give it to Taylor, which I did, and told him: "I am afraid Dan Pullen going to kill you." He gave me $7, to give Albert and I said to Albert "You have to get off; I am afraid Dan Pullen will kill you; that is what he trying to do all the time."

He took the money to get off.

Q. When you sold your garden for $6, to Mr. Pullen did you then understand that you were to have the garden back, if Mr. Pullen quit keeping store and went up to the prairie?

A. I understood because Dan Pullen said if he quit keeping the store he would give me back the land.

The witness, Addie Sox, corroborates Jimmy as to the house of Eph Pullen being blown down; his taking a small Indian house and his departure from the village, and says:

Dan Pullen bought an Indian house on the hill at that time; he just want the house, not the ground; when Baxter came down to Quillehute he built a store below the hill where a store now stands; the old chief Howeattle, said to Baxter "Make a store on the hill; did not want him to make a store where the Indian village is." It was ten years ago when Baxter had the store and then Pullen keep the store in it. Dan came to my house and asked me if I would let him have my garden as he wanted to raise something and gave me a blanket worth $5, to pay for the fence and for work I had done and old stumps. He said he did not buy the ground, just the fence and to have lots of wood, and when he quit keeping store he would go up to the prairie and give me back the ground.

Oliver Wood, formerly Indian agent at the Quinaielt agency, testified that Pullen told him in 1880 or 1881, when he was there on business of the agency, that the store building belonged to Baxter. Pullen does not deny this conversation.

The government introduced a certified copy of a deed from Pullen and his wife to Albert M. Brooks, who was shown to be a member of the firm of Baxter and Co., dated August 14, 1884, for five acres of ground upon which the store building is located, the consideration being $1.00; also a deed from Brooks and wife to the Washington Fur Company, for the same land, dated January 9, 1885. To the store, as originally constructed, Pullen put on an addition, and, with his family, resided there. This is the residence that he had on the land when he made final proof.

I think a fair preponderance of the testimony shows that this house was the property of Baxter and Co., at the time of the cash entry, and that the same was used for business purposes. The residence of Pullen thereon was a mere incident to his business occupation; a convenience for himself, and his residence was not established or maintained with a *bona fide* intention of procuring a pre-emption claim.

I think this conclusion is fully justified by the other improvements he had at that time. His final proof shows that he had "about three acres" under cultivation and this he used for a garden. While it is impossible to tell how much of the land the Indians had in their gardens, yet it is shown that some of the land Pullen then claimed to have under cultivation had been taken from them by him. His present residence stands on the spot formerly occupied by Indian Californis' house, whom he forced to move off. The Indian's story of this is as follows:

My house was removed five years ago by Pullen; it was situated on the land where his house now stands. He came into my house and told me to tear it down; I said "No, I don't want to put my house up; I have just finished a new house." The house is not like Indian houses you have now. He came to my house again and sitting down by my side said "I want you to tear your house down, I am going to build a house on this place where your house now stands. I want you to tear the house right off. I said "No, sir; I do not want to put my house off, and when I said "No" he struck me in the face and said "I want you to tear your house right off." I was holding two babies when Pullen struck me and I did not want to strike him back because one of my feet was cut with an axe and I had to walk around on crutches. I tore my house down; I was afraid of Pullen. He gave me a keg of nails.

I therefore find that the entryman originally went upon and used this land only for business purposes; that he got permission from the Indians for that purpose only, and in fraud of their possessory right, has attempted to secure the same.

It needs no argument to convince the student of the policy of the government toward the aborigines of the country, that their rights will, under the law be protected where, in ignorance of their rights and by reason of their confidence in the integrity of the more learned settler, they have been defrauded of their heritage. This little peninsula has been their harbor and their refuge for ages. By their own labor and skill as fishermen they have always been and are now self supporting. To deprive them of this landing place and thus destroy their own

usefulness and deprive them of the only vocation they are capable of pursuing, would be a cruelty that is abhorent to our policy. Therefore, within the reasonable construction of the law the protecting arm of the government will be extended to guard them from the avarice and cupidity of their more enlightened brother the white man. Inasmuch as the government has recognized their right to occupy this land, notwithstanding the treaty of 1859, I hold that their rights then are similar to those of a settler, and that the acts of Pullen in getting and holding possession of the land were those of a trespasser and he can take nothing thereby. As a further recognition of the right of the Indians to this land by the government the identical land in dispute, together with others in the neighborhood, were, by executive order of February 19, 1889, withdrawn from sale and settlement, subject, however, to any existing rights of any party.

The language of the supreme court in Atherton *v.* Fowler (96 U. S., page 519) seems particularly applicable to this case.

> Does the policy of the pre-emption law authorize a stranger to thrust these men out of their houses, seize their improvements, and settle exactly where they were settled, and by these acts acquire the initiatory right of pre-emption? The generosity by which Congress gave the settler the right of pre-emption was not intended to give him the benefit of another man's labor, and authorize him to turn that man and his family out of their home. It did not propose to give its bounty to settlements obtained by violence at the expense of others. The right to make a settlement was to be exercised on unsettled land; to make improvements on unimproved land. To erect a dwelling-house did not mean to seize some other man's dwelling. It had reference to vacant land, to unimproved land; and it would have shocked the moral sense of the men who passed these laws, if they had supposed that they had extended an invitation to the pioneer population to acquire inchoate rights to the public lands by trespass, by violence, by robbery, by acts leading to homicides, and other crimes of less moral turpitude.

See also Christian *v.* Strentzel, 7 L. D., 68; Turner *v.* Bumgardner, 5 L. D., 377; and Roberts *et al. v.* Gordon, 14 L. D. 475.

It is urged by counsel that this entry should be confirmed under the seventh section of the act of March 3, 1891. I do not think it is confirmed under that act, for the reason that the entry was a nullity in its inception and it does not therefore come within the meaning of the statute. Mee *v.* Hughart, 13 L. D., 484; United States *v.* Smith, id., 533.

The great conflict in the testimony is in regard to the character of the land included in the purchase under the act of June 3, 1878 (20 Stat., 89). The witnesses on behalf of the government, at least those who claimed to have any knowledge of it, are uniformly of the opinion that the soil is good for agricultural purposes and the timber of no value, except for firewood, while those on the part of the defendant, are equally as positive that its only value is for the timber. I think, however, that a fair preponderance of the testimony shows that the land was not subject to entry as timber-land. It strikes me that the government's witnesses, by reason of their long and thorough acquaint-

ance with the land, are better prepared to know the true condition than those who are, for the most part entirely unfamiliar with the lines, the character of the soil or the growth thereon, except by a casual observation or superficial examination; that by reason of their apparent disinterestedness and the fairness and impartiality with which the witnesses for the government give their testimony, it is entitled to more weight than that offered by the defendant, supported as it is almost entirely by the relatives of himself and wife.

Your decision is therefore reversed and you will cause said entries to be canceled. You will, also, inform the Commissioner of Indian Affairs of this decision.

PEREIRA *v.* JACKS.

Motion for review of departmental decision of September 8, 1892, 15 L. D., 273, denied by Secretary Noble, March 2, 1893.

RAILROAD GRANT—ADJUSTMENT.

FLORIDA CENTRAL AND PENINSULAR R. R. CO.

The right to the grant conferred by act of May 17, 1856, has not been forfeited by any act of the Florida R. R. Co., or its successors, and the State of Florida has by no act of its legislature denied to said company the benefits of said grant, but has through its executive recognized the rights of said company thereunder, and it is therefore incumbent upon the Department under the act of March 3, 1887, in the absence of any Congressional action looking toward forfeiture, to proceed with the adjustment of said grant, though the road was not constructed within the time fixed therefor.

Secretary Noble to the Commissioner of the General Land Office, March 2, 1893.

Referring to my letter of February 15, 1893, returning to your office, with my approval, clear list No. 3 of lands within the Gainesville land district, Florida, selected on account of the grant made by the act of May 17, 1856, to aid in the construction of a railroad "from Amelia Island on the Atlantic to the waters of Tampa Bay, with a branch to Cedar Keys on the Gulf of Mexico," which road is now known as the Florida Central and Peninsular Railroad Company, I have deemed it proper to submit for your information the reasons that prompted the decision and action of the Department in said matter.

On March 16, 1891, I addressed you a letter stating that the Department was in receipt of a communication from Mr. Wayne Mac Veagh, complaining of the delay in the adjustment of said grant, in which I stated that I had not taken action thereon for the following reasons:

1st. That Senator Call, of Florida, has been urging upon the consideration of Congress for several years a forfeiture of this grant;

2d. The possibility that Congress might take some action looking to a forfeiture thereof.

It appearing that it was not the policy of Congress to forfeit any land grants where the road had been constructed, although built out of time, I could see no necessity for further delay in the adjustment of this grant, under the provisions of the act of March 3, 1887, and directed that, unless some reason existed why such adjustment should not be proceeded with, you will prepare a clear list of the pending selections of said company and present it for my approval.

At the time such instructions were given, there was pending before the Department a motion filed by Senator Call for review of the decision of Secretary Schurz ofJanuary 28, 1881, in the matter of the reservation of lands granted to the State of Florida, under the act of May 17, 1856, for the construction of a road from Amelia Island to Tampa Bay, and Cedar Keys.

The effect of these instructions was to deny said application, no sufficient reason being shown why the decision of Secretary Schurz, which had been affirmed by Secretaries Teller and Lamar, should be disturbed.

Said decision of Secretary Schurz held, that a map showing the definite location of said road from the junction of the Cedar Keys branch, at Waldo, to the waters of Tampa Bay, was filed in the Department December 14, 1860, and within the time required by the act for the construction of the road, all other portions of the road having been previously exhibited by maps filed in and recognized by the Department. By this decision the Commissioner of the General Land Office was directed to make the necessary withdrawal of lands to protect the rights of the company and to secure the proper adjustment of the grant upon the line designated. It was made upon the application of the Atlantic, Gulf and West India Transit Company, formerly the Florida Railroad Company, for a review of the decision of Secretary Chandler of April 29, 1876, rejecting the claim for a withdrawal of lands and the recognition of the rights of said company under the act of May 17, 1856. Secretary Chandler held that no map showing the definite location of the road from Waldo to Tampa Bay had ever been filed in the Department, and the failure of the company to perform this important act within a reasonable time after the date of the grant should be taken as conclusive evidence of the abandonment of the grant.

It was urged by Senator Call, in support of his application, that the action of Secretary Chandler in this matter was binding upon his successors, and could not be revoked by Secretary Schurz, and that if it was competent for Secretary Schurz to reverse the decision of Secretary Chandler, it was equally competent for any subsequent Secretary to reverse the decision of Secretary Schurz.

The company resisted this application, upon the ground that it was clearly shown that the map of definite location of the entire road had been filed in the Department, and the greater part of the road com-

pleted long prior to the expiration of the time allowed for the completion of the road. It requested the Department to proceed with the adjustment of the grant in accordance with said decision.

In passing upon this application Secretary Lamar, in an elaborate opinion in which all the issues were carefully presented (5 L. D., 107), concurred in the ruling of Secretary Schurz—which had also been concurred in by Secretary Teller in his decision of January 30, 1884,—that the map of definite location was filed by the Florida Railroad Company within the time required, and it was held that, under the facts presented, Secretary Schurz had the right to entertain jurisdiction of the subject; but he declined to direct the Commissioner to proceed with the adjustment of the grant, because proceedings were then pending in Congress looking to the forfeiture of said grant.

Congress having failed to provide for the forfeiture of this grant, the company, on March 7, 1887, again urged that the Commissioner of the General Land Office be directed to proceed without delay with the adjustment of said grant, and pending the consideration of this application, Senator Call again filed in the Department a request that no action be taken looking to the certification of lands to the Florida Railway and Navigation Company, upon the following grounds:

(1.) That no location was ever made under this grant within the lifetime of the grant, under any authority from the State, or its legislature, or its executive.

(2.) That no grant was ever made by the State of this land to the Florida Railway Company or its successors, or to any other company.

(3.) That none has ever been made up to this date.

(4.) That the State is is the grantee named in the act.

(5.) That no road has ever been built under the grant or upon the line of any survey made by authority of the State during the lifetime of the grant.

(6.) That the Supreme Court of the United States has in numerous cases decided that a location under a grant was a condition precedent to the vesting of any title.

(7.) That the grant being for lands within six miles of either side of a road between certain designated points, that it could describe no land or line of road which was not built.

(8.) That no road has ever been built on any line of survey or location made by authority of the State under the grant of May 17, 1856.

(9.) That the State of Florida has, by continuous legislation since the year 1858, repeatedly denied to the Florida Railroad Company any of the benefits of this grant, and has granted a right of way and incorporated various other companies for the construction of a railway between Waldo and Tampa, giving, however, to none of them the benefit of the grant of May 17, 1856.

(10.) That the governor of Florida, M. S. Perry, in 1858, in his message to the legislature of Florida, officially declares that no survey and no location of any road had been made from Waldo to Tampa, and that he had refused to approve the location of the lands under the road then projected to be built by the Pensacola and Georgia Railroad Company to Pensacola.

This is the motion above referred to, the several grounds of which may be embraced under three general heads:

1: That no location of the road was made under proper authority, within the time required.

2: That no grant was made by the State of this land to the Florida Railroad Company, or its successors.

3: That the State of Florida has denied to the Florida Railroad Company the benefits of this grant, and has incorporated and granted to other roads the right of way between Waldo and Tampa, giving to none the benefits of the grant of May 17, 1856.

The first ground was fully settled and disposed of by Secretary Lamar's decision of August 30, 1886, re-affirming the decision of Secretary Teller, who by that decision re-affirmed the decision of Secretary Schurz, holding that a map of definite location of the whole line of road was filed in the General Land Office within the time required for the construction of the road. (See 2 L. D., 561; 5 L. D., 107, and Ex. Doc. in record, page 12.)

It is further alleged by Senator Call "that no grant was made by the State of this land to the Florida Railroad Company, or its successors."

This question was also considered by Secretaries Lamar and Teller, in the decisions above referred to, in which it was distinctly held that the benefits of the grant of May 17, 1856, was conferred by the State of Florida upon the Florida Railroad Company, whose rights and interests thereunder have been assigned and transferred, through its successors, to the Florida Railway and Navigation Company.

The act of January 6, 1855, known as the internal improvement act of the State of Florida, by section 4, provided for the building of certain roads, among which was one from Amelia Island on the Atlantic to the waters of Tampa Bay, in south Florida, with an extension to Cedar Keys, in east Florida. This was done in anticipation of a grant of lands from the United States for the purpose of aiding in the construction of said roads. (Ex. Doc., page 18.) Section 5 of said act then provides:

> That the several railroads now organized or chartered by the legislature, or that may hereafter be chartered, any portion of whose route as authorized by their different charters and amendments thereto shall be within the line or routes laid down in section four (4), shall have the right and privilege of constructing that part of the line embraced by their charter, on giving notice to the trustees of the internal improvement fund of their full acceptance of the provisions of this act, specifying the part of the route they propose to construct; and upon the refusal or neglect of any railroad company now organized to accept within six months from the passage of this act the provisions of the same, any other company duly authorized by law may undertake the construction of such part of the line as they may desire to make, and which may not be in progress of construction under a previous charter.

The Florida Railroad Company, which had previously been incorporated with authority to build a road from the Atlantic Ocean across the State to the Gulf of Mexico, accepted the provisions of said act March 6, 1855, within three months after the passage of said act. (Journal 1858, p. 72; Documents accompanying Governor's message.)

By act of December 14, 1855, the charter of said company was amended,

authorizing it to construct its road from Amelia Island, on the Atlantic, to the waters of Tampa Bay, in south Florida, with an extension to Cedar Keys, in east Florida, under the provisions of the internal improvement act.

By act of Congress of May 17, 1856, a grant of lands was made to the State of Florida to aid in the construction of a railroad "from Amelia Island on the Atlantic to the waters of Tampa Bay, with a branch to Cedar Keys, on the Gulf of Mexico," being the precise line designated in the internal improvement act, and in the amended charter of the Florida Railroad Company.

Acting under this authority, the Florida Railroad Company, in 1857, filed in the General Land Office the map of definite location of that part of the main line of said road from Fernandina (Amelia Island) to Waldo, and of the branch line from Waldo to Cedar Keys, and commenced the construction of the road on this part of the line, completing it in 1860. On December 14, 1860, the company filed a map of definite location of the remaining portion of the road from Waldo to Tampa Bay.

Passing upon the question as to the right of the Florida Railway and Navigation Company to the benefits of this grant, as successor of the Florida Railroad Company, Secretary Lamar, in his decision of August 30, 1886, said:

> The act of May 17, 1856, granted to the State of Florida, for the purpose of constructing the road aforesaid, six sections per mile on each side of said road, prescribing the manner in which the State might dispose of said lands, and providing that if said road or branch is not completed within ten years, no further sales shall be made and the lands unsold shall revert to the United States. The benefit of this grant was conferred by the State of Florida upon the Florida Railroad Company, whose rights and interests thereunder have been assigned and transferred through its successors to the Florida Railway and Navigation Company. The road was completed to Fernandino *via* Waldo to Cedar Keys in 1860, and lands inuring for that portion of the road were certified to the State in 1858 and 1860, a map of definite location for such portion having been filed and accepted as the basis of the adjustment of the grant.

Secretary Teller in his decision of January 30, 1884, passing upon the same question, said:

> This company was formerly known as the Florida Railroad Company, and by the act of the Florida legislature, made in anticipation of the grant, said company became the beneficiary of the grant. In 1872 the name of the company was changed to the Atlantic, Gulf and West India Transit Company. The route of the road from Amelia Island to Cedar Keys was definitely located in 1857, and the road was constructed in 1860, such construction being that of all of the branch line, and that part of the main line from Fernandina to Waldo.

It will be seen from the extracts above quoted that the Department has directly considered and recognized that the benefits of the grant of May 17, 1856, were conferred upon the Florida Railroad Company, and, acting upon this, the Department, in 1858 and in 1860, certified to the State lands inuring for that portion of the road from Fernandina, *via* Waldo, to Cedar Keys, which was completed in 1860.

The only question remaining for consideration is as to the right of the Florida Railway and Navigation Company to the benefits of the grant of May 17, 1856, for that part of the road between Waldo and Tampa Bay.

In a speech delivered by Senator Call in the United States Senate, March 3, 1887, and filed with and made part of his application, he says:

> The fact that the State of Florida had expressly denied to this company (referring to the Florida Railroad Company) the right to the grant of 1856, has never been considered by the Interior Department.

In the same speech he also says:

> I had supposed that on the production of the acts of the legislature of Florida and the message of her governor, and the opinion of her attorney-general in December, 1858, that this fact was established; that by an act of sovereign legislation, of full force and effect, the State of Florida did, in 1858, deny to the Florida Railroad Company the benefits of the internal improvement act of 1856, and granted it to another company.

It is evident from what follows, in the speech above referred to, that he has reference solely to that portion of the road from Waldo to Tampa Bay not completed within the ten years required by the act.

This is shown by the ninth ground of objection, embodied in the third general ground, as follows:

> That the State of Florida has denied to the Florida Railroad Company the benefits of this grant, and has incorporated and granted to other roads the right of way between Waldo and Tampa, giving to none the benefits of the grant of May 17, 1856.

The act of the legislature of Florida (January 10, 1859), referred to by Senator Call, is the act incorporating the Florida Peninsular Railroad Company, and granting to said company the right of way from a point on the Florida Railroad to Tampa Bay. (Statutes 1858, page 62.)

It is urged by Senator Call that this act denied to the Florida Railroad Company the benefits of the internal improvement act of 1855, by conferring it upon another road, and by necessary implication also denied to the Florida Railroad Company the benefits of the grant of May 17, 1856. He also insists that this was the opinion of the Attorney General of the State, to whom the matter was referred when the bill to incorporate the Florida Peninsular Railroad Company was pending before the legislature.

The question submitted to the Attorney General was whether the "bill to be entitled an act to construct a railroad from a point on the Florida Railroad, in east Florida, to Tampa Bay, under the style of the Florida Peninsular Railroad Company, in any of its provisions does or does not conflict with the chartered rights or privileges of any other company."

He was considering the question with reference to the internal improvement act solely, and makes no reference whatever to the rights of any other road under the act of May 17, 1856. The question was, whether, under the internal improvement act, the Florida Railroad

Company had the exclusive right to build a road between Waldo and Tampa Bay. He says:

> While, therefore, the Florida Railroad Company may be entitled to build their road to the waters of Tampa Bay under authority of the amended charter, they are not, in my opinion, entitled to the benefit of the restriction against the building of a lateral road, and hence I conclude there is no provision of the bill referred to your committee which conflicts with the chartered rights of any other company. . . .
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> . . . . . .
>
> The authority of the Florida Railroad Company to build the road from the point of divergence to the waters of Tampa is claimed to be derived from the act to amend the act incorporating the said company, approved 14th December, 1855. There is nothing in this act that I can discover which conflicts with the bill referred to your committee, unless it is determined that all exclusive rights and benefits of the internal improvement act are, by the terms of the said first section, unconditionally conferred on said company. I am, however, inclined to the opinion that the real intent of the first section of the amended act was simply to grant to the Florida Railroad Company the privilege of building their road to the waters of Tampa Bay, and that if they desired the exclusive privileges offered in the internal improvement law, they must conform to the conditions and adopt the course which only secures them to other companies, because to come under the internal improvement law is to come under its conditions as well as its benefits.

But whatever may have been the opinion of the attorney-general, as to the right of the State to grant the right of way from Waldo to Tampa to another road and to confer upon it the benefits of the internal improvement act to the exclusion of any other road, it does not appear that any such bill was passed.

The act granted to the Florida Peninsular Railroad Company the right of way from a point on the Florida Railroad to Tampa Bay, and also the benefits of the "internal improvement fund," to aid in the construction of said road, but it did not deny to the Florida Railroad Company the benefits of the grant of 1856, or of the internal improvement act, or attempt in any manner to impair or affect the rights of any other company. On the contrary, it provided "that the provisions of this act shall not be so construed as to prejudice the chartered rights of any other company."

The internal improvement act of the State of Florida, approved January 6, 1855, provided that so much of the 500,000 acres of land granted to the State for internal improvement purposes by the act of Congress of March, 1845, as remains unsold and of the proceeds of the sale of such lands remaining unappropriated; and also of the swamp lands granted by the act of 1850, and of the proceeds of the sale of such lands that have accrued shall be set apart as a fund to be called the internal improvement fund of the State of Florida, to be applied according to the provisions of the act.

The act then describes what lines of road were proper improvements to be aided from said fund, among which was the line from Amelia Island to Tampa Bay.

Section 21 of said act provided:

That should the government of the United States grant land to the State of Florida for the purpose of aiding in the construction of the lines of railroad indicated, and their extensions, by general or special act, said lines of railroad shall be entitled to all the benefits and advantages arising from said grant that the State of Florida would be entitled to by the construction of said lines of railway and their extensions.

The Florida Railroad Company was incorporated by an act of the legislature of Florida, approved January 8, 1853, and under section 5 of the internal improvement act was entitled to the benefits of that act, being a chartered company authorized to build upon one of the routes laid down in section 4 of said act, having accepted the provisions of the act within three months after its passage.

By act of December 14, 1855, of the legislature of Florida, the charter of the Florida Railroad Company was amended, "so that the said company shall have power to construct the railroad from Amelia Island on the Atlantic, to the waters of Tampa Bay, in south Florida, with an extension to Cedar Keys, in east Florida, under the provisions of an act to encourage a liberal system of internal improvements in this State, approved the 6th day of January, A. D. 1855." This is the precise line designated in the act of May 17, 1856, passed thereafter.

Now, as the 21st section of the internal improvement act provided that the company authorized to construct the road upon any of the lines designated by said act should be entitled to all the benefits and advantages of any grant made by the United States to aid in the construction of said road, there can be no question that the Florida Railroad Company, by the terms of its charter and the provisions of the internal improvement act, was entitled to the benefits of the grant of May 17, 1856, upon complying with its provisions.

The act of May 17, 1856, gave the company ten years in which to complete its road. In pursuance of the requirements of said act, the Florida Railroad Company filed a map of definite location of its road from Fernandina (Amelia Island) to Cedar Keys, *via* Waldo, in 1857, and completed that portion of the road in 1860. In 1860 the company also filed a map of definite location of the remaining portion of the road from Waldo to Tampa Bay, thereby causing the grant to attach to the specific sections contemplated by the grant along the entire line of the road.

In 1858 the company had contracted for the building of forty miles of the road from Waldo to Tampa Bay, with a continuous extension twelve miles farther, and before the commencement of the war a distance of forty-five miles of the road was graded with culverts and trestles constructed.

At the date of the act incorporating the Florida Peninsular Railroad Company, the right of the Florida Railroad Company under the grant of May 17, 1856, had attached along the entire line of the road,

and having by the terms of that act ten years in which to complete the road, that right could not be divested by the State by incorporating another road with the right to build a lateral line, even if the act pretended to divest the Florida Railroad Company of the rights acquired under the act of May 17, 1856, or of its initial right to this grant under the internal improvement act of January 8, 1855, because the title of the State was that of a mere trustee, and it had no power to divest the rights of the beneficiary which had been attached, having up to that time fully complied with the terms of the grant.

But a reference to the act incorporating the Florida Peninsular Railroad Company shows that it was not intended to impair, or in any manner affect or divest, the rights of the Florida Railroad Company; nor was the grant to the Florida Peninsular Company of the benefits of the internal improvement act inconsistent with the rights previously conferred upon the Florida Railroad Company, or a denial of the benefits of the grant of May 17, 1856.

It is also urged by Senator Call that the grant has expired and that the legislature of Florida made declaration of the fact that the company was not entitled to the benefits of this grant after the expiration of the time required by the act for the construction of the road.

The declaration referred to is the following resolution of the legislature of Florida of 1868 and 1869:

> Whereas, by reason of the conflict of arms which prevailed in this State between the years of 1861 and 1865, it became impracticable to proceed with the construction of the roads comprehended in the system of internal improvement adopted by this State, whereby the grant of lands made by the United States in aid thereof, so far as applicable to the unconstructed portion of said system, expired by the operation of the limitation contained in the fourth section of the act of Congress making said grant; and
>
> Whereas, this State is now desirous of promoting the completion of the said system, or so much of the unfinished part as leads from Amelia Island to Tampa Bay: Therefore,
>
> Be it resolved, That our Senators and Representatives in Congress be requested to urge the early passage of an act reviving the grant contained in the act of Congress entitled "An act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of certain railroads in said States," approved May 17, 1856, and that the operation of said act be extended to a term of —— years from the passage of an act reviving the aforesaid grant; but nothing herein contained shall be construed as a request to grant any lands to companies heretofore chartered by any State of the Union or by any act of Congress.

I see nothing in this resolution to warrant the conclusion arrived at by Senator Call, but, on the contrary, it shows that the State was anxious to have the grant revived for the purpose of completing the road commenced by the Florida Railroad Company. The resolution merely shows that the legislature supposed at the time that the grant had lapsed, but the decision of the Supreme Court of the United States in the case of Schulenberg *v.* Harriman (21 Wall., 44), rendered shortly thereafter, in construing a grant precisely similar in this respect, corrected this error.

By an act of the legislature of Florida, approved January 18, 1872, the name of the Florida Railroad Company was changed to the Atlantic, Gulf and West India Transit Company, continuing the rights, franchises, privileges, etc., the same as if no change had been made.

By section 4 of the act of December 14, 1855, amending the charter of the Florida Railroad Company, it was provided:

That the president and directors of the Florida Railroad Company may set off any portion of their line to persons desirous of constructing the same, and in that event such portion may have a distinct organization, with all the grants, rights, powers, duties, and privileges conferred on the Florida Railroad Company, with the right to adopt a different name, in order to keep the stock account and liabilities separate.

Acting under this authority, the Atlantic, Gulf and West India Transit Company, by proper assignment set off and gave authority to the Peninsular Railroad Company to build that part of the road from Waldo to Ocala, a distance 44.88 miles, and on July 1, 1882, the governor of the State of Florida made the following certificate to the Secretary of the Interior:

Sir: I have the honor to certify that the railroad from Waldo to Ocala, in the State of Florida, being a part of the line of railroad from Amelia Island, on the Atlantic, to the waters of Tampa Bay, specified in the act of Congress approved May 17, 1856, and entitled "An act granting public lands in alternate sections to the States of Florida and Alabama to aid in the construction of certain railroads in said States," has been completed, and is in actual operation, and that said railroad from Waldo to Ocala is of a continuous length of 44.88 miles.

Acting under the authority conferred by section 4 of the act of December 14, 1855, above referred to, the Atlantic, Gulf and West India Transit Company by proper assignment set off and authorized the Tropical Florida Company to build that portion of their line of road from Ocala to Tampa Bay, and on August 5, 1882, the governor of the State of Florida made the following certificate to the Secretary of the Interior:

I have the honor to certify that twenty-six miles five hundred and twenty feet of railroad, commencing at Ocala, in Marion County, State of Florida, and running southwardly toward Tampa Bay, the same being a part of the line of railroad designated in the act of Congress approved May 17, 1856, entitled "An act granting public lands in alternate sections to the States of Florida and Alabama, to aid in the construction of certain railroads in said States," to run from Amelia Island, on the Atlantic, to the waters of Tampa Bay, with a branch to Cedar Keys, on the Gulf of Mexico, are completed, and that the said twenty-six miles five hundred and twenty feet of railroad is owned and operated by the Tropical Florida Railroad Company.

By act of March 8, 1881, the legislature of Florida incorporated the Tropical Peninsular Railroad Company with the right to construct a road from a point at or near Ocala to the city of Tampa, with a grant of alternate sections of swamp and overflowed lands to the extent of six sections per mile on each side of said road.

The act incorporating the said railroad company was not intended to divest the rights of the Florida Railroad Company, or its successor, the Atlantic, Gulf and West India Transit Company, nor was the grant of

lands made by said act given in lieu of lands granted to another road by the act of May 17, 1856, because the act expressly provided "that the grant of lands herein made shall not interfere with any other rights heretofore granted to any other railroad company."

Under its charter the Tropical Peninsular Railroad Company had the right to build a line of road from Ocala to Tampa, and to receive therefor the benefit of the grant made by the act; but this did not impair or in any wise diminish the right of the Atlantic, Gulf and West India Transit Company from also building its line of road from Ocala to Tampa Bay, either with its own funds or by authorizing another company to build said line under the authority conferred by section 4 of the act of December 14, 1855, and to receive therefor the benefit of the grant of May 17, 1856.

The chartered privileges of the Tropical Peninsular Company are not inconsistent with the rights of the Florida Railroad Company and its successors, under the grant of May 17, 1856, and the governor of the State of Florida recognized that right when he certified to the Secretary of the Interior that twenty-six miles of said road, commencing at Ocala and running south in the direction of Tampa Bay were completed "the same being a part of the line of railroad designated in the act of Congress approved May 17, 1856," and that said twenty-six miles of railroad is owned and operated by the Tropical Florida Railroad Company.

Whether a company receiving a grant from the State to aid in constructing a lateral line of road between the same points named in the charter of the Florida Railroad Company, would by the acceptance of authority from the Florida Railroad Company, or its successors, to build the road upon its line, be entitled to the benefits of the grant from the State, is not necessary to be considered in connection with the right of the Florida Railroad Company or its successors, or its assignees under the act of May 17, 1856, because that is a question solely between the State and the company, in which the government has no interest.

In January, 1883, the Peninsular Railroad Company and the Tropical Florida Railroad Company were merged and consolidated under the name of the Florida Transit Peninsular Railroad Company, and on March 5, 1884, all of the several companies that built any part of the line of road from Amelia Island to Tampa Bay, with a branch to Cedar Keys, were consolidated and merged in one company, under the name of Florida Railway and Navigation Company, now known as the Florida, Central and Peninsular Railroad Company, which now represents all right, title, and interest in said line of road.

These several consolidations were all made under and in accordance with the laws of Florida, and the legality of said consolidation has been certified to by the officials of said State and seems not to be questioned.

With the exception of the grant for the road in question, the grants

made by the act of May 17, 1856, have been practically adjusted. This road has been entirely constructed, the portion between Fernandina and Waldo (eighty-five miles) having been built in time, the remaining portion between Waldo and Tampa (152.65 miles) after the expiration of the time limited by law, and in each instance the governor of the State has certified to the construction of these roads, as they progressed under and in accordance with the provisions of the 4th section of the act of Congress making the grants, and in other ways gave recognition to the companies claiming through the State.

The grant in question was the subject of departmental report of January 10, 1883, in response to Senate resolution of December 27, 1882, and, again, in report of February 7, 1884, in response to Senate resolution of February 7, 1884, and since that time numerous reports have been made in each instance upon bills introduced by Senator Call looking to the forfeiture of this grant.

It will thus be seen that since 1883, Congress has been, at regular intervals, kept informed as to the status of this grant, and during this time, more than ten years, no action has been taken looking to the forfeiture of the same.

After a careful consideration of all the objections that have been urged against this grant and the listing of lands on account thereof, I became satisfied that the right to the grant of May 17, 1856, had not been forfeited by any act of the Florida Railroad Company, or its successors; that the State of Florida has, by none of the acts referred to, denied to said company the benefits of said grant, but that the State of Florida, through its governors, has recognized the right of the company to receive the benefits of said grant, since the dates of the acts referred to, and that the Florida Central and Peninsular Railroad being now the successor of every company having a right to build any part of said road, under articles of consolidation made under and according to the laws of Florida, and so recognized by said State, and the road having been constructed, under the provisions of the act of March 3, 1887 (24 Stat., 556), it became my duty to adjust the grant, the approval of the list in question being a step in that direction.

Since the approval of these lists, I have received a letter from Senator Call, directing my attention to the provision in the last general appropriation act, the object and intention of which he states "was to suspend any further action by the Department in regard to these lands until Congress should otherwise provide."

The portion of the act referred to is found on page 370 of the unbound volume of the Statutes, containing the acts passed by the first session of the 52d Congress. It is that portion of the act making appropriation for surveys, and in appropriating $125,000 for the survey of lands in railroad limits, the following provision is found: "Provided, That no part of this sum of money shall be used for any land embraced in any grant to the State of Florida."

It is sufficient to say that none of the lands contained in the approved list referred to were surveyed under the appropriation above referred to, and I am unable to so construe the provision to that act to have the effect claimed for it.

I have thus reviewed all the objections heretofore made against this grant, and the recent objections of Senator Call, embodied in his letter above referred to, and can find no good reason to cause me to reconsider the action already taken in directing that the adjustment of this grant be proceeded with and in approving the list referred to.

For the reasons above set forth, I have also approved lists numbered 1 and 2 of lands within the Gainesville land district, Florida, selected on account of the grant made by the act of May 17, 1856, to aid in the construction of a railroad "from Amelia Island on the Atlantic to the waters of Tampa Bay, with a branch to Cedar Keys on the Gulf of Mexico," which road is now known as the Florida Central and Peninsular Railroad Company, which are returned herewith.

RAILROAD GRANT—EXCEPTED LAND—INDIAN RESERVATION.

DELLONE *v.* NORTHERN PACIFIC R. R. CO.

Lands embraced at definite location of this road within a technical Indian reservation established under the provisions of a treaty, do not form a part of the "Indian country" to which the provisions contained in section 2, of this grant, for extinguishing the Indian title, are applicable, but are reserved from the operation of said grant under the express terms of the third section thereof.

The case of the Northern Pacific R. R. Co. *v.* Miller, 7 L. D., 100, in so far as in conflict with the decision herein is overruled.

Secretary Noble to the Commissioner of the General Land Office, March 2, 1893.

I have considered the appeal by A. H. Dellone from your decision of October 23, 1889, holding his homestead entry for cancellation, for the reason that lots 2 and 3 and the S. ½ of the NW. ¼, Sec. 25, T. 1 S., R. 10 E., Bozeman land district, Montana, covered by said entry, passed to the Northern Pacific Railroad Company, under its grant made by the act of July 2, 1864 (13 Stat., 365), and sustaining the action of the local officers in rejecting his final proof tendered upon said entry.

The land in question is a portion of the Crow Indian reservation, established by the treaty of May 7, 1868 (15 Stat., 649), released under an agreement and sale agreed to by the Indians on June 12, 1880, and accepted and ratified by the act of Congress approved April 11, 1882 (22 Stat., 42). It is within the primary limits of the grant as shown by the map of definite location filed June 27, 1881, and is also within the limits of the withdrawal upon the map of general route shown upon the map filed February 21, 1872.

The sole question presented by the appeal is, whether these lands were in a condition to pass under the grant at the date of the definite location of the road.

The 2d section of the granting act provides that:

The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the road named in this bill.

The 3d or granting section provides:

That there be, and hereby is, granted to the "Northern Pacific Railroad Company," . . . . . 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 pre-emption, 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.

The history of the occupancy of lands by the Crows and the status of the ceded portion of the reservation is clearly set forth in the decision of this Department in the case of said company against Clark (5 L. D., 138), being as follows:

By the act of June 30, 1834, all that part of the United States west of the Mississippi River, except the States of Missouri and Louisiana and the Territory of Arkansas, was declared to be the Indian country. The fee of this vast territory was in the United States, subject, however, to the full right of the various tribes of Indians to the land they occupied, until that right should be extinguished by the United States, with their consent. The territory then occupied by the Crows extended over a vast range of country, from the northern boundary of New Mexico to the Missouri River in northern Montana. It had no fixed boundaries, and was not recognized strictly as a reservation, but simply as the territory of the Crows. This was the condition of their territory when the grant to the Northern Pacific road was made; and at that time no treaty had been made with said Indians guaranteeing to them a positive reservation for their exclusive use and occupation.

In 1868, four years after the grant to this road, a treaty was entered into between the United States and the Crow tribe of Indians, by which a tract of land bounded on the east by the 107th degree of longitude, on the south by the territory of Wyoming, and north and west by the Yellowstone river, was set apart for the absolute and undisturbed use and occupation of said Indians, and by said treaty the Crows relinquished all title, claims or rights to any portion of the territory of the United States, except what was embraced within the defined limits of such reservation.

This treaty further provided that, under certain conditions therein named, individual members of said tribe may within said reservation select lands for agricultural purposes which shall be certified to them; and that, when their lands shall be surveyed, Congress shall provide for protecting the rights of such settlers in their improvements, and may fix the character of the title held by each. It was further provided that no cession by the tribe shall be understood or construed in such manner as to deprive, without his consent, any individual member of the tribe of his right to any tract of land selected by him as before provided.

By this treaty the Indian title was extinguished to all lands occupied by the Crows and claimed by them as their territory (except the reservation named); and by the

same instrument an absolute reservation of a tract of land, designated by fixed boundaries, was formally set apart for their use and occupation, and the full and free use and enjoyment of the same was guaranteed to them by the government.

When the case just referred to was before this Department it was urged by the company, 1st: that there was no formal reservation of any land for the Crows until made by the treaty of May 7, 1868 (*supra*), which was four years after the passage of the act making the grant for said company, and, 2d, that from and after the date of the agreement of June 12, 1880, the Indian title to that land was extinguished, and that from that date it became part of the public domain, subject to its grant.

After a full consideration of the matter, however, it was held that these lands were in a state of reservation at the date of the filing of the map of definite location, July 27, 1881, and did not become a part of the public domain until the passage of the act of April 11, 1882 (*supra*). As to the first claim it was held, that the lands falling within the contemplation of the 2d section of the act, requiring the extinguishment of the Indian title, referred to "such lands as were then embraced in what was generally known as the territory of the Indians, and not such parts of said territory as were embraced in defined and technical reservations. Such reservations are as free from the operation of the grant as a reservation for any other purpose."

This decision would seem to have effectually disposed of any claim that might be made under the grant to aid in the construction of the Northern Pacific Railroad, to any portion of the ceded lands of the Crow Indian reservation.

In the case of the Northern Pacific Railroad Company *v.* Miller (7 L. D., 100), it was held:

But the final and governing answer to this claim of a basis for selection for lands embraced within the Indian Reservation has been furnished by the supreme court in the case of Buttz against this company, *supra*, in which it has been explicitly adjudged that such lands passed by the grant to the company, *in fee*, subject to the Indian right of occupancy which the government will at its pleasure extinguish. The tracts listed in October, 1887, as lost to the grant because lying within the Yakima Reservation, in fact passed to the company by the grant, and afford no basis of claim to select others in lieu thereof.

The lands in the Yakima Indian Reservation were set apart and reserved by the treaty of June 9, 1855 (12 Stat., 951), and were therefore not merely "Indian country," but a "defined and technical reservation."

If the lands in said reservation passed under the grant, then it must be held that the lands in question also passed, and so with the case of numerous other reservations along the long line of the road, large portions of which have been allotted to the Indians and otherwise disposed of under the theory announced in the Clark case (*supra*).

Your decision, now before me, on appeal, is based upon the holding in the Miller case, which, if sustained, must result in overturning title heretofore given in many cases. I am of the opinion, however, that the

holding made in the Miller case, just referred to, is not warranted by the decision of the court on which it is based, and that the holding in the Clark case should be followed in the adjustment of this grant.

I might remark, in passing, that the Miller case assigned other reasons for disregarding the indemnity selection, and so much of said decision as denied the sufficiency of the basis on which the selection rested, on account of the character of such lands, might properly be regarded as *obiter dictum*.

The case might be here rested, but the importance of the question requires that I examine the decision of the court in the Buttz case (119 U. S., 55). The opening statement in the decision in that case is as follows:

> The land in controversy and other lands in Dakota, through which the Northern Pacific Railroad was to be constructed, was within what is known as Indian country.

Again, on pages 70 and 71, is found the following:

> The provisions of the 3d section, limiting the grant to lands to which the United States had then full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from pre-emption or other claims or rights, did not exclude from the grant Indian lands, not thus reserved, sold or appropriated, which were subject simply to their right of occupancy.
>
> Nearly all the lands in the Territory of Dakota, and, indeed, a large, if not the greater, portion of the lands along the entire route to Puget Sound on which the road of the company was to be constructed, was subject to this right of occupancy by the Indians. . . . . In our judgment, the claims and rights mentioned in the third section are such as are asserted to the lands by other parties than Indians having only a right of occupancy.

The land involved in the Buttz case was a portion of the country generally denominated as "Indian country," but was not included within the boundaries of any defined treaty reservation.

The decision of the court clearly recognizes the distinction between "Indian country," or the portion of the Northwest Territory over which the Indians exercised the right of chase, from those lands which were set apart by treaty stipulations and known as "Indian Reservations."

The language of the grant is specific in excepting therefrom all lands "reserved," and, in the Leavenworth, Lawrence and Galveston case (2 Otto, 737), it was held that:

> A proviso, that any and all lands heretofore reserved to the United States, for any purpose whatever, are reserved from the operation of the grant to which it is annexed, applies to lands set apart for the use of an Indian tribe under a treaty. They are reserved to the United States for that specific use; and, if so reserved at the date of the grant, are excluded from its operation. (Syllabus.)

This decision has been repeatedly quoted with approval by the court, and is in no wise affected by the decision in the Buttz case, which was limited in its operation, and referred only to the country occupied originally by the Indians, but not embraced in a treaty reservation.

In the recent case of the Northern Pacific Railroad Company *v.* Bardon (145 U. S., 585,) the provision relative to the extinguishment of

the Indian title, contained in the act making the grant for the Northern Pacific Railroad Company, was referred to as distinguishing the Buttz case from the holding in the Leavenworth case.

I do not think it was the intention of the court here to enlarge upon the holding made in the Buttz case, so as to authorize the company to take lands specially excepted from its grant by the terms of the granting section.

Until the definite location of the road, the grant did not attach to any particular tracts of land, and the United States was at liberty to reserve them in accordance with treaty stipulation.

A number of such reservations had been made long prior to the passage of the act making the grant in question. In most of these reservations, as was the case in the Crow reservation, provision was made that the individual members of the tribe might select lands within said reservation, and that when such lands shall be surveyed, Congress shall provide for protecting the rights of such settlers. This was also the case in the Yakima reservation, established in 1855.

It will be seen that, within such reservations, the Indians had more than a mere right of occupancy, as provision was made whereby they might ultimately secure the fee, and, aside from their reserved character, there was an obligation resting upon the government to protect them in their rights, which was, to say the least, as strong as the obligation upon the government to extinguish the Indian title.

I am therefore of the opinion that such lands are not within the contemplation of the grant, and your decision is accordingly reversed, and the Miller case, so far as in conflict herewith, is hereby overruled.

MINING CLAIM—LAND EXCLUDED FROM APPLICATION.

ADAMS LODE.

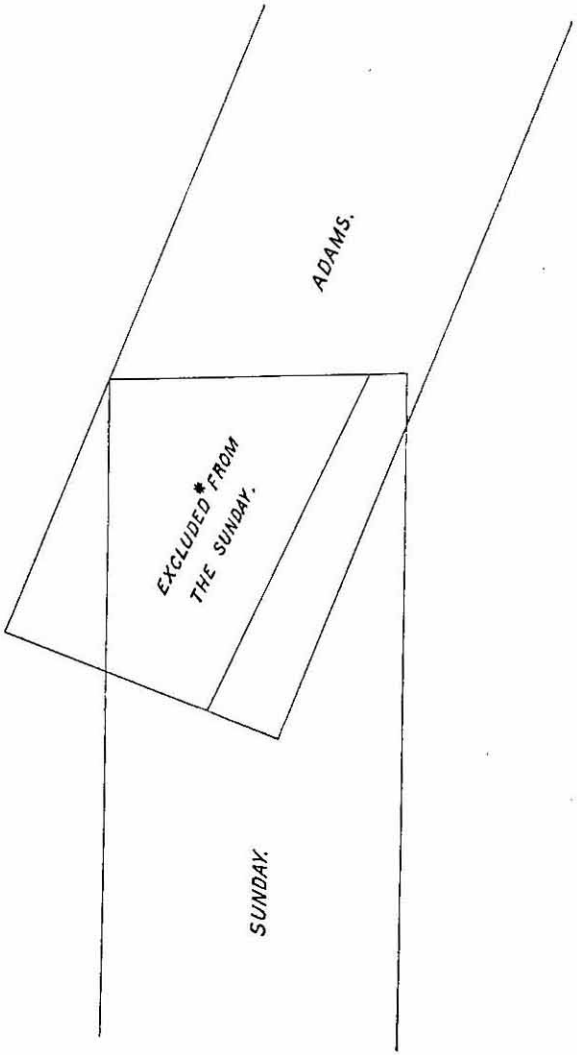
Land embraced within a mineral application and subject to appropriation thereunder, but excluded therefrom, when entry is made, is thereafter vacant public land and may be properly included within the subsequent application of another, and a discovery on such tract is sufficient to support the later claim.

Secretary Noble to the Commissioner of the General Land Office, February 21, 1893.

This record presents the appeal of George L. Adams from your decision dated February 27, 1892, in the case of mineral entry No. 431, for the Adams and three other lode claims in the Glenwood Springs, Colorado, land district.

That part of said entry known as the Adams lode claim conflicted with the ground included in the Sunday lode application, made April 19, 1888, to the extent of 1.482 acres. Entry No. 201 was made under said application for the Sunday and another lode December 26, 1888,

but the ground in conflict as aforesaid, was not included in said entry. The entry here in question was made December 28, 1891, and included the space so in conflict. This space contained the Adams discovery shaft.



You find in effect that said space was relinquished after application by the Sunday claimants, and the Adams claimants thus enabled to enter a claim that they otherwise could not have entered, and hold the entry in question for cancellation as to said conflicting space. And it further appearing that said Adams discovery is near the line of the Sunday lode, if projected, you require of the appellants satisfactory evidence showing "that a discovery of valuable mineral has been made on the remainder of the Adams lode and also a new survey of the claim."

I can not concur in this disposition of the case.

The space in conflict was, it is true, embraced in the "Sunday" application. But being excluded from the entry based upon such application it became vacant at the date, December 26, 1888, when such application matured into entry.

At the date, March 10, 1891, of the application upon which the entry here in question is based the ground involved had thus been vacant more than two years and was of course subject to entry.

If therefore the entry here in question is in other respects regular it will be allowed.

The fact that the Adams discovery lies near the line of the Sunday lode does not in itself warrant a new survey or a further discovery.

Nor does the failure by appellants, who claim the Adams lode under a location made prior to that of the Sunday, to adverse, during the period of its publication, the application for the latter lode, affect the validity of the entry in question.

Your judgment is reversed.

STATE OF CALIFORNIA *v.* NOLAN.

Motion for review of departmental decision of November 19, 1892, 15 L. D., 477, denied by Secretary Noble, March 2, 1893.

RAILROAD GRANT—ADJUSTMENT—INDEMNITY SELECTION.

DUBUQUE AND SIOUX CITY R. R. CO.

The requirement that where indemnity selections have been made without specifications of loss, that such deficiencies should be specified before further selections are allowed, may be waived on final adjustment, where the grant is largely deficient and the list submitted contains a proper designation of the loss on which it is based.

Secretary Noble to the Commissioner of the General Land Office, March 2, 1893.

I am in receipt of your letter of February 17, 1893, transmitting for my approval clear list No. 49, embracing 195.81 acres, within the fifteen miles indemnity limits of the grant made by the act of May 15, 1856, to aid in the construction of a railroad from the city of Dubuque to a point on the Missouri river near Sioux City, and with a branch to the mouth of the Tete de Morts.

The beneficiary under the grant appertaining to the portion of the road east of range 36 west is the Dubuque and Sioux City Railroad Company, on account of which the lands submitted are listed.

In making selection of these lands in 1878, the company assigned a basis therefor, which is shown in the list, but you report that the company has not specified a loss for the lands certified prior to the estab-

lishment of the rule by this Department requiring that the losses should be designated as a basis for indemnity selections.

The adjustment of this grant, submitted by your letter of September 23, 1889, shows the grant to be deficient about seventy thousand acres (see Vol. 12 L. D., page 347).

Attached to the list is a letter from William Ragan, agent for said company, in which he states that with the certification of these lands "I am willing to declare the grant satisfied, and make no further demands under the grant."

Under the circular of August 4, 1885 (4 L. D., 90), it is required that, where indemnity selections have heretofore been made without specifications of losses, the company should designate the deficiency for which such indemnity is to be applied, before further selections are allowed.

In view of the fact that an adjustment of this grant has been submitted, showing the same to be many thousand acres deficient, and that with the approval of the lands now submitted, the grant is practically adjusted, and as this list is in proper form, and contains a designation of losses for the tract selected, I deem it unnecessary to insist that the company shall make designation for the lands heretofore approved, and the requirement in this instance is waived.

There has been no showing as to the non-mineral character of this land, but, as it is in a strictly agricultural State, I have approved the list, which is herewith returned, with the understanding that no further claim is to be made on account of this grant.

HAGEN *v.* SEVERNS ET AL.

Motion for review of departmental decision of November 18, 1892, 15 L. D., 451, denied by Secretary Noble, March 2, 1893.

RAILROAD GRANT—FORFEITURE ACT—SALE.

GULF AND SHIP ISLAND RAILROAD.

The measure of a grant in its adjustment under the forfeiture act of September 29, 1890, is the granted land that lies opposite to, and coterminous with, the completed portion of the road.

The right to sell lands on account of preliminary work, and for constructed road, provided for in section 4, of this grant, is limited to the number of acres contained in the designated section within the twenty miles specified therein.

In determining whether a mortgage operates as a sale of the land, and so prevents forfeiture, the status of the mortgagee must be settled under the law of the State. In the State of Mississippi the holder of a mortgage, that has not been foreclosed, takes only a chattel interest, and, consequently such transaction does not constitute a sale of the land, nor place it beyond the power of Congress to declare a forfeiture thereof.

The right of the company to select indemnity recognized and provided for in section 7, of the forfeiture act, is restricted to the even numbered sections in the indemnity limits opposite to, and coterminous with, the portion of its road constructed and in operation at the date the act of forfeiture took effect.

Secretary Noble to the Commissioner of the General Land Office, March 3, 1893.

I have examined your report of February 11, 1892, in the matter of the adjustment of the grant claimed by the Gulf and Ship Island Railroad Company, and have also considered the objections of said company to conclusions reached by you.

You hold that the grant is one of "place", and therefore that the amount of land the company is entitled to is the number of acres found in the even-numbered sections within the granted limits co-terminous with constructed road being 70,395.86 acres, and that indemnity must be taken in the indemnity limits co-terminous with constructed road. It is claimed on behalf of the company that it is entitled to one hundred and twenty sections of land which were authorized to be sold prior to construction, and to one hundred and twenty sections authorized to be sold on the completion of twenty miles of its road, and that it is entitled to select its indemnity lands from both the even and odd sections in the indemnity limits, and the odd sections in the granted limits.

The grant involved is that of August 11, 1856 (11 Stat., 30), granting to the State of Mississippi to aid in the construction of certain railroads, "every alternate section of land designated by even numbers; for six sections in width on each side of each of said roads", with the right to take indemnity from the lands of the United States nearest to the tiers of sections above specified in alternate sections or parts of sections within fifteen miles from the line of road, the lands granted to be disposed of only as the work progressed and to be subject to the disposal of the legislature of the State for the purpose specified, and for no other. Section four of said act reads as follows:

And be it further enacted, That the lands hereby granted to the said State shall be disposed of by said State only in the manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any continuous twenty miles of either of said roads is completed, then another like quantity of land hereby granted, not exceeding one hundred and twenty sections for such road may be sold; and so on from time to time, until said roads are completed; and if said roads are not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the United States.

The State, it seems, accepted the grant by act of February 2, 1857 and by act of December 3, 1858, conferred upon the Gulf and Ship Island Railroad Company that part of the grant pertaining to the line, from Brandon to the Gulf of Mexico. A map of definite location of the road in question was filed and accepted on December 3, 1860. Although the withdrawal, which was made August 9, 1856, prior to the

approval of the granting act, was never formally revoked until 1887, and then only as to the indemnity limits, no attention was paid to it, and the lands were disposed of without regard to said order. In 1884, however, after the Gulf and Ship Island Company had made a relinquishment in favor of all parties who had been allowed to enter lands within the limits of its grant your office suspended from entry and settlement the vacant lands in the even-numbered sections within fifteen miles of the road as located. It seems that no work was done upon said road other than establishing the line of definite location until after the year 1882. In that year a charter was given the Gulf and Ship Island Railroad Company. In the brief filed, the company formed under the charter of 1882 is referred to as the "re-organized company," but no further statement of the relationship of the two companies, the one incorporated under the act of November 18, 1857, and the other under that of February 23, 1862, is made therein. In a memorial filed in the case, on behalf of this company, and the mortgagee, it is said that the first company having failed "to do anything beyond filing the map of definite location, the Legislature in 1882, re-chartered it, and subrogated the newly organized company to all the rights and privileges heretofore granted to the Gulf and Ship Island Railroad." An examination of the legislative act of 1882, and amendments thereto of March 1, 13 and 15, 1884, shows that in the first act there was nothing to indicate an intention to provide for a re-organization, or a re-chartering of the old company, and nothing to connect the company therein provided for, with the former, and that there was no mention in that act of the land granted to the State by the act of Congress of 1856; but in the act of March 13, 1884, is found the following provision:

> That the said Gulf and Ship Island Railroad Company are hereby subrogated to all the rights and privileges heretofore granted by the State of Mississippi to the Gulf and Ship Island Railroad Company, and shall have the right to use and enjoy such field notes, maps and surveys as have been heretofore made in the interest of said road, as were authorized and granted by the State under the acts approved March 2, 1854 and December 3, 1858.

It is upon this provision of the law that the present applicant must base its claim to be the beneficiary of said grant, rather than upon the theory of a re-organization or re-chartering of the old corporation. The act of 1882, conferred upon the board of directors of said company power to borrow money and to "pledge or mortgage all, any or every part of the property of any kind belonging to said company" to secure the payment thereof.

Under date of January 1, 1887, said company executed two mortgages in favor of the Manhattan Trust Company, one being declared a first lien upon the line of said company and all its property, excepting land then owned, or to be acquired from the State of Mississippi, or under the act of Congress of 1856, to secure the payment of bonds to be issued as the road should be constructed, to the amount of not ex-

ceeding $12,000 per mile, and the other being declared a second lien on the property described in the first mortgage, and a first lien upon all lands then owned, or that might afterwards be acquired from the State of Mississippi, not necessary to the operation of the road, and all lands to which said company was then, or might become entitled to obtain under said act of Congress approved August 11, 1856, or any other act of Congress, and the acts of the legislature of Mississippi relating thereto, to secure the payment of bonds to be issued at the rate of $8,000 per mile of completed road. It is provided in this latter mortgage that all the proceeds of the lands therein described shall be devoted to the formation of a sinking fund for the taking up of the bonds secured thereby. That instrument contains the following provisions in regard to the sale of the lands:

> It is understood and agreed that the company (Railroad) may from time to time sell and dispose of such lands, or any part thereof, in such lots and parcels, and for such prices, whether for cash or otherwise, and on such terms as it may deem proper, accounting to the trustee, and paying over to, and depositing with them, all moneys and securities received on account of such sales, after deducting therefrom the cost of making the same, and any expenses as above provided then unpaid, for which the said lands are justly liable, and that the trustee shall join the company in the execution and delivery of the proper deed or deeds from time to time to the purchaser or purchasers of the land so sold, upon payment over to them of the purchase money or securities so to be received therefor in compliance with the terms of sale.

It is further provided that the mortgagor company shall retain full possession and control of the mortgaged property, but that if default be made in the payment of any bond or the interest thereof, for a period of ninety days, the whole indebtedness shall become immediately due and payable, and the trustee shall, upon the request in writing of the holders of a majority of the outstanding bonds take possession of said property. These constitute the provisions of said mortgages, which it seems necessary to notice particularly, and to bear in mind in the consideration of the questions now presented. It should be stated in this connection that it is alleged that prior to the passage of the forfeiture act, the full complement of bonds for twenty miles of completed road were executed and issued, and are now outstanding.

It seems that prior to the date of the forfeiture, a section of twenty miles of road had been built and that no more was built during the year allowed by that act for the completion of the road to Hattiesburg. It is stated by counsel that in September, 1887, the company filed a list of selections for one hundred and twenty sections of land in aid of preliminary work, and that in July, 1890, the governor of the State caused to be filed lists of selections for two hundred and forty sections of land, being one hundred and twenty sections for completed road lying along that portion of the road then built, and one hundred and twenty sections for preliminary work lying north of constructed road, but within a section of twenty consecutive miles.

The foregoing sets forth the important facts in the history of this grant,

and presents its status at the date of the act of forfeiture of September 29, 1890 (26 Stat., 496). The first section of that act provides as follows:

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State, or to any corporation to aid in the construction of a railroad opposite to, and co-terminous 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: Provided that this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted.

Section seven of said act refers specifically to the grant now under consideration, and reads as follows:

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

As to the holding that this is a grant in place rather than one of quantity you were right. The company claims that it is entitled to one hundred and twenty full sections for constructed road without regard to the number of acres found in the designated sections opposite that section of its line, and to one hundred and twenty full sections for preliminary work without regard to the number of acres contained in the designated sections in the continuous length of twenty miles chosen for their section, but this claim cannot be allowed. The provision of the granting act is "that a quantity of land not exceeding one hundred and twenty sections . . . . and included within a continuous length of twenty miles . . . . may be sold." This so clearly limits the quantity of land to be sold to the number of acres contained in the designated sections within the length of twenty miles, that there is no room for argument. It is true, the supreme court in the case of Railroad Land Company *v.* Courtright (21 Wall., 310), say this act

authorized a sale of one hundred and twenty sections in advance of construction, but in that same decision state expressly that there was one restriction or limitation, that is, that said sections should be included within a continuous length of twenty miles. This restriction must be kept in mind in our consideration of the question as to the amount of land the company was authorized to sell, and a like limitation applies when we come to determine the quantity of land due the company on the adjustment of its grant under the forfeiture act.

That this granting act authorized the sale of the designated sections in this case the even-numbered, found in any section of twenty miles along the line of its road as definitely fixed prior to actual construction of its track, and upon the completion of twenty miles of road, the sale of those sections in another continuous length of twenty miles is too well settled to need more than a statement of the fact at this time. Railroad Land Company *v.* Courtright (*supra.*)

If there was no sale of land prior to the act declaring the grant forfeited, then the constructed road would, under the general rule, furnish the basis for determining the amount of land to which the company is entitled. In the adjustment of a grant where the road has been completed, the quantity of land earned thereunder is to be measured by the length of road actually constructed. Railroad Company *v.* Herring (110 U.S., 27). This same rule has been applied in several instances in the adjustment of grants under forfeiture acts where only a portion of the road provided for in the granting act had been actually constructed. Michigan Land and Iron Co. (12 L. D., 214), Ontonagon and Brule River R. R. Co. (13 L. D., 463). There seems to be no good reason for applying a different rule in this case. The provisions of this forfeiting act are the same in effect as those of the acts under consideration in those cases. All land is forfeited which lies opposite to, and coterminous with, the portion of the road not completed. The corrollary of this proposition is that the grantee is entitled to all the lands granted by said act which lie opposite to, and coterminous with, the completed portion of the road. This is the theory upon which you reached your conclusion as to the quantity of land to which the company is entitled for constructed road, and to that extent your action is affirmed.

It remains to be determined whether the even-numbered sections of land lying adjacent to the line of said road, and within a continuous length of twenty miles, were so disposed of prior to the forfeiting act, as to be taken out of the operation of that act. Selection has been made of such sections in the length of twenty miles next to the completed portion of the road. If they had been actually sold, and disposed of in accordance with the authority of the fourth section of the granting act, which is quoted hereinbefore, then they must, in my opinion, be held beyond the reach of the grantor to declare a forfeiture thereof, and consequently, are not affected by the act of September 29, 1890, *supra.* The lands which were to revert to the United States were those re-

maining unsold upon the failure of the grantee to comply with the conditions of the grant, or rather those remaining in that condition at the date of the forfeiture act.

It is strenuously insisted that the mortgage given by this company, operated as a conveyance of the title to the lands to the trustee, and the transaction constituted in law a sale of said lands, that is, of all lands which the company had a right to sell, and in support of this is cited the case of Tucker *v.* Ferguson (22 Wall., 527). In that case the mortgage and trust deed contained a power of sale in the trustees, and terms and conditions for the management of the estate, while in the the case now under consideration, the power of sale was retained by mortgagor. The trustee here had no control over these lands for the purpose of sale or otherwise, and could acquire none, except upon default on the part of the mortgagor, when he might take possession of the property, institute and maintain foreclosure proceedings, and cause the property to be sold and conveyed under the directions of the court. This is not a mortgage with a power of sale in the mortgagee; but as if to make it positive and certain that it was not intended to give the trustee in this mortgage any control over the land, it is provided, that upon payment of said bonds in full, "the estate and title hereby conveyed shall revert and vest in the said company, its successors and assigns, without further conveyance, and without entry or other act therefor."

The question here presented, is as to whether the execution of an ordinary mortgage constitutes a sale of the lands covered thereby, within the meaning of the granting act in question. Some general propositions may be noticed as proper to be borne in mind in considering this case.

This mortgage has words of general description, and therefore conveyed lands held by a full equitable title, as well as those held by a legal title. Thompson *v.* Valley R. R. Co. (132 U. S., 68), Toledo R. R. Co. *v.* Hamilton (134 U. S., 296), Central Trust Co. *v.* Kneeland (138 U. S., 414).

This mortgage included not only the land then owned, but also all land to be thereafter acquired, that is, it contains the "after-acquired property" clause, and therefore covered not only the land then owned, but became a lien upon all subsequently acquired, which fell within the descriptive terms of the instrument. (See authorities above cited.)

In taking up the question as to the effect of a mortgage upon the title of the land encumbered, we are met at outset by the fact that formerly a theory obtained in courts of equity differing very materially from that controlling in the courts of law, and that in some of the States one rule has been adopted, and in some the other. Chancellor Kent in speaking of the rights of a mortgagor in law says: "Upon the execution of a mortgage, the legal estate vests in the mortgagor, subject to be defeated upon performance of the condition", (4 Kent's Com.,

154) while when he comes to speak of his standing equity uses the following language: "The equity doctrine is, that the the mortgage is a mere security for the debt, and only a chattel interest, and that until a decree of fore-closure, the mortgagor continues the real owner of the fee." (Ibid, 159). In Perry on Trusts (Sect. 602 j), we find the following statement as to the effect of a mortgage.

In law, a mortgage is considered, as between the mortgagor and mortgagee, and so far as it is necessary to give full effect to the mortgage as a security for the performance of the condition, as a conveyance in fee. But for all other purposes it is considered, especially until entry for condition broken, as a mere charge or incumbrance, which does not divest the estate of the mortgagor.

In Washburne on Real Property, (Chap. 16, Sect. 1) mortgages are defined as "one form of lien upon real estate to secure the performance of some obligation", and it is further said that, "as ordinarily understood, a lien upon land does not imply an *estate* in it, but a mere right to have it in some form, applied towards satisfying a claim upon it." Farther on in the same chapter, (Sect. 4) the interest of the mortgagee in law is stated as follows:

By the common law, a mortgagee in fee of land is considered as absolutely entitled to the estate, which he may devise or transmit by descent to his heirs, and in equity as follows:

As a general proposition, equity regards a mortgage, especially before the condition is broken, as creating an interest in the mortgaged premises of a personal nature, like that which the mortgagee has in the debt itself. It treats the debt as the principal thing, and the land as a mere incident to it. Whatever it does with the land is an auxiliary to enforcing payment of the debt.

These quotations from standard authorities present the general phase of the question very clearly, and while in the different States the somewhat different theories have been adopted, yet it is, I think, quite safe to say the tendency has been away from the common-law doctrine, and towards that of the courts of equity.

The statute of Mississippi provides as follows (Code 1880, Sect. 1204);

Before a sale under a mortgage, or deed of trust, the mortgagor or grantor shall be deemed the owner of the legal title of the property conveyed in such mortgage or deed of trust, except as against the mortgagee and his assigns, or the trustee after breach of the condition of such mortgage or deed of trust.

The question as to the interest taken or held by a mortgagee has engaged the attention of the supreme court of Mississippi in several cases, and in the decision in Carpenter *v.* Bowen (42 Miss., 28), the court, after stating the doctrine of the equity courts, makes use of the following language:

This equitable doctrine, concerning the rights of mortgagor and mortgagee, has gradually been naturalized in the common law code, and, by the adoption of principles long established in chancery, it has become well settled, in courts of common law, that the mortgagee, *until fore-closure*, has only a chattel interest; that a mortgage is but a *charge* upon the land, and that whatever would give the money, will carry the estate in the land along with it, to every purpose. The estate in the land is the same thing as the money due upon it. It will be liable to debts; it will go to executors; the assignment of the debt will draw the land after it. From these

properties of the mortgagee's estate, it appears in the strongest manner, that it is not *in the land*, but in the security only. The debt is considered as the principal, and the mortgage as an incident only.

If, as here so positively stated, the mortgagee takes no estate in the land, then surely the giving of a mortgage does not constitute a sale under the terms of the granting act now under consideration. In the same decision may also be found the following language:

Until fore-closure, whether the mortgagee has possession or not, the estate mortgaged is a pledge only; the relation of debtor and creditor exists, and the equity of redemption is unimpaired. Although the mortgagee has a chattel interest only, yet in order to render his pledge available, and give him the intended benefit of his security, it is considered as real property, to enable him to maintain ejectment for the recovery of the possession of the land mortgaged. It is only considered as real estate for the purpose of enabling the mortgagee to get it into possession. When contemplated in every other point of view, it is personal property.

A similar ruling is made also in the case of Buckley *v.* Daley (45 Miss. 338).

It seems further from these cases that it is the *fore-closure*, rather than the breach of condition that operates to vest in the mortgagee a title to the land, that is, that changes what was before a chattel interest into an estate in the land. The status of the mortgagee in this case must be determined under the law of the State of Mississippi, where the land in question is situated, and where the instrument was executed; and under that law, as above quoted, and the construction given it by the supreme court of the State, it must be held that since there was no fore-closure prior to the forfeiting act, the mortgagee had only a chattel interest under his mortgage, and the transaction did not constitute a sale of the land, or operate to place it beyond the power of Congress to declare a forfeiture thereof. The cases cited by counsel for the company go upon the theory that the mortgage vested in the mortgagee the legal title to the land; but as we have seen, that theory can not properly be applied in this case. I do not find that this question has been directly before this Department in exactly the same connection in which it is presented in this case. The effect of a mortgage as a conveyance of an estate in the land, has, however, come up under various laws, and the conclusion has been that it did not constitute a sale, conveyance or alienation. Thus it has been held that the giving of a mortgage was not such a transaction as would prevent a preemptor from making oath as required in section 2262, Revised Statutes, that he had not made any agreement or contract by which the title he might acquire from the government, should inure in whole or in part to the benefit of any person but himself.

Larson *v.* Weisbecker (1 L. D., 409).

Young *v.* Arnold (5 L. D., 701).

William H. Ray, (6 L. D., 340).

Murdock *v.* Ferguson (13 L. D., 198).

It has been held, too, that the giving of a mortgage is not a sale or

alienation within the purview of section 2291, Revised Statutes, which requires a homestead claimant, at the date of making final proof, to make affidavit that no part of the land has been alienated. Mudgett *v.* Dubuque, and Sioux City R. R. Co. (8 L. D., 243). It has also been held that a mortgagee is not an assignee with in the meaning of section 2362, Revised Statutes, which provides for the repayment in certain cases, "to the purchaser or his legal representatives or assigns" of purchase money. Alonzo W. Graves (11 L. D., 283) Emma J. Campbell *v.* decided October 20, 1892, (15 L. D. 391).

While these cases do not perhaps control in the one now under consideration, they may properly be considered as involving principles similar, and indeed quite closely related to the one involved here. Said cases show that the tendency in this Department, as in the courts, has been to consider the interest of the mortgagee as a chattel interest only, rather than as an estate in the land itself. If this be the proper rule to apply in this case, and of that I think there can be no doubt, in view of the provisions of the State law, and the authorities hereinbefore cited, then it must be held that the giving of this mortgage was not a sale within the terms of the granting act. After a careful consideration of this matter, I am of the opinion that there was no sale of these lands within the meaning of the statute, and therefore concur in your conclusion that this company is entitled to so much land only as is to be found in the designated sections opposite to, and coterminous with that portion of its road completed, and in operation at the date of the act of forfeiture.

It is further contended that when the State conveyed these lands to the company, authorizing them to be pledged to secure bonds, and that was done, she had sold them as contemplated by the statute, the case of Tucker *v.* Ferguson *supra*, being cited in support of that proposition. The two cases are not, however, quite parallel. In the case before the supreme court there was no question of forfeiture involved. It went upon the theory that it had not been shown that there had been any default, and that even if there had been, the United States could alone take advantage of the breach of condition to declare a forfeiture.

The fact is, however, as shown in the statement of the case, that the road had, at the time the case was before the supreme court, been completed, the lands thereby earned, and that the United States had never attempted to assert any right of forfeiture. While these facts are not emphasized in the decision of that case, it seems proper to note them here in making a comparison of the two cases, and to show that the decision there does not necessarily control here. What was said by the court in that case must be taken as said in the light of the facts existing there. It is true that the lands involved there had passed out of the class included in the reverter, that class being, as stated by

the court, those "to which the right to sell had not attached." In this case the reverter included all lands not sold, and it is urged that the court laid no stress upon the different character of lands subject to reversion under the respective grants, citing in support of this contention the case of West Wisconsin Ry. Co. *v.* Supervisors (93 U. S., 595), which the court stated to be in all respects similar to Tucker *v.* Ferguson, whereas it appears that the reverter in that case included the same class of lands as those in the grant now under consideration, that is, lands not sold. In said case of West Wisconsin Ry. Co. *v.* Supervisors, the facts are not fully stated in the report, but it appears incidentally that the road had been completed, and that no question of the right of forfeiture arose. This being the case, there was no occasion for distinguishing between the two grants, and for the purposes of that case they were properly held to be virtually the same. The contention of the company can not be sustained; but on the contrary, I must hold that the cases cited do not necessarily controvert the conclusion that until these lands had passed out of the class included in the reverter, by being earned by the building of the road, or by actual sale, they were subject to forfeiture. That the transaction here did not constitute a sale, we have already determined.

There remains yet to be considered the company's claim as to indemnity selections. It is admitted that for lands lost prior to definite location indemnity selections must be made as provided in the granting act, from alternate selections; but it is contended that under the last clause of section 7 of the act of September 29, 1890, *supra*, selections of lieu lands for those lost after the definite location may be made from both even and odd sections, and that this privilege was given as a consideration for the company's relinquishment. This question as to the effect of section 7 of the forfeiting act has heretofore been considered by this Department, and the conclusion then reached is expressed in the following language (12 L. D., 269):

> I concur in your view that there is nothing in the said seventh section of the forfeiture act which will justify the implication that Congress intended to enlarge the indemnity privilege by authorizing lieu lands to be selected from both the odd and even sections along the line of constructed road. This last act, so far as it relates to this company, may be construed *in pari materia* with the original granting act of 1856, which restricted the indemnity selections to alternate sections, and the fact that the forfeiture act does not repeat the language of the former act, but says there may be certified to the company "lands in lieu" of those lost, means that such lands are to be selected in accordance with the provisions of the original grant, the forfeiture of which the seventh section only suspended without enlarging in any way.

A reading of the seventh section of the forfeiting act will show that the consideration for the relinquishment mentioned therein, was the postponement of the declaration of forfeiture as to this grant for a period of one year from that date. If no provision as to indemnity had been added, the company could not have claimed land in lieu of that

thus surrendered. The forfeiting act in section six contains the following provisions:

> That no lands declared forfeited to the United States by this act shall, by reason of such forfeiture, inure to the benefit of any State or corporation to which the lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant.

To allow the claim of the company would both enlarge the area of land covered by said grant, and confer a right upon the company to lands not included in the granting act, thus conflicting with both the letter and the spirit of the law. It was not the intention of this act of forfeiture to in any way enlarge the grant to said company, or to confer upon it rights not found in the granting act. This claim of the company, that under the provisions of section seven of the forfeiting act it may select as indemnity for lands relinquished under said section, both even and odd sections, cannot be allowed, and it will be restricted in such selections to the class of lands designated in the granting act as subject to indemnity selection.

It is further claimed that the relinquishment made in 1884, expressly reserved the right of selecting lands under the act of June 22, 1874 (18 Stat., 194), and that under said act selections may be made of both even and odd sections in both granted and indemnity limits. The facts as to this relinquishment are not fully set forth, nor have I any means of determining from the record now before me, whether it was understood, accepted and treated as being made under said act. This does not, however, seem material. Congress, by the seventh section of the act of forfeiture, made a general provision covering all lands, without exception, which had before that time been sold or entered under the pre-emption or homestead laws, or upon which there were bona fide pre-emption or homestead claims on January 1, 1890, and the company accepted that provision. Under that agreement must the indemnity claim of the company be determined, and as we have before concluded, it is restricted to even sections in the indemnity limits opposite to, and coterminous with, the portion of its road constructed and in operation at the date the act of forfeiture took effect.

This disposes of all objections to your report adversely to the company, and the lists submitted with such report have been approved, and together with the other papers in the case are herewith returned.

ATWATER ET AL. *v.* GAGE.

Motion for review of departmental decision of August 1, 1892, 15 L. D., 130, denied by Secretary Noble, March 3, 1893.

HOMESTEAD—SETTLEMENT—RESIDENCE.

STAPLES *v.* RICHARDSON.

(On Review.)

The notice given by settlement and improvement extends only to the technical quarter section upon which they are situated.

A settler who by mistake erects his house outside the boundaries of his claim, but on discovery of such mistake removes to, and lives on his claim, is constructively a resident thereon from the first.

Secretary Noble to the Commissioner of the General Land Office, March 3, 1893.

On the 7th of December, 1892, you transmitted, on the part of Hollan Richardson, a motion for review and reversal of the decision rendered by the Department on the 12th of November, 1892, in the case of Edward Staples against said Richardson (15 L. D., 410).

The land involved in the controversy is the N. ½ of the NW. ¼, the SE. ¼ of the NW. ¼, and the NE. ¼ of the SW. ¼ of Sec. 23, T. 47 N., R. 9 W., Ashland district, Wisconsin, which was a portion of the Wisconsin Central grant forfeited by the act of September 29, 1890, (26 Stat., 496), and was opened to entry, after due notice of publication, on the 23d of February, 1891.

On the 23d of February, 1891, Richardson filed soldier's declaratory statement for said land, and on the same day Staples presented his homestead application, claiming a right to make entry for the tract, under the provisions of the second section of the act above mentioned, which provides:

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

The application of Staples was rejected, on account of the filing of Richardson at an earlier hour, and a hearing was ordered to determine the rights of the parties. At such hearing it was shown that in April, 1888, Staples made settlement upon the SW. ¼ of the NW. ¼ of said section 23, where he built a house, and cleared and cultivated a garden, and continued to reside until January, 1891. All this time he says he believed that his residence and improvements were upon the NW. ¼ of the NW. ¼ of said section. Upon discovering his mistake, he built a new house further north, but by a survey, made after Richardson's filing, it was found that this second house was also a few feet over the line, and upon the south-west, instead of the north-west quarter of said quarter section. In the following April he made a third attempt, and

succeeded in locating his house upon one of the forty-acre tracts which he had applied to enter.

The motion for review is based upon the fact, that upon this showing, the Department held that Staples' claim was protected by section 2, of the forfeiture act of September 29, 1890.

At the date of the passage of that act, Staples was an actual settler upon a portion of the lands thereby forfeited, which gave him a preference right to enter the same. It is insisted by the council for Richardson, that under the decision of the Department, in the case of Pooler *v.* Johnson (13 L. D., 134), this right on the part of Staples should be limited to the technical quarter section upon which he was an actual settler. It is also urged, that inasmuch as in his application to enter, he did not include the forty-acre subdivision upon which he was an actual settler, he has no preference right to make entry for the land selected by him.

At the time Richardson filed his soldier's declaratory statement, the land described therein was all subject to entry or filing, according to the records in the land office. No part thereof had been filed for or entered, and no actual settlement or improvements had been made upon either of the forty-acre subdivisions embraced in his statement. Any person subsequently claiming all, or any portion of said land, must therefore establish a prior right thereto, by showing a settlement thereon, of which Richardson must have had actual, or constructive notice. It is not pretended that he had actual notice of any such claim, but it is urged that the settlement and improvements of Staples upon the SW. ¼ of the NW. ¼ of section 23, was constructive notice to Richardson that Staples claimed four other and different forty-acre subdivisions, but made no claim to the forty acres upon which he was an actual settler, and whereon he had made his improvements.

I know of no case, reported or unreported, in which the Department has ever allowed any such doctrine to prevail. No doctrine is better settled than that the notice given by settlement and improvement extends only to the technical quarter section upon which they are located. This was distinctly held in the Pooler *v.* Johnson case, already cited. That case was cited with approval in the decision of which a review is asked, although its doctrine was disregarded in the concluding paragraph thereof. It is clear, therefore, that the decision complained of should at least be so modified as to exclude from the application of Staples all land not embraced in the quarter of the section containing his improvements.

This leaves for consideration the question as to whether the settlement and improvements of Staples upon the SW. ¼ of the NW. ¼ of section 23,—he being under the impression that they were upon the NW. ¼ of said quarter section,—were sufficient to constitute him an actual settler upon the said northwest quarter of said quarter section,

and give him a preference right to enter the same, under the act of September 29, 1890.

As already seen, that act awarded such preference right only to actual settlers upon the land claimed by them. The settlement laws require actual residence by pre-emptors and homesteaders, upon the land sought to be acquired by them, but the Department has repeatedly held that a homesteader, who by mistake erects his house outside the boundaries of his claim, but on the discovery of his mistake removes to his claim, and establishes his residence thereon, has resided there constructively from the first. This was held in Noe *v.* Tipton (14 L. D., 447), and is in accordance with a long line of decisions.

In the case at bar, I think it must be held that when Staples established his residence in the north-west quarter of section twenty-three, he intended to locate his house upon the north-west quarter thereof, and thought he was doing so. When he discovered his mistake, he attempted to remedy it, by building another house further north. When it was found that this second house was not upon the land which he desired, he made a third effort, and succeeded in locating upon the NW. ¼ of the NW. ¼ of the section. These repeated efforts, I think should be accredited to him as "good faith", and applying to his case the rule followed in the cases cited, it should be held that he had constructively resided upon said land from the first.

This would give him a preference right to enter "the same", but the doctrine of the Pooler *v.* Johnson case would limit his entry to the technical quarter section upon which his settlement and improvements were located.

It follows, therefore, that the decision of the Department, of which a review and reversal is asked, should be modified so as to allow the application of Staples so far as it relates to the N. ½ and the SE. ¼ of the NW. ¼ of Sec. 23, and deny the same so far as it relates to the NE. ¼ of the SW. ¼ of said section, for which the filing of Richardson should be allowed to remain intact. It is so ordered.

PAULSON *v.* OWEN.

Motion for review of departmental decision of July 29, 1892, 15 L. D., 114, denied by Secretary Noble, March 3, 1893.

RAILROAD GRANT—PRE-EMPTION FILING.

HOLM *v.* ST. PAUL M. AND M. RY. CO.

(On Review).

The submission of final proof and payment for a portion of the land included within a pre-emption filing is an abandonment of the remainder of the claim, and relieves such tract from the operation of the filing.

Secretary Noble to the Commissioner of the General Land Office, March 3, 1893.

I have considered the motion filed by the St. Paul, Minneapolis and Manitoba Railway Company for the review of departmental decision of September 3, 1892 (unreported), rejecting its claim to lot No. 5, Sec. 9, T. 127 N., R. 39 E., St. Cloud land district, Minnesota, and directing the allowance of Peter J. Holm's application, presented therefor on February 27, 1886.

This tract is within the primary limits of the grant for said company, the right of which attached upon the acceptance of its map of definite location December 19, 1871.

Holm's application was rejected by the local officers for conflict with the grant for said company, and such action was sustained by your office on appeal. Holm further prosecuted his claim to this Department, resulting in departmental decision of June 17, 1892 (14 L. D., 656), adverse to the company.

The ground of the adverse judgment was that the records of your office show that one Per O. Krom, on July 29, 1867, filed an unoffered pre-emption declaratory statement, No. 3035, for this land, which had not expired by limitation at the date of the definite location of the road, and therefore served to defeat the grant.

In said decision it was stated:

Upon investigation it is found that this tract was patented to the railroad company in February 1889. . . . .

The issuance of the patent terminated the jurisdiction of the Department over the land, but since said patent was wrongfully and erroneously issued, you will serve notice upon the St. Paul, Minneapolis and Manitoba Railway Company to show cause within thirty days from notice why proceedings should not be instituted under the provisions of the act of March 3, 1887 (24 Stat., 556), to vacate the outstanding patent.

In its answer to the rule served as directed, the company set up (1) that the lot in question had not been patented to the company or for its benefit, (2) that the pre-emption claim of Per O. Krom had no legal existence at the date of the definite location of the road.

This answer was considered in departmental decision of September 3, 1892, wherein it was held:

Upon further investigation it is found that your office was in error in reporting that said tract had been patented; it follows that proceedings looking to the vaca-

tion of the said alleged patent must be dropped, for no patent or certificate having been issued, the Department has authority to determine the rights of all parties.

Your judgment of May 24, 1889, rejecting Holm's application to enter the land in question is therefore relieved from suspension, and for the reasons given in departmental decision of June 17, 1892 (14 L. D., 656), your judgment of May 24, 1889, is hereby reversed. You will allow the application of Holm.

The motion now under consideration alleges the following grounds of error:

1. In not considering and passing upon that part of its answer of the 12th of August, 1892, to the rule to show cause why judicial proceedings should not be instituted to vacate its alleged patent for the lot in question, as relates to the pre-emption claim and filing of one Per O. Krom, and

2. In not holding that the said pre-emption claim and filing had no legal existence at the date of the definite location of the company's road.

In support of the second proposition the company alleges, and therein it is sustained by your records, that Per O. Krom filed declaratory statement No. 3035, July 29, 1869, alleging settlement same day, for lots 1, 2, 3, 5, and 6, of the section in question; that on October 13, 1869, more than two years prior to the attachment of rights under the grant, he made proof and payment upon said filing only as to lots 1, 2, and 3, upon which Alexandria cash entry No. 269 issued, and by this act it is urged he abandoned all claim under his filing to the other tracts covered thereby, and in support thereof refer to the case of Nix *v.* Allen, 112 U. S., 129.

The portion of the answer filed to the rule before referred to, urging the abandonment of the filing by Krom as to the lot in question prior to the definite location of the road, was not considered in departmental decision of September 3, 1892, and from a re-examination of the case, in the light of the showing now made, I am of the opinion that the motion is well taken, and that the lot in question was free from adverse claim, so far as the record shows, at the date of the definite location of the road.

Under the authority of the case referred to, it must be held that, with the offer of proof and payment upon a portion of his pre-emption claim, Krom abandoned the remainder of the tract, and, in the absence of proof of other claim thereto at the date of the definite location of the road, the previous decisions of this Department in the matter must be, and accordingly are hereby recalled and vacated, and your decision sustaining the action of the local officers, in rejecting Holm's application for conflict with the grant, is hereby sustained.

LEVESQUE *v.* ARMSTRONG.

Motion for review of departmental decision of November 19, 1892, 15 L. D., 445, denied by Secretary Noble, March 3, 1893.

OKLAHOMA LAND—SETTLEMENT RIGHT.

STANDLEY *v.* JONES.

One who is lawfully within the territory of Oklahoma prior to the opening thereof, and afterwards goes outside of its boundaries in order to place himself on an equality with others, and takes no advantage of his former presence in said territory is not disqualified as a settler therein.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 3, 1893.

I have considered the case of Moses M. Standley *v.* George W. Jones, on appeal by the latter from your decision of March 11, 1892, holding for cancellation his homestead entry for the SW. ¼ of Sec. 17, T. 15 N., R. 3 W., Guthrie, Oklahoma, land district.

Jones made homestead entry for this land on April 30, 1889, and, on May 7th following, Standley filed affidavit alleging that Jones entered upon and occupied said land prior to twelve o'clock noon of April 22, 1889, contrary to the provisions of the President's proclamation.

Upon notice duly served, a hearing was had in the case, and the receiver rendered a decision recommending the cancellation of the entry. Therein it is said: "We find," etc., and as the register has submitted no opinion, I take it that he concurred in the opinion of the receiver, but neglected to sign it. From the judgment the entryman appealed, and you, upon March 11, 1892, affirmed the register and receiver, and held the entry for cancellation, from which he again appealed.

The testimony of plaintiff consists of his own statements and the testimony of one, Lawrence Morgan. He does not pretend to know anything about when Jones went on to the land; says he saw him there in the afternoon of April 22, 1889; that Jones told him, about the 26th or 27th of April, that he came into the Territory on the 17th of April, and hauled lumber to Kingfisher land office, and had a permit to take land before time, and that he came on to this land Sunday evening. This is all he states about when Jones went on to the land.

Morgan says he met Jones on April 22, between eleven and twelve o'clock, as near as he can recollect the time of day, on the land. Jones then claimed the land; that he saw Jones in the forenoon, before he (Morgan) went to the land; that Jones was driving a team to a wagon, a gray and a brown or bay horse. That a Mr. Hostetler and a Mr. Miller were present while he was on the land and talking with Jones; they took part in the conversation.

This is, substantially, the testimony in chief. The testimony offered by Jones shows that he and Mr. Hostetler, Huff, Smith, and Combs, went into the territory on the 17th or 18th of April, 1889, to haul the material for the building of the land office at Kingfisher from Guthrie, and to help put up the building. They were employed by a Mr. Baird, who had the contract for erecting the land office buildings at Guthrie

and Kingfisher. They were furnished a pass from the officer in command of the troops on duty along the north line of the territory; this pass was endorsed by "J. A. Pickler, Inspector of Public Lands." Jones took in his wagon, from the north line to Guthrie, horse feed, provisions, a breaking plow, and some other goods. He had to leave his wagon-bed, and property at Guthrie, and load lumber on the running gears" of the wagon; he put some feed and provisions in Huff's wagon. On the morning of the 19th of April they started from Guthrie to Kingfisher; there were several teams; they reached Kingfisher after night, the distance being about thirty-five miles. On the 20th they helped put up the building, and on the morning of the 21st started back whence they came, intending to go by Guthrie to get the wagon-bed, feed, etc., and to reach the north line that day, so that they could reach the "Stillwater country" in the afternoon of the 22d. After traveling eighteen or twenty miles, they stopped about an hour, had dinner, and fed the teams. It appears that one of Jones's horses, that had been sick on the way to Kingfisher was found to be sick again, and, upon consultation, it was determined to leave the wagons and extra horses, take each a horse, and go out of the territory at the west side, which was but little over half as far as to the north line. Thereupon they took their wagons and horses off of the road into the head of a draw, a short distance. They picketed the extra horses, left the wagons, and rode to the west line, following the trail toward Kingfisher for some distance, when they bore south of west and crossed the line from five to seven miles south of Kingfisher. They camped here till about noon the next day. They had no watch in the party, but had a compass which they set up, and set a small stick to the south of it to try to determine by the sun when it was high noon. About noon the "boomers" started, and Jones and party started, in the race. They traveled east and passed near the wagons, when two of the five stopped, hitched up the horses and brought the wagons. Jones and two others rode ahead to "pick" good sites; Jones selected the tract in controversy, the others selected tracts in the vicinity. At night Jones and Hostetler took a wagon to Guthrie, and got Jones's wagon-bed and the "stuff" left there, also a trunk Hostetler and Huff had some goods in. This is, substantially the statement of all of these five men.

A Mr. Timberlake, who says he had come from Kansas, with a Mr. Wirt, a liveryman, testifies that he was on the west line with Wirt, who had ten horses, and was going to Kingfisher to start a livery stable. On the morning of the 22d he started out to trade off one of Wirt's horses, and rode down the line some distance, came to Jones and party, saw Jones's gray mare picketed, bantered him for a trade. Jones declined to trade the mare, but said he had a horse over on the prairie he would trade. After passing some words, he left. He next saw Jones in Kingfisher some time before the hearing. There was a man with him while riding around. He and Wirt were going to Kingfisher. W. L. Dunn testifies that he was with Timberlake, and he

corroborates what Timberlake says about the matter. Dunn was going to Kingfisher.

Mr. Miller, Fitzgerald, and other witnesses contradict Morgan's statements on material points. A Mr. Ray testifies that he heard Morgan declare that he was a "sooner" and could not hold land, but that he would "make some good money out of it."

Your decision goes into detail in referring to what you seem to consider serious conflicts in the testimony of Jones's principal witnesses. You refer to the matter of Jones's contract with Baird, that it was an "indefinite arrangement." Jones said Baird asked him to go and haul lumber; he had a wagon and team doing nothing. Baird assured him that going into the territory on permit would not affect his right to take land; said he would pay him what he paid the others, and he agreed to go and went.

You question Smith's evidence, because on another trial he said the party left the Kingfisher trail at Cottonwood springs, while in this case he says they left it at a mound. It appears that the mound and spring are only about two hundred yards apart, the spring being north of the trail. They passed both, and left the trail near both. I do not see that there is anything in this to discredit the witness. You refer to the fact as material that Hostetler said on another trial that they started when the "boomers" said it was time to go; while in this case he says no one of the "boomers" came and told him it was time to go. He says they heard the "boomers" calling to one another, and saw them start, and their party started in the race. This is a very small discrepancy in testimony.

You seem to throw out the evidence of Timberlake and Dunn for some reasons, one of which is that Timberlake recognized Jones in Kingfisher several months after the horse trade incident. You say: "Although they met 5,000 people that morning, they are able to recognize claimant when next they met him in Kingfisher about ten months afterwards." This is very strained. Some of the witnesses supposed there were 5,000 people waiting along the west line, but there is no evidence that Timberlake met and talked with fifty of them. You say "it is strongly improbable that men would ride a distance of nine or ten miles up and down a line, when at noon of the same day the horses were to enter a race in which the horses would need to be in the best possible condition." The evidence shows that they were going to Kingfisher, three or four miles distant; they were not going into the race for land.

You finally doubt the truth of the statements of Jones and his witnesses, because of the great feats of their horses, as stated by them. You say they "traveled over forty miles on the 21st; next day, it is claimed, they were ridden to the claims inside of three hours, a distance of 24 or 25 miles." In your opinion this "is remarkable and highly improbable," but it is only a matter of opinion, as we have no testimony as to the age, size, or power of endurance of the horses.

The men seem to have been in earnest, and one witness says he had been preparing his horse for three weeks for the race.

You speak of Jones taking a plow to Guthrie when he went there first, and think it shows bad faith. Jones was going to the territory as soon as it was opened, and I am unable to see what advantage, if any, his plow lying at Guthrie could give him over others racing for land; he had gone out to take an even start.

In the case of Taft *v.* Chapin (14 L. D., 593), and cases there cited, the principle appears to be established that one being lawfully in the territory must not use his position to his own advantage, or to the disadvantage of those outside of the territory. In Blanchard *v.* White *et al.* (13 L. D., 66), where parties had stationed horses at intervals in the territory that they might have relays of fresh horses, the entries made on tracts reached by this means were canceled, because of the unlawful acts and the advantage taken.

You further say Jones took advantage of his opportunity to choose a route over which to travel, and that he selected the tract upon which he would settle. This is denied, and it appears that the land is some three miles from the road over which they traveled, and he says he never saw the land until he came upon it in the afternoon of the 22d, he simply went toward timber, and rode till he found a tract that suited him; others did the same.

While your decision goes into detail as to nearly all the witnesses, you do not mention Morgan's testimony (it was effectually impeached), and without it Standley has no case.

I have carefully considered the entire record and evidence, and do not find any sufficient reason for canceling the entry. The contest is therefore dismissed, your decision being accordingly reversed.

FAULL *v.* LEXINGTON TOWNSITE.

Motion for review of departmental decision of October 18, 1892, 15 L. D., 389, denied by Secretary Noble, March 3, 1893.

SURVEY—SHALLOW LAKE—RECESSION.

LAKE MALHEUR.

In the exercise of a sound discretion a survey of land lying between the meander line and shore of a shallow lake may be ordered, where the government owns the land adjoining the lake; if the frontage is of sufficient extent and the recession of the water has uncovered a space large enough to warrant the extension of the lines.

Secretary Noble to the Commissioner of the General Land Office, March 3, 1893.

I am in receipt of your letter of June 27, 1892, transmitting a petition filed in your office, which petition is signed by Fred Otley, J. R.

Hendricks, and a number of other citizens of Harney county, Oregon, praying that you will order a survey of land lying between the meander line as run, and the shore line as it now exists, of Lake Malheur, in said county.

It is claimed that the water has materially receded since the surveys were made, and the meander line was run; that these lands thus uncovered "are good for agricultural purposes;" that they lie in townships 25, 26 and 27, ranges 31, 32, 32½ and 33, east of Willimette meridian.

The petitioners represent that they are "citizens and voters of Harney county, Oregon, now settled in good faith below the meander line surrounding Malheur lake," etc.

In your letter "E," of May 13, 1892, addressed to Hon. Binger Hermann, M. C., you say:

> Although in some of the townships named in the petition now under consideration, viz: township 25 south, range 33 east, township 26 south, range 32 east, township 26 south, range 33 east, and township 27 south, range 30 east, there appears no entry against the lots bordering upon the lake, according to the tract books in this office, there are according to the record, State selection of certain lots bordering upon the lake in sections 32, 33, 34 and 35, lists 10, 4, 5 and 25, respectively, of township 26 south range 31 east, W. M., Oregon, in the survey south of the lake.

You mention a pre-emption declaratory statement on SW. ¼, section 14, of township 25 south, range 32½ E., and a homestead application for lots 3 and 4 section 19, and timber culture entry for lot 4, section 21, and lots 1 and 2, section 22, same town and range.

It appears that this lake is over twenty miles long, nearly east and west, and about five miles wide. It is a shallow lake, little more than a swamp or marsh, lying three thousand six hundred feet above sea level. Copies of the official surveys of the townships bordering it are filed as exhibits herein. You cite the cases of Hardin *v.* Jordan, and Mitchell *v.* Smale (140 U. S. Reports 371 and 406) as authority for declining to grant the petition. Following the decision in Hardin *v.* Jordon, we have the doctrine of riparian rights applied to non-navigable lakes, as it was previously applied to non-navigable streams, and that each adjoining proprietor holds to the center of the lake. This would give the State of Oregon the land that is uncovered from year to year in front of sections 32, 33, 34, and 35, of township 26 range 31, but the government owns sections 31 and 30 of this township, and applying the same rule to it, as to the State, I can see no reason why the township lines should not be extended, and also the lines between sections 29 and 30, and 35 and 36, so as to give the government its riparian rights. For the same reason I do not see why the lines in all the townships where the government owns up to the shore line of the lake should not be extended. Township 26, range 31, north of lake has never been surveyed, except a few sections, and no meander line of the lake has ever been run.

In my letter of instructions, of January 12, 1892, (14 L. D., 119) the concluding sentence is as follows:

> If, however, it should appear that none of the lands or lots contiguous to a former non-navigable meandered lake or pond have been patented, or applied for under the general land laws, I see no reason why the lake—if it has become dry and fit for agricultural purposes—should not be surveyed and disposed of as government lands.

This language would seem to imply that no land surrounding a lake could be surveyed after a meander line had been run, until the lake became entirely dry. This is too narrow a construction; if a lake recedes, as it appears this one has, so as to make useful for agricultural purposes, a wide strip of land within the meander line, while there is yet water at the center of the lake, there is no reason why the lines of the survey should not be extended, so that this land may be entered.

Again, it is said if "*none* of the lands or lots contiguous," etc. We have in the case at bar a lake crossing three and a half townships on its south front, and nearly as much on the north. On the south line four miles are taken in one township, leaving three townships in which the government owns the entire boundary, while on the north, all the entries and filings are confined to one township, and on the west no entries have been made.

It appears that this lake proper is quite small but it was, in 1877 when the surveys were made, surrounded by what is called "tule swamps;" within fourteen years the water has receded, leaving a wide strip of land all around the lake proper, fit for cultivation, and persons having settled upon this land ask that it be surveyed, that they may acquire title thereto. It will not do to say that because entries have been made along the boundary of the lake in two townships, that this bars the government from extending the lines over its own land, and the land that has accrued to it by the receding of the water. Especially is this true of the township along which no meander line has been run. Taking the decision of the court cited, in its broadest sense, it does not prevent the government from extending its lines and following up the receding water. A meander line is run, not as a boundary, but as a basis for a calculation of area, and to place the land on the market. A new meander line and new calculation basis must be made.

This statement of the matter enlarges to some extent the limited terms of the paragraph quoted of the circular mentioned, and I am satisfied that the wording of said circular was too narrow in its expression to meet cases like this, that will arise from time to time in shallow lakes far above sea level.

You will, therefore, order surveys of those lands where no meander line has been run, and in townships where the government owns the land adjoining the lake, in cases where the frontage is of sufficient extent, and the receding water has uncovered a space sufficiently large to warrant the extension of the lines. A sound discretion should be exercised in such cases, under the above ruling.

CARPENTIER *v.* MAHEW ET AL.

Motion for review of departmental decision of June 22, 1892, 14 L. D., 665, denied by Secretary Noble, March 3, 1893.

PRACTICE—WITHDRAWAL OF APPEAL—HEARING.

UNITED STATES *v.* NORTHERN PACIFIC COAL CO.

The withdrawal of an appeal from an order of the General Land Office holding an entry for cancellation, on the report of a special agent, with opportunity to apply for a hearing, permits said order to become final; and failure to apply for a hearing prior to the appeal is an admission of the truthfulness of the charge on which said order is predicated.

An application to re-open such a case with a view to a hearing therein should not be favorably considered where the facts relied upon to warrant such action are not specifically pleaded, and the proof set out by which it is proposed to show that the entry is in fact valid, and the report of the special agent not true.

Secretary Noble to the Commissioner of the General Land Office, March 3, 1893.

The following coal entries were held for cancellation by you on February 18, and March 8, 1888, respectively, upon the reports of Special Agent J. A. Munday, and the parties in interest were allowed sixty days in which to apply for hearings to show cause why the entries should be sustained, to wit:

Coal Entry No. 1 of Andrew Munden, for the E ½ of SW ¼ and E ½ of NW ¼, Sec. 16, T. 20 N., R. 15 E.

* * * * * * *

[Description of eleven other entries omitted.]

The Northern Pacific Coal Company, transferee in each of the above entries by its attorney W. K. Mendenhall, Esq., appeared but did not apply for hearings in order to show cause why said entries should not be cancelled; instead of this course it appealed the cases to the Department, and on May 23, 1888, the record in each was duly transmitted. On December 2, 1890, following, it filed in the Department a withdrawal of its several appeals, and on December 5, following, said appeals were dismissed and the records were all returned to you. On December 6th, following, the Northern Pacific Coal Company presented the affidavit of John Kangley, its general manager, alleging substantially that the information procured and filed against said entries by Special Agent J. A. Munday, was obtained by false and fraudulent means, and that he is informed and believes

that the affidavits procured by said special agent were in many instances not read by the parties making the same before signing, and that they were unaware of the true contents of the same; that they signed the same upon the representations and at the request of the special agent, and had they fully understood the contents thereof they would not have so signed them; This affiant is further informed and believes

that many of said entrymen purchased their lands in good faith and with their own means. Your affiant further says and believes that if a hearing is had the said coal company will be able to show that the statements in said affidavits are not the true facts in the case.

Thereupon the company applied for a hearing to show the validity of said entries.

You have not yet acted upon this application, but have forwarded the record to this Department that you may be instructed as to how you should proceed.

Since the record has been transferred here the attorney for the company has renewed the application for a hearing, alleging that the company never has admitted, in fact, that the allegations set forth in the reports of the special agent, upon which the entries were held for cancellation, are true, and that as shown by the affidavit of Mr. Kangley above referred to, it believes that the information procured by said agent was so procured by misrepresentation and fraud, and is alleged that these averments have been sustained in those cases in which the company has been allowed hearings, and the company ask that the evidence of the entrymen in the cases of Christian Miller, entry No. 4, and of W. B. Wilson, entry No. 30, in the hearings had in their cases, which are now before your office, be examined and made a part of this case. Copies of claimants' briefs, wherein extracts from their evidence bearing specially on this point, will be found on pages 20 to 29, in the Miller brief, and pages 19 to 23 in the Wilson brief. It is also alleged that Thomas Johnson, whom the special agent charges to have been the agent of the company for the purpose of coal rights, never was such agent and that he himself denies said agency. It is also denied that any of the entrymen were in their employ, or were parties to any arrangement whereby any person was to sell his coal right and make entry for their benefit.

The company further allege that it purchased said lands in good faith, believing the entrymen had good titles and legal rights to sell, and without knowledge then or now that said entries were not lawfully made.

The extracts of evidence in the Miller and Wilson cases have been examined. Said evidence was given in other cases than the ones now under consideration, and does not purport to contain all the evidence given by the parties, besides these witnesses have made affidavits before Special Agent Munday in which they state facts directly contrary to the statements made in these cases. It is true that parts of their purported testimony tend to show that the affidavits before made by them were signed without their understanding the contents thereof.

The showing made by the new application for hearing, filed since the record came here, is based largely on the affidavit of Kangley, and the allusion to the evidence of Miller, Wilson and Johnson in other cases, is but supplementary thereto This affidavit consists of a general charge, made upon belief, that the special agent of your office obtained the

information upon which the entries were held for cancellation by fraud, and that if hearings are allowed the company will be able to show that some, at least, of the entrymen have acted in good faith, and said entries are therefore valid.

The withdrawal of its appeals from the order of your office holding the entries for cancellation, permitted said order to become final and having, before the appeals were taken, refused and neglected to apply for hearings, as was contemplated in your order, such refusal and neglect will constitute an admission on its part of the truthfulness of the charges on which said order was predicated.

It follows that the company cannot now apply for hearings as a matter of right, and if hearings are to be ordered it must be by virtue of the provisions of rule 114 of the Rules of Practice, and that general supervisory authority possessed by this Department over the disposal of the public domain prior to the issuance of patents.

It is shown by the records that since said entries have been held for cancellation, others have asserted rights to some of the tracts, and some have been allowed to make entries thereon, but, aside from the interests of these parties, does the showing made by the company warrant this Department in exercising its supervisory authority and ordering the hearings asked for? I think not. The proof is not set out by which it is proposed to show that the entries were valid. No witness is named who will swear to the validity of a single one of the entries, or that the showing made by the special agent's report is not true. The application for a hearing is based upon allegations, the truthfulness of which are not even vouched for by the affiant. The affidavit is made only on information and belief and does not even claim that the company can show, if a hearing be ordered that all of the entries are valid. It consists of a general charge made on information and belief that some of the entries are valid and that the company hopes to be able to show it—by what means or by what evidence is not named. The facts relied upon to warrant you in opening up this case are not specifically pleaded. I am of the opinion that under the circumstances in this case, you are not warranted in opening up these cases upon the showing made. The application for hearing should therefore be denied.

The records are herewith returned to you, and you are instructed to proceed in accordance with the views herein expressed.

RAILROAD GRANT—ADJUSTMENT—MINERAL LAND.

CALIFORNIA AND OREGON R. R. CO.

In the adjustment of this grant the non-mineral character of lands cannot be considered as established by the fact alone that the returns of the surveyor general do not show said lands to be mineral.

Secretary Noble to the Commissioner of the General Land Office, March 3, 1893.

With your letters of February 23, 1892, was submitted for my approval clear lists numbered 22 and 24, embracing 124,432.92 acres and 163,234.44 acres, respectively, lying within the indemnity limits of the grant made by the act of July 25, 1866, to aid in the construction of the California and Oregon Railroad.

The townships in which the lands selected lie are indicated upon a State map. Such map also shows by coloring whether in the townships, in which such selections are made, any mineral claims exist. From this map it appears that the great majority of the selections contained in these lists are in townships in which there are known mineral claims, the remaining selections, with a few exceptions, being in the immediate townships adjoining those in which are located such mineral claims.

The only showing offered by the company is the affidavit of the selecting agent attached to the lists, which is as follows: "That the lands are vacant, unappropriated, and not interdicted mineral nor reserved lands," etc. This affidavit is of little or no effect as tending to show the character of the lands selected, and might be made by any one.

In this connection, I must call attention to that portion of the certificate attached to these lists, which is as follows: "And all of said lands being non-mineral in character, and none of said lands being returned as mineral by the United States surveyor general," etc. This is, in effect, a judgment as to the character of the lands, based entirely upon the return of the surveyor-general, which has never before, to my knowledge, been so accepted, and should not be included in the certificate.

From the character of the surrounding lands, I do not think it would be safe to approve these lists without further investigation by the United States or specific showing on the part of the company as to their non-mineral character.

Said lists are therefore herewith returned without my approval.

SCHOOL GRANT—MINERAL LAND—BUILDING STONE.

SOUTH DAKOTA *v.* VERMONT STONE CO.

Lands chiefly valuable for ordinary building stone are not excepted as "mineral lands" from the grant to the State for school purposes.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 3, 1893.

On February 2, 1890, the Vermont Stone Company applied for a patent under the mineral laws as a placer mine for the N. ½ SW. ¼, and N. ½ of S. ½ of NW. ¼ and W. ½ of W. ½ of the W. ½ of the NE. ¼ Sec. 16, T. 104 N., R. 49 W., Mitchell, South Dakota.

The State of South Dakota protested against said application on the ground that the tract in question was not mineral land and therefore not subject to disposition under the mineral laws, and that the section belonged to the State under its grant from the government for school purposes.

On April 23, 1890, a trial was had between the parties and after considering the evidence, the register and receiver found that the land was subject to entry under the mineral laws and dismissed the protest. The State appealed to your office, where, on September 3, 1890, the finding of the local land officers was affirmed. The case is now brought here on appeal of the State from said decision.

By letter of November 9, 1891, you call attention to this case and the cases of South Dakota *v.* O. H. Smith, and J. A. Cooley and B. F. Hayden *v.* Thomas Jamison, and state that—

> In view of the possibility that some specific instructions governing such cases and their adjudication may be made by you in your decision in one or more of said cases, I have the honor to request that an early action be taken by you therein.

It is contended by those claiming the right to a patent for this tract as a placer mine that their claim was initiated at a time when the Department's rules and decisions allowed such land as this to be entered as placer ground and that they have expended large sums of money in developing their mine and that to deprive them of a patent now would work a great injustice and hardship.

The appeal of the State of South Dakota from your office decision of September 3, 1890, alleges,

> 1st, That said land is not mineral land in the sense of the law allowing mineral entries,
>
> 2d, If mineral it is not of the character allowing a placer claim thereon,
>
> 3d, If said land is subject to entry under the placer law, but one claim of twenty acres could be taken by the applicant.

On January 2, 1891, in the case of Coulin *v.* Kelly (12 L. D., 1), the Department held that stone that is useful only for general building purposes does not render land containing it subject to entry under the mining laws.

On August 4, 1892, an act of Congress was approved (27 Stat., 348), entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws;" said act is as follows—

That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims: *Provided*, That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

SEC. 2. That an act entitled "An act for the sale of timber lands in the State of California, Oregon, Nevada, and Washington Territory," approved June third, eighteen hundred and seventy-eight, be, and the same is hereby, amended by striking out the words "States of California, Oregon, Nevada, and Washington Territory" where the same occur in the second and third lines of said act, and insert in lieu thereof the words, "public-land States," the purpose of this act being to make said act of June third, eighteen hundred and seventy-eight, applicable to all the public-land states.

SEC. 3. That nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one.

The passage of this act makes land chiefly valuable for building stone subject to entry under the placer mining laws, unless such lands have been reserved for the benefit of the public schools or donated to any State.

The tract in question is within the grant to the State of South Dakota for school purposes, when the State was admitted into the Union (25 Stat., 676), February 22, 1887.

Lands chiefly valuable for ordinary building stone are not mineral in character in the sense in which the term "mineral lands" is used when applied to grants. The tract in question being non-mineral, must be held to have passed to the State.

The fact that the act in question provides that certain kinds of stone quarries may be entered under the placer laws does not warrant the finding that such stone quarries constitute mineral lands in the sense in which such lands are held to be excepted from grants. Clark *et al.* *v.* Ervin (16 L. D., 122), decided February 13 1893.

Your judgment will therefore be reversed and the application of the Vermont Stone Company rejected.

RIGHT OF WAY—RESERVOIR MAP.

MCVEY AND FINDLEY.

The survey of a reservoir should show the lines of the government survey around the same, and the map thereof should be prepared on a scale proportionate to the size of the reservoir.

Secretary Noble to the Commissioner of the General Land Office, March 3, 1893.

I am in receipt of your letter of the 16th of July, 1892, transmitting a map in duplicate filed by Messrs. McVey and Findley, of their reservoir site in section 8, T. 26 N., R. 4 W.

You state in your letter of transmittal that this reservoir lies in the Helena, Montana, land district. There is nothing on the map or field notes or affidavit to show that it lies in the Helena district, or that the map was filed in the Helena land office. There is a file mark on the map "Filed in duplicate May 31, 1892, A. A. Swiggett, Register." The affidavit was made before a notary. This map is made on such a small scrap of tracing linen that there was scarcely room to note more than the register wrote; still it is proper that it should show where it was filed.

The section lines or subdivision lines of the quarter section are not given on the map except the lines of section 8, adjoining the NE. corner of said section.

The survey appears to be accurately made, but the courses are given by the angles made by the intersecting lines, instead of the course of each line being given from a meridian passing through the station point of the line. Thus the second line reads—"89° 40′ west or right 984 feet," whereas its course is about N.69°W., allowing 21° variation for the needle. To give the courses by the needle and the distances in chains and links is more practical, although the other method may be equally accurate.

The map appears to have been hastily drawn, on a mere scrap of linen, less than six inches square, with as little information on it as could be furnished and come at all within the regulations.

The Department has said that a reservoir may be mapped on a scale of one thousand feet to the inch, and again it accepted a map on six hundred feet to the inch. It is not the purpose to fix any arbitrary rule of reservoir surveys, but a civil engineer or surveyor should exercise his judgment, and a survey should show the government lines around the reservoir, the scale being governed largely by the size of the reservoir, one covering many miles of area being on a smaller scale than one embracing only four or five acres.

This map is, therefore, returned without my approval, that it may be prepared in accordance with the suggestions made, and that it may show in what land district the land lies and in what office it is filed.

PRACTICE—REHEARING—SETTLEMENT RIGHT.

RUMBLEY *v.* CAUSEY.

A conditional application for a rehearing addressed to the Secretary of the Interior, for consideration in the event of adverse action on a pending appeal before the Department, is not authorized by the Rules of Practice.

Priority of settlement is protected as against an intervening entry where the settler within three months after settlement applies to contest said entry alleging his own priority of right. During the existence of such adverse entry a formal application to enter on the part of the contesting settler is not necessary for the protection of his interest.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 7, 1893.

On the 20th of June, 1889, John V. Causey made homestead entry at the Kingfisher land office, Oklahoma, for the N. W.¼ of section 23, T. 11 S., R. 7 W. The land is now in the Oklahoma land district.

On the 17th of July, 1889, Marion W. Rumbley filed affidavit of contest against said entry, alleging that he made settlement on the land on the 22d of April, 1889, prior to any other person, and that his settlement and improvements were well known to Causey at the time he made his entry.

A hearing was ordered, at which a very large amount of conflicting testimony was taken. The local officers, after considering the same, rendered their decision on the 12th of December, 1890, in which they found that the charges made by Rumbley were sustained by a preponderance of the evidence, and recommended that the entry of Causey be canceled, and that Rumbley be allowed to make entry for the land. Upon appeal, that decision was affirmed by you, on the 11th of March, 1892.

On the 6th of April, 1892, Causey filed in the local office an appeal to the Department from your decision, and on the 12th of July, 1892, he filed in said local office an application, addressed to the Secretary of the Interior, asking that he be awarded a new hearing before the register and receiver, "in the event that the decision of the Honorable Secretary on the appeal of the applicant in this case shall sustain the decision rendered against appellant by the Honorable Commissioner."

Neither the Rules of Practice nor any regulation of the Department, authorizes any such conditional application for rehearing. The motion is therefore denied, without prejudice to a new motion being made, in accordance with the Rules of Practice of the General Land Office, and the Department of the Interior.

This leaves for consideration the appeal from your decision of March 11, 1892. After pointing out the particulars in which your decision is contrary to the evidence, it is alleged that you erred

in not sustaining the motion of the defendant to dismiss said action, for the reason that plaintiff did not apply to enter said tract, and tender the fees for such entry to the register and receiver within three months from the date of his alleged settlement.

There is no merit in this point. Land covered by one entry is not subject to another, at the same time, and it would therefore have been an idle ceremony for Rumbley to have applied to make entry for the land already covered by the entry of Causey, as an application to enter land, not subject to entry at the time the application is made, confers no rights upon the applicant.

Rumbley initiated contest against the entry of Causey, within three months after his (Rumbley's) settlement upon the land, and by such proceeding preserved his settlement rights as effectually as he could by an application to enter, as before his entry could be allowed, that of Causey must be removed from the land. A prior settler, who initiates contest within three months after settlement, and who applies to enter within thirty days after receiving notice that he has succeeded in his contest, is in time. It would have been error, therefore, to have granted defendant's motion to dismiss the contest, upon the grounds stated by him.

I deem it unnecessary to recapitulate the facts established by the evidence. I think it sufficient to say that it was made to appear that Rumbley made settlement upon the land on the 22d of April, 1889, and camped and resided thereon from that time until about the middle of June. He then went for his family, and returned to the land on the 5th of July, 1889, whereon he has since resided. The fact that Rumbley had made settlement upon the land prior to his entry, was known to Causey at the time he presented his application, and his rights in the land are therefore subject to those of Rumbley. The good faith of Rumbley was not successfully assailed, and the decision appealed from is therefore affirmed.

PRE-EMPTION—SECOND HOMESTEAD ENTRY.

SHEPHERD *v.* FAST.

A judgment in an ex-parte case awarding the right to make a second homestead entry, on the assumption that no adverse claim exists, will not defeat the prior intervening claim of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 8, 1893.

The land involved in this application is the S. ½ of N. E. ¼, Sec. 22 T. 18, R. 23 W., 6th p. m., Wa Keeney, Kansas, land district.

It is shown by the record that Martha Bever, now Martha Fast, filed her pre-emption declaratory statement for said land March 6, 1886, alleging settlement December 3, 1885, and on September 27, 1887, she offered final proof before the probate judge of Ness county. Jasper N. Shepherd protested against the same. On January 3, 1888, he made

homestead entry of the NE. ¼ of said Sec. 22, alleging settlement November 16, 1885, and on March 2, 1888, offered final proof under Sec. 2305 Revised Statutes, before the probate judge of Ness county, where Fast appeared and protested. Thereafter and on May 8, 1888, the attorneys for the respective parties entered into a stipulation that the evidence should be submitted to determine their respective rights to the land "and the right to proceed to trial in the case as authorized by the Hon. Commissioner, is hereby waived." Hearing was accordingly had before the local officers, from the evidence they held that the final proof of Martha Fast for the said S. ½ of NE. ¼, should be allowed and the homestead entry of Shepherd canceled as to said land, and final certificate issue to him for the N. ½ of said NE. ¼. Shepherd appealed and you by letter of February 1, 1892, reversed their decision, holding the pre-emption filing of Mrs. Fast for cancellation and awarding all the land to Shepherd; whereupon Mrs. Fast prosecutes this appeal, assigning as error, substantially that your decision is against the law and the evidence.

The testimony shows that before said pre-emption filing and homestead entry were made, one McCaslen contested a prior entry of said land and caused it to be canceled by direction of your letter "C" of November 17, 1885. It is claimed by Mrs. Fast that she caused this contest to be instituted and paid all the expenses thereof with the understanding that she was to have McCaslen's preference right, and in pursuance of this agreement went upon the land and established her residence in April, 1885, but could not make her filing until the thirty days' preference right of McCaslen had expired by limitation. She claims that through the neglect of her attorneys, who had the matter in charge, her filing was delayed until March 6, 1886.

Shepherd claims that he purchased McCaslen's preference right and moved upon the N. ½ of the NE. ¼ on November 16, 1885. By reference to the case of Jasper N. Shepherd (6 L. D., 362) it will be seen that he was not qualified under the law to make homestead entry at that time, nor until the promulgation of that decision, which was on November 26, 1887. In that case he sought to have a prior homestead entry made by him, amended so as to get the said NE. ¼ instead of land he had failed to secure under the prior homestead entry. In that case was said by the Department (p. 363):

> While on the facts as presented the application can not properly be treated as an application to amend, it being rather an application to make a new homestead entry, there is, I think, in view of all the circumstances, sufficient reason to give it favorable consideration as an application to make a second entry. There is no adverse claim to the land which Shepherd now seeks to enter, and the question is one solely between him and the government.

It was also held that,

> While he was not entirely free from fault in not making more thorough investigation before making his entry, his failure in that regard may, as between him and the government and in view of his explanation, properly be excused.

And the order was that Shepherd be allowed "to make homestead entry on the tract covered by his application."

This was an *ex parte* proceeding and was considered by the Department purely as a matter between the applicant and the government. It was not intended, in my opinion, notwithstanding the language of said order that the decision should be construed to preclude any rights in the land that might accrue to others either by settlement or entry. So far as the record in that case discloses there were no adverse rights to the land in question; yet, as a matter of fact, when that decision was promulgated Mrs. Fast had made final proof on one-half of the tract.

Shepherd had no legal right to enter this land until his disabilities had been removed by this judgment, and did not make his entry until January 3, 1888. So that, in my view of this case his right to the land in question only dates from the date of notice of the former decision. Or, in other words, I do not think it was contemplated by that judgment that the right to make another homestead entry should be construed to relate back to the date of his settlement to the prejudice of intervening rights if there were any.

There is some testimony on the part of Mrs. Fast tending to show that she established a residence on the land in April, 1885, and maintained it, with some necessary absences, until final proof. But I do not think the testimony is sufficient to establish this condition of affairs, but, I think it must be held that she established her permanent residence in February, 1887, though it is shown that she was on the land more or less, and improving it, prior to that time. She began the erection of her new house late in 1886, and it was finished and occupied in February following, and she continued to reside there and improve the place until the time she made final proof in September, 1887. Hence whatever laches there may have been on her part in regard to residence was cured before the right of Shepherd attached.

At the time Shepherd went upon the land in November, 1885, Mrs. Bever was there, and he had actual knowledge of her claim to the land. He ordered her off at that time and during the conversation each stated to the other his and her respective claim to the land. He made his settlement and all his improvements on the north half of the quarter and hers are upon the south half. It seems to me from all the facts and circumstances that each of these parties should be given the land respectively settled upon.

Your judgment is therefore reversed. The final proof of both parties will be returned to the local office with directions to cancel the homestead entry of Shepherd for the S. ½ of the NE. ¼ of said section, and final certificate will issue to Martha Fast for said land on payment of the required purchase money, and Shepherd will be permitted to make final entry of the N. ½ of the NE. ¼ of said section.

PRIORITY OF SETTLEMENT—APPLICATION TO ENTER.

HUNTSBARGER *v.* EICKMAN.

A formal application to enter within three months after settlement is not required to protect priority of settlement as against the intervening entry of another, where the settler initiates a contest against such entry within said period on the ground of his own priority.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 9, 1893.

The land involved in this appeal is the NW. ¼, Sec. 14, T. 19 N., R. 7 W., Kingfisher, Oklahoma land district.

The record shows that Peter Eickman made homestead entry of said tract April 26, 1889. On May 23, 1889, James Huntsbarger filed an affidavit of contest alleging—

that at the date of said homestead entry aforesaid, said affiant was an actual settler residing upon, improving and cultivating said tract of land; that said homestead entryman had not at the date of filing his homestead entry No. 237 for the land involved made settlement upon said tracts; that affiant is the only *bona fide* settler upon said tract; that on the 22d day of April, 1889, at twenty-five minutes past twelve p. m., of said day, affiant made a personal *bona fide* settlement upon said tract of land; that affiant is a legally qualified homestead entryman, as more fully appears from his homestead application and affidavits hereto attached,

and asks that by "virtue of his prior settlement he be allowed to enter said tract of land under his homestead application hereto attached."

There is attached to this affidavit of contest an affidavit sworn to before the receiver, that the applicant did not enter upon and occupy any of the lands in Oklahoma, prior to 12 o'clock, noon, April 22, 1889; also an application to enter said lands, but the certificate is not signed by the register; also the affidavit required by a homestead applicant, sworn to before the receiver. These papers and affidavits are all dated "May 1889," the day left blank. Hearing was had before the local officers and as a result thereof they decided that the contestant was the prior *bona fide* settler and recommended that the entry of Eickman be canceled. He appealed and you by letter of January 23, 1892, affirmed their decision, whereupon he prosecutes this appeal, assigning as error, substantially, that your decision is against the law and the evidence.

I am satisfied from an examination of the record that your decision, affirming that of the local officers upon the questions of fact as to the settlement of the parties upon the land in question is correct. I think it is fairly shown that Huntsbarger was the prior settler and that Eickman did not make settlement on the tract on April 22, 1889, what he did on that day was upon another and different tract.

It is insisted by counsel for Eickman that Huntsbarger did not present legal application to enter the land within three months from date of his settlement, and that therefore he has not complied with the law

by perfecting his original entry. In other words: in order to establish a better and superior right to the land, the settler must formally present his application to enter the land at the local office within three months from date of settlement, in addition to instituting a contest, notwithstanding the fact that there may be a prior entry of record.

This position is untenable. The settler has done all the law requires of him when he institutes a contest to test the superior right to the land as between himself and an entryman. It is a sufficient evidence of his good faith when he puts in motion the only means by which the entry can be removed from the record. In this case, the settler, within thirty days after the entry was made in the local office, filed his contest, accompanied by an application to enter the land substantially correct in form, and I am of the opinion that to require him, in addition, to have the local officers formally reject his application, as they must do under these circumstances, would simply be imposing a useless formality.

The authorities relied on by counsel in support of his position are not in point. (Christensen *v.* Mathorn, 7 L. D., 537; Watts *v.* Forsyth, 5 L. D., 624; Same, 6 L. D., 306). The decision in those cases, and I may say in numerous others, is that "the settlement of a homesteader is only protected as against other and later settlers for the period of three months, after which the next settler, in point of time, who has complied with the law, takes the land." In those cases the settler allowed the three months in which he should make his entry to elapse, without so doing. In the case at bar the settler took the only means known to the law to cancel the entry of an entryman in order that he might make an entry, which he can not do until the record is clear.

Your judgment is affirmed.

APPLICATION TO ENTER—DESERT LAND DECLARATION.

JAMES J. FEELY.

An application to enter, filed since the act of August 30, 1890, restricting the acquirement of title to three hundred and twenty acres in the aggregate, must be accompanied by an affidavit showing that since said act the applicant has not filed upon or entered a quantity of land which would make, with the tract applied for, more than three hundred and twenty acres.

The provisions of the act of May 26, 1890, do not authorize the execution of a desert land declaration before a commissioner of a circuit court outside of the county in which the land is situated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 9, 1893.

I have considered the appeal of James J. Feely from your decision of June 10, 1892, affirming the action of the local officers at Susanville,

California, rejecting his application to enter, under the desert land laws, the E. ½ of the NE. ¼ of Sec. 21, and the W. ½ of the NW. ¼ and the SW. ¼ of Sec. 22, T. 28 N., R. 16 E.

The record shows that said Feely subscribed and swore to his desert land declaration before W. B. Beaizley, deputy clerk and commissioner of the United States circuit court for the northern district of California, and the affidavits of his two witnesses were also made before the same officer.

That portion of the oath, namely, "entered or filed upon, is erased, and in lieu thereof are inserted the words, "acquired title."

Upon presentation of said papers the register rejected the same for the reason that they were "not accompanied with an affidavit of the form prescribed by the Department under the provisions of the act of August 30, 1890, limiting applicants to three hundred and twenty acres."

Feely appealed, alleging that "the act of filing does not operate to exhaust the rights of an applicant, but that to exhaust such rights it is necessary that title should be acquired," and you held that if the applicant had "any entry or filing in existence uncanceled, he cannot be permitted to make any other entry or filing that with those in existence would make more than three hundred and twenty acres." You further held that the declaration was fatally defective, because the papers were taken before "a commissioner of the U. S. circuit court for northern district of California at his office in San Francisco, which is contrary to the express ruling of the Department in the case of Edward Bowker (11 L. D., 361), construing the act of May 26, 1890 (26 Stat., 391).

Counsel for appellant insists that said act of May 26, 1890, should receive a reasonable construction; that it was intended to be remedial in its operation, so that a desert land affidavit may be made "before a court commissioner of the United States circuit court for the county in which the land is situated, and if the affidavit submitted under said act of August 30, 1890, was not sufficient, you "should have required or allowed the applicant to amend by stating what filings or entries he had made since the date of said act."

It does not appear that the applicant offered to amend his affidavit under said act of 1890, and the erasure and interlineation above mentioned show that he deliberately changed the form of affidavit prescribed by you for the guidance of the local officers under the direction of the Secretary. (See 11 L. D., 296–297.)

In the case of Edward Bowker (*supra*) the provisions of said act of 1890, relative to the making of final proofs "and all other affidavits required under the homestead, pre-emption timber culture and desert land laws" were carefully and elaborately considered by Mr. Secretary Noble, and he held that "the law does not authorize the making of such proofs and affidavits before such commissioner outside of the

county and State or district and Territory in which the lands are situated, unless the lands are situated in an unorganized county, which case is otherwise fully provided for by law."

Upon a careful consideration of the whole record, I am unable to perceive any error in your decision, and it is therefore considered that the same must be, and it is hereby, affirmed.

RAILROAD LANDS—ACT OF MARCH 3, 1887.

UNION COLONY *v.* FULMELE, ET AL.

The right of purchase under section 5, act of March 3, 1887, is not dependent upon the qualifications of the immediate grantors of the company, but may be exercised by any subsequent bona fide purchaser of the land who possesses the requisite qualifications.

The second proviso to said section applies only to lands settled upon in good faith after December 1, 1882, and prior to the passage of said act, and an application to enter filed within said period will not operate to except the land covered thereby from the right of purchase conferred by said section upon transferees of a railroad company.

Under the right of purchase accorded to a transferee of a railroad company by said section, patent may issue to such purchaser, his heirs, or assigns, for such tracts as he may make payment to the United States, without respect to the acreage embraced therein, even though it may be less than a legal sub-division. The patent in such case should contain a recital that it is issued under the provisions of said section.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 10, 1893.

The land involved in this controversy is the S. ½ of Sec. 3, T. 5 N., R. 65 W., Denver land district, Colorado, and is within the limits of the grant to the Denver Pacific, now known as the Union Pacific Railway Company. It was, however, excepted from said grant, by reason of existing pre-emption filings at the date of the filing of the map of definite location of the railroad.

These filings were made by Mary Butts and Matthew J. Alexander, the former having filed for the SE. ¼ of said section on the 19th of September, 1856, and the latter for the SW. ¼ on the 2d of November, of the same year.

On the 23d of September, 1885, Jacob Fisher applied to make homestead entry for the SW. ¼ of said section, and on the 1st of October he applied to make timber culture entry for the SE. ¼. Both applications being rejected, he appealed. His appeal was decided by the Department on the 8th of September, 1888, wherein it was held, as already stated, that said land was excepted from the grant to the railway company. The applications of Fisher were thereupon returned for acceptance, and his entries allowed, in accordance therewith, on the 30th of October, 1888. Both said entries were afterwards canceled, upon re-

linquishments executed by him; his homestead entry on the 27th of April, 1889, and his timber culture on the 1st of August, of the same year.

On the day that Fisher's homestead entry was canceled, John T. Fulmele made homestead entry for that tract, and George J. Brovo made a similar entry for the tract covered by his timber culture entry, on the day of its cancellation. Both Fulmele and Brovo established their residence upon the tracts for which they made entry, within six months after making the same.

The evidence in the case shows that the land in question, together with a large quantity of other land, was conveyed by the railroad company, on the 13th of April, 1870, to Horace Greeley, in trust for The Union Colony of Colorado, and that Greeley conveyed it to the Colony Company on the 19th of the following month.

According to its certificate of incorporation, The Union Colony of Colorado was incorporated in April, 1870, under the provisions of Chapter 18, of the R. S. of Colorado, and amendments thereto, approved February 11, 1870. Its capital stock was $25,000, divided into 5,000 shares of $5.00 each. Its object: manufacturing, mining, constructing and maintaining ditches and canals, building schools and houses of public worship, and inducing immigration to Colorado.

The colony divided the whole of section 3 into lots of twenty acres each, and sold such lots to its members. Among the purchasers of lots were Joel E. Davis, Fred W. Dille, Charles Camp, Robert Hale, and others. Davis afterwards caused to be published notice of his intention to make proof of his right to purchase the W. ½ of the SE. ¼ and the E. ½ of the SW. ¼ of said section, under the act of March 3, 1887, (24 Stat., 556). The notice was addressed to Jacob T. Fisher, John T. Fulmele, The Union Pacific Railway Company and whom it may concern, and named July 20, 1889, as the day for making such proof.

He made his proof on the day appointed, without objection, but on the 20th of August Fulmele and Brovo filed protest against the admission of such proof, made oath that they had no notice of his application until after his proof was made, and asked to be allowed to submit evidence in support of their entries and claims.

On the 10th of September, 1889, the local officers dismissed the protests of Fulmele and Brovo, and recommended the cancellation of their entries, as to the tracts included in Davis' application. The case coming before you upon appeal, you directed the local officers to appoint a day for a hearing, and to notify all parties in interest. Such hearing took place on the 4th of May, 1891, and on the 11th of September of that year, the local officers decided in favor of the transferees of the railroad company, and recommended that the homestead entries of Fulmele and Brovo be canceled.

From this decision the homestead claimants appealed, and on the

27th of February, 1892, you rendered a decision in the case, in which you held their entries for cancellation, and concluded by saying:

I am, therefore, of the opinion that it is in accord with the letter and spirit of the provisions of section 5, of the act of March 3, 1887, for the Colony Company to make proof and payment for the land; and, should this decision become final, it will be allowed to do so, upon the cancellation of the entries of Fulmele and Brovo.

From such decision by you, Fulmele and Brovo appealed to the Department. Their appeals are separate, but the same attorney appears for both, and the errors complained of, nineteen in number, are the same in each notice.

To properly determine the rights of the respective parties to this controversy, it is necessary to ascertain and construe the provisions of section 5, of the act of March 3, 1887, (24 Stat., 556). The chapter in which said section occurs is entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes." The section and proviso referred to are as follows:

That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: *Provided*, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: *Provided further*, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

That the lands in question were excepted from the grant to the railway company, was determined by the Department, in its decision rendered upon the appeal of Fisher, on the 8th of September, 1888. Long prior to that time, however, the company had sold the land to Horace Greeley, trustee in trust for The Union Colony of Colorado. The deed from the company to Greeley was dated April 13, 1870, and on the 19th of the next month Greeley conveyed the lands to The Union Colony of Colorado. The colony divided its purchase of 9,324.06 acres into twenty-acre lots, and sold said lots to its members. Most of the deeds by the colony were made in 1871, or within a year or two thereafter.

On the 13th of February, 1889, your predecessor, with the approval of the Department, issued a circular of instructions under the act of March 3, 1887, (8 L. D., 348). In reference to the fifth section of said

act, it was announced that applicants to purchase under said section would be required to publish notice of such intention, and that their proof must show:

1. That the tract was of the numbered sections prescribed by the grant.
2. That it was coterminous with constructed parts of said road.
3. That it was sold by the company to the applicant, or one under whom he claims, as a part of its grant.
4. That it was excepted from the operation of the grant.
5. That at the date of said sale it was not in the *bona fide* occupancy of adverse claimants under the pre-emption or homestead laws, whose claims and occupancy have not since been voluntarily abandoned.
6. That it has not been settled upon subsequent to the first day of December, 1882, by any person or persons claiming the right to enter the same under the settlement laws.
7. That the applicant is, or has, declared his intention to become a citizen of the United States.
8. And that he, or one under whom he claims, was a *bona fide* purchaser of the land from the company.

It was announced that the proof upon these points being found satisfactory, entry would be allowed, and certificate and receipts issued, reciting that the entry was made in accordance with the fifth section of the act of March 3, 1887, but that no entries would be allowed under said section until it should be finally determined by the Department that the land was excepted from the railroad grant.

On the 1st of August, 1890, you suggested to the Department that under the act of March 3, 1887, and the instructions of February 13, 1889, title to land might be secured by a bona fide purchaser from the original purchaser, in cases where the original purchaser was not qualified to acquire title to public land, and you recommended that said instructions be amended so as to prevent the grantee of the original purchaser from obtaining title, except in cases where the original purchaser was qualified to purchase from the government. The Department declined to act upon your suggestion, and in a letter addressed to you, under date of August 30, 1890, expressed the opinion that by the passage of the act of March 3, 1887, it was in no sense the intention of Congress to confirm sales made by the railroad company, but rather to afford citizens, or persons having declared their intention to become such, who were bona fide purchasers of land to which the company had no title, a means of acquiring title from the government, to the exclusion of settlers or purchasers under the general land laws.

The reply of the Department to your letter and recommendation, is published in 11 L. D., 229, and the substance of the views expressed, are condensed in the following syllabus:

The right of purchase from the government, conferred by section 5, act of March 3, 1887, is not limited to the immediate purchaser from the company, but may be exercised by any bona fide purchaser of the land, who has the requisite qualification in the matter of citizenship; and if the applicant is not the original purchaser from the company, it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers may have been.

Between the first day of December, 1882, and the passage of the act of March 3, 1887, neither Fisher nor Fulmele or Brovo made actual settlement upon the land. It is true, that prior to the last named date Fisher applied to make entries for the tracts, but such applications did not bring the land within the second proviso to section 5 of said act, and exempt it from purchase by the grantees of the Union Colony. That proviso applied only to lands which were settled upon subsequent to the first of December, 1882, and prior to the passage of the act of March 3, 1887, by parties claiming in good faith a right to enter the same under the settlement laws. Union Pacific Ry. Co., *et al.*, *v.* McKinley (14 L. D., 237). To hold that Fisher's applications to enter, made in 1885, were equal to entries at that date, affords no relief, as the proviso protected only settlement rights.

It has been seen that Davis, Camp, and the other purchasers of portions of the land in controversy, received their deeds from the Union Colony more than a dozen years before Fisher applied to make entries therefor, the colony having received its deed from the railroad company at a still earlier date. My conclusion therefore is, that such lot owners, upon making the showing required by section five, of the act of March 3, 1887, may purchase the land owned by them, under said act.

This disposes of all questions necessary to consider in the case, except that as to how and by whom patent to the land is to be obtained. The homestead and pre-emption laws expressly provide that under their provisions, patent shall issue to, or in the name of, the party making the entry or location, no matter who may be the real owner of the land when patent issues, except in case of the death of such party before making proof. Those laws also provide that entries and locations under their provisions, shall be made in conformity to the legal subdivisions of the public lands, and after the same have been surveyed, and shall not embrace more than one hundred and sixty acres, and that the recitals and description of land in patents shall in all cases follow the register's certificate of entry or location. Under these laws, therefore, patent can issue only for tracts containing one hundred and sixty, one hundred and twenty, eighty, or forty acres.

The act of March 3, 1887, however, contains no such provisions. That act provides that any person who makes the proof required by the fifth section thereof, as herein quoted from the circular of February 13, 1887, shall be allowed to make payment to the United States for said lands at the ordinary price for like lands, *and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns.* Title to the land may have passed through any number of transferees, before vesting in the bona fide purchaser who makes the proof and payment, but patent shall issue to such purchaser, his heirs or assigns.

Another distinction between the homestead and pre-emption laws and the act of 1887, is that while the former limit the number of acres

for which patent may issue, to not more than one hundred and sixty, and not less than forty, there is no such limit to the act of 1887. For what land the purchaser has bargained he may make payment to the United States at the ordinary price for like lands, and thereupon patent shall issue therefor. Under these circumstances, I am of the opinion that the provisions of the homestead and pre-emption laws as to the quantity of land to be entered do not necessarily apply to lands purchased under the act of March 3, 1887, and that under its provisions patents may issue to the purchaser, his heirs or assigns, for such tracts as he has made payment to the United States. In reference to the certificates and receipts issued for such lands, the instructions of February 13, 1889, provided that they should recite the fact that they were issued in accordance with the fifth section of the act of March 3, 1887. I think the patents issued for said lands should contain a similar recital.

The certificate of incorporation of the Union Colony of Colorado was dated April 13, 1870, and was recorded on the 15th of that month. By the terms of said certificate, the colony was to exist twenty years. I find no intimation in the evidence, or the briefs and arguments filed in the case, that the term of existence of the colony has ever been extended. This being so, it ceased to exist nearly three years ago. It is certainly, therefore, not in a condition to make the proof required by the act of March 3, 1887, even if a corporation could make proof for land which, at the time of making proof, it did not own. Then, too, one of the matters required to be shown by the applicant for a patent, was that he is a citizen of the United States, or had declared his intention to become one. There are several obstacles, therefore, it seems to me, in the way of your decision being carried into effect. The question of the citizenship of the original purchaser is disposed of in the instructions cited from 11 L. D., 229, but the question of the non-existence of the corporation, and the non-ownership of the land, still remain, and, I think, render a compliance with the provisions of your decision impracticable.

Attorney General Garland, in his opinion addressed to the Secretary of the Interior, on the 17th of November, 1887, in reference to the provisions of the act of March 3, of that year, (6 L. D., 272), after construing each section separately, concluded that the whole scope of the act was remedial, and said:

> 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.

The Department immediately issued instructions in accordance with such opinion, (6 L. D., 276), but neither in those instructions, nor in any since issued, nor in any decisions rendered, has it been called upon to determine the question whether the purchaser could, or could not

receive patent from the government for a tract of land embracing a less number of acres than constitutes a legal subdivision.

Purchasers under the homestead and pre-emption laws cannot receive such patents, because those laws expressly prohibit their issue, but, as already seen, the act of March 3, 1887, contains no such provision. It provides that when a purchaser from a railroad company shall make payment for the land to the United States, patent therefor shall issue to such purchaser, his heirs or assigns.

In the case of the Union Colony, its large purchase from the railroad company was divided into farms of twenty acres each, by running a line through the centre of each forty-acre tract. By this means, each member of the colony could acquire a farm and home for himself, however poor he was in this world's goods. Many hundred thousand dollars were expended by these small farmers, in building large and small irrigating ditches, to cover the land, and render it possible to raise crops. After over twenty years of labor, in reclaiming these trackless and barren plains, these small farmers now live upon well improved farms, surrounded by all the advantages of civilization.

The colony purchased the land from the railroad, and the small farmers purchased from the colony. They are bona fide purchasers, and have made payment for the land to the United States, at the ordinary government price for like lands. They now ask that the government comply with the act of Congress passed for their relief, and issue patents for the land. Very likely the man who has a twenty-acre farm could not enlarge it if he wished. He may not have the means to purchase more, and his neighbors may not be willing to sell. Shall it be said that because he has but twenty acres, and can get no more, the government will not allow him to perfect title to the land for which he has paid? I think such was not the intent of the law under consideration. Certainly, such is not its language, for it says that upon payment being made to the United States for said lands, *patents shall issue therefor*.

That the act is remedial, no one will question, and in Potter's Dwarris on Statutes, page 231, it is said:

> A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule, a remedial statute ought to be construed liberally. Receiving an equitable, or rather a benignant, interpretation, the letter of the act will be sometimes enlarged, sometimes restrained, and sometimes it has been said, the construction made is contrary to the letter: which should be read—*ultra* the letter, and confined to ancient statutes.

Giving such a construction to the act in question, and, I think, without violating either its letter or spirit, my conclusion is, that Davis has shown himself entitled to patent for the land for which he made proof, and that the other parties to the controversy, who are claimants under the act of March 3, 1887, will also be entitled to patent, upon making the proof required by said act.

That portion of the decision appealed from, which canceled the homestead entries of Fulmele and Brovo, is affirmed, while that portion which allowed a corporation which does not exist, to secure a patent for land which it long since sold, is reversed.

PRE-EMPTION ENTRY—SECTION 2260 R. S.

TYLER *v.* VAN LEUVEN.

The disqualification imposed by the second clause of section 2260 R. S., upon a settler who removes from land of his own to reside on the public land, cannot be avoided on the plea that the land embraced within the pre-emption claim was not in fact "public land" at the date when the settler established his residence thereon.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 11, 1893.

On August 10, 1889, David Van Leuven filed his declaratory statement (No. 2111) for the W. ½ of the SW. ¼ and the S. ½ of the NW. ¼ of Sec. 27, T. 49 N., R. 37 W., at Marquette, Michigan, alleging settlement on December 11, 1888.

On the same day Emma J. Tyler made homestead entry (No. 5256) of the same tract, alleging that she had been an actual settler thereon since the sixth day of April, 1889.

This land was included in the primary limits of the grant to the State of Michigan by the act of June 3, 1856 (11 Stat., 21), to aid in the construction of a railroad from Marquette to Ontonagon, and was forfeited to the United States by the act of March 2, 1889, (25 Stat., 1008).

On January 25, 1890, Van Leuven filed notice of his intention to make final proof in support of his claim before the local officers on March 19, 1890, when his final proof was submitted. Miss Tyler protested against its allowance, and a hearing was had.

On May 26, 1890, the local officers found "that the land ought to be awarded to the earliest bona fide settler thereon, and that Van Leuven was living upon the land when it was restored to settlement by the act of March 2, 1889, "and that he ought to be, and hereby is, awarded priority of right thereto as first settler."

On appeal, by letter of March 15, 1892, you reversed the decision of the local officers, rejected Van Leuven's final proof, and held his filing for cancellation, on the ground that he quit or abandoned his residence on land of his own to reside on the public land in question in the same State, in violation of the second inhibition of section 2260 of the Revised Statutes, citing the case of Lehman *v.* Snow (11 L. D., 539). An appeal has been taken to this Department.

The facts are fully stated in your decision to which reference is made.

An examination of the evidence satisfies me that the conclusion reached by you is correct.

It is contended, however, that the land in question was within the primary limits of the grant to the State of Michigan by the act of June 3, 1856. That at the date when Van Leuven settled thereon the title to said land was vested in said State, and therefore it cannot be properly be regarded as "public land" within the meaning of said inhibitory clause of the statute. That "placing the construction upon the testimony most favorable to the contestant, he abandoned his residence to reside upon the lands of the State of Michigan." This contention is more technical than sound.

As between settlers upon land withdrawn for railroad purposes, priority of settlement may be properly considered. McInnis *v.* Cotter (15 L. D., 583); Tarr *v.* Burnham (6 L. D., 709). But priority of settlement could not be awarded to one who was then disqualified to make settlement. Van Leuven sought to gain advantage over other settlers by going upon this land while it was not open for settlement. He cannot be permitted to claim that the land is "public land" for the purpose of settlement thereon, and at the same time say that it can not be regarded as "public land" for any other use. He settled upon the land in order to obtain a title from the United States, not from the State of Michigan.

He first tendered a declaratory statement for this land on January 30, 1889, at the Marquette land office, which shows that he then regarded it as "public land." On the rejection of his statement he appealed to your office, on the ground that "said lands have not been railroad lands since the joint resolution of 1862, and the relinquishment under it, whereby the said State of Michigan received in lieu other lands elsewhere."

In his final proof made March 19, 1890, he swore that he settled upon the land December 11, 1888, and moved with his family thereon on January 10, 1889, and had lived there since. He thus gained a priority of settlement, and became the first settler, as the land officers found in awarding him the land; but such priority should not be awarded to one disqualified to make such settlement. After making such a record he should be held estopped from claiming that the tract was not "public land," when such claim is made for the sole purpose of enabling him to evade the inhibition of the statute. If he was disqualified to make settlement December 11, 1888, by reason of said inhibition, that disqualification continued.

The fifth section of the act of March 2, 1889, allowed settlers on lands forfeited by that act, who should desire to enter the same under the homestead law, when making final proof, "for the time they have already resided upon and cultivated the same."

This provision gave homestead settlers the same privilege in counting the time of their residence upon forfeited land as if they had settled

upon "public land." Any disqualification on the part of such settler which would prevent his legal settlement on "public land" would attach to him as a settler on lands forfeited by said act, and would subsist as a continuing disqualification when said land was restored to the public domain by said act. Congress did not intend to confer this privilege upon one disqualified to make settlement. The same principle applies in spirit and intent to a pre-emption settler.

Your judgment is affirmed.

MINING CLAIM—PROTEST—HEARING.

TAM ET AL. *v.* STOREY.

On a sufficient showing made by protest the Department has authority to investigate a mineral entry, and order a hearing to determine whether there has been due compliance with the mining law, although it may appear that the adverse location, set up by the protestant was not made until after the entry in question had been allowed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 13, 1893.

On August 13, 1892, the Department granted the application of John L. Tam and John W. Cotter, filed by their attorney, to have certified to this Department the record in the case of their protest against mineral entry No. 2223 of the Single Tax lode claim, Helena, Montana, made by Lucy M. Storey which protest was dismissed by you on April 13, 1892, and their right of appeal denied. By your letter "N" dated August 24, 1892, said record was transmitted, and it is now before me for consideration.

It appears that said Storey, on April 30, 1890, filed her application for patent of said lode claim, based upon a location dated January 1, 1889, and amended location made December 9, same year, which was recorded on January 4, 1890; that the order of survey was made January 18, 1890, and, after due publication, no adverse claim being filed, the local officers allowed said entry on August 7, 1890.

On March 19, 1891, a protest was made against issuing a patent upon said entry by G. W. Nicholson and J. W. Shields, alleging,—(1) that said claim was not duly located; (2) that the applicant had not made the required expenditures for improvements on said claim, and had not expended over fifty dollars in its development; and (3) that there have not been made upon said claim five hundred dollars worth of improvements for its development, or for any other purpose. Accompanying said protest were filed *ex parte* affidavits, in which it is alleged that at date of said application the improvements made by the applicant would not exceed the sum of sixty dollars.

On August 25, 1891, counsel for applicant filed in your office an

amended abstract of title, showing that the applicant had acquired title to the Addie Laura claim, located on April 8, 1889. With said abstract of title was also filed the affidavit of the applicant, in which she swears that she purchased said Addie Laura mine, and afterwards located the same premises as the Single Tax mine; that she should have stated in her application for patent to the Single Tax mine that her title had been acquired by conveyance and location. At the same time four other affidavits were filed, alleging that improvements were made on said claim during the year 1891 to the amount of $250 and one witness swears "that fully one thousand dollars has been expended on said mine in its development."

On November 3, 1891, you denied said protest.

Afterwards, to wit, on April 7, 1892, John L. Tam and John W. Cotter filed a protest, alleging,—(1) that said claimant has failed to locate said claim and fix the boundaries thereof, as required by law; (2) that she had not, at the time and place of posting location notice, discovered a mineral-bearing vein; (3) that she never made or caused to be made or done five hundred dollars worth of work of improvement upon said Single Tax lode claim, or the ground embraced therein; (4) that said protestants are the owners of an undivided interest in the "Single Out" and "Double Out" lode claims, which include the ground embraced in the said Single Tax lode claim, and that said Single Out and Double Out lode claims were duly located by said protestants, "and that the said locations are still subsisting and valid." Accompanying said protest are numerous affidavits tending to sustain said allegations.

You dismissed said protest because the first three allegations contained therein were included in said protest of Nicholson and Shields, and the fourth allegation did not show when said Single Out and Double Out locations were made, or that the protestants or their "predecessors in interest" had any title to the ground covered by said locations prior to the appropriation of the same by the Single Tax application when they might have protected their interest by filing adverse claims. In said departmental decision it was stated—

> It is quite evident that if the allegations in said protest be true, patent ought not to issue on said entry, and under the authority of the rulings of this Department in the cases of Bodie Tunnel and Mining Company *v.* Bechtel Consolidated Mining Company *et al.* (1 L. D., 584–590), Bright *et al. v.* Elkhorn Mining Company (8 L. D., 122–126), Weinstein *et al. v.* Granite Mountain Mining Company (14 L. D., 68), the protestants should have a hearing before this Department upon their appeal from the rejection by you of their protest, asking that the allegations therein be investigated.

The record has been carefully examined, and there is a great discrepancy between the statements in the affidavits submitted by said protestants and those submitted by the claimant with her amended abstract of title. If the former be true, as stated in said departmental decision granting the writ of certiorari, patent ought not to issue on said

entry. This conflict of statements in said affidavits cannot well be determined without a hearing before the local officers, where the witnesses may be brought face to face and be subject to cross-examination.

If it be conceded that the protestants did not make their locations until after said entry was allowed, still the Department has authority to order a hearing to determine whether there has been due compliance with the mining law. Alice Placer Mine (4 L. D., 314); Sweeney *v.* Wilson *et al.* (10 L. D. 157); Devereux *et al. v.* Hunter *et al.* (11 L. D., 214); Apple Blossom Placer *v.* Cora Lee Lode (14 L. D., 641).

In the case of Lee *v.* Johnson (116 U. S., 48, 52), the supreme court said—

> So, in the present case, the Secretary of the Interior came to the conclusion, from the evidence returned by the register, that Johnson must be considered not as a *bona fide* homestead claimant, acting in good faith, but as one seeking, by a seeming compliance with the forms of law, to obtain a tract of land for his son-in-law, who had previously exhausted his homestead privileges, observing that the element of good faith is the essential foundation of all valid claims under the homestead law. Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands.

In the case of Knight *v.* United States Land Association (142 U. S., 161–181), the late Justice Lamar, speaking for the court, said—

> 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.

In the exercise of this well recognized supervisory authority, in my judgment, the case at bar is one that requires a further investigation to ascertain whether the requirements of the mining law have been duly complied with by the claimant.

You will accordingly direct the local officers to duly order a hearing, at which the protestants will have an opportunity to show that the claimant has not complied with the requirements of the mining law, and she will be allowed to furnish testimony showing the validity of her said entry.

Your decision denying the application for a hearing is reversed.

PRACTICE—APPEAL—NOTICE.

EADS *v.* HARTSHORN.

One who appeals to the Department, from a decision of the General Land Office affirming an order of the register and receiver rejecting an application to enter, is not required to give notice of such appeal to a subsequent applicant for the same tract, whose application has been suspended during the pendency of the proceedings on appeal.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 14, 1893.

On October 3, 1892, you transmitted the papers in the matter of the appeal of Richard Hartshorn from your decision of July 12, 1892, sustaining the action of the local officers in rejecting his application to make homestead entry of the SW. ¼ of Sec. 13, T. 13 N., R. 4 E., Oklahoma land district.

In your decision, after rendering judgment as above, you added the following:

On November 28, 1891, one Joseph L. Eads presented an application to enter the SW. ¼ of Sec. 13, T. 13 N., R. 4 E., which was suspended pending action on Hartshorn's application. On January 11, 1892, J. A. Wilson presented an application for the same tract, which was suspended pending action on the prior applications of Eads and Hartshorn. You will hold said applications of Eads and Wilson (which are herewith returned) in abeyance until final action is taken on the Hartshorn application.

The Department is now in receipt of a motion filed by counsel for Eads, asking that Hartshorn's appeal be dismissed—

For the reason that said Hartshorn did not give said Eads any notice of said appeal. (See 11 L. D., page 621, case of Horace H. Barnes.)

The case above cited suggests no reason why Hartshorn's appeal should be dismissed. Said case held that one Burrows was, "by reason of his subsisting entry," entitled to notice of Barnes' appeal. In the case at bar, Eads has no subsisting entry, and therefore Hartshorn was not required to serve him with notice of appeal. (Hiram Brown *et al.*, 13 L. D., 392.)

The motion to dismiss is therefore overruled.

HOMESTEAD—COMMUTATION—RESIDENCE.

FRANCIS A. LOCKWOOD.

The fourteen months of residence required of a commuting homesteader by section 2301, R. S., as amended by section 6, act of March 3, 1891, must be computed from the date of the original entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 15, 1893.

On March 18, 1891, Francis A. Lockwood filed in the land office at Waterville, Washington, his application (No. 150) for the homestead

entry of the NW. ¼ of the NW. ¼ of Sec. 8, and the N. ½ of the NE. ¼ and the NE. ¼ of the NW. ¼ of Sec. 7, T. 28 N., R. 25 E., W. M.

On August 12, 1891, he gave notice of his intention to make final proof in support of his claim before the local office on September 23, 1891, which notice was duly posted and published.

On September 23, 1891, he made final proof, showing that he settled on said land about the middle of May, 1890, when he built a house thereon, into which he moved with his wife and four children on June 2, 1890; that he had lived there thereafter, and broken forty acres of land, dug two wells, set out thirty fruit trees, and made over a mile of fence, all of the estimated value of from $450 to $500.

His final proof was approved, and on said September 23, 1891, he was allowed to make commuted cash entry (No. 271) of said land, under section 2301 of the Revised Statutes, and received final certificate and receipt therefor.

The papers were transmitted to your office, and by letter of May 12, 1892, you suspended said entry "for the reason that proof was not made in conformity with section 6 of the act of March 3, 1891, which requires fourteen months residence from date of entry," and directed that when the entryman could show such residence he should be permitted to submit supplemental proof without re-advertising.

From this decision an appeal has been taken to this Department.

The ground upon which it is based is sufficiently set forth in the fifth specification, as follows:

> Error not to have held that claimant herein, by his actual settlement, residence, cultivation and valuable improvements on said land prior to act of March 3, 1891, initiated his claim thereto, and had acquired vested rights in and to said land prior to the date of said act, under and by virtue of the homestead laws then existing. Sec. 3, Act May 13, 1880.

The sixth section of the act of March 3, 1891 (26 Stat., 1095), amends section 2301 of the Revised Statutes so that it reads as follows:

> Sec. 2301. Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section 2289, from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months.

Before amendment this section read:

> Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section 2289, from paying the minimum price for the quantity of land so entered, at any time, before the expiration of the five years, and obtaining a patent therefor from the government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights.

Section 2289, above referred to, provides that certain qualified persons "shall be entitled to enter one quarter section or a less quantity of unappropriated public lands."

When Lockwood filed his application to enter said land on March 18, 1891, he accompanied it with the usual affidavit that he had filed his application "for an entry under Section 2289, Revised Statutes." He thereby "availed himself of the benefits of section 2289" within the meaning of said section 2201, above cited, and he did so after the passage of the act of March 3, 1891. His case comes, therefore, within the express terms of said section 2301, as amended by said act. He could not legally make final proof and purchase the land until "after the expiration of fourteen calendar months from the date of said entry."

It is contended that by the third section of the act of May 14, 1880 (21 Stat., 140), his residence relates back to the date of his settlement. That section provides as follows:

Sec. 3. That any settler who has settled, or shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States Land Office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he had settled under the pre-emption laws.

A settler under the pre-emption laws on surveyed, unoffered land has three months after settlement thereon within which to put his claim on record, and in the application of the provisions of this act to the right of commutation as it stood under section 2301, prior to amendment, it has been held by the Department that the purchaser is entitled to have his period of residence computed from the time of settlement. Clark S. Kathan, 5 L. D., 94. The reasons, however, that led to such holding do not reach the question as presented under the law as it now stands.

The only limitation in time within the five year period, placed on the right of commutation originally, is found in the words "on making proof of settlement and cultivation as provided by law, granting pre-emption rights," and under this provision the Department very properly allowed the commuting homesteader credit for residence from the date of his settlement, in view of the enlarged settlement rights conferred by the act of 1880, and the fact that the period of residence required under the pre-emption law was not statutory but a departmental regulation, established to secure an assurance of good faith on the part of the settler.

But section 2301, as amended, contains a specific requirement in the matter of residence that removes the question now at issue from the line of reasoning adopted in the Kathan case. The right of commutation can now only be exercised "after the expiration of fourteen calendar months from the date of such entry . . . . upon making proof of settlement and residence and cultivation for such period of fourteen months." The terms "so entered" and "such entry" in the section taken and accepted in their ordinary sense, as used in the statutes and employed in the land department, can only mean the recorded claim

of the settler made upon due application and payment of the requisite fees, and it is from the date of this "entry" that the period of residence must now be computed if "settlement" is not accepted as the equivalent of such "entry." It is true that the Department has in some cases, for the protection of a settlement right, held that it was, under the act of 1880, the initiation of an entry, and as such to be included therein, but no such question is involved herein. The general right of the homesteader to hold the land by virtue of his settlement and without an entry, may be conceded without recognizing the special privilege to submit commutation proof.

Now, as heretofore, the homestead settler who takes a claim and lives thereon five years is entitled to credit for residence from the date of his settlement, but if he desires to commute he must show a period of fourteen months' residence from the date of his entry. The language of the statute permits no other conclusion. In framing its provisions it was the evident purpose of Congress to impose such restrictions upon the right of commutation as to ensure the establishment of an actual residence on the land, and this purpose is all the more apparent when it is remembered that the same act that amended this action repealed the pre-emption law outright, thus limiting the exercise of the settlement right to the homestead law with its longer period of residence. Your judgment is therefore affirmed.

RELINQUISHMENT—FRAUD—APPLICATION TO ENTER.

HAMILTON *v.* HARRIS ET AL.

A charge of fraud in procuring a relinquishment will not be inquired into as between a contestant who files said relinquishment and another party having possession of a prior relinquishment that is not filed, where on the charge made by the contestant and the showing thereunder the entry under attack should be canceled.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 15, 1893.

The land involved in this appeal is the NW. ¼ of Sec. 28, T. 28 N., R. 5 E., Seattle, Washington, land district.

The record shows that Sarah B. Dunlap filed pre-emption declaratory statement for said land August 21, 1889, alleging settlement June 1, 1889. On June 25, 1890, Charles Ott made homestead entry of said tract. On October 18, 1890, Mrs. Dunlap offered final proof before the clerk of the probate court at Snohomish, where Alexander Hamilton appeared and filed a protest against her proof, alleging that she had failed to comply with the law in the matter of residence on and cultivation of the land. A hearing was had before the local officers, January 15, 1891, and from the record on April 28, 1891, held that the

charges were sustained and recommended that the final proof be rejected. They also decided that—

> It further appears that one Charles Ott made homestead entry No. 13,384 on June 25, 1890, for said tract, and that this protest was filed by Alexander Hamilton for his benefit, he having no means of any nature whatsoever to carry on a contest. We are therefore of the opinion that the land should be held subject to the homestead entry of the said Charles Ott, and that the pre-emption declaratory statement of Sarah B. Dunlap should be canceled.

It is not shown by the record when the parties received notice of this decision or whether it was ever served on them. No appeal seems to have been taken.

On February 26, 1891, and before the decision in the local office had been given, Sarah B. Dunlap filed an affidavit of contest against the entry of Ott, alleging failure to settle upon and cultivate said land, and, upon information and belief, that he made said entry for speculative purposes and has sold all his right to the same for a valuable consideration. There is a pencil memorandum on this paper: "Held subject to contest Hamilton *v.* Dunlap."

On May 5, 1891, Hamilton presented his soldiers' declaratory statement for said land and the same was "refused because the tract applied for is included in the homestead entry 13,384 of Charles Ott, and also in the pre-emption declaratory statement 14,663 of Sarah B. Dunlap, on which final proof has been made and which is now pending on appeal from office decision in the case of Hamilton *v.* Dunlap." Hamilton appealed.

On May 11, 1891, Mrs. Dunlap filed an "amended" affidavit alleging, in addition to the other charges, that Ott has relinquished his right and that she is not the purchaser of and has no interest in said relinquishment.

On May 12, 1891, notice of contest was issued on the charges made by Mrs. Dunlap, fixing the date of hearing July 8, following, and on May 22, Ott accepted service of the same.

On the same day Mrs. Dunlap presented her application to make homestead entry for said tract, together with the relinquishment of Charles Ott made and executed that day. This is endorsed: "Presented May 22, 1891, and suspended pending appeal of Alex. Hamilton from refusal of his soldiers' declaratory statement." Mrs. Dunlap appealed.

There is in the files another relinquishment from Ott dated and acknowledged October 16, 1890. There is no file mark on this but the register reports that it was presented by Hamilton and filed May 26, 1891, and at the same time he presented affidavits of Ott and wife and himself. It is charged in the affidavit of Ott that Mrs. Dunlap procured his relinquishment by fraudulent representations; that she stated to him that the case of Hamilton *v.* Dunlap had been decided in her favor and that she desired the relinquishment simply to avoid delay

in getting an order from the General Land Office canceling his entry. He says:

that because of his poverty he was unable to bear the expense of a protest and hearing against the said Sarah B. Dunlap for which reason he, on the 16th day of October, 1890, for a valuable consideration executed a relinquishment of his said homestead and delivered the same to one Alexander Hamilton; that the said Hamilton thereupon filed a protest against the allowance of a proof by the said Dunlap.

Hamilton in his affidavit says:

That said relinquishment was duly made by said Ott on October 16, 1890, and delivered to affiant—he—said affiant paying a valuable consideration therefor, and has since said last named date been in his possession.

In the consideration of Hamilton's appeal from the action of the local officers in rejecting his application to file soldiers' declaratory statement, you considered the entire record in the case including Mrs. Dunlap's appeal from the suspension of her homestead application, and made an examination of the testimony taken in the protest case of Hamilton *v.* Dunlap, from which there was no appeal, and by letter of November 9, 1891, you decided that the final proof of Mrs. Dunlap in her pre-emption should be rejected, the filing canceled and that matter closed; that Ott's homestead entry should also be canceled, "with the right of Mrs. Dunlap to make homestead entry of the land."

Hamilton filed a motion for rehearing on the grounds: (1) That Mrs. Dunlap well knew when she procured Ott's relinquishment that he "had prior thereto given his relinquishment to this petitioner, and that she well knew the purposes for which said relinquishment had been made," and (2) That she had married and left for parts unknown and that her attorneys were holding said land through "a figure-head to save the land for" her father. By letter of April 23, 1892, you denied said motion on the ground that the showing was not sufficient. Hamilton appealed, assigning as error:

First. The Honorable Commissioner erred in overruling the motion of Alexander Hamilton for a rehearing on the ground that said motion was insufficient and the further ground that rule of practice 78 had not been complied with.

Second. That the Honorable Commissioner erred in his decision November 9th, 1891, over-ruling the decision of the Honorable register and receiver at Seattle, suspending the H. E. application of Sarah B. Dunlap, (now Sarah B. Harris).

Third. The Honorable Commissioner erred in holding that the relinquishment of Ott, procured by misrepresentation and fraud could possibly enure to the benefit of the holder thereof, Sarah B. Dunlap.

Fourth. The Honorable Commissioner erred in holding that Sarah B. Dunlap could file her H. E. until that of Charles Ott had been canceled and the record thereby cleared; that said record could not be cleared by the filing of a relinquishment procured by fraud and misrepresentation.

Fifth. The Honorable Commissioner erred in refusing to allow said Alexander Hamilton an opportunity to show fraud and non-compliance with the law on the part of H. E. claimant Sarah B. Dunlap, now Sarah B. Harris.

Sixth. The Honorable Commissioner erred in overruling the motion to dismiss the appeal of said Sarah B. Dunlap, upon the ground that the order suspending the H. E. application of said Dunlap was not an order from which an appeal would lie.

I do not deem it necessary to go into the old case of Hamilton *v.* Dunlap, only so far as may be necessary to determine the *bona fides* of the parties. That case has long since become *res adjudicata*, and the living question before me now is as to which of these two parties is entitled to enter this land.

It is shown by the testimony that the land in dispute was formerly embraced in the homestead entry of Dennis O'Leary, made April 14, 1888, and as the result of a contest brought by A. A. Dunlap, the former husband of the defendant that entry was canceled. A few days before it was canceled on the records of the local office, however, said Dunlap, while at work on the land, was killed by a falling tree. Prior to his death he had built a house on the land in which he and his wife had resided for some months, and he had made other valuable improvements thereon. After her husband's death Mrs. Dunlap filed her pre-emption declaratory statement for the tract. On May 5, 1891, seven days after the date of the decision of April 28, 1891, Hamilton presented his soldier's declaratory statement which was refused because of the entry of Charles Ott, who, the local officers found, had a subsisting entry on the land. Hamilton's protest against the final proof of Mrs. Dunlap, defeated her pre-emption claim, but it did not clear the record so that his filing could be accepted. The fact that he had Ott's relinquishment in his possession availed him nothing; to be of any virtue it should have been made of record. But there was also Mrs. Dunlap's contest against the land, so that, in no event, could his application have been received.

Now, on May 22, following, Mrs. Dunlap presented to the local officers the relinquishment of the only legal claim that then encumbered the record, and with it her homestead application for the land. The relinquishment by Ott therefore, cleared the record for Mrs. Dunlap's entry subject of course to final action on Hamilton's application. The filing of this relinquishment, together with the affidavits of Ott and Hamilton subsequently filed, certainly make a strong *prima facie* case in favor of Mrs. Dunlap, for the reason that he—Ott—admits under oath, the truth of the allegations in her original and amended affidavits of contest, and it is my judgment that the showing is amply sufficient to warrant the cancellation of Ott's entry. I am therefore of the opinion that Mrs. Dunlap's application to enter the land should be received as of the date it was tendered, subject to her future compliance with the law.

I do not think the charge of fraud against Mrs. Dunlap in procuring Ott's relinquishment is one that the department should inquire into under the circumstances. Ott's entry, or rather his holding the land under his entry, was clearly wrongful, according to his own statement. He says he had no interest whatever in his homestead entry from October 16, 1890. He is complaining of the fraud only so far as

to protect his friend Hamilton who is the real party in interest. Hamilton having obtained no legal right to the land is in no position to ask the Department to aid him.

There have been other motions filed in the course of these complicated proceedings that I have not mentioned, preferring to decide the case on its merits and not discuss the side issues, for the reason that they do not affect directly the substance of the controversy, as I have defined it.

It seems that Charles T. Brewer presented his homestead application for said land January 26, 1892, and the same was refused by the local officers "because the tract applied for is embraced in the application of Sarah B. Dunlap to enter as a homestead and the application of Alexander Hamilton to file a soldier's declaratory statement and now pending." He appealed and you by letter of April 23, 1892, affirmed their action, as it was in accordance with rule 53, Rules of Practice. He also appealed assigning error as follows:

1. It was error to hold that this appellant's application had been properly rejected.

2nd. It was error to hold that said land was not subject to entry by this appellant on the date this appellant applied to enter said land.

3d. It was error to hold that the pending applications of Dunlap and Hamilton, or either of them—was a segregation of the land from the body of the public domain, or a bar to this appellant's homestead application, duly presented for said lands.

4th. It was error to hold that a rule (as rule 53) formulated for the administration of the law will be permitted, in its operation, to defeat a statutory right (H. *vs.* S., 10 Copps, page 158).

Your decision affirming the action of the local officers in the rejection of Brewer's application must be affirmed. There was pending in the local office the applications of both Mrs. Dunlap and Hamilton to enter the land, which were prior in point of time to Brewer's; both had appeals pending at the time and the local officers had reported these facts to you. Rule 53 of Practice, says:

The local officers will thereafter (after forwarding their report) take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

Your judgment is affirmed.

TIMBER CULTURE ENTRY—ACT OF MARCH 3, 1893.

JEROME HEWITT.

A timber culture entryman who complies with the terms of the law for the requisite period, and, at the end of such time, replants the entire tract, may thereupon submit final proof under the fourth proviso of section 1, act of March 3, 1891, as amended by the act of March 3, 1893.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 17, 1893.

This is an appeal by Jerome Hewitt from your decision dated March 24, 1892, affirming the action of the register and receiver in rejecting his final proof submitted October 21, 1891, in support of his timber-culture entry made April 3, 1882, for the SW. ¼, Sec. 26, T. 111 N., R. 65 W., Huron, South Dakota.

It appears from your decision, wherein the facts are fully stated, that from the date of his entry until the spring of 1890, he rendered a reasonable compliance with the law. At that time, under the belief that the statute required 2700 trees per acre, he plowed up the trees which he had cultivated on the land and in 1891, he set out rooted trees, which at the date of his proof were of the requisite size and number.

Your decision and that of the register and receiver both proceed upon the theory that notwithstanding the claimant's manifest good faith and the fact that at the date of proof he had a sufficient number of trees on the land, yet the fact that such trees, (having been set out but a few months before proof) had not been cultivated and protected for the time required by law, was fatal.

Whether or not Hewitt's proof could be accepted as showing a compliance with the timber-culture act of June 14, 1878 (20 Stat., 113), need not now be considered.

The fourth proviso in Sec. 1, of the act of March 3, 1891 (26 Stat., 1095), provides—

> That the preparation of the land and the planting of trees shall be construed as acts of cultivation, and the time authorized to be so employed and actually employed shall be computed as a part of the eight years of cultivation required by statute:

By the act (Public No. 124) making appropriation for sundry civil expenses of the government, approved March 3, 1893, (page 24) such proviso is amended by adding thereto the following words:

> *And provided further,* That if trees, seeds, or cuttings were in good faith planted as provided by law and the same and the land upon which so planted were thereafter in good faith cultivated as provided by law for at least eight years by a person qualified to make entry and who has a subsisting entry under the timber culture laws, final proof may be made without regard to the number of trees that may have been then growing on the land.

Hewitt's acts in connection with the land here in question meet the requirements just outlined and his proof should therefore be accepted.

Your judgment rejecting his proof is accordingly hereby reversed

SOLDIERS' ADDITIONAL HOMESTEAD—ACT OF MARCH 3, 1893.

CHARLES HOLT.

The purchaser in good faith of the certificate of a soldiers' additional homestead right, who locates the same, though said certificate is invalid for such purpose, may perfect title to the land under the act of March 3, 1893, on payment of the government price.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 17, 1893.

I have considered the appeal of W. R. Hill, from your decision of August 20, 1890, holding for cancellation soldier's additional homestead entry No. 21,785, final certificate No. 9,361, in the name of Charles Holt, located by said Hill upon the SW. ¼ of SW. ¼ of Sec. 12, and NW. ¼ of NW. ¼ of Sec. 13, T. 8 S., R. 23 W., Kirwin, Kansas. Said entry or location was made February 15, 1886.

You held the entry for cancellation on the ground that Holt had sold and transferred his right therein for a valuable consideration to another party, prior to the date of entry. Your decision was based upon the ruling of the Department in the case of J. M. Walker (10 L. D., 354), and must be affirmed unless there has been some remedy provided by legislation.

In the act of Congress, "making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes," approved March 3, 1893, it is provided:

That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate.

In the case at bar, I find that under date of April 20, 1883, the Commissioner of the General Land Office certified that Charles Holt was entitled to an additional entry, not exceeding 79.75 acres; hence the entry in question was based upon the certificate of the Commissioner to make the same.

The land in question appears to be occupied for townsite purposes, but the inhabitants decline to assert any claim under the townsite laws, and through the probate judge of the county, have relinquished and waived all rights and claims thereto under said laws. Hence there appear to be no adverse claimants.

The certificate issued to Holt, and located by Hill, is found to be invalid for the reason before stated.

Hill makes affidavit that he is a purchaser in good faith of said cer-

tificate for a valuable consideration, and he would seem to be entitled to the relief provided in the act of Congress, above cited.

The papers in the case are herewith returned to your office for such action as is proper in the premises.

PRACTICE—SECOND CONTINUANCE—DEPOSITION.

LYMAN *v.* MILLER.

Where a case has been once continued on account of the absence of a material witness, and on the day so fixed for trial an application is made for an order to take the deposition of said witness, such application does not supersede the necessity of duly applying for a further continuance.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 17, 1893.

On April 27, 1889, John W. Miller made homestead entry (No. 305) of the S. ½ of the NE. ¼ and the N. ½ of the SE. ¼, Sec. 3, T. 18 N., R. 3 E., at Guthrie, Oklahoma Territory.

On October 9, 1890, Lorenzo B. Lyman filed an affidavit of contest against said entry, alleging that said Miller entered and occupied said land prior to noon of April 22, 1889, in violation of the act of March 2, 1889 (25 Stat., 1006), by his agent, Oscar W. Payne, who secured possession of said land in the forenoon of April 22, 1889, and afterwards surrendered the possession thereof to said Miller, under and by virtue of a prior collusive agreement between them to that effect. Said affidavit was duly corroborated by said Oscar W. Payne.

A hearing was ordered for July 10, 1891, at the local office, when the parties appeared, and said Lyman filed a motion for the continuance of the case for thirty days, on account of the absence of said Payne. Thereupon the case was continued to August 26, 1891.

On the latter date said Lyman filed a motion, with interrogatories, to take the deposition of said Payne. The local officers refused said second motion, on the ground that said application does not comply with the rules of practice, and dismissed the case for want of prosecution.

On September 17, 1891, an appeal was taken, and by letter of March 26, 1892, you affirmed the decision of the local officers. An appeal now brings the case to this Department.

The motions now under consideration should conform to Rules 20 and 21, Rules of Practice.

The affidavit in the second motion makes the following showing, to wit:

That Oscar W. Payne is a material and necessary witness in said contest. That said witness lives in Al-lu-we, Cherokee Nation, Indian Territory. That said witness resides more than fifty miles from this land office, and resides out of this, the Oklahoma Territory.

It is evident that this affidavit does not "show" the existence of the facts required to be set forth in the subdivisions of said Rule 20.

It is contended, however, that said affidavit substantially complies with Rules 23, 24 and 25 of the Rules of Practice. But these rules relate to the taking of depositions, and not to a motion for a continuance.

Rule 21 requires that "the party applying for a further continuance shall at the same time apply for an order to take the depositions of the alleged absent witnesses." While, therefore, said affidavit may be sufficient as an application to take the deposition mentioned, it is wholly insufficient as an application "for a further continuance." The party must apply for a further continuance at the same time that he applies for an order for a deposition. An application for an order to take a deposition only does not supersede the necessity of "applying for a further continuance," and the latter application must be based upon the affidavit required by said Rule 20, so far as the same is applicable.

The sixth subdivision of Rule 20 would not be applicable where the application for a further continuance is accompanied with an application for an order to take a deposition, but the first five subdivisions would seem to be entirely applicable.

The contestant presented no proper ground for the second continuance, and the local officers were justified in refusing said application.

Your judgment is affirmed.

WARRANT LOCATION—SEGREGATION—OFFICIAL NEGLECT.

NEAL *v.* MCMULLIN.

An order of the General Land Office directing the location of a military bounty land warrant upon a specific tract of land operates to segregate said tract from the public domain, and precludes the subsequent acquisition of settlement rights thereon, notwithstanding the fact that the local office failed to enter said order of record as directed.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 18, 1893.

The land involved in this appeal is the SE. ¼, SW. ¼, Sec. 1, and NE. ¼ of NW. ¼, Sec. 12, T. 22 N., R. 3 E., 5th p. m., Ironton, Missouri, land district.

It is shown by the record that on September 24, 1857, Calvin Dickey located military bounty land warrant No. 44,341 (war of 1812, act of 1855), on the SE. ¼ of SE. ¼, Sec. 1; the NE. ¼ of NW. ¼ and NW. ¼ of NE. ¼, Sec. 12, T. 22, R. 3 E.

By letter of August 28, 1860, said location was canceled by your office, "for the reason that the tracts are not contiguous."

On July 31, 1861, you informed the local officers that you were in receipt of a letter from Colman and Barber, of St. Louis, Mo., containing

the warrant, in which it was alleged that it had been sent to them—the local officers—with a request that it might be re-located on the said tracts described as being in Sec. 12, and the SE. ¼ of SW. ¼ of said Sec. 1. You instructed the register and receiver to examine their books and plats and if the above described tracts were found to be vacant and subject to location, to locate the warrant thereon, report their action to you "and forward the duplicate certificate of location to Messrs. Colman and Barber, St. Louis, Missouri."

On May 31, 1887, John McMullin made homestead entry of the tract in controversy.

On June 25, following, you called upon the local officers for a report as to what action had been taken pursuant to your instructions of July 31, 1861, also the status of the land. In reply, under date of June 27, they reported as follows:

The township plat clearly shows that said warrant was located on the NW. ¼ NE. ¼ NE. ¼ NW. ¼, Sec. 12, and SE. ¼ SW. ¼ Sec. 1, Tp. 22 — 3 east, Sept. 24, 1857, but in the tract-book and register of entries an error appears to have been made for the location there reads the same as above with the exception that it describes the SE. ¼ SE. ¼, Sec. 1, instead of SE. ¼ SW. ¼, Sec. 1, and as this erroneous description was reported by the then register and receiver, the Hon. Commissioner by letter of August 28, 1860, canceled the whole of said location "for the reason that those tracts are not contiguous" and the warrant was returned to Messrs. Coleman and Barber of St. Louis, Mo., and the location was so noted at the time of such cancellation on the tract book and register of entries. It appears that Messrs. Coleman and Barber in the year following made an effort to have the said warrant relocated, and correctly so, on the land originally desired the NW. ¼ NE. ¼ and NE. ¼ NW. ¼ Sec. 12, and SE. ¼ SW. ¼, Sec. 1 — 22 — R. 3 east, and the warrant was transmitted to this office with Commissioner's letter of July 31st, 1861, with instructions to the register and receiver concerning it. There is nothing to show either upon the plat, tract-book or register of entries of this office that the register and receiver paid any attention to Commissioner's letter of July 31, 1861, and the cancellation of said location under Commissioner's letter of August 28, 1860, has remained to this date, and the land has remained vacant until very recently.

Upon the application of Geo. A. Neal to have the SE. ¼ SW. ¼, Sec. 1, 22 — R. 3 east restored to market for cash entry and transmitted to you March 29, 1887, by us, we respectfully called attention to the condition of said land as connected with location of said warrant No. 44,341, but by your letter "C" dated April 16, 1887, we were instructed that "by the tract books in your office said tract has never been appropriated in any manner" and to proceed to restore said tract to market in the usual manner."

Before, however, the full notice could be given and public sale made, we were further instructed by your letter "C" dated May 13, 1887, to allow one John McMullen to enter as a homestead the SE. ¼ SW. ¼, Sec. 1,-22-3 east, which was accordingly done as homestead No. 9342 May 31st, 1887, for SE. ¼ SW. ¼, Sec. 1, and NE. ¼ NW. ¼, Sec. 12-22-3 east, and Mr. Neal was instructed not to proceed further in the notice for sale of the land. The NW. ¼ NE. ¼ of Sec. 12-22-3 east, remains unappropriated since the cancellation of said warrant location in 1860.

It seems that one J. C. Tully who formerly owned the land, and who is the grantor of Neal, called your attention to this matter and at his request, you by letter of June 28, 1888, directed the local officers to notify Neal "that if he will make an application for the cancellation of

Mr. McMullin's entry," and submit abstract of title showing title in himself "prompt action will be taken looking to the cancellation of the homestead entry and to the re-instatement of Dickey's location of the SE. ¼ of SW. ¼ of Sec. 1," and the land in said section 12.

Neal accordingly forwarded the abstract and an affidavit in which he states that he "bought in good faith for a valuable consideration the said NE. ¼ of the NW. ¼ of Sec. 12," and has made lasting and valuable improvements thereon. He asked that McMullin's entire entry be canceled. This you did by letter of February 12, 1889. McMullin appealed and by departmental decision of October 23, 1889, your judgment was reversed for the reason that McMullin had not had "his day in court," and it was ordered that the case be remanded and the local officers directed to order a hearing "for the determination of the question as to the superiority of right to the land in question."

You directed a hearing and the contestant George A. Neal filed an affidavit of contest against said homestead entry, alleging as reasons for its cancellation: (1) that the NE. ¼ of NW. ¼ of Sec. 12, embraced in said entry, "was not subject to homestead entry for the reason that the United States government" sold said forty acres on September 24, 1857, to Calvin Dickey, (2) because Dickey and those claiming under him have paid taxes on the same; (3) because said forty acres have come down through regular conveyances from Dickey to affiant; (4) because affiant has valuable and permanent improvements on the same; (5) because McMullin had no right to make the entry of this land because of the ownership and improvements of affiant; (6) because McMullin was a tenant of Neal's at the time of his entry.

The testimony was taken before the county clerk of Ripley county, Mo., and on examination thereof the register and receiver decided that "the superiority of right appearing to us to be in favor of the plaintiff George A. Neal, we render our decision in his favor." McMullin appealed, and you by letter of January 26, 1892, affirmed their judgment, holding his entry for cancellation, whereupon he prosecutes this appeal, assigning as error, substantially, that your decision is against the law and the evidence.

From the testimony taken at the hearing it is shown that Neal erected a two story house with six rooms below, one above, full size of building, and three tenement houses; dug a well sixty feet deep and had less than thirteen acres cleared. All these improvements are on the NE. ¼ of NW. ¼ of Sec. 12. It is not clear when these improvements were made, but it was probably between July, 1886, and March, 1887, as he did not go into possession of the land until June 21, 1886. Neal has never lived on the land; the house was built for a boarding house, for men employed in getting out timber, and I believe that this clearing was done simply by removing the timber, at least it is not shown that it was cultivated or in a condition to be. It is proven that McMullin had worked for the contractors who were getting out timber,

and when he finished with them Neal says he employed him "to clear land on the tract now in contest," for which he paid him; "at that time defendant did not claim the land." As nearly as I can ascertain from the testimony McMullin lives on the forty in Sec. 12, and in a house built by Neal, at least McMullin does not claim to have built any house and Neal says he allowed him to occupy one of his. McMullin has cleared about thirteen acres on the "north forty," and about half an acre on the "south forty." There is no testimony showing that McMullin was a tenant of Neal. The improvements of Neal are estimated as being worth from $900 to $1000, while those of the defendant are said to be worth $150.

If this controversy were considered simply as an ordinary contest between two homestead claimants, I do not think the evidence sufficient to warrant your decision. It seems to me, granting for the sake of the argument that the land was subject to homestead entry at the time McMullin filed his application, that there is no evidence showing a superior right in Neal to the same. His improvements were not placed there either for the purpose of improving the land or making it a home, as contemplated by the homestead law, while those of McMullin, were. So that, unless the land had been segregated, or sold, as claimed by Neal, in 1857, the contest must be dismissed.

There can be no dispute about the action of your office on July 31, 1861, in positively ordering the relocation of this warrant, if, on investigation by the local officers, the land was found vacant; and, as shown by the report quoted, the land was vacant and subject to entry at that time. So it is apparent that it was only through the neglect of the local officers in not complying with your order that the relocation was not perfected. The locator, it seems to me, had done all that the law required him to do when he got the positive order from your office to relocate the warrant, and "it is a well established principle that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him." (Pomeroy *v.* Wright, 2 L. D., 164.)

I think this order had the effect of segregating the land although it was not formally entered upon the record, and the failure of the local officers in this particular should not be construed to defeat the right of the locator. (Linville *v.* Clearwaters *et al.*, 11 L. D., 356.)

The locator of the warrant and the subsequent owners of the land have acted on the presumption that the local officers did as directed, and I think they were justified in doing so.

I do not think it can be seriously contended that McMullin had no knowledge of this order for the relocation of the warrant. The order has remained on file and is therefore a part of the records of the local office with which he is charged with notice.

Your judgment is therefore affirmed.

PRACTICE—APPEAL—TIMBER CULTURE.

REYNOLDS *v.* KENNY.

An appeal which properly names the parties to an action, describes the judgment complained of, and states the grounds of complaint, is sufficiently specific, without giving the number of the entry, or the legal sub-divisions of land involved.

Credit for breaking and cultivation, performed by a previous occupant, may be allowed a timber culture entryman where the land is left in proper condition for the growth of trees, and the entryman in such case is not required to make use of the same until the second year of the entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 18, 1893.

On the 20th of August, 1889, Edward F. Kenny made timber-culture entry for the NW. ¼ of Sec. 9, T. 27 N., R. 10 W., O'Neill land district, Nebraska.

On the 22d of August, 1890, Samuel G. Reynolds filed an affidavit of contest, alleging that the entryman had failed to break or plow, or cause to be broken or plowed, five acres the first year after the date of his entry. The affidavit contained other allegations, but no proof was offered in support thereof.

The hearing took place in October, 1890, and on the 24th of March, 1891, the local offices united in a decision, in which they recommended that the contest be dismissed, and the entry of Kenny stand intact.

Upon appeal, you set said decision aside on the 25th of March, 1892, and a further appeal brings the case to the Department. After the appeal from your decision was taken, you were asked to dismiss the same, because it did not describe the land or entry in controversy, nor set forth in clear and concise terms the errors of which contestee complains. Having no authority to entertain the motion, you transmitted it to the Department, with the other papers in the case.

There is no merit in the objection that the land and the entry were not described in the notice of appeal. An appeal which properly names the parties to the action, and describes the judgment complained of, and states the grounds of complaint, is sufficiently specific, without giving the number of the entry or the legal subdivisions of the land.

Rule 88 of the Rules of Practice requires an appellant, in his notice of appeal, to clearly and concisely designate the errors of which he complains. The Department has repeatedly held that an assignment of error to the effect that the decision below is contrary to the law and evidence, is not sufficient to sustain an appeal, on objection thereto. Underhill *v.* Berryman (15 L. D., 566), and cases therein cited.

This disposes of the first three specifications of error enumerated in the notice of appeal before me, and leaves only the fourth to save it from dismissal. The fourth ground of error is that the case was decided by you upon a point upon which no evidence was given. The specification in connection with this ground of error is that no evidence was

submitted in support of the charge that the claim was held for speculative purposes. The relief prayed for is that your decision may be reversed, and that of the local officers sustained, for the reason that their's "is right, and in accordance with the evidence, the law, and the equities of the case."

While this is not a very strict compliance with Rule 88, I think the errors of which he complains are made sufficiently clear to allow the appeal to be considered. The motion to dismiss is therefore denied.

From the evidence in the case it appears that for several years prior to the entry of Kenny, the land in question had been held by different parties under the timber culture law. The local officers found that at the time Kenny made his entry, there were five or six acres on the claim upon which the ground was mellow, and that there were from two to three thousand trees growing thereon. They also found that "the evidence in this case clearly shows an attempt on the part of the contestant to annoy and disturb the contestee without the shadow of an excuse," and that "the contestant has failed to prove his case in every respect."

This latter statement by the local officers is too broad, as it did affirmatively appear by the evidence that the charge that Kenny did not break or plow five acres of the land within the first year after his entry, was true. That being so, however, would not necessarily call for the cancellation of his entry. It was held in Seifer *v.* Dodd (15 L. D., 9), that "failure to break or cultivate land the first year does not warrant the cancellation of a timber culture entry, where it appears that a former entryman has left the land in a condition of cultivation to be utilized in accordance with the requirements of the timber culture law."

When Kenny made his entry the land was in the condition above described. Between five and six acres had been properly cultivated and planted to trees. In the spring after he made his entry, a prairie fire swept over that part of the country, and burned the trees. The ground still remained mellow, and in good condition to be utilized for the purpose of tree growing, but he waited to see if the burned trees would not revive, or sprout from the roots. Such growth had not taken place at the time the contest was initiated, which was two days after the expiration of the first year after the entry. Before the hearing, however, two or three thousand trees had sprouted, and were growing on about three and a half acres of the five acres formerly planted. These were cultivated, and other land plowed, after the contest and before the hearing. This work was performed, not in consequence of the contest, but in pursuance of a previous intention, as soon as it could be determined whether the burned trees would or would not revive.

In the case of Davis *v.* Monger (13 L. D., 304), it was held that "a timber culture entryman who enters a tract broken by a previous claimant, and in condition to be utilized for timber growing purposes, is en-

titled to credit for such breaking, and not required to use the same until the second year." In that case, as in the one at bar, contest was brought a year and two days after entry, and it was remarked "hence there remained a year lacking two days, in which to make use of the previous breaking." In that decision, cases in support of the doctrine laid down were cited from nearly every volume of the Land Decisions, from one to eleven, and its closing words were: "Your decision is reversed."

I think the facts and circumstances of the case at bar bring it within the rule laid down in the Davis *v.* Monger case, and those therein cited, and that the conclusion reached by the register and receiver, that the contest should be dismissed and the entry of Kenny allowed to remain intact, was correct. The decision appealed from is therefore reversed.

RAILROAD LANDS—ORDER OF RESTORATION—SETTLEMENT.

NEWELL *v.* HUSSEY.

An express provision, in a departmental order restoring to settlement and entry lands previously withdrawn for the benefit of a railroad grant, prohibiting settlement on such lands until their formal opening, precludes the consideration, in determining the priorities of applicants for lands thus restored, of acts of settlement in violation of said order.

In case of simultaneous applications to enter the same tract the privilege should be awarded to the highest bidder.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 20, 1893.

I have considered the case of Fred S. Newell *v.* John J. Hussey, upon the appeals of both parties from your decision dated October 12, 1892, involving the SE. ¼ of Sec. 17, T. 49 N., R. 7 W., Ashland, Wisconsin, land district.

On the 9th day of January, 1893, after the case was appealed to the Department you informed it that the same question involved in this case is involved in about one hundred others pending in your office and you recommended an early consideration of this case; thereupon, on the 10th day of January, it was made special and the attorneys of record duly notified thereof.

Newell and Hussey both applied to make homestead entry for the tract in question, each of them alleged settlement thereon prior to the time said tract became subject to entry. Their applications were received by mail at the local land office before nine o'clock on the morning of November 2, 1891. The register and receiver decided their applications to be simultaneously received, and ordered a hearing to determine the rights of the parties to the tract. The hearing was duly had, at which both parties appeared in person and by their attorneys and introduced their testimony.

The register and receiver rendered their decision in favor of Newell and recommended that his application be allowed. From their judgment Hussey appealed.

On the 12th day of October, 1892, you decided that these claimants are not entitled to any benefits by reason of their settlements on the land prior to its formal opening, and as their applications were simultaneous you directed the local officers to fix a day for selling the tract to the highest bidder of these two applicants in the event that no appeal should be taken from your judgment.

From your judgment both parties appeal.

Before entering upon the discussion of the questions presented by the respective appeals it seems to be proper to clearly define the status of the land involved, before and at the time the inceptive rights of the parties are alleged to have attached to it. Said land is situated within the limits of the withdrawal made for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railroad Company, under the acts of Congress approved June 3, 1856 (11 Stat., 20), and May 5, 1864 (13 Stat., 66). On the 11th day of February, 1890 (10 L. D., 157), Secretary Noble closed the adjustment of the grant for the benefit of said railroad company and made the following order:

> I now direct that all lands under withdrawals, heretofore made, and held for indemnity purposes under the grants for the benefit of the Chicago, St. Paul, Minneapolis and Omaha Railway Company, be restored to the public domain and open to settlement under the general land laws; provided the restoration shall not affect rights acquired within the primary or granted limits of any other congressional grant. This order, however, will not take effect, or be so construed, as to authorize the acquisition or recognition of any rights to said lands, or any portion thereof, until thirty days' notice thereof, through advertisement, shall have been previously given by the officers of the district land offices.

On the 19th day of December, 1890 (11 L. D., 607), Secretary Noble modified this order so that the restoration should not become effective until after ninety days' notice thereof had been given through advertisement, by the district land officers, which advertisement was directed to contain a notice to parties claiming as purchasers under the act of March 3, 1887 (24 Stat., 557), requiring them to submit their proof and make payment in pursuance of the circular of February 13, 1889 (8 L. D., 348–351); and that their failure to submit proof and payment within the time named would be treated as a waiver of claim; and then the Secretary proceeded to say that: "All land not so claimed to be subject to entry under the settlement laws by the first legal applicant at the expiration of the period of the aforesaid ninety days." (See 11 L. D., at page 612). In pursuance of the above directions the register and receiver of the local land office gave the required notice that said lands would be opened for entry on the 17th day of April, 1891. The matter thus rested until the 11th day of March, 1891, when a communication from you dated February 12, 1891, urging a modification of the former directions, was considered by the Department, (see 12 L. D., 259), wherein you stated that:

It is apparent that unless some rule is devised to guide the local officers in disposing of the lands, that, due to the conflicting advice of attorneys, innumerable conflicts will arise and great confusion prevail, and perhaps bloodshed.

Based upon information of like import from the register and receiver and also direct information to the Department, and after reciting the status of the lands and the several orders and steps taken by the land department, looking to their opening to entry and settlement, the Secretary said (ib., p. 260):

The lands in question are reported to be quite valuable. After it was known that the adjustment of said grant would leave a surplus of lands to be opened to the public, numerous attempts were made to obtain preference rights by settlements thereon, and by applications to make homestead entries or to file declaratory statements therefor. In respect to such settlements, the opinion of this Department was expressed in the case of Shire *et al. v.* Chicago, St. Paul, Minneapolis and Omaha Railway Company (10 L. D., 85-88).

In that case the alleged settlements were set up as a reason why certain selections made by the railway company should not be approved, and the rights of the company only being involved, the Department said that settlements made subsequent to the withdrawal of said lands conferred no rights legal or equitable 'as against the railroad company.' It would seem *a fortiori*, that, the withdrawal being made by competent authority, as has been repeatedly held, parties locating within the reservation thus established and in defiance of the prohibitions of lawful authority, can acquire no *rights* as against the government. Such parties are occupants, without right, of the public lands, if not intruders upon the reservation.

It was further found that these lands have great value for the pine timber thereon; that they were likely to be eagerly sought after by many persons, out of which confusion, and perhaps angry conflicts were likely to arise. It was therefore deemed proper by the Secretary to direct that further instructions to the district officers, in relation to the *entry* and *settlement* of these lands, be issued in the hope of avoiding these difficulties and—

Especially with the view to prevent those, who, in violation of law, have invaded the reservation under the pretense of settlement from acquiring preferred rights over others who have waited in an orderly manner the action of the officers of the law, and also to give as fair an opportunity as can be afforded, under the circumstances, to all who desire to make entry of said land.

You were accordingly directed to:

Instruct the register and receiver to give notice by advertisement that the lands in question *will not be open to settlement until Saturday, April* 18, 1891. . . . . On and after April 18, the remaining lands will be open to settlement; and such homestead applications as may then or thereafter be presented will be acted on in the usual way.

The order of March 11, 1891, was subsequently suspended by the Secretary and remained so until the 22d day of October, 1891, when Secretary Noble ordered said lands restored (see letter Misc. Press Copy Book, No. 228, p. 235), and on the same day, as appears from your decision in this case, you carried into effect his order by telegram to the local officers opening the land in question "*to settlement and entry*" on November 2, 1891. You also directed and required the reg-

ister and receiver to "'conform to instructions heretofore given in so far as such instructions are consistent and harmonious with these directions.' In other words, no right would be recognized by reason of settlement prior to the date of opening of said lands."

The specifications of error assigned by the respective appellants are in substance that you erred in finding the facts and in your conclusions of law in the case. It is contended by counsel for Newell that he was the first settler after November 2, 1891, and that he performed the first act of settlement after that date. The testimony shows that both Newell and Hussey were living on the tract on that date; that neither of them made or performed any new act of settlement on the land in question on November 2, 1891. From a careful examination of the testimony in the case, I am satisfied that in your finding of facts there was no error, both of the parties being occupants of the tract before and at the time it was opened for settlement and entry.

Your conclusion of law was that they acquired no priority of right by reason of such settlements. In the case of Smith *v.* Place (13 L. D., 214), it was held that a settlement upon land withdrawn for indemnity purposes confers no rights as against the government, but as between two claimants for such land priority of settlement may be properly considered. In the case of Hobson *v.* Halloway *et al.* (13 L. D., 432), it was held that a settlement and filing on land withdrawn for the benefit of a railroad grant confer no right under the pre-emption law; and where the settler dies prior to the restoration of the land to the public domain there is no interest to descend to the heirs of the claimants.

In the cases of Pool *v.* Moloughney (11 L. D., 197); Shire *et al. v.* Chicago, St. Paul, Minneapolis and Omaha Railroad Company (10 L. D., 85); Geer *v.* Farrington (4 L. D., 410), and many other cases, the doctrine announced in Smith *v.* Place, *supra*, has been followed and applied by the Department, and in cases similar to them in all substantial respects it is now *stare decisis*. The case at bar does not come within the rule announced in those cases as is quite apparent from an examination of the statement of the facts and the uniform directions by the land department, respecting the matter of settlement upon the land in controversy, prior to the date of its opening and settlement, as hereinbefore outlined. In none of said cases had such orders, instructions or directions been given prior to the time when the reservation covering the land was removed, as were specifically given in respect to settlement upon the lands in question in this case. The first formal order for the restoration of these lands was made on the 11th day of February, 1890, at which time there is no claim or pretense that either of these parties was a settler upon the land; both of these parties made their settlement thereafter; that order expressly provided that it would not take effect "or be so construed as to authorize the acquisition or recognition of *any* rights to said lands, or any portion thereof, until thirty days' notice thereof" etc.; these parties therefore went on the land with the

express understanding and with full notice that they could not by settlement or otherwise, acquire "any rights to said lands." Their settlements were made in the first instance in defiance and in violation of the departmental directions in the matter; they have continued to claim settlement rights in face of the departmental directions, given before the land was properly open for settlement, wherein it was said March 11, 1891 (12 L. D., 259): "That *no* priority of right will be recognized as having been initiated or acquired by *settlement* upon any of said land prior to their formal opening to settlement, as hereafter prescribed," etc. These directions were not in any manner modified by the final order opening said lands to settlement.

The question is thus presented whether these parties can acquire rights under their settlements, made in direct violation of the orders, directions and instructions of this Department. These directions are reasonable under the surrounding circumstances; they were evidently made for the attainment of the ends of justice in controversies likely to arise between claimants for these valuable lands when they should be thrown open to disposition under the law; they were intended to give to claimants an equal and a fair show to obtain the land; they were framed for the purpose of preventing any one from taking an unfair and unjust advantage of his fellows in securing title to the lands involved. Under the circumstances presented by the record in the case, it seems clear that the question must be answered in the negative. To hold otherwise would be to put a premium upon the acts of the wrong doer by allowing him as a result of his wrongful and illegal acts to thus obtain a preference over the law-abiding citizen.

Under the circumstances of this case your action, in entirely eliminating the question of settlement, was right and proper. The question of settlement and improvements being eliminated the rights of the parties must necessarily rest upon their applications, which being simultaneous, the tract must be disposed of to the highest bidder, under the rule governing such applications.

For the foregoing reasons the judgment appealed from is affirmed.

SETTLEMENT RIGHTS—ACT OF JUNE 20, 1890.

GILLEN *v.* BEEBE ET AL.

A settlement made on the reservoir lands opened to disposition by the act of June 20, 1890, after the beginning of the calendar day fixed for such opening, and prior to the entry of another, made on the same day for the same tract, defeats the right of the entryman.

A claimant for such lands who, prior to the day fixed for opening the same to settlement and entry, enters thereon for the purpose of selecting a tract and tracing the boundaries thereof, and thus securing an advantage as against others, is disqualified to enter said land, under the provisions of section 3, of said act, although no settlement is made by such claimant until after the lands are subject thereto.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 22, 1893.

The land involved in this controversy is the N. ½ of NW. ¼ and lots 1, 2 and 3, Sec. 12, T. 39 N., R. 6 E., 4th p. m., Wausau, Wisconsin, land district.

The record shows that M. B. Beebe made homestead entry of the NE. ¼ of NW. ¼ and lots 1, 2 and 3, of said section, township and range, December 20, 1890. Upon the application of John Gillen a hearing was ordered to determine his rights as a settler upon the land under his application made January 8, 1891, to enter N. ½ of NW. ¼, and lot 1 of said section, township and range in which application he alleged settlement December 20, 1890, "between the hours of 12 and 1 o'clock, a. m., of that day;" and it appearing from the records of the local office that Samuel H. Norton had made application to enter lots 1, 2 and 3, and NE. ¼ of NW. ¼ of said section, alleging settlement thereon Decembet 20, 1890, he was also ordered to appear.

Hearing was had before the local officers, and as a result thereof, they decided

as between the filers . . . Beebe and the settlers Gillen and Norton, in favor of the settlers Gillen and Norton and recommend the cancellation of the aforesaid homestead entry.

As between the settlers, the office would recommend . . . . that an amicable settlement be made between them; in default of this we recommend that the privilege of entry be awarded to the highest bidder.

Beebe appealed and you by letter of April 9, 1892, affirmed the judgment of the local officers as to the cancellation of his entry, but modified their decision by allowing Gillen "the preference right of entry to the N. ½ of NW. ¼," and Norton "the preference right of entry to lots 1, 2, and 3. Both Beebe and Gillen appealed; the former assigning error as follows:

First:—In holding that Congress meant the usual day of twenty-four hours in the act of June 20, 1890, when it evidently meant the official land office day, commencing at 9 a. m.

Second:—In holding that the act of May 14, 1880, allowing settlement and residence to be made on the land before entry permitted settlement and residence upon land not subject to entry.

Third:—In not finding and holding that John Gillen was disqualified to make entry of the land, because according to the testimony he entered upon the land prior to the day it was opened to entry, to wit, before 9 a. m., December 20, 1890, and thereby forfeited all right to enter the same under the act of June 20, 1890.

Fourth:—In not finding and holding that Samuel H. Norton was disqualified to make entry of the land, for the reason that the testimony discloses that he entered on the land prior to the day it was opened for entry, to wit, prior to 9 o'clock a. m. on December 20, 1890, and thereby forfeited all right to enter the same under the act of June 20, 1890.

Fifth: In holding Beebe's homestead entry for cancellation when he was the first legal applicant therefor and when there was no valid adverse claim to the tract.

Sixth:—In finding contrary to both the law and the evidence.

Gillen alleges error for the reason that your decision does not award to him the preference right to enter lot 1, instead of awarding the same to Norton.

The land in controversy was withdrawn from the market for reservoir purposes by proclamation of the President of the date of April 5, 1881, and by act of Congress June 20, 1890, (26 Stat., 169), the same was restored to the public domain subject to entry under the homestead law. The first section provided:

> That there is hereby restored to the public domain all the lands described in certain proclamations of the President of the United States . . . . in the State of Wisconsin; and that these lands, when so restored, shall be subject to homestead entry only.

Section 2 has no bearing upon the issue herein involved. Section 3 reads as follows:

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

By circular of July 22, 1890 (11 L. D., 212), for the instruction of the local officers, it was said:

> You will observe that the statute, by its terms, does not take effect until December 20, 1890; no entry for, or settlement upon, said lands will be allowed until the expiration of that time, and the lands are made subject to entry under the homestead law only.

As between the entryman Beebe and the settlers Gillen and Norton, the facts are that Beebe made his entry at the local office shortly after 9 o'clock a. m. December 20, 1890, while the settlers went upon the land between 12 and 1 o'clock a. m., on the same day and made their settlements.

The identical question presented by the specification of errors, and so ably argued by counsel for Beebe, was passed upon in the case of Johnson *v.* Crawford (15 L. D., 302), wherein it was decided that

> The word "day" as employed in section 3, act of June 20, 1890, opening to settlement and entry certain reservoir lands, is not restricted to the "business day" recognized in the practice of the local office, but contemplates the calendar day of twenty-four hours; and a settlement on said lands, made after the beginning of said day and prior to the entry of another on the same day, defeats the right of such entryman.

Therefore if it is shown that Gillen and Norton were both qualified settlers under said act, it follows that Beebe's entry should be canceled, and if it appears that either was disqualified, then his settlement should be declared ineffective.

It is practically conceded by counsel that the acts of settlement were sufficient, and from an examination of the testimony, I am satisfied there was a substantial compliance with the law by both Gillen and Norton. In fact this question is not raised either in the specification of errors or the briefs.

I think it advisable to state that the N. ½ of NW. ¼ and lot 1—containing 135.30 acres—constitute the technical fractional NW. ¼ of said section; while lots 2 and 3—containing 77.65 acres—is all the land there is in the technical fractional SW. ¼ of said section, the land lying on the shore of a meandered body of water.

It is contended by counsel for Beebe that Norton forfeited all right to enter the land by reason of entrance thereon December 19. The testimony of Norton upon this point is as follows:

Q. Did Mr. Pradt (who is shown to be a surveyor) show you this land before you went on?

A. Yes sir

. . . . . .

Q. When? at what time?

A. He was with me the day of the 19th; I was with him and he was with me.

Q. In the forenoon?

A. No, in the afternoon. I think about two o'clock, I should say it was now.

Q. Did he go with you over the land?

A. Not over the whole of it, no sir.

Q. Over what portion did he go with you?

A. I know on lot one, according to his description of the land; were on lot 1 and the NE. of NW. and on lot 2.

Q. You know this to be a fact from what Mr. Pradt told you?

A. He showed me the stake and the meander post, and the numbers, which was proof to me that I was right.

Q. Did you go on there for the purpose of examining your land to find out where your lines were?

A. To know just how the land was; to see if the land was what I wanted or not.

It is further shown that when he went upon the land on the 20th that the point he started for was the meander-post mentioned and from that went over to the land.

It is insisted by the counsel this act of Norton brings him within the purview of the third section of the act of June 20, 1890, and that the penalty prescribed should be inflicted against his settlement. It seems to me that his action was a violation of the law. The legislative intent in the enactment of this provision was manifestly for the purpose of placing all those seeking these lands upon an equal footing; that there should be no favoritism in the selection. The very act of Norton in going there on the 19th, for the purpose for which he admits being present, was precisely what Congress intended to prevent, that is, that persons should not, in advance of the opening, go upon the territory to be thrown into market, make their selections and trace the boundaries, thus gaining an unfair advantage of those disposed to respect the law.

The act of March 2, 1889 (25 Stat., 1005), providing for the opening of the territory of Oklahoma, contained a similar prohibition in these words:

That no person entering upon and occupying said lands before said hour of 12 o'clock, noon, of the 22nd day of April, A. D., 1889, hereinbefore fixed, will ever be permitted to enter any of said lands or acquire any rights thereto.

It will be noticed that this provision of the law is substantially the same as that incorporated in the act under consideration. In construing this language the Department has said (Townsite of Kingfisher *v.* Wood *et al.* (11 L. D. 330):

> The language of the law was broad as it could be made, prohibiting any one from entering upon the lands for the purpose of settling the same. The end sought by the people was *settlement*. This it was that would produce title; convert the public domain into private property. The statute's chief purpose was to regulate settlement. Each act of the individual was induced by his desire to make settlement of a particular piece of land, and the statute declared for this purpose no one should enter upon or occupy these lands—this territory—until they are opened for such "settlement" by proclamation of the President. It matters not whether it is read in the conjunctive or disjunctive; whether it is to be read as saying "enter upon *and* occupy" or "enter upon *or* occupy;" the evident purpose of the law was to prohibit one or another entering the territory before the proclaimed hour, *with a view and purpose of settlement of any part thereof*. No one could be there, legally with such purpose, in whole or in part. Whether there before the time by some permit or without it, the one who then entertained the intention of making a settlement and to use the advantage which his presence gave, to the exclusion of others, was violating the spirit of the law, and it destroyed his claim when attempted. If he had declared it before, he should have been expelled; if he exhibited such preconceived purpose by his subsequent acts, he not only could not lawfully claim any particular tract, but forfeited all right to future acquisition.

In the light of this authority and upon the facts presented in the case at bar, I think Norton was disqualified to enter said land.

Your judgment is therefore modified as follows:—Gillen will be permitted to enter the land applied for, that is, the N. ½ of the NW. ¼ and lot 1 of said section 12; the entry of Beebe will be allowed to stand for lots 2 and 3; but canceled as to the NE. ¼ of NW. ¼ and lot 1 of said section.

APPLICATION TO ENTER—DESERT LAND ENTRY—CONTEST.

SLAUGHTER *v.* PADIA.

An application to make homestead entry of land embraced within the existing desert land entry of another should be rejected; but if the applicant alleges a prior settlement right a hearing may be allowed to determine the rights of the parties.

The failure of a desert land entryman to submit final proof within the statutory period will not operate to defeat his right to perfect his entry, where a part of the land is involved in a pending contest.

No preferred right is secured by a successful contest against a homestead entry of land that is included within the prior desert land entry of another, against whom no default is charged; nor will such a contest constitute an "adverse claim" that will defeat the equitable confirmation of such entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 23, 1893.

On October 25, 1883, you transmitted the papers in the case of William B. Slaughter *v.* Jose F. Padia and John P. Casey, involving the NE. ¼ of Sec. 10, T. 1 N., R. 15 W., Santa Fe land district, New Mexico.

Casey made desert land entry of two hundred and eighty acres, including the quarter section in controversy, on August 9, 1882.

The plat of survey of the township was filed in the local office on January 2, 1883. Padia made homestead entry of the tract on March 15, 1883—within three months after the filing of the townsite plat—alleging settlement in November, 1871.

Slaughter filed affidavit of contest against Padia's entry on November 22, 1884, with the usual charge of abandonment and failure to reside on the claim.

Hearing was had on January 28, 1885. As the result of the testimony then taken the local officers found—

> That the allegations of contest have been proved; that Padia has not complied with the homestead law; that there are no extenuating circumstances shown; that therefore homestead entry No. 1836 is recommended for cancellation; and that Slaughter be accorded preference right of entry.

No reference is made in any part of the local officers' decision, to Casey's desert land entry, and when the case was considered by you, in May, 1886, you remanded the case for a rehearing, on the ground that the testimony was "too conflicting and unsatisfactory to warrant a decision." At the same time the record in Casey's desert land entry was transmitted to the local officers with instructions to make him a party to the trial, that he might show cause why his desert land entry should be sustained.

A rehearing was had, commencing July 27, 1886, at which a large amount of testimony was taken.

On November 9, 1886, the local officers reached a judgment, in which they state that—

> On the day set for hearing the contestant appeared in person, and by N. B. Laughlin, his attorney. The contestee also appeared in person, and by M. B. Read, his attorney. John P. Casey was represented by P. L. Vanderveer, his attorney. . . . . From the testimony submitted it is evident that the law has not been complied with in the matter of said desert land entry No. 32, and the same should be conceled. . . . . Padia, who is a sheep-man, has claimed this land as a ranch, and has had his hands there off and on, but has not made his home there as is contemplated by the homestead law. The law has not been complied with in the matter of residence, and the improvement and cultivation of the land has not been such as to indicate the good faith or *bona fide* intention of the claimant.

and recommend the entry for cancellation.

Padia appealed from said decision to your office, where, on February 10, 1888, you affirmed the judgment of the local officers, and held both entries for cancellation.

Padia appealed from your decision to this office.

While the record was on file in the Department, awaiting action, Casey filed an affidavit, in which he alleged—

> That he was not a party to said contest case, has never received any notification of said case from the land office when the same was pending, and has never authorized any person or persons to appear for him in said suit or contest, therefore the testimony upon which his entry is held for cancellation is *ex parte*, and affiant has not had his day in court.

Inquiry being made of the local officers, and of the person representing himself to be Casey's attorney, no evidence was offered contradicting Casey's sworn statement. Therefore the Department, on January 2, 1889, directed that you should order a hearing,—

> At which an examination shall be made into Casey's good faith, and fulfillment of the requirements of the law in connection with his desert land entry No. 32—it being understood that, hearing having been already had as to the rights of Padia and Slaughter, the question of their compliance with the law shall not be entered into any further than may be found necessary in order to throw light upon the question of Casey's compliance therewith.

I am now in receipt of your letter of March 3, 1893, transmitting the record of the hearing above ordered. As the result of said trial, the local officers found that the witnesses needed were "scattered all over the territory," and their evidence was therefore taken by deposition—all parties being afforded an opportunity to be heard. After carefully summing up the substance of said depositions, they unite in finding that "Casey's good faith is sustained by an overwhelming preponderance of the testimony," and therefore recommended that his desert land entry be held intact.

It will, therefore, be necessary in disposing of this case, to consider Padia's homestead entry of March 15, 1883, and Casey's desert land entry of August 9, 1882.

I have carefully examined the testimony taken at the hearings had in the matter of Padia's homestead entry, and concur in the conclusions reached by the local officers and by you that he never established or maintained a *bona fide* residence on the tract.

As to Casey's desert land entry, it is shown that it was made August 9, 1882. On March 15, 1883, seven months and six days later, the local officers allowed Padia to make homestead entry of a quarter section of the same land. These two entries covering the same tract have remained of record upon the tract books of your office until the present time. When Padia applied to enter said tract, his application should have been rejected; and if he claimed residence and improvements prior to the date of the desert land entry, he should have been allowed to institute contest against the same.

It will be noted that Slaughter has no complaint to make of Casey's entry. There is no charge from any quarter against it. After the first hearing in the contest of Slaughter against Padia, you ordered a rehearing, and transmitted Casey's entry papers to the local officers, with the direction to make him "a party to said hearing,"—for the very good reason that the contest between Slaughter and Padia was relative to land to which Casey, on the face of the record, had the prior and paramount right, and to which neither of them had or could obtain any right whatever until Casey's entry should be canceled.

I have examined the testimony taken in accordance with the directions contained in said departmental letter of January 2, 1889, and con-

cur with the local officers in the opinion that "Casey's good faith is sustained by an overwhelming preponderance of testimony." The time prescribed by law within which he should make final proof has long since passed; but he is excusable for not offering such proof while the land embraced by his claim was under contest; indeed, until the issuance of circular instructions of March 15, 1892, 14 L. D., 250, he would not have been permitted by the departmental Rules of Practice to do so.

Slaughter has shown that Padia had failed to fulfill the requirements of the homestead law. Under ordinary circumstances he would by his contest acquire the right to make entry of the tract. But in this case, after the cancellation of Padia's entry, no one will have a right to enter the tract, for it will still be embraced in and segregated by Casey's prior entry. The second section of the act of May 14, 1880, confers a preference right of entry, but that right can not be exercised upon the land embraced in Casey's entry and against which there is no default alleged.

Slaughter's contest having been aimed at Padia, and not at Casey, against whom he has never initiated any adverse action, he cannot be considered as having acquired such a right in the premises as would constitute an "adverse claim" that would prevent the submission of Casey's final proof, if it should be found satisfactory in all respects except as to time, to the board of equitable adjudication.

For the reasons herein set forth, your decision of February 10, 1888, is affirmed in so far as it holds Padia's entry for cancellation; but so much of the same as holds Casey's desert land entry for cancellation is modified, and you will notify him that a reasonable time will be allowed him in which to make final proof on the same.

OFFICIAL SURVEY—AMENDMENT OF ENTRY.

NOYES *v.* BEEBE.

A private survey will not be accepted as sufficient to warrant a conclusion that the official survey, as of record, is inaccurate.

An intervening adverse claim defeats an application to change or amend an entry.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 23, 1893.

On the 15th of January, 1891, Almond R. Noyes made pre-emption cash entry for lots 1, 2, and 3, of Sec. 3, T. 35 N., R. 37 E., and lots 2 and 3 of Sec. 34, T. 36 N., R. 37 E., W. M., Spokane Falls land district, Washington, having filed his declaratory statement therefor on the 23d of June, 1890, in which he alleged settlement on the 20th of April, 1880. Patent was issued for said land January 18, 1892.

On the 18th of February, 1891, Avery A. Beebe made homestead entry for the SE. ¼ of the NE. ¼, and the NE. ¼ of the SE. ¼ of Sec. 3, T. 35 N., R. 37 E., in the same land district. He commuted his entry, and made final proof on the 29th of December, 1891, at which time Noyes protested against the allowance of said proof, claiming that a portion of the land embraced in Avery's entry was occupied, cultivated, and improved by him, and had been for several years, under the belief that it was included in his pre-emption cash entry.

The local officers allowed testimony to be submitted upon the questions raised, and on the 26th of January, 1892, dismissed the protest, on the ground that there was no actual conflict between the lands covered by the entry of Noyes and those embraced in the entry of Beebe. They also found that Beebe had complied with the homestead law, and recommended that his proof be accepted

On the 11th of November, 1891, your office received a petition in behalf of Almond R. Noyes, in which he prayed that the approval of the plats of the townships in which said lands were situated

> may be set aside, and that new plats may be substituted therefor, to the end that divers errors in the present plats may be corrected, and that the petitioner may be relieved against great hardship, the consequence of an error in his entry into which he was led by the said errors of the plats.

This application was denied by you on the 24th of February, 1892, at which time you also declined to order an investigation in the field for the purpose of ascertaining whether or not an error was made in the survey of the meander line of the Columbia river, adjoining or opposite the lands of Noyes. An appeal to the Department was taken from your action, the case being volume 17, number 328.

On the 9th of May, 1892, you rendered a decision in the case of Almond R. Noyes *v.* Avery A. Beebe, in which you approved the action of the local officers in dismissing the protest of Noyes against the final proof of Beebe. An appeal from your decision brings that case to the Department, it being volume 17, number 415.

On the 8th of December, 1892, a motion was filed on the part of Noyes, for the consolidation of the case of Almond R. Noyes, and that of said Noyes against Beebe, and, as no objection has been interposed to such motion, and as I see no impropriety in considering said cases together, and rendering a decision covering the questions involved in both, such action will be taken.

From the record before me, I learn that on the 14th of August, 1890, the register of the land office at Spokane Falls addressed a letter to the United States surveyor-general, at Olympia, Washington, transmitting a plat and corresponding field notes of the survey of a part of section 3, township 35 north, range 37 east, Willamette Meridian, executed by J. M. Bewley, county surveyor of Stevens county, Washington, at the request of Mr. A. R. Noyes, and also an affidavit of Mr. Noyes,

stating that he had filed a declaratory statement in the United States land office at Spokane Falls, on June 23, 1890,

for lots 2 and 3 of Sec. 34, T. 36 N., R. 37 E., Will. Mer., and lots 1, 2, and 3 of Sec. 3, T. 35 N., R. 37 E., and that he did so with the impression that his said survey embraced all the land west of the NW. ¼ of the SW. ¼ and the SW. ¼ of the NW. ¼ of section 2 and being all the land west of said section 2 and the river). That affiant is familiar with the surveys, and believes there was an error made in the plats filed in the Spokane Falls land office, June 23, 1890, as relates to the lots 2 and 3 of Sec. 3, T. 35 N., R. 37 E., Will. Mer., and the SE. ¼ of the NE. ¼, and the NE. ¼ of the SE. ¼ of Sec. 3, as shown on said plat to be full, should be noted as lots 2 and 3 of Sec. 3, T. 35 N., R. 37 E., and further that lots 2 and 3 of Sec. 3, as shown on said map, are not in existence, and that my claim embraces all the land lying between the east line of that portion of section 3 and the river.

The United States surveyor-general, in a letter addressed to you, under date of December 17, 1890, reported that the survey of the townships in question was made by U. S. Deputy Surveyor Berry, that it had been examined and found substantially correct, and he recommended that no change or correction be made in said survey.

In a letter addressed by you to said United States surveyor-general, under date of January 29, 1891, you expressed concurrence in his views, and suggested that the attention of the register and receiver be directed to the following paragraphs in the circular from your office of March 13, 1883:

1st. The boundaries of the public lands established and returned by the duly appointed government surveyors, when approved by the surveyors-general and accepted by the government, *are unchangeable.*

2d. The original township, section, and quarter section corners established by the government surveyors must stand as the true corners which they were intended to represent, whether the corners be in place or not.

It was after these proceedings, that Noyes petitioned your office for a correction of the survey of said townships, accompanying his petition with a plat showing a survey made by Charles H. Morgan, a civil engineer, who makes affidavit that his plat shows correctly the course of the bank of the Columbia river and its relation to the lines of the public survey, and also the course of the meander line represented by the field notes of the public survey in section 3, township 35 north, range 37 east.

It was claimed that the government plats included land which is commonly covered with water, and is part of the bed of the Columbia river, and it is represented that the course of said river is at a great distance west of its true course, whereby Noyes was led to pay for land of no value, and failed to enter the land which he intended to enter.

In the case of John W. Moore (13 L. D., 64), it was held that "the returns of the surveyor-general, and the record of a survey made under his direction, are evidence of the highest character, that no private survey can be allowed to overcome." I do not feel at liberty, therefore, to pronounce the government survey inaccurate, simply because Mr. Mor-

gan has made a different one. The surveyor-general was employed by the government to make a correct survey and plat of the locality.

And it is no where claimed that Noyes did not get patent for the land described in his declaratory statement and entry, or that Beebe included in his entry any land covered by the entry and patent of Noyes. After Noyes made his final proof, the SE. ¼ of the NE. ¼ and the NE. ¼ of the SE. ¼ of Sec. 3, T. 35 N., R. 37 E., were found to be vacant land, and Beebe made homestead entry therefor.

According to the metes and bounds of the lots described by Noyes, he has already made entry for 156.96 acres. He desires to include eighty acres more, making 236.96 acres in all, or 76.96 acres above the maximum. He makes no suggestion of surrendering any of the land included in his present entry, but claims that a portion thereof is under water, and therefore of no use to him.

In the case of Roberts et al. *v.* Gordon (14 L. D., 475), it was held that a patentee may be permitted to relinquish a portion of the land covered by his patent, and take in the place of the land relinquished a tract which through mistake was not included in the original entry, nor in the patent issued thereon.

Such change, however, can not be allowed where the lands desired have been filed upon or entered by another party, before the application to change is made. It is only in the absence of intervening adverse rights that the lands intended to be taken may be substituted for those mistakenly filed upon or entered. Cowan *v.* Asher (6 L. D., 785). That case also held that a second filing is not permissible except in cases where the claimant, through no fault of his own, is unable to perfect entry under the first. Noyes was not only able to perfect entry under his filing, but he did perfect the same, and secured patent for the land covered thereby, and not until after Beebe made entry did he express any desire to change, alter, or amend his entry.

It is true that a portion of the land for which Beebe made entry had been cultivated by Noyes prior to such time, but it was not included in his entry, and I know of no rule of law, under the circumstances, under which he is entitled to it.

Several cases are cited in which the Department has ordered a hearing to determine the existence or non-existence of a stream, which is represented on the plat as "meandered," with a view to the reformation of the survey if improperly allowed. This course was pursued in the case of Jacob Dunbar (12 L. D., 73), and in the more recent case of Bernard Ruane (15 L. D., 342). The case at bar, however, presents no such question, as there is no doubt about the Columbia river being a meandered stream.

Under the instructions and decisions of the Department, I think you were justified in refusing to order a correction of the government survey. I also think that you correctly construed the rulings of the De-

partment, in approving the action of the local officers in dismissing the protest of Noyes against the final proof of Beebe. The decisions appealed from are therefore affirmed.

RAILROAD GRANT—ORDER OF RESTORATION.

SOUTHERN PACIFIC R. R. CO. (ON REVIEW).

Directions given for the restoration of lands withdrawn for the benefit of the Southern Pacific, lying within the primary limits of the grant to said company and the indemnity limits of the grant to the Atlantic and Pacific.

Secretary Smith to the Commissioner of the General Land Office, March 24, 1893.

Under date of June 23, 1888 (6 L. D., 816), this Department rendered a decision, involving certain lands in the overlapping limits of the grant to the Atlantic and Pacific Railroad Company (14 Stat., 292), and that to the Southern Pacific Railroad Company (16 Stat., 573), the conclusion of which is in the following words:

> In the present case, as to the lands lying within the granted limits of the Atlantic and Pacific Railroad Company, the decisions of the supreme court in the cases heretofore cited, (97 U. S., 419, and 112 U. S., 720) are conclusive against the rights of the Southern Pacific Railroad Company to any of the lands within said limits, and I therefore concur in your recommendation, that the unpatented lands within said limits—that is, the lands embraced in the first and third class—shall be opened to settlement and entry.
>
> As to the lands embraced within the second class—that is, of lands within the granted limits of the Southern Pacific Railroad Company, and within the indemnity limits of the Atlantic and Pacific Railroad Company—in view of the doubt heretofore expressed, I concur in your recommendation that there can be no objection to continuing in reservation the unpatented lands of this class, pending adjudication by the courts, or until such time as the Department may deem it proper to remove the reservation.

The attorneys for the Southern Pacific Railroad Company filed a motion for review and modification of said decision, and asked that action, restoring the lands to entry, be suspended, to await the decision of the questions involved, by the courts. J. H. Call, as attorney for settlers upon some of the lands in question, filed a motion for review, asking a modification of said decision, in so far as it held that lands of the second class should be longer reserved. Later, further showing was made in support of the request, that no action should be taken in the premises until the decision of the supreme court of the United States, in cases then pending, brought by the United States, to secure the cancellation of certain patents theretofore issued to said company, which cases, as shown by copies of the bills filed therein, presented with said request, necessarily involved the questions presented to the Depart-

ment, and the decisions in which would afford a ruling upon said questions by the supreme court. Under these circumstances, no action has been heretofore taken upon said motions.

Decisions have now been rendered in the cases then pending before the supreme court, and the questions raised by the motions for review have been decided. The case of the United States *v.* Southern Pacific Railroad Company, (146 U. S., 570) involved lands included in the first class mentioned in the departmental decision, that is, lands within the common primary limits of both grants. The conclusion reached is expressed in the last paragraph of the decision (p. 607), which reads as follows:

> Our conclusions, therefore, are, that a valid and sufficient map of definite location of its route from the Colorado river to the Pacific Ocean was filed by the Atlantic and Pacific Company, and approved by the Secretary of the Interior; that by such act, the title to these lands passed, under the grant of 1866, to the Atlantic and Pacific Company, and remained held by it, subject to a condition subsequent until the act of forfeiture of 1886; that by the act of forfeiture the title of the Atlantic and Pacific was retaken by the general government, and retaken for its own benefit, and not that of the Southern Pacific Company; and that the latter company had no title of any kind to these lands.

This is the theory upon which it was concluded that the recommendation of your office, that lands of said class should be opened to settlement and entry, should be concurred in. The position taken by this Department being the same as that subsequently taken by the supreme court, will be maintained, and the motion for review, filed in behalf of the Southern Pacific Railroad Company, must be, and is hereby denied.

The cases of the United States *v.* Colton Marble and Lime Company, and United States *v.* Southern Pacific Railroad Company (146 U. S., 615), involved lands similarly situated as those in the second class, mentioned in the departmental decision in question, that is, lands in the primary limits of the grant to the Southern Pacific Railroad Company, and within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company.

The conclusion reached by the court is, that the title to none of these lands passed, or could pass, to the Southern Pacific Railroad Company. This is the adjudication by the court, pending which these lands were, by the departmental decision under consideration, continued in reservation. This point having been finally decided against said railroad company, there is no reason for continuing such reservation, and you will therefore take such steps as may be necessary to restore this class of lands to entry and settlement.

SOLDIER'S ADDITIONAL HOMESTEAD—CERTIFICATE OF RIGHT.

KISIAH GOODNIGHT.

A purchaser of an invalid certificate of a soldier's additional homestead right, who enters therewith a tract of land in the name of the party to whom the certificate is issued, may perfect title to such land under the act of March 3, 1893, by paying the government price therefor.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 24, 1893.

The issue raised by this appeal is as to the validity of soldier's additional homestead entry, for the SW. ¼ of the NE. ¼ and the S. ½ of the NW. ¼ of Sec. 1, T. 17 N., R. 67 W., Cheyenne, Wyoming, entered May 18, 1885, in the name of Kisiah Goodnight, widow of John Goodnight, deceased.

The material facts made by the record are as follows:

On December 21, 1870, John Goodnight made homestead entry for the SW. ¼ of the SE. ¼ and the SE. ¼ of the SW. ¼ of Sec. 7, T. 16 N., R. 22 W., Clarksville, Arkansas, which was canceled for abandonment July 23, 1878. In February, 1883, Goodnight applied to have said entry re-instated, which was refused, January 9, 1884, from which no appeal was taken, and on March 10, 1884, he purchased the SE. ¼ of the SW. ¼ of said section, embraced in his former entry, which was patented November 1, 1884. On March 1, 1883, while the application to re-instate was pending, he filed an application for certification of his right to make soldier's additional homestead entry, and, on August 27, 1884, this application was rejected, for the reason that Goodnight had died, March 12, 1884. Subsequently, an application for certification was filed by Kisiah Goodnight, his widow, of the right of additional homestead, and upon this application a certificate was issued, October 27, 1884, certifying that she was entitled to an additional homestead entry of not exceeding one hundred and twenty acres, under section 2306 of the Revised Statutes.

There is also with the record a power of attorney, dated September 20, 1884, and executed by Kisiah Goodnight, empowering and authorizing Joseph M. Carey, of Wyoming Territory, as her attorney in fact, to apply for, locate, and enter, under said section 2306 of the Revised Statutes, one hundred and twenty acres of public land, as additional to the forty acres of original homestead.

On May 18, 1885, Joseph M. Carey, as attorney in fact for Kisiah Goodnight, made the entry in controversy, as soldier's additional homestead entry, in the name of Kisiah Goodnight, under the certificate of additional homestead right issued to Kisiah Goodnight, but it is admitted by counsel in the argument of the case that the certificate was purchased by the attorney in fact, who entered the land for his own benefit in the name of his principal.

Under the law and rules and regulations of the Department, the certificate was illegal, and the entry thereunder could not pass to patent. But the act of March 3, 1893, making appropriation for sundry civil expenses of the government for the fiscal year ending June 30, 1894, provided:

> That where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate.

As this case seems to come within the purview of said act, it is returned to your office for appropriate action. Charles Holt, (16 L. D., 294).

PROCEEDINGS ON FINAL PROOF—PROTESTANT.

WILLIAMS *v.* THOMAS.

A protestant against final proof who waives objection to the action of the local office in allowing new proof to be made, leaves the controversy to be determined on the testimony taken at the presentation of the second proof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 24, 1893.

Evan G. Thomas filed declaratory statement No. 372 (Ute series) November 8, 1885, alleging settlement January 1, 1885, for the E. ½ of the NE. ¼, the SW. ¼ of the NE. ¼, and the NE. ¼ of the SE. ¼, Sec. 36, T. 1 N., R. 96 W., Glenwood Springs, Colorado.

On December 2, 1885, John Williams filed declaratory statement No. 386 for the NE. ¼ of the SE. ¼, the S. ½ of the NE. ¼, and the NW. ¼ of the NE. ¼ of said section, alleging settlement November 6, 1885, thus conflicting with Thomas's filing as to the S. ½ of the NE. ¼ and the NE. ¼ of the SE. ¼ of said section.

After due publication, Thomas submitted final proof on August 20, 1887, against the acceptance of which Williams, on the same day, filed his written protest, alleging under oath his own settlement and filing and improvements on the land, his pre-emption right, etc., and protesting against "a patent being issued to said Thomas," for the reason that he was a prior locator and settler; that Thomas has not resided continuously or at all on the land or any part thereof; that he has not improved the land as provided by law; that he is an alien, and therefore disqualified to make entry. He asked to be allowed to cross-examine all the proof witnesses, and to submit original proof in his own behalf to establish his superior right to the land.

On the day Thomas submitted his proof, the register and receiver made the following endorsement thereon:

Rejected, August 20, 1887, for the reason that claimant has failed to show actual continuous residence on the land for six months preceding this date, and for the reason the proof now offered is unsatisfactory.

On October 13, 1887, Thomas again offered final proof, and protestant again appeared; whereupon the proof witnesses were cross-examined at great length, and other testimony was taken showing protestant's settlement and improvements upon the land.

The register and receiver on December 23, 1889, recommended the acceptance of Thomas's final proof, and the cancellation of Williams's filing as to the land in controversy.

On appeal, you, by your decision of January 29, 1892, affirmed that judgment, and Williams further prosecutes his appeal to this Department.

It is a well settled rule that where one elects to make final proof in the face of a duly recorded adverse claim not shown to be illegal, he must stand or fall by the record then made, and, if such person fails to show compliance with the law, his claim is subordinated to that of the adverse claimant. Wade *v.* Meier (6 L. D., 308); Jacobs *v.* Cannon (ibid., 623); Wright *v.* Brabander (ibid., 760); Hults *v.* Leppin (7 L. D., 483); Campbell *v.* Ricker (9 L. D., 55); Cobby *v.* Fox (ibid., 501).

When Thomas's final proof was rejected, August 20, 1887, and he failed to appeal, his rights to the land were subordinated to those of Williams. The record fails to show that the local officers on rejecting the proof, formally decided that Thomas had a right to offer proof anew; but it would appear that such was their opinion at the time, as shown by a statement contained in the caption of the record reading as follows:

John Williams filed his D. S. 386, December 2, 1885, and filed affidavit of contest against the proof of Mr. Thomas, whose proof was rejected by the register and receiver—he having failed to show proper residence, the contestant reserving his contest until the contestee offered new proof.

The fact that contestant reserved his contest until new proof was offered would indicate, in the absence of anything to the contrary, that he consented to that action. Had he insisted upon a cancellation of Thomas's filing on the rejection of the first final proof, or had he appealed from any order or judgment of the local officers, allowing new proof to be offered, a different question would be presented. But, as above shown, it appears that he practically agreed to the second final proof being offered, and postponed his contest until it should be presented. He thus waived whatever rights he may have had by the failure of Thomas to show compliance with the law in the matter of the first proof, and directed his efforts to show a non-compliance with the law, when the second proof was offered.

Having waived this right, judgment upon the merits of the controversy must be determined from the testimony taken at the hearing on the presentation of the second proof. That testimony is very voluminous. I have carefully examined the same, and find the statements of witnesses, upon important questions relating to the good faith of Thomas, quite difficult, if not impossible, to reconcile.

Your decision substantially sets forth the material facts in the case; and, in view of the concurring opinions of your office and the local office, that "claimant settled upon the land in good faith and complied with the law as to residence and cultivation," I do not feel at liberty to disturb your decision. Chichester *v.* Allen, 9 L. D., 302.

The judgment appealed from is accordingly affirmed.

TIMBER CULTURE ENTRY—ADMINISTRATOR—COMMUTATION.

FRANK E. WRIGHT.

The administrator of the estate of a deceased timber culture entryman cannot commute the entry of the decedent for the benefit of an heir who is not a resident of the State in which the land is situated.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 25, 1893.

I am in receipt of your letter "G," of August 20, 1892, transmitting the appeal of Frank E. Wright, administrator of the estate of Frank C. Russel, deceased, from your decision of March 21, 1892, rejecting his commutation proof on timber culture entry No. 146, Lewiston, Montana, land district, involving the E. ½ of NE. ¼ and E. ½ of SE. ¼, Sec. 22, T. 13 N., R. 15 E., P. M., made by Russell during his life-time. Russell died in Montana; his heir is a non-resident of the State.

Section 225, of chapter 8, division 2, of the statutes of Montana provides that the administrator of an estate "must take into his possession all the estates of the decedent, real and personal," etc. It further provides that the possession of the administrator is the possession of the heirs, and possession by the heirs is subject to the possession of the administrator for the purpose of administration, as provided by law. Section 226 gives the administrator authority to maintain actions for the recovery of real, as well as personal property. He may maintain an action for trespass on real estate, even when committed during the life-time of the decedent. He must in brief take charge of the real estate, and it is quite apparent that he not only may, but it is his duty to preserve it, and to do this he may cultivate the land, and in case of timber culture entry, may, and should do those things required by the timber culture law necessary to completing the title, thus preserving the property.

The first section of the act of March 3, 1891, to repeal timber culture

laws, saves from the operation of the act *bona fide* claims lawfully initiated before the passage of the act. The provision of the act which allows commutation to cash entry, limits such commutation to "Actual bona fide residents of the State or Territory in which the land is located," etc.

I do not concur in your holding that an administrator of an estate in Montana is not the legal representatives of the estate of the deceased. The law of Montana, authorizing the appointment of administrators, is similar to the law of South Dakota, appointing special administrators, and their duties and obligations are similar.

In the case of Halvor O. Stadskler *v.* The heirs, or legal representatives of Ole Vestboe, deceased, (L. and R., Vol. 264, p. 454), and in John A. Sabin's case, (16 L. D., 149) the question was fully considered, and it was held that the administrator of an estate in South Dakota could cultivate the land, and make final proof in a timber culture entry, as legal representative of the deceased. In the case at bar, however, the heirs of the entryman are non-residents of the State of Montana, which fact brings another question into this case. Can the administrator of an estate make commutation proof under the act of March 3, 1891, entitled "An act to repeal timber culture laws," etc., the heir being a non-resident of the State? I think not. At the death of the ancestor the fee vests in the heir, so in a timber culture entry, the initiated right to a fee, conditional upon the compliance with the requirements of the law, vests in the heir. The statute of Montana places the possession, the use, the rents and profits, of the real estate in the administrator, and the responsibility of caring for, protecting and preserving the estate is upon him. He is answerable to the court appointing him, for his conduct, and to the heir for loss by his laches. He becomes by the law, the officer of the court, and is subject to its orders, and is by the law the agent of the heir, and the legal representatives of the decedent. What he does in the way of growing trees, cultivating and improving the land, is, in so far as the government is concerned, done by the decedent, and in so far as the heir is concerned, it inures to his benefit, as it is done in his (the administrator's) fiduciary capacity. In legal effect, it is the entryman by his "legal representative" complying with the law, as to timber culture, but the moment the patent issues, the fee is in the heir.

The act of March 3, 1891, permits commutation of timber culture entries, restricted to residents of the State in which the land is situated. The proof, as every other step in perfecting title, inures to the heir. Plowing, planting trees and cultivation may be done by a non-resident; commutation can be made only by a resident.

Under the act of March 3, 1891, "*bona fide* claims, lawfully initiated before the passage of this act, may be perfected upon due compliance with law in the same manner . . . . as if this act had not been passed," and the administrator may perfect the claim, and make final

proof under the law in force before this act was passed, by which law the beneficiary need not be a resident of the State, but he can not have the benefit of the commutation provision of the later act, unless the beneficiary comes within the restrictive clause of that provision.

The final proof will be rejected because the heir is a non-resident of the State of Montana; the entry will remain intact, subject to compliance with the requirements of the law, by either the administrator or the heirs. Your decision is modified accordingly.

NATURALIZATION—ACT OF JULY 15, 1870.

WINNEBAGO INDIANS.

The naturalization of a Winnebago Indian under the provisions of section 10, act of July 15, 1870, does not make his children citizens of the United States.

Acting Secretary Chandler to the Commissioner of Indian Affairs, February 10, 1893.

I acknowledge the receipt of your communication of May 6, 1891, relative to the status of children of Winnebago Indians who had become citizens of the United States under the provisions of the act of Congress approved July 15, 1870 (16 Stat., 335–361).

In reply thereto I transmit herewith an opinion rendered by Assistant Attorney General Shields, dated February 9, 1893, on the subject, in which I concur.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, February 9, 1893.

I have the honor to acknowledge the receipt, by reference from the Hon. First Assistant Secretary, for an opinion thereon, of a communication from the Acting Commissioner of Indian Affairs, relative to the status of children of the Winnebago Indians, who had become citizens of the United States under the provisions of the act of Congress approved July 15, 1870 (16 Stat., 335–361).

Article one of the treaty of April 15, 1859 (12 Stat., 1101), provided for an assignment in severalty from the eastern part of the Winnebago Indian reservation, of not exceeding eighty acres of land to each head of a family, and not more than forty acres to each male person eighteen years of age and upwards.

By the act of February 21, 1863 (idem 658), provision is made for the removal of the Winnebago Indians from Minnesota and the sale of their reservation for their benefit.

By section nine of said act of 1870, provision was made for the allotment of lands in severalty to certain of the Winnebagoes lawfully residing in Minnesota, and section ten of said act provides—

That if at any time hereafter any of the said Indians shall desire to become citizens of the United States they shall make application to the judge of the district court of the United States for the district of Minnesota, and in open court make the same proof and take the same oath of allegiance as is provided by law for the naturalization of aliens, and shall also make proof to the satisfaction of said court that they are sufficiently intelligent and prudent to control their affairs and interests; that the (y) have adopted the habits of civilized life, and have for at least five years previous thereto been able to support themselves and families; whereupon they shall be declared by said court to be citizens of the United States, which declaration shall be entered of record, and a certificate thereof given to said party. On the presentation of the said certificate to the Secretary of the Interior, with satisfactory proof of identity, he may at the request of such person or persons cause the land severally held by them to be conveyed to them by patent in fee simple, with power of alienation, and may at the same time cause to be paid to them their proportion of all the moneys and effects of said tribe held in trust by or under the provision of any treaty or law of the United States. And on such patents being issued, and such payments ordered to be made, such persons shall cease to be members of said tribe, and thereafter the lands so patented to them shall be subject to levy, taxation, and sale, in like manner with the property of other citizens.

By the act of May 29, 1872 (17 Stat., 165–185), it was declared that,—

the intention and meaning of said ninth and tenth sections to authorize and direct the Secretary of the Interior to cause to be patented to each and every Winnebago Indian, lawfully resident in the State of Minnesota at the date of said act, in accordance with the conditions of said two sections, an allotment of land, who have not heretofore received the same, in quantity as provided in the treaty of April fifteenth, eighteen hundred and fifty-nine.

Many certificates were issued to the Winnebagoes under the provisions of said sections, and on March 23, 1874, the status of the minor children of the naturalized Indians was carefully considered and adjudicated by your predecessor, Mr. Secretary Delano, who decided that,—

The naturalization of an Indian who is at the head of a family, does not, in my opinion, confer the right of citizenship upon the children, or members, of his family.

The naturalization laws admit to the rights of citizenship, the children of "any alien being a free *white person*," who becomes a citizen under said laws.

In the cases under consideration, the law provides: that the Indians, in addition to the proof required, under the naturalization laws, shall also make proof of their intelligence, and civilization, and their ability to support themselves and families, whereupon they shall be declared citizens of the United States.

The inference, therefore, is that it was not the intention of the law to admit to the rights of citizenship, any persons of *Indian blood*, who have not established the possession of the qualifications which it prescribes.

The application, made on behalf of the children, or members of the family of the *Indians*, who have received certificates of naturalization, should therefore be rejected.

It must be conceded that said departmental decision, having stood unchallenged for nearly two decades, ought not to be overruled by the Department unless clearly wrong. (15 Peters 377–401; 5 Op., 29; 9

Op., 300–387; 12 Op., 169, 356; 13 Op., 387, 457; 14 Op., 275; 15 Op., 315; 17 Op., 27–29.)

Upon a careful consideration of the question presented, I am of the opinion that the conclusion of Mr. Secretary Delano is sound and ought to be followed. It is well settled by the decision of the United States supreme court, in the case of Elk *v.* Wilkins (112 U. S., 94–100), that "General acts of Congress did not apply to Indians, unless so expressed as to clearly manifest an intention to include them." Hence we have only the provisions of said section ten to consider, in order to ascertain whether the naturalization of the said Indians will make their children citizens of the United States. This section expressly requires the Indian, desiring to become naturalized, to furnish certain proof to the satisfaction of the court to whom application is made, (1) that he is competent to manage his affairs in a prudent manner, and (2) that he has adopted the habits of civilized life, and for five years prior thereto has been able to support himself and family. Upon making such proof the individual Indian is entitled to be declared a citizen of the United States, and to receive from the court a certificate to that effect. There is no provision of law declaring that, upon receipt of said certificate, his children shall become citizens of the United States, and in the absence of such statutory requirement I do not think they can be so regarded. The provisions of said section ten must be duly complied with before the Indian applicant can be entitled to a certificate of naturalization, or be regarded a citizen of the United States.

TIMBER LAND ENTRY—OFFERED LANDS.

INSTRUCTIONS.

Lands which have been offered but withdrawn from private entry by the act of March 2, 1889, are not subject to entry under the timber and stone act as amended August 4, 1892.

Secretary Noble to the Commissioner of the General Land Office, February 21, 1893.

In your letter of November 7, 1892, it is stated that you are in receipt of a telegram from the register at Duluth, Minnesota, asking—"Are lands which have been offered but withdrawn by act of March 2, 1889, subject to entry under timber and stone act, as amended August 4, 1892?" Being in doubt as to how the question should be answered, you submit the matter for my direction.

By the act of June 3, 1878 (20 Stat., 89), commonly called the timber and stone act, it is provided that surveyed public lands in California, Oregon, Nevada and Washington, valuable chiefly for timber, "and which have not been offered at public sale," may be sold as therein prescribed. This act was amended August 4, 1892 (27 Stat., 348), by

striking out California, Oregon, Nevada and Washington, and inserting in lieu thereof the words "public-land States," the purpose being to make the former act applicable to all the States in which were public lands of the character described in said act. This is the only effect of the amendment.

Formerly the policy of the government, in administering the Land Department, was, after due notice, to offer at public sale to the highest bidder the surveyed public lands. Such of them thus offered as were not then sold, were thereafter subject to private sale, and could be purchased by what was known as "private cash entry." The lands thus subject to private purchase became known, in land office terminology, as "offered" lands; those which could not be thus purchased were known as "unoffered" lands. It is surveyed lands, chiefly valuable for timber, in the public land States, and in the last category which are purchasable under the act of June, 1878, *supra*.

The question as to what are "offered" and what are "unoffered" lands was before the Supreme Court in the case of Eldred *v.* Sexton (19 Wall., 189). The law on the subject is summed up in the opening sentence of the court's opinion on p. 195, as follows:

> It is a fundamental principle underlying the land system of this country that private entries are never permitted until after the lands have been exposed to public auction at the price for which they are afterwards subject to entry.

And the court held that, though the lands there in controversy, when formerly within the limits of the railroad grant, had been offered for sale at $2.50 per acre, being no longer within those limits, and the price having been reduced to $1.25 per acre, were not subject to private entry at the last price until they had first been offered at public auction at the reduced price. So the private cash entry of Eldred at $1.25 per acre, not having been made upon "offered" lands, was declared to be illegal, and the lands were awarded to Sexton, who purchased after an offering at the reduced price.

In the case of United States *v.* Budd (43 Fed. Rep., 630), the United States circuit court of Washington applied the rule laid down in the Eldred *v.* Sexton to entries under the timber and stone act of 1878, *supra*, saying—

> A reasonable construction of the statute would limit the application of the words "and which have not been offered at public sale according to law" to lands which at the date of the act belonged to the class of unoffered lands, as contradistinguished from what in the practice of the land department is known as "offered" lands; that is, lands which are subject to private cash entry at the minimum price.

This case was afterwards affirmed by the Supreme Court, but the above question was not passed upon.

In the case of Ward *v.* Montgomery (15 L. D., 280), this Department followed the decision of the circuit court in the Budd case, the facts in the two cases being almost identical. The lands in both were in the same town and range, had been offered for sale in 1863 at single minimum price, and afterwards in 1870 were withdrawn, because within the

limits of the Northern Pacific Railroad grant, by which the price was increased to $2.50 per acre. They had not been offered at public auction at the changed price, and consequently under the cited cases were not "offered" lands when the entries were made.

The result of these decisions, and the acts of Congress, may be summarized as determining that surveyed lands in the public land States, valuable chiefly for timber, which at the date of the act of 1878 belonged to the class of unoffered lands, may be sold under the provisions of said act.

The policy referred to of making public offerings and sales of government lands has been gradually superseded by the more beneficent method of disposing of the lands under the settlement laws; and in recent years such offerings and sales have been so infrequent as to form exceptions instead of the rule.

Finally, by the act of March 2, 1889 (25 Stat., 854), Congress declared that thereafter no public lands shall be subject to private entry except those in Missouri; and by the act of March 3, 1891 (26 Stat., 1093), the sale of land at public auction was prohibited, with a few exceptions. Consequently, the quantity of "offered" lands can not be increased and those in existence can no longer be disposed of by private cash entry.

In this condition of the law, and referring to the departmental decision in the case of Ward *v.* Montgomery, it seems to be thought that the recent act prohibiting private entries of "offered" lands, thus withdrawing them from sale, has placed them in the category of "unoffered" lands, and therefore they are now subject to sale and entry under the timber land act of 1878, *supra*.

I do not concur in these views. The effect of the decisions herein cited is that where there has been a change in the price at which lands may be disposed of, there must be a public offering at the changed price before they can be bought at private entry. But here is no change in price made by the recent legislation. Congress simply abolished one method of disposing of them. That is all. They can not be obtained by private cash entry, but are subject to disposition under other laws, as they were before the passage of the act of 1889.

The legislation in question does not in express terms declare that hereafter all "offered" lands shall be treated as though they are "unoffered," and it seems to me that it would be straining construction beyond all reasonable bounds to hold that the distinctions, in law or fact, which have so long existed between the two classes of land are abolished by a questionable inference arising from the prohibition against private entries, an inference or implication which in effect would make the term "offered," if not synonymous, at least interchangeable, with that of "unoffered" lands. In my opinion this would not be construction, but simple departmental legislation.

If the distinction between the two classes of land had been destroyed, as contended, and "offered" lands have thereby been made "unof-

fered" lands, yet under the decision of Ward *v.* Montgomery and the Budd case cited therein, these lands would not be in any event subject to entry under the timber land act of 1878, as both of these cases distinctly hold that only those lands which belonged to the class of "unoffered" lands on June 3, 1878, the date of the passage of the act, can be entered under its provisions. Therefore the lands which have become "unoffered" since June 3, 1878, or which have been made such by the provisions of the act of March 2, 1889, if any, are not subject to entry under the timber land act.

In view of these considerations, and others that might be presented, you are directed to answer the inquiry of the register in the negative.

CONTEST—SUSPENDED ENTRY—RELINQUISHMENT.

JOPLING *v.* ANDERSON.

In case of a joint contest against a desert land entry where all the contestants unite in a similar charge, such common allegation may be taken in corroboration of the separate affidavits of contest.

An application to contest a suspended entry should be held until the order of suspension is removed, and where the revocation of such order recognizes the right of the contestant to proceed with his contest, such right can not be defeated by an intervening relinquishment of the entry under attack.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 27, 1893.

On May 28, 1877, J. T. Anderson made desert land entry No. 299 for Sec. 20, T. 27 S., R. 26 E., Visalia, California. It was suspended, together with all such entries at that office on September 28, 1877.

On September 11, 1888, J. T. Jopling filed in the local office an affidavit of contest against said entry, together with his application to enter as a homestead the SW. ¼ of said section. In said affidavit of contest he alleges that the land embraced in Anderson's entry was not desert in character.

March 2, 1888, separate affidavits by D. S. Woodruff and Lydia P. Gay were filed against said entry, accompanied by their applications to enter respectively the NE. ¼ and the NW. ¼ of said section; and on April 14, 1888, Nancy Benson filed her affidavit against said entry, and applied to enter the SE. ¼ of said section. All of these affidavits alleged that the land embraced in Anderson's entry was not desert in character.

All these applications to contest as well as to enter, were refused and rejected by the register and receiver, and separate appeals were filed by each from said action to you.

In the meantime, and on January 2, 1889, Anderson relinquished his desert land entry, and the same day it was canceled by the register and receiver. On the same day the following filings and entries were per-

mitted to go of record for said tract: pre-emption declaratory statement No. 10,016, by Samuel Reed, for the NE. ¼ thereof; pre-emption declaratory statement No. 10,017, by Elmer Harpman, for the NW. ¼; timber culture entry No. 2537, by William E. Houghton, for the SE. ¼; and homestead entry No. 6944, by H. P. Bender, for the SW. ¼.

On January 12, 1891, all the suspended desert land entries at the Visalia land office were released from suspension, and an order made to the effect that all persons who had applied to contest any of said entries during their suspension should be allowed to proceed with their contests. United States *v.* Haggin (12 L. D., 34).

On March 16, 1891, you considered the applications to contest Anderson's entry, and held that Woodruff, Gay, Benson and Jopling were joint contestants, and that they had a right under the order of January 12, 1891 (*supra*), to proceed against said entry. That as the filings of Reed and Harpman for the NE. ¼ and the NW. ¼ of said section did not segregate the tracts from entry, the applications of Woodruff and Gay to enter those tracts should be allowed, and the entries made of record. You also directed the register and receiver to give those who made entries for the remainder of said section after Anderson's entry was canceled, thirty days in which to show cause why their entries should not be canceled and the prior applications of Benson and Jopling allowed.

A showing was made by Jopling and Benson, and on October 7, 1891, you considered the same, and held that Jopling's affidavit of contest was not corroborated, and that of Benson, while properly corroborated, "fails to allege that such invalidity existed at the date of entry." You accordingly rejected said applications to contest.

Jopling alone has appealed from your judgment to the Department.

I think your decision of March 16, 1891 was correct, in holding that the contests of Jopling, Benson, Woodruff, and Gay might properly be called a joint contest; with this in view it was error to hold on October 7, 1891, that Jopling's affidavit to contest was not properly corroborated, for each of the four affidavits charge substantially that the land embraced in Anderson's entry was not desert in character.

The contests were properly refused when filed, because the entry was suspended, and such entries are not subject to contest. George F. Stearns (8 L. D., 573). They should have been held until the suspension was removed. The applications to make entry were also properly rejected, because the tracts at that time were not subject to entry, being covered by Anderson's entry. Goodale *v.* Olney (13 L. D., 489).

These applicants to contest could not proceed with their contests until said entry was relieved from suspension. This was done by the order made in the case of the United States *v.* Haggin on January 12, 1891 (12 L. D., 34). It was expressly provided in said order that parties who had applied to contest should be allowed "to proceed with their contests." When allowed to thus proceed the rights of Jopling relate back to the date of filing his contest, which was before Ander-

son's entry was relinquished. He is therefore entitled to a hearing, and if he can establish the truth of his allegations of contest, he will be entitled to a preference right of entry. Webb *v.* Loughrey *et al.* (10 L. D., 302); Brown *v.* Henderson (14 L. D., 306); Jackson *v.* Stults (15 L. D., 413).

You will therefore order a hearing on Jopling's contest affidavit, after notice to all interested parties, and should the evidence sustain the charge as made, you will cancel any and all adverse claims initiated subsequent to the cancellation of Anderson's entry, and allow Jopling a preference right to enter that portion of the land sought by him.

Your judgment is accordingly reversed.

PRE-EMPTION—TRANSMUTATION—ACT OF MARCH 2, 1889.

UNITED STATES *v.* CROW.

The right to transmute a pre-emption claim under section 2, act of March 2, 1889, cannot be exercised where title to the land could not have been secured by the applicant under the pre-emption law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 27, 1893.

On February 2, 1892, you considered the case of the United States *v.* William M. Crow, and held his pre-emption declaratory statement, filed September 29, 1885, for the NW. ¼ of SE. ¼ and SW. ¼ of NE. ¼, Sec. 25, T. 10 S., R. 24 E., Roswell, New Mexico, for cancellation.

At the same time, in the case of the United States *v.* George W. Stratton, you held for cancellation Stratton's private cash entry, made October 6, 1885, for NW. ¼ SE. ¼ and the SE. ¼ of NE. ¼ of said section 25.

Stratton moved for review of your decision canceling his entry. Crow appealed from that canceling his filing. Pending his appeal, Crow applied to make homestead entry for the land embraced in his filing, under section two, the act of March 2, 1889 (26 Stat., 854). By letter dated May 28, 1892, addressed to resident counsel for Stratton, you suspended action on Stratton's entry until final disposition of Crow's filing.

Counsel for Crow allege that no notice was given of this action and accordingly ask that the case be remanded to you for action upon Stratton's motion for review.

Counsel for Stratton concede the priority of Crow's claim but contend that his filing is illegal and that it should therefore be canceled without reference to the entry of Stratton.

The facts relating to the claim of Crow are sufficiently stated in your decision in his case, and need not be repeated in detail.

It appears that prior to making the filing here in question, Crow had

filed pre-emption declaratory statement No. 431, dated December 1, 1883, for land in said township, and that such filing was rejected as illegal under the second clause of Sec. 2260 R. S., because he had removed from land of his own in said Territory, to settle on that embraced in said declaratory statement, and also because he therein alleged settlement at a date prior to submitting proof in support of his neighboring homestead entry.

The filing in question being thus "a second declaration for another tract" you held it to be illegal under the provisions of the pre-emption law, Sec. 2261 R. S. So far as the record discloses Crow could have completed his entry under his first filing, but for his own acts in the premises. Consequently, his present filing is not within the purview of the departmental rulings, whereby second pre-emption filings are allowed, when for reasons beyond the pre-emptor's control, he could not complete entry under his first filing.

Crow's application to transmute under the second section of the act of March 2, 1889, *supra*, doubtless operated as a waiver of the pre-emption proof, submitted by him under his said filing, for the land in question. But his claim being confessedly prior to that of Stratton, his case is here upon said application.

For the reasons hereinbefore stated Crow's present filing is clearly illegal. It follows that he could not have secured title to the land under the pre-emption law and that he therefore can not exercise the right of transmutation under the act of 1889, *supra*. Arthur Crocker (15 L. D., 525). Crow's application to transmute is accordingly denied.

The land covered by Stratton's private entry had been embraced in the homestead entry of one Cooper, which entry was canceled July 22, 1884. You held that as said land had not been "restored after its segregation by said homestead entry" Stratton's entry was illegal.

Thus it will be seen that the matters relating to the Stratton entry in no way affect the confessedly prior claim of Crow, and no decision is rendered touching said entry.

Crow's filing being, as stated, illegal, your judgment canceling the same is hereby affirmed.

RAILROAD LANDS—ORDER OF RESTORATION—APPLICATION.

JOSEPH G. LACHANCE.

An application to enter lands embraced in the order restoring to entry certain lands certified to the State for the benefit of the Bay de Noquet grant, confers no right if filed before the day fixed for such restoration.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 28, 1893.

By letter of April 24, 1891, you sustained the action of the register and receiver in rejecting the application of Joseph G. Lachance to file

pre-emption declaratory statement for the N. ½ of the NE. ¼, the SW. ¼ of the NE. ¼, and the NW. ¼ of the SE. ¼, of Sec. 5, T. 51 N., R. 30 W., Marquette land district, Michigan.

The ground of the rejection of said application was that the land had previously been certified to the State of Michigan for the benefit of the Bay de Noquet and Marquette Railroad Company, under the acts of June 3, 1856 (11 Stat., 21,) and March 3, 1865 (13 Stat., 520).

Lachance appealed from your decision, on the ground that although the land had been certified to the State of Michigan, yet the State had not patented them to the railroad company; that it had not been earned by the railroad company; that by a joint resolution of the legislature of the State, the governor had been authorized to relinquish its claim; and in view of the probability that such relinquishment would soon be executed, he asked that his application be made of record, in order that he might be awarded the prior right to the tract when it should be restored to market and opened to settlement and entry.

This matter has already been disposed of, by the action of the Department in the matter of the adjustment of said grant, in its letter to you dated October 3, 1892 (15 L. D., 312). On September 1, 1892, you reported that the governor of Michigan had, September 26, 1889, executed a relinquishment to the United States of 15,970.33 acres of lands that had been approved to the State for the Bay de Noquet and Marquette Railroad Company. Among them is the land applied for by Lachance. In your report you recommended that the relinquishment be accepted; that the land be restored to the public domain and opened to settlement under the homestead laws; that a notice of such restoration be published in some newspaper having a general circulation in said land district;

> And that there be inserted in said notice of restoration, a notice to prior applicants for such lands, *that their prior applications conferred upon them no rights*, and that, upon the date specified in the notice, all lands included in the list will be opened to entry without regard to such applications, *which shall be held rejected by said notice.*

On October 3, 1892, the Department approved your report, and especially, "your recommendation as to the manner of the restoration," and you were instructed to "direct the publication of the notice preliminary to the opening of these lands to entry."

On October 5, 1892, you issued instructions to the local officers at Marquette, as above directed.

In view of the facts herein set forth, your decision rejecting Lachance's pre-emption declaratory statement is affirmed.

PRACTICE—MOTION FOR REVIEW.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 30, 1893.

Registers and Receivers, United States Land Offices.

SIRS: In accordance with the instructions given by departmental decision of November 15, 1892, in the case of Wm. H. Allen *v.* Wm. M. Price, 15 L. D., 424, directing certain changes of practice in regard to the rights of contestants and the closing of contest cases pending time allowed for filing motions for review, you are instructed as follows:

In cases where an entry is cancelled by reason of contest, the land covered by the same is to be reserved from entry for the period of thirty days from due notice to the contestant of his preference right of entry thereof.

Should an application to enter the land be presented by a stranger to the record, you will receive and hold the same in abeyance to await the action of the contestant, and should such contestant fail to exercise his right, such application or applications must be disposed of in accordance with the law and rulings of the Department. Should a waiver of the preference right of an entry duly executed by the contestant be filed, the tract will at once become subject to entry.

In regard to final action by this office, no case will be closed until the expiration of time for filing motion for review has expired. Therefore, hereafter, upon receipt of the letter of this office promulgating a departmental decision, you will, with as little delay as possible, notify all parties in interest of said decision, and also, at the same time, *notify this office* as to the service of such notice, and at the expiration of the time allowed for filing motions for review, under Rules 76, 77, and 78, of Practice, Circular, 5 L. D., 204, you will report action taken, that the case may be closed by this office. In event a motion for review is filed in your office, you will immediately forward same to this office.

In cases in which the parties are represented by resident counsel before this office, such attorneys will be advised by this office of the decision made and the time for filing motions for review will begin to run from the date that service is first made upon such counsel (see Peterson *v.* Fort, 11 L. D., 439), and in all cases where a motion for review is filed in this office, you will be advised thereof without delay.

Blank forms for your use in carrying out these instructions will be furnished you as soon as possible.

Promptly acknowledge the receipt hereof.

Very respectfully,

M. M. ROSE,
Acting Commissioner.

Approved:

GEO. CHANDLER,
Acting Secretary.

TIMBER AND STONE ACT—OFFERED LANDS.

NORMAN L. CROCKETT.

The limitation of the right of purchase under the timber and stone act to "unoffered lands" is not removed or modified by the provisions of section 1, act of March 2, 1889.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 30, 1893.

The land involved in this appeal is the SW. ¼, Sec. 2, T. 9 N., R. 10 W., W. M., Vancouver, Washington, land district.

The record shows that Norman L. Crockett made application October 2, 1890, to purchase said land under the provisions of the act of June 3, 1878. He submitted final proof pursuant to published notice and receiver's duplicate receipt issued January 20, 1891.

In the course of business the matter was considered by you, and on May 17, 1892, you held the entry for cancellation on the ground (1) that the land was "offered" August 3, 1863; and (2) that the proo was insufficient in that it shows that the witnesses examined the land October 26, 1890, while in the "sworn statement, dated October 2, 1890, he says he had personally examined the land."

From this decision the applicant appealed, assigning as error:

(1). The Commissioner erred in holding said entry for cancellation for the reason that it was made and allowed upon so called offered land.

(2). The Commissioner erred in holding that land embraced in said entry was ever legally offered.

(3). In holding that land embraced in said entry was not legally subject thereto.

(4). In not referring said case to the Secretary of the Interior with recommendation that it be approved by board of equitable adjudication.

(5). In not sustaining the final proof offered and made and patenting said entry.

The act under which applicant is seeking to purchase known as the timber and stone act, (20 Stat., 89), as amended by the act of August 4, 1892 (27 Stat., 348), reads—

That surveyed public lands of the United States within the public land states . . . . . valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold, etc.

It is conceded that the land in controversy was offered as stated by you, but it is contended by counsel that "their quality and status under this offer was abolished and changed into unoffered land by the first section of the act of March 2, 1889" (26 Stat., 121). This section reads as follows:

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.

It is insisted that this act "withdrew the land in controversy from the category of 'offered' lands long prior to the date of Crockett's

entry." The case of Ward *v.* Montgomery (15 L. D., 280) is quoted by counsel in support of their position.

I do not concur in this view. The effect of that decision "is that where there has been a change in the price at which lands may be disposed of, there must be a public offering at the changed price before they can be bought at private entry." In the case at bar there has been no change in price and the act last quoted does not alter it. Congress simply intended by that act, in my opinion, to abolish one method of disposing of lands.

> The legislation in question does not in express terms declare that hereafter all offered' lands shall be treated as though they are 'unoffered' and it seems to me that it would be straining construction beyond all reasonable bounds to hold that the distinctions, in law or fact, which have so long existed between the two classes of land are abolished by a questionable inference arising from the prohibition against private entries, an inference or implication which in effect would make the term 'offered,' if not synonymous, at least, interchangeable, with that of 'unoffered' lands. (See Instructions to your office February 21, 1893, 16 L. D.)

I am clearly of the opinion that the status of the land in controversy remains unchanged and is not subject to entry under the timber land act. Eldred *v.* Sexton (19 Wall., 189).

Your judgment is therefore affirmed.

Very respectfully,

GEO. CHANDLER,
First Assistant Secretary.

CONFIRMATION—RULE OF APRIL 8, 1891.

HARPER *v.* BELL ET AL.*

The rule of April 8, 1891, providing for the disposition, on motion, of cases falling within the confirmatory provisions of Section 7, act of March 3, 1891, is not applicable to cases ready for disposal in their regular order.

Acting Secretary Chandler to the Commissioner of the General Land Office, August 18, 1892.

On July 6, 1883, Robert S. Bell made pre emption cash entry No. 347, and on July 12, following, received receipt and certificate for the SW. ¼ of Sec. 23, T. 16 N., R. 22 W., North Platte, Nebraska.

On August 6, 1883, he sold and transferred the N. ½ of said tract to N. V. Harlen for $350, and on September 11, 1883, the S. ½ of said tract was sold and transferred by him to the Brighton Ranch Company for $250.

In 1886 Brock Harper initiated a contest against said entry. A trial was had October 27, 1886, and the local officers recommended that the contest be dismissed. On appeal, you reversed their finding, and held

* Not reported in Vol. 15.

the entry for cancellation; and on February 9, 1889, an appeal having been taken from your judgment, this Department modified your judgment, and directed another hearing (8 L. D., 197), and on October 18, 1889, said hearing was had. After considering the evidence submitted, the register and receiver again recommended that the contest be dismissed, and on December 2, 1890, you reversed their finding, and held the entry for cancellation.

The case has now been brought before me on appeal.

Since the case reached the Department on appeal, the transferees of the N. ½ of the tract, have filed a motion, asking that a patent issue for said tract, by virtue of the provisions of the seventh section of the act of March 3, 1891, (26 Stat., 1095).

On August 1, 1892, attorneys for contestant, by letter, call the attention of the Department to the fact that a copy of said motion to confirm was not served on contestant, or any of his attorneys. They cite rule of April 8, 1891, which provides for disposing of confirmed cases on motion. (12 L. D., 308).

I have examined the order above cited, and conclude that it has no reference to motions made in cases like this, ready in their regular order for disposal, and hence not taken out of the regular order for disposition. The rule requiring that when a party files a motion under the order cited, he shall serve the opposite side with a copy, is applicable only in cases which have not been reached in their regular order on the docket, and is intended to give interested parties notice that it is proposed to advance the case, or take it up without reference to the regular order. It manifestly can have no application in this case, for it has been regularly reached, and it is the duty of the Department to dispose of it under the law, and confirm the entry, if it is confirmable, independent of the motion.

It is shown by the record that the entry in question was made, and final certificate issued on July 12, 1883. The tract was sold after final entry, and before March 1, 1888, for a valuable consideration, and no adverse claims exist which originated prior to final entry. The purchasers are presumed to have acted in good faith in making these purchases, and, in fact, there is much in the record to show their good faith, and no fraud on their part has been found.

It follows that a sufficient showing is made to indicate that the case comes within the purview of the act of March 3, 1891, (*supra*).

Your judgment is reversed, and you will call on the present holders of this land to furnish such proof as is required by the Department (12 L. D., 450). After receiving this proof, you will adjudicate the case under the act and instructions cited.

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

BELLAMY *v.* CAMPBELL ET AL.

A charge that an entry was fraudulently made, and that the transferee holding thereunder had knowledge of such fraud, should be investigated before determining whether said entry is confirmed under section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 31, 1893.

I have considered the appeal of George Bellamy from your decision of June 14, 1892, in the case of said Bellamy *v.* Cyrus Campbell, entryman, and William Lemon, transferee, involving the SE. ¼ of Sec. 2, T. 159 N., R. 51 W., Grand Forks, North Dakota, land district.

The record shows that on March 5, 1881, Campbell made homestead entry for said tract, and on the 10th day of November, 1881, made commutation proof and payment for it and at the time received his final certificate therefor.

On the 8th day of September, 1887, you held Campbell's entry for cancellation, notice of which was sent to him by registered letter in October, 1887, which notice was not received by him, but returned to the local officers unopened.

On December 21, 1887, Lemon filed an appeal from said decision.

On May 25, 1888, Bellamy filed in the local office his corroborated affidavit of contest against Campbell's entry, charging a failure

to establish a residence on the land as required by law, in this, that he did not live there and make his home on the land at any time prior to the date of his proof . . . . . That before making said proof he agreed to sell and dispose of the land, to one Henry Mason and in accordance with said agreement he (the said Campbell) did sell and deed away all his right, title and interest in and to said tract.

On the 11th day of March, 1889, the appeal of Lemon was decided by the Department in his favor, but in view of the charges contained in Bellamy's affidavit of contest, it was held that

said contest should be allowed to proceed according to law, pending the determination of which said proof and entry should stand suspended . . . . . should this contestant fail to sustain his contest and no further evidence of bad faith in the entryman be developed, then the entry will be allowed to pass to patent on the proof as made.

A hearing was ordered and had before the local officers, at which the contestant and Lemon, the transferee, appeared and submitted their testimony, Campbell making default.

The register and receiver decided in favor of the contestant and recommended the cancellation of Campbell's entry.

From which judgment Lemon appealed.

On the 30th day of September, 1891, upon an examination of the evidence and records in the case, you found that there was no adverse claim existing against this entry at the time final certificate was issued;

that no fraud on the part of the transferee had been found by a government agent, and that said land had been transferred by said entryman after the issuance of final certificate and prior to March 1, 1888. Thereupon you held that the case was covered by the seventh section of the act of March 3, 1891 (25 Stat., 1095), and dismissed the contest upon the transferee furnishing certain proofs.

On the 24th day of November, 1891, Lemon as transferee, filed in the local office a certified abstract of records showing a chain of title from the entryman to Lemon; together with satisfactory proof that the land had not been reconveyed to the entryman; copies of said proofs were served upon Bellamy's attorney on the same day. Notice of your decision of September 30, 1891, was not served on Bellamy until February 23, 1892. On June 14, 1892, you dismissed the contest and directed Campbell's entry to go to patent.

Bellamy appeals.

The errors assigned are in effect that you erred in passing the entry to patent under the act of March 3, 1891.

After the appeal was taken counsel for Bellamy filed herein the affidavits of George Bellamy, James Bellamy, David Myers and Abraham Almas from which counsel claims it will appear:

(1). That William Lemon loaned the money ($100) to Henry Mason to purchase the tract in question of the entryman Campbell.

(2). That Lemon went upon the land prior to date of entry November 10, 1891, to ascertain its value.

(3). That he, Lemon, was fully aware of the contract made by Campbell prior to the entry of said land—to sell the same to Henry Mason, and,

(4). That said Lemon had knowledge of the fraud which was being practiced by Campbell in thus disposing of his homestead claim prior to entry.

I think there is enough shown by these affidavits to warrant an investigation in order to determine Lemon's true connection with the matter, before passing upon the question as to whether the entry is confirmed under the act of March 3, 1891. You will therefore direct such investigation to be had before the register and receiver of the local office with the view of ascertaining the facts: (1) As to whether there was any fraud perpetrated by Campbell in connection with said entry; (2) What knowledge, if any, of any fraud practiced by Campbell in connection with said entry did Lemon have at or before the time he loaned the money to Mason.

The abstract of title filed in this case shows that Mason, after mortgaging this land to Lemon, mortgaged it to C. Aultman and Company for $732.50, on December 14, 1883, and to I. Underwood and A. Diggs, on August 9, 1884, for $488.45, and, although the land seems to have been sold at sheriff's sale under the mortgage given to Lemon, yet there may be some contingency by which the subsequent mortgagees may be entitled to some rights, even if Lemon should be precluded, and I have therefore to direct that notice be given them of the investigation to be had, that they may assert any rights they may have in the premises.

Upon the testimony taken the register and receiver will report their finding and return the testimony and record to you, after which you will re-adjudicate the matter in the light of the showing then made.

CONTESTANT—ACT OF JULY 26, 1892.

THOMPSON *v.* BROWNELL.

The act of July 26, 1892, amending section 2, act of May 14, 1880, and providing that the heirs of a deceased contestant may proceed with the contest, is not applicable to cases in which the contestant's death occurs prior to the passage of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, March 31, 1893.

This record presents an appeal taken by the attorneys for Frank J. Thompson from your decision dated February 18, 1892, in the case of said Thompson *v.* Duane R. Brownell, affirming that of the register and receiver dismissing Thompson's contest alleging abandonment, filed October 25, 1888, against Brownell's homestead entry, made April 29, 1885, for N. ½ of SE. ¼, SE. ¼ of NE. ¼, Sec. 21, and SW. ¼ of NW. ¼, Sec. 22, T. 39 N., R. 7 E., Susanville, California. The appeal in this case was filed April 18, 1892, and personal service thereof was had same day upon the attorneys for Brownell, who, on May 9, 1892, filed a motion to dismiss said contest. The death of Thompson was suggested by said motion, and the same was accompanied by affidavits setting out that he (the contestant Thompson) died on or about November 6, 1891.

Service of this motion was had same day (May 9, 1889) upon Thompson's attorneys and no reply has been made thereto.

By the rulings in force prior to July 26, 1892, the preference right of entry allowed a successful contestant by section 2, of the act of May 14, 1880, (21 Stat., 140), was held to be a personal privilege that lapsed with his death. By the act of July 26, 1892, (27 Stat., 270), the act of 1880, *supra*, was amended by adding thereto a second proviso which reads as follows:

Provided further, That should any such person who has initiated a contest die before the final termination of the same, said contest shall not abate by reason thereof, but his heirs who are citizens of the United States, may continue the prosecution under such rules and regulations as the Secretary of the Interior may prescribe, and said heirs shall be entitled to the same rights under this act that contestant would have been if his death had not occurred.

By the circular approved January 9, 1893, (16 L. D., 34), this Department declared that the provisions of said act of 1892, will be applicable to all cases in which the death of the contestant occurred, or may occur, after that date, and before the final termination of the contest.

The contestant as hereinbefore shown died in November, 1891, that is, more than eight months before the passage of said act.

It follows that the motion to dismiss is well founded. It is accordingly sustained and the contest of Thompson dismissed.

By letter "H" dated October 5, 1892, you transmit the final proof submitted by Brownell August 29, 1892. Also a protest filed same day by the widow of contestant Thompson against said proof, based upon the allegation that it could not be allowed pending the present appeal. These papers, together with those transmitted by your letter "H" dated August 5, 1892, are returned for your appropriate action.

OKLAHOMA TOWNSITES—DEEDS—UNCLAIMED LOTS.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., March 31, 1893

To the Trustees of Townsites in the United States Land Districts, Oklahoma Territory.

GENTLEMEN: I am in receipt of numerous letters from several of the boards of trustees reporting that they have a number of deeds for lots which they have been unable, after repeated efforts, to get the parties in whose names they are executed to call for, and that assessments are due upon said lots.

Letters have also been received from some of said boards making reports as to the unclaimed lots in certain of the towns, and also as to the reservation for parks and for sites for public buildings, and asking for instructions as to the conveyance of the said reservations to the proper authorities.

You will, where you have completed the work of preparing the deeds for the lots awarded by you to the several claimants, publish for fifteen days in some newspaper of general circulation in the town where said lots are situated, or if there be no newspaper published in said town, then in some newspaper of general circulation published in the county in which said town is situated, a list of the lots, and their respective claimants, the deeds for which remain in your possession, and that unless said deeds are called for, and the assessments upon said lots paid within twenty days from the date of said notice, said lots will be considered as unclaimed and included in the list of lots unclaimed which are to be sold under the direction of the Honorable Secretary of the Interior in accordance with the provisions of section 4 of the act of May 14, 1890. At the expiration of the twenty days you will transmit to this office a printed copy of the notice given accompanied by an affidavit of the publisher of the newspaper in which such notice is printed

to the effect that such notice was published for the required time, and a list of the lots for which the parties have obtained the deeds.

In addition to this publication, a like notice should be given by mail whenever the post office address of the claimant is known. You will transmit with your other report, a full list of such unclaimed lots, with the post office address of each claimant, so far as known, and state if notice was given to claimant by mail, in addition to the notice by publication.

To avoid further trouble in the matter of unclaimed deeds, you will not, hereafter, prepare a deed for any lot until the claimant has made all of the required payments therefor, including the estimated cost of preparing the deed.

In towns where there remain unclaimed lots, not reserved the board of trustees having jurisdiction therein, will give notification by publication, in the same manner and for the same length of time as herein indicated relative to unclaimed deeds that upon a day to be fixed by the board, which shall not be less than twenty days, nor more than thirty days after the date of said notice, and at a certain place, said lots will be offered for sale to the highest bidder; said notice to contain a list of the lots. You will not, however, in towns where unclaimed deeds remain in the possession of the board of trustees, take any steps looking to the sale of the unclaimed lots until after the expiration of the time which may be fixed under these instructions for the claimants to obtain such unclaimed deeds, and where a decision has been made by any of the board of trustees, that certain lots in any town should not be awarded to the claimants thereof, but should be sold for the benefit of the municipality, and the claimants have filed appeals to this office, no steps shall be taken to dispose of the unclaimed lots in such town until the determination of all of such cases, in order that not more than one sale of unclaimed lots may be necessary.

When lots are thus sold, you will issue deeds to the purchasers, upon the payment of the purchase money.

All moneys for which lots may be sold shall be paid to the disbursing officer of the respective boards, who will issue his receipt therefor, and from the proceeds of such sales, all expenses attending the sale and conveyance of the lots sold shall be paid, and all assessments upon the lots sold shall be deducted from such proceeds.

Upon the conclusion of each sale the board will report to this office the result thereof, the amount of money received from the sale of the lots, the expenses attending the sale and conveyancing, the amount of assessments upon the lots sold, and all claims by members of the boards for compensation for work in connection with such sales.

A printed copy of the notice of the sale, and an affidavit of the publisher of the newspaper that the same was published for the required time, must accompany the report. Upon receipt of such report direc-

tions will be given as soon as practicable, as to the disposition of the net proceeds of the sales.

The boards of trustees in the respective towns will convey to the proper authorities, as soon as practicable after receipt hereof, the lots reserved for parks and for sites for public buildings unless the patent issued to such trustees does not include the land so reserved.

Very respectfully,

S. W. LAMOREUX,
Commissioner.

Approved.
HOKE SMITH,
Secretary.

RAILROAD GRANT—SETTLEMENT RIGHT.

NORTHERN PACIFIC R. R. CO. *v.* PATTERSON.

Land embraced within an unexpired pre-emption filing at the date of withdrawal on general route is excepted from the operation of said withdrawal.

The possession, occupancy, and improvement of a tract by a qualified claimant under the settlement laws, existing at definite location of the road, serve to except such tract from the grant, although the claimant had not at such time established residence on said land.

Acting Secretary Chandler to the Commissioner of the General Land Office, March 31, 1893.

I have considered the case of the Northern Pacific Railroad Company *v.* James L. Patterson, involving the S. ½ of the NW. ¼ and the N. ½ of the SW. ¼, Sec. 25, T. 2 S., R. 5 E., Bozeman land district, Montana, on appeal by the company from your decision of March 22, 1892, holding the land to have been excepted from the grant for said company.

The company's claim to this land is based upon the grant made by the act of July 2, 1864 (13 Stat., 365), and with reference to said grant these lands are within the primary limits, and opposite the definite location shown upon the map filed July 6, 1882, and were also included within the limits of the withdrawal on general route, the map showing which was filed February 21, 1872.

The records show that one John Stevens filed pre-emption declaratory statement No. 1932, for this land, on October 6, 1871, alleging settlement the 4th of the same month, and that Alfred Downer filed pre-emption declaratory statement No. 2097, for same land, November 28, 1871, alleging settlement September 19, 1871. This land being unoffered, said filings were subsisting claims at the time of the filing of the map of general route, February 21, 1872, and under the uniform holding of this Department since the case of Malone *v.* Union Pacific Railway Company (7 L. D., 13), said claims served to except the land in

question from the operation of the withdrawal attaching upon the filing of said map.

On April 23, 1883, James L. Patterson, the present claimant, made timber-culture entry No. 165, for this land, which entry he relinquished February 29, 1888, and same day made homestead entry No. 927, under which he now lays claim to the land.

On December 21, 1886, the company applied to list this land on account of its grant, and upon the rejection of said list by the local officers, appealed to your office, urging that this land was on July 6, 1882, the date of the definite location of the road,

> public land, to which the United States had full title save as against the grant to the said company, and not reserved, sold, granted, or otherwise appropriated, except to said company, under its said grant, and free from pre-emption or other claims or rights.

It was upon this application to list the land that proceedings were begun, resulting in the case now before me.

The sole question for consideration is, was there such a claim to this land on July 6, 1882, as served to except the same from the operation of the grant, otherwise it must be held that it was not subject to Patterson's entry when made, and that the company's list was improperly rejected.

There seems to be no dispute about the facts, which are as follows:

In 1877, Patterson bought for $400 the possessory claim to this land of John Stevens, who filed therefor in 1871, and soon thereafter applied to make entry at the local office, which was refused him. With the same result he at several other times during the years 1877 and 1878 sought to make entry of this land.

At the time of the sale to Patterson, Stevens had a small house upon the land, about ten acres broken, and the tract partly fenced. Patterson at this time was living on the adjoining one hundred and sixty acres, but at once took possession of the land in question and began to improve the same, so that at the date of the definite location of the road, July 6, 1882, he had the entire tract under fence, about sixty acres in crops, and the land well irrigated. Since 1879 the land has been cropped each year, and Patterson has continued to claim the same, although he did not move from the adjoining land until 1888.

With the exception of the entries made for this land, Patterson has never exercised any of the rights granted by the general land laws.

With the sale to Patterson all claim under Stevens's filing was at an end, but, as Patterson at once took possession and has since continued to claim and improve the land, being duly qualified to assert claim under the settlement laws, which he did prior and subsequent to the date of the attachment of rights under this grant, I am clearly of the opinion that, by these acts, such a right was initiated by Patterson as served to except the land from the grant, although he did not actually begin to reside thereon until after the allowance of his homestead entry in 1888.

In the case of Northern Pacific Railroad Company *v.* Potter (11 L. D., 531), it was held that:

Where possession and occupancy alone, at the time rights under a railroad grant attach, are relied on to except the land from the grant, it must affirmatively appear that the party in such possession had the right, at that time, to assert a claim to the land in question under the settlement laws. (Syllabus.)

Can there be any question but that Patterson, on July 6, 1882, had a *right* to assert claim to this land under the settlement laws, and, further than this, it is clearly shown that he was, at that time and for a long time prior thereto, actually asserting claim to this land by the continued improvement of the same and his repeated efforts to make entry thereof under the homestead laws. His residence upon the land was not necessary until after his entry had been allowed, and having a house upon the adjoining tract, it would be unreasonable to hold that he must move the same upon the land in dispute, while the question as to whether he would ever be permitted to make entry of the same was, as it then appears to have been, so much a question of doubt. It is true that, when he made entry in 1883, it was under the timber culture laws and not under the settlement laws, but this can in no wise affect the disposition of the case, as the status of the land at the date of the definite location of the road must control, and, as it is shown that the land was excepted from the grant, its subsequent disposition is a matter in which the company can have no interest.

From a review of the entire matter, I affirm your decision, holding the land to have been excepted from the company's grant. The company's list will therefore stand rejected and Patterson's entry remain of record awaiting final proof.

TIMBER CULTURE—AMENDATORY ACT OF MARCH 3, 1893.

CIRCULAR.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., April 6, 1893.

Registers and Receivers, United States District Land Offices.

GENTLEMEN: By the first section of the act of March 3, 1891, (26 Stat., 1095) the laws providing for the entry of public lands for timber culture purposes were repealed so far as regards any future claims, and continued with certain prescribed modifications for the adjustment of any claims initiated prior to such repealing act, as follows, viz:

1. The following words of the last clause of section 2 of the act of June 14, 1878, (20 Stat., 113) namely, "That not less than twenty-seven hundred trees were planted on each acre," were repealed.

2. It was provided that in computing the period of cultivation the time should run from the date of the entry, if the necessary acts of cultivation were performed within the proper time.

3. It was further provided that the preparation of the land and the planting of

trees should be construed as acts of cultivation, and the time authorized to be so employed and actually employed, should be computed as a part of the eight years of cultivation required by statute.

One of the conditions of the act of June 14, 1878 (20 Stat., 113), embraced in the following words, viz, "at the time of making such proof there shall be then growing at least six hundred and seventy-five living and thrifty trees to each acre," was left untouched in the repealing act, so that persons proposing to perfect title thereunder were required to show in the final proof the existence of the quantity and character of trees on the land as therein prescribed.

Congress at its recent session, by act of March 3, 1893,—Public—No. 124,—entitled "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes", enacted as follows, viz:—

That section one of an act entitled, "An act to repeal timber culture laws and for other purposes," approved March third, eighteen hundred and ninety-one, be, and hereby is amended by adding the following words to the fourth proviso thereof: And provided further, That if trees, seeds, or cuttings were in good faith planted as provided by law and the same and the land upon which so planted were thereafter in good faith cultivated as provided by law for at least eight years by a person qualified to make entry and who has a subsisting entry under the timber culture laws, final proof may be made without regard to the number of trees that may have been then growing on the land.

Under this enactment, parties may make final proof without showing the existence of the quantity and character of trees on the land at the time of their doing so, as required under the previously existing law, provided that it be made to appear in the proof.

1. That trees, seeds, or cuttings were in good faith planted according to the requirements of the timber culture laws as amended by the first section of the act of March 3, 1891, before mentioned.

2. That the trees, seeds, or cuttings so planted, and the land upon which they were so planted were in good faith cultivated for at least eight years in manner prescribed in the timber culture laws.

3. That the claimant was qualified to make entry under said laws.

4. That he has an entry subsisting thereunder.

5. That the facts of the case are such as to show the claimant's good faith in his proceedings under the statutes.

You will therefore apply and give proper effect to the provisions of the act of March 3, 1893, according to the foregoing, in any cases coming before you as contemplated in the instructions of the [general] circular of February 6, 1892, pages 29 and 139 *et seq.*, to which you are referred.

Very respectfully,

M. M. ROSE,
Acting Commissioner.

Approved,
HOKE SMITH,
Secretary.

PRIVATE CLAIM—COSTS OF SURVEY.

LILBURN W. BOGGS.

The cost of surveying and platting a private land claim must be paid into the Treasury of the United States; and payment of such costs to the surveyor general is not the payment required by statute.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 4, 1893.

I have considered the appeal taken from your decision of March 26, 1892, requiring payment of the cost of surveying and platting that part of the California rancho Napa confirmed to Lilburn W. Boggs.

The act of July 31, 1876 (19 Stat. 102, 121), provides—

That an accurate account shall be kept by each surveyor-general of the cost of surveying and platting every private land claim, to be reported to the General Land Office with the map of such claim; and that a patent shall not issue nor shall any copy of any such survey be furnished for any such private claim until the cost of survey and platting shall have been paid into the Treasury of the United States by the party or parties in interest in said grant or by any other party.

The cost of survey and platting in this case, as charged upon the books in the office of the surveyor general for California, was itemized by Theodore Wagner, the then surveyor general, as follows:

April 1, 1880, To survey,	. . . . .	$113.94
" " " " platting,	. . . . .	31.75
		145.69

It appears that on April 3, 1880, the bill of T. J. Dewoody, deputy surveyor, for the first item of $113.94, was forwarded to the Land Department for approval, and was approved for payment on June 19, 1880, and the presumption is that payment was made therefor out of the Treasury of the United States. It is contended, however, that the above account with some other miscellaneous items, were paid to said Wagner in cash on July 12, 1880, and an exemplification of the said account taken from the debit and credit accounts of the expense of surveys and platting of private land claims kept by said Wagner shows that such payment was then made to him. But under date of September 23, 1891, William H. Pratt, then United States surveyor general for California, writes that "A very thorough examination of the matter fails to show any deposit for the same having been made in the U. S. Treasury here."

Payment to the surveyor general is not payment "into the Treasury of the United States." It was the plain duty of the parties interested in said grant to make payment "into the Treasury of the United States," as is expressly provided by said act. This Department cannot relieve them from compliance with this requirement of the statute. Pueblo of Monterey (13 L. D., 294).

It is incumbent, therefore, upon the parties interested in this grant to show that payment of said items has been made "into the Treasury of the United States," either by themselves, or by the surveyor general, whom they made their agent, or otherwise such payment must hereafter be made before patent can issue.

Your judgment is affirmed.

HOMESTEAD CONTEST—LEAVE OF ABSENCE—PRACTICE.

YARNEAU *v.* GRAHAM.

Leave of absence granted to a homesteader under section 3, act of March 2, 1889, does not preclude the initiation of a contest during such period on account of non-compliance with law prior thereto.

A defendant who is regularly in court on a charge of non-compliance with law, and elects to plead a special statutory defense, and does not submit evidence in response to the charge, is bound by such election, and is not entitled to a further hearing in the event his defense is not held good.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 4, 1893.

Katie Graham made homestead entry, on July 30, 1887, of the S. ½ of the SW. ¼ of Sec. 27, and the N. ½ of the NW. ¼ of Sec. 34, T. 116, R. 56, Watertown land district, South Dakota.

On February 16, 1891, she filed application for a leave of absence from said homestead, for five months, alleging that she was unable to support herself and those dependent upon her, by her labor on the land. The application was granted.

On February 18, 1891, Richard Yarneau filed affidavit of contest, alleging abandonment and failure to reside upon, cultivate, and improve the land as required by the homestead law.

A hearing was ordered to be held on April 23, 1891. On that day, at half past one o'clock, p. m., counsel for the defendant filed his special appearance—

For the purpose of this motion, and for no other purpose, and moves that the above entitled case be dismissed, for the following reasons: (1) The affidavit of contest in this case was filed after the said claimant had been granted a leave of absence from said claim, under the second section of an act of Congress approved March 2, 1889; and (2) for the reason that the notice of contest served on the claimant in this case does not describe the land embraced in her homestead entry.

This motion to dismiss was overruled by the receiver. It would appear that the register was not present: all the papers in the case that were sworn to on that day bear the receiver's signature to the jurat; and the register, in the course of his decision uses the following language:

Before passing upon this case I called the attorneys of both parties before me, and it seems to be conceded that the Hon. Receiver overruled the motion to dismiss.

If the register had been sitting in the case, it would hardly have been necessary for him to call upon the attorneys in order to learn what action had been taken on the motion.

The case was called at two o'clock, p. m. The contestant, being sworn, testified that he lived about one-fourth of a mile from the land, and that he knew from personal observation that the defendant had not "fenced, cultivated, built, resided upon, or in any way improved said tract," except that about two years before, about half an acre had been broken, which had never been plowed, but permitted to go back to weeds; that about three years before she had "placed a small shanty on the land;" that there were no other buildings or improvements of any kind; and that she had never since the date of entry (more than three and a half years before) resided on the land.

The preceding testimony was corroborated by three witnesses, all of whom lived within a mile of the land; one of them had known it for nine years, one for six years, and one for two years and a half.

Defendant offered no testimony, but insisted upon his motion to dismiss, which the receiver overruled.

Defendant excepted, elected to stand on his special appearance, and gave notice of appeal.

On May 16, 1891, the register rendered decision, holding that the contest should be dismissed.

On August 6, 1891, the receiver recommended, in view of the testimony taken and the refusal of the defendant to offer any testimony, that the entry ought to be canceled.

When the record was transmitted to your office you held the entry for cancellation. From your decision the defendant appeals to the Department.

The several allegations of error may be summed up in one, substantially as follows: "that the affidavit of contest was filed, and hearing set, during the time allowed claimant to be absent, under leave of absence granted under the third section of the act" of March 2, 1889. In his argument counsel for defendant quotes from said section the proviso that "such settler so granted leave of absence shall forfeit no rights by reason of such absence;" and he contends that said proviso was nullified by her being called on to defend her entry during the period embraced in her leave of absence.

The meaning of the clause above cited is not difficult to understand. If the plaintiff in this case had filed an affidavit showing that the defendant had been absent from and had failed to cultivate and improve the land during the period embraced in her leave of absence, the contest could not properly be allowed; for *such* absence would work no forfeiture of any right. This is the "protection" extended by the act cited. But the contention that no contest can be initiated during the period embraced in such granted leave of absence, for non-compliance with the law during a period prior to that when such leave began, can not be sustained.

The defendant acknowledges due notice of the hearing; she has had her day in court, but refused to offer any testimony, electing to rely upon another line of defense; and she must now be held to her election.

(Kelley *v.* Moran, 9 L. D., 581). "Her refusal to submit evidence when offered the opportunity in the regular course of proceeding, cut off her right to be heard further on the merits of the case." (Brannon *v.* Uriell, 5 L. D., 446; see also Dixon *v.* Sutherland, 7 L. D., 312).

Concurring in your conclusion that the evidence clearly shows failure to reside upon, cultivate, and improve the land as required by the homestead law, I affirm your decision.

HOMESTEAD—AMENDMENT—ACT OF MARCH 2, 1889.

CARRIE A. ENGLEBRIGHT.

The heir of a deceased homesteader cannot secure an amendment of the original entry by a new entry under section 2, act of March 2, 1889.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 5, 1893.

On May 15, 1885, Artemas C. Scribner made homestead entry (No. 441) of the S. ½ of the SW. ¼, the NE. ¼ of the SW. ¼, and the SE. ¼ of the NW. ¼, Sec. 26, T. 12 S., R. 74 W., at Leadville, Colorado.

Said entry was erroneously allowed by the local officers, for the reason that the NE. ¼ of the SW. ¼ and the SE. ¼ of the NW. ¼ of said section was included in the pre-emption cash entry (No. 362) of John Holton, made October 26, 1877.

On May 27, 1892, Mrs. Carrie A. Englebright filed an application, as sister and heir at law of said Scribner, who was killed in April, 1891, alleging that the NE. ¼ of the NW. ¼ and the NW. ¼ of the NE. ¼, Sec. 35, T. 12 S., R. 74 W., is south of and adjacent to that part of the land properly embraced in said entry, and is vacant public land, agricultural in character, and properly subject to homestead entry; and asking that said entry be amended by including said last mentioned tract therein in lieu of that which had been improperly allowed in said entry.

By letter of March 30, 1892, you denied said application and held said homestead entry for cancellation as to that part in conflict with said Holton's entry. An appeal now brings the case to this Department.

In your decision it is stated that by letter of May 24, 1890, Scribner was advised to the effect that he was probably entitled to the benefits of the second section of the act of March 2, 1889 (25 Stat., 854), which he had not availed himself of at the time of his death.

The petition alleges that it was the desire of the deceased to have his entry include said tract now sought, but that he was killed before he had carried out his intention.

It is contended—"That it is not now too late for his heir to exercise the right that he may have had in the premises, and she desires so to do."

It is obvious that so much of Scribner's entry as conflicts with the prior cash entry of Holton must be canceled. The entry of the eighty acres which would then remain of Scribner's entry (the S. ½ of the SW. ¼) could thereafter be completed by his heir at law under section 2291 of the Revised Statutes, which provides that "the person making such entry, or if he be dead, his widow, or in case of her death, his heirs or devisee," may complete such entry and "be entitled to a patent as in other cases provided by law."

Section 2372 provides that—"In all cases of an entry hereafter made of a tract of land not intended to be entered, by a mistake of the true numbers of the tract intended to be entered, . . . the purchaser, or in case of his death, the legal representatives, not being assignees or transferees," may take proceedings to have the entry change to the tract "intended to be entered." But this section does not apply to the present case, because Scribner "intended to enter" the tract he did enter. He made no "mistake of the true numbers of the tract." The local officers made a mistake in informing him that said tract was open to entry,—at least as to that part covered by Holton's entry. Had he been correctly informed, he would doubtless have changed his intention. Under the information given him he carried out his exact intention in making his entry and that intention has not been frustrated by his mistake. His case does not come therefore under the provisions of said section 2372. Lizzey Peyton (15 L. D., 548).

The act of March 2, 1889 (25 Stat., 854), section 2, provides—

> That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one-quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title to lands under the pre-emption or homestead laws already initiated.

While Scribner, during his lifetime, could have availed himself of this privilege of making a new entry, such privilege is not conferred upon his widow or legal representative. There seems to be no more reason why the widow or legal representative should make the entry contemplated by this statute, than the original entry itself. The law allows the legal representative in the case of the death of an entryman to complete an entry which he has initiated, or to amend an entry which he has made by mistake, as already shown, and this is done in express terms; but it nowhere allows a legal representative to initiate a new entry.

To allow this to be done in the present case would be equivalent to importing a provision into the statute which Congress has not seen fit to place there. The entry allowed by this act is a new entry, and though it may include a part of the same land included in the former entry, it does not relate back to said former entry, or reinstate it. Ripley *v.* Cauffman (14 L. D., 305).

The application must be denied. Your judgment is affirmed.

HOMESTEAD—CITIZENSHIP—APPLICATION.

SMITH *v.* UNITED STATES.

An alien over twenty one years of age who enlists in the United States Army and is honorably discharged therefrom occupies the status of one who has declared his intention to become a citizen, and as such possesses the requisite qualification in the matter of citizenship to initiate a homestead entry.

A pending application to make homestead entry protects the rights of the applicant against the subsequent claims of another.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 6, 1893.

I have considered the case of Andrew J. Smith *v.* the United States, on appeal by the former from your decision of May 19, 1892, holding for cancellation his homestead entry for the SE. ¼ of the NW. ¼, Sec. 35, T. 114 N., R. 23 W., 5 P. M., Marshall, Minnesota, land district.

One, John Olson made application to enter this land on January 21, 1892. His application, and an accompanying affidavit, set forth the fact that he had enlisted in the United States Army, Co. A., 11th Minnesota Regiment, U. S. Volunteers, on August 24, 1864, and that he was honorably discharged therefrom June 26, 1865. He claimed that this made him a naturalized citizen of the United States, but on learning that it did not, he went before the district court of Sibley county, on January 28, 1892, and was duly naturalized, the certificate of the court says *inter alia*, "The said John Olsen having thereupon produced to the court testimony showing that he was honorably discharged from the military service of the United States", etc.

When his application to make entry was sent to the Land Office, it was defective in some particulars, and was returned for amendment, and was returned a second time because it did not show why it was made before the clerk of the district court, instead of at the land office. It was amended in this particular, and when again sent to the office, it was rejected for the reason that on January 25, Andrew J. Smith had made entry for the tract. From this rejection he appealed, and you held that the local officers had erred, and that "a legal application to make homestead entry is, while pending, equivalent to actual entry, so far as the rights of the applicant are concerned, and withdraws the land embraced therein from any other disposition until final action thereon. See Peterson *v.* Ward (9 L. D., 92); see also, the case of Banks *v.* Smith (2 L. D., 44), wherein it is held that "an application, erroneous in form, returned for correction, should take effect from the date when first received at the local land office."

You further held that Olson's service in the army was equivalent to a declaration of intention to become a citizen, citing the instructions of Commissioner McFarland to the register and receiver at Watertown, Dakota, (2 L. D., 195, Par. 4).

I do not find that the Department has ever had occasion to pass upon the question here presented, or that any instructions or circular has been issued by it upon the matter, but I consider the above instructions in accordance with the law. Section 2166, R. S., provides that any alien twenty-one years of age, who has enlisted, or may enlist, in the United States army, either regular or volunteer forces, and who has been honorably discharged therefrom, may be admitted to citizenship "without any previous declaration of intention to become such." He need not prove more than one year's residence. The court must be "satisfied by competent proof of such person's having been honorably discharged from the service of the United States."

It is claimed that you erred in holding that the mere declaration that Olson was a soldier, without accompanying proof that he was honorably discharged, was sufficient to base his application upon. Olson says in his affidavit that he was honorably discharged, but whether his discharge certificates accompanied the application is not shown. It would, of course be the best evidence of his honorable discharge. The local officers appear to have been satisfied that such was the fact, but they held that an honorable discharge was not equivalent to a declaration of intention. The law says that it is the equivalent, and the courts so hold, and so held in his case. If it is sufficiently the equivalent to form the basis for admitting a man "to all and singular the rights, privileges, and immunities" of an American citizen, it is certainly sufficiently the equivalent to form the basis for allowing a man to enter a homestead.

I have examined the authorities cited by you in support of the other proposition in your decision, and find that they fully support it. In addition, I may say that it is uniformly held that "a pending application to make homestead entry, protects the rights of the applicant against the subsequent claims of others." See Mallet *v.* Johnson, *et al.* (14 L. D., 658), and cases there cited.

Your decision is affirmed, the entry of Smith will be canceled, and the application of Olson be allowed.

HOMESTEAD—REINSTATEMENT—ADVERSE CLAIM.

MORGAN *v.* MORGAN.

The right to receive a patent is not defeated by the inadvertent cancellation of a homestead entry and the intervention of an adverse claim, where prior thereto the entryman had submitted satisfactory final proof in due accordance with law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 6, 1893.

The land involved in this case is the NE. ¼ of Sec. 14, T. 140 N., R. 56 W., Fargo, North Dakota.

The record in this case shows that on May 22, 1879, Henry Morgan made homestead entry for said tract and that on October 26, 1885, Jane

Morgan, widow of said Henry Morgan deceased, made final proof and final papers were issued in the case.

On October 15, 1885, however, William H. Morgan, son of the deceased settler, protested against his mother being allowed to make proof on said entry, on the ground that she had not lived with his father for several years, which protest was rejected by the local officers on the day final proof was made and the case submitted to you in the regular order of business; no appeal having been taken.

In your examination of the case you affirmed the action of the local officers as to the rejection of the protest, but suspended the final proof on the ground that Morgan had not completed his citizenship before his decease and therefore that Jane Morgan, the widow, should show that she is a citizen of the United States, she having filed only a declaration of intention to become such. The proof in other respects was found satisfactory. The local officers were directed to call upon the party for such evidence, but after repeated efforts to reach the party, as more fully appears in your decision in the case, dated February 1, 1892, the entry was finally canceled July 23, 1887, and on July 29, 1887, William H. Morgan made homestead entry of the same land.

Under date of January 1, 1892, Jane Morgan transmitted through her attorney Dudley M. Wells of Coldwater, Michigan, an affidavit and petition setting forth that she believes she has been wrongfully defrauded of her just rights and asks a reconsideration and reinstatement of her case for the reasons: First, that when she made final proof she filed therewith her citizenship papers and that the local officers informed her that her papers were all correct; Second, that at the time she was called upon to furnish evidence of citizenship she was not in the United States and was unable to attend to the matter on account of illness. This is corroborated by two witnesses.

Under date of February 1, 1892, in view of said petition, you reexamined the case and then discovered that the supposed declaration of intention filed by Mrs. Morgan was in reality a certificate of full citizenship, whereupon you reinstated the erroneously canceled entry and held that of William H. Morgan for cancellation.

From this decision he appeals, alleging substantially, that as the original entry of his father had been canceled, the land was restored to the mass of the public domain and subject to entry by the first legal applicant; that he was the first legal applicant and made entry of the land, and therefore as his claim had lawfully become of record, the former entry should not be reinstated in the face of and to the prejudice of his legally acquired rights. Furthermore, that he received no notice of the filing of his mother's petition for reconsideration and that his rights were thus prejudiced thereby.

There is no question as to the qualification of the plaintiff to make the entry, but the whole matter turns upon the fact,—was the land subject to such entry? I think not.

Final proof in this case had been made within the statutory period, showing a strict compliance with law; the naturalization papers of the widow, who made the proof, were properly filed when said proof was made, in accordance with the rules governing such cases; the final papers were issued by the local officers and all that actually remained to be done was for the government to issue the patent.

The fact that the land department inadvertently canceled the entry instead of issuing a patent can not defeat the right of the defendant. Her right and equitable title was complete when she perfected her final proof and filed proper naturalization papers as required by law, and therefore when the mistake was discovered, the only proper thing to do, was done, to reinstate the entry of the defendant as the superior right and hold the entry of plaintiff for cancellation.

In regard to the plaintiff not receiving notice of the petition as alleged. I do not consider that such fact has in any manner worked injustice, or prejudiced his rights in the case, as he was duly notified of your action and by his appeal now, has his day in court. If I were to sustain his point and require service of notice, it would avail him nothing; it would not change the record of the fact that his mother was duly naturalized, hence, I am not inclined to do a useless thing where it would only result in unnecessary expense and benefit neither party.

Your decision is accordingly affirmed.

RAILROAD GRANT—ADJUSTMENT.

MOBILE AND GIRARD R. R. CO.

Directions given for the adjustment of the Mobile and Girard grant, and submission of a list in proper form for certification to the company in full satisfaction of the grant.

Secretary Smith to the Commissioner of the General Land Office, April 7, 1893.

In departmental communication of February 1, 1893, full instructions were given with respect to the adjustment of the grant to the Mobile and Girard Railroad Company under the act of September 29, 1890, (26 Stat., 496). Therein it was held:

From a careful review of the section in question, I am of the opinion that its effect is to confirm to the company an amount of land equal to that earned by the building of the road from Girard to Troy, or 302,233.79 acres, and, as the large purchasers have agreed to pro-rate the amount remaining, after deducting the small holdings, the interests of the United States are in no wise prejudiced. Without passing upon the validity of any of these claims, you are directed to make due call upon the purchasers to make selection of their respective amounts under their agreement within thirty days, in order to identify the lands that will be patented to the company.

. . . . . Upon receipt thereof, you will be enabled to allot the lands to the company, and upon the approval of that allotment by this Department, the grant, and all claimants thereunder, will be fully satisfied, and the remaining lands within the grant may then be restored under the terms of the forfeiture act. (16 L. D., 70).

Since the receipt of these instructions, you have submitted at different times several lists of lands, in the aggregate embracing 300,469.39 acres. These lists represent the selections made by large purchasers under the pro-ration referred to, and a list on account of the small purchasers embracing 23,487.73 acres.

I learn upon inquiry that the remaining lands necessary to make up the full amount are embraced in reported sales by the company to small purchasers, who have not asserted any right under their purchase, and an approximation of the sales made to small purchasers to one hundred and sixty acres.

The 8th section of the forfeiture act of September 29, 1890, *supra*, requires that

> The Secretary of the Interior in making settlement and certifying to or for the benefit of said company the lands earned thereby shall include therein all lands sold, conveyed, or otherwise disposed of by said company not to exceed the total amount earned by said company aforesaid.

It was well known that prior to the passage of this act, there had been certified to the State on account of this grant an amount of lands far in excess of that earned by the building of the road from Girard to Troy, and it is plain that in this adjustment a *re-certification* was contemplated under the restrictions and in accordance with the terms of said adjustment act, which re-certification should be in full satisfaction of all claims made on account of the grant.

No formal adjustment of the grant has yet been submitted by you, and the several lists are not in proper form, and, disconnected as they are, do not constitute an adjustment of the grant. It is also noticed that the allotments made to the large purchasers are in excess of the amount to which they are entitled.

The instructions of February 1, 1893, before referred to, contemplated that the large purchasers might make selection of their respective interest, after deducting the small holdings, so that in the aggregate the amount to be certified to the company would not exceed that confirmed to the company by the forfeiture act.

The small purchasers not parties to the agreement to pro-rate were, under the terms of the agreement, to be protected to their full claim as reported by the company in its list of sales. It was not therefore intended that such small purchasers should make due selection or assertion of claim under the forfeiture act, but that their lands should be first identified and included in the allotment in satisfaction of the grant, the balance due on account of the grant to be pro-rated between the persons parties to the agreement, according to their respective holdings.

Your report of October 25, 1892, contained the following statement of sales made by the company, based upon the showing made before the local office under the publication heretofore provided for by this Department, viz:

To Abram Edwards	74,203.98
" Joshua Thompson	118,807.29
" James A. Carney	19,578.49
" numerous persons	16,233.50
" claims not reported by company	720.49
" sales reported, but no claim presented	13,108.51
" Van Kirk Construction Company	262,994.49
	505,646.75
Less duplication in Edwards and other sales	1,479.64
Total sales	504,167.11

Three of these items appear to represent sales to persons not parties to the agreement, viz: the 4th, 5th and 6th items, amounting to 30,062.50 acres. I learn, however, that the 4th item includes the sales to McMillan & Son (2155 acres), who were parties to the agreement, and are bound to pro-rate. Deducting this amount, leaves 27,907.50 acres covered by sales that must be protected. List No. 1 submitted by you covering minor sales only embraces 23,487.73 acres. After allotting said amount, 27,907.50 acres, leaves 274,326.29 acres to pro-rate among the parties to the agreement. The sales to such parties amount to 477,739.25 acres; hence, the per cent allotted to each will be 57,423, instead of fifty-eight per cent as shown by the lists submitted by you.

It is further noticed that the lists submitted by you do not fully satisfy the grant, and their approval, even if in form, would not constitute an adjustment of the grant, so that the excess might be restored to settlement and entry, as contemplated by the adjustment act.

I therefore herewith return the lists, and direct that a proper adjustment be submitted of this grant, accompanied by a list in proper form for certification to the company in full satisfaction of the grant, embracing the lands sold by the company in amount equal to that found to be due on account of the building of the road from Girard to Troy.

This list should contain a preamble reciting the acts making the grant and providing for this adjustment; the acceptance by the company of the provisions of the adjustment act, and its relinquishment of all right and title to other lands than those allotted under said act; the action of this Department and notice to claimants under this act; the agreement of certain purchasers to pro-rate, and the action of the Department thereon, with instructions in the matter of the final allotment to the company.

In describing the lands allotted, the name of the purchaser might be given in the column headed "remarks," and in the certificate attached to the list it should be shown that the lands are certified to the company, under the provisions of the act of September 29, 1890, for the benefit

and use of the purchasers named in the list and in full satisfaction of the grant.

In this adjustment care must be taken not to include any lands covered by reported settlement claims originating prior to January 1, 1890, and should any of the minor sales be covered by such claims, it will, of course, alter the per cent to be allotted to the parties to the agreement.

It is of the greatest importance that this matter be speedily disposed of, and to this end you will make the same "special" for consideration.

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

UNITED STATES *v.* LANGDON ET AL.

A case involving the reinstatement of an entry can not be advanced for consideration on a motion for confirmation under section 7, act of March 3, 1891.

An entry canceled prior to the passage of said act is not within the confirmatory provisions thereof.

A transferee who, previous to his purchase, examines the premises covered by an entry can not be considered a *bona fide* purchaser under said section, where an examination would disclose the fact that the entryman had not complied with the law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 7, 1893.

J. W. Langdon has appealed from your decision of February 1, 1892, holding for cancellation the commuted homestead entry of Martin H. Berry for the NE. ¼ of the SE. ¼, the S. ½ of the NE. ¼, and the NE. ¼ of the NE. ¼, Sec. 18, T. 12 S., R. 3 W., Los Angeles, California, and allowing the homestead entry of Harris A. Sledge for the same tract to remain intact.

Berry commuted his entry to cash and received final cash certificate August 4, 1885. In September of the same year, he sold the land to Langdon, appellant herein.

January 27, 1887, the entry was held for cancellation on the report of a special agent, and afterwards, to wit, May 18, 1888, it was finally canceled by your office, it having been made to appear that the entryman, Berry, had been duly notified of your former action and had taken no steps to have his entry reinstated.

July 13, 1888, Sledge made homestead entry for the tract.

Upon complaint of Langdon, the transferee, that he had not received any notice of the action of your office in holding the entry for cancellation, you ordered a hearing to allow him to show, if he could, why the entry should be reinstated.

The trial was had in July, 1890, and the local officers recommended that the entry be reinstated. Sledge appealed, and you reversed the action of the local officers, as aforesaid.

Afterwards Langdon appealed to this Department, and with his

appeal filed a motion for confirmation of said entry under section seven of the act of March 3, 1891 (26 Stat., 1095), and the Department, on October 15, 1892 (Press Copy Book, L. and R., 255, p. 91), held that the motion for confirmation must be denied for the reason that the entry could not be confirmed until it was reinstated, and the question of reinstatement being involved in the appeal from your decision, the case could not be advanced for consideration upon a motion for confirmation. Therefore counsel for Langdon filed a motion for review of said departmental decision.

The grounds of said motion are error, because "said ruling was premature, as the case had not been reached for action;" in holding that Berry's entry had not been reinstated on the record. Counsel for Sledge has filed a motion to dismiss said motion for review, because "said motion is not accompanied by an affidavit of the party or his attorney 'that the motion is made in good faith and not for the purpose of delay,' as required by Rule 78 of Practice," in proof of which is submitted copy served, marked "Exhibit A." An inspection of said copy shows the following—

District of Columbia, ss.:

S. D. Luckett on oath states that he is one of the attorneys for the transferee in the above cause and that he makes the foregoing motion in good faith and not for delay. And affiant further states that, as per attached receipt, he caused a true copy of said motion to be mailed by registered letter to J. O. W. Paine, Esq., San Diego, Cal., attorney for intervenor Sledge.

S. D. LUCKETT.

Subscribed and sworn to Nov. 10, 1892.

Notary Public.

While it is true that the copy served in this case does not have the name of the notary attached before whom it was subscribed and sworn to, yet it does have the name of Mr. Luckett signed to the copy, and the original motion has the affidavit complete.

In my judgment the motion to dismiss must be denied.

Counsel insist that they did not ask to have said case advanced on the docket for the purpose of considering said motion, and for this reason they did not serve their motion on Sledge, in accordance with the rule in Harper *v.* Bell, decided on August 18 (16 L. D., 336). In that case the Department held that a motion to confirm under section seven did not fall under the rule of April 8, 1892, which provides for disposing of confirmed cases (12 L. D., 308) when the case had been reached in its regular order, for then, without regard to said motion, if it appeared that the entry came within the confirmatory provisions of said section the Department would confirm it. But it was not intended by said decision to abrogate Rule 99 of Practice, which reads "No motion affecting the merits of the case or the regular order of proceeding will be entertained, except on due proof of service."

If, therefore, a party, in a contested case, files a motion for confirmation under said section with the intent to advance it without due no-

tice of proof of service, the Department will not entertain the motion, but this will not prevent it from executing the law, if the record, irrespective of said motion, shall show that the entry in question is within the confirmatory provisions of said section.

The motion to confirm this entry cannot be sustained for two reasons:

1st. Berry's entry was canceled prior to the time said section was adopted.

2nd. Langdon in his testimony says that he examined the land and improvements before he purchased it.

If this is correct, then he found that there were not sufficient improvements upon the tract to justify him in the belief that Berry acted in good faith in making his entry, hence, he can not be considered as a bona fide purchaser within the meaning of said section.

The only effect of the judgment sought to be reviewed is that the case cannot be advanced for consideration under said motion, because it involves the question of reinstatement. It is apparent, therefore, that there is no good ground for a revocation of said departmental decision, and said motion must be, and it is hereby overruled.

The evidence has been carefully examined and it is my judgment that the law was not complied with by the entryman.

Your judgment is affirmed.

PRACTICE—HEARING—RULE 35.

ISMOND *v.* CANNING.

After notice of a hearing has been given it is too late to apply for an order directing the evidence to be taken under Rule 35 of Practice.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 8, 1893.

On December 8, 1883, James Canning filed a pre-emption declaratory statement for the SE. ¼, Sec. 20, T. 129 N., R. 60 W., Aberdeen, South Dakota, alleging settlement March 23, 1883.

On March 7, 1884, William P. Ismond made a homestead entry for said tract, and on July 23, 1884, filed his protest against Canning's final proof. The register and receiver, after considering the evidence submitted at the trial had between the parties, sustained Canning's proof, and Ismond appealed to you.

On December 7, 1885, after considering the case, you reversed the decision appealed from; and Canning appealed to the Department, where, on October 24, 1887, your judgment was affirmed.

Canning then moved for a review of the departmental decision, which was denied. He also asked for a rehearing, on the ground of newly discovered evidence, and furnished affidavits showing that two of Ismond's principal witnesses had sworn falsely at the trial and after-

wards admitted it. The rehearing was allowed on February 20, 1890, and in the judgment of that date it was stated that—

I have carefully examined the testimony in the case, and I am of the opinion that but for the evidence of the two witnesses who are alleged to have sworn falsely, the judgment of this Department in the case would not have been found in favor of Ismond.

You will therefore, order a rehearing under the rules of your office to determine first; whether or not the evidence of said Raymonds (meaning the two witnesses charged with false swearing) was false, and whether such false testimony was given with the knowledge of and was procured by contestant.

Should the allegations in said affidavits be sustained by the evidence, then hearing should be continued upon the issues involved in the original case, and you should then determine the rights of the parties upon the evidence introduced.

You promulgated this decision on March 18, 1890, and a hearing was ordered before the register and receiver, to take place on December 12, 1890. December 9, 1890, the date of the hearing was changed to May 5, 1891, by stipulation of both parties, and afterwards by stipulation it was continued until May 26, 1891, at 10 o'clock a. m.

On the day last above mentioned Canning applied for a continuance and commission to take testimony before a justice of the peace near the land, and filed his own affidavit, which, omitting the formal parts thereof, is as follows:

James Canning the protestant above named being first duly sworn on his oath says that he and all of his witness in the above entitled action live more than eighty miles from the Fargo land office, and that himself and his witnesses cannot personally attend at the Fargo land office at the hearing in the case. That John Courtney, F. D. Stroup, and others are important witnesses of the contestant and will testify that the above contestant resided continuously upon the above described land ever since the month of March, 1883, and that ever since said date it has been said contestant's home and only home. That they cannot appear at the Fargo land office.

Wherefore affiant asks that F. S. Randall, justice of the peace in and for Dickey Co., N. D., of Ludden N. D., be appointed referee to take the testimony of said John Courtney, F. D. Stroup and others.

(Signed) James Canning.

Objection was made by attorneys for Ismond, and it was contended that the first issue to be determined was as to the alleged falsity of the testimony of Charles and H. C. Raymond, and that this issue must be determined before it could be known whether any further steps were necessary or not. They further stated that the said Raymonds were present, having come from Minneapolis, a distance of two hundred and fifty miles, expressly to give their testimony pursuant to stipulation of parties that the hearing should take place on that day.

On motion of Ismond the continuance was refused, and as Canning refused to proceed with the trial, the register and receiver dismissed the hearing, and Canning appealed from said order to you. On October 7, 1891, you held that "since a rehearing of this case was ordered by the Secretary, the case should not be, in my opinion, sum-

marily dismissed, under the circumstances shown." You conclude as follows—"I must, therefore, in accordance with the foregoing view, reverse your action dismissing the case, and remand it for a hearing at your office, after legal notice to all parties, in pursuance of the Secretary's decisions." Ismond has appealed from your judgment to the Department.

The hearing directed by the departmental judgment of February 20, 1890, was not intended to open up the case on the old issues unless Canning should first sustain his charges that Ismond's witnesses had sworn falsely, because it was believed that if their evidence was worthy of belief the judgment in the case already made was correct.

The burden of proof rests with Canning to sustain the charges made by him against the credibility of Ismond's witnesses, and until he has done this there is no necessity of witnesses to show his settlement, etc.

His affidavit for continuance and for the designation of an officer near the land to take testimony is fatally defective, because it does not state that any of the witnesses named would swear that the evidence given by the Raymonds was false, or that it was procured to be given falsely by Ismond. Besides, the application is evidently made under Rule 35 of the Rules of Practice, and can only be granted in the discretion of the register and receiver, exercised by them "and stated in the notice of the hearing."

It is too late to apply to have evidence taken near the land after notice of a hearing has been given. He might have applied for the issuance of a commission to take depositions under Rules 24 to 34 inclusive by filing interrogatories, but he did not do this.

As the hearing was ordered on affidavits furnished by Canning making grave charges against the witnesses of Ismond, he should have used due diligence to have been ready to furnish the evidence which he said he could and would furnish if a hearing should be ordered. The case was twice continued after notice was issued of the time and place of trial, and it is not made to appear that Canning used any diligence to prepare to sustain his charges against the credibility of Ismond's witnesses, but asks a continuance and an order to take testimony to show his compliance with the law.

I am of the opinion that the register and receiver were correct in dismissing the hearing, and I can see no sufficient grounds for ordering a new hearing. Your judgment is therefore reversed and the case closed.

TIMBER CUTTING—ACT OF MARCH 3, 1891.

BIG BLACKFOOT MILLING CO.

A permit to cut timber, obtained without due advertisement as required by departmental regulations, and substantially changed by erasures and interlineations after the order therefor was granted, should be revoked.

Secretary Smith to the Commissioner of the General Land Office, April 8, 1893.

On the 28th day of July, 1891, a petition was filed in the General Land Office by the Big Blackfoot Milling Company for a permit to cut timber from a large tract of land in Montana. The tract selected was a narrow strip extending fifty or sixty miles up the Big Blackfoot River. The clear purpose was to obtain permission to cut the timber made easily accessible to the market by the stream without going to the trouble and expense of also cutting the timber some distance from the stream. The number of sections covered by their amended application was 37.

This application was advertised as is required by the following rule:

In order that farmers who desire to have the forests preserved in the interest of water supply for irrigation and all others having adverse interests may have due notice of such applications, the parties making an application, as herein provided, shall cause a notice of such application, describing the lands and timber which it is desired to use, to be published at least once a week for three consecutive weeks, in a newspaper of general circulation in the State, District, or Territory, and also in a newspaper in the county, or, where there is more than one county, in each of the counties wherein the lands are situated, and a printed copy of the published notices must be submitted with the application, together with the affidavit of the publisher or foreman of each newspaper, attached thereto, showing that the same was successively inserted the requisite number of times, and the dates thereof. (Circular May 5, 1891, paragraph 8, 12 L. D., 456.)

The Secretary on the 16th day of January, 1892, gave a permit to cut from 17 $\frac{5}{8}$ sections, to continue for a space of twelve months.

On the 10th day of September, 1892, a second petition was filed by this company asking for permission to cut timber from all of the land covered by the original petition, and asking that the privilege continue for three years.

This last petition was referred to the First Assistant Secretary and he filed a report against the permit. The Secretary at first denied the petition, but subsequently, on the 13th day of February, 1893, granted it, allowing the company to cut for three years from 22 $\frac{1}{8}$ sections.

The second application was not advertised according to the rule above stated.

On the 8th day of March, 1893, the Secretary had this permit called to his attention. He learned that the permit had been changed so that it applied to sections other than those embraced in the order granting the permit, and that the second petition had not been advertised as the

rule required, and on the 11th day of March, 1893, an order was issued revoking the permit.

A petition was filed to rescind the order revoking the permit. This petition and the petition to grant the permit were heard at the same time.

The original order of February 13th, applied to sections not covered by the order granting the permit in 1892, and no advertisement of the second petition was made as the rules controlling permits to cut timber required.

The permit, before it passed out of the hands of the register, was substantially changed by erasures and interlineations.

These facts alone would require the permit to be revoked, but there is an additional reason deserving attention. The permit was granted within a few days before the end of the term of the former administration. It was to continue through three years of the present administration. It applied to more sections of land than had ever been covered by any permit heretofore granted. It extended for many miles through a large territory, applying to the select sections of timber easily made accessible to market. The same company had paid to the railroad for the privilege of cutting from alternate sections at a rate which would make their permit worth, according to the lowest estimate, $46,000.00,—according to the highest, $138,000.00. This permit covered 22 ½ sections of land. Except to this company and to the Bitter Root Development Company, no permit, so far as I can learn, was ever allowed to exceed nine (9) sections. There was but one of nine sections, and, since June 1892, all permits, with the exception of those to this company and to the Bitter Root Development Company, have been limited to two sections. Is it wise to extend such great privileges to a single company? Is it desirable to so hasten the destruction of the forests of our country?

These questions must certainly cause doubt as to the advisability of this permit, even though no other objection existed, and the petition to rescind the order of revocation is denied.

This brings up the application of the company on the petition of September 10th, 1892, revived by the order setting aside the permit of February 13, 1893. In so far as it applies to sections included by the permit of January 16th, 1892, I will consider it. In so far as it applies to additional sections, the failure to advertise clearly defeats it. While seriously doubting whether even an extension of time to cut from sections covered by a permit should be allowed without a new advertisement, still the company has acted upon the course pursued on the petition by this Department, and serious inconvenience may now be entailed on the public unless some concessions are made for the present season.

It is therefore directed that the Big Blackfoot Milling Company be allowed to select four sections from the number of those covered by the

permit of January 16th, 1892, and that a permit issue according to the provisions of the permit of February 13th, 1893, to allow said company to cut from the sections selected until January 1st, 1894. Each section selected must be a full section in length and width.

TIMBER CULTURE CONTEST—CONTESTANT.

WILSON *v.* VAUGHN.

A timber culture contestant, who, for purposes of cultivation, has control of the land embraced within the entry under contest, will not be permitted to take advantage of his own failure to cultivate in order to defeat the rights of the entryman.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 11, 1893.

The land involved in this appeal is the W. ½, NE. ¼ and the E. ½ NW. ¼, Sec. 24, T. 21 S., R. 22 W., Larned, Kansas, land district.

The record shows that Charles L. Vaughn made timber-culture entry of said tract November 9, 1889. On February 21, 1891, Henry Wilson filed an affidavit of contest, alleging failure to break five acres the first year and abandonment; also there had been some breaking done previous to the entry but no cultivation of the same. A hearing was had before the local officers and as a result they decided that the charges were sustained and recommended the cancellation of the entry. The entryman appealed and you by letter of April 6, 1892, reversed their judgment, whereupon Wilson prosecutes this appeal assigning as error, substantially that your decision is against the law and the evidence.

It appears from the testimony that previous to Vaughn's entry there had been broken on said land about eighteen acres; that on the day he made the entry he made a contract with one Simons by which he—Simons—was to attend to the cultivation of the land. Simons says he made a bargain with the contestant to let him have the ground to put in a crop for one-fourth of the same and that Wilson was to cultivate five acres of the land. Wilson positively denies that he was to cultivate the land. He admits, however, that he put wheat on the eighteen acres on December 15, 1890, and that he rented the ground from Simons, and that he knew Simons was the agent of Vaughn.

In the case of Lucas *v.* Ellsworth (4 L. D., 205), it was said—

> A portion of this cropping, embracing three acres, was done by the contestant under permission of Ellsworth's agent, and if he failed to prepare the ground for and cultivate his own crop, after obtaining control of the land for that purpose, he is estopped from charging the failure upon his lessor for the purpose of depriving him of his entry and taking the land for himself.

It seems to me that the case at bar falls within the doctrine there announced and is conclusive against the contestant.

Your judgment is therefore affirmed.

DESERT LAND CONTEST—ADVERSE CLAIM.

MEADS *v.* GEIGER.

The right of a desert land entryman, who fails to effect reclamation within the statutory period, to perfect his claim is not defeated by the intervention of a contest, where from the first, the entryman has shown the utmost diligence and good faith, and the default is due to a mistake which the entryman is engaged in rectifying when the contest is initiated.

The case of Lee *v.* Alderson cited and distinguished.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 12, 1893.

On September 2, 1886, Davison M. Geiger made desert land entry (No. 336), for the NW. ¼, Sec. 31, and the SW. ¼, Sec. 30, T. 7 S., R. 34 E., M. D. M., at Bodie, now Independence, land district, California.

On September 18, 1889, George A. Meads made his affidavit of contest against said entry, which was filed September 23, 1889, alleging that said Geiger "has not reclaimed said tract of land, nor any part thereof, by conducting water thereon," nor made final proof thereon, nor payment therefor.

On September 23, 1889, a hearing was appointed, and citation issued for the parties to appear at the local office on November 26, 1889, when the parties appeared and submitted testimony.

On March 10, 1890, the local officers rendered their opinion, that the entry of Geiger should remain intact; that he should be allowed to make final proof upon making the proper showing, and that the contest should be dismissed.

On appeal their action was reversed by your decision of February 3, 1892, and Geiger's entry was held for cancellation. An appeal now brings the case before me.

The facts as disclosed by the evidence are as follows: In October, 1886, Geiger began work on a ditch to convey water from the McNally ditch, about ten miles distant, to the northwest corner of the land in controversy. From that date he worked diligently and "the whole time" for three years in constructing said ditch; he also employed from three to four horses, with plows and scrapers, and from two to six men. He expended over $5,000, besides his own time. He has erected a house on the land sixteen by sixteen and one-half feet, in which he took up his residence about October 1, 1888. He has also built a stable for horses, and a corral.

On September 2, 1889, three years from the date of his entry, Geiger had constructed a ditch sixteen feet wide at the top, eight feet wide at the bottom, and two feet deep, to the land, and through its entire length, but owing to a mistake in the level the water, when let on in August, 1889, only flowed to within a half a mile of the land. Upon this discovery Geiger immediately set to work to cure the defect by

constructing a new ditch for a mile and a half, which was completed so that water ran upon the land about November 5, 1889, with lateral ditches, so that water could be conveyed upon each forty acre subdivision of the land. About six miles of the ditch was constructed through very rocky washes from the mountain, parts of which had to be covered with dirt hauled from elsewhere, and about one mile was cement, which required the use of pick and shovel. It appears that Geiger is the owner of a sufficient quantity of water, running in the McNally ditch, to irrigate the land.

The foregoing acts prove the utmost good faith on his part, and he only failed to comply with the strict letter of the law by reason of the mistake in the grade in the last half mile of the ditch before reaching the land.

The desert-land act of March 3, 1877, (19 Stat., 377) provides that the person desiring to avail himself of the benefits of said act may file his declaration "that he intends to reclaim a tract of desert land, not exceeding one section, by conducting water upon the same within the period of three years thereafter, and that "at any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid . . . . a patent for the same shall be issued to him."

It will be observed at the outset that the statute makes no specific provision forfeiting the rights of the entryman in the event that the reclamation is not effected, nor final proof submitted within the period designated. Miller *v.* Noble (3 L. D., 9); and to cover such cases of default on the part of entrymen, the board of equitable adjudication has provided special rules for the confirmation of entries where failure to show literal compliance with the statute is due to ignorance, accident, or mistake, or to obstacles which the entryman could not control, and "where there is no adverse claim" (6 L. D., 799).

On the facts as shown herein, if the case were pending on final proof it would fairly fall within the rule adopted for equitable action, in the absence of any adverse claim. In other words there is nothing shown that requires the government in its own interest to cancel this entry, or object to its perfection, and if it is now canceled, it must be due to the intervening adverse claim of the contestant, and it is therefore necessary to consider what right, if any, a contestant may acquire in a case like this.

The entryman has been from the first untiring in his efforts to effect reclamation. He has not spared money nor labor in his efforts to comply with the law. Sixteen days after the expiration of said period his entry was attacked, at which time he was actively engaged in the work of reclamation that he had commenced three years before, and, prior to the hearing he had the requisite water supply. His action in this matter was in no wise induced by the contest, but was in strict pursuance of his original intent.

The decision of your office rested largely upon the authority of Lee *v.* Alderson, (11 L. D., 58), wherein it was held in effect that the intervention of a contest defeats the right of a desert entryman in default to complete his entry. This general proposition is unquestionably correct. The two cases, however, are widely distinguished in this respect, that in the case cited the entryman made no effort toward the construction of his ditches until within five months of the expiration of the entry, and that his subsequent efforts were not effectual, while in the case at bar the defendant was at no time remiss in the matter of diligence, and was finally successful in securing water sufficient for the purposes of irrigation. In one case the default was of such grave character that it could not well be cured while under attack, although an effort in that direction had been previously commenced, while in the other through the unremitting diligence of the entryman reclamation was nearly effected before the contest was begun.

Your decision is reversed.

RAILROAD LANDS—ACT OF FORFEITURE—APPLICATION.

McKERNAN *v.* BAILEY.

The act of March 2, 1889, declaring forfeited certain lands granted to the State of Michigan in aid of railroads, and resuming title thereto, operates to annul and vacate a former certification of said lands and restore them to the public domain, subject to the first legal application therefor.

Failure of a pre-emptor to appeal from the rejection of his application will not preclude his subsequent assertion of priority of right as against another, where at the date of such action the title to the land was erroneously believed to not be in the United States.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 12, 1893.

On May 19, 1888, Elsie A. McKernan offered homestead application for the N. ½ of the SW. ¼ and the N. ½ of the SE. ¼ of Sec. 11, T. 51 N., R. 35 W., at the Marquette land office, Michigan, which was rejected by the local officers, and, on appeal, said rejection was affirmed by your office letter of July 16, 1888.

Said land lies within the six mile limits of the grant to the Marquette, Houghton and Ontonagon Railroad Company, which was forfeited by the act of March 2, 1889 (25 Stat., 1008).

On July 16, 1888, Ella F. Bailey tendered her pre-emption declaratory statement for the SW. ¼ of the NW. ¼, the N. ½ of the SW. ¼ and the NW. ¼ of the SE. ¼ of Sec. 11, T. 51 N., R. 35 W., which was rejected, and she took no appeal.

On April 10, 1889, Miss Bailey renewed the tender of a pre-emption declaratory statement for the same land, which was again rejected, and she took no appeal.

On May 1, 1889, Miss McKernan re-offered a homestead application for the same land covered by her first application, which was held by the local officers awaiting final action by the Department on said forfeiture act.

On May 11, 1889, Miss Bailey offered pre-emption declaratory statement for the same land covered by her previous statements, which was also held for said action of the Department.

On September 12, 1890, homestead entry (No. 5708) of Miss McKernan for the land covered by her said applications, and declaratory statement (No. 2692) of Miss Bailey for the land embraced in her said statements, were made and filed simultaneously at the local office.

On November 6, 1890, Miss Bailey offered final proof in support of her claim, and Miss McKernan appeared and protested against its allowance, on the ground that she first filed upon the land claimed by her on May 19, 1888, and first settled thereon on March 7, 1889, and was therefore entitled to priority of right to the land in conflict.

A hearing was had, and both parties appeared and submitted testimony.

On January 19, 1891, the local officers found in favor of Miss Bailey, approved her final proof, and recommended the cancellation of McKernan's entry, so far as in conflict with Bailey's claim.

On appeal, by letter of May 13, 1892, you affirmed the decision of the local officers.

An appeal now brings the case to this Department.

The application of Miss McKernan made May 19, 1888, was rejected by your letter of July 16, 1888, on the ground that said land had been certified or approved to the State of Michigan on account of said grant, on July 21, 1860, and holding that "the jurisdiction of this office over public land ceases with the certification or approval for the benefit of a grant, and, as the lands hereinbefore described were certified or approved prior to the presentation of said applications, they must necessarily be rejected," citing the case of Garriques *v.* Atchison, Topeka and Santa Fe R. R. Co. (6 L. D., 543), and others. Her application was properly rejected, as also was the declaratory statement of Miss Bailey, tendered July 16, 1888, and for the same reason. No rights were acquired either by said application or by the tender of said statement. Nester *v.* Torgeson (15 L. D., 482).

The forfeiture act of March 2, 1889 (25 Stat., 1008), provides—

> That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to the State of Michigan, ... which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain.

By the very terms of this act the United States "resumed the title" to the lands forfeited thereby, and "declared" them "to be a part of the public domain." This provision had the effect to annul and vacate the said certification, and to restore said lands to the public domain

free from the effect of the original grant, and the certification thereunder. New Orleans Pacific Railway Co. (14 L. D., 321); same *v.* Sancier (14 L. D., 328); United States *v.* Repentigny (5 Wall., 211, 268).

After the passage of said forfeiture act the first attempt of either of the parties to put their claims upon record was the tender by Miss Bailey on April 10, 1889, of a second pre-emption declaratory statement for the tract claimed by her. This should have been received, and it was not her fault that it was rejected. This rejection was based upon a mistake as to the true status of the land. It was supposed that the title thereto was still in the State of Michigan, and would there remain until surrendered to the United States, and therefore was not open to entry and settlement. Under these circumstances the failure of Miss Bailey to appeal from said rejection "is not a bar to her right to assert priority of claim." Avery *v.* Smith (12 L. D., 550, 552).

The records of the local office showed that she had tendered a filing for the land she claimed. It was a legal filing, and was notice that she claimed this exact tract.

It also appears from the evidence that Miss Bailey made the first settlement upon the land, having established her residence thereon in September, 1888, in a house which had been built for her in July, 1888. She remained eight days upon the land in said September, and returned there March 8, 1889, and lived there thereafter and made improvements thereon. Miss McKernan first went upon the land March 7, 1889, but her residence was less continuous and her improvements less valuable than those of Miss Bailey.

The statement in the protest of Miss McKernan against the final proof of Miss Bailey that Miss McKernan first filed upon the land is not correct, if legal filings only be regarded, and the allegation that she first settled thereon is not borne out by the evidence. Miss Bailey was the first to offer a legal filing, and the first actual settler upon the land.

Your judgment is affirmed.

TIMBER CULTURE ENTRY—APPLICATION.

WILLIAM ROBB.

An application to make timber culture entry filed by a successful contestant at the initiation of his suit, and rejected prior to the repeal of the timber culture act, under the circular order of August 18, 1887, does not confer any right upon the applicant that can be asserted subsequent to the repeal of said act.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 13, 1893.

William Robb has appealed from your decision of June 14, 1892, holding for cancellation his timber-culture entry, No. 7335, for the SW. ¼ of Sec. 9, T. 123, R. 72, Aberdeen land district, South Dakota.

He was the successful contestant against the former entry of George C. Smith for the same tract. At the time of initiating such contest (March 18, 1890), the contestant filed application to enter the land. As the result of his contest, the entry was canceled on November 19, 1890. Notice of the cancellation was sent to the contestant, and received by him November 27, 1890. He failed, however, to forward the money and make entry of the tract until March 7, 1891. Four days before that date (to wit, on March 3, 1891), Congress passed an act repealing the timber-culture law (26 Stat., 1095). Your decision holds that as he did not make said entry within thirty days, it must be canceled.

He sets forth in his appeal that about the time he received notice of the cancellation of the prior entry it became "absolutely imperative" that he should "visit his parents in the east;" that he had not sufficient means to pay the expenses of his journey and to make the entry; that as soon as possible after his return he forwarded to the local office the fees and commission. He adds, and your letter confirms his statement, that there is no intervening right.

On August 18, 1887, you issued to registers and receivers of local land offices a circular (see Smith *v.* Fitts, 13 L. D., 670), which, among other things, directed that, upon the cancellation of a contested entry,

> The contestant to be notified of the cancellation of the entry, and advised that he will be allowed thirty days within which to enter the tract upon the application filed, upon his showing his present qualifications; and in the event of his failure so to do, *his application will stand rejected without further action* upon your part, and the tract held subject to entry by the first legal applicant.

Under these instructions, when thirty days had elapsed from receipt of notice by Robb of the cancellation of the entry that he had contested, his application previously filed stood rejected without further action. Thereafter he had no further *preference* right of entry. He had simply the same right as any other person. He would possess such right, not by virtue of the application he had filed when he initiated contest, for under the rule that application stood rejected; but (if at all) by virtue of a new application to be made thereafter. In the meantime, however, the act of March 3, 1891, repealing the timber-culture act, was passed. An application made, by him or any one else, after that date could not be allowed.

Your decision holding the entry for cancellation must therefore be affirmed.

SOLDIERS' HOMESTEAD—DECLARATORY STATEMENT.

AUGUR *v.* MCGUIRE.

No right is acquired under a soldier's homestead declaratory statement if the soldier did not actually serve ninety days in the army of the United States.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 13, 1893.

On February 23, 1891, Francis M. McGuire, by Owen A. Bryant, as agent, filed, at Ashland land office, Wisconsin, soldier's declaratory statement (No. 78) embracing the SW. ¼ of the NW. ¼, the W. ½ of the SW. ¼ and the SE. ¼ of the SW. ¼ of Sec. 23, T. 47 N., R. 9 W. There was an affidavit accompanying said statement, made by McGuire February 17, 1891, that he had "served for a period of two months and fifteen days in the army of the United States, during the war of the rebellion, and was honorably discharged therefrom, as shown by a statement of such service herewith."

The statement of service referred to is a certificate of the Adjutant General of the State of Wisconsin dated September 20, 1886, to the effect that the records of his office

show that Frank M. McGuire, late of the 8th Reg't. of Wisconsin infantry volunteers, enlisted on the 20th day of July, 1861, and was commissioned as second lieutenant in company C of said regiment on the fourth day of September, 1861, to rank from the 29th day of August, 1861; was mustered into the military service of the United States, at Madison, on the 9th day of September, 1861, by Major Brooks, for the term of three years, and resigned on the 5th day of October, 1861.

McGuire claimed to enter said tract under sections 2290, 2304, and 2309 of the Revised Statutes.

On February 24, 1891, Joseph Augur tendered his homestead application (No. 2887) for the same tract. Said application was on the same day rejected erroneously by the local officers on account of McGuire's prior filing.

Augur did not appeal from said rejection, but on March 11 1891, filed an affidavit of contest against said filing, alleging that McGuire had no settlement or improvements on said land, but that he (Augur) had settled thereon on September 15, 1890, had made substantial and valuable improvements thereon, and had resided thereon with his family.

A hearing was ordered for June 16, 1891, at the local office, when the parties appeared and submitted testimony. On July 15, 1891, the register and receiver found from the testimony that said land had "not been settled upon and cultivated according to law, and that contestant acquired no prior settlement right," and recommended that said statement (No. 78) should not be canceled.

On appeal, by letter of March 30, 1892, you affirmed the opinion of

the local officers that Augur secured no right to the land by virtue of his alleged settlement. You further held that—

Although he failed to appeal from your erroneous decision rejecting his application, he initiated his contest within the time allowed for such appeal; therefore, said application is hereby returned, and you will notify him that upon his showing the proper qualifications, the same will be made of record, inasmuch as the land was properly subject to homestead entry at the date of Augur's application.

In regard to McGuire's filing, you decided as follows—

Francis McGuire claims to have been enrolled in Co. C, 8th Wisconsin regiment, July 20, 1861, and have been mustered into service as a second lieutenant in said company Sept. 9, 1861, and discharged Oct. 5, 1861, upon tender of his resignation. This statement has been verified by the War Department, and shows that his term of service was two months and fifteen days from date of enrollment. Therefore, as McGuire had not served a period of ninety days, he was not qualified to file a soldier's declaratory statement, and S. D. S. No. 78 is hereby held for cancellation.

An appeal now brings the case to this Department.

It appears that on August 18, 1891, McGuire tendered an application to make homestead entry of said tract, which was held by the local officers subject to the result of the contest initiated by Augur. The latter was allowed to make homestead entry (No. 2887) of said tract on April 7, 1892, in consequence of your decision.

It is contended, *inter alia*, that there was error in your decision—

1. In holding that McGuire was not qualified to make a soldier's declaratory statement.

2. In causing the local officers to allow Augur's homestead entry on April 7, 1892.

Section 2304 of the Revised Statutes, under which McGuire claims said tract, provides that—

Every private soldier and officer who has served in the Army of the United States during the recent rebellion, for ninety days, and who was honorably discharged, . . . shall be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres.

From July 20, 1861, the date of McGuire's enlistment, to October 5, 1861, the date of his resignatien, is a period of 77 days. But it is contended that McGuire's resignation was not accepted until January 9, 1862, and that he was not discharged from the service until that date, and that in 1887 he was paid for service till his discharge on certificate from the Second Auditor's Office, and that therefore his service extended till January 9, 1862.

A statement of McGuire's military service has been received from the Second Auditor of the Treasury in response to the request of this Department, as follows—

McGuire was enrolled Sept. 9, 1861, mustered in as of that date, as per report of Aug. 10, 1885, Adjutant General's Office, and resigned Oct. 5, 1861, saying in his letter of resignation, "Deeming myself incompetent to fulfill the duties imposed on me." First Sergeant Seth Pierce, same Co., was appointed 2d Lieutenant in McGuire's stead Oct. 8, 1861, and was paid from and including that date to May 11, 1862,

when he also resigned. On the roll of the company from organization to Oct. 31, 1861, McGuire's name appears next to the First Lieutenant's, but is erased from the column "Present," and there appears the remark "Resigned October 5th, 1861." Seth Pierce appears as first sergeant, and was paid as such, with the remark, "Promoted to 2nd Lieutenant October 8th, 1861." McGuire's name is dropped from the subsequent rolls. There is no record that McGuire served after October 5, 1861, nor that he was present up to Oct. 3, 1861. If he remained in camp subsequent to Oct. 8, 1861, he must have been aware that his successor went on duty on that date. He (Mr. McGuire) was paid at the time of his resignation from Sept. 9, 1861, to Oct. 5, 1861, only, and filed no claim for arrears until April 20,1885. On August 17, 1886, he was asked to state to what date he did duty and to forward the order accepting his resignation or any paper received by him in lieu thereof. He forwarded an affidavit dated Nov. 10, 1886, stating that he received said order about the middle of February, 1862, at Eau Claire, Wis., and that he "did service long after the date his order says resignation is to take effect." This statement is not corroborated by the records, as above stated. In January and February, 1862, the company was arduously employed in the field in Missouri and Illinois.

It thus appears from the records of his service, both State and National, and from his own affidavit, that McGuire's "service in the army" terminated on October 5, 1861. The service contemplated is *actual* service. 3 Opinions of Attorneys General, 687; Elizabeth C. Bartlett (5 L. D., 674). "Service in the army" cannot be rendered by one who was *not* "in the army," but who was in Eau Claire, Wisconsin, while his company was "arduously employed in the field in Missouri and Illinois." McGuire's declaratory statement was properly held for cancellation and should be canceled.

I am of the opinion that this result is due to the contest initiated by Augur, though not specially charged in his affidavit of contest. His attorneys have called the attention of the Department to the insufficient length of McGuire's military service, and he was the first legal applicant for the land. He was equitably entitled to a preference right of entry, and his homestead entry may be allowed to remain intact.

Your judgment is affirmed.

ABANDONED MILITARY RESERVATION—APPRAISAL.

FORT RICE.

An abandoned military reservation, embracing both surveyed and unsurveyed land, may be appraised, so far as surveyed, and advertised for sale.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 11, 1893.

I am in receipt of your letter of March 13, 1893, transmitting a statement made by the appraisers of the Fort Rice abandoned military reservation in North Dakota.

The appraisers submit a diagram, showing that in township 137 N., range 79 W., what was a large tract of land at the time the township was surveyed, is now the bed of the Missouri river, and that what

was at the date of survey the bed of the river, is now a sand bar. The change in the course of the river affects, to a greater or less extent, the land in twelve sections in said township. The appraisers ask for instructions.

It is a question of some difficulty to determine what is the proper and best course to pursue in this case. Owing to the change in the course and bed of the river, it is not practicable to appraise the land in accordance with the legal subdivisions indicated on the plat of survey, and it is not practicable at this season of the year to make a new survey of the lands affected by the change in the course of the river.

In my opinion, the better course is to instruct the appraisers to complete the appraisement of the land so far as surveyed.

As to the sand bars which they state they have listed, but not appraised, let them state, without formal appraisement, what, in their opinion, said tracts can be sold for.

When the reservation is advertised for sale, the twelve sections involved, viz: 19, 20, 21, 22, 27, 28, 29, 30, 31, 32, 33 and 34, should be reserved from sale, and you will again report the matter to this Department, with your recommendation as to what course should be pursued in order to complete the disposal of said twelve sections.

In order to do this to a better advantage, it may be well to have an examination made as to the course of the river after the high water of the spring season has receded, as the course of the river seems to be subject to change.

OKLAHOMA LANDS—SETTLEMENT RIGHTS.

GOLDEN *v.* COLE'S HEIRS.

The heirs of a homesteader are not required to reside on the land embraced within the entry of the decedent.

A homesteader who by misadventure is within the territory of Oklahoma prior to the opening thereof, but subsequently goes outside, and there remains, until the time fixed for opening, and who secures no advantage over others by reason of his former presence therein, is not disqualified thereby to enter lands in said territory.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 15, 1893.

I have considered the case of T. M. Golden *v.* The heirs of Charles Cole, deceased, on appeal by the former, from your decision of March 30, 1892, dismissing his contest against homestead entry No. 245, made by Charles Cole, for the NW. ¼, Sec. 5, T. 17 N., R. 2 E., Guthrie, Oklahoma, land district.

Cole made homestead entry for the land on April 27, 1889. He made settlement on the tract at about 1.30 o'clock p. m., on April 22, 1889. Affidavit of contest was filed against said entry May 28, 1889, but

before the hearing was held the entryman died, and the case was revived against the heirs and legal representatives of the deceased, notice being served upon his mother. It appears by the supplemental affidavit that the entryman had never been married, and that his mother is a widow.

The affidavit charges that the entryman was unlawfully in and upon the Territory embraced in said Guthrie land district, and that he entered upon said tract of land before noon of April 22, 1889, in violation of the act of Congress and the proclamation of the President of the United States, opening said Territory. This affidavit was amended afterward, and a charge of abandonment by the heirs and legal representatives of said Cole was added.

Hearing was duly had, and the local officers recommended the cancellation of the entry. The heirs appealed, and you reversed the ruling of the local officers, and dismissed the contest, from which decision Golden appealed.

The testimony shows that a party of six persons, under the guidance of one, I. N. Terrill left Arkansas City, Kansas, about the 17th of April, and traveled in a couple of wagons southward, *via* Willow Springs, Ponca, Otoe Springs, and thence to the Iowa reservation. They were trying, it appears, to pass east of Oklahoma, cross the Cimarron River, and then move west on the south side of the river, to be ready to enter the Territory at 12 o'clock, noon, on the 22d instant, but the principal witness, I. N. Terrill, who was acting as guide, says that he was confused by the trails and took the one bearing in a general south course, and got over the Oklahoma line without knowing it; that when he discovered that the trail bore west so as to carry them into the Territory, they were probably half way across the "Pan-handle", and they went ahead and crossed the Cimarron, and got into the Iowa reservation, where they went into camp. He says he did not tell the men that they were in the Territory; that they stopped and fed their teams and ate dinner, and moved on; that Cole was not away from the party, and the party did not look for land.

It appears that when Cole crossed the river on the 22d, and reached a tract of land, it was claimed by another; he went to a second tract, and found a man on it, when he went to a third tract, which was vacant, he settled thereon and made this entry. One of the witnesses, a Mr. Sheats, says he was on the tract in controversy on the morning of the 22d of April, and saw a man there, who told him his name was Cole, but the account this witness gives of himself, and the testimony in the case, leads me to believe that there is some mistake in regard to this. The preponderance of the testimony shows that during all of the 21st of April, and until noon on the 22d, Cole was south of the Cimarron River, entirely outside of the Territory.

On the matter of abandonment, the case fails. The heirs were not,

by law, compelled to reside on the land, and the mother has done what she could to improve it. There is nothing tending to show that she intended to abandon it.

Taking the preponderance of the evidence in the case, and we have only to say whether the crossing of a part of the Territory, after the issuing of the proclamation of the President and before the hour of entry fixed by it, forfeits Cole's right to acquire title from the government to any land in the Territory. The object of the statute and the proclamation was to keep all persons out of the Territory until noon, on the 22d day of April, 1889, when all could go in on an even race for homes. It was impossible to deprive people who had been over the Territory of the knowledge they had thus acquired, but it was the intention of Congress that persons should stay out of the Territory, after it had been secured as part of the public domain, until a certain hour. So, to steal into the Territory, and look over the land for the purpose of selecting a particular tract; to send horses in advance, that one might have relays of horses in the race; to pretend to secure employment with a railroad company, to quit work within the Territory at noon; to secure a deputy marshalship, to be resigned at noon on the 22d of April; to go into the Territory on any pretence, prior to the time fixed, whereby the person sought to obtain unfairly an advantage over others, is an intentional violation, as it is an attempted evasion of the law and the proclamation, but in the case at bar, if human testimony is to be relied upon, this party of six men crossed this narrow portion of the Territory called the "Pan-handle" without any intention of violating the law, or gaining any advantge, being ignorant, in fact, that they were in the Territory until they were over half way across, and then they appear to have taken no advantage of the situation, did not go over the country to select choice tracts but went on the trail, out of the Territory, and there remained until the hour for going in.

Mr. Cole was not informed of the fact that he was on forbidden ground, was not away from the party, took no advantage of his presence in the Territory to select any particular tract, acquired in fact no information, and secured nothing that gave him any advantage over others in selecting a tract for a home.

I do not find that if living he should forfeit his homestead by reason of this technical violation of the law and proclamation. It is, strictly speaking, a technical violation, but it may well be classed as a misadventure, an innocent mistake, and lacks the element of wrong, because it was the result of ignorance of fact, which ordinary care could not have prevented, and it gained him no advantage.

In the case of Smith *v.* Townsend, decided by the United States supreme court October term, 1892, (April 3, 1893,) the court, upon a full discussion of the statute and proclamation of the President, relating to the opening of Oklahoma Territory, held that any person who

was in the Territory at noon of April 22, 1889, was disqualified from taking a homestead in the Territory. The court, however, say:

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

While the question in the case at bar was not before the court, and therefore not passed upon, the above expression is apparently an intimation that had it been presented as herein, the entry would have been allowed to remain intact.

Having given this case careful consideration, I do not find that the entry ought to be canceled. The contest will, therefore, be dismissed. Your decision is accordingly affirmed.

PRACTICE—NOTICE BY PUBLICATION—RESIDENCE.

MORRISON *v.* DAVIDSON.

Service of notice by publication will be set aside where it is apparent that by ordinary diligence personal service could have been made.

A homestead entry will be canceled if the entryman fails to establish and maintain residence on the land embraced therein.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 15, 1893.

I have considered the case of John A. Morrison *v.* Elis Davidson, on appeal by the latter from your decision holding for cancellation his homestead entry for the SW. ¼, Sec. 5, T. 32 N., R. 5 E., Seattle, Washington Land District.

The homestead entry of said Davidson (not Morrison as stated in your decision) was made on April 20, 1888, and on November 25, 1889, Morrison filed an affidavit of contest against the same, charging abandonment and want of improvement and cultivation of the land. Notice of this affidavit was delivered to the sheriff of Snohomish county on December 4, 1889, and on the 7th of the same month it was returned, showing that contestee had not been found; thereupon, January 16, 1890, notice by publication, posting and mailing was given, the taking of testimony to be before the clerk of the superior court of Skagit county, Washington. On the day set for the hearing, the attorney of defendant (contestee) appeared specially for the purpose of objecting to the proceeding, and filed his motion

That the contest herein be dismissed for the want of legal service of the notice thereof upon said claimant, and protests against the taking of testimony, or any other proceeding herein, except such dismissal. This motion is based upon the records, files and proceedings in this cause.

On February 7, 1890, a similar motion was filed, the ground being that notice of said hearing had not been served upon defendant, and that neither said land office nor clerk had jurisdiction in the premises. The motions were addressed to the register and receiver of the Seattle land office, and to said clerk of the superior court. They were overruled and the taking of testimony was proceeded with, and upon conclusion the several motions with the testimony were transmitted to the land office. On February 13, 1890, a similar motion was filed in the office at Seattle. The motion was overruled, but the contestant filed a motion asking that the service be quashed, that a rehearing be ordered, and that new notice be issued; this motion was sustained, and new notice issued, which was served personally on defendant, the hearing being set for July 29, 1890. The defendant excepted to the action of the register and receiver, to save the question, and proceeded to trial.

The local officers, upon passing on the case, recommended the cancellation of the entry, from which the entryman appealed. You sustained their rulings upon the several motions, and their finding upon the evidence and held the entry for cancellation, from which he again appealed.

It is claimed in the appeal as first error, that you erred in sustaining said action of the local officers in overruling the motion to dismiss, and in quashing the service. It is urged that the motion to dismiss should have been sustained and that the local officers had no jurisdiction of the case because the service was defective, and that the record proves defective service. The service was clearly defective; the defendant lived in the same town in which the local office was situated, and to send the notice to the sheriff of the county in which the land was situated, when it was well known that the entryman did not reside in that county, and never had resided there, was a mistake, and because he could not be found in the county in which the land was situated, was not ground for publication, when the entryman lived almost adjoining the land office, and was engaged in keeping a public house, which fact was known, or with the slightest diligence could have been known to the contestant.

But the affidavit of the contest was in all respects regular, and contained facts sufficient to constitute a cause of action, and the local officers had jurisdiction of the subject matter of the suit, but not of the person of the defendant. The regularity and legality of the hearing depended upon jurisdiction of the person, but the local officers having jurisdiction of the subject matter, could legally proceed to acquire jurisdiction of the person of defendant. The clerk could not pass upon the motion to dismiss, he acted only in a notarial capacity, and very properly sent the motions up with the testimony. When it came to the notice of the local officers that the service was defective, they did not err in quashing it, continuing the case, and proceeding to serve proper

notice, and under the latter notice the hearing was regularly held. There was no error in these proceedings. The testimony is clear that this entryman had lived with his family for six or seven years in Seattle, where he keeps a saloon. He caused a little "slashing" to be done on the land in controversy, probably a quarter of an acre, during the year 1888, but did nothing further until more than six months after his entry; he then had a log house built near the tract, by mistake it was off the tract seventy five to one hundred feet, but if that were considered immaterial, he never furnished the house to make it habitable, and never took his family to it, or near it.

It appears that after he learned of the contest, and after the first motion to dismiss, but before the hearing, he had a house built on the land, and about four acres of "slashing" done, and he had a little grass seed sown on a small patch that was cleared up, and had a little garden planted, potatoes and other vegetables, but he has never had any residence on the tract, and aside from occasionally visiting it, he makes no pretence of a residence on the land. His reasons are that he is not able to work on a farm, that his wife would not go to the place, that he wants to educate his children. The land lies in a wild part of the country, a long way from a railroad, and on a trail that is over rough and rugged road, and Davidson prefers to live in Seattle and conduct a saloon, to taking up his home in the wilds of township 32, N., R. 5 E. This is clearly shown by the evidence.

There was a motion filed for a rehearing, and an affidavit showing what the witness would testify to if permitted, with a statement in the affidavit that he had promised to attend the trial, but was sick and could not come. This motion was overruled because the local officers held that the better practice would have been to file a motion for continuance before the hearing was closed. A rehearing was properly refused, the testimony proposed to be introduced is merely cumulative, and could not change the decision.

Your decision is affirmed, and the entry will be canceled.

TIMBER CULTURE CONTEST—EVIDENCE.

TRUEX *v.* RAEDEL.

A judgment of cancellation is not warranted, if the specific charge as laid in the affidavit of contest, and set forth in the notice, is not sustained by the evidence.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 15, 1893.

The land involved in this appeal is the SE. ¼, Sec. 12, T. 29 S., R. 30 W., Garden City, Kansas, land district.

The record shows that William K. Raedel made timber-culture entry

of said tract March 12, 1885. On March 13, 1890, John W. Truex filed an affidavit of contest alleging that Raedel—

> Has failed to comply with the timber-culture law in this, to wit: he has failed during the fifth year after filing on said land and up to this time to plant any trees, seeds or cuttings on said land, and said failures continue to exist at this time.

Service was had by publication and the cause of action as stated in the published notice is:

> That no part of said tract has been planted or re-planted to trees, tree seeds, or cuttings on said tract by or for said entryman during or within the 5th year from date of entry and he is at this date in default.

A hearing was had before the local officers and as a result they decided that the charges were sustained and that the entry should be canceled. The defendant appealed and you by letter of February 18, 1892, reversed their decision whereupon the contestant prosecutes this appeal, assigning as error substantially that your decision is against the law and the evidence.

At the trial of this case the contestant, over the objection of the entryman, introduced some testimony as to what had been done on the land prior to the fifth year, and it was largely upon this testimony that the local officers decided the case. The admission or consideration of this testimony was clearly erroneous. The charge as laid is for default in the fifth year as distinctly as language can make it. The defendant was justified in relying for his defense upon the specific allegations, and it was unfair to him to be called upon without any preparation and in the course of the trial to meet another and different issue. If the contestant desired to attack his entry on other grounds he should have done so by amendment with sufficient notice to the defendant to permit him to prepare for his defense.

Confining the issue therefore to the fifth year, it is shown that the entryman, through his agent, made a contract on February 24, 1890, to have replanted five acres of the ground and to cultivate the trees twice during the summer at the rate of $3.50 per acre. In pursuance of this contract five acres were replanted with the required number of trees before March 31, and before the date of hearing, June 13, the ground had been cultivated once. This work having been pursuant to a contract made before the initiation of the contest was a sufficient compliance with the law.

Your judgment is therefore affirmed.

PRE-EMPTION FINAL PROOF—ADVERSE CLAIM.

COFFIN *v.* INDERSTRODT.

A pre-emptor who submits final proof in the presence of an adverse claim of record must submit to an order of cancellation in the event that he fails to show due compliance with law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 18, 1893.

I have considered the case of Elihu J. Coffin *v.* Charles Inderstrodt upon the appeal of the latter from your decision of May 28, 1892, affirming the action of the local officers at New Orleans, Louisiana, rejecting his pre-emption proof and holding for cancellation his pre-emption declaratory statement No. 143 for the NW. ¼ of Sec. 42, T. 9 S., R. 2 W., filed on July 19, 1889, alleging settlement thereon the fifteenth of the same month, because the claimant never established a bona fide residence on said land. July 12, 1890, said Coffin filed homestead entry No. 12,413 for the same land.

The appellant alleges as error—(1) In holding that Inderstrodt's filing was upon land subject at the time of settlement to private entry. (2) In holding that he was not entitled to submit new proof of his compliance with the law as to settlement and cultivation. (3) In holding that he was not entitled to thirty-three months from the date of settlement in which to submit final proof.

The record shows that on June 2, 1890, the register signed a notice of the pre-emptor's intention to make final proof in support of his claim on July 14, following, before the clerk of the district court at Crowley, Louisiana, and on July 10, 1890, said Coffin filed his affidavit of contest against said pre-emption claim, alleging failure to comply with the requirements of the pre-emption law as to residence and cultivation.

On June 11, same year, notice issued on said affidavit summoning the parties to appear at the local office on August 27, 1890, which was served on the pre-emptor on July 14, same year, being the day fixed for making final pre-emption proof.

On July 18, 1890, the local officers state that

> after a thorough examination of the proof and the papers and the testimony for Coffin, protestant, and carefully considering all the facts and circumstances surrounding the case, we conclude that Inderstrodt never established a bona fide residence on the land in person. Hence his proof must be rejected. Parties in interest notified of thirty days allowed for appeal.

On August 6, counsel for the pre-emptor filed in the local office his protest, under oath, in which he acknowledges the receipt of the letter of the local officers of July 18, 1890, notifying him of the rejection of said proof, and the dismissal of said contest against said filing by said Coffin, and asking that he also be notified according to law of the dis-

missal of his contest; also protesting against the refusal of the local officers to notify Coffin, as requested.

Said counsel also states that to protect the rights of his client he has notified Coffin that his contest was dismissed by the local officers.

On August 16, 1890, counsel for Inderstrodt filed in the local office a motion for rehearing of the case, on the ground of surprise and intimidation.

On April 7, 1891, the local officers refused said motion, for the reason that the pre-emptor cannot escape the consequences of his own laches; that the tract in question being "offered land" pre-emption proof was required to be made within twelve months from date of settlement, and no objection was made to this requirement by the pre-emptor prior to the rejection of his final proof, and also that the evidence plainly shows that the pre emptor did not act in good faith and did not establish a residence in good faith on said land.

On appeal, you reviewed the evidence and found no reason for disturbing the conclusion of the local officers.

In the argument of counsel accompanying said appeal, it is strongly insisted that said tract is not of the class of "offered land" because by the act of March 2, 1889 (25 Stats., 854), the right of private entry was abolished in all the States and Territories except Missouri, and that the pre-emptor had the right to offer his final proof at any time within thirty-three months from date of settlement.

It is also contended that the homestead claimant, Coffin, can only be considered a protestant, having been notified by the counsel of claimant of the dismissal of his contest by the local officers at the date of the rejection of his final proof, and having taken no appeal therefrom.

It is quite unnecessary to pass upon the question whether said tract is of the class of "offered" or "unoffered" land, for it appears that the pre-emptor did not ask for a continuance at the time set for making his final proof, although apprised by the record of the fact that the protestant had a homestead entry of record for the same tract. He proceeded to offer his proof in the face of an adverse claim of record, and the same was rejected. Under the rulings of the Department, upon this state of facts, the pre-emptor cannot be allowed further time for making proof, even if it be conceded that the land was "unoffered." This has been the settled ruling of this Department. Wade *v.* Meier (6 L. D., 308); Jacobs *v.* Cannon (id., 623); Hults *v.* Leppin (7 L. D., 483); Campbell *v.* Ricker (9 L. D., 55); Cobby *v.* Fox (id., 501); Sparks *v.* McPherson (12 L. D., 627); Boord *v.* Girtman (14 L. D., 516).

The local officers expressly found that the pre-emptor had not made settlement and residence in good faith, and this finding was concurred in by you. In such cases your decision will not be disturbed unless clearly wrong. Creswell Mining Co. *v.* Johnson (8 L. D., 440); Chichester *v.* Allen (9 L. D., 302); Collier *v.* Wyland (10 L. D., 96); Darragh *v.* Holdman (11 L. D., 409); Tyler *v.* Emde (12 L. D., 94); Watkins *v.*

Garner (13 L. D., 414, 416); Jackson *v.* Stultz (15 L. D., 413, 414); Hargrove *v.* Robertson (id., 499).

With reference to the contention that Coffin's contest against said claim was dismissed by the local officers, it is sufficient to say that the record fails to show such dismissal. But if it be true that the contest was dismissed by the local officers on the day the final proof was rejected, that fact would not change the rule as above stated, for the rejection of the final proof of the pre-emptor for the reasons stated operates as a judgment in favor of the homestead claimant.

After a careful examination of the whole record, it does not appear that your judgment should be reversed. It is, therefore, affirmed.

PRACTICE—NOTICE OF APPEAL.

DEAN *v.* RICHARDS.

The Department will not consider an appeal in the absence of notice to the opposite party and due proof thereof.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 19, 1893.

By letter of October 31, 1892, you transmitted the papers in the case of Edwin D. Dean *v.* William G. Richards, upon appeal by Dean from your decision of June 14, 1892, dismissing his protest against Richard's homestead entry for lots 1 and 2, of the NE. ¼ and the SE. ¼ of the NE. ¼, and lot 3 of the NW. ¼ of Sec. 2, T. 16 N., R. S. E, Sacramento, California, land district.

Among the papers, I find a motion to dismiss the appeal herein, upon the ground that no notice thereof was served upon Richards or his attorneys, as required by the Rules of Practice. In reply to said motion it is contended that it must be denied because "there is no proof on file in the Land Department that there was no such service" (of the appeal), and further, that the motion to dismiss should be sustained by the affidavit of some person, that no notice of appeal was served. Under date of November 30, 1892, the attorneys for Richards addressed a letter to this Department, stating that they had received a copy of the reply to their motion, and also an affidavit by the attorney for Dean, stating that he served a copy of the notice of appeal on the attorney of Richards, at Sacramento, California, by depositing it in the post office, addressed to him. No such affidavit is found among the papers, nor is any reference made to it in the reply to the motion to dismiss. The attorney for the appellee has, however, filed the affidavit of the attorney at Sacramento, stating that he never received notice of the appeal, and was not aware that one had been filed, until he accidentally discovered the fact, about one month after the date of filing, from an entry on the record in the local land office.

The Rules of Practice require that notice of appeal from a decision by the Commissioner of the General Land Office and specifications of error shall be filed within sixty days from service of notice of such decision. Rules 93, 94, 95 and 96 prescribe the mode of service in such cases, and read as follows:

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

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

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

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

There is no showing made in this case of a compliance, or even an attempted compliance with these requirements. The record should affirmatively show that the requirements of the Rules of Practice have been met. The contention that the lack of notice should be made to appear by affidavit, cannot be entertained. This would be to require a party to establish a negative.

This Department will not consider an appeal in the absence of notice thereof to the opposite party, and due proof thereof.

Town of Jennings *v.* McFarlain (13 L. D., 4),

Crawford, *et al. v.* Dickinson, *et al.* (13 L. D., 574),

Hennessey Townsite (14 L. D., 452).

Under the authority of these decisions the appeal in this case cannot be entertained; therefore the motion to dismiss must be sustained, and said appeal is hereby dismissed.

TIMBER CULTURE PROOF—ACT OF MARCH 3, 1893.

NANCY D. SMYTH.

Under the amendatory act of March 3, 1893, final timber culture proof may be accepted without regard to the age and size of the trees growing on the land, if it is shown that the entryman has, in good faith, planted and cultivated trees thereon for eight years.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 20, 1893.

I have considered the appeal of Nancy D. Smyth from your judgment of January 30, 1892, rejecting her final proof on timber culture entry No. 3937, made by William S. Smyth, now deceased, for the SW. ¼ of Sec. 31, T. 33 N., R. 20 W., Valentine, Nebraska.

The record shows that a proper amount of breaking and cultivation was done, and that ten acres of trees were planted by entryman prior to his death in 1886. Since then the replanting and cultivation of trees has been performed by his widow, Nancy D. Smyth.

It is shown that during nearly every year since trees were first planted they have been killed by drought, and others have been planted in their places. At the time of making proof, June 16, 1891, there were on each acre of the ground planted more than nine hundred living trees, but they were shown to be small, many of them being less than one year old. You rejected her proof, holding that the trees were too small, and had not been cultivated for the requisite length of time, and you suggest that she may save her claim by buying it by virtue of the provision of Sec. 1, of the act of March 3, 1891 (26 Stat., 1095).

She has appealed from your judgment, and in considering the case I find that the act of Congress approved March 3, 1893 (Public No. 124), entitled "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four and for other purposes," amends Sec. 1 of the act of March 3, 1891 (*supra*) by adding to the fourth proviso thereof the following—

And provided further, That if trees, seeds, or cuttings were in good faith planted as provided by law and the same and the land upon which so planted were thereafter in good faith cultivated as provided by law for at least eight years by a person qualified to make entry and who has a subsisting entry under the timber culture laws, final proof may be made without regard to the number of trees that may have been then growing on the land.

The claimant in this case is shown to have planted, replanted, and cultivated the trees for more than eight years, and hence, her proof being sufficient to show the same, she is entitled to a patent under the law as it now stands.

The law having been amended since the rendition of your judgment, and upon the record as now presented the applicant being entitled to a patent, your decision must be reversed. Said proof should be approved and patent duly issued thereon.

SETTLEMENT RIGHTS—RELINQUISHMENT—SECOND ENTRY.

NEIL *v.* SOUTHARD.

The right of a settler who is on land embraced within the entry of another attaches at once on the relinquishment of said entry, and defeats an application to enter filed by a third party immediately after said relinquishment.

A pre-emption claim initiated prior to the act of March 2, 1889, may be transmuted under section 2 of said act to a homestead entry, notwithstanding the fact that the claimant has theretofore perfected a claim under the homestead law.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 24, 1893.

On the 25th of June, 1888, Fred A. Keep made homestead entry for the S. ½ of the NW. ¼, and the N. ½ of the SW. ¼ of Sec. 8, T. 11 S., R. 33 W., Wa-Keeney land district, Kansas. He relinquished said entry on

the 17th of December, 1888, on which day Haviland Southard made timber culture entry for the same land.

Prior to that time, to wit, on the 4th of December, 1888, William J. Neil presented an affidavit of contest against the homestead entry of Keep, alleging abandonment, and a general charge of fraud. His application to contest was rejected, on the ground that the charge of abandonment was prematurely made, and the charge of fraud was not sufficiently specific. He appealed, and you affirmed the decision of the local officers. In the same letter, you approved the action of such officers in refusing to allow the protest of Neil against allowing Keep to relinquish his entry, except in his (Neil's) favor.

On the 26th of December, 1888, the local officers rejected the preemption declaratory statement presented by Neil for this land, in which he alleged settlement thereon prior to the 17th of December, 1888, the date of Southard's entry. He appealed from their action, and you directed that a hearing be had to determine the respective rights of the parties.

The trial took place on the 5th of August, 1890, and on the 27th of that month, the local officers rendered their decision in favor of Neil. On the 3d of March, 1892, you affirmed the decision of the register and receiver and held the timber culture entry of Southard for cancellation.

On the 28th of August, 1891, Neil made application to enter the tract under the homestead laws, in case his contest was successful, and in your decision of March 3, 1892, you held that inasmuch as he had heretofore made a homestead entry, which was commuted to cash entry June 20, 1888, he had exhausted his rights under the homestead laws, and could not be permitted to make another entry under said laws.

From this part of your decision Neil appeals, claiming that you erred in rejecting said application, which should have been granted under the provisions of the second section of the act of March 2, 1889, (25 Stat., 854).

Southard appeals from that part of your decision which holds his timber culture entry for cancellation, and awards the land to Neil. The case is therefore before the Department upon the appeal of both parties to the controversy.

The relinquishment of Keep was not the result of any act, or action on the part of Neil. The latter, therefore, has no equities in the case, to influence a decision in his favor, and must depend entirely upon the rights secured by his settlement upon the land prior to the entry of Southard.

The evidence shows that Neil went upon the land on the 26th of November, 1888, and commenced digging a cellar. He also worked upon the cellar on the 3d, 14th and 15th of December, and from nine until half-past ten o'clock in the forenoon of the 17th of that month. The 17th was the day the entry of Southard was made, at ten o'clock in the forenoon. Neil was therefore at work excavating the cellar, at

the very hour that Keep's relinquishment was filed, and Southard's entry was made. Over this cellar he erected a house, twelve by fourteen feet in dimensions, completing the same on the 2d of January, 1889. He furnished it, and established his residence therein the next day, from which time he slept there continuously. Being a single man, he took his meals elsewhere, except at rare intervals, when he would cook and eat at his own house.

Had the entry of Keep remained intact, and been followed by full compliance with law, Neil would have gained no rights by his settlement. The moment Keep's entry was canceled, however, the land became subject to settlement or entry, and the rights of Neil attached.

An application to enter land confers no greater rights than settlement, and gives to the applicant no claims superior to those of an actual settler upon the land at the time the application is made. Southard, therefore, obtained no greater claim to the land in dispute, by presenting his application to enter it, on the 17th of December, 1888, than he would, had he gone upon the land that day and begun his actual settlement. Had he done this, there is no question but that his rights would have been inferior to those of Neil.

In the case of Wiley *v.* Raymond (6 L. D., 246), it was held that on the relinquishment of an entry, the right of a settler, then residing on the land, attaches *eo instanti*, and is superior to that of a homesteader who enters the land immediately after the said relinquishment. In the case of Zaspell *v.* Nolan (13 L. D., 148), this doctrine was carried to the extent of holding that "a timber culture entryman who files a relinquishment, and thereupon applies to enter the land under the homestead law, cannot thereby defeat the adverse right of a settler who is residing upon said land at the date of the relinquishment." In that case, the former entryman made the relinquishment, with no intent or purpose to abandon the land, but simply to change his entry from timber culture to homestead, and it was held that the rights of an actual settler could not be cut off by such change. In Fosgate *v.* Bell (14 L. D., 439), all the cases bearing upon the question are collated and discussed, and the rule laid down in Zaspell *v.* Nolan adhered to.

In each of those cases, the land was awarded to the settler who was residing upon said land at the date of the relinquishment. It may be insisted that that rule would not award the land in the case at bar to Neil, as he was not residing upon the land in dispute at the date of the relinquishment of Keep's entry. It is true that his house was not completed, and his actual residence established upon the land until two weeks after such relinquishment, but the Department has repeatedly held that residence is established from the moment that the settler goes upon the land with the bona fide intention of making his home there. Humble *v.* McMurtrie (2 L. D., 161); Grimshaw *v.* Taylor (4 L. D., 330); United States *v.* Skahen (6 L. D., 120); Lulu M. Marshall (6 L. D., 258); Franklin *v.* Murch (10 L. D., 582). It must be held, there-

fore, that Neil comes within the rule laid down in Fosgate *v.* Bell, and the cases therein cited.

In Pooler *v.* Johnson (13 L. D., 134), it was held that the notice given by settlement and improvement extends only to the technical quarter section upon which they are located. I am asked to apply that doctrine to this case, and to hold that inasmuch as Neil's improvements were confined to the N. ½ of the SW. ¼ of said section 8, the notice given by such improvements did not extend to and include the S. ½ of the NW. ¼ of said section.

In view of the fact that Neil had, prior to the entry of Southard, filed an affidavit of contest against the entry of Keep, in which the whole tract was described, and had also filed notice that he had made settlement upon the land, accompanied with a protest against the relinquishment of Keep's entry, except the same should inure to his benefit, I think it must be held that Southard had, or might have had, notice of the extent of Neil's settlement claim, and that the Pooler-Johnson doctrine should not be applied to the case.

This leads to the affirmance of your decision of March 3, 1892, so far as the appeal therefrom of Southard is concerned, and leaves for consideration the appeal of Neil from that part of your decision in which you denied him the right to change his pre-emption filing to a homestead entry, on the ground that having made a prior homestead entry, he had exhausted his rights under the homestead laws.

The proviso to section 2, of the act of March 2, 1889, (25 Stat., 854), reads as follows:

> That all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act, may change such entries to homestead entries, and proceed to perfect their titles to their respective claims under the homestead law, notwithstanding they may have heretofore had the benefit of such law, but such settlers who perfect title to such claims under the homestead law, shall not thereafter be entitled to enter other lands under the pre-emption or homestead laws of the United States.

This provision of the statute must have escaped your attention when you rendered your decision in the case. Neil's claim was initiated prior to the passage of the act of March 2, 1889, and that act distinctly provided that all pre-emption settlers thus situated might change their claims to homestead entries, and perfect their titles under the homestead laws, notwithstanding they had previously had the benefit of such law.

That part of your decision which denied to Neil this privilege, was therefore contrary to law, and is hereby set aside, and he will be permitted to change his entry, in accordance with the provisions of law cited. Your decision is modified accordingly.

PAYMENT—EXTENSION OF TIME—RESOLUTION OF SEPTEMBER 30, 1890.

EDWARD W. SHELDON.

A settler who is unable, by reason of drouth, to plant a crop, is entitled to an extension of time within which to make payment for the land.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 24, 1893.

I have considered the appeal of Edward W. Sheldon, involving the SE. ¼ of Sec. 7, T. 18 N., R. 49 W., Sidney land district, Nebraska.

It appears that on May 5, 1890, he filed a pre-emption declaratory statement for said land, alleging settlement May 3, 1890; that in October following the local officers granted him a leave of absence for one year, under the act of March 2, 1889 (25 Stat., 854). Under date of April 13, 1892, he made final proof, and on April 12, 1892, the local officers transmitted to you his affidavit, duly corroborated, to the effect that he is unable to pay for the land, on account of his failure to raise a crop in 1890, because of the severe drouth, and asked for an extension of time within which to make payment.

June 21, 1892, you denied the petition; whereupon he appeals.

A joint resolution of Congress, approved September 30, 1890 (26 Stat., 684), provides:

> That whenever it shall appear by the filing of such evidence in the offices of any register and receiver, as shall be prescribed by the Secretary of the Interior, that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead or pre-emption claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due.

Under date of October 27, 1890 (11 L. D., 417), the following circular of instructions was prescribed:

> Any party applying for the extension of time authorized by said resolution will be required to submit testimony, to consist of his own affidavit, corroborated, so far as possible, executed before the register or receiver, or some officer authorized to administer oaths in land matters, within the county where the land is situated, setting forth in detail the facts relating to the failure of crops, on which he relies to support his application, and that he is unable by reason of such failure of crops to make the payment required by law.

The applicant in this case filed his application for an extension of time to make payment in conformity with the regulations laid down in the above circular, but it appears that you denied the application, for the reason that there was no failure of crops, or, in other words, that the resolution above quoted only affords relief in cases where there is a failure of growing crops.

The resolution referred to is remedial and should receive a liberal construction. It authorizes the Secretary of the Interior to prescribe

the evidence which the applicant must file to secure relief, and in this case this has been done, showing that by reason of the severe drouth he was unable to break the ground in 1890 to produce a crop; that from May, 1890, to the present time, he has resided upon the land, except when absent in 1891 by permission; that he has a good house and barn, and ten acres broken and sown to wheat, all of which is worth $200, and that all the money he earned during his leave of absence has been expended on the place, and therefore he is unable to make payment for the land.

The applicant appears to have complied with both the letter and spirit of the law, and, in my judgment, his inability to plant a crop by reason of drouth is within the intent of the resolution, and the relief asked for should have been granted.

Your decision is reversed.

PRACTICE—AFFIDAVIT OF CONTEST—CORROBORATION.

PATTERSON *v.* MASSEY,

AND

BUCKLEY *v.* MASSEY.

The local officers are warranted in rejecting an affidavit of contest if it is not corroborated as required by the rules of practice.

If an affidavit of contest is made upon facts within the knowledge of the contestant it may be corroborated by witnesses who base their statements upon information and belief; but if the allegations of the contestant are based upon information and belief, they must be supported by one or two witnesses whose statements rest upon facts within their knowledge.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1893.

By your letter of February 14, 1893, you transmitted the papers in the case of George F. Patterson *v.* George W. Massey, on the appeal of Patterson from your decisions of September 28, and November 25, 1892, rejecting his application to contest Massey's commuted cash entry for the NW. ¼ of Sec. 34, T. 12 N., R. 3 E., Oklahoma City land district, Oklahoma Territory.

On the 20th day of February, 1893, said case was made special by Secretary Noble, and the parties notified.

On the 25th day of March, 1893, you transmitted the appeal of William H. Buckley from your decision of September 28, 1892, denying his application to contest Massey's said entry for said tract.

The record shows that on the 28th day of February, 1891, Massey made homestead entry for the tract; that on the 5th day of August, 1892, he commuted it to cash entry; that on January 2, 1892, Buckley

filed in the local office his application to be allowed to contest said entry, which was rejected by the register and receiver. His affidavit is as follows:

BEFORE THE U. S. LAND OFFICE, OKLAHOMA CITY, O. T.

TERRITORY OF OKLAHOMA,
County of Oklahoma, ss.

Personally appeared before me, Elva C. Barrows, a notary public in and for Oklahoma county, Oklahoma Territory, William W. Buckley, who being duly sworn according to law, on oath states:

I am acquainted with the tract of land embraced in the H. E. of George W. Massey, being H. E. . . . . made on the . . . day of . . . . 1891, at the U. S. Land Office, Oklahoma City, O. T., for the NW. ¼, Sec. 34, Tp. 12, N. R. 3 W.; that your affiant is informed and verily believes that said entry was fraudulent in its inception and is held for speculative purposes, in this: That on the 30th day of April, 1889, one William J. McClure made H. E. for the above described tract at the U. S. Land Office, Guthrie, I. T., now O. T., said H. E. being H. E. 425, Guthrie series; that after the making of said H. E. and prior to the hearing of the several contests in relation to the same, which contests are hereinafter more specifically mentioned, the said William J. McClure, as your affiant is informed, testified in a certain contest case in which Carley J. Blanchard, Vestal Cook and Ewers White were interested, and were parties, to such a state of facts as under the rulings of the register and receiver and the Commissioner of the General Land Office and also the Secretary of the Interior, received since the said entry of Massey's was made, would disqualify him from making or holding an entry within the limits of the lands declared open to entry and settlement by the President's proclamation of March 23, 1889, and the act of Congress of March 2, 1889, under which said proclamation was issued; that after said ruling had been made and promulgated, as before mentioned the said William J. McClure did enter into a fraudulent and collusive agreement whereby George W. Massey was to make a fraudulent purchase of said McClure's interest in said claim, which interest amounted to nothing more than the improvements he had placed upon the land for the fictitious sum of thirty thousand dollars, said payment being made in notes signed by the said Massey and said Massey at that time being a man of moderate means and not solvent if said collections were demanded; that said sale and transfer was accompanied by the making of the relinquishment of William J. McClure to his said H. E. No. 425, which relinquishment was presented simultaneously with the application of Massey to enter said tract which entry was allowed and receiver's receipt No. . . . issued therefor; that said H. E. of George W. Massey was fraudulently made as your affiant is informed and verily believes, for and in the interest of the said William J. McClure and for the purpose of protecting him in his title to a valuable tract of land lying contingent to Oklahoma City, O. T., and for speculative purposes, as is fully shown from the price paid, and not for agricultural purposes; that since the making of the entry of the said George W. Massey said William J. McClure has continued to reside in the same house occupied by him on said tract and has used said dwelling house, corrals, out-buildings and other appurtenances as his home, claiming to be a tenant of the said Massey's; that Oklahoma City, a city of several thousand inhabitants is located upon the S. E. ¼, and the south half of the NE. ¼ of Sec. 32, Tp. 12 N., R. 3 W., and immediately west of the south portion of the tract covered by the said H. E. No. . . . . of George W. Massey's; that prior to the making of the said entry of said Massey's and since said entry was made, the relations of the said William J. McClure and George W. Massey have been close and intimate; all of which statements are made upon information and belief, as obtained from parties who he believes to be reliable; that John B. Koonce, who filed affidavit of contest No. . . . . Guthrie series, against the entry of said William J. McClure before men-

tioned, and involving the above described tract, is disqualified from taking the same or from making entry thereon, for the reason that the said Koonce as your affiant is informed and verily believes, did enter upon and occupy a portion of the lands declared open to entry and settlement by the act of Congress of March 2, 1889, and the President's proclamation dated March 23, 1889, issued thereunder; that William P. Slavens who filed affidavit of contest No. . . . . Guthrie series, against the H. E. of William J. McClure above named and against the tract of land above described, is as your affiant is informed and verily believes disqualified from either claiming or entering said tract for the reason that he did enter upon and occupy a portion of the lands declared open to entry and settlement by the act of Congress of March 2, 1889, and the President's proclamation, dated March 23, 1889, issued thereunder, contrary to law, all of which statements, made upon information and belief, derived from reliable sources, your affiant asks to be allowed to prove at such time and place as may be named by the register and receiver or the Hon. Commissioner of the General Land Office for a hearing in said cause, and asks to be allowed to prove said allegations, and that the H. E. of George W. Massey be canceled, the contests of Koonce and Slavens be dismissed and your affiant be awarded the preference right of entry under the act of May 14, 1880, he, your affiant to pay the expenses of such hearing.

WILLIAM H. BUCKLEY.

Subscribed and sworn to before me, this 10th day of September, 1891.

ELVA C. BARROWS,
Notary Public.

(My commission expires April 14, 1895.)

TERRITORY OF OKLAHOMA,
Oklahoma County, ss.

Personally appeared before me, E. C. Hamill, who being duly sworn upon oath says that he has read the foregoing affidavit of William H. Buckley and knows the contents thereof, that they are true, to the best of his knowledge and belief.

E. C. HAMILL.

Subscribed and sworn to before me this 7th day of January, 1892.

HUGH H. HILLMAN,
Notary Public.

(Com'n Ex. Dec. 29, 1894.)

Buckley appealed from the action of the register and receiver to you.

On the 8th day of August, 1892, Patterson filed an application to contest Massey's cash entry; that on the 28th day of September, 1892, you considered Buckley's appeal from the rejection of his application to contest, and affirmed the judgment of the register and receiver denying it; that on the same day you considered Patterson's application to contest said entry, and denied it; that a motion for review of said decision was filed by Patterson, and on the 25th day of November, 1892, said motion was denied by you.

From your actions, as above outlined, Buckley and Patterson both appeal.

While these appeals present two separate and distinct cases yet as they both seek to assail Massey's entry, I have thought best to consider them both together and determine the question involved in them in one decision.

Inasmuch as Buckley's application was filed first in point of time, his application will be disposed of first. The local officer's action is

endorsed on the back of his application as follows: "Rej. for the reason that the same is not properly corroborated. Fee tendered Jan. 7, 1892, 30 days for appeal." This affidavit was sworn to by Buckley on the 10th day of September, 1891, nearly four months before it was filed in the local land office; it was filed there on the 2nd day of January, 1892, and at the time it was filed it was not in any way corroborated, for that which was evidently intended as a corroboration of it consists of a written statement, endorsed on the affidavit, made by E. C. Hamill and sworn to by him on the 7th day of January, 1892, the day the local officers passed upon and rejected the affidavit; it does not appear very clearly whether Hamill's statement was endorsed upon it before or after the same was acted upon by the local officers, but it may very reasonably be concluded that at the time they acted upon the contest affidavit, Hamill's statement was not endorsed upon the paper, and if this were so, then there was nothing to corroborate Buckley's affidavit at the time they acted. In their action they simply exercised their discretion, and in order to have their action reversed, it is incumbent upon Buckley to show that they abused such discretion, which the party complaining fails to do.

The local officers are justified in rejecting an affidavit of contest if it is not corroborated, as required by the rules of practice. Farmer *v.* Moreland (8 L. D., 446); Atlantic and Pacific R. R. Co. *v.* Armijo (9 L. D., 427).

It is practically conceded by counsel for Buckley in their argument that the above cited cases are conclusive in a case where there is *no* corroborating affidavit filed, but they claim that Buckley's affidavit was corroborated by the sworn statement of Hamill, at the time the local officers acted upon it, and you seem to have taken this view of it in the decision appealed from.

While I take a different view of the case in this respect, yet inasmuch as counsel for Buckley have elaborately argued the case upon the theory that Hamill's sworn statements were a sufficient corroboration under the rules of practice, and have cited departmental decisions which they claim sustain their theory, I will briefly consider the case and authorities relied on by them, upon the theory that Hamill's statements were before the local officers.

You found that the allegations in Buckley's petition, if proven, would not warrant a cancellation of the entry, and I am inclined to adopt your view of it; yet, conceding this to be erroneous, it does not follow that there was error in rejecting it.

In Paulson *v.* Owen (15 L. D., 114), it was held that an *affidavit* of contest may be based on the information and belief of the contestant. There the affidavit was corroborated by the affidavit of *one* witness stating material *facts* within the actual knowledge of the affiant.

In the case of Epps *v.* Kirby (15 L. D., 399), the contest was instituted against a desert land entry; the affidavit alleged that the land

covered by said entry was in no respect desert land. This affidavit was corroborated by two witnesses who swore that they knew its contents, and that they knew the land involved, and believed the statements in the affidavit to be true.

In Hyde *et al v.* Warren *et al* (14 L. D., 576), the Department found that the contest affidavit "was sufficiently corroborated," without setting out at length the facts upon which the finding was made.

In the same case on review (15 L. D., 415), it was said—

> The corroborating affidavits in this case are somewhat loosely drawn, but it is not difficult to conclude that they aver the *truth of the charges* in the contest affidavit. After this further consideration of the question, I can but reaffirm the statement in the original decision, that this affidavit is sufficiently corroborated.

In this case Buckley's affidavit itself is based upon information and belief that the entry was fraudulent in its inception; Hamill's corroborating statements are "that he has read the foregoing affidavit . . . . . and knows the contents thereof, that they are true to the best of his knowledge and belief." This only amounts to an averment that he is informed and *believes* that Buckley has been *informed* and that Buckley *believes* the charges made in his contest affidavit to be true. Such an averment cannot be properly held as a corroboration, either within the spirit or letter of the rule of practice, which requires the contest affidavit to be accompanied by the affidavits of one or more witnesses "in support of the allegations made." See Rule 3 of Rules of Practice.

The allegation that said entry was fraudulently made; that the entryman was disqualified, and the other charges made by Buckley on information and belief, are in no wise supported by the fact that Hamill's knows what such allegations are and believes them to be true. The rules require the contestant to fully set forth the *facts* which constitute the grounds of contest, which may be done upon the information and belief of the contestant; but these allegations must be supported by one or more witnesses. When the affidavit itself is made upon facts within the knowledge of the contestant, they may be supported by witnesses who base their statements upon information and belief; when the allegations of the affidavit itself are based upon the information and belief of the contestant, they must be corroborated by one or more witnesses whose statements must be based upon facts within their knowledge, and not upon mere information and belief. For the foregoing reasons your judgment dismissing Buckley's petition to contest is affirmed.

This brings me to the consideration of the application of Patterson to contest Massey's entry, which was filed in the local office August 8, 1892, and transmitted to you accompanied with a report of the receiver, in which he stated that:

> We have carefully considered this matter and recommend that the application to contest be denied. The proof is regular in all respects, and in our opinion permission to contest in this case is only asked for the purpose of annoyance and delay,

in the hope of thereby being able to procure money from the parties who purchased the land. We personally know the defendant, and from his appearance it is our opinion he will live but a few months at most. He is one of our best citizens, and we think his entire connection with the tract of land has been in good faith. If permission to contest is granted in this case, we believe it will be far reaching in its influence for evil, as we have in this city a class of men who will consider this case a precedent, and who will annoy and harass every man who makes final proof on valuable claims in our land district.

The affidavit of contest sets forth that Patterson is well acquainted with the tract embraced in Massey's entry, and that affiant—

Has been informed and believes, and so states upon oath, that said final proof was fraudulently and illegally made, and in violation of the oaths in said final proof in this, to wit: That the said George W. Massey did prior to said final proof, enter into a fraudulent and illegal contract and agreement with one C. W. Price and others, by the terms and conditions of which and for valuable considerations the said Massey agreed to make final proof on said tract and to convey a portion of said tract to the said C. W. Price and others, by good and sufficient deed of warranty. That said George W. Massey has already received a portion of the consideration on said contract, and that said contract is in full force and effect. That the statements made in said final proof, under oath, that said Massey had not contracted to sell, or alienate any portion of said tract, was made contrary to the true facts, and renders his final proof fraudulent and void, and this the contestant asks permission to prove at such time and place as may be named for a hearing for said cause, he the contestant, paying such expenses of said hearing as are by law required.

At the same time and place Seymour S. Price appeared and upon oath stated:

That he has heard read the within affidavit of G. F. Patterson and knows the contents thereof, and that the things and matters therein stated, so far as related to C. W. Price, are, to his own personal knowledge, true.

Afterwards, on the 31st day of October, 1892, Patterson filed a supplemental affidavit, in which he alleges that Massey was not a qualified entryman at the date said entry was made, and that said homestead entry was illegal and void, for the reason that Massey entered the territory of Oklahoma prior to noon on April 22, 1889, contrary to law. This affidavit is corroborated by Henry Overman.

This supplemental affidavit was made after you had denied his original application and was forwarded by you to the Department. You denied Patterson's original application upon the authority of Aldrich *v.* Anderson (2 L. D., 71). Said case has not been followed by the Department, but has been practically overruled. See Molinari *v.* Scolary (15 L. D., 201).

I am satisfied that Patterson's original affidavit states facts sufficient to warrant an investigation of the matters it charges under the rulings of this Department, as to the *bona fides* of Massey's entry. The same is true of his supplemental affidavit. They are both sufficiently corroborated under the rules of practice. It follows that you erred in denying his application. The papers in the case are herewith returned with the direction that you order a hearing upon Patterson's application with the least possible delay, before the local officers of the proper

land office, under the rules of practice. Upon the testimony taken thereat the local officers will adjudicate the case without delay and it will take the usual course.

You forwarded, without action on your part, the papers in the case of the rejected application of one James Graham for the land involved in this case, which was transmitted by the register and receiver to you on the 11th day of January, 1893. The papers in the Graham matter are herewith returned with the direction that action thereon be suspended until the case of Patterson *v.* Massey is finally disposed of and then for proper action by you.

TOWN SITE APPROPRIATION—SCRIP LOCATION.

McCHESNEY ET AL. *v.* ABERDEEN ET AL.

One who is not a party in interest is not entitled to be heard on appeal.

The mere fact that a tract of land has been included within the corporate limits of a city or town, does not prevent entry of the same under the general land laws, provided that it can not be entered as a town site by the municipal authorities.

Land actually settled upon, and used, and occupied for town site purposes is not subject to scrip location.

Secretary Smith to the Commissioner of the General Land Office, April 26, 1893.

I have considered the case of John T. McChesney and Joseph M. Kean *v.* The City of Aberdeen, Abner C. McAllister, Harry E. Brooke, Helen M. Smith, and Peter O. Arten, involving the SE. ¼ of Sec. 14, T. 123, R. 64 W., Aberdeen, South Dakota.

You rejected the claims of the city of Aberdeen, McAllister, Brooke Smith and Arten, and awarded the land to McChesney and Kean under their applications to locate Porterfield scrip. McAllister has appealed.

Lyman C. Dayton was not a party to the case before your office; he has, however, filed an appeal from your decision, and has also filed what he denominated a motion and petition for a review and reconsideration of the decision of my predecessors, Secretary Noble, Acting Secretary Muldrow and Secretary Vilas, and to reinstate his homestead entry No. 3823 for the above tract of land.

It is proper, in view of this action, that some statement be made in relation to the entry and claim of said Lyman C. Dayton.

He made homestead entry for this land September 25, 1884.

This entry was allowed under the decision of Acting Secretary Joslyn, dated August 8, 1884 (11 C. L. O., 202), upon the ground that Dayton had filed the first application to make entry in connection with his contest against the former entry of Scott for said land. On a motion for review of this decision, filed by James R. Dayton, a party in interest, my predecessor, Secretary Lamar, under date of March 9, 1885,

ordered a hearing between said Lyman C. and James R. Dayton. This order was as follows:

It should be observed that in this case the real contest lies between James R. and Lyman C. Dayton, and that the finding in favor of the latter rested on the record as it reached this Department.

It has, however, been persistently alleged on the behalf of the said Daytons that the record in some particulars was incomplete, and this, taken in connection with other claims asserted by the said contesting parties, on which there is no evidence to warrant action, has made it advisable, to order a hearing with special reference to the following points:

1. As to the time when an application to enter the tract in dispute was first filed by either of the said Daytons, the nature of such application and why made.

2. As to whether James R. Dayton applied to amend his application to enter the said tract and take the same under the homestead law.

3. As to any improvements made by either of the contesting parties upon said land, the extent and nature of the same, and when made, as well as the location of such improvements with reference to the legal subdivisions of the quarter section.

4. As to the residence upon said tract or occupation thereof by either of the said Daytons, when commenced and to what extent maintained.

You will therefore order a hearing in accordance with the foregoing.

As the result of the hearing held under this order, the local officers found that

neither James R. Dayton nor Lyman C. Dayton have any valid right either in law or equity to this tract of land; that all their pretended and assumed rights either of record or otherwise should be canceled and set aside, and the land held open to the first legal applicant.

Your predecessor affirmed the decision of the local officers, finding in effect that the contests initiated by both the Daytons were speculative and hence of no effect.

On appeal to this Department Acting Secretary Muldrow found that the decision of the Department dated August 8, 1884, which allowed the entry of Lyman C. Dayton upon the grounds that he had filed the first application to enter the land when embraced in the prior timber culture entry of Scott, which he had contested, could not stand, for the reason that the evidence showed that he had not filed the first application to make entry. He further found that said Dayton's action was speculative, and that he had not at any time intended to take the land for *bona fide* settlement, and he therefore canceled his homestead entry (6 L. D., 164).

On a motion for review my predecessor, Secretary Vilas, on February 25, 1889 (8 L. D., 248), rendered an elaborate decision, in which he sustained the decision of Acting Secretary Muldrow. In this decision it was expressly held that the entry of Dayton was invalid at inception, and that it was properly canceled, and that by "due process of law."

On a motion for re-review, my predecessor, Secretary Noble, under date of July 17, 1889 (9 L. D., 93), sustained the decision of Secretary Vilas.

The government is a party in interest in every contest relating to public lands, in so far as seeing that the requirements of the law are

faithfully observed. This is a principle too firmly established to require discussion. Russell *v.* Gerold (10 L. D., 18), and the cases therein cited. When this principle is taken into consideration, together with the order issued by Secretary Lamar, there can be no doubt but that the Department was fully justified in passing judgment on the validity of Dayton's entry at its inception, as well as upon the question of his compliance with the law before and after his entry.

There is really nothing new in the motions, petitions, and arguments advanced by Mr. Dayton. His contention, presented in various forms, really amounts to this, that his entry was valid at inception, and that it was canceled without due process of law; but on both of these points the Department has, after careful investigation and elaborate argument, passed judgment. That judgment has become final under all the rules of law and practice, and it will not be disturbed at this late day; hence his motion and petition for a review and reconsideration of the decisions of my predecessors are denied. Dayton was in no way a party in interest before your office in the case decided by you, and which is now before me, and he had no right of appeal therein. His appeal is therefore dismissed without further consideration.

In your decision of February 20, 1892, you rejected the application of the city of Aberdeen, filed through its mayor, to enter this land "as an additional entry to the townsite of Aberdeen." The ground of this rejection is stated as follows:

> The city of Aberdeen in no manner owes its existence to the townsite laws of the United States, but was incorporated under the Territorial laws of Dakota, being located wholly on private lands. As such, and being so located, the city of Aberdeen cannot exercise any functions of a government townsite.

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

You rejected the pre-emption claim of McAllister, upon the ground that the land was included within the incorporated limits of the city of Aberdeen.

He appealed.

It is the ruling of the Department, that the mere fact that a tract of government land has been included within the corporate limits of a city or town, does not prevent entry of the same under the general land laws, provided that said tract of land cannot be entered as a townsite by the authorities of said town or city. Harper *v.* Grand Junction (on review) (16 L. D., 127).

Your decision, therefore, rejecting the claim of McAllister, cannot be sustained on the ground assigned by you; it does not follow, however,

that he is entitled to enter the land. That will depend upon the facts connected with this tract.

You awarded the land to McChesney and Kean upon their application to locate Porterfield scrip thereon. This decision is based upon the case of Lewis, *et al. v.* Town of Seattle, *et al.* (1 L. D., 497), in which it was held that:

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

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

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

As before stated, the decisions of the Department on the claims of the Daytons to this tract of land have become final and conclusive; you will, however, instruct the local officers to order a hearing in relation to the land, where the facts in reference to its settlement, occupation and use may be ascertained, in order that the Department may have a basis upon which to determine its future disposal, whether it should be reserved for townsite purposes, or whether it should be entered as a part of the townsite of Aberdeen, or as a separate townsite, or should be awarded to the pre-emption claimant, or to the scrip applicants. The facts are not known to the Department, and before an intelligent and just decision can be rendered, the facts must be shown.

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

TIMBER LAND—SETTLEMENT RIGHT.

BRUNET ET AL. *v.* TWIDLE.

A settlement, not made in good faith, but for the purpose of securing the timber growing on the land, will not defeat the subsequent application of another to purchase under the act of June 3, 1878.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 27, 1893.

On the 23d of April, 1889, Napoleon Brunet filed application to purchase the W. ½ of the NE. ¼, and the W. ½ of the SE. ¼ of Sec. 35, T. 36 N., R. 7 E., Seattle land district, Washington, under the provisions of the act of June 3, 1878, (20 Stat., 89). On the same day, Edward McKeown applied to purchase the east half of both said quarter sections, under the provisions of the same law.

On the 25th of July, 1889, Henry J. Twidle made homestead entry for the NE. ¼ of said section, and offered final commutation proof in support of his entry, on the 20th of November, of the same year, alleging that he established his residence on the tract on the 19th of March, 1889.

Both Brunet and McKeown filed protests against the acceptance of such proof, on the ground that the tract was unfit for agricultural purposes, and only valuable for its timber.

The hearing which followed, commenced on the 20th of April, 1890, and ended on the 30th of that month. For the purposes of the trial, the cases of the two applicants to purchase were consolidated, and by stipulation, the claims of both were to be decided upon the testimony submitted.

On the 12th of March, 1891, the local officers united in a decision in favor of the applicants to purchase, holding that the homestead entry of Twidle was made for speculative purposes, to obtain possession of the land for its timber, and recommended that it be canceled.

On the 29th of March, 1892, you reversed their decision, on the ground that Twidle was a *bona fide* settler, and had improvements upon the land on the 23d of April, 1889, and that the act of June 3, 1878, provided that timber land entries could not be made of land thus situated, without regard to its character.

Brunet and McKeown unite in an appeal from your decision, and thus bring the case to the Department.

The testimony in the case is very conflicting. The witnesses on the part of Twidle testify that there are from forty to sixty acres of the land which, if cleared of its timber, could be cultivated, and so far as they know, would produce such agricultural crops as are grown in that part of the State of Washington. That in their judgment, the soil is sufficiently good for that purpose, and the land not more than five or six hundred feet above the Skagit river.

On the other side, the witnesses testify that there is not an acre in any one place which could be plowed, and not more than five or six acres on the whole tract which could be cultivated, if all the small patches with good soil could be concentrated. That the balance is too rocky, gravelly, rough, broken and steep to be of any value for the ordinary purposes of agriculture. That at the south line the land is about twelve hundred feet above the Skagit river, while at the north line it is a thousand feet higher. That people in that section do not attempt to farm land situated even five or six hundred feet above said river.

The improvements of Twidle consist of a cabin on the south-west corner of the quarter section, an acre or thereabouts cleared, so far as the small trees and brush are concerned, a half acre sown to grass seed, and eight or ten small apple trees planted.

The large trees upon this "cleared" ground were all left standing, being from twenty-five to thirty-four in number, according to the count of different witnesses, and averaging about four thousand feet of timber to the tree. It was shown that the apple trees could not thrive so long as they were overshadowed by the large fir trees, and that the large trees could not be cut down without injuring or destroying the apple trees.

As to the quantity of timber or lumber on the tract, the witnesses differed more than half. Those for the homesteader estimated the quantity at from three to four million feet, worth twenty-five cents per thousand, while the witnesses for the applicants to purchase, placed the quantity at from eight to ten million, and the value at from fifty to seventy-five cents per thousand, as it stood. This was the quantity of merchantable lumber, excluding that which would be damaged or destroyed by felling the trees upon the rough, rocky and steep ground.

Twidle claims to have established his residence upon the land in a house built by him, on the 19th of March, 1889, and to have resided there continuously until he made final proof. He then left, and did not return until the Saturday before the hearing, when he paid a visit to the tract. He does not explain how he busied himself upon the land during the spring, summer and fall of 1889, as he raised no crops or garden truck and did not sow his grass seed until fall. Notwithstanding this positive testimony by Twidle that he raised nothing on the land during 1889, one of his witnesses, Philip Neary, testified that he saw him digging potatoes on the tract in the fall of that year. This witness was largely relied upon to prove the agricultural character of the land.

All the witnesses for the applicants to purchase, testified as to the temporary character of the cabin erected by Twidle, and one of them, in speaking of his improvements, said: "I should judge that it was all fictitious; there is nothing there that would be permanent, it is only just a sham; there is nothing done; if a man was going to live there, he would want some place to live, and there is no indication of permanency at all." This statement of the witness Decatur, was not contradicted by any witness for Twidle, who admitted that he had not attempted to live in the house in the winter.

I deem it unnecessary to allude at greater length to the testimony in the case. The field notes of the surveyor who surveyed township 36, and the reports of the special agent of the Department, who examined the land prior to the filing of the plats in the local office, show that the entire township is mountainous, unfit for agricultural purposes, and chiefly valuable for timber.

It is true that the act of June 3, 1878, which provides for the sale of timber land, recognizes the right to appropriate such lands under the settlement laws, but it was held in Porter *v.* Throop (6 L. D., 691), that settlements on lands embraced in said act, should be closely scrutinized,

as the character of the land may, in connection with other facts in the case, affect the question of the settler's good faith.

The same views were expressed in the case of Wright *v.* Larson (7 L. D., 555). In that case it was said that "a settlement to be *bona fide* must be made for the purpose of making the tract a home, and a settlement for the purpose of securing the timber on the land, or for any other purpose than establishing a home, is not *bona fide* settlement within the meaning of the act of June 3, 1878." In that case, the Department awarded the land to the applicant to purchase, reversing the decisions of the local officers, and of your office, which had given it to the homesteader.

In the case at bar, the local officers found that Twidle was not a *bona fide* settler upon the land, and that he did not make his homestead entry for the purpose of making his home upon the tract. In support of this finding, they refer to the careful manner in which he "omitted to cut down the merchantable trees in the immediate vicinity of his cabin, but with an eye to the value of the timber, left them standing, while he cleared out the undergrowth and planted his fruit trees."

In the case of Miller *v.* McMillen (14 L. D., 160), it was held that "the presence of improvements on a tract of land will not exclude the same from disposition under the act of June 3, 1878, where said improvements are not made and maintained under a *bona fide* occupation of the land." In that case, your decision, which awarded the land to the pre-emptor, was reversed by the Department.

All the facts and circumstances of the case at bar, convince me that Twidle's was not a *bona fide* settlement upon the land in question, for the purpose of establishing a home thereon, but that it was a colorable settlement, made with a view of securing the benefit of the timber upon the tract. I think the local officers reached a correct conclusion in the case, and the decision appealed from is accordingly reversed.

CONTESTANT—TIMBER CULTURE CONTEST.

MITCHELL *v.* SALEN.

The validity of a contest is not affected by the fact that the contestant is a minor.

During the suspension of the township plat a timber culture entryman is excused from compliance with law in the matter of cultivation and planting.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 27, 1893.

This record presents the appeal of Abram Salen from your decision, dated December 23, 1891, in the case of Arthur B. Mitchell *v.* Abram Salen, involving the NW. ¼, Sec. 5, T. 5 S., R. 44 W., Akron, land district, Colorado.

Salen made timber culture entry for said tract August 16, 1886, at the Denver office. On August 19, 1889, Mitchell filed a contest against said entry charging failure to comply with the law in the matter of cul-

tivating and planting. Upon a trial had, the register and receiver found for the contestant, and upon appeal, you affirmed their judgment.

The testimony submitted at the hearing on said contest is sufficiently stated in your said decision, and shows that Salen broke ten acres of the land in 1888, but did no planting or cultivation.

It is urged by the appellant, however, that the contestant was a minor and disqualified as a contestant. This is immaterial. Under the rulings of the Department, the government is a party to every contest and can, if it chooses, act upon the record and cancel the entry regardless of contestant's qualifications.

Counsel for appellant also alleged, and the records of your office show, that the township plat was suspended May 12, 1887, and restored by your order dated June 20, 1889, hence it is urged that the claimant's entry should not be canceled "for a failure to comply with the law, without an allowance of sufficient time after the completion of the official survey, and giving of official notice of the same, to do the work required by law."

In the case of John Buckley (10 L. D., 297), and in that of Beley *v.* Cook (15 L. D., 215), it is held, in effect, that during the suspension of a township plat, an entryman under the homestead law is excused from compliance with that law.

The rule thus laid down is, by analogy, applicable to a claimant under the timber culture law, and consequently obtains in the case at bar.

As the record shows that the township plat was suspended more than three months before the expiration of the first year of Salen's entry, and that Mitchell's contest against said entry was initiated within about two months after its restoration, it follows that Mitchell's contest is premature, and that it must therefore fail.

Mitchell's contest is accordingly dismissed.

Your judgment is reversed.

TIMBER LAND—MARRIED WOMAN—RES JUDICATA.

MERRITT *v.* PHILP.

The doctrine of *res judicata* is not applicable in the absence of identity in the persons and parties.

The right to reinstatement can not be recognized where the adverse action has become final, and the claim of another intervenes.

Land covered by a growth of timber so extensive and dense as to render the tract as a whole substantially unfit for cultivation, is of the character contemplated by the act of June 3, 1878.

A married woman who is authorized by the law of the State to purchase and hold realty as a *femme sole*, is qualified to enter land for her own use under said act of 1878.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 27, 1893.

On August 9, 1883, Albert Philp filed at the Stockton, Cal., land office his declaratory statement (No. 12,023) for the W. ½ of the NW. ¼

of Sec. 25, and the E. ½ of the NE. ¼ of Sec. 26, T. 5 S., R. 21 E., M. D. M., alleging settlement July 30, 1883.

On August 20, 1883, Benjamin Merritt filed his sworn statement (No. 74) to purchase said tract under the timber act of June 3, 1878 (20 Stat., 89).

A hearing was duly had, and the case finally came by appeal to this Department, was decided March 3, 1885, and is reported in Merritt *v.* Short *et al* (3 L. D., 435). Philp's declaratory statement was ordered canceled because he had removed from land of his own to reside upon the land in controversy, in violation of the second clause of section 2260 of the Revised Statutes, and Merritt's timber land application was rejected because the testimony showed "that the land is not of such a character as contemplated in said act." The land was "held subject to entry and settlement by the first legal applicant."

On March 21, 1885, Philp made homestead entry (No. 4376) for said land, and relinquished the same on September 9, 1889, when he made application (No. 984) for said tract under said act of June 3, 1878, and November 23, 1889, was set for taking proof. On November 22, 1889, he filed his abandonment of said land, and his wife, Annie Philp, made timber land application (No. 1213) for said tract. On the same day Merritt filed an affidavit asking that he be allowed to contest said application of Annie Philp, and tendered a supplemental application to purchase said tract under said act.

On November 30, 1889, Annie Philp advertised that on February 18, 1890, she would submit proof before the local officers to establish her claim to said tract, when both parties appeared and submitted testimony.

On April 11, 1890, the local officers found that the tract is timbered land, and not agricultural in character," and concluded "that equity and good faith require that the original T. & S. No. 74 application of Benjamin Merritt should be reinstated, and that he then have the preference right during ninety days thereafter to purchase the land in contest."

On appeal, by letter of March 22, 1892, you reversed the decision of the local officers, rejected Merritt's supplemental application, and held the application of Annie Philp for cancellation.

Both parties have appealed to this Department.

The first question to be considered relates to the character of this land. Is it, in the language of the act of June 3, 1878, "valuable chiefly for timber, but unfit for cultivation?" This provision has recently been construed by the supreme court in the case of United States *v.* Budd (144 U. S., 154, 167), in which the rule is laid down that—"The chief value of the land must be its timber, and that timber must be so extensive and so dense as to render the tract as a whole, in its present state, substantially unfit for cultivation." Judged by this rule, the land must be considered "valuable chiefly for timber, but unfit for cultivation," within the meaning of those terms as used in said act.

The land is situated at an altitude of over 5000 feet, is rocky and of granite formation. The soil is shallow and poor, and cannot be irrigated on account of its altitude. The attempts made to raise crops thereon have all failed. The season for raising crops is short. In the winter the ground is covered with deep snow. The tract is heavily timbered with pine, fir, and cedar trees, and was variously estimated to be worth from $2,000 to $4,000 for its timber. There has lately grown up a greater demand for timber than formerly, and a lumber mill has been erected within a quarter or half of a mile of said tract, and a greater amount of lumbering is carried on now than a few years ago.

The decision in the case of Merritt *v.* Short *et al*, (*supra*) is not binding in this contest, because not between the same parties. There is not, in the two contests, "identity in the thing sued for, in the cause of action, in the persons and parties, and in the quality of the persons—concurrence in which four conditions must exist in order to make a matter *res judicata*." Henry T. Wells (3 L. D., 196, 199).

Between the parties to the present contest, the character of the land is now decided for the first time. Neither is the wife, Annie Philp bound by the decision in the former contest against her husband, Albert Philp. That judgment is not a bar to her application. There is no evidence that he has any interest in the present contest. She testified that she had separate property, devised to her by her father, and that with the money realized from its sale she proposes to pay for this land. She contends that she is entitled to purchase and hold real estate as a *femme sole* under the laws of the State of California. She has filed an affidavit to that effect; also stating "that she proposes to purchase said land with her separate money, in which her husband has no interest or claim, that said entry is made for her sole and separate use and benefit, that she has made no contract or agreement whereby any interest whatever therein will inure to the benefit of her husband or any other person." There is no evidence to the contrary.

In the case of Isabella M. Dwyer (6 L. D., 32), it was held that—"As the laws of California permit a married woman to purchase and hold realty as a *femme sole*, and to control and manage her separate property, free from all and any interference from her husband, I am of the opinion that the entryman in this case is entitled to purchase under the act of June 3, 1878." See Civil Code of California, Sections 162 and 171. Nancy J. Harris (11 L. D., 371).

The judgment in the former contest rendered March 3, 1885, against Merritt, was final, and disposed of his application (No. 74) made August 20, 1883. Before he took any steps to have the same reinstated, or to file a supplemental application, Annie Philp had filed her application. She was therefore prior in point of time in putting her claim upon record. Her claim intervened when the land was subject to disposal, and cannot be defeated by the subsequent application of Merritt. Henry T. Wells (*supra*); Dorney *v.* Vaughn (16 L. D., 8, 10).

Your office letter ("P"), of November 5, 1891, withdrawing from disposal said tract, with other lands, "pending investigation of Tulare Forest Reserve," provided that "entries already initiated may be perfected." The application of Annie Philp was filed November 22, 1889, and may therefore be "perfected."

Your judgment is modified accordingly.

PRE-EMPTION ENTRY—DOUBLE MINIMUM LAND.

DAVID SAMPSON.

A pre-emption entry including double minimum land erroneously allowed at single minimum price is not confirmed by the proviso to section 7, act of March 3, 1891.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, May 1, 1893.

I have considered the appeal of David Sampson involving his pre-emption cash entry for NW. ¼ of SW. ¼, Sec. 29, E. ½ of SE. ¼ and SW. ¼ of SE. ¼, Sec. 30, T. 2 S., R. 57 W., Denver, Colorado.

It appears by the record that on October 15, 1888, Sampson made proof and pre-emption cash entry of said tracts and paid $1.25 per acre, the amount required by the local officers, whereupon final papers were issued and the case regularly transmitted with the returns for that month to your office for approval.

Under date of August 6, 1891, you having examined the case, informed the local officers that the S. ½ of Sec. 30, said town and range, is within the twenty mile limits of the Union Pacific Railway, therefore double minimum land or $2.50 per acre, and instructed them to call upon the entryman to make an additional payment of $100, on the E. ½ of SE. ¼, falling within said limits and on payment thereof to issue supplemental receipt therefor.

October 12, 1891, the claimant through his attorney filed in your office an application for reconsideration of your action in requiring further payment on the land, and asked that the entry be approved under the proviso in Sec. 7, of the act of March 3, 1891 (26 Stat., 1095). Accompanying said application was the affidavit of claimant's attorney setting out that the motion for reconsideration was made in good faith and not for purposes of delay.

Under date of December 16, 1891, you decided that the entry under consideration is not subject to confirmation under the seventh section referred to, and that payment of the additional purchase money, as required by your letter of August 6, 1891, must be made, whereupon the claimant appeals.

It will be observed that said section seven, upon which the claimant relies for confirmation of his entry, also provides that where a clerical error has been committed in the entry of public lands, such entry

may be suspended upon proper notification to the claimant through the local land office until the error has been corrected.

In the case under consideration the local officers erred in accepting $1.25 per acre for the entire tract covered by the entry, whereas a portion of the same was subject to the pre-emption entry of Sampson only on payment of $2.50 per acre and therefore the entry was very properly suspended.

Section 2357, Revised Statutes, provides "that the price to be paid for alternate reserved lands along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre." This law has not been complied with, as to the double minimum lands embraced in Sampson's entry, and I am of the opinion that it does not fall within the provisions of said section seven, for confirmation.

It appears by the records in your office that not only does the E. ½ of SE. ¼ of Sec. 30, fall within the granted limits of said railway, but that the SW. ¼ of SE. ¼ of the same section is also within said limits and consequently, double minimum land; therefore your instructions to the local officers under date of August 6, 1891, above referred to, calling for an additional payment of $100, on the E. ½ of SE. ¼, should be amended by directing the local officers to call for the payment of $1.25 per acre on the SW. ¼ of SE. ¼, or a total of $150, on the one hundred and twenty acres within railroad limits.

Your decision is modified as above indicated.

PRIVATE CLAIM—GADSDEN PURCHASE—RESERVATION.

TUMACACORI AND CALABAZAS GRANT.

The Commissioner of the General Land Office may examine into matters pertaining to the assertion of a private claim on the suggestion of parties alleging interests present and prospective in conflict with said claim, if such action is otherwise proper.

The provisions of section 8, act of July 22, 1854, respecting private claims in New Mexico, were extended by the act of August 4, 1854, to include the lands acquired by the Gadsden purchase, and are in force, and applicable to such private claims within said purchase as are now included in the territorial limits of Arizona.

The reservation of land under the provisions of said section is statutory in character, and operates *proprio vigore* upon the land claimed, as soon as claim therefor is made before the surveyor-general, and withholds the same from other appropriation, until disposed of by direction of Congress; and it is not in the power of the executive to change, modify or revoke the reservation thus made.

The reservation thus directed by statute is not dependent for its efficacy upon the filing of a plat showing a survey of the claimed lands, or the notation of such reservation on the records of the Land Department, but such action is proper as notice to intending settlers, and in the interest of good administration.

The act of March 2, 1891, establishing a court for the settlement of private claims, while repealing section 8, of the act of 1854, does not revoke or annul the statutory reservations in force at the time of its passage.

In no case should entries or notations on the official tract books be expunged or erased. If an entry is made that is afterwards found to be erroneous, the record as made should not be mutilated or obliterated, but corrected by another entry showing the error.

Secretary Smith to the Commissioner of the General Land Office, May 8, 1893.

On January 7, 1880, the surveyor general of Arizona reported favorably upon and recommended for confirmation the Tumacacori and Calabazas grant. The report of the surveyor general and accompanying papers were transmitted to Congress, for consideration, by Secretary Schurz on May 24, 1880. (Sen. Ex. Doc., No. 207, 2nd Sess., 46th Cong). Up to March 3, 1891, no final action was taken by Congress in relation to said claim, though it appears to have been favorably considered by at least one committee. (House report No. 518, 48th Cong., 1st Sess.).

On October 1, 1888, George W. Atkinson and others, claiming to be settlers upon lands within the limits of said grant, filed a petition in your office praying for an investigation of the same, and, through their counsel, requested a restoration to the public domain of any lands found to have been unlawfully held in reservation on account of said grant.

On March 2, 1889, your predecessor, Commissioner Stockslager, made a decision, in which he deals at length with the history of this grant and the record of the proceedings in relation thereto before the surveyor-general of Arizona, and, finding many imperfections in the title papers and irregularities in the action of the surveyor-general, concludes that the case was not properly before that officer; hence his action in reporting it for approval was improper, and that there is no authority in law for making a reservation of the claimed lands pending the action of Congress on the report of the surveyor-general; and the Commissioner concludes as follows:

there is not and has never been any lawful, valid or actual reservation of lands for the Tumacacori and Calabazas claim, and I hereby direct that any notes of suspension of lands from public entry on account of said claim, found on the tract-books of this office or the local office, be expunged therefrom as unauthorized, improper and illegal.

The appeal of the Santa Rita Land and Mining Company, claiming to be the owner of said grant, brings the matter before me for review.

The appellants file eight specifications of errors, which may be stated more orderly and concisely as follows:

1. Error in assuming jurisdiction on the suggestion of strangers to the record with no interest involved.

2. Error in holding that private land claims within the Gadsden purchase are not within the provisions of the act of 1854, directing the reservation of claimed lands pending the action of Congress in relation thereto.

3. Error in considering questions affecting the validity of the grant title and the action of the surveyor-general in the premises.

4. Error in assuming to vacate a statutory or departmental reservation.

The first specification, as herein stated, is overruled. The fact that the information, or suggestions, upon which the Commissioner thought proper to act in this case, came from outside parties, if true, is no reason why he should not have made an investigation, if it was otherwise proper. The investigation was entered upon in discharge of what he believed to be his duty, and it is entirely immaterial whether the information which induced his action was obtained from the officers of the bureau or was furnished by parties with or without interest. But, in this instance it cannot be said that the information and suggestions came from parties entirely without interests in the matter, for the petitioners state that they are settlers upon and have improved what they believed to be public lands, but which have been erroneously included within the limits of the reservation for said grant, and that they are in danger of being driven from their homes and losing their improvements. Here is an allegation of present interest in the improvements made on these lands, and of a prospective or potential interest in the land itself. And it would be unfortunate under such circumstances if the Commissioner is to be prevented from giving a patient hearing to the appeals of parties so situated.

The second specification of errors, as herein stated, involves a consideration, to some extent, of the acquisition of Arizona, and of the legislation of Congress in relation to private land claims therein.

The Mexican cession, made by Article V, of the treaty of Guadalupe Hidalgo, proclaimed July 4, 1848 (9 Stat., 922), includes a large portion of the Territory of New Mexico, as at present constituted, and also all that portion of the Territory of Arizona which lies north of the Gila river. By Articles VIII and IX, of said treaty the private property within the ceded territory belonging to resident or non-resident Mexicans is to be fully protected. And in a protocol to said treaty it is declared, in relation to private grants, made by Mexico in the ceded territories, that the true intent is to "preserve the legal value they may possess, and the grantees may cause their legitimate titles to be acknowledged before the American tribunals."

Afterwards, by the act of September 9, 1850 (9 Stat., 446), the southern part of the territory east of California, thus ceded, was embraced within certain limits and organized as the Territory of New Mexico.

By Article I of the treaty of December 30, 1853 (10 Stat., 1035), Mexico ceded to the United States part of her territory, east of the Colorado and south of the Gila river, and south of a straight line drawn due east from a point where the most southern branch of the Gila river crosses the 109th degree of west longitude, thence to the Rio Grande River and north of a boundary line then established between the two countries. The land within this cession is known as the "Gadsden Purchase."

By Article V of the last treaty it is declared that articles eight and nine of the treaty of Guadalupe Hidalgo "shall apply to the territory

ceded by the Mexican Republic by the first article of the present treaty, and to all the rights of persons and property" as though the same were again recited and fully set forth. Article VI provides that no grants of land within the ceded territory shall be recognized as valid which were made subsequent to September 25, 1853, or which, if made prior thereto, "have not been located and duly recorded in the archives of Mexico."

By act of July 22, 1854 (10 Stat., 308), the President was authorized to appoint a surveyor-general for the Territory of New Mexico, and by section 8 of said act it was declared:

> 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; . . . . . 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.

At the date of the passage of this act no part of the Gadsden purchase was within the organized Territory of New Mexico. But in a short time thereafter it was all placed therein, for, by act of August 4, 1854 (10 Stat., 575), Congress enacted:

> That, until otherwise provided by law, the territory acquired under the late 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 the 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, within which is the western portion of the Gadsden purchase, wherein is located the Tumacacori and Calabazas grant. The second section of this last act provides for the appointment of a surveyor-general and other officers, whose—

> powers, duties, and the compensation . . . . . 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.

By the sundry civil appropriation bill of July 2, 1864 (13 Stat., 344–352), the sum of $10,000 was appropriated for surveying the public land in Arizona, and by section 8, it was enacted:

> That until otherwise directed by law the Territory of New Mexico and the Territory of Arizona shall constitute one surveyor-general's district.

This last section was impliedly repealed by section 4 of the act of March 2, 1867 (14 Stat., 542), which enacted: "That the Territory of Arizona is hereby attached to the surveying district of California."

No appointment of surveyor-general was made under the act of February, 1863, *supra*, until after the passage of the act of July 11, 1870 (16 Stat., 230), which declared:

> That the Territory of Arizona is hereby created a separate surveying district, and that the President, by and with the consent of the Senate, shall be, and hereby is, authorized to appoint a surveyor-general for the Territory, whose annual salary shall be three thousand dollars, and whose power, authority, and duty shall be the same as those provided by law for the surveyor-general of Oregon.

A reference to the Oregon act, September 27, 1850 (9 Stat., 496), shows the surveyor-general thereof is to have the same authority and perform the same duties as are vested in and required of the surveyor-general of land northwest of the Ohio river (act of May 18, 1796, 1 Stat., 464), except as otherwise provided. There is nothing in the two acts referred to, or the act of 1870 itself, which would authorize the surveyor-general of Arizona specially to act upon Spanish or Mexican grants. Probably to cure this omission, or preclude the implication that he was to be deprived of the jurisdiction in that respect which had been conferred by former acts, four days after the passage of the act of July, 1870, *supra*, a clause was inserted in the general appropriation bill July 15, 1870 (16 Stat., 291–304), as follows:

> For surveying the public lands in Arizona, at rates not exceeding fifteen dollars per lineal mile for standard lines, twelve dollars for township, and ten dollars for section lines, ten thousand dollars; 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 entitled 'An act to establish the offices of surveyor-general of New Mexico, Kansas, and Nebraska, to grant donations to actual settlers, and for other purposes,' approved July twenty-second, eighteen hundred and fifty-four, and his report shall be laid before Congress for such action thereon as shall be deemed just and proper.

It is insisted that the act of 1854, *supra*, by its terms, is restricted to private land claims within the limits of the cession by the treaty of Guadalupe Hidalgo, and therefore is not applicable to the lands within the Gadsden purchase. I do not so read the law, but am satisfied, upon a review of the recited legislation, Congress intended that said acts were to be construed together as part of one system or method to be followed in relation to the private land grants within the two terri-

tories named; and that it was intended said system should be applicable alike to such grants or claims therein, whether the lands covered by them were ceded by the one treaty or the other.

Congress having full power to legislate on this subject, I can imagine no reason why it should direct that lands derived under the older treaty should be placed in reservation and protected, pending investigation, and those which were ceded under the younger treaty should be thrown open to entry or settlers encouraged to go upon them. The stipulations as to the protection of private property in both treaties are identical, those of the first having been adopted in the second. But, independent of any such treaty stipulations, the obligation of the government, under the laws recognized by all civilized nations, to protect private property, is as imperative in the one case as in the other. If the rule claimed by your predecessor be the correct one, the anomalous condition of affairs would be presented of Congress directing that grants of the same kind, from the same source, in the northern portion of a Territory, should be dealt with by one rule, whilst those in the southern portion thereof should be dealt with, by the same officer, under a different rule; the claims in one place to be protected from intruders by a reservation, and in the other place to be left defenceless. It is not believed that it was intended to enact laws to produce a condition so incongruous, so unjust, and so calculated to create confusion.

In considering this question, it should also be borne in mind that at the time the act of 1854 was passed, the Gadsden treaty of December 30, 1853, had been ratified and proclaimed, wherein the provisions of the treaty of Guadalupe, in relation to the protection to be extended to claimants under Mexican and Spanish grants, had been specially referred to and adopted. Unless an expression, or a strong implication to that effect can be found, it would be an unwarranted assumption to hold that Congress, legislating to carry out existing treaty obligations in relation to grants in the territory ceded by Mexico should utterly ignore one treaty and so restrict its legislation that no action could be taken in relation to the claimed land in one of the cessions. On the contrary, it would seem that every presumption ought to be the other way. And this presumption is strengthened when it is recollected that the two cessions were of adjacent and contiguous territory, the last cession being but a supplement to the first, obtained professedly for the purpose of making it more complete and satisfactory, of straightening and otherwise improving its boundaries.

In view of these circumstances, part of the history of the times, it is fair to assume, in the absence of expression or clear implication to the contrary, that the legislation referred to was intended to be broad enough to cover the lands within both cessions. Indeed, Congress seems to have left but little room for doubt as to its purpose in this respect, for in a few days thereafter, by act of August 4, 1854, *supra*, it specifically placed all the lands acquired by the Gadsden treaty

within the limits of New Mexico, declaring they should be subject to "all" its laws. This brief but comprehensive act may be fairly regarded as a legislative declaration that the laws of New Mexico contained ample provisions for the protection of the public and private interests in the lands thus added to its territory.

It is my opinion, then, that the lands within the Gadsden purchase became subject to the provisions of section 8 of the act of July 22, 1854, after the passage of the act of August 4, 1854, when said lands were incorporated with the Territory of New Mexico.

But it is insisted that even if it be true that the provisions of the act of July 22, 1854, were extended to private grants located on the Gadsden purchase within the Territory of New Mexico, yet the provisions of said section ceased to be applicable thereto within Arizona when it was organized into a separate Territory. This position is not tenable, in my opinion.

In the second section of the act of February, 1863, *supra*, organizing the Territory of Arizona, which Congress well knew was to include within its limits land obtained under both treaties, it is declared that acts amendatory to the act organizing the Territory of New Mexico, not inconsistent, shall be "extended to and continued in force" in the new Territory "until repealed or amended by future legislation." The act of July 22, 1854, *supra*, was amendatory to the act of 1850 organizing the Territory of New Mexico, inasmuch as in the said eighth section for the first time steps were taken to organize the land system therein by the appointment of a surveyor-general, and, as has just been said, it was applicable to and operative over all parts of New Mexico, including that portion carved out of it and organized as Arizona.

The language of the act of 1863, *supra*, seems to make it so plain as to admit of no argument to the contrary that section 8 of the act of July 22, 1854, was "extended to and continued in force" over the whole of Arizona, "until repealed or amended" by later legislation. Where is the later legislation which has repealed or amended this mandate? Not in section 8 of the appropriation bill of 1864, *supra*, for that is rather confirmatory inasmuch as it declares that New Mexico and Arizona shall constitute one surveying district, and presumably with one system of laws; not in the subsequent act of 1867, *supra*, whereby Arizona was temporarily "attached" to the surveying district of California. This last act contains no express repeal of the laws theretofore "continued in force" over Arizona, nor anything from which an intention to repeal or modify them can properly be implied. The language of the last act is different from that of the act whereby New Mexico and Arizona are made to "constitute one surveyor-general's district;" that is each, of these Territories is to be a constituent or essential part of the one district. In the last case, Arizona, as organized, with all the laws which have been "extended" over it, is simply "attached" temporarily to the surveying district of California and it thus became

the duty of the surveyor of that State to administer his office in the attached Territory, under the particular laws applicable thereto, and not under those applicable to the public lands or private claims in California.

All this is made the more plain by reference to the subsequent legislation contained in the acts of July 11 and 15, 1870, *supra*, whereby Arizona was made a separate surveying district, and the instructions to the surveyor-general therein, in relation to Spanish and Mexican grants were, perhaps, out of abundant caution, repeated, as declaring the law.

It is my opinion, therefore, that the provisions of section 8 of the act of July 22, 1854, having been extended to the lands within the Gadsden purchase by the act of August 4, 1854, were "continued in force" over the same by the act of 1863, and are yet in force and applicable to private land claims in Arizona, unless "repealed" or "amended by subsequent legislation, either expressly or by clear implication.

The fact that the clause, providing for a reservation of the lands claimed and reported upon, is omitted from the proviso in the appropriation bill of July 15, 1870, which undertakes to define the duty of the surveyor-general in Arizona, does not militate against these views. There is no conflict between section 8 of the act of 1854 and this last proviso. It is not necessary to hold that the last repeals the reservation clause of the former. Both laws can stand together and be enforced, for they both seek the same end, attaching to the same subject, within the same Territory. The canons of construction imperatively require that they should be read together as part of one system.

The rulings of the Land Department and its practice in the administration of the laws relating to these grants are in harmony with the opinion which I have expressed.

On August 25, 1854, when New Mexico included Arizona as well as all the lands of the Gadsden purchase, the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, issued a letter of instructions to the surveyor-general of New Mexico prescribing rules for his guidance in proceedings relating to private grants under section 8 of the act of 1854, *supra*. In these instructions there is nothing to indicate that they and said act do not apply to all the lands within the limits of New Mexico then under his jurisdiction. (See *Public Domain*, p. 394.)

In 1872 the surveyor-general of New Mexico seemed to have some doubt as to his power to report upon private land claims within the Gadsden purchase, and your office submitted the matter to the Secretary (Mr. Delano), who, on February 17, 1872, decided that section 8 of the act of 1854 was made applicable, by act of August 4, 1854, to all the territory acquired by the Gadsden purchase, but the surveyor-general of New Mexico could only report on private land claims within that part of the Gadsden purchase not incorporated in the Territory of Arizona. (C. L. L., 601.)

In the Land Office report of 1877, on page 26, Commissioner Williamson says that by the—

act of July 15, 1870, (16 Stat., p. 304,) the provisions of the eighth section of the act of July 22, 1854, were extended to Arizona, and the surveyor-general thereof was thereby clothed with as ample jurisdiction over grants therein as was vested in the surveyor-general of New Mexico over like claims in the Territory of New Mexico.

On January 16, 1877, with the approval of the Secretary of the Interior, the Commissioner of the General Land Office issued instructions to the surveyor-general of Arizona directing him to proceed in compliance with the requirements of said act of July 22, 1854, and supplemental legislation, to report to Congress the origin, nature, and extent of all private land claims within his district. (ib., p. 27). In said instructions, the Commissioner, reciting that part of the act of July 15, 1870, *supra*, which confers upon the surveyor-general of Arizona all the powers, and imposes the duties enjoined upon the surveyor-general of New Mexico, by the act of July 22, 1854, quotes at length section 8 thereof as defining said powers and duties, and copies almost verbatim the instructions theretofore given to the surveyor-general of New Mexico under said act. In the instructions to both officers, they are directed to require from every claimant an authenticated plat of survey, or other evidence showing the precise locality and extent of the tract claimed. The directions then state:

This is indispensable in order to avoid any doubt hereafter in reserving from sale as contemplated by law the particular tract or parcel of land for which claim may be duly filed, etc. (Pub. Dom., *supra*. Letter Book Priv. Land Claims. Vol. 33.)

The directions were repeated substantially by Commissioner McFarland to the surveyor-general of Arizona in the matter of the Ranchos de Las Algodones (1 L. D., 166), and of the Rancho San Juan De Las Boguilas (ib., 167), both within the Gadsden purchase.

In 3 L. D. (p. 438), Secretary Teller quotes the reservation clause of section 8 of the act of 1854 as applicable to the private land claim of San Raphael De La Zanja, in Arizona, and also within the Gadsden purchase. On page 439 he said:

there being a claim pending in Congress—which was also presented to the surveyor-general and decided adversely by him—to have a confirmation by the metes and bounds set up by the claimants, it is proper to inquire what lands are reserved by law. The statute defines them. "Until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or disposal by the government," etc.

This case came again before the Department in 4 L. D. (p. 482) when Secretary Lamar affirmed the former ruling, with much emphasis, quoting also the reservation clause of the act of July 22, 1854, as containing the law applicable to the claim. The ruling in the Tres Alamos grant, similarly situated, reported on page 430 of the same volume, is to the same effect. Indeed, in 15 C. L. O. (p. 33), Commissioner Stockslager himself, on April 11, 1888, made a ruling to the same effect in relation to the Peralta claim, a large portion of which covers land within

the Gadsden purchase in Arizona. Doubtless there are other decisions to the same effect, but these are sufficient to show the contemporaneous and continued construction of the law by those charged with its execution. A practice and rulings as well settled and uniform as here shown, establishing a rule of property, should not be disregarded. And in this particular case, Commissioner McFarland, on February 20, 1885, in a letter to Hon. W. S. Holman, House of Representatives stated that your office had examined said claim, that the proceedings were regular, that the claimed land had been properly reserved, and that no reasons appeared why the grant should not be confirmed.

It is also proper to refer to what seems to be a legislative construction to the same effect by Congress. Neither in its organic act, nor in any other statute is there an express reservation of land for school purposes to Arizona, prior to the adoption of the Revised Statutes. But by the United States Revised Statutes, section 1946, it is expressly declared that sections 16 and 36 in each township in Arizona shall be reserved for school purposes therein. By the act of June 27, 1866 (14 Stat., 74), the commissioners thereby authorized to be appointed to revise the United States Statutes, were required, in section 2, to insert in their revision "side notes . . . . . with references to the original text from which each section is compiled." In the side note to section 1946 reference is made to section 2 of the act of 1863, *supra*, organizing the Territory of Arizona as reserving the school sections to it. Recurring to that section it shows, as before said, no express school reservation, but a declaration, in rather obscure language, extending the original act of New Mexico, and acts amendatory thereto, over Arizona. Section 15 of the act of September 9, 1850 (9 Stat., 446), organizing the Territory of New Mexico, and section 5 of the act of June 22, 1854, *supra*, both contain a provision reserving the sixteenth and thirty-sixth sections for school purposes in New Mexico.

Thus the commissioners of revision, and Congress, by accepting their work and enacting it into law, declared that by said section 2 of the Arizona act the laws of Congress pertaining to New Mexico were fully applicable to Arizona.

In addition to what has been here said, it may be added that the supreme court has recently had before it a case involving the present status of the grant now under consideration. In the case of Astiazaran *v.* Santa Rita Land and Mining Co., reported in 148 U. S., page 83, a bill was filed in the Arizona court by parties asserting claim to this grant adverse to that of the present holders, and asking to have petitioners' title quieted. The supreme court affirmed the judgment of the courts below for the defendant, on the ground that Congress, having constituted itself the particular tribunal to finally determine, upon the report and recommendation of the surveyor general, whether the claim is valid or invalid whilst proceedings to that end are pending, the question of title cannot be contested in the ordinary courts of justice.

And in arriving at this conclusion, the court assumes that the jurisdiction of the surveyor general of Arizona, in relation to the grant, is conferred and defined by the acts of July 22, 1854, and of July 15, 1870, before cited.

So also in the recent case of Cameron *v.* United States, reported in the same volume. The United States instituted proceedings in the district court of Arizona to compel Cameron to remove a fence alleged to enclose a portion of the public lands. The defendant entered a general denial and claimed a right to the land under the Mexican grant for the Rancho San Rafael de la Zanja, which had been reported favorably by the surveyor general of Arizona, but which was not yet confirmed by Congress. The supreme court held that as the possession of the land in question was under color of title, the courts could not interfere until the matter of the grant title had been finally acted upon by the appointed tribunal. In coming to this conclusion, the court expressly decides that, under the legislation of Congress, heretofore cited, the reservation clause in section 8 of the act of July 22, 1854, is applicable to the private grants of Arizona.

For these reasons I think the second assignment of error by appellants should be sustained.

The third specification of error, as herein stated, goes to the propriety of the consideration, by the Commissioner, of questions affecting the validity of the grant title, the regularity of the surveyor's proceedings, and the correctness of his report in relation to said grant claims.

Your predecessor, in his decision, page 16, expressly disclaims having entered into the consideration of the question of title, or of the regularity of the proceedings for the purpose of affecting the question of title. But assuming jurisdiction to determine whether or not there is or ought to be a reservation of land and its extent, because of the Tumacacori and Calabazas claim, he goes at length into a consideration of the treaty and legislative provisions relating to private land claims in New Mexico and Arizona, the title of the particular grant under consideration, and the action of the surveyor-general in reference thereto. Finding from this examination that the grant claim as presented to the surveyor-general was an illegal and not a *bona fide* grant, and that the action of that officer, in taking jurisdiction of and reporting upon the same, was not only irregular, but without sanction of law, he concludes that there could be no "lawful, valid, or actual reservation" on account of a claim of that character, and directs that all entries on the records, showing such reservation, shall be "expunged" therefrom. In other words, the Commissioner, claiming authority to determine whether there should be a reservation in this case, finds sufficient cause to determine the matter in the negative, and gives among his reasons, for coming to this conclusion, those above stated.

As this assignment of error, like the second, under the theory of the Commissioner, goes to the reasons which influenced his judgment, and

not to the judgment itself, it is not essential to consider it separately from the fourth and last assignment of error, which attacks directly the correctness of the judgment of the Commissioner, that there is no reservation of land for said grant.

It is not to be denied that the Commissioner of the General Land Office, subject to the approval of the Secretary of the Interior, is authorized, for proper purposes, to make reservations of the public lands and to revoke the same, when, in the exercise of his judgment, such action should be taken. The question in the present case does not arise under this general power, but is presented under a different condition of law and facts.

Here the Commissioner decides that there never was a legal reservation, and then proceeds to abrogate one which he says was wrongfully and informally made. The first inquiry then is, was there a lawful reservation of the lands in question?

It has been shown that in pursuance of the national obligation to protect property rights, in the newly ceded territory, Congress passed the act of 1854, *supra*, as to the land within the then boundaries of New Mexico, which were enlarged, a few days thereafter, so as to include the Gadsden purchase. By section 8 of the recited act and regulations thereunder, parties claiming land grants within said territory were to make claim therefor before the surveyor-general, and present to him their evidence on that behalf. That officer was to ascertain "the origin, nature, character and extent of all claims" thus submitted, under the rules prescribed, and make full report on all such "claims" to Congress for its action; and until the final action of that tribunal "on such claims, all lands covered thereby shall be reserved," etc.

This language, to my apprehension, is perfectly plain, its meaning clear beyond controversy, leaving no room for discussion, which would fail to enlighten.

The legislation of Congress in relation to grants in the territory acquired from Mexico was somewhat different from its legislation as to grants within previously acquired territory. In regard to the Mexican grants, whilst intending to fully protect private property interests, it was not proposed to recognize those grants as complete, but rather as inchoate, and needing further confirmatory action on the part of the government. The purpose of this legislation was not to evade any national obligations or to meet them in a narrow or illiberal manner, and with a view of enforcing forfeiture, but to discharge them in a broad and liberal spirit, as becomes a great nation desiring to afford protection to just rights, by giving the parties, who possess them, an opportunity to make a record thereof in this country in such a manner as will prevent future controversy, and put the land titles of those communities upon a stable foundation. Fremont *v.* United States, 17 How., 542, 553; Botiller *v.* Domingues, 130 U. S., 238–247.

None of the titles being recognized, before adjudication, as complete,

they were held to be mere "claims" for land asserted to have been granted while the country was under the dominion of a former government. To carry out, in good faith, our obligations, it was of the utmost importance that the land covered by such "claims" should be held intact for the benefit of the claimants, if successful in the assertion of right thereto. This could only be done effectually by severing those lands from the public domain and placing them in reservation. Of so much importance did Congress deem this reservation, that it was not content to leave the matter to the discretion of those charged with the administration of the land laws, whose power, if exercised, was ample to make a reservation; but it unequivocally and in the most positive manner declared that all lands covered by such claims "shall be reserved." This mandate is peremptory, without qualification, and emanates from the highest authority known to the law. The act does not say that the Secretary may in his discretion reserve the claimed lands, or if the Commissioner be satisfied the claim is legal or *bona fide*, or that the proceedings before the surveyor-general be regular, then the Commissioner may reserve them, or not. In contending that such is the law of the case, your predecessor seems to have entirely lost sight of the purpose of Congress and of the language used in the act of 1854, as well as of the decisions of the courts and the Department on like statutes, or in analogous cases.

By act of March 3, 1853 (10 Stat., 244), the public lands in California, with certain exceptions, were thrown open to settlement and entry. Among the exceptions were "lands claimed under any foreign grant or title." In the case of Newhall *v.* Sanger (92 U. S., 761), the question came before the supreme court as to whether the provision of the last cited act would reserve the lands within the claimed limits of a fraudulent grant. The court said, page 765:

> This section expressly excludes from pre-emption and sale all lands claimed under any foreign grant or title. It is said that this means "lawfully" claimed; but there is no authority to import a word into a statute in order to change its meaning. Congress did not prejudge any claim to be unlawful, but submitted them all for adjudication.

It is thus seen that the validity or invalidity of the claim can in no respect affect the question of the reservation, where claim is made and investigation is pending. In fact, the invalidity can not be ascertained until after adjudication, whilst the reservation was intended to be an actual subsisting prohibition against intrusion, upon the claimed lands, until an opportunity was afforded the parties for a judicial hearing and investigation. Necessarily, then, to effectuate fully its purpose, this prohibition was intended to operate as soon as "claim" was made to a particular tract of land before the surveyor-general, for it was as important to protect it from intruders during his investigation as that of Congress.

I have therefore no difficulty in deciding that this is a case of statutory reservation, which operated *proprio vigore* upon the land claimed,

as soon as claim therefor was made before the surveyor-general, and withheld the same from other appropriation, until disposed of by direction of Congress; and that it is not in the power of the executive to change, modify, or revoke the reservation thus made.

When Congress made the grant of lands, to aid in the construction of the Northern Pacific Railroad, in section 6, of the land granting act (13 Stats., 365), it was provided that after "the general route (of the road) shall be fixed . . . . . the odd sections of land hereby granted shall not be liable to sale or entry or pre-emption," etc. In the case of Buttz *v.* Northern Pacific Railroad (119 U. S., 55), the supreme court held that the above language created a statutory withdrawal which went into operation immediately when said route became fixed by the filing and acceptance of a map thereof. Said the court, on page 72:

> When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or pre-emption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain; it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or pre-emption it has been the practice of the Department in some cases, to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

The act of Congress making a grant of land to the State of Kansas for the benefit of the St. Joseph, etc. Railroad contains the ordinary provision usual in such acts, to the effect that "in case it shall appear that the United States have, when the line or route of said road is definitely fixed" disposed of or reserved any of the granted lands, other lands shall be allowed therefor. In the case of Van Wyck *v.* Knevals (106 U. S., 360), the supreme court regarded this language as creating a self-acting statutory withdrawal, which went into effect, *eo instanti* the line of the road was definitely fixed. On page 367 the court says:

> It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary nor any other officer of the Land Department can extend the period by requiring something to be done subsequently, and until done, continuing the right of parties to settle on the lands as previously. Otherwise, it would be in their power, by vexatious or dilatory proceedings, to defeat the act of Congress, or at least seriously impair its benefit.

I think the rules laid down in these cases, applicable to the one under consideration. The act of 1854 created a statutory withdrawal, which

attached instantly to land claimed before the surveyor-general, and was co-extensive with that claim; nothing that the land officers may do can in any way affect the validity, the extent or effectiveness of said withdrawal, which being established by Congress is subject to its action alone. What the Commissioner or the surveyor-general might do in the way of defining the extent of the reservation, whilst effective, perhaps, as notice to the public at large, could in no way add to or take from the force and effect of the reservation made by Congress, or prejudice the rights of the claimants.

In this case, it is complained that subsequently to forwarding his report the surveyor-general transmitted the plat of a survey showing the particular lands claimed, and that a corresponding reservation has been noted on the tract-books in yours and the local land office. It is asserted that this plat was irregularly filed, does not correspond with the form of the original grant, and shows an acreage largely in excess of that called for in the grant papers. This may all be true and yet not in any way affect the legality or efficacy of the reservation established by statute. That reservation, as shown before, would have gone into effect if no plat had ever been filed, and no action taken by the land officers in relation thereto. But it was proper that such plat should be filed and such reservation noted on the records. They showed the location and extent of the lands which, the surveyor understood, were claimed by those setting up rights under the grant, and upon which the statutory withdrawal operated. If such notation did not act, in effect, as an executive reservation of the lands therein described, it would be a notice and warning to paties intending to settle, which, if heeded would probably prevent complications and troubles. It was, therefore, in the interest of good administration that such notation was made upon the records, and for the same reason it ought to stand, though its obliteration can in no wise affect adversely the rights of the grant claimants, or the operation of the statutory withdrawal established to protect those rights.

I find nothing in the case of Pinkerton *v.* Ledoux (129 U. S., 346), quoted by your predecessor, in conflict with these views. There, the court below refused to instruct the jury that the report of the surveyor-general under the act of 1854, *supra*, entitled the plaintiff to such absolute and exclusive possession of the land within the claimed limits of an unconfirmed Mexican grant as would enable him to recover them in an action of ejectment. This ruling was affirmed by the supreme court on page 351: and the reasons as set forth are obvious. As before said, the policy of our law was to treat all these Mexican grants as conferring only inchoate or equitable rights, needing confirmation to ripen into a legal title, which could be accorded by Congress alone. The report of the surveyor-general only shows what, on investigation, he has found to be the origin, character, and extent of the claim set up. But until the report is confirmed, it is no evidence of either the legal title or of

the boundaries of the grant, in an action where recovery is sought on the strength of the legal title. That case has no bearing whatever upon the question of reservation in this case.

It is apparent that the first inquiry under the last specification of error must be answered in the affirmative, and that there was a "lawful reservation of the lands in question." And, inasmuch as that reservation was one established by the statute and was to remain in operation subject to the direct or other action of Congress confirming or rejecting the grant claim, it follows logically that the action of your predecessor in declaring there was no reservation for the grant, is erroneous and without authority, the matter of the report of the surveyor-general and the reservation of land claimed before him being entirely beyond the control of the Commissioner.

It is not seen that the act of March 3, 1891 (26 Stat., 854), establishing a court for the settlement of private land claims, has any particular bearing upon the matters herein discussed. As shown, the act of 1854 provided that upon the institution of proceedings before the surveyor-general, the claimed lands should be reserved until the final action of Congress. The act of 1891 repeals that portion of the act of 1854 referred to, and hereafter there will be no such proceedings before the surveyor-general, and no coincident statutory reservation. But the repealing act does not, either by expression or necessary implication, revoke or annul the statutory reservations in force at the time of its passage. In my opinion, every legal intendment is that said reservations should remain in full effect until the claims they protect are disposed of in accordance with the provisions of the new act.

The judgment in said case is therefore reversed, and the papers therein returned to your office.

It is proper to call your attention to the order of Commissioner Stockslager in relation to the reservation in this case. He directs that any notes of suspension of lands from entry on account of said claim, found on the books of either office, shall "be expunged" therefrom. The books referred to are the official tract-books, in which, under the admirable system of book-keeping in operation for so many years, are posted or noted, in connection with the respective tracts of land, everything relating to them which comes to the knowledge of the officers in the regular course of business, so that, in reference thereto, the history of each tract and its present status are shown. An order to "expunge," erase, or obliterate anything thus recorded, if obeyed, will result in mutilation of the public records of the Land Department, a proceeding entirely unjustifiable under any circumstances, calculated to destroy the integrity of those records, and render them wholly unreliable. In no case should the entries upon these records ever be tampered with, expunged or erased. If an entry be made, which was afterwards ascertained to be improper, recourse should not be had to the process of obliterating or mutilating the record as it is made; but another entry

ought to be made, showing the error. Thus the integrity of the record would be preserved and a full and truthful history of all the proceedings, in relation to the particular tract of land, shown by the books of the office. I am not aware that it has been the practice of your office to order matters "expunged" from the records thereof, no order similar to the one herein have come under my observation; but if such a practice prevails, you will give such directions as will at once put a stop to it.

ENTRY—AMENDMENT—PATENT—SURVEY.

ELISHA B. MARTIN.*

The right to amend an entry is defeated by an intervening adverse claim.
A patent should not issue for land under a technical sub-divisional description not shown by the public surveys.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 2, 1892.

On the 7th of November, 1888, Elisha B. Martin filed his pre-emption declaratory statement for the S. ½ and the NE. ¼ of the NE. ¼ of Sec. 6, T. 20 S., R. 17 E., M. D. M., Visalia land district, California, alleging settlement on the first day of that month. He made cash entry for the land on the 3d of February, 1890. The area of this tract is one hundred and thirty-six acres.

On the 10th of September, 1889, Charles F. Wilson made timber-culture entry for the remainder of said quarter section the NW. ¼ of the NE. ¼. Subsequently, said entry was held for cancellation, upon the report of a special agent of your office, but such action was afterwards revoked, leaving the entry intact.

On the 29th of May, 1891, the local officers transmitted to your office the application of Martin for the amendment of his entry, so as to embrace the entire NE. ¼ of said section six, and for the cancellation of the timber-culture entry of Wilson. This application was refused by you, on the 9th of December, 1891, and an appeal from your decision brings the case to the Department.

In his application, Martin alleges that the south half of the NE. ¼ of said section contained eighty acres, and the north half one hundred and twelve acres. That he applied to file his declaratory statement for the entire NE. ¼ of said section, but was not allowed to do so, the local officers informing him that said quarter embraced one hundred and ninety-two acres, and he could only file for such fractional parts thereof as approximated one hundred and sixty acres. He accepted this statement as correct, and made filing and entry as already stated.

In his appeal to the Department, Martin states that before making settlement upon the land in question, he purchased the improvements

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* Not reported in Vol. XV.

thereon from one, Albert W. Amsbaugh, for the sum of $500, who represented to him that he had a pre-emption on the whole of said NE. ¼ of said section six, and that he never knew to the contrary until he applied to file his own declaratory statement. He also alleges that he went into possession of the whole of said NE. ¼ and had prepared for cultivation, at great expense, the land for which Wilson afterwards made timber culture entry.

Whether the local officers erred in not allowing Martin to file his statement for the entire NE. ¼ of section six, is not the question now before me. If he was dissatisfied with their action to preserve his rights, he should have appealed; failing to do so, and so long as the timber culture entry of Wilson was made prior to this application, and remains of record, Martin's application to amend can not be allowed. The record before me does not make a showing which calls for the cancellation of the entry of Wilson in favor of Martin. He alleges that Wilson made timber culture entry for a subdivision of section six which had no existence. The same might be said of his filing. If there was no NW. ¼ of the NE. ¼ of said section, there was no NE. ¼ thereof, and if the entry of Wilson for the NW. ¼ of the NE. ¼ should be canceled, the filing of Martin for the NE. ¼ therefore should share the same fate. Your refusal, therefore, to allow the amendment applied for by Martin, is approved.

This, however, still leaves two entries of record in your office, which can not be passed to patent, as the subdivisions of land described therein, have no existence. The map of township 20, filed in your office, shows the NE. ¼ of section 6, to be divided only into a northern and a southern part, the former containing 112, and the latter 80 acres. Before patents can issue, the entries must conform to those subdivisions, or a new survey of that quarter section must be made. I call your attention to this situation, and suggest that appropriate action in the premises be taken by your office.

RIGHT OF WAY—DITCH—MARGINAL LIMIT.

LEWIS J. DAWSON.

In approving an application for a right of way for a ditch the Department does not determine the marginal width necessary for the construction and maintenance of the ditch.

Secretary Smith to the Commissioner of the General Land Office, May 8, 1893.

I am in receipt of your letter of February 20, 1893, transmitting a map in duplicate, filed by Lewis J. Dawson, in the land office at Pueblo, Colorado, with his application for its approval, that he may have the

benefit of sections 18 to 21, of the act of March 3, 1891, (26 Stat., 1095).

This map embraces a small ditch with lateral, and two small reservoirs. It takes its water from Swift creek. The initial point (being at the head gate) is in the NE. ¼ of NW. ¼ Sec. 7, T. 22 S., R. 73 W., said point being S. 33° 15′ W., 1550 feet from the S. ¼ corner of Sec. 6, of said town and range. Thence it bears north east two miles and 1140 feet to a reservoir. It is two feet in width. It runs nearly its entire length through private lands, but enters the SW. ¼ of Sec. 52, T. 21 S., R. 73 W., which tract is public land. The main ditch terminates in the reservoir at a point N. 75° 10′ E., 950 feet from the quarter corner on the south line of said Sec. 32. A lateral taken out at a point near the south line of said section N. 85° E., 600 feet from the quarter corner on the south line of said section 32, runs N. E., and flows into another reservoir at a point N. 50° 10′ E., 1465 feet from the same corner of section 32. This lateral is 1100 feet in length, and two feet wide.

The initial point of the larger reservoir, designated as No. 1, is on the middle line, north and south of the S. E. quarter of said section 32, N. 88° 28′ E., 1328 feet from the ¼ section corner on the south line of said section 32. It is rectangular in shape, and covers 6.66 acres.

The initial point of the smaller reservoir is N. 55° E., 1635 feet from said quarter section corner on the south line of section 32; its area is 1.16 acres.

Both of these reservoirs are on public land. The surveyor files an affidavit in verification of his survey, and says that the land sought to be appropriated can be utilized for reservoir purposes.

This is a very narrow ditch, but as it affects public land, and the applicant's survey and map are in substantial compliance with the requirements of the law and regulations of the Department, the map is approved, subject to all existing valid rights. While section 18, of said act of March 3, 1891, grants fifty feet on each side of the marginal limits of a canal or ditch, regardless of its width, the 21st section of the act so limits the operation of the former section that the ditch or canal owner can only occupy such right of way 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." In approving this map, the Department grants only such right of way as the law provides; the width necessary for the construction, maintenance and care of the ditch is not determined.

The map and papers transmitted by your said letter are herewith returned.

ALLOTMENT—ARTICLE 7, TREATY OF MARCH 19, 1867.

McLEAN *v.* BISSON.

The right to allotments provided in article 7, of the treaty of March 19, 1867, is not dependent upon settlement or residence on the land, but is secured by the cultivation of the specified quantity of land; and when the Indian has complied with such requirement, his right to the tract involved vests at once, and attaches thereto, whether the certificate of such right is, or is not, issued to him at such time.

Acting Secretary Chandler to the Commissioner of Indian Affairs, April 3, 1893.

I acknowledge the receipt of your communication of 18th January last, transmitting the papers in the case of the appeal of Lillie McLean from the decision of your office of December 12, 1892, in instructing the Chippewa Commission to cancel the allotment theretofore made to said Lillie McLean by said Commission and allot the land to the contestant, Antoine Bisson.

In reply thereto, I transmit herewith an opinion of the Hon. Assistant Attorney General for this Department, dated 1st instant, in which I concur, wherein it is held that Bisson has no right to the land as against the claim of McLean and that the allotment made to her by the Commission should be confirmed and established.

OPINION.

Assistant Attorney General Shields to the Secretary of the Interior, April 1, 1893.

I have the honor to acknowledge, by reference of Acting Secretary Chandler dated February 18, 1893, a communication from the Acting Commissioner of Indian Affairs, dated January 18, 1893, transmitting to the Department the papers in the case of the appeal of Lillie McLean from the decision of the Indian Office, dated December 12, 1892, "in instructing the Chippewa Commission to cancel the allotment theretofore made to said Lillie McLean and allot the land to the contestant, Antoine Bisson." The question involved is the determination as to which of the contestants, Lillie McLean or Antoine Bisson, should be allotted the NW. ¼ of Sec. 21, T. 141, R. 41 W., on the White Earth Reservation, Minnesota, under the provisions of Article VII, of the treaty of March 19, 1867 (16 Stat., 719), as provided for in the act of January 14, 1889 (25 Stat., 642). By the papers submitted, it appears that the controversy arose over the claims of McLean and Bisson as to which of them should receive the allotment for the land in question; that the Chippewa Commission, in making the allotment, heard and considered the testimony and proof offered by the parties; that said Commission awarded and allotted the land to McLean; that on the 12th

day of December, 1892, the Commissioner of Indian Affairs considered the matter and directed the Commission "to cancel the allotment to Lillie McLean and to allot the land to the contestant Antoine Bisson," from which order McLean seeks to appeal to you; and the testimony and record upon which said actions were based are transmitted for your consideration. The matter was referred to me "for an expression of opinion on the legal questions herein presented."

It seems that the parties to this controversy are members of the "Chippewa Indians of the Mississippi," and so far as I am able to glean from the papers before me, they both are claiming the land in question under the terms of the seventh Article of the treaty of March 19, 1867 (16 Stat., 719), which reads as follows:

> As soon as the location of the reservation set apart by the second article hereof shall have been approximately ascertained, and reported to the office of Indian affairs, the Secretary of the Interior shall cause the same to be surveyed in conformity to the system of government surveys, and whenever, after such survey, any Indian, of the bands parties hereto, either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to receive a certificate, showing him to be entitled to the forty acres of land, according to legal subdivision, containing the said ten acres or the greater part thereof, and whenever such Indian shall have an additional ten acres under cultivation he or she shall be entitled to a certificate for additional forty acres, and so on, until the full amount of one hundred and sixty acres may have been certified to any one Indian; and the land so held by any Indian shall be exempt from taxation and sale for debt, and shall not be alienated except with the approval of the Secretary of the Interior, and in no case to any person not a member of the Chippewa tribe.

Informal inquiry at the General Land Office elicits the fact that the plat of the survey of the township in which the land in question is located, was approved by the surveyor-general of Minnesota on the 12th day of February, 1872. The language of the seventh article is that—

> Whenever, after such survey, any Indian . . . either male or female, shall have ten acres of land under cultivation, such Indian shall be entitled to a certificate, showing him to be entitled to the forty acres of land,

and so on for every "additional ten acres under cultivation, he or she shall be entitled to a certificate for an additional forty acres," until "one hundred and sixty acres may have been certified to any one Indian." This language does not in terms nor by implication require the Indian to either settle or live upon the land; it only requires him or her to "*have ten acres under cultivation*" in order to be entitled to a certificate showing him to be entitled to the forty acres of *land*. While it may be true that the parties to the treaty contemplated by holding out this inducement that the Indians availing themselves of it, might in the course of time, build houses and live in them, yet the language used in the treaty certainly fails to make such action on the part of the Indians a condition precedent to the establishment of their *right* to the land. At the time the treaty was made the land set apart for these Indians was unsurveyed, wild land, situated beyond the frontier white

settlements; other bands and tribes of Indians not always at peace with these, were located or roved at large in the country north, west and south of the land set apart for this band; the government was, no doubt, anxious to have these Indians adopt the habits and customs of the white man—in a word become civilized—this is evident to my mind from the several provisions in said treaty relating to schools, mills, houses on the reservation, cattle, farming utensils, etc. Under these and all the circumstances it seems reasonable to conclude that as an entering wedge looking to the final accomplishment of these purposes, it was intended to only require the Indian to put the specified number of acres of land into a state of cultivation, in order to encourage him in an effort to become civilized, and to invest him with the right to the land he cultivated and the additional land specified in the treaty. Whenever the Indian performed his or her part by putting the specified number of acres in cultivation, he or she became entitled to the land, his or her right to it became vested and at once attached, irrespective of whether the certificate was or was not issued to him, for the issuance of the certificate was a matter over which the Indian had no control.

In this case it is shown that Lillie McLean was in 1876, the wife of one Timothy Mooers, who apparently was a white man; that in said year they settled upon the land under her right as an Indian; that he (Mooers) built a shanty, fenced and broke or caused to be broken forty acres of the land. She swears that in 1879 she applied to the agent to have a certificate issued to her for the land, and he informed her that he would have to write to Washington for it and promised to do so; but she never heard anything more about it. It is shown that Mooers had fifty-five acres of the land in question plowed and put in one crop on part of it.

It is claimed on the part of Bisson that Mooers did not make this improvement for his wife, but for another woman whom he intended to marry at some time in the future; this claim is unreasonable on its face, and is not supported by the testimony, for Mooers himself testified, that the improvements were made for his wife, now Lillie McLean. When Mooers and his wife separated, she went to the government school at Red Lake, where she was employed as a seamstress, and afterwards she was divorced from Mooers. After the Mooers went away from the land, one Southware occupied it awhile, then one Blair occupied it until 1890, when it is claimed, he sold it to Bisson, who, I infer, has held the possession of it since.

While the testimony in this case is not entirely satisfactory, yet I am disposed to think the opinion of the Commission who had the opportunity to see the witnesses and judge of their testimony should be given considerable weight, and I think there is sufficient in the record to sustain their decision.

Upon the facts and record, as submitted, my conclusion of law is

that Bisson has no right to the land as against the claim of McLean, and that the allotment made to her by the Commission should be confirmed and established by you, and I so advise.

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

POMOSENO CAMPOS.

An entry canceled prior to the passage of the act of March 3, 1891, is not confirmed by section 7 of said act; nor does the pendency of proceedings under permission to show cause why such entry should be reinstated, bring it within the confirmatory operation of said section.

First Assistant Secretary Chandler to the Commissioner of the General Land Office, April 11, 1893.

July 15, 1882, Pomoseno Campos made final homestead entry for the S. ½ of the NW. ¼ and the N. ½ of the SW. ¼ of Sec. 31, T. 19 N., R. 32 E., Folsom, New Mexico.

Said entry was held for cancellation by your office October 8, 1887, on report of Special Agent C. G. Coleman, for lack of residence and improvements, and because made in the interest of one, Juan Vigil.

January 19, 1888, it was canceled, but afterwards, to wit, June 22, 1888, on the application of said Juan Vigil, who had become the purchaser of the land, a hearing was ordered, to allow him to show why the said entry should be reinstated and sustained.

The hearing was had March 20, 1889, and on November 6, 1891, the local officers recommended that the entry be confirmed, under the 7th section of the act of March 3, 1891, (26 Stat., 1095), and by your decision of February 29, 1892, you affirmed their action.

In the meantime, to wit, December 15, 1890, Luciano Solano had been allowed to make homestead entry for the S. ½ of the NW. ¼ and the W. ½ of the SW. ¼ of the same section. He was allowed to intervene, and has appealed from your said decision.

I cannot concur in your judgment.

At the date of the passage of the confirmatory act of March 3, 1891, Campos' entry had no existence, it having been canceled by your office January 19, 1888, and the hearing subsequently ordered was to show cause why the entry should be reinstated. The act of March 3, 1891, *supra*, makes no provision for reinstating canceled entries, for the purpose of confirming the same thereunder. James Slocum, 15 L. D., 421 It must be reinstated, if at all, under the evidence taken at the hearing. That evidence has been examined, and, in my judgment, clearly shows that Campos did not comply with the law as to residence and improvements.

I am further satisfied from such examination that his entry was made in the interest, and for the benefit of Vigil, the transferee.

Your judgment is therefore reversed, and the entry of Campos canceled.

INDIAN LANDS—AGREEMENT OF DECEMBER 19, 1891—ACT OF MARCH 3, 1893.

CHEROKEE ALLOTMENTS.

In selecting lands under paragraph 4, Article II, of the agreement of December 19, 1891, providing allotments for certain Cherokee Indians residing on the ceded lands, the head of the family is required to take his allotment out of his improved lands. The members of his family have the preferred right in making their selections to take lands improved by the husband or father, but are not restricted to said lands; but if they take improved lands, the selection is then limited to lands embraced within the improvements of the husband or father.

Selections made by the owners of improvements who do not reside within the ceded limits, must not embrace tracts less in area than the smallest legal sub-division, and must be taken in such manner as to include their improvements up to the limitation in acreage provided in said agreement.

The allotments provided for in said agreement are to be made by the people entitled to receive the land, subject to the approval of the Secretary of the Interior.

The right to purchase one hundred and sixty acres conferred by the act of March 3, 1893, upon D. W. Bushyhead extends to any lands within the ceded portion of the territory not in conflict with rights of selection conferred by paragraph 4, of Article II, of said agreement, and the rights of the Chilocco school, recognized by said act, or any other reservation.

Assistant Attorney General Hall to the Secretary of the Interior, May 10, 1893.

The question has been submitted to me informally, together with certain papers on the subject, as to the proper construction of paragraph 4 of Article II, of the agreement between the United States and the Cherokee Nation, whereby certain lands of the Cherokee Nation were ceded to the United States, which agreement was entered into on the 19th day of December, 1891. This agreement deals with two classes of persons to whom allotments of lands are to be made. The first class are persons who reside within the territory ceded to the United States by the Cherokee Nation, and that part of the agreement which relates to allotments for the benefit of this class reads as follows:

> That any citizen of the Cherokee Nation who, prior to the first day of November, 1891, was a bona fide resident upon and further had, as a farmer and for farming purposes, made permanent and valuable improvements on any part of the land herein ceded and who has not disposed of the same, but desires to occupy the particular lands so improved as a homestead and for farming purposes, shall have the right to select one-eighth of a section of land, to conform, however, to the United States surveys; such selection to embrace, as far as the above limitation will admit, such improvements. The wife and children of any such citizen shall have the same right of selection that is above given to the citizen, and they shall have the preference in making selections to take any lands improved by the husband and father that he can not take—until all his improved land shall be taken.

The language of the above paragraph of the agreement leaves its meaning somewhat doubtful in two respects, first, whether the family,

as a family, should take one allotment, or whether each member of the family should have an allotment; and second, where such allotments should be taken. I think the report made by the Commissioners on the part of the United States, to the President, aids very materially in reaching the true meaning of said paragraph. The Commissioners, in reference to said paragraph, use the following language:

> There are thought to be about seventy Cherokees residing on, or who have made improvements on, the lands ceded to the United States in the agreement. They are mainly in number and location, in a little corner of the country west of the Arkansas River, and east of the Pawnee reservation. These improvements have been in progress for years, and one-eighth of a section of land will not, in every case, embrace all the improvements made by one person. So, for those that reside there with their families—following the general allotment law—the Commission has agreed that each member of the family may take one-eighth of a section.

First. The above paragraph from the report of the Commission makes it very plain that the agreement gives to each member of the family one-eighth of a section of land—both by the express statement in the report to that effect, and by reference to the "general allotment law," which provides that every Indian entitled to an allotment shall have an eighth of a section. See Supplement to Revised Statutes, Vol. 1, p. 897.

Second. It will be observed that the citizen who made the improvements is required to embrace in his allotment his improved land in whole or in part. The agreement does not give to such person the right to select such land as he may choose, but it provides that where he "desires to occupy the particular lands so improved as a homestead and for farming purposes," he shall have the right to select one-eighth of a section of land to conform to the United States surveys, and to "embrace, as far as the above limitation (one-eighth of a section) will admit, such improvements." His right to select is confined to the lands he has improved. But no such restriction is placed upon his family in making their selections. The language relating to selections by families is, "the wife and children of any such citizen shall have the same right of selection that is above given to the citizen," that is, the right to select one-eighth of a section of land. But members of the family are not confined to the lands which have been improved by the head of the family. The language is "they shall have the preference in making selections to take any lands improved by the husband and father that he cannot take." In other words, they have the right to select, each, an eighth of a section, and, if they "prefer" the improved lands, they can include in their selections any improved lands not taken by the husband and father, "until all of his improved land shall be taken," provided, of course, that their allotments do not exceed the number of acres given to each member of the family.

This view of the question is strongly supported by the construction placed upon the agreement by the Commissioners in their report above quoted, wherein they say, "These improvements have been in progress

for years, and one-eighth of a section of land will not, in every case, embrace all the improvements made by one person." And, to compensate for such loss that might befall such citizen, the Commissioners gave to each member of the family "one-eighth of a section of land."

The above report makes the meaning of the agreement quite clear that the head of the family is required to embrace in his allotment the land he has improved in such manner as to conform to the United States surveys, and not beyond the limitation of one-eighth of a section of land; while each member of the family will be permitted to select his or her allotment, and shall have the "preference" (that is, the right) in making *selections* to take any land improved by the husband or father, within the limitation as to quantity, and which selections shall also conform to the United States surveys. The family could not select for allotment any land improved by any citizen other than the husband or father.

I do not construe the agreement to mean that the family shall take land in compact form and adjoining the land of the "husband and father," nor do I believe that the exercise of the rights of families can be so restricted by the Secretary of the Interior.

I therefore advise that the head of the family is required to take his allotment out of his improved lands, and that his family is not so restricted in making their selections, but if they take improved lands, such selection must be of improvements of the husband or father.

There is another class of persons provided for by the terms of this agreement, to wit: Any citizen of the Cherokee Nation not a resident within the land ceded, who, prior to the first day of November, 1891, had for farming purposes made valuable or permanent improvements upon any of the lands herein ceded, shall have the right to select one-eighth of a section of land, to conform to the United States surveys, such selection to embrace, as far as the above limitation will permit, such improvements. That is, it must conform to the United States surveys in this respect, that he shall not take land in a quantity smaller than the smallest legal sub-division, to wit., forty acres; and he shall take his allotment in such manner as to embrace his improvements, up to the limitation provided in said agreement, to wit., eighty acres. It will be seen that the family of such person is not entitled to any allotment of land.

The agreement further stipulates that the number of allotments shall not exceed seventy, and that the number of acres so allotted shall not exceed 5,600. The Chief of the Division of Indian Affairs in the Interior Department has furnished me with a list of persons claiming these allotments, and the claimants now number one hundred and thirty-two, and has stated to me that he has learned of others who will make application for allotments under the provisions of this agreement. It would seem that the Commissioners who acted in behalf of the United States and for the Cherokee Nation made a mistake as to the number

of persons residing within the ceded Territory, on improved lands, and persons residing within the Cherokee Nation who had improved lands within said ceded territory. With this, however, according to my view of the duties of the Secretary of the Interior in the premises, you will have no concern, for it is my construction of the agreement and the act of Congress that these allotments are to be made by the people entitled to receive the lands, and it would be your duty simply to approve the allotments, if, when reported to you, they are found to be properly made.

Under the general law, allotments of the public lands are made by an officer or agent of the United States government to persons entitled to receive them. The general law has reference to allotments on reservations of government lands. But the act of Congress approved March 3, 1893 (27 Stat., 640) which ratifies the agreement now under consideration, provides that the allotments provided for in the 4th paragraph of Article II of said agreement shall "be made without delay *by* the persons entitled thereto, and shall be confirmed by the Secretary of the Interior before the date when said lands shall be declared open to settlement; and the allotments so made shall be published by the Secretary of the Interior for the protection of proposed settlers."

It is insisted by the Chief of the Division of Indian Affairs that the act of Congress should read, that the allotments "shall be made without delay *to* the persons entitled thereto;" thus following the general law of the United States in making allotments of public lands to persons entitled to receive them. I caused an investigation to be made to ascertain whether the word "by" which is in the printed act, is there by inadvertence, or whether, being there properly, the act should receive the construction as though the word "to" were used in lieu thereof. I find, on examination, that the bill passed the house, went to the Senate and was there amended and the word "to" after the word "delay" was inserted by a Senate amendment. There was a failure on the part of the House to agree to certain amendments proposed to the bill on the part of the Senate, and a conference committee considered the disagreement of the two houses touching such amendments, and said committee reported that the word "to" in the Senate amendment should be stricken out, and the word "by" inserted in lieu thereof. This report was agreed to by both Houses of Congress, and the act as passed reads, "the allotments provided for in the fourth section of the agreement shall be made without delay by the persons entitled thereto." Thus it is clearly shown that the word "by" was used advisedly by Congress, and that it was the intention of Congress that the allotments provided for in said agreement should be made "*by* the persons entitled thereto."

You will observe that the lands to be covered by these allotments are not to be purchased by the United States. The price paid by the United States for the ceded lands is $1.40 per acre, and the agreement

stipulates that "from the price to be paid to the Cherokee Nation for the cession herein provided for, there shall be deducted the sum of one dollar and forty cents for each acre so taken in allotment." The agreement, in effect, requires the Cherokee Nation to give the lands to be allotted to the persons who are to receive the same. I doubt not it was for this reason that Congress provided that the allotments "shall be made by the persons entitled thereto."

It is my opinion that you should leave this matter of making the allotments originally to the persons entitled to receive these lands in allotment, reserving the right to pass finally upon the correctness of the allotments when they are submitted to you for approval. I am of opinion that by dealing with the question in this manner you will be relieved, and so will any officer of the government you might appoint to make the allotment, of a very disagreeable and annoying duty; for I take it you would have much trouble in determining how allotments allowed to seventy persons should be divided among one hundred and thirty-five, or perhaps one hundred and forty. These people can doubtless make some satisfactory arrangement among themselves, and better, no doubt, than could be made by any officer of the government. It will not matter, however, with the allottees, so I am informed, who makes the allotments, but I thought proper to call your attention to this view of the subject.

In passing on this matter finally, in approving or disapproving the allotments, you will have the right to require them made in conformity to your views, for your approval of the allotments is necessary to make them valid.

There is another question, raised in the same informal manner, and submitted to me for my consideration and opinion thereon, to wit: What are the rights of D. W. Bushyhead under the provisions of the act of Congress approved March 3, 1893?

You will observe that the articles of agreement do not embrace the claim of Bushyhead, provision therefor being made alone by the act of Congress. The agreement provides that a citizen who has improved a farm and resided on it for farming purposes shall have eighty acres of land; and the like privilege is given to each member of the family of such person, and also citizens who had improved farm lands and for farming purposes, and not residing thereon, shall be entitled to receive each eighty acres.

The citizens entitled to the allotments above referred to are not required to pay for the same, either to the United States government or to the Cherokee Nation, and they are limited to eighty acres. The language of the act of Congress concerning D. W. Bushyhead is:

That D. W. Bushyhead, having made permanent or valuable improvements prior to the first day of November, eighteen hundred and ninety-one on the lands ceded by the said agreement, he shall be authorized to select one quarter section of the

lands ceded thereby, whether reserved or otherwise, prior to the opening of said lands to public settlement; but he shall be required to pay for such selection at the same rate per acre as other settlers, into the Treasury of the United States in such manner as the Secretary of the Interior shall direct.

It will be observed from the above provision of the act of Congress, that Bushyhead is not required to show that he had improved land "as a farm or for farming purposes;" but the declaration is that he has "made permanent or valuable improvements" thereon, which is the consideration for the sale to him of a quarter section of land, and the requirement is that he shall pay to the United States for such lands as he may select, at the same rate per acre as the other settlers.

You will observe also that Bushyhead is not confined to the improvements made by him, but he is permitted to take his quarter section (one hundred and sixty acres) at any place within the ceded territory whether reserved or otherwise. I do not believe, however, that it was the intention of Congress that Bushyhead should be allowed to take lands that have been improved by the allottees provided for by the agreement, or by the act of Congress ratifying the agreement, for said act does not in any wise change that clause of the agreement which provides for such allotments.

The act of Congress also reserves certain lands therein particularly described, for the benefit of the Chilocco Indian Industrial School, set apart by executive order of July 12, 1884; which reservation, however, is *not* made by the articles of agreement.

I cannot believe that it was the intention of Congress to change or alter the provisions distinctly made by the articles of agreement between the United States and the Cherokee Nation, and which were ratified expressly by the act. The act of Congress permits Bushyhead to purchase one hundred and sixty acres of government land at the government price. He is not one of the seventy allottees provided for in the agreement. Each one of the allottees is entitled to eighty acres, without charge, while Bushyhead is to pay for the land he may receive, and is entitled to purchase one hundred and sixty acres. The seventy allotments are given to citizens who have improved lands as farmers and for farming purposes. No such requirement is made of Bushyhead, but he is permitted to purchase one hundred and sixty acres of land of the United States at government price, because he has made permanent and valuable improvements on lands ceded by the agreement between the United States and the Cherokee Nation. The act of Congress does not state on what particular land improvements were made, nor the kind of improvements, nor does it confine Bushyhead's purchase to any particular portion of the ceded land.

It is therefore my opinion that Bushyhead would have the right to select one hundred and sixty acres at any place within the ceded portion of the territory, which does not conflict with the rights of persons mentioned in paragraph 4 of Article II, and with the rights of the Chilocco school above referred to, or any other reservation.

Whatever selection Bushyhead may make, will be subject to your approval, and must be made prior to the opening of the lands to settlement.

Approved,

HOKE SMITH,

Secretary.

SCHOOL LAND—INDEMNITY—FRACTIONAL TOWNSHIP.

STATE OF MONTANA.

The fact that sections sixteen and thirty-six are left unsurveyed on account of their mountainous character does not render such sections fractional in quantity, or wanting from a natural cause, so as to warrant the selection of indemnity therefor.

Secretary Smith to the Commissioner of the General Land Office, May 12, 1893.

The State of Montana, by its board of land commissioners, has appealed from your decision of March 29, 1892, rejecting its list No. 1 of indemnity school selections, filed in the Missoula land office, November 19, 1891.

Error is alleged in your holding "that a township partly surveyed and partly unsurveyed on account of 'rugged mountains' is not fractional in the sense required by section 2275 Revised Statutes, as amended by the act of February 28, 1891."

In the list submitted for approval, the alleged cause of the deficiency in forty-six of the school sections is that they are "unsurveyed;" and in lieu of some of these unsurveyed sections, six hundred and forty acres of other lands were selected, and for others a less number of acres. In many cases the surveys were not extended over the school sections, on account of "rugged mountains."

The existing provisions authorizing selections to compensate deficiencies for school sections are found in sections 2275 and 2276 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796).

The particular provision relied upon as authorizing the selections made upon the basis used (unsurveyed on account of rugged mountains) is found in the last clause of section 2275 as amended, which reads as follows:

> And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever.

The mere fact that sections sixteen and thirty-six are left unsurveyed because of "rugged mountains" does not in any sense render those sec-

tions fractional in quantity or wanting from any natural cause, if actually in place.

It may be conceded that the rugged character of the mountains will render it inexpedient to extend the public surveys over such portions, and that by reason of this natural condition, the school sections may often be found of but little value; but this condition does not justify the selection and certification of other and more valuable lands in lieu of such school sections as chance to fall in a mountainous region, in the absence of any provision therefor.

The judgment appealed from is affirmed.

HARPER *v.* GRAND JUNCTION.

Motion for review of departmental decision of February 14, 1893 (16 L. D., 127) denied by Secretary Smith, May 13, 1893.

ABANDONED MILITARY RESERVATION—SETTLEMENT RIGHTS.

STATE OF MONTANA *v.* WOOLVERTON ET AL.

The provisions of the act of February 13, 1891, for the disposal of the abandoned Fort Ellis military reservation protects the rights of settlers who, prior to the establishment of said reservation, had in good faith settled on lands embraced therein, and were subsequently dispossessed by the military, and, on the abandonment of the reservation, resumed their occupancy and improvement of the land; and the right of selection conferred upon the State by said act will not defeat such settlement rights.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1893.

On the 13th of February, 1891, Congress passed "An Act to provide for the disposal of the abandoned Fort Ellis military reservation in Montana, under the homestead law, and for other purposes." (26 Stat., 747). The first section of the act authorized the Secretary of the Interior to cause the land embraced in said reservation to be surveyed. The second section granted to the State of Montana one section of said reservation, to be used as a permanent militia camp-ground, and to be selected so as to embrace the buildings and improvements thereon. By the third section, the State of Montana was authorized to select the remaining portions of such reservation, or any part thereof, within one year after the approval of the survey, in part satisfaction of the grant to said State made by the act of February 22, 1889. Sec. 3 contains the following provisos:

Provided, 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: *Provided,* That if any portion of said reservation shall remain unselected by said State for a period

of one year after the approval of the survey, that portion remaining unselected shall be subject to entry under the general land and mining laws of the United States: *Provided further*, That if within said period of one year the Governor of said State shall officially notify the Secretary of the Interior that the State has completed its selections, then the Secretary shall at once proclaim the remaining lands open to entry as aforesaid.

In providing for the survey of the reservation, and in giving the State the right to make its selections within one year after the approval of such survey, Congress seems to have overlooked the fact that the survey of all the lands in the reservation had been made in the summer of 1887, which survey was approved by your office on the 19th of December, of that year. According to the returns of the U. S. surveyor general, in Division "E," of your office, the plat of survey was received in the district land office, January 5, 1889, more than two years prior to the act of February 13, 1891, which gave the State one year after the approval of the survey for making its selection.

On the 19th of October, 1891, the State of Montana, under, and by virtue of an act of Congress entitled "An Act to provide for the division of Dakota into two States, and to enable the people of North Dakota, South Dakota, Montana and Washington to form Constitutions and State Governments, and to be admitted into the Union on an equal footing with the original States, and to make donations of public lands to such States", approved February 22, 1889; also, "An Act to provide for the disposal of the abandoned Fort Ellis Reservation in Montana, under the homestead law, and for other purposes", approved February 13, 1891, made and filed its selection for the whole of sections 22, 23 and 26, township 2 S., range 6 E., which was rejected by the local officers of the Bozeman land district, on the 23d of said October, for the reason that said sections were partially covered by the homestead entries of the defendants in this controversy, and others.

From this action by such local officers the State duly appealed, and on the 28th day of January, 1892, you rendered a decision in the case, in which you stated that you did "not see the way clear to give relief to the above mentioned settlers on the Fort Ellis Reserve", and therefore held their entries for cancellation. The case is brought to the Department by appeals from your decision, by said settlers.

The military reservation of Fort Ellis was created by executive order of February 15, 1868, and relinquished July 26, 1886, under the act of July 5, 1884, (23 Stat., 103), which was entitled "An Act to provide for the disposal of abandoned and useless military reservations." Said act provided for the survey, appraisement, and sale of the lands included within the limits of any military reservation, which then had, or might thereafter become useless for military purposes, and contained the following provisos:

Provided, That any settler who was in actual occupation of any portion of any such reservation prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith for the purpose of

securing a home and of entering the same under the general laws, and has continued in such occupation to the present time, and is by law entitled to make a homestead entry, shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the government surveys and subdivisions: *Provided further*, That said lands were subject to entry under the public land laws at the time of their withdrawal.

At the time the land embraced in the Fort Ellis military reservation was withdrawn from settlement, by the creation of said reservation, William H. Lee was residing upon the NW. ¼ of section 26, having built a house and established his residence there in 1866. He cultivated the land until the fall of 1868, when he was compelled to leave by the military authorities, who appropriated his improvements for the use of the post. His improvements were valued at $1,000, beside $400 invested in an irrigating ditch. William W. Woolverton made settlement on the SW. ¼ of Sec. 23, in June, 1867, and cultivated the same for two years, being ejected by the military in May, 1869. He had made valuable improvements and expended $700 in an irrigating ditch. His improvements were appropriated or demolished by the military. George C. Howard made settlement on the SE. ¼ of Sec. 26, in June, 1867, and was also ejected by the military.

After the relinquishment of the reservation, and its abandonment for military purposes, these parties returned to the land from which they had been ejected by the military, and afterwards made homestead entries for the respective tracts. Woolverton's entry was made on the 27th of March, 1890, Lee's on the 12th of April of the same year, and Howard's on the 15th of July, 1891. Each of these persons was qualified to make entry under the homestead law at the dates of their respective applications.

The lawful character of their settlements originally is not disputed. Such settlements, however, did not in any manner interfere with the right of the government to reserve the land before entry, either for temporary or permanent purposes. In this case the reservation was temporary, and the question presented is, Did their settlements prior to the reservation by the government, and their entries after the relinquishment of the reservation, and prior to the initiation of any other rights, give such settlers rights in the land which would prevent its selection by the State of Montana, under the law of February 13, 1891?

In behalf of said settlers and homesteaders, it is claimed that their original settlements were for the purpose of securing homes, and of entering the land under the general laws, and it is insisted that their ejectment by the military, and enforced absence, should be counted to them as "continued occupation," which would bring them within the proviso of the act of July 5, 1884. Numerous decisions by the Department, in which compulsory absence has been regarded as constructive presence, are cited in support of this proposition, among them being that of Parson *v.* Hughes (8 L. D., 593), wherein Mrs. Hughes was forced off the land in 1879, and did not resume possession until 1885,

in which it was held that her residence on the land was not broken by her ouster, and that she at no time abandoned the tract.

The act of July 5, 1884, was a general law to provide for the disposal of abandoned and useless military reservations, while the act of February 13, 1891, was passed especially to provide for the disposal of the abandoned Fort Ellis military reservation under the homestead law, and it provided "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."

Not until the passage of the act of 1891, was the State of Montana given any rights in the lands embraced in the Fort Ellis reservation, and one of the marked features of legislation concerning the public lands, especially in grants and privileges to States and railroads, is that the actual, qualified settlers who have entered or settled prior to such adverse grant, are generally saved.

In deciding the case of John W. Imes (12 L. D., 288), the Department held that the act of February 13, 1891, protected only such settlement rights as were acquired under, and recognized by the act of 1884. In that case, Imes made no attempt to obtain title to the land until February 5, 1889. He then sought to avail himself of the prior settlement of Maltby and Gum. This he was not allowed to do, and because he possessed none of the qualifications required by the act of 1884, his application to pre-empt the land was rejected.

The ruling in that case, however, would not cut off the claims of the applicants for the lands in the case at bar. They were possessed of personal settlement rights acquired under, and recognized by the act of 1884, and were not basing their claims upon the prior settlement of others. The facts and circumstances of the two cases are therefore materially different.

Imes made no settlement upon the land desired by him, prior to its inclusion in the military reservation, or prior to January 1, 1884, while Woolverton, Lee and Howard settled upon the land claimed by them, nearly three years before its reservation, and occupied it until ejected by the military. They returned to their respective claims when the military departed, and continued to occupy and cultivate the same until they made homestead entries therefor. Such entries were made before the State of Montana, or any other party, sought to secure the land.

The act of 1884 recognizes the right of these parties to make settlement upon the land at the time their settlements were made, by providing for the protection of the rights of "any settler who was in actual occupation of any portion of any such reservations prior to the location of such reservation." This provision inclines me to the opinion that the rights of such parties, in case their "actual occupation" should be interrupted by the act of the government, and through no fault of theirs, and should be resumed at the earliest opportunity, would date from the time of their original settlement.

Under all the circumstances of the case, I think their acts of settlement upon the land, and improvement thereof until ousted by the military, and their return when the military withdrew, was such an occupation as the Department and the courts would hold to be "continuous." This would bring them within the proviso of the act of July 5, 1884. Were this not the case, I think the provisions of the act of February 13, 1891, which said "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," would allow their entries to remain intact.

My conclusion is, that the local officers properly rejected the application of the State of Montana to make selection of the land covered by the homestead entries of Woolverton, Lee and Howard, and the decision appealed from is accordingly reversed.

MOLINARI *v.* SCOLARY.

On motion for review of departmental decision of August 22, 1892 (15 L. D., 201), a rehearing ordered by Secretary Smith, May 13, 1893.

RAILROAD GRANT—ADJUSTMENT—FORFEITURE ACT.

ALABAMA AND CHATTANOOGA R. R. CO.

The quota of lands to aid in the construction of this road in the common limits of other grants having been satisfied, the remaining lands in such common limits appertain to the other roads, and being opposite the unconstructed portion of said roads are restored to the public domain by the forfeiture act of September 29, 1890.

Further approvals on account of a grant will not be made, where the adjustment shows that the certifications already made are in excess of the amount granted.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1893.

I have considered the appeal filed in behalf of Frank Y. Anderson and John A. Billups, trustees for the State, and the bondholders, from your decision of January 26, 1892, holding for cancellation a certain list, filed May 13, 1885, in the United States land office at Huntsville, Alabama, on account of the grant made by the act of June 3, 1856 (11 Stat., 17), to aid in the construction of the road known as the Alabama and Chattanooga Railroad.

By the act of June 3, 1856 (*supra*), Congress granted lands to the State of Alabama to aid in the construction of several roads, nearly all of which radiated from Gadsden. Among the roads provided for was one "from Gadsden to connect with the Georgia and Tennessee line of railroad through Chattooga, Wills, and Lookout valleys;" also for a railroad "from near Gadsden to some point on the Alabama and Mis-

sissippi State line in the direction of the Mobile and Ohio Railroad, with a view to connect with said Mobile and Ohio Railroad."

By act of the State legislature, dated June 20, 1858, these grants were conferred upon different companies, but the respective maps of definite location were filed by said companies on the same date, October 11, 1858.

In accordance with an act of the State legislature, these two franchises were consolidated in one company, the name of the new corporation being known as the Alabama and Chattanooga Railroad Company.

Other grants were provided for by the act of June 3, 1856 (*supra*), to aid in the construction of the roads since known as the Tennessee and Coosa Railroad, the Coosa and Chattooga Railroad, and the Selma, Rome, and Dalton Railroad, the lines of all of which, as described in the act of 1856, centered at Gadsden.

It is apparent that the grants for these numerous roads, radiating from a common center, must overlap. Within these common limits but one grant was made, to be divided in proportion to the number of grants whose limits covered the common territory—thus, in a conflict of two grants each would be entitled to a moiety, and where three grants overlap, only one-third of the common area was granted on account of each road. (St. Paul & Sioux City R. R. Co. *v.* Winona & St. Peter R. R. Co., 112 U. S., 720.

The selections involved in this case are within the primary limits of the grants for the Alabama and Chattanooga Railroad, but are also within the primary limits of one or more of the other grants provided for by the act of 1856.

In your opinion the lands are classified, and for special descriptions reference is made thereto. Said decision states that "an adjustment of the grant claimed by the Alabama and Chattanooga Railroad Company shows that said company has received more than its quota of the lands falling within the common limits aforesaid." If this be so, and it is not denied in the appeal, it is plain that there is no authority of law for a further approval of lands within such common limits on account of the grant for said company.

The appeal practically admits the correctness of your decision under the law of 1856, but seems to rely upon the act of the State legislature, approved February 20, 1883, as authority for its claim to all vacant lands within the limits of its grant, without regard to other grants made by the act of 1856.

It is sufficient to state that none of the grants, conflicting with that of the Alabama and Chattanooga in the neighborhood of Gadsden, were earned by the construction of the roads provided for in the act of 1856, and by the terms of the general forfeiture act of September 29, 1890 (26 Stat., 496), the grants appertaining to the portions of such unconstructed roads were forfeited and declared to be a part of the

public domain. It is unnecessary, therefore, to consider the scope and intent of the State act of 1883, as the State could not dispose of the lands granted to aid in the construction of any particular road, except for the purpose of building that road.

As the quota to aid in the construction of the Alabama and Chattanooga Railroad within the common limits of other grants has been satisfied by the approvals heretofore made, it must be held that the remaining lands within such common limits appertain to the grants for the other roads, and, being opposite the unconstructed portions of such roads, they are restored to the public domain by the act of September 29, 1890 (*supra*). The 6th section of said act provides:

> That no lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant.

A further reason, however, appears why these lands can not be listed on account of the road in question. With the exception of the lands in two sections, all of the lands listed are east of Gadsden and opposite that portion of the road formerly known as the Wills Valley Railroad.

In the adjustment of the grant for the Alabama and Chattanooga Railroad Company, it was held that the grants for the portions of the road east and west of Gadsden were separate and distinct grants, and that, although subsequently consolidated under one company, there was no authority for the certification of lands within the limits of one road to satisfy lands on account of the other (United States *v.* Alabama State Land Company, 14 L. D., 129). Said adjustment having shown that the certifications heretofore made within the limits of the portion east of Gadsden were in excess of the amount granted on account of that portion of the road, to the amount of 72,054.28 acres, you were directed to make demand for the reconveyance of such amount of lands, in accordance with the provisions of the 2d section of the act of March 3, 1887 (24 Stat., 556). With such an excess, I should refuse to make further approvals on account of this grant, in accordance with the provisions of section 7 of said act of March 3, 1887, were there no other reasons for denying the approval of this list.

From a review of the whole matter, I must therefore approve your action and direct the cancellation of this list.

UNITED STATES *v.* ALLARD ET AL.

Motion for review of departmental decision of April 16, 1892 (14 L. D., 392) denied by Secretary Smith, May 13, 1893.

PRIVATE CLAIM—CONFIRMATION—RESURVEY.

MESITA DE JUANA LOPEZ GRANT.

The confirmation of a Mexican grant as "examined, approved, and recommended" for confirmation by the surveyor general, and as "duly surveyed by the United States," without requiring the issuance of patent to the confirmee, leaves the Department without jurisdiction in the premises; and an order of the General Land Office for the resurvey of a grant thus confirmed is unauthorized by law.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1893.

By letter of July 7, 1888, to Surveyor General Julian of New Mexico, your office, in accordance with his recommendation, ordered a resurvey of the Mesita de Juana Lopez grant situated in Santa Fé county, said Territory. The appeal of the owners of the grant, from that order, brings the case before me now.

Said grant, it appears from the record before me, was made by the Spanish government of New Mexico, in January 1782, to Domingo Romero, Miguel and Manuel Ortiz; the grantees were placed in posession of the land petitioned for in the same month, by Carlos Fernandez, duly commissioned by the governor for that purpose, and they and their legal representatives have been in possession ever since.

On September 30, 1872, application was made, by the owners, to Surveyor General Proudfit of New Mexico to investigate and report upon said claim, in accordance with the provisions of section 8 act of July 22, 1854—10 Stat. 308. This investigation was had, the grant recommended for confirmation by that officer November 29, 1872, and reported by him through this Department to Congress as grant No. 64, with transcript of the papers in the case, among which is a "sketch map" of the land, supposed then to contain 69,120 acres. H. Ex. Doc. No. 128, 42nd Congress, 3rd Session. In October 1876, the claim was surveyed by deputy Reeves under the appropriation made for the survey of private land claims, by the sundry civil bill of July 31, 1876—19 Stat. 102, 121; which survey was examined and approved by the surveyor general of New Mexico, February 28, 1877, and ascertained to contain an area of 42,022.25 acres instead of 69,000 acres as before estimated. An official copy of this survey, certified to by the Commissioner of the General Land Office, was placed in the hands of the committees on Private Land Claims of both Houses of Congress prior to their reports on said claim. See Senate Report No. 149, 45th Congress, 2nd Session. Said grant was reported upon favorably to both Houses and confirmed by act of January 28, 1879—20 Stat., 592—as follows:

That the private land claim in the Territory of New Mexico known as the Mesita Juana Lopez grant, made by the Spanish government January eighteenth, seventeen hundred and eighty-two, examined, approved, and recommended for confirmation by the surveyor-general of New Mexico, November twenty-ninth, eighteen hun-

dred and seventy-two, designated as private land claim number sixty-four, and duly surveyed by the United States, the field-notes of the survey and plat being approved by the surveyor-general of New Mexico on February twenty-eighth, eighteen hundred and seventy-seven, be, and the same is hereby confirmed; *Provided*, That the foregoing confirmation shall only be construed as a quit-claim or relinquishment of all title or claim on the part of the United States in and to said private land claim, and shall not affect the adverse rights of any person or persons to the same; nor shall the United States be liable to make compensation for any part of said land to which there are or may be any adverse rights or claim.

In 1883, on the application of the claimant of a conflicting grant, Commissioner McFarland ordered an investigation of said survey, but notice of the application not having been served on the opposite side, the order was revoked.

On June 19, 1886, Surveyor-General Julian of New Mexico, by letter, called attention to the former application for investigation and the action thereon, and stated if the allegations then made were true the grant as surveyed not only included portions of other private claims, but a considerable quantity of public land, and he submitted the matter for the direction of the office. On July 7, 1886, Commissioner Sparks directed that an investigation of the matter be made by the surveyor general; and on the report made by that officer, on January 5, 1887, a new survey was ordered.

I do not think it necessary to enter into a discussion as to whether the Reeves survey is right or wrong. It may be stated in a general way, however, it is claimed, that by the survey, the grant was exaggerated to more than three times its proper size, or from 12,000 acres to 43,000; that the grant was only for the Mesita or table lands, west of the Juana Lopez canon, which terminate some distance north of the Galisteo river; whereas by the survey the grant is extended some ten miles south of the table lands and several miles south of the river, including both table and valley lands; and also that, by the survey, it was extended over a mile too far to the west.

It seems that these objections to the survey are made so late that your office and this Department are precluded from inquiring into them by the terms of the act of confirmation, *supra*. About the construction of that act I have no doubt. In my opinion Congress confirmed the grant in accordance with the survey which had been made and was then as much as any other part of the record, before that body. Your office thought otherwise. Commissioner Sparks, in his decision, says the statute is not expressed in such clear and unmistakable language as to free the executive from responsibility in the matter; that acts of Congress confirming grants must be construed strictly against the confirmees, and, if there be a doubt as to the scope of the act, that construction should be adopted which will support the claim of the government rather than that of individuals; and he did not believe that it was the intention of Congress to confirm a mere preliminary survey and preclude the government from investigating the true boundaries of the claim, or detecting fraud in any manner it might present itself.

Entertaining these views, he held the true construction of the act to be that, the claim "as examined, approved and recommended" by the surveyor general was confirmed by the act; that the portion thereof relating to the survey "was interpolated as merely giving a history of the claim and for the purpose of closer identification." These views were concurred in by Commissioner Stockslager who made the decision appealed from.

I do not think the position assumed as to the intention of Congress and its meaning is tenable. To hold that the important reference to the survey in the act, was "interpolated as merely" giving "a history" of the claim and for the purpose of closer "identification" is to either ignore the preceding language or to assume that Congress did a vain thing, an assumption not to be tolerated if any other construction can be adopted.

The identification of the grant claim could hardly be more exact than that contained in the words preceding the mention of the survey. Its location is stated, then its name, the government by which granted, the day of the month and year when made, the fact that it had been "examined approved and recommended for confirmation" by the officer appointed by law for that purpose, the date of his recommendation and the number given to it by him in the list of private land claims. What more was needed to complete the "identification" of the grant or to summarize its "history?"

Referring to the legislation of Congress, confirming private grants in New Mexico, no instance is found of as complete a history or of as close an identification of a grant as the language used in the present instance, before reference is made to the survey. By the act of December 22, 1858, 11 Stat., 374, nineteen pueblo grants, designated only by name and the letters of the alphabet and four others by name and numbers only, are confirmed as reported.

By the act of June 21, 1860, 12 Stat., 71, thirty grants described only by the number given to them in the report of the surveyor general and three described by the name of claimant and a number, are confirmed as reported. In act of March 1, 1861, 12 Stat., 887, only one is mentioned and that is confirmed by the number alone, as reported. The act of June 12, 1866, 14 Stat., 588, mentions but one and that is confirmed by number and name of claimant. By act of February 9, 1869, 15 Stat., 438, one by name as reported, and by act of March 3, 1869, 15 Stat., 342, five by numbers only. And it is to be observed that in all the acts quoted there is no reference to a previous survey, but in two or three instances surveys are directed to be made thereafter.

Surely after the very full description given in the first part of the act of confirmation there was no need to recite the fact of the survey as additional evidence of identification. Similar surveys were doubtless made in other grants and were before Congress, yet no mention of any of them is made in the confirmatory acts.

If merely the designation of the numerals, used by the surveyor general in his reports, or the name of the claimants, was thought by Congress to be sufficient identification of more than sixty claims, confirmed by the acts cited, is seems like ignoring intelligible language to insist that the sole purpose of Congress in this instance was to further identify this claim. I am therefore forced to the conclusion that there was a purpose in the use of language so specific and exceptional.

Construing the whole act, and all its parts, together, I do not see how the judicial mind can hold otherwise than that Congress intended to, and did confirm, the grant "as examined, approved and recommended," and "duly surveyed by the United States."

Commissioner Sparks says Reeves' survey was merely intended "as a preliminary survey" and did not "preclude the government from investigation" etc.

This view seems to be in direct conflict with the views of Congress and the supreme court.

The former body declared that the land had been "duly surveyed by the United States." What was meant by the term "duly surveyed?"

Section 8 of the act of July 22, 1854, *supra*, relating to private land claims in New Mexico, requires the surveyor general of that Territory "to ascertain the origin, nature, character and *extent*" of such claims as come before him.

Considering the power and duty of the surveyor general under said section, in the Maxwell Land Grant case 121 U. S., 325, 369, the supreme court said:

> Upon what argument, therefore, it can be held that the surveyor general, with this entire matter before him, and with the means of ascertaining or describing with precision the extent of the grant to these parties, should be held not to have passed upon it, but simply upon the validity of the original transaction with Armijo, is not readily to be perceived. The surveyor-general was not certainly of the class of officers to whom would have been confided by law the mere question of the legal validity of a grant made by a Mexican governor to a Mexican citizen. Others could do that as well as he when the facts were laid before them. But as his office was a surveying office, and was designed to ascertain the location and the extent of grants by an examination of the maps and surveys, and making new surveys if necessary, a function pre-eminently appurtenant to his office, he must be supposed to have reported upon all that was proper for consideration in its confirmation. And when the Congress of the United States, after a full investigation, and elaborate reports by its committees, confirmed these grants, "as recommended for confirmation by the surveyor general" of the territory, we must suppose that it was intended to be a full and complete confirmation, as regards the legal validity, fairness and honesty of the grant, as well as its extent.

It is just to say that Mr. Sparks' opinion was expressed July 7, 1886, and the opinion of the court was not delivered until April 18, 1887.

In the Maxwell grant case no survey had been made, but from the papers before him the surveyor general had undertaken to ascertain the "extent" of the grant by describing the boundaries thereof. His power so to do was denied. But the court holds that the authority to inves-

tigate these grants was confided to that officer more particularly because of his capacity to ascertain the "extent" thereof than for any other reason; and it was his duty to ascertain the "location and extent" by examination of the papers in the case "and making new surveys if necessary." In this case he found it necessary to make a survey under the appropriation made by Congress. That survey was found to be correct and sent to Congress. The survey was not therefore a mere preliminary or incomplete survey as supposed. But in the language of Congress the grant was "duly surveyed by the United States." Having been surveyed in a proper, regular and becoming manner, and so declared by Congress, where is the authority to order another survey, which might or would have the effect to modify, alter or nullify the former?

In addition to what has been said, it abundantly appears, from the proceedings of Congress that the matter of the survey was fully considered by that body and its committees and it was clearly intended to confirm the grant as surveyed.

There was no debate in the Senate upon the bill; but in the report of its Committee on Private Land Claim, heretofore referred to, it is said:

> This claim was surveyed by United States deputy surveyor Rollin J. Reeves, in October, 1876, which survey was examined and approved by the surveyor-general of New Mexico, February 28, 1877, and was ascertained to embrace forty-two thousand and twenty-two and eighty-five hundredths (42,022.85) acres instead of sixty-nine thousand (69,000) acres as originally estimated. An official copy of this survey certified by the Commissioner of the General Land Office is in the hands of the Committee. This survey was made under authority of the act of Congress approved July 31, 1876.

In the report of the Committee of the House it is said: "The claim has now been surveyed by the surveyor general and the boundaries accurately determined."

And in debate which followed the presentation of the report, the inquiry was made by Mr. Eden, "What is the amount of the claim?" To which Mr. McGowan, who presented the report, replied, "about 44,000 acres" which was approximately the amount shown by the survey, whilst the original report of the surveyor general estimated the acreage at about 69,000 acres. See Cong. Record, 3rd Session, 45th Congress, 406, 407.

It should also be stated in this connection the "sketch map" of the grant, found in the House Ex. Doc. No. 128 *supra* which of course was before the committees of both Houses and part of their reports thereto, shows the grant to extend very considerably south of the Galisteo river. Showing that it was well understood at the time of the confirmation that the grant was not restricted to the table lands alone, as contended by Surveyor General Julian, and Commissioner Sparks, but was located as surveyed by Reeves.

Congress having thus taken final action on the grant, and the confirmatory act not requiring the issue of patent to the confirmees, this Department is absolutely without further jurisdiction in the premises. The supreme court has said in relation to these claims,—"The final action on each claim reserved to Congress, is, of course, conclusive, and therefore not subject to review in this or any other form." Astiazaran *v.* Santa Rita Mining Co., 148 U. S., 80, 82.

I am therefore of the opinion that the decision of your office, ordering a new survey, was erroneous and is contrary to law. The same is hereby reversed and the papers in the case are herewith returned to you.

CONNOR *v.* TERRY.

Motion for review of departmental decision of October 1, 1892 (15 L. D., 310) denied by Secretary Smith, May 13, 1893.

CONTEST—SUSPENSION OF SECTION—PRIVATE CLAIM.

DELPY *v.* DELPY ET AL.

The suspension of a section from entry pending the determination of the boundaries of a private claim, precludes the allowance of a hearing between subsequent claimants under the public land laws for land in said section.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1893.

I have considered the case of Pierre Delpy *v.* Julian Delpy and William Harris, involving the W. ½ of the NE. ¼ and the W. ½ of the SE. ¼ of Sec. 18, T. 11 S., R. 3 W., S. B. M., Los Angeles, California, as presented by the appeals of said Julian Delpy and Harris from your decision of April 20, 1892, holding that said Pierre Delpy had a superior right to the NW. ¼ of said NE. ¼ of said section over said Harris; that said Julian Delpy had no right to the SW. ¼ of the NE. ¼ and the W. ½ of the SE. ¼ of said section; and that as between said parties Pierre Delpy had the superior right to the W. ½ of the NE. ¼ and the W. ½ of the SE. ¼ of said section.

It appears from the record that on October 9, 1880, Bernard Delpy entered the SW. ¼ of the NE. ¼ and NW. ¼ of the SE. ¼ of said Sec. 18, and on February 12, 1886, Julian Delpy applied to contest said entry, which application was rejected because "all of section 18 was suspended from entry by surveyor-general's letter of December 5, 1881, pending final location of the Rancho Buena Vista," and at the same time offered his timber culture application for the SE. ¼ of the NW. ¼ the SW. ¼ of the NE. ¼ and the W. ½ of the SE. ¼ of said section; that on appeal you, on May 24, 1886, allowed said contest and stated that "should the contest

result in the cancellation of said entry it would be time to consider whether the land was subject to entry by the contestant;" that on the day set for a hearing of said contest, Pierre Delpy filed a relinquishment of said timber culture entry, executed May 15, 1882, and offered to file his pre-emption declaratory statement for the W. ½ of the SE. ¼ of said section, and on the same day Julian Delpy offered another timber culture application for the tracts covered by his former application; that said application and declaratory statement were forwarded to you, and on November 15, 1886, you rejected the same on account of the suspension of said section, and canceled said timber culture entry of Bernard Depy.

It further appears that on December 18, 1888, William Harris was allowed to make homestead entry of the NW. ¼ of the NE. ¼ of said section 18, and on January 2, 1889, Pierre Delpy again offered to file pre-emption declaratory statement for the W. ½ of the NE. ¼ and the W. ½ of the SE. ¼ of said section 18, claiming settlement on May 20, 1882, which was rejected by the local officers, because the south half of said section was suspended, and also for conflict with said homestead entry of Harris; that, on appeal, you affirmed the action of the local officers as to the W. ½ of the SE. ¼ of said section, and advised them that if Delpy so desired, a hearing might be ordered by them to determine the respective rights of Harris and Delpy to said NW. ¼ of the NE. ¼.

Thereupon the local officers ordered a hearing citing said Delpy and Harris and also Julian Delpy to attend the hearing on September 19, 1889, and on June 13, 1890, they found that Julian Delpy was entitled to the land covered by his said timber culture application, and that said homestead entry of Harris should be canceled.

On appeal you found that it was not intended that Julian Delpy should be cited at said hearing, and that his motion to dismiss as to him should have been granted by the local officers; but as he had participated in the proceedings at the hearing, he has suffered no wrong, and said action of the local officers would not be disturbed.

You further find that the E. ½ of the NE. ¼ and the E. ½ of the SE. ¼ of said section was erroneously patented to Julian Delpy on May 20, 1882; that the boundaries of said Rancho "have never been finally determined, and the numerous surveys thereof have been rejected," (citing 5 L. D., 559; 6 L. D., 41; and 13 L. D., 841); that the record fails to show that the suspension of said section has ever been revoked, and that you would not determine what portion thereof "will be included within said private land grant when the survey thereof is finally approved;" that said lands "are not now subject to appropriation," but in view of the length of time the controversy has been pending a final disposition of the rights of said settlement claimants should be made as between themselves, citing as a precedent the case of George

S. Jones *v.* Brandon Kirby (13 L. D., 702); and you disposed of the rejected claims of said portions as aforesaid.

In my judgment it will not now be necessary to pass upon the several specifications of error alleged in said appeals.

The record shows that all of said section 18 was suspended on account of said rancho claim on December 16, 1881, and no action should have been taken by you or the local office relative thereto until the final determination of said boundaries or the revocation of said suspension. The suspension of said section operated as a suspension of all entries therein of tracts to which patent had not been issued.

It is well settled that a contest should not be allowed where the government has in its own interest commenced proceedings against an entry. Joseph A. Bullen (8 L. D., 301); Gage *v.* Lemieux (9 L. D., 66); Canning *v.* Fail (10 L. D., 657); Epps *v.* Newcomb (12 L. D., 370); Fargher *v.* Parker (14 L. D., 83).

The case of Jones *v.* Kirby (*supra*) cited by you as a precedent, involved the rights of claimants upon unsurveyed land under Valentine scrip, and the pre-emption laws, and does not conflict with the views herein expressed. In that case was considered the proper construction of the act of February 25, 1885 (23 Stat., 321), prohibiting the unlawful enclosure of public lands, but it was held, among other things, that "an enclosure of public land made in violation of the statute and departmental regulations is no bar to the acquisition of a settlement right of another."

But it was not intended to hold that where a section has been suspended on account of a rancho claim, the boundaries of which are *sub judice*, hearings should be ordered to determine the rights of claimants attempted to be initiated subsequent to said suspension.

Said appeals will accordingly be dismissed without prejudice, and your said decision and all proceedings in the premises will be suspended until the final determination of the boundaries of said rancho claim. If it shall be finally adjudicated that said tracts or any part thereof are not within said rancho, then you will re-adjudicate the case.

JONES *v.* DRIVER.

Motion for review of departmental decision of December 2, 1892, 15 L. D., 514, denied by Secretary Smith, May 13, 1893.

VIRGINIA MILITARY LAND WARRANT—ASSIGNMENT.

STEPHEN FEIKE (ON REVIEW).

An assignment or quit claim deed of all interest in the location of a Virginia military land warrant, and the survey thereunder, executed after abandonment of such location and survey, and subsequent to January 1, 1852, does not operate to vest in the assignee the ownership of said warrant, and as such owner, entitle him to receive in exchange for said warrant Revolutionary scrip, as provided in the act of August 31, 1852.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1893.

I have considered the motion for review of departmental decision of October 18, 1892, (15 L. D., 383), rejecting the application of Stephen Feike to have issued to him Revolutionary bounty scrip in lieu of Virginia military land office exchange warrant No. 467, for five hundred and sixty-three acres of land.

The facts are set forth at great length in the decision of your office, and in the departmental decision, of which review is asked.

The material facts necessary to the consideration of the question now before me, are as follows:

Said warrant issued to Sarah C. Morton on June 3, 1839, and on March 23, 1848, Sarah C. Morton married John S. Woolfolk.

At a date prior to February 16, 1849, said warrant was located for said Sarah C. Woolfolk on land situated on Scioto Brush creek, Adams county, Ohio, and a survey of the same was made on February 16, 1849. The survey was numbered 15,662. Said entry or location, and survey, however, was not returned to the General Land Office prior to January 1, 1852. For this reason, and for the further reason, that the survey embraced a greater number of acres than five hundred and sixty-three, the entry or location was void and of no effect, and Sarah C. Woolfolk obtained no title to said five hundred and sixty-three acres, nor any right to said land, which she could convey to another. The land reverted to the United States, and was granted to the State of Ohio, and by said State was granted to the Ohio State University, and by said University was sold to Stephen Feike, the present applicant, and his only title to the land is derived from said University.

In the face of the fact that Sarah C. Woolfolk had no right in said land, which she could convey, she, together with her husband, did, on the 20th day of October, 1865, execute the following deed or conveyance:

This indenture, made and entered into this 20th day of October, one thousand, eight hundred and sixty-five, between John L. Woolfolk and Sarah C. Woolfolk, his wife, who was Sarah C. Morton, all of the county of Orange, State of Virginia, of the one part, and George Taylor Jenkins of the city of Baltimore, of the other part, witnesseth that for, and in consideration of the sum of one dollar and other good con-

siderations to the said John L. Woolfolk and Sarah C., his wife, in hand paid by the said George Taylor Jenkins, the receipt whereof is hereby acknowledged at, and before the sealing and delivering of these presents, doth hereby grant, bargain and sell unto the said George T. Jenkins, his heirs, etc., their interest in a certain tract or parcel of land, originally entered for the said Sarah C. Woolfolk, No. of entry 15,662, lying on Scioto Brush Creek, Adams county, Ohio, containing five hundred and sixty-three acres, more or less. To have and to hold the land, or their interest therein, which is hereby conveyed unto the said George T. Jenkins forever.

In testimony whereof, the parties have hereunto set their hands and seals this, the 20th day of October, 1865.

JOHN L. WOOLFOLK. [SEAL]
SARAH C. WOOLFOLK. [SEAL.]

This instrument was duly acknowledged, and was recorded in the county where the land was situated.

Whatever interest or right George Taylor Jenkins possessed by virtue of this deed, has been conveyed in lawful manner to Stephen Feike, the present applicant. Sarah C. Woolfolk has made no application for the issue of Revolutionary scrip in lieu of said warrant No. 487, and no such application has been made by her representative, other than said Feike, who asserts that he has a right to receive said scrip, by virtue of his purchase of the interest conveyed by Sarah C. Woolfolk and her husband by the deed dated October 20, 1865, heretofore recited.

Your office denied his application, and your decision was affirmed by departmental decision of which review is asked. In said departmental decision it was stated:

It will be seen by the petition of applicant that he does not claim to own the warrant itself or to have any assignment of the same, and his counsel, in their argument, admit he does not own or possess it, but base his right to it by reason of the fact that Sarah C. Morton, to whom it was issued, did, by her deed, sell and transfer the land she supposed had been located with it, and he now being the owner of the identical land she attempted to locate, and did transfer, that he is *ipso facto* the proprietor of the warrant, and that the scrip should be issued to him.

In their petition for review, counsel for Feike, after quoting the above statement, say:

Our argument has been entirely misconceived. Our claim has been always that the conveyance of Mrs. Morton of the land located, although the survey was declared void, was in itself an assignment of the warrant and we have cited authorities to sustain such position.

In his petition for scrip, dated June 9, 1886, Feike says:

Your petitioner, Stephen Feike, of Sardinia, Brown county, Ohio, represents that he is the present owner of six hundred and sixty one thousand and seventy-four parts of Virginia military continental exchange land warrant No. 467, dated June 3, 1839, and issued to one Sarah C. Morton for 563 acres on account of the services of an ancestor of hers in the Revolutionary war. That on the 15th of February, 1849, said Sarah C. Morton, then being the owner of the whole of said warrant, located the same on 1074 acres of land in Brush Creek township, Scioto county, and in Franklin township, Adams county, Ohio, by an entry of that date. That on the 20th of October, 1865, Sarah C. Morton, then intermarried with one John L. Woolfolk, conveyed her entire interest in said warrant, entry and survey to one George Taylor Jenkins, of the city of Baltimore, Maryland.

It will thus be seen that Feike has constantly asserted the ownership of the warrant.

The question to be determined therefore, is this; Did the conveyance, above recited, vest in Jenkins and his assignees, the ownership of said warrant? If so, Feike, as the assignee of Jenkins, has a right to the scrip, upon the surrender of the warrant, as the act of August 31, 1852, (10 Stat., 143) provides that scrip shall issue "in favor of the present proprietors of any warrant thus surrendered."

The questions connected with the property rights arising from the location of Virginia military land warrants have long been before the courts of the country, especially the courts of Ohio.

It is merely a truism to assert that all the interest a party had in the land located by such a warrant, was derived solely through said warrant. When the warrant was properly located, and the location was surveyed and the survey was returned to the proper officer in the lawful manner, the locator became entitled to a patent.

In the case of Wallace *v.* Porter (14 Ohio, 276) which arose from the location of a Virginia military warrant, the court says:

> It is well established that a locator, having made his entry upon land, may afterwards withdraw his warrant from it, so long as the entry remains a subsisting entry, it is an appropriation of the land. But when it is withdrawn, the land becomes vacant.

This decision was based upon the decision of the United States supreme court in the case of Taylor's Lessee *v.* Myers (7 Wheaton, 23).

The question discussed was this:

> Can the owner of a survey, made in conformity with his entry, and not interfering with any other persons right, abandon his survey after it has been recorded.

The court say:

> The military warrants, to which these questions refer, originate in the land law of Virginia. The question, whether a warrant completely executed by survey, can be withdrawn and so revived by the withdrawal, as to be located in another place, has never, so far as is known, been decided in the courts of that State. In Kentucky, where the same law governs, it has been recently determined that a warrant once carried into survey with the consent of the owner, cannot be re-entered and surveyed in any other place. In Ohio, it is not understood that the question has been decided.
>
> The first question, however, does not involve the right of the owner of a warrant, which has been surveyed, to enter and survey it elsewhere; but his right to abandon it entirely.
>
> It draws into doubt the right of an individual, to refuse to consummate a title once begun.
>
> In this respect no coercive principle is to be found in the act. An entry is forfeited, if not surveyed within a limited time. A survey is forfeited if not returned to the land office by a specified time. In these cases, the right of abandonment is recognized. An individual may abandon his survey by not returning it to the land office within the time prescribed by law. Why may he not abandon it by any other unequivocal act? This is not prescribed as a single mode by which a right is to be exercised; but is annexed as a penalty for not proceeding to complete a title. The legislature determined, that no man should be allowed to lock up land from others, without such an appropriation as would subject it to the common burdens of society.

He was at liberty to perfect his title, or to lose it; but was required to do the one or the other.

It seems to be an ingredient in the character of property, that a person who has made some advances towards acquiring it, may relinquish it, provided the rights of others be not affected by such relinquishment.

The courts thus recognized the right of the locator to abandon his location. The warrant remained in his possession but his interest in the tract of land located was lost. No interest remained which he could convey.

Counsel for Feike say:

These authorities show that the warrant supports the entry and survey, and give the latter their only validity. They also show that the assignment, alienation or conveyance of an entry or entry and survey, carries with it the warrant, as being the only authority to uphold or legalize the entry and survey.

While admitting the truth of the first proposition, I cannot admit the correctness of the second. The authorities cited, including the two above quoted, utterly fail, in my opinion, to sustain the second proposition of counsel.

In the case at bar, Woolfolk made the location and survey, but abandoned both by her failure to return the same to the proper officer within the time prescribed by law. In law this must be assumed to have been a voluntary act. Thirteen years after said abandonment she executed an assignment or quit-claim deed of what? Of all her interest in said location and survey, 15,662, which was none at all, as all of said interest had been abandoned thirteen years before.

In the case of May *v.* Le Claire (11 Wallace, 217), the court, in speaking of a quit-claim deed, say: "In such cases, the conveyance passed the title as the grantor held it, and the grantee takes only what the grantor could lawfully convey."

This is simply a concise statement of a fundamental principle of law.

In the case at bar, Woolfolk had no title to the location, survey or land, to convey, hence Jenkins, the grantee took none.

The time in which Woolfolk could complete the title to the land which was initiated by the location of the warrant in 1849, expired January 1, 1852. Had the transfer, which was attempted by the instrument dated October 20, 1865, been made within the lifetime of the location and prior to said January 1, 1852, I think it would follow that the foundation, or the basis of the location, would have passed also; then had the assignee or grantee failed to have completed his title to the land within the time prescribed, it would have been a question solely between himself and the government, but the basis of his claim would have remained in his possession.

But such is not the fact.

Had it been the intention to assign this warrant (which had become entirely separated from the location and the land) as well as the interest in the land or location, it must be assumed that words indicating

that intention would have been used. In the absence of such words, and in the absence of any evidence showing that such was the intention, I do not think it can be assumed.

I see no error in the conclusion reached in departmental decision, of which review is asked, and the motion is therefore denied.

RAILROAD GRANT—INDEMNITY SELECTIONS.

NORTHERN PACIFIC R. R. CO. *v.* DAVIDSON.

The fact that a deficit exists in a railroad grant does not relieve the company from the necessity of selection to acquire title to indemnity lands.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1893.

I have considered the case of the Northern Pacific Railroad Company v. James Davidson, involving the W. ½ of the NW. ¼ and the N. ½ of the SW. ¼, Sec. 17, T. 1 S., R. 48 E., Miles City land district, Montana, on appeal by the company from your decision of March 24, 1892, holding for cancellation its indemnity selection of said tract.

This tract is within the limits of the withdrawal made by letter of October 8, 1883, for indemnity purposes, on account of the grant for said company, but admitting, for the purposes of this case, that there was authority to make such withdrawal, yet the same was revoked by departmental order of August 15, 1887, and the land in question not having been selected by the company prior to this time, was included in the lands restored to settlement and entry under such order of revocation.

The company made selection of this land on June 30, 1890, but prior to this time a settlement right had attached thereto in the present claim, which was a bar to the selection by the company.

The records show that on July 21, 1890, James Davidson made homestead entry No. 591 for this land, and after due notice by publication he made final proof on December 15, 1890, upon which final certificate No. 217 issued. No appearance was made by the company at the time of the offer of proof, nor was any protest filed against the acceptance of the same. This proof shows that Davidson made settlement upon the land in the spring of 1885, and that he has continued to reside there since such time, making the same his home, and, at the date of the offer of proof, had valuable improvements on the land valued at $600.

Whatever bar existed by reason of the withdrawal for indemnity purpose was removed by its revocation in 1887, and the subsequent selection by the company can not prevent Davidson's right, acquired by his settlement, from ripening into a perfect title.

The company urge, under the authority of the decision of the supreme court in the case of the St. Paul and Pacific Railroad Company *v.* North-

ern Pacific Railroad Company (139 U. S., 1), that the lands being free from claim at the date of the definite location of the road, no selection was necessary to attach a right under the grant, there not being sufficient lands within the indemnity limits to satisfy the grant for losses sustained within its primary limits.

A similar contention was made in the case of said company against Pettit (14 L. D., 591), but in that case it was held that said decision is not authority for holding that title can be acquired to indemnity lands prior to the selection thereof.

In the case of the Southern Pacific Railroad Company *v.* McWharter (14 L. D. 610), a similar question was considered, and it was held that the fact that a deficit exists in the grant does not relieve the company from the necessity of selection to acquire title to indemnity lands.

As said in the latter case:

> If this be so, then there was no authority to revoke the indemnity withdrawal. The question as to the authority to revoke the withdrawal of indemnity lands on account of this grant and others of a like nature was thoroughly considered by this Department prior to the revocation of such withdrawals, and rights of others attaching under such revocation have been repeatedly recognized by this Department as against the claim of the company. Southern Pacific R. R. Co. *v.* Meyer, 9 L. D., 250; Southern Pacific R. R. Co. *v.* Cline, 10 L. D., 31; Lane *v.* Southern Pacific R. R. Co., 10 L. D., 454; Southern Pacific R. R. Co. *v.* Meyer, 10 L. D., 444.

I therefore affirm your decision, and direct the company's selection of the tract in question be canceled, and that Davidson's entry be disposed of in the usual manner.

STATE SELECTION—UNSURVEYED LAND.

STATE OF IDAHO.

The Department will not reserve unsurveyed lands from settlement in order that the State may select lands therein, after survey, in satisfaction of the grant made by the act of admission.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1893.

I am in receipt of your letter of April 4, 1892, transmitting a letter from the State Board of Land Commissioners of the State of Idaho, asking that certain townships (unsurveyed, but for the survey of which contracts have been entered into upon application made by the State authorities) be withdrawn from settlement and entry, in order to allow the State authorities an opportunity to select the lands therein, in satisfaction of certain grants made to the State by the act of admission.

The act of Congress approved March 3, 1893, entitled "An Act making appropriations for sundry civil expenses of the Government, for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes," has the following proviso.

> Provided further, that the States of North Dakota, South Dakota, Montana, Idaho, and Washington, shall have a preference right over any person or corporation to

select lands subject to entry by said States granted to said States by the act of Congress approved February twenty-second, eighteen hundred and eighty-nine, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States; and *provided further*, That such preference right shall not accrue against bona fide homestead or preëmption settlers on any of said lands at the date of filing of the plat of survey of any township in any local land office of said States.

It is true that no lands were granted to the State of Idaho by the act of February 22, 1889 (25 Stat., 676), but the grant to said State was made by the act of Congress approved July 3, 1890, (26 Stat., 215).

A reference, however, to the act of February 22, 1889, making a grant of land to the States of North Dakota, South Dakota, Montana and Washington, for various purposes, viz: for the benefit of a University, an Agricultural College, public buildings, etc., and a reference to the act of July 3, 1890, making similar grants to the State of Idaho, renders it clear to my mind that it was the intention of Congress to permit each State to make selections of lands in the manner prescribed, in satisfaction of the grants made.

It is clear from this legislation, that the subject of a reservation of lands to allow the State to select the same, has been before Congress, and such action taken thereon, as in the judgment of that body was deemed necessary.

I do not consider that the Department would be justified in an attempt to go further than this legislation, and to reserve unsurveyed land from settlement, even if such a reservation was practicable, of which I have serious doubts.

The application of the State Board of Land Commissioners is therefore denied.

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

INSTRUCTIONS.

The lands opposite the unconstructed portion of the Northern Pacific road, from Wallula to Portland, forfeited by act of September 29, 1890, and within the limits of the Dalles Military Wagon Road, are restored to the public domain by said act, and will not be suspended from entry pending the result of any action in the courts that may be contemplated on behalf of the Wagon Road Company.

Secretary Smith to the Commissioner of the General Land Office, May 13, 1893.

By letter of March 9, 1892, Messrs. Copp and Luckett, attorneys for certain settlers upon lands within the conflicting limits of the grant made by the act of July 2, 1864 (13 Stat., 365), for the Northern Pacific Railroad Company, and that made by the act of February 25, 1867 (14 Stat., 409), for the Dalles Military Wagon Road, requested that their clients be permitted to make entry of the lands settled upon, under departmental decision of February 17, 1892 (14 L. D., 187).

This conflict occurs opposite the unconstructed portions of the Northern Pacific Railroad, extending from Wallula, Washington, to Portland, Oregon, the grant appertaining to which was declared forfeited and the lands restored to the public domain by the act of Congress approved September 29, 1890 (26 Stat., 496).

The material facts governing the rights of the Dalles Company in the premises are similar to those in the case of the conflict between the grants for the Northern Pacific and the Oregon and California Railroad Companies, considered in the opinion of February 17, 1892 (*supra*), wherein it was held (syllabus):

The grant of the odd numbered sections within the overlapping primary limits of the Northern Pacific, and Oregon and California roads, east of Portland, Oregon, was for the benefit of the former company under the act of July 2, 1864, and the forfeiture thereof by the act of September 29, 1890, is to the extent of the withdrawal made under the sixth section of the act of 1864; and under said act of forfeiture no rights of the Oregon and California road are recognized within said conflicting limits.

In that case certain of the lands had been patented to the Oregon and California Company, and a suit has been recommended to recover the title erroneously conveyed, in accordance with the provisions of the act of March 3, 1887 (24 Stat., 556).

In the present case, none of the lands have been patented, and, as far as I am advised, there has been no request on the part of the Wagon road company for a suspension in the matter of the restoration of the lands.

In your letter of March 28, 1892, you report that

the attorneys for the Oregon and California asked that the order for the restoration be suspended pending the determination of the question involved by the courts, and the suspension was directed February 27, and approved by you on March 10, 1892. Precisely the same questions are involved in the Dalles Military Road grant, which is overlapped by the Northern Pacific . . . . . It was therefore concluded, in the absence of any directions from you to the contrary, to suspend the disposal of the lands within the overlapping limits of the grants last named, although no objection to the restoration has been made by the Military Road Company. No order of suspension, has, however, yet been issued.

The question arises, should such suspension be authorized?

Having determined that the lands are included in the forfeiture declared by the act of September 29, 1890 (*supra*), I am of the opinion that, as declared by the act, they are a part of the public domain, and that no suspenson should be ordered to await the result of any action in the courts, contemplated by those aggrieved at my decision in the premises.

In the case of the Wisconsin Central Railroad grant (10 L. D., 63), it was held that certain lands were excepted from the grant, and application for suspension was made by the company, pending judicial proceedings. This was denied (11 L. D., 615), and there it was stated:

If such action should be taken in the present instance, it is not seen how it could well be refused, where any claim is set up to a tract of land. Any one, claiming rights as a settler or entryman, which have been passed upon adversely by this

Department, would have a right to expect that the particular tract claimed by him should be held in reservation until he had his rights finally adjudicated by the supreme court of the United States.

This applies with equal force to the case in hand, and I have therefore to direct that no order of suspension issue, but that the settlers upon such lands be permitted to make entry thereof, as in in other cases provided.

PRACTICE—APPELLATE JURISDICTION.

TOWNSITE OF KEOKUK FALLS.

The Secretary of the Interior will not pass on the correctness of a decision prepared for the signature of the Commissioner of the General Land Office, in a case under consideration in said office.

Secretary Smith to the Commissioner of the General Land Office, May 18, 1893.

By letter of October 6, 1892, your office submitted for my consideration the draught of a decision in the matter of the Keokuk Falls townsite entry, covering the SE. ¼ of Sec. 23, the W. ½ of the SW. ¼ and lots 3 and 4, Sec. 24, and W. ½ of the NW. ¼ and lots 1, 2, 3 and 4, Sec. 25, T. 11 N., R. 6 E., Oklahoma Territory.

The decisions of your office are subject to review by this Department, by way of appeal by any party who thinks himself injured thereby. Upon such appeal the appellant should be, and is, under the rules, allowed opportunity to present his claims by way of argument. If, however, the Department should consider draughts of opinions prepared for your signature, and advise you as to the correctness thereof, the parties litigant would in effect be shut off from resort to this Department as an appellant tribunal. Not only so, but their claims would virtually be adjudicated without any opportunity to them to be heard here, and quite possibly without a full knowledge by the Secretary, of the merits of those claims.

The mere statement of these facts is sufficient to condemn the practice of submitting draughts of decisions in cases pending in your office for the approval of this Department. Such matters should take their regular course.

The papers submitted are herewith returned, that a decision may be rendered by you, after which the matter will be duly considered, if any party feeling aggrieved by such decision shall present the case under the rules governing such matters.

STATE SELECTIONS.

Circular respecting the preference right of the States of North Dakota, South Dakota, Montana, Idaho, and Washington, under the Sundry Civil appropriation act of March 3, 1893, to select lands under their grants for the period of sixty days after filing of the township plats.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., May 10, 1893.

The registers and receivers of U. S. Land Offices in North Dakota, South Dakota, Montana, Idaho and Washington.

SIRS: In the act of March 3, 1893, "making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-four, and for other purposes" (Public—No. 124), the following enactment was made:

That the States of North Dakota, South Dakota, Montana, Idaho, and Washington shall have a preference right over any person or corporation to select lands subject to entry by said States granted to said States by the act of Congress approved February twenty-second, eighteen hundred and eighty-nine, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States: And *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 filing of the plat of survey of any township in any local land office, of said States.

Under the foregoing provisions of law, the following regulations are made for your guidance:

1. Upon the filing of the township plats on the appointed day, as provided in the circular of October 21, 1885 (4 L. D. 202), the States named in the provision of law above quoted must be regarded as having a general preference right to make selections of the lands subject to selection by them for the period of sixty days from the time of such filing, the day of filing to be excluded in computing said period.

It will be observed that the grants named in the law as the ones under which the preference right of selection is given are those made by the act of February 22, 1889 (25 U. S. Stat., 676), providing for the admission of North Dakota, South Dakota, Montana, and Washington as States into the Union. This act makes no grant of lands to Idaho. However, it was evidently the intention of Congress to give a preference right to Idaho to make selections under the act providing for its admission as a State into the Union, approved July 3, 1890 (26 U. S. Stat., 215), as is given to the other States mentioned, and the law is therefore so construed, and you will govern yourselves accordingly.

2. During said period of sixty days no person not claiming in virtue of settlement existing at the date of the filing of the plats, nor corporation, will be allowed to enter the lands subject to selection by the respective States; but the law cannot be held to inhibit, during said period, the selection of lands previously granted to a corporation by Congress, as, for instance, the granted sections within the primary limits of a railroad grant.

3. The bona fide claims of homestead and pre-emption settlers existing at the date of filing the plats being protected by the law, their claims may be made of record during said period of sixty days in the absence of State selections of record of the lands claimed by them, upon exparte showings of the applicants, by affidavit of each applicant, that he, or she, had made bona fide settlement prior to the time

that the plats had been filed. A pre-emptor, to be entitled to file, will be required to show bona fide pre-emption settlement prior to March 3, 1891, the date of the repeal of the pre-emption law.

4. In the event that a person makes application during said period for land already selected by the State, alleging settlement thereon existing at the date of the filing of the plat of the township, it will become your duty to order a hearing under practice rules to determine the respective rights of the parties. (James *et al v.* Nolan, 5 L. D., 526; Baxter *v.* Crilly, 12 L. D., 684.) And since the States have a general preference right to select within said period, you will take the same course, in the event that they present lists of selections and urge their acceptance as to tracts already covered by the actual entries of alleged settlers. The States, in such instances, will be required to attack the entries by affidavit of their authorized agents, duly corroborated, denying the existence of bona fide settlement on the part of the entry men prior to filing of the plat in each case, or alleging that the settlers were not legally qualified to make settlement. When there is a pre-emption filing of record, a selection of the land filed upon may be admitted subject to the pre-emptor's right, which must be shown on proof.

You will post a copy of this circular in your office in a conspicuous place, and take such other measures to give it publicity as may be commended to your judgment.

Very respectfully,

S. W. LAMOREUX
Commissioner.

Approved:
HOKE SMITH
Secretary.

HOMESTEAD ENTRY—HEIRS OF ENTRYMAN—PATENT.

INSTRUCTIONS.

In the event of the death of a homesteader who leaves no widow, but both adult and minor heirs, the patent should issue to all the heirs equally, and not to the minor heirs to the exclusion of adults.

Secretary Smith to the Commissioner of the General Land Office, May 22, 1893.

I am in receipt of your communication of May 8, 1893, in which my attention is called to the case of Bernier *et al. v.* Bernier *et al.*, 147 U. S., 242, construing sections 2291 and 2292, Revised Statutes, in which it is held that in the event of the death of a homestead entryman leaving no widow, but both adult and minor heirs, patent when issued should issue to all the heirs equally, and not to the minor heirs to the exclusion of adults.

You say "the uniform practice in your office has been to issue patent in such cases to the minor orphan children by name," and you ask to be advised whether the practice of your office shall be changed to conform to the decision above referred to.

The supreme court is the highest judicial authority of the land, and its interpretation of laws, written or unwritten, is conclusive upon, and should be respected by, all departments of the government.

Upon a hasty examination of the published decisions of this Department I find that these statutes have been construed according to the practice heretofore in vogue in your office, that is to say, in conformity with a literal construction of section 2292, which directs that in the event of the death of both father and mother, the right and fee in a homestead shall inure to the benefit of the infant child or children. The supreme court in Bernier *v.* Bernier, *supra*, construes this section in connection with section 2291, and holds that section 2292 applies only in cases where all the children are minors; that if some are adults, the homestead right goes to all equally, as provided in section 2291.

Holding contrary to this are Sarah Leonard (1 L. D., 41); Peter Kackman (id., 86); Alien Heirs (2 L. D., 98); also an elaborate opinion of Assistant Attorney-General Shields of May 2, 1890 (10 L. D., 543). These and all others in conflict with Bernier *et al. v.* Bernier *et al.* must be considered as overruled, and in the issue of patents hereafter you will conform to the said opinion of the supreme court.

RAILROAD RIGHT OF WAY—MAP OF LOCATION.

CREEDE AND GUNNISON SHORT LINE R. R.

The affidavit and certificate required on a map showing the location of a section of road, under the railroad right of way act, should be written on the same sheet with the map, and not on a detached sheet.

The termini of located sections of road should be designated by reference to the lines of the public surveys.

Acting Secretary Sims to the Commissioner of the General Land Office, May 25, 1893.

I have at hand your letter of the 6th instant submitting and recommending the approval of three maps of definite location of sections of the Creede and Gunnison Short Line Railroad, filed under the provisions of the right of way railroad act of March 3, 1875 (18 Stat., 482).

In reply I have to state that the maps have been examined and not being satisfactory they are herewith returned without approval.

The maps do not bear the affidavits and certificates required by the provisions of the act, but those documents are written on detached sheets and pinned thereto. In addition to this the termini of sections are not designated by reference to the lines of the public surveys. In the matter of these defects I refer to your letter of January 12, last, submitting maps filed by the Sweetwater Valley Railway Company in which you recommended that the maps be not approved; also to de-

partmental letter of the 16th of the same month returning the maps in accordance with your recommendation.

The Department is still of the opinion that your recommendation in the Stillwater case was a proper one and adheres to the line of action adopted therein.

CONFIRMED ENTRY—SECTION 7, ACT OF MARCH 3, 1891.

JAIRUS LINCOLN.

A pre-emption entry made by one who had previously filed a declaratory statement for another tract is confirmed by the proviso to section 7, act of March 3, 1891, in the absence of any pending protest or contest, and where no proceedings against such entry are begun within the period of two years from the date of the final certificate.

The cases of Mee *v.* Hughart, 13 L. D., 484, and United States *v.* Smith, 13 L. D., 533, cited and distinguished.

First Assistant Secretary Sims to the Commissioner of the General Land Office, May 27, 1893.

Jairus Lincoln has appealed from your decision of July 2, 1891, canceling his pre-emption cash entry, made November 22, 1887, for the E. ½ of the NW. ¼ and the W. ½ of the NE. ¼, Sec. 32, T. 3 N., R. 70 W., Denver, Colorado.

It appears that he had made a previous filing, and it was for this reason that you, on November 6, 1890, held the entry for cancellation, and allowed him sixty days to show cause why his entry should not be canceled for illegality. Thereupon, the entryman made affidavit, stating he had made a former pre-emption, the same being No. 6938 (Denver series), for the NW. ¼ of Sec. 20, T. 3 N., R. 68 W.; that he relinquished the same on June 9, 1873; that he made homestead entry for the same tract and afterwards made final proof; that he relinquished said pre-emption filing, for the reason that at the time he did so the thirty-three months allowed for proof were about to expire, and having improved the same, he exercised his right of homestead for the same tract; that he made the entry (now held for cancellation) in good faith, having been advised by the register that the entry would be legal and valid.

Thereupon your office, in the decision appealed from (July 2, 1891), canceled the entry, and he appeals from that judgment.

The proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), reads as follows:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

It will be seen that the entry was allowed and final certificate issued thereon November 22, 1887. The entry was held for cancellation November 6, 1890. No "proceedings" therefore were begun within the period of two years from the date of the final certificate.

There is no pending contest or protest against the validity of the entry, and, under such circumstances, patent should issue, under the authority of the proviso above quoted, unless the entry was void.

The conditions prescribed in the section above quoted, authorizing confirmation, may be apparently present, and yet confirmation under the act be properly refused, when the facts become fully known, as in cases where the person purporting to make the entry was not *in esse* at date the entry was allowed; or, where the land department had no jurisdiction over the land covered by the entry, and similar cases where the entry was absolutely void. So, in the case of Mee *v.* Hughart, 13 L. D., 484, it was held that a soldier's additional entry, made by an assumed agent, more than eighteen months after the death of the soldier, is a nullity, and confirmation under the act quoted was refused. "It was an entry in name and upon the books of the local office, but not in fact or in law."

So, also, in the case of United States *v.* Smith, 13 L. D., 533, a pre-emption entry was allowed of lands not subject to pre-emption; here there was no jurisdiction to dispose of the lands under the pre-emption laws, and, while all other conditions were apparently present authorizing confirmation, yet it was refused. There was no law for its disposition in the manner made.

But, when the land department has jurisdiction of the lands covered by an entry, and the entry is apparently made under existing law, and there is one *in esse* to whom an entry has been allowed, on proof deemed by the local officers to be satisfactory, and all the conditions prescribed in the act authorizing confirmation are present, and no fraud is shown, "the entryman shall be entitled to patent."

So, in the case of Patrick Tracy, 13 L. D., 392, although it appeared that the entryman was inhibited from acquiring the right of pre-emption under the second clause of section 2260 of the Revised Statutes, "having abandoned his residence on his own land to reside on the public land in the same state or territory," yet all the conditions authorizing the issuance of patent under the act of 1891 (*supra*) being present, patent was directed to be issued.

And in the case at bar, although it appears that the entryman had made a previous filing for other lands, and a second filing when made was prohibited, yet the land being subject to entry, and the land department having complete jurisdiction, and, as above seen, all the conditions are present which are prescribed by the act of 1891 (*supra*), patent should issue.

It is so ordered, and the decision appealed from is reversed.

PRE-EMPTION ENTRY—CONFIRMATION—ACT OF MARCH 3, 1891.

JOSEPH X. YOCUM.

A pre-emption entry made by a settler that moves from land of his own to reside on the public land is confirmed by the proviso to section 7, act of March 3, 1891, in the absence of any pending protest or contest, and where no proceedings have been initiated against such entry within two years from the issuance of the receiver's receipt.

First Assistant Secretary Sims to the Commissioner of the General Land Office, May 27, 1893.

I have considered the appeal of Joseph X. Yocum from your decision of July 18, 1891, holding for cancellation his pre-emption cash entry for the NE¼, Sec. 30, T. 2 N., R. 51 W., Akron, Colorado, land district.

This entryman made final proof upon due notice, paid for the land, and secured final certificate and receiver's receipt on October 1, 1888. There was no pending contest or protest against the validity of said entry, and is none as yet against it. You held it for cancellation because it appeared to your satisfaction that he moved off of land owned by him when he settled upon this land, but as more than two years had elapsed after the issuance of the receiver's receipt prior to March 3, 1891, the said entry is confirmed by the act of that day (26 Stat., 1095). Your decision is reversed, and the papers returned herewith. See Patrick Tracey, 13 L. D., 392.

DESERT LAND—LASSEN COUNTY ACT—REPEAL.

THOMAS R. GRINDLEY ET AL.

The act of March 3, 1875, providing for the entry of desert lands in Lassen county, California, is repealed by the amendatory act of March 3, 1891.

An entry made under said act of 1875 since the date of its repeal must be canceled, but the claimant in such case may, if qualified, make new entry under the amended act, with credit for the amount already expended in reclamation.

Secretary Smith to the Commissioner of the General Land Office, May 31, 1893.

By your letter of August 31, 1891, you directed the register and receiver of the Susanville, California, land office to allow no more entries to be made under the provisions of the act of March 3, 1875 (18 Stat., 497), and you also held for cancellation all such entries that had been allowed subsequent to March 3, 1891, date of approval of the "Act to repeal timber-culture laws, and for other purposes." (26 Stat., 1095.)

Prior to your said order and subsequent to the approval of the said act of 1891, Thomas R. Grindley had made entry for the N. ½ of Sec. 15, T. 28 N., R. 16 E., M. D. M., which land is situate in Lassen county,

California, and within the Susanville land district. Your said order of cancellation embraced his entry, and he has appealed therefrom to this Department.

The only question raised by the record is, whether the act of March 3, 1891, repealed the act of March 3, 1875.

You hold in your said letter that the provisions and requirements of the two acts are so at variance that they can not both stand together, and that therefore the latter must be regarded as repealing the former.

The act of 1875 extended only to lands in Lassen county, California, and is as follows:

That it shall be lawful for any citizen of the United States, or any person of requisite age who may be entitled to become a citizen, and who has filed his declaration of intention to become such, to file a delaration with the register and the receiver of the proper land district for the county of Lassen, California, in which any desert land is situated, that he intends to reclaim a tract of desert land situated in said county, not exceeding one section, by conducting water upon tho same, so as to reclaim all of said land within the period of two years thereafter; and said declaration shall be under oath and shall describe particularly said section of land, if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey; which said declaration shall be supported by the affidavit of at least two credible witnesses, establishing to the satisfaction of the register or receiver the fact that said lands are of the character described in this act. And at any time within the period of two years after filing said declaration, and upon making satisfactory proof of the reclamation of said tract of land in the manner aforesaid, before the register and the receiver of said land office, such person shall be entitled to enter or locate the reclaimed section, or any part thereof, in the same manner as in cases where public lands of the United States are subject to entry, at a price not exceeding one dollar and twenty-five cents per acre, and shall receive a patent therefor.

SEC. 2. That all lands within said county of Lassen, exclusive of timber lands and mineral lands, which do not produce grass, or which will not, without such reclamation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act.

Two years later Congress passed what is known as the desert land act, as follows:

That it shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter. *Provided, however*, That the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers, and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining, and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register

and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. *Provided*, That no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form.

Section 2. That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated. . . .

Section 3. That this act shall only apply to and take effect in the States of California, Oregon, and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office.

This last act was amended by the act of March 3, 1891. The section of the act of 1891, amendatory of the act of 1877, is as follows:

Sec. 2. That an act to provide for the sale of desert lands in certain States and Territories, approved March third, eighteen hundred and seventy-seven, is hereby amended by adding thereto the following sections:

Sec. 4. That at the time of filing the declaration hereinbefore required the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands may associate together in the construction of canals and ditches for irrigating and reclaiming all of said tracts, and may file a joint map or maps showing their plan of internal improvements.

Sec. 5. That no land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid; and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be cancelled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: *Provided*, That proof be further required of the cultivation of one-eighth of the land.

Sec. 6. That this act shall not affect any valid rights heretofore accrued under said act of March third, eighteen hundred and seventy-seven, but all bona-fide

claims heretofore lawfully initiated may be perfected, upon due compliance with the provisions of said act, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed; or said claims, at the option of the claimant, may be perfected and patented under the provisions of said act, as amended by this act, so far as applicable; and all acts and parts of acts in conflict with this act are hereby repealed.

Sec. 7. That at any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands but this section shall not apply to entries made or initiated prior to the approval of this act. *Provided, however*, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States.

Sec. 8. That the provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located.

It will be observed that, while the act of 1875 had reference only to one county in the State of California, that of 1877 applied to and took effect in the whole State of California, together with the States of Oregon, Nevada, and the then Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico, and Dakota, while the statute as amended March 3, 1891, adds to these the State of Colorado.

By the statute of 1875, applicable to Lassen county, California, the applicant was allowed to enter one section or any part thereof. He was required to reclaim it within two years from the date of filing his declaratory statement, and upon proof of reclamation he could make entry therefor and receive patent "at a price not exceeding one dollar and twenty-five cents per acre."

Any citizen of the United States or any person of the requisite age entitled to become a citizen, and who had declared his intention to become such, was entitled to the benefits of this act.

By the act of 1877 applicants were given three years after filing their declaration in which to offer proof of reclamation. They were required to pay twenty-five cents per acre upon filing their declaration and one dollar per acre upon making final proof. The qualifications of the applicant were the same as provided in the law of 1875. In this statute no reference is made to the law of 1875, and it contains no clause repealing other or inconsistent acts.

The act of March 3, 1891, contains several provisions differing essentially from those in either of the two preceding acts. For example, by the first two acts a qualified entryman could enter six hundred and forty acres, by the last he is restricted to three hundred and twenty acres. By the first act he has but two years in which to reclaim his land. By the second act he has three years, and by the last four years. By the first two acts, in his final proof, he has only to show that he has reclaimed the land by conducting water thereon, and that he has a sufficient supply, etc.; whereas by the last act he must show that he has expended in such reclamation "at least three dollars per acre of whole tract reclaimed."

Under the first two acts any one who is a citizen of the United States, or any one who has declared his intention to become such, is entitled to make entry; whereas under the act of 1891: "No person shall be entitled to make entry of desert land, except he be a resident citizen of the state or territory in which the land sought to be entered is located."

The foregoing are the most material variances between these different statutes, except that the statute of 1877 contained no repealing clause, while that of 1891 provides that "all acts and parts of acts in conflict with this act are hereby repealed."

The well established rule, that repeals by implication are not favored, is invoked for appellant, and very able and elaborate arguments are filed, insisting that the law of 1875 is still in force in Lassen county.

I have examined with care the authorities cited in the briefs submitted by appellant, as well as others bearing upon the question at issue, and am not able to concur in their view of the law as applicable to this case. It is true that the law of 1875 is in the nature of a special act, having application to a very small territory (one county in California), and it is equally true that the law of 1877 is special in its nature, in the sense of not being of general application, and it is none the less special, because it is applicable to a much larger territory than that of 1875. So, also, is the amendatory act of 1891. They are all local in their application, differing only in the extent of territory embraced in their provisions. The act of 1877 covers the territory embraced in that of 1875, and the amendatory law of 1891 covers that embraced in both the other acts and the State of Colorado in addition thereto.

It is probable that by the last amendatory act Congress intended to embrace in its purview all the arid land of the country, and it therefore may be regarded as a general law, regulating the disposal of all public lands not productive without the aid of artificial irrigation.

But whether considered as a general law or one of local application is not in my judgment very material to the determination of the question presented. That question is, what was the intention of Congress in the passage of this amendatory act? Was it designed to establish

a uniform rule applicable to all the territory embraced within its provisions to the exclusion of all rules and laws in conflict with it?

If this was the intention of Congress, then, without any special repealing clause, the law of 1875 must be regarded as repealed by the latter act.

While it is true that repeals by implication are not favored by the courts, it is also true that:

When a statute is evidently intended to cover the whole subject to which it relates, it will by implication repeal all prior statutes on the same subject.

(Cooley's Const. Lim., 5th Ed., page 183 — note; see also Campbell *v.* Case, 1st Dak., 17.)

To the same effect is Bartlett *v.* King Ex'r., 12 Mass. 545, in which the rule is stated as follows:

A subsequent statute revising the whole subject matter of a former one and evidently intended as a substitute for it, although it contains no express words to that effect, must on the principles of law, as well as reason and common sense, operate to repeal the former.

(See also United States *v.* Claflin, 97 U. S., 546.)

The case of the State *ex rel.* Attorney General *v.* Pearcy, 44 Mo., 159, is, I think, in point. It appears that by a special statute of February 9, 1864, the office of recorder of deeds was established in Buchanan county, Missouri, the duties of that office having theretofore devolved upon the clerk of the circuit court. The office was made elective, and the incumbent was to hold his office two years. In the revision of the general statutes in 1865, it was provided that:

On the first Tuesday after the first Monday in November, 1865, and every four years thereafter, an election shall be held for said office of recorder in each county of the state where the offices of the clerk of the circuit court and recorder of deeds have been separated.

The respondent had been elected to the office of recorder in 1864, and re-elected in November, 1866. At the general election in November, 1868, one Bell was elected to the same office. Pearcy, the respondent (*in quo warranto*), refused to yield possession of the office, claiming that in the election of 1866 he was elected for four years, under the provisions of the general statute, *supra*. His right to hold for four years depended upon whether the revision of the general statutes of 1865 repealed by necessary implication the special statute in relation to Buchanan county.

Section 6 of chapter 224, of the revision of 1865, provided that:

All acts and parts of acts of a private, *local*, or temporary nature, or especially applicable to particular cities or counties, in force on the first day of November, in the year of 1865, not repealed by or repugnant to the provisions of the general statutes . . . . . shall continue in force or expire according to their respective provisions or limitations.

The court held that the special statute in relation to Buchanan county was repealed by the general statute, because it was apparent that the legislature designed to establish a general and uniform system

throughout the state, thus following a well established rule that, when a later or general statute is evidently intended to supersede or supply the place of one or more special or local statutes, they must be regarded as repealed by it, at least so far as they are repugnant to it, even though no repealing clause is contained in the later statute.

Applying this rule to the question before me, its solution does not seem difficult. The material variances between the law of 1875 and the amendatory section in the law of 1891 have been heretofore pointed out, and show that the two acts are clearly repugnant in nearly all their essential parts.

The amendment is embraced in a statute, which in its scope affects all or nearly all the laws relating to the public lands, and is, to that extent, a revision and correction of the same.

Is it to be presumed that Congress intended to limit desert land entries to three hundred and twenty acres elsewhere and allow an applicant to enter six hundred and forty acres in Lassen county? Or to confine entries elsewhere to citizens resident in the state or territory where the land is located, and leave lands in this county open to the entry of any citizen of the United States regardless of his place of residence?

No reason is perceived why these distinctions should be made. Had there been a general statute regulating desert land entries in operation at the date of the enactment of 1875, this special act making different provisions for Lassen county would have rested, presumptively, on sufficient reasons known to the legislators, and a subsequent amendment to such general law, without reference to the local act, would not have operated as a repeal of the special act.

This is, to a great extent, the foundation of the rule laid down by courts and commentators, that the repeal of a special or local law can not, ordinarily, be implied by a subsequent revision of a general act embracing the same subject. (See State *v.* Pearcy, cited above, and case of State *ex rel.* Vastine *v.* McDonald, 38 Mo., 529.)

The case at bar does not come within the purview of this rule. The act of 1875 was the first legislation on the subject. It was an experiment in the reclamation of arid lands. This later amendatory act is the result of riper experience, and, in my judgment, is designed to supersede and supply the place of all former legislation in relation to the disposal of desert lands.

Counsel for appellant say that lands in Lassen county are especially difficult to reclaim, because of the scarcity of the water supply; but an examination of the map of the arid region shows an equal dearth of supply in many other sections of the country.

It would seem that counsel for appellant recognize one part of this amendatory act as binding, for neither the claim of applicant nor that of fifty-nine others represented by the same counsel, exceed an approximate half section.

It is true that the number of acres allowed to any one claimant under any of the land laws is limited to three hundred and twenty by the general appropriation act of August 30, 1890 (26 Stat., page 391); but, if the argument of counsel is of force, this provision could not affect entries in Lassen county, because that was a law of local application, and was not repealed in terms by this general enactment in the appropriation act. If the Lassen county act was not repealed by the amendatory act of 1891, or that of August 30, 1890, each of these applicants is entitled to enter six hundred and forty acres, yet with a singular unanimity their claims are limited to three hundred and twenty acres.

Further, it is shown by the affidavit of Grindley that he has already expended at least one thousand dollars in reclaiming the land. If this be true, and I have no reason to doubt it, he is in condition, if a qualified entryman, to make proof under the amendatory statute of 1891, for he has expended more than three dollars for each acre embraced in his application, and in his case no hardship will result from requiring a compliance with the law as amended.

Your action in rejecting these several applications is therefore affirmed.

I see no reason, however, why the applicants may not be allowed to make entry for their several claims under the act as amended, provided they are qualified entrymen thereunder, and be credited with the amount already expended in the reclamation of their claims.

SURVEYOR'S FEES—CONTRACT—SPECIAL RATES.

JAMES C. JEFFERY.

The failure of the General Land Office to submit for the Secretary's approval a contract with a deputy surveyor that properly provides for special rates, will not defeat the right of the deputy to an adjustment of his account under the terms of the contract, where he has performed the work in compliance therewith, and the statute providing for the approval of such contract by the Secretary does not preclude such action after the performance of the work.

Secretary Smith to the Commissioner of the General Land Office, May 31, 1893.

I have considered the appeal taken by James C. Jeffery from your decision of August 10, 1892, in the matter of the adjustment of his account as United States deputy surveyor for the survey of township 13 north, range 9 west, Willamette meridian, State of Washington, on his contract (No. 362) with the United States surveyor general for said State, dated May 6, 1891, and approved June 8, 1891, by T. H. Carter, Commissioner of the General Land Office.

Said contract provides that there should be paid to said Jeffery

where the lines of survey shall pass over lands that are "heavily timbered, mountainous, or covered with a dense undergrowth," at rates not exceeding $25 for standard and meander lines, $23 for township lines, and $20 for section lines, per mile, for every mile actually run and marked in the field, etc.

Said Jeffery surveyed said township and rendered his account therefor in accordance with the above figures, amounting in the aggregate to $1,429.97.

By your letter of August 10, 1892, in the adjustment of said account, you reduced said total sum to $895.62, by computing said lines of survey at $18, $15, and $12, as allowed by the appropriation act of August 30, 1890 (26 Stat., 371, 390).

It is contended that there was error in not computing said survey at the rates named in said contract, inasmuch as said rates were authorized by the appropriation act of March 3, 1891 (26 Stat., 948, 971).

The provision in said act under which said contract rates are claimed is as follows:

> That in the States of Washington and Oregon there may be allowed, with the approval of the Secretary of the Interior, for the survey of lands heavily timbered, mountainous, or covered with dense undergrowth, rates not exceeding $25 per linear mile for standard and meander lines, $23 for township, and $20 for section lines; and said rates in contracts hereafter made, shall apply to the unexpended balances assigned to said States of the appropriation for the current fiscal year.

In your letter of October 4, 1892, you state the general ground of your said decision as follows—"The Deputy's contract (No. 362) does not appear to have the direct approval of the Secretary."

For this reason said contract rates were disallowed, and the account was computed and approved at the rates established by said act of August 30, 1890 (26 Stat., 390). The latter act provides as follows:—

> That the Commissioner of the General Land Office may allow for the survey of lands heavily timbered, mountainous, or covered with dense undergrowth, in the States of Oregon and Washington, rates not exceeding $18 per linear mile for standard and meander lines, $15 for township, and $12 for section lines.

It appears from the appropriation act of March 3, 1891, above cited, that the rates therein mentioned "may be allowed with the approval of the Secretary of the Interior." No time or manner is specified in the act when or how that approval shall be given. It does not appear that said contract has ever been heretofore submitted to the Secretary for his approval or disapproval, and the same is now brought to his attention for the first time. The deputy surveyor should not be made to suffer for this inadvertence. The work has been performed by him, relying upon the contract rates of payment, and he is equitably entitled to the same. The United States surveyor general for the State of Washington has certified to the correctness of the account rendered by the deputy surveyor. The contract rates have been approved by the Commissioner of the General Land Office, and would doubtless have heretofore been officially approved by the Secretary of the Interior if the same had been submitted to him for his action. I am of the opinion that it is not now too late to give such official approval to said contract rates, and the same are hereby allowed and approved, and said account will be adjusted upon that basis.

Your judgment is modified accordingly.

HOMESTEAD SETTLEMENT—TOWNSITE CLAIM CONTEST.

TOWNSITE OF MOORE *v.* TURNER ET AL.

The prior settlement right of a homesteader will not defeat the claim of subsequent townsite settlers, if not asserted and maintained in good faith after the adverse occupancy of the land for townsite purposes.

No preference right is acquired by filing a contest against an entry that is involved in a pending application for the right of amendment that necessarily calls for the cancellation of such entry.

Secretary Smith to the Commissioner of the General Land Office, May 31, 1893.

I have considered the case of the Townsite of Moore *v.* William Turner and George W. Leverich, involving the S. ½ of sec. 14, T. 10 N., R. 3 W., Oklahoma City, Oklahoma.

Your letters, dated March 8, 1892, and January 24, 1893, contain long statements of facts in relation to the various claims to this land, the orders which have been issued in relation to the same, etc., but the facts necessary for a proper understanding, and for a proper disposal of this case, are as follows:

The land in question became subject to settlement and entry at 12 o'clock, noon, on April 22, 1889. On April 26, 1889, Edgar Rye made homestead entry for the SW. ¼ of said section 14. On May 2, 1889, he filed his application to amend said entry to embrace the SE. ¼ of said section 14. In this application, made under oath, he states:

> On April 26, 1889, I filed my said entry, No. 157, and covered thereby the SW. ¼ of Sec. 14, T. 10 N., R. 3 W., when in fact I had settled upon and improved, and intended to homestead the SE. ¼ of said section 14, T. 10 N., R. 3 W. I had at the time of my said filing, a house (frame) on said SE. ¼ of section 14, and other improvements, to the value of $100, and the error in location was caused by inability to read the inscription upon the quarter section stone. . . . . Said SE. ¼ of section 14 has not been adversely filed upon, nor otherwise legally appropriated.

So far as the record shows, Rye has asserted no claim to either the SE. ¼ or SW. ¼, other than as recited above. He made default at the hearing, and if he ever made actual settlement on the land, he seems to have abandoned it at a very early day.

On May 6, 1889, William Turner made application to enter said SE. ¼ of section 14, as a homestead, but was informed of the application of Rye to embrace said land in his amended homestead entry. Turner then filed an affidavit, asserting that he was the first settler upon the land, that he settled thereon between one and two o'clock in the afternoon of April 22, 1889, and he requested that a hearing be ordered to determine the question of his prior right as against Rye and all others asserting a claim to the land; this hearing to determine the rights of the various parties did not take place until June, 1892.

On June 6, 1889, a petition or application was filed in the local land office to enter the W. ½ of SE. ¼ W. ½ of NE. ¼ E. ½ of NW. ¼ and E. ½

of SW. ¼ of said section 14, as the townsite of Moore, under the townsite laws of the United States.

This application was signed by one hundred and six persons, who alleged that they were citizens of the United States and occupiers of lots in the town of Moore; the petition was filed by W. C. Perry, mayor of said town. This application embraced three hundred and twenty acres.

On January 27, 1890, the town authorities amended this application to embrace the SE. ¼ and E. ½ of SW. ¼ of section 14, aggregating two hundred and forty acres.

I do not consider it necessary to confuse the understanding, or to obscure the points at issue, by a recital of all the various orders issued in connection with the various claims to the land involved, or of the action taken in some instances, or the want of action in others.

The townsite claim is now being asserted through the townsite board, under the act of May 14, 1890.

The question at issue is between those claiming as townsite settlers, and Turner, who claims the SE. ¼ under the homestead law, and this important question must be determined upon the evidence submitted at the hearing in June, 1892. It is clear from the evidence of Turner himself and of his witnesses, that on the day the lands were opened to settlement, April 22, 1889, there was a side track of the Atchison, Topeka and Santa Fe Railroad Company on this quarter section of land, and a sign board thereon, indicating that it was "Moore's Station." On the afternoon of that day, Turner alighted from the train and went upon the land; he spaded a small tract, and next day commenced to dig a well, and afterwards had about half an acre plowed and planted in corn. On the 6th of May he made application to enter the land as a homestead, as before recited.

He returned to the State of Indiana some time in May, and remained there until some time in September.

From April 22, to the time when he returned to Indiana, he appears to have resided with his son on an adjoining tract, his own testimony on this point is as follows:

Q. You staid with your son on his claim the most of the time before you went to Indiana, didn't you?

A. Slept there at night bad nights; slept on my own when it would be fair so I could lay out; staid over there with the son most of the time.

On his return to the land in September, he built a house on the east half of the quarter section, not then claimed as a part of the townsite; has improved the same, and has resided thereon since.

He states that he never consented to part with any portion of this tract for townsite purposes.

The evidence of Turner, and most of his witnesses, as to the townsite settlement, is unsatisfactory and evasive. Muir, one of his witnesses, testified that he left that vicinity May 10th, and there was no town

then, but that five or six days after they had settled, (which was on April 22) some men went around with a tape line and laid off some lots; also that before he left, there had been lumber sold on the ground, and people were talking of establishing a town.

A son of Turner says that the first town improvements were placed on the land about July 1, and yet the record shows that on June 6, more than one hundred persons signed an application to enter the land as a townsite, alleging that they were occupiers of lots.

In behalf of the townsite claimants, A. M. Petite testifies that he opened the post office, and was ready for business in the townsite of Moore on the land in question, on July 1, 1889; that he first came to that vicinity about May 10, 1889; that at that time lumber was being sold on the ground, and there was a grocery store and several other buildings, and quite a number of people.

J. W. Cowan testifies that he was on the land first about April 27 or 28, 1889; that he established a restaurant on the land; that in the early part of May lumber was sold on the tract; that he had a conversation with the claimant Turner on April 28 or 29, and Turner told him that he was contesting or holding the land, and he thought in time that it would be a town there, and for him (Cowan) not to invest his money in town property, that if he (Turner) gained, he (Cowan) would get lots.

D. C. Richardson testifies that he commenced to sell lumber on the land early in May, 1889, and has continued the business there since that date.

R. H. Wingo testifies that at the time they were digging the well, soon after April 22, he had a conversation with the party at work, in which Turner took part in regard to building a town there, and Turner said he was going to contest the claim, and "that if he got it, he would give us all the town lots we wanted." Wingo further testifies that he and two other men built a house on the railroad right of way on this land, sometime between the 22d of April and 3d of May, in which they placed a small stock of groceries to sell. Wingo's testimony in relation to the building of a house, and the selling of groceries, is corroborated by Thomas Crawford.

Eliminating the mass of irrelevant testimony, or testimony which has no bearing on the important points at issue, the facts are found to be: that Turner made the first act of settlement on this tract, that these acts were the least possible that could be made, and still be regarded as acts of settlement; he made no attempt to erect any place of abode on the land; in no sense of the word can it be said that he made a bona fide attempt to reside thereon; he lived with his son on an adjoining tract. During this time, viz: between April 22 and some time in May, but the exact date is not given, when Turner left for a distant State, it was apparent that a townsite settlement was being made on the land; it was talked of, lots were surveyed, business was established; it must have been so understood, and the evidence was convincing; it was a

growing settlement, not a town settled in a day, as many of the Oklahoma towns were; yet notwithstanding all these facts, we find that Turner voluntarily departed from that vicinity, leaving but the slightest possible evidence behind him that he was asserting any claim to the land. Even when more than one hundred people filed a petition on June 6, to make townsite entry of eighty acres, he did not return to assert his claim, but remained away for months thereafter, and finally when he did return, he built his house on the east eighty acres of the quarter section, which at that time was not claimed by the townsite settlers, and has resided thereon since.

It is the contention of counsel for Turner, that his client always expressed his unqualified dissent to these townsite operations, always asserting that he wanted the tract for his homestead, and in support of this contention, he refers to the evidence of Cowan, already quoted, and to the testimony of other witnesses. The statements referred to were made by Turner after his return to the land in September, long after the townsite settlement had been made, and steps taken to obtain title to the land.

In view of all the facts, it is impossible for me to reach the conclusion that Turner was trying to assert or maintain an honest bona fide and sincere homestead claim to the eighty acres which he knew was claimed by the townsite settlers.

Before Turner made homestead application for the land on May 6, 1889, a settlement for townsite purposes had been initiated on the west half of the quarter section applied for, and this settlement has been continued since, constantly growing, and the land is now actually occupied and used for townsite purposes, and improvements to the value of many thousands of dollars are located thereon.

The slight acts of settlement made by Turner, taken in connection with the fact that he immediately withdrew from the land for months, leaving the townsite settlers to continue their improvements, cannot defeat the townsite claim to said eighty acres.

The E. ½ of SE. ¼ was not claimed by the townsite until January 27, 1890, and has never been used for townsite purposes. Before that date, Turner had established a bona fide settlement on said tract, and his right is the superior one. Turner should be allowed to make homestead entry for the E. ½ of SE. ¼, and the W. ½ of SE. ¼ should be entered for the benefit of the townsite claimants.

The conflicting claims to the SW. ¼ of section 14, remain to be disposed of. As before stated, this land was embraced in the homestead entry of Edgar Rye, made April 26, 1889. On May 2, 1889, he stated under oath that he had never made settlement on said land, and did not intend to make entry for the same. He was asserting no claim to the land, and had no right to it, and upon the receipt of his statements, the Department would have been justified in canceling his entry.

On December 31, 1890, G. W. Leverich filed an affidavit of contest

against the entry, alleging that Rye had abandoned the land, and had never established his residence thereon.

These charges, in effect, contained nothing in addition to what was already known to the Department by the statements of Rye himself. His contest should have been rejected, not only upon the ground that he alleged nothing in effect, which was not already known to the Department, and had been the subject of its action, but also upon the ground that the entry of Rye had, in effect, been canceled by your order of February 8, 1890, instructing the local officers to allow his application to amend said entry to embrace the SE. ¼.

It is a well established principle that a person can obtain no preference right by filing a contest against an entry during the pendency of a proceeding by the government against said entry, which proceeding would of itself result in the cancellation of the entry. Comar *v.* Wendling (12 L. D., 25), and the cases therein cited; and the case is even stronger where the charge in the affidavit is but a repetition of the information already in possession of the government.

Leverich can claim no preference right of entry, as a contestant. On March 11, 1891, he made application to enter the land as a homestead. At that time the townsite of Moore was claiming the E. ½ of SW. ¼, both under the original application of June 6, 1889, and amended application of January 27, 1890. At the date of the hearing, there were valuable townsite improvements on said eighty acres, and it was used and occupied for townsite purposes. There were no townsite improvements on the W. ½ of the SW. ¼.

The claim of the townsite settlers to the said E. ½ of SW. ¼ must be considered as superior to that of Leverich, but the latter's right to make entry for the W. ½ of the SW. ¼, should be recognized under his application filed March 11, 1891, which was prior to any claim asserted by the townsite.

For the reasons above given your decision is affirmed.

CONFAR *v.* CONFAR.

Motion for review of departmental decision of November 26, 1892, 15 L. D., 506, denied by Secretary Smith, June 2, 1893.

PRACTICE—REHEARING—CONTESTANT—CERTIORARI.

FRENCH *v.* NOONAN.

The authority of the Commissioner of the General Land Office to order a rehearing in a contest case, is not restricted to cases in which the applicant for such order is entitled thereto.

The exercise of the Commissioner's discretion in ordering a rehearing will not be disturbed in the absence of a clear showing of abuse thereunder.

A contestant who desires to maintain his status as such must pay the expenses of a rehearing.

An application for a writ of certiorari should be accompanied by a copy of the decision complained of.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

Aaron J. French has filed a petition for an order, under Rules 83 and 84 of Practice, directing you to certify to the Department the papers in the case of said French against timber-culture entry of Thomas Noonan for the SE. ¼ of Sec. 10, T. 111, R. 60, Huron land district, South Dakota.

From the petition it appears that on September 9, 1892, you ordered a rehearing in said case. The petitioner contends that such rehearing ought not to have been ordered, on the grounds, (1) that the application therefor not having been made by Noonan within thirty days after receipt of notice of decision against him, you had no jurisdiction to grant a rehearing; (2) under the facts disclosed you had no discretion to exercise; (3) if it were conceded that you had any discretion, the granting of a rehearing was a gross abuse of such discretion; (4) that in directing a rehearing, you ought to have ordered that the expenses of such rehearing should be paid by the contestee.

To which it may be said that while, under Rule 77 of Practice, the contestee could not properly claim a rehearing unless his application were filed within thirty days from receipt of notice, I find no rule placing any similar restriction upon your authority in ordering a rehearing. In fact, your jurisdiction over the land continued until issuance of patent, unless the matter is brought before the Department on appeal or in some other manner. (Charles W. Filkins, 5 L. D., 49). "Patent had not yet issued on final proof; and while thus under consideration, the jurisdiction of your office to institute inquiry into the nature of the claim was undoubted." (Robert Hall *et al.*, 5 L. D., 174.)

There being no doubt of your jurisdiction, the exercise of your discretion in the matter will not be disturbed unless there is a clear and satisfactory showing of abuse of it. (See Reeves *v.* Emblen, 8 L. D., 444; same on review, 9 L. D., 584; Samuel J. Bogart, 9 L. D., 217; Fletcher *v.* Roode, 10 L. D., 250; Finch *v.* Morath, 13 L. D., 706.) That you abused your discretion in ordering a hearing in the case now under consideration does not appear to me to have been clearly shown.

It was no part of your duty to order that the expenses of the rehearing should be borne by the contestee. The second section of the act of May 14, 1880 (21 Stat., 140), provides that "in all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption homestead, or timber-culture entry, he shall . . . . . be allowed thirty days from date of notice, to enter said land." If the applicant herein intends to retain the position of contestant, and to enter the land in case a hearing shall result in the cancellation of the present entry, he must "pay the land office fees." Or, if he desires to avoid the expense of further litigation, he can withdraw from the contest, and abandon all claim to the land under what would be his preference right if he remained in the case.

Whether the case of McMahon *v.* Grey (5 L. D., 58), referred to by the applicant, is parallel and pertinent to the one now under consideration can not be determined, inasmuch as the applicant herein has failed to furnish a copy of your decision complained of; and for this reason alone the application might properly be denied. (Hoover *v.* Lawton, 13 L. D., 635.)

The motion is overruled.

TAM ET AL. *v.* STORY.

Motion for review of departmental decision of March 13, 1892, 16 L. D., 282, denied by Secretary Smith, June 2, 1893.

TIMBER CULTURE ENTRIES—COMMUTATION—INSTRUCTIONS.

Commutation of timber culture entries under the provisions of the act of March 3, 1891, should not be allowed without due publication of notice of intention to submit final proof under said act.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

By letter of May 6, 1893, you transmitted for my approval a circular of instructions in the matter of final proof in commutation of timber culture entries, by which it is proposed to modify the instructions of your office of April 29, 1892, so that hereafter publication of notice of commutation final proof will not be required where the original entry was made prior to September 15, 1887.

Prior to the date of circular approved July 12, 1887, (6 L. D., 280) it was not required that notice of intention to make final proof in timber culture entries should be published, but by that circular it was required that notice in such cases "should be published in the same manner as in homestead and pre-emption cases." This provision was afterwards modified by circular of December 3, 1889, (9 L. D., 672) to the extent

of excepting from the requirement of publication those cases where the original entry was made prior to September 15, 1887. This modification was made evidently upon the theory that no condition should be imposed upon the entrymen that was not in force at the time his entry was made, and the date of September 15, was fixed so that due notice of the new requirement might be given before it should take effect.

By the act of March 3, 1891, (26 Stat., 1095) the timber culture laws were repealed, but the following proviso was attached:

That any person who has made entry of any public lands of the United States under the timber culture laws, and who has for a period of four years in good faith complied with the provisions of said laws, and who is an actual bona fide resident of the State or Territory in which said land is located, shall be entitled to make final proof thereto, and acquire title to the same by the payment of one dollar and twenty-five cents per acre for such tract, under such rules and regulations as shall be prescribed by the Secretary of the Interior, and registers and receivers shall be allowed the same fees and compensation for final proofs in timber culture entries as is now allowed by law in homestead entries.

In the circular of instructions of April 27, 1891, (12 L. D., 405) issued under this law, nothing was specifically said as to the publication of notice of final proof in commuted timber culture entries, it being said, "Final proof for the commutation of timber culture entries under this provision, shall be made as other final timber culture proof is made."

Under date of April 29, 1892, your office addressed a letter to the registers and receivers, which was not, it seems, submitted for the approval of this Department, which reads as follows:

The provisions of circular of December 3, 1889, (9 L. D., 672) in regard to publication of notice of intention to make final proof on timber culture entries, are not intended to apply to commutation proof on such entries under the act of March 3, 1891. In the commutation of timber culture entries, the notice of intention to offer such proof must be published in the same manner as in final proof on entries made subsequent to September 15, 1887, no matter what may be the date of the original entry. This is in accordance with circular of February 6, 1892, page 29, which states: "Final proof for the commutation of timber culture entries under this provision shall be made as other final timber culture proof is made."

Inasmuch, however, as an opinion had been expressed by this office that the provisions of said circular of December 3, 1889, applied to the commutation of timber culture entries, all commutation proof made before the receipt of this circular in which publication of notice has not been made, will be accepted if satisfactory in other respects, but in the future you will allow no commutation of timber culture entries without the required notice by publication and posting.

If a day has been designated for the submission of such proof in any case, and the proof has not yet been taken, you will advise the party that publication of notice of intention to submit such proof will be required. Acknowledge receipt hereof.

It is now proposed to change the rule announced in that letter, and to waive the requirement of publication of notice in all cases where the entry sought to be commuted was made prior to September 15, 1887.

The requirement of published notice of the making final proof is a salutary one, and should obtain in all cases, unless good reason is shown for waiving it. The reason for excepting from that rule the entries

made prior to its adoption was good, but it does not apply in the commutation of those entries. At the date of entries made prior to September 15, 1887, there was no provision existing for perfecting them by way of commutation, and hence the entrymen could not have expected to perfect them in that manner. When this privilege was extended, it was upon the condition that final proof should be made "under such rules and regulations as shall be prescribed by the Secretary of the Interior." The requirement of published notice in these cases cannot be said to be an added hardship or condition not contemplated at the time the original entry was made.

The existing rule has undoubtedly come to be well understood by those interested in such entries, and a change would tend to create confusion. No change should be made in existing regulations, unless it be demanded to secure a compliance with the requirements of law, or to give relief from an unnecessary hardship.

Believing as I do, that this requirement of publication of notice of intention to submit final proof in support of commuted timber culture entries in all cases, is a just and salutary one, I must withhold my approval from the circular submitted.

PRACTICE—APPEAL—CONFIRMATION—SOLDIERS' ADDITIONAL HOMESTEAD.

CLEVELAND ET AL. *v.* NORTH ET AL.

The fact that an appeal is taken in the name of a deceased entryman, without authority from the administrator, will not prevent consideration of the case on behalf of a transferee.

A purchaser of land sold under a power of attorney that amounts to an absolute sale of a soldier's additional homestead right, prior to the exercise thereof, is not a *bona fide* purchaser within the intent and meaning of the confirmatory provisions of section 7, act of March 3, 1891.

A soldier's additional homestead entry based on a certificate of right improvidently re-issued after a final adjudication that the claimant was not entitled to make such entry, is a nullity and must be canceled.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

I have considered the motion filed for the review of departmental decision of June 16, 1892, in the above mentioned case, in which it was held that soldier's additional homestead entry in the name of Mathew B. North for the N.½ of SE.¼ and lot 4, Sec. 20, T. 62 N., R. 14 W., Duluth land district, Minnesota, is confirmed by the 7th section of the act of March 3, 1891 (26 Stat., 1095).

To a proper understanding of the question, it is necessary to review the facts relative to the several entries made in the name of said North.

On December 23, 1865, he made homestead entry No. 2112, for lots 1

and 4, Sec. 4, T. 37, R. 17, Booneville land district, Missouri, containing 68.90 acres, upon which he made proof and received final certificate No. 331, April 5, 1871.

On September 12, 1878, your office issued to North, under section 2306 of the Revised Statutes, a certificate, showing him to be entitled to an additional right of entry under the homestead laws for 91.10 acres. On October 7, 1879, this certificate was located at Carson City, Nevada, but said entry was canceled May 2, 1885, as illegal, because based on service in the Missouri Home Guards, and upon the face of the certificate was made the following notation:

CARSON CITY, NEV.
Hd. entry 354, final 106, based on this certificate canceled as illegal May 2, 1885.
W. H. D.
C.

This certificate should never have been re-issued, but, upon the request of Luther Harrison, as attorney for North, it was returned to him, with your office letter "C" of May 26, 1887.

It may be here stated that, on December 13, 1884, Seneca H. Marlette, as transferee of North, was permitted to purchase, under the act of June 15, 1880, the entry made by North at Carson City.

After the return of this certificate, it was first attempted to be located, so far as is shown by the record now before me, at Pueblo, Colorado, on June 2, 1887, the application being rejected "for the reason that the tract applied for is embraced in the limits of the derivative claim of Thomas Leitensdorfer under Vigil and St. Vrain grant."

Upon appeal, your decision of October 24, 1887, reversed the action of the local office, and directed that the application for additional entry be allowed, which was done on November 19, 1887, as homestead No. 4986, final certificate No. 2117. In making this entry the certificate was not used, an affidavit being presented, signed by North, as the basis of his right to an additional entry.

In the meantime, that is after the presentation of the application at the Pueblo land office, and before the allowance of the entry thereon, to wit, on August 31, 1887, the certificate issued to North was presented at the Duluth land office, Minnesota, and entry allowed as homestead No. 3661, final certificate No. 1329. This is the entry now in question.

On December 28, 1889, you held said entry for cancellation, for the reason that the service alleged by North does not entitle him to an additional entry under section 2306 of the Revised Statutes, and therein no reference is made to the previous entries made by North.

The register's certificate, attached to both the entry made at Pueblo and that in question, certifies that North appeared in person and made the entry.

The appeal from your decision holding the entry in question for cancellation was signed by Fielder B. Chew and O. H. Herring, attorneys for North. This appeal was filed February 25, 1890, and it is shown

that North died in 1888, and that his administrator had not authorized the filing of the appeal.

Subsequently to the passage of the act of March 3, 1891 (*supra*), a motion was filed for the confirmation of this entry, under the provisions of section 7 of the act, which was granted by the decision of June 16, 1892, for the review of which the motion now under consideration was filed.

One of the grounds for review is that no proper appeal was filed from your decision holding the entry for cancellation, for the reason that none was authorized to be taken by the administrator.

It appears, however, that on August 31, 1887, the same day that this entry was made, it was transferred to other parties, and they would undoubtedly be entitled to protect their interests by appeal, even though the appeal be taken in the name of North, the entryman.

The appeal was duly accepted and the case forwarded to this Department, and it was in such a condition that the confirmation provided by the act of 1891 might properly be applied, if the case as made falls within the provisions of said section 7 of the act.

It would seem that under the previous construction given to this act, the fact that the entry was in existence at the date of the passage of the act having been established, the only question to be inquired into is as to the *bona fides* of the alleged purchasers. Jesse W. Finch, 14 L. D., 573; Doctor F. Cushman, 15 L. D., 186.

The abstract of title filed in this case shows that on August 31, 1887, the same day the entry was made, James A. Boggs, as attorney, transferred the land to Camelle Poirier, Douglas A. Petre, James A. McLenon, Alex. M. Morison, and R. R. Macfarlane, each receiving an undivided one-fifth interest in the land, the consideration in each case being stated as $1000. A copy of the power under which this sale was made has been filed, and it shows that it was executed June 20, 1887, and was, in effect, an absolute sale of the additional right, for, in consideration of $100, it was made irrevocable, and the party in whose favor the power was executed was authorized to receive for his own use and benefit any money or other property arising from the sale, and the right of the entryman to any such proceeds or property was specifically released.

It must be remembered that when this power was executed, viz: June 20, 1887, North had no interest in this land, it being at that time covered by another entry, which was relinquished on August 31, 1887, the same day North made entry, and at said date he was prohibited by law from selling the land to be acquired under the homestead law, or making any contract having such an object in view, for in such case the entry would be made not for his own benefit, but in the interest of others.

The fact that sale of the land was made the same day of the entry would tend to connect the purchasers directly with the purchase of the

additional right, but, aside from this, the purchasers under a mere power to sell, are bound to inquire into the validity of such power and, if the same be void, they can not claim confirmation as *bona fide* purchasers.

There can be no question but that the power under which this sale was made was an absolute sale of the additional right under the certificate erroneously re-issued by your office, and as such was absolutely void, as the right to an additional entry was not assignable. (John M. Walker, 7 L. D., 565.)

While it appears that several conveyances have been made since the transfer at the time of the entry, yet the affidavit on which confirmation was granted in the former opinion states that Alex. M. Morrison, Douglas A. Petre, and R. R. Macfarlane are the present owners of the land.

It will thus be seen that the land is in the hands of three of the five original owners who bought directly of Boggs under the power referred to.

In the case of the Puget Mill Company *v.* Brown (54 Fed. Rep., 987), the plaintiff claimed an interest in certain land by reason of an additional homestead entry made under an assignment of the additional right of entry granted soldiers, the assignment being in form and substance similar to the one under which the present entry was made. In said case it was urged that the assignment was, in effect, a sale or attempted transfer of the rights of the homestead claimant, such as is recognized and protected by the second section of the act of June 15, 1880 (21 Stat., 238). In dismissing the suit the court held that:

An attempt to convey a title cannot be bona fide on the part of the vendee, unless in making the purchase he acts with reasonable prudence, and under an honest belief that the vendor has the right to convey the title to him. Now, I find annexed to the statement of facts the original instrument, purporting to be a power of attorney from Susan King to W. D. Scott, under which the deed to plaintiff was executed by Scott. By the date of its execution and acknowledgment, in connection with the admitted fact that the complainant's bargain was for "scrip" (so called), and that it paid the purchase to a stranger, and the further fact that upon the present trial the complainant has not offered to prove that the so-called "scrip" which it bargained for was different in character from the sets of blanks which were commonly sold and traded in by dealers, and by them called "Soldier's Additional Homestead Scrip," the inference is justified that the complainant, at the time of its purchase, either knew, or ought to have known, that said power of attorney either divested the maker of it of all her beneficial interest in the land some four months prior to the additional entry in the land office at Olympia, and therefore falsified the statements of the application and affidavits, whereby the entry was made, or that, at the time when it left the possession and control of its maker, said power of attorney was a mere blank, utterly void, and that by subsequent filling the blanks, so as to make it appear to be complete and valid, a forgery was committed.

My conclusions are that the attempted transfer of rights acquired under the homestead laws to the complainant was not bona fide; that the cash entry was therefore not authorized by the act of June 15, 1880; and that no rights adverse to the government can be acquired in advance by an entry not authorized by law, even though sanctioned in advance by a commissioner of the general land office.

Applying the reasoning herein set forth to the facts in the present case, I must hold that the claimants for confirmation are not *bona fide* purchasers within the meaning of the act of March 3, 1891 (*supra*), and the former decision of this Department holding the entry to be confirmed is hereby recalled and set aside.

The entry not being confirmed, it but remains to consider the appeal from your decision holding this entry for cancellation.

In the additional entry made at Carson City, Nevada, it was finally adjudged that North was not entitled to an additional homestead entry, under section 2306 of the Revised Statutes. The certificate on which said entry was allowed was improvidently returned in 1887, and is the basis of the entry now under consideration. Having been adjudged to be invalid, it belongs to the files of your office, and the present entry based thereon is a nullity.

Your decision is therefore affirmed, and the entry by North, now under consideration, is hereby canceled.

RAILROAD GRANT—HOMESTEAD ENTRY.

NORTHERN PACIFIC R. R. CO. *v.* MEAD.

The grant to the Northern Pacific Company between Portland, Oregon, and Tacoma, Washington was made by the joint resolution of May 31, 1870, and a tract of land at said date embraced within a *prima facie* valid homestead entry is excepted from the operation of said grant.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

I have considered the motion, filed by the attorney for the Railroad Company, for a review of departmental decision of August 20, 1892, (Press Copy Book No. 251, p. 346), in the case of the Northern Pacific Railroad Company *v.* N. B. Mead, involving the NW. ¼ of SE. ¼ and lots 3, 5 and 6, Sec. 19, T. 1 S., R. 2 W., Oregon City, Oregon.

In said decision it was held, that the grant to the Northern Pacifi Railroad Company between Portland, Oregon, and Tacoma, Washington, was made by the joint resolution of May 31, 1870, (16 Stat., 378) and that at the date of said grant, the land in question was excepted therefrom, by reason of the homestead entry of Thomas Kelly, which was made November 19, 1869, and canceled May 19, 1871. This last proposition was based upon the decision of the Supreme Court in the case of Bardon *v.* The Northern Pacific Railroad Company, (145 U. S., 535).

The reasons assigned for the motion for review are, that it was error to hold that the grant to the Railroad Company between Portland and Tacoma, was made by the joint resolution of May 31, 1870, rather than by the original granting act of July 2, 1864, and that it was error to hold that the case comes within the decision of the supreme court in the Bardon case.

In the case of the Northern Pacific Railroad Company *v.* McRae (6 L. D., 400), decided September 30, 1887, this Department held, that the grant to the Company, between the two points named, was made by the joint resolution of May 31, 1870, and that decision was followed in the case now under consideration.

In support of his contention, counsel calls attention to the fact, that on December 29, 1886, the district court of the State of Washington held that the grant to the company between the two points named, was made by the original granting act of July 2, 1864.

The decision in the McRae case was rendered nearly a year subsequent, but my predecessor did not concur in the view held by the court. Counsel also cites the decision of the U. S. circuit court in the case of the United States *v.* Northern Pacific Railroad Company, (43 Federal Reporter, 842) in which the court held that the grant to the company, between Portland and Tacoma, was made by the original granting act of July 2, 1864. It is true that this decision was rendered subsequent to the decision of the Department in the McRae case; no appeal, however, was taken from the decision of the circuit court, hence the question has never been determined by the U. S. supreme court, the only tribunal whose decisions have controlling weight with this Department in the adjudication of questions which come before it.

In my opinion, no sufficient reason is alleged why the decision of my predecessors, Secretary Lamar and Secretary Noble, on this point should be overruled, and I must decline to take such action at the present time.

In support of his second proposition, counsel says:

> A homestead claim, like a pre-emption, is not complete until the conditions subsequent have been complied with, and the final certificate of entry has been made on which the patent issues. Until this time the land cannot be properly said to be segregated from the public domain, so as not to be the subject of a Congressional grant.

I cannot concur in this view. No principle is more firmly established in the administration of the public land laws, than the one that an uncanceled homestead entry, *prima facie*, valid on the records, is a segregation of the land embraced thereby. Gilbert *v.* Spearing (4 L. D., 463). Land thus segregated is not open to sale or other disposition, hence it is not "public land," as that term is used in the acts making grants to railroad companies. On this point the court in the Bardon case say:

> The grant is of alternate sections of public land, and by public land, as it has been long settled, is meant such land as is open to sale or other disposition under general laws. All land, to which any claims or rights of others have attached, do not fall within the designation of public land.

It follows that the tract in question, being separated by the homestead entry of Kelly from the mass of the public lands, at the time the grant was made to the Company, did not pass thereunder. The motion for review must, therefore, be denied.

DONATION CLAIM—DEVISE—FINAL PROOF.

VEATCH *v.* PARK.

A donation claimant who has not fully complied with the terms of the law has no title to the land embraced within his claim that can be conveyed by devise.

Section 8 of the donation act of September 27, 1850, prescribes no limit as to the time in which the heirs of a claimant shall file proof of compliance with law up to the time of the settler's death, and the failure of the widow to submit such proof for a term of years does not defeat her right to perfect title under said act.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

The case of Frances H. Veatch *v.* M. F. Park is before me on appeal of the latter from your decision of August 18, 1891, holding that Park is not entitled to perfect title to his homestead entry, made June 10, 1889, on the N. ½ of the SE. ¼ and the E. ½ of the SW. ¼ of Sec. 28, T. 18 S., R. 3 W., Roseburg, Oregon.

The record discloses the following facts:

Daniel S. Davis became a resident of the State of Oregon in June, 1852. Under the act approved September 27, 1850 (9 Stat., 496), known as the donation act, he, on December 29, 1853, filed notice, No. 3728, accompanied by proof of his residence upon and cultivation of the tract above described, by two witnesses, George N. Rinehart and Peter S. Morton. On September 19, 1856, he married Frances H. Brown (appellee herein), and resided with her upon the land until March, 1857, when he died, having lived upon the land about three years and three months. His only surviving heir was his widow. He left a will, by the terms of which he bequeathed to his wife, Frances H. Davis, "one half of my property . . . . . and I give and bequeath my land to Francis Marion Davis, my brother." There was no formal admittance to probate of the will, but Silas Brown was appointed executor of the same and gave bonds as such.

The land thus bequeathed is thought to be the land now in contest, since the testator appears to have claimed no other real estate.

Some time after the death of Daniel S. Davis, Francis M. Davis, to whom he attempted to devise the land, sold the same to James Stewart. A certified abstract from the records shows that said conveyance was by warranty deed executed, January 13, 1864, for the consideration of $500.

Stewart has been in possession of the land since the purchase, and has about thirty acres of the same in cultivation, the residue being enclosed with other lands belonging to him.

After the death of the donation claimant (in 1857), his widow (appellee) removed from the land and never returned to it. In September, 1867, she was married to I. M. Veatch, and has lived with him since that time in eastern Oregon, three hundred miles from the land.

When Park entered the land in 1889, the words "donation claim of D. S. Davis" were written in pencil on the township plat books opposite the said tracts, and this notice was sufficient to show that the land was not subject to entry, being segregated. John J. Elliott, 1 L. D., 303.

It appears that the notification, No. 3728, and proofs of residence and settlement of the donation claimant were transferred in 1867 from the Oregon City land office to the Roseburg office, but when Park's entry was allowed these papers appear to have been misplaced or overlooked.

Upon complaint, filed September 8, 1890, by Frances H. Veatch, alleging, substantially, the facts above set forth, and that Park well knew said facts when he made said entry, a hearing was ordered and the testimony taken before W. R. Walker, county clerk of Lane county, Oregon, October 24, 1890. Considering the same, the register and receiver arrived at different conclusions. The receiver recommended that the donation claim be canceled, and that Park's entry remain intact; the register recommended that Park's entry be canceled and Mrs. Veatch be awarded the land upon the proof offered. Upon appeal, you affirmed the decision of the register, and Park further prosecutes his appeal to this Department.

When your decision appealed from was prepared, certain papers pertaining to this case, filed in your office in 1885, were not considered, being "unnumbered and misplaced."

It appears that on August 29, 1885, James Stewart, the said transferee, filed in the local office at Roseburg what purported to be a copy of a notification, filed by Daniel S. Davis, in the Oregon City land office, (about) March 20, 1854. He also made oath that the original notification had been lost, or misplaced, and could not be found; that the said Davis resided upon and cultivated said land (now in contest) until the time of his death, or about March 19, 1857; that he purchased said lands of the successors in interest of said Davis, and "is now the owner of all right, title, and interest he had in and to said lands." In support of the notification, he also filed affidavits of J. B. Stowell and J. C. Reid, stating that they were personally acquainted with the said Davis, and know that he personally resided upon and cultivated said tracts of land, continuously, from about March 20, 1854, until his death, which occurred about March 19, 1857.

One Azariah Park (presumably father of the homestead claimant herein) also made oath that he personally knew the said Davis, donation claimant to said land, and that at the time Davis settled thereon "he was a white male citizen of the United States, over twenty one years of age," and that he emigrated to Oregon prior to the 1st day of December, 1853.

The local officers transmitted these papers to your office, and, on October 16, 1885, your office advised the register and receiver that "an

abstract or index of donation papers now on file here, which was kept by the surveyor-general of Oregon, and the register and receiver at Oregon City, shows that Daniel S. Davis filed notice No. 3728, December 29, 1853, accompanied by proof of Davis' residence on and cultivation of said tracts by two witnesses."

Your office then instructed the register and receiver to call upon the heirs and widow of said Davis to furnish certain proofs, therein given, to be filed in your office on or before March 1, 1886. The purpose of the testimony called for was to ascertain whether Davis had complied with the law up to the time of his death; his heirs, if any; when he was born; whether married or single, and, if married, to whom, when and where; and whether the heirs claim said land under the 8th section of the act of 1850 (*supra*). The letter closed with the following statement: "Pending the proceedings to determine the status of said donation, you will not allow any entry of the lands in question."

From the sworn statements of Mrs. Veatch, it appears that she was not called upon to make the proof, indicated in your said letter; on the contrary, it appears that the register and receiver neglected to carry out the instructions therein given, and ignored the order as to the disposition of the land, permitting Park, on June 10, 1889, to make entry, as above set forth.

By the terms of section 5 of the donation act (*supra*), there was granted

> to all white male citizens of the United States. . . . . above the age of twenty-one years, emigrating to and settling in said Territory (Oregon), between the first day of December, eighteen hundred and fifty, and the first day of December, eighteen hundred and fifty-three . . . . . the quantity of one quarter section, or one hundred and sixty acres of land . . . . . who shall comply with the foregoing section (Sec. 4) and the provisions of this law.

Section 4 of said act prescribes the benefits of the act to those (of the classes therein mentioned), "who shall have resided upon and cultivated the same for four consecutive years, and shall otherwise conform to the provisions of this act."

Davis, the donation claimant, having settled in the then territory after December 1, 1850, and before December 1, 1853, was only entitled to one quarter section of land. He had not resided upon the land, however, "for four consecutive years," at date of his death, and therefore had not fully complied with the terms upon which the grant was made. Having no title to the land himself, he had no power to devise it, and neither his devisee, nor Stewart, the grantee, obtained any title. Hall *v.* Russell, 101 U. S., 503.

Mrs. Veatch (appellee herein) must have known the contents of her husband's will; and her failure for about thirty-three years to assert any rights to the land as the widow and sole heir of the donation claimant, warrants the conclusion that her failure to claim the land was from an erroneous conclusion—namely: that her husband, having title in himself, had devised it to his brother. She states in an affidavit, sworn to September 3, 1890, that she "was uninstructed in the law

at the time of the death of the said Daniel S. Davis, and did not know her legal rights, and was unaware that it was necessary to make final proof on said . . . . . claim."

Section 8 of the act of September 27, 1850 (*supra*), provides:

> That upon the death of any settler before the expiration of the four consecutive years continued possession required by this act, all the rights of the deceased under this act shall descend to the heirs at law of such settler, including the widow, when one is left, in equal parts; and proof of compliance with the conditions of this act up to the time of the death of such settler shall be sufficient to entitle them to the patent.

The proof now shows that the donation claimant was a qualified entryman, and that up to the time of his death (about nine months before the expiration of the required four years of residence and cultivation) he had conformed to the provisions of the act.

These facts could have been shown by the widow, immediately after the claimant's death, but, as above seen, she "was unaware that it was necessary to make final proof," did not understand her legal rights, and doubtless supposed the title had been conveyed by her husband's will.

Section 8, above quoted, prescribes no limit to the time in which the heirs of the donation claimant shall file "proof of compliance with the conditions of this act up to the time of the death of such settler," and section 7 provides that the proof may be made "at any time after the date of such settlement."

Mrs. Davis (now Veatch) became the donee under the grant, on the death of her husband. While she was not entitled to patent until "proof of compliance," etc., had been made, yet it now appears that she was the sole heir, and her apparent neglect to submit proof for several years, can not take away rights which the law cast upon her. "On his (Davis's) death, his heirs became qualified grantees." Hall *v.* Russell, *supra*.

The decision appealed from awarding the land to Mrs. Veatch is affirmed, and Park's entry, for reasons above given, will be canceled.

PRICE OF LAND—FORFEITED RAILROAD GRANT.

THOMAS A. HOLDEN.

Lands within the primary limits of the grant to the Oregon Central company included within the forfeiture act of January 31, 1885, are by the express terms of said act reduced to single minimum, and the reduction in price thus provided for extends also to said lands within the overlapping primary limits of the subsequent grant to the Northern Pacific.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

On the 17th of March, 1892, you transmitted to the Department the application of Thomas A. Holden, to be relieved from the additional pay-

ment of $1.25 per acre for the SW. ¼ of the SE. ¼ of Sec. 6, the NW. ¼ of the NE. ¼, and the E. ½ of the NW. ¼ of Sec. 7, T. 10 N., R. 7 W., Vancouver land district, Washington, which additional payment had been required of him by your decision of April 7, 1891.

Holden made pre-emption cash entry for the land on the 21st of November, 1888. He made settlement thereon while it was unsurveyed, and has resided there continuously since. The survey showed the land to be within the primary limits of the grant for the Oregon Central Railroad Company, under the act of May 4, 1870, (16 Stat., 94), and opposite the unconstructed portion of that road, the grant for which was forfeited by act of January 31, 1885, (23 Stat., 296).

The lands are also within the primary limits of the grant for the Northern Pacific Railroad Company, under joint resolution of May 31, 1870, (16 Stat., 378), and within the limits of the withdrawal of August 13, 1870, upon the filing of the map of general route, and opposite the constructed road. The Department holds that the grant for the Central company was prior to that to the Northern Pacific company, that therefore the lands in the former grant were excepted from the latter as "reserved" lands by section three of the act making said later grant, and that upon the forfeiture of the former the unearned lands were restored to the public domain.

On the 7th of April, 1891, you advised the local officers at Vancouver, that under the ruling of the Department, in the case of William D. Baker (12 L. D., 127), the land in question was subject to disposal only at the double minimum price, and directed them to require of Holden an additional payment of $1.25 per acre.

He protested against such payment, and the register advised him to bring his case to the attention of First Assistant Secretary Chandler, of the Interior Department. Upon complying with that suggestion, he was advised that the question was one which should be submitted to the Commissioner of the General Land Office. He thereupon addressed a communication to you, on the 8th of December, 1891, in which he made a full statement of all the facts of the case. In a letter addressed to him, under date of December 23, 1891, you informed him that under the ruling of the Department in the Baker case, you could afford him no relief, and suggested that if exception be taken to this action, an appeal could be taken to the Department, when the case would come properly before it for consideration. Acting upon your information, he brings his case to the Department.

In addition to the facts already stated, it appears that some eight years ago, Holden purchased from the Northern Pacific Railroad Company the land embraced in section seven, as herein described, and placed a homestead upon that in section six. After the passage of the forfeiture act of January 31, 1885, which restored the land to the public domain, he sought to make an additional homestead entry for the land in question in section seven. This he was not permitted to do, and, according to the statement now before me, he thereupon relinquished

his existing homestead entry and made pre-emption filing for the entire tract, under the said act of January 31, 1885.

The second section of said act provided that all persons who at the date of its passage were actual settlers in good faith on any of the lands thereby forfeited, who were otherwise qualified, should be entitled to a preference right to enter the same, but in case such settlers were not entitled to thus enter or acquire such land under existing laws, they should

be permitted, within one year after the passage of this act, to purchase not to exceed one hundred and sixty acres of the same, at the price of one dollar and twenty-five cents per acre; and the Secretary of the Interior is hereby authorized and directed to make such rules and regulations as will secure to said actual settlers the benefits of these rights: *Provided*, That the price of the even-numbered sections within the limits of said grant and adjacent to and coterminous with the uncompleted portions of said road, and not embraced within the limits of said grant for the completed portion of said road, is hereby reduced to one dollar and twenty-five cents per acre.

The third section of said act repealed the act of March 3, 1875, (18 Stat., 519), which was an act for the relief of settlers on lands within railroad limits, but which did not relieve them from the payment of double minimum price for said lands.

The act of 1875 was a general law, relating to settlers upon all lands within railroad limits, as are also the other acts fixing the price of lands within said limits at two dollars and fifty cents per acre, while the act of 1885, is special, limited to "certain lands granted to aid in the construction of a railroad in Oregon." The rule formulated by Endlich (Sec. 216), to be observed in such cases, reads as follows:

Hence, if there are two acts, or two provisions in the same act, of which one is special and particular, and clearly includes the matter in controversy, whilst the other is general, and would, if standing alone, include it also; and if, reading the general provision side by side with the particular one, the inclusion of that matter in the former would produce a conflict between it and the special provision,—it must be taken that the latter was designed as an exception to the general provision.

Under this rule, I am clearly of the opinion that it was the intention of Congress to change the price of the lands in question, from $2.50 to $1.25 per acre, by the special act of 1885. This was also the view taken by your office, and by the Department, in the instructions issued under said law, on the 8th of July, 1885, (4 L. D., 15).

This rule must control in construing these acts. These two laws were standing on the books when the forfeiture act was considered, and the fact that the two grants over-lapped, and the condition of the lands in these over-lapping limits were necessarily known to Congress. In the face of these facts it is directed that all the forfeited lands in the Oregon Central grant should be disposed of at the single minimum price, without any exception being made as to the lands also within the limits of the Northern Pacific grant. Congress not having provided an exception as to these lands, this Department is not authorized to inject into the act words necessary to work such an exception.

Your action in the matter was based upon the decision of the Department, in the case of William D. Baker (12 L. D., 127). The facts of the two cases are materially different. In the Baker case it does not appear that the land involved, was within the primary limits of the grant for the Oregon Central Railroad Company. It is only stated that the tract is within the primary limits of the grant to the Northern Pacific Railroad Company. In the case at bar, the land in question was within the primary limits of the grants for both said roads. As already stated, the Department holds that the grant for the Oregon Central Company was prior to that for the Northern Pacific, and that upon the forfeiture of the grant for the first mentioned company, the lands were restored to the public domain.

It was only lands within the primary limits of the grant for the Oregon Central Railroad Company which were affected by the special act of January 31, 1885. Such lands were reduced in price by said act to one dollar and twenty-five cents per acre, but such reduction did not extend to lands situated as were those in the Baker case. It follows, therefore, that the rule laid down in the case is not applicable to the case at bar, and that you erred in applying it thereto.

The direction issued by you to the local officers on the 7th of April, 1891, to require Holden to make an additional payment of $1.25 per acre for the land in question, was, therefore, erroneous, and his application to be relieved from the payment of the same is hereby granted.

SURVEY OF ISLAND—ISOLATED TRACT—STATE SELECTION.

STATE OF IDAHO.

An order for the survey of an island in a meandered river may be properly made, where it appears that said island existed substantially at the date of the survey of the riparian lands as at present, and should have been included then in the public surveys.

It is within the discretion of the Commissioner of the General Land Office to sell an island thus surveyed as an isolated tract, or allow its disposition under the general laws for the disposal of the public lands; a pending application of the State, therefore, to select the same should be respected, under the preferred right accorded by the act of March 3, 1893, when the survey is made, if the land is subject to such selection.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

I am in receipt of your letter of May 8, 1893, enclosing an application signed by Frank A. Fenn, selecting agent, state board of land commissioners for the State of Idaho, for the survey of an island situated in Snake river in sections 14, 15, 22 and 23, T. 3 S., R. 34 E., Idaho, in order that it may be brought into market for disposal and selection for Insane Asylum purposes, under act of Congress, approved July 3, 1890, admitting the State into the Union, (26 Stat., 215).

It appears that notice of this application was duly served upon J. Acuff and A. L. Clark, the owners of the main lands on the adjacent bank of the river, and they acknowledged the service of said notice, but allege no ownership of the island, nor do they offer any objection to the survey of the same.

The first question to be determined is this: Is said island subject to survey as public land, and as a part of the public domain? It is clear that at the time the lands on the banks of the river, opposite this island, were surveyed in 1879, said island existed substantially as it exists to-day. It does not appear why the lines of the public survey were not extended over it at that time. The river was meandered, but whether it is navigable or not does not appear.

In the matter of the application of N. J. Paul to survey an island in Loup River, Nebraska, my predecessor found on June 10, 1892, (Press Copy No. 245, p. 271) that the island was in existence at the date of the survey of the township in which it was located, viz:, 1868, and said: "This being true, I see no reason why the same should not be surveyed."

And this finding was in the face of a claim by one, Scott who alleged that said island "lies mainly east" of lot one which he owned.

In the case of Childress, *et al. v.* Smith (15 L. D., 89), the main question involved was the ownership of an island in White River, Arkansas. The lands on the bank of the river were surveyed, and the river meandered in 1821, but the island was not surveyed until 1854. It was contended by those who owned the land on the bank of the stream, title to which had been derived from the government under the survey of 1821, that they were the owners also of the island which was claimed by a homestead settler under the survey of 1854.

My predecessor held that the ordering of the survey in 1854, was a determination by the Land Department that the land belonged to the government, and he sustained the claim of the homestead entryman. In discussing the question of the ownership of the land on the island, he said it would depend, among other things, upon the existence of the island, as such, at the date of the survey of the adjacent lands on the bank of the river, in 1821; the inference clearly being, that the island, if then in existence, should have been surveyed as public land, when the lands on the bank of the river were surveyed.

This appears to be the doctrine of the Department, and the extension of the lines of survey is but the completion of the work which should have been done when the surveys of the main lands on the banks of the river were made.

I think the application of the survey of this island should be granted. In section 2455, R. S., it is provided that:

> It may be lawful for the Commissioner of the General Land Office to order into market . . . . such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale.

It is thus entirely discretionary with the Commissioner to sell this isolated tract (island) when surveyed, or to allow it to be disposed of under the laws for the disposal of the public lands.

Under the act of March 3, 1893, making an appropriation for the survey of public lands, the State of Idaho, among others, is allowed a preference right to select lands in satisfaction of the grants made to her by the act of admission. Should this tract be surveyed, and should it be found in the class of lands subject to such selection by the State, the application on file should be respected.

The act approved August 5, 1892, making an appropriation for the survey of public lands, provides that for the survey of "lands heavily timbered, mountainous, or covered with dense undergrowth" in the State of Idaho, rates not exceeding $25, $23 and $20 may be allowed with the approval of the Secretary of the Interior.

There is nothing in the record to indicate that the land on this island is of the character above specified; on the contrary, the indications are that it is not of this character; it is alleged that it is used for the purpose of pasturage, and for the cutting of wood.

You recommend that if the land is of such a character as to warrant it, the special maximum rates, $25, $23 and $20, be allowed for the survey, and you request authority to instruct the surveyor general accordingly.

I cannot approve this request, for the reasons above stated; I see no authority of law for the payment of such rates for lands of the character this island appears to be.

As before stated, I am of the opinion that this island is subject to survey, but the work must be done at the rates provided by law.

PRACTICE—MOTION FOR REVIEW—RULE 78.

FICKERT *v.* SPENCER.

A motion for review must be accompanied by an affidavit of the applicant or his attorney that the motion is "made in good faith and not for the purpose of delay," and this requirement is not met by an affidavit of the attorney as to the verity of the matters stated in the motion.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

On the 27th of February, 1893, you transmitted, on the part of Mary L. Fickert, motion for review of departmental decision of November 26, 1892, in the case of said Fickert against Robert M. Spencer, in which the appeal of Fickert from your decision of February 8, 1892, was dismissed because the same was not filed within the time prescribed by the Rules of Practice. The land involved is the SW. ¼ of Sec. 8, T. 32 S., R. 31 E., Visalia land district, California.

On the 8th of May, 1889, Spencer filed application to purchase said land, under the act of June 3, 1878, (20 Stat., 89). On the 6th of June, 1889, Fickert filed her pre-emption declaratory statement for the same land, alleging settlement May 21, 1889, and when Spencer offered his final proof, she filed a protest, alleging that said land was more valuable for agricultural purposes than for its timber.

A hearing was had, and on the 20th of August, 1890, the local officers decided in favor of Spencer. On the 9th of May, 1891, you affirmed their judgment, and held Fickert's declaratory statement for cancellation, and approved and accepted Spencer's proof.

Her appeal to the Department from your decision was dismissed on the 26th of November, 1892, on the ground that it was not filed within the time prescribed by the Rules of Practice.

In the motion before me, I am asked to review that decision, to find that said appeal was filed, or at least transmitted, within the time allowed, and to reinstate the same, in order that it may be considered and decided upon its merits.

Rule 78 of the Rules of Practice provides that "motions for rehearing and review must be accompanied by an affidavit of the party, or his attorney, that the motion is made in good faith, and not for the purpose of delay."

No such affidavit accompanies the motion in this case. The attorney makes oath that he knows the contents of the motion papers, and that "the same is true to his own knowledge, except as to the matters which are therein stated on his information and belief, and as to those matters he believes it to be true."

The Rules of Practice were adopted for the government of the Department and subordinate offices in land cases, and attorneys having such cases in charge, must comply with said Rules, or suffer the consequences of a disregard thereof.

The motion before me is not in compliance with Rule 78, of the Rules of Practice, and it is therefore dismissed.

PRIVATE CLAIM—SECTION 3, ACT OF MARCH 3, 1819.

D. C. HARDEE (ON REVIEW).

The third section of the act of March 3, 1819, is limited to claims based upon inhabitancy and cultivation "not having any written evidence of claim reported," and does not operate to confirm a claim reported in the list of claims, founded on orders of survey, which ought not to be confirmed.

Secretary Smith to the Commissioner of the General Land Office, June 2, 1893.

This is a motion filed by D. C. Hardee to review the decision of the Department of April 4, 1889 (8 L. D., 391), affirming the action of your

office in refusing to approve certain certificates of location, issued to him as the legal representative of James Bryson, deceased, by the United States surveyor-general at New Orleans, Louisiana, under the act of June 2, 1858 (11 Stat., 294), in satisfaction of a certain private land claim for six hundred arpens in that State.

The motion is based mainly upon the ground that it was error to hold that said claim was not confirmed by the third section of the act of March 3, 1819 (3 Stat., 528), for the reason that said section only confirmed claims based upon residence and cultivation without any evidence of title.

The third section of said act of March 3, 1819 (*supra*), under which appellant insists that said claim was confirmed, is as follows:

> That every person, or his or her legal representative, whose claim is comprised in the lists, or register of claims, reported by said commissioners, and the persons embraced in the list of actual settlers, or their legal representatives, not having any written evidence of claim reported as aforesaid, shall, where it appears by said reports or by the said lists that the land claimed or settled on had been actually inhabited or cultivated by such person or persons in whose right he claims, on or before the fifteenth day of April, one thousand eight hundred and thirteen, be entitled to a grant for the land so claimed, or settled on, as a donation: *Provided*, That not more than one tract shall be thus granted to any one person, and the same shall not contain more than six hundred and forty acres; and that no lands shall be thus granted which are claimed or recognized by the preceding sections of this act.

The list or register of claims, reported by said commissioners, referred to in said act, is the list reported by Commissioner Cosby to Congress, January 7, 1813 (Am. State Papers, Green's Ed., Vol. 3, p. 6), made in accordance with the provisions of the act of April 25, 1812 (2 Stat., 713), in which the claims were classified as follows: 1st, "Register A," claim founded on complete titles; 2d, "Register B," claims founded on order of survey, which ought to be confirmed; 3d, "Register C," claims founded on alleged grants, which were not valid; 4th, "Register D," claims founded on orders of survey, which ought not to be confirmed; 5th, a list of anomalous claims; 6th, a list of actual settlers; and, 7th, a supplemental list of actual settlers.

The claim of James Bryson, under whom Hardee claims, is embraced in "Register D," founded on orders of survey, which the commissioner reported ought not to be confirmed.

In the decision sought to be reviewed, it was held:

> It is manifest that the claim of Bryson was not confirmed by either of said sections for the reason that it was not founded on a complete grant, as contemplated by the first section, and since it was not recommended for confirmation by said commissioner, although founded upon written evidence, it does not come within the provision of the second section of said act. Nor does the claim come within the provisions of the third section of said act of 1819, because that section applies, by its express terms to claims based upon inhabitancy and cultivation "not having any written evidence of claim reported as aforesaid."

It is apparent that the commissioner, in reporting upon the claims founded on orders of survey, which, in his opinion, ought not to be

confirmed, did not take into consideration the question of settlement and cultivation by the claimant, for the reason that in such cases inhabitancy and cultivation is not material, but in the list of actual settlers, who had no written evidence of claim, the date of inhabitancy and cultivation was the sole question that was determined by the commissioner, and it is evident that the third section of the act aforesaid had reference solely to this class of claims, and confirmed only those where it appeared from said reports that the land claimed or settled upon had been actually inhabited or cultivated, by such person or persons in whose right he claims, on or before the 15th day of April, 1813.

It is urged by the appellant that "Bryson, being an actual settler prior to 1813, was in no worse condition with an incomplete title in his pocket, than he would have been without it."

This was precisely the question presented to the Department in the decision now under review, and, from a careful re-examination of the question, I see no reason for disturbing said decision.

The motion is denied.

RIGHT OF WAY—RESERVOIR SITE.

FIRST NEW MEXICO RESERVOIR AND IRRIGATION CO.

A river bed may be included within a reservoir site where it is satisfactorily shown that it carries no water during the season when water is most needed.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1893.

I am in receipt of your letter of June 17, 1892, transmitting a copy of the articles of incorporation and due proof of the organization of "The First New Mexico Reservoir and Irrigation Company" of Roswell, Lincoln county, New Mexico, also three maps in duplicate, one representing certain canals, one a storage reservoir, the other a distributing reservoir. It also filed its application for the approval by the Secretary of the Interior of these papers and maps that it may have the benefit of sections 18 to 21 inclusive of the act of March 3, 1891 entitled "An act to repeal timber culture laws and for other purposes," (26 Stat., 1095).

The company has utilized what it calls a dry arroyo in constructing one canal. This begins in dam No. 2 of its storage reservoir in the south-east corner of Sec. 16, T. 12 S., R. 22 E., which said point is S. 46° 08′ W., 1386 feet from the middle corner on the east line of section 16, thence by curves to a point in the NW ¼ of NW ¼ of Sec. 17, T. 12 S., R. 23 E., a distance of 29,595 feet or 5.6 miles where it flows into another canal belonging to this company. Another canal begins in dam No. 1 of said storage reservoir N. 5° 34′ W., 2769 feet from the south-east

corner of section No. 4, T. 12 S., R. 22 E., and follows the course of the Hondo river in a north-eastern direction, and empties into the distributing reservoir of said company at a point 715 feet north of the center corner on south line of section 26 in said township, being 15,300 feet or 2.9 miles in length. Another canal begins at a point in the lower dam of said company's distributing reservoir in the NW ¼ of Sec. 36, T. 11 S., R. 22 E., which point is referred to the north-east corner of said quarter section, it being S. 33° 44′ W. 1535 feet from said corner, thence following the channel of the Hondo river in a south-eastern course to a point indicated as "station 112" on the line between the SE ¼ and SW ¼ of the NE ¼ of Sec. 6, T. 12 S., R. 23 E., a distance of 11,200 feet, 2.12 miles. Here the canal leaves the river, turning south. This is noted as a separate canal, and it runs 40,095 feet, (7.6 miles) to a point 170 feet east of the south-west corner of Sec. 34, T. 12 S., R. 23 E., N. M. Pr. M. The total length of the four canals is 18.21 miles, all in Chaves county, Roswell land district, N. M. They appear to have been surveyed and mapped in compliance with law and the rules and regulations of the Department, and are approved subject to all existing valid rights. The company's "storage reservoir" covering 3163.45 acres, inclusive, of the fifty feet outside the water line is situated in T. 12 S., R. 22 E., except a very small part on section 13 of T. 12 S., R. 21½ E. This reservoir is made by constructing a dam across the Rio Hondo, the initial point being the south end of the center line of crown of dam which referred to the north-east corner of Sec. 9, T. 12 S., R. 22 E., is S. 71° 48′ W. 1368 feet therefrom. This dam is 2500 feet in length, and the center line bears N. 33° 38′ W. to a point near the center corner of section No. 4. A meander line runs by curves to a point on the Hondo river at the middle of the north and south line of section 5, six hundred and sixty-one feet south of the middle corner on the north line of said section. The large body of the reservoir lies south of the river, extending to sections 19, 20, and 21 of this township. This reservoir takes in about two miles of the Rio Hondo. It has been held that a person or corporation can not by damming a river, flowing the water back, running a traverse or meander line around it and calling it a reservoir site thereby become the sole owner of the natural water supply. See Penasco Reservoir case (13 L. D., 683), in which it was sought to appropriate several miles of river front by the construction of a dam across the river. The Penasco is a river flowing perpetually, and furnishing water to the adjacent land owners for domestic use, for watering animals, and for irrigation purposes at all seasons of the year.

In the case of Colorado Land and Reservoir Company (13 L. D., 681), it was asked that certain lake beds be approved as reservoir sites, and it was said in the decision that it was evidently the intention of Congress to encourage the much needed work of constructing ditches, canals and reservoirs in the arid portions of the country:

> But it is quite clear that it was not intended that a person or corporation could by

running a boundary line around a natural lake that is already a source of water supply thereby become the proprietor of it. . . . If, however, these so called lakes are merely depressions in the surface, which, although they may collect water in the rainy season, furnish no supply in summer, there can be no good reason why they should not be utilized as reservoir basins.

This principle is applicable to river and arroyo beds or channels as to lake beds. The adjoining proprietors cannot be injured by granting a dry channel to a person to use as a storage for water, by damming it and holding the spring floods until they are needed in the season of drought. The record shows that this reservoir is some distance up the Hondo from its confluence with the Pecos, and the affidavits show that along this portion of the river, while it carries a good volume of water during the season of melting snow in the mountains where it takes its rise, yet the bed of the river is dry during a large portion of the year, and this when water is needed. I can see no good reason why this portion of the river bed should not be utilized and absorbed in a reservoir along the space sought to be appropriated. The other reservoir, called the "distributing" reservoir lies in township No. 11 of ranges 22 and 23. It covers an area of 2136.23 acres, including the fifty feet outside the water line. This reservoir also covers a small portion, less than a mile, of the Hondo river. The initial point of this survey is in the SE¼ of the SW¼, Sec. 25, at the north end of the dam, being N. 33° 27′ W., 1032 feet from the south-east corner of the SW¼ of Sec. 25, T. 11 S., R. 22 E.

These reservoirs appear to have been accurately surveyed and noted, and inasmuch as the small portions of the river included are of that part of the river which furnishes no water of any service to the people in the vicinity during the dry portions of the year, I do not consider that the approval of these maps is in conflict with the decisions heretofore made by the Department. These maps of the reservoirs are therefore approved subject to all existing valid rights.

This view of the matter appears to be in accordance with the spirit of joint resolution of Congress, approved March 20, 1888, (25 Stat., 618), and the provision in the act making appropriations for sundry civil expenses of the government, passed March 2, 1889, (25 Stat., 939–961), relating to "reservoirs for the storage of the surplus water, which, during the winter and spring seasons flows through the streams" of the Rocky Mountains.

RAILROAD GRANT—ADJUSTMENT—ACT OF SEPTEMBER 29, 1890.

NORTHERN PACIFIC R. R. CO.

The Northern Pacific company is permitted to amend its selections made of the moiety to be retained on account of the constructed branch line of its road, from the lands within the common limits of the grants made for its main and branch line, and opposite the unconstructed portion of the main line, the grant for which was forfeited by the act of September 29, 1890, such amendment being necessary for the protection of transferees of the company, and not operating to increase the grant, or prejudice the interests of the government, or the rights of other parties.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1893.

I have again before me the application by the Northern Pacific Railroad Company to amend the selections made of the moiety to be retained on account of the constructed branch line of said road, from the lands within the common limits of the grants for its main and branch lines, and opposite the unconstructed portion of the main line, the grant appertaining to which was forfeited by the act of Congress approved September 29, 1890 (26 Stat., 496).

It must be remembered that within this common limit the company was entitled to a moiety of all lands within the common limit of the two grants, on account of the construction of its branch line. This moiety extended to all the lands, but that the government might be able to dispose of its moiety, the company was required to select an amount of lands within the common limit equal to one half the common area to which it would receive full title, the balance to remain to the United States subject to other disposition (11 L. D., 625). In selecting this amount, certain restrictions were placed upon the company: that is, that they take the alternate odd numbered sections, it not being the purpose to permit the company to make a pick of the lands.

In making this election, the company took generally the odd sections designated by the numbers 1, 5, 9, etc., but certain exceptions were made, in order to protect purchasers from the company of portions of the remaining odd numbered sections, the company relinquishing portions of the elected sections, equal to the amount covered by the exceptions, the difference being adjusted in the townships in which the exceptions occurred.

This was tacitly approved by this Department, and restoration ordered of the remaining lands, the same to be opened to entry upon a certain day named in the notice, viz: March 17, 1891.

On March 16, 1891, the day preceding that set for opening the lands to entry under the forfeiture act, the company filed in the North Yakima, Washington, land office, an application to amend its list of selections, on account of its moiety for the constructed branch line, so

as to retain about 13,000 acres formerly surrendered—viz: portions of sections 3, 7, 11, etc., and to relinquish an equal amount from the selected sections, viz: 1, 5, 9, etc.

The basis for said application alleged by the company was, that through an inadvertence a sale made to the Northern Pacific and Yakima Irrigation Company, on the 17th of April, 1890, was overlooked, and the amendment was desired in order to protect that company.

Upon the following day, certain parties, about fifty, applied to make entries of portions of the lands in question, under the notice of restoration, and when advised of the application to amend filed by the company, they protested against the allowance of the same, alleging bad faith on the part of the company and adverse rights in themselves.

After a full consideration of the matter by this Department, a hearing was directed, in order that the facts relative to the alleged sale of these lands and the rights of the adverse claimants might be fully presented for the consideration of this Department. At this hearing all parties were represented, and after a full consideration of the testimony, the local officers and your office both find that the irrigation company, in whose interest the amendment is desired, is a regularly organized company, independent of the Northern Pacific Railroad Company; that the alleged sale was made in good faith, and upon the strength thereof, said irrigation company has expended a large amount, nearly $300,000 in work upon surveys and the building of its canal.

There can be no question that the United States might hold the company, and thereby its transferees, to the election heretofore made, but it would seem that the irrigation company is entitled to the equitable consideration of this Department, and that the application should be allowed, unless the granting thereof will interfere with the rights of other persons or of the United States in the premises.

As to the adverse claimants' rights, the Commissioner reports that only six have performed any act looking to a settlement upon the land, and that four of these merely cut sage brush, or made a small clearing for the purpose of the erection of a house. The remaining two have built houses upon the land, valued at $75.

The report of the local officers states that, "there are no settlers on the land," consequently the applicants are not in a position to urge any particular equity in themselves, further, I am of the opinion that they would not have gained any rights by making settlements thereon prior to the day set in the notice of restoration.

It is true that the negligence on the part of the railroad company led two of the claimants into making improvements valued at $75.00 each, but these were only made with the intention of securing an advantage over other intending settlers, and I can see no good reason in making exception in their cases.

From your report, it appears that one H. J. Williams was, on April

15, 1891, allowed to make homestead entry of the E. ½ of the NW. ¼ and lots 1 and 2, Sec. 19, T. 10 N., R. 22 E., being part of the land in question, but he is reported to have made no improvements, never resided upon the land, and could not be found at the time of the hearing.

As to the interest of the United States, the Commissioner reports "that the lands which the company proposes to surrender in lieu of them are in their natural state of equal, if not greater, value." It will therefore be seen that to grant the application can in no wise interfere or prejudice the rights of the United States or of other parties; while to deny the application must result in great loss to the projectors of this canal very necessary in the future development of this part of the country, and ultimately to those persons who in the future may desire to settle upon and make homes in the portions of the country intended to be aided by the furtherance of this great enterprise.

The company's grant is in no wise increased thereby, as the amount retained under the selection but equals the area originally taken—that is, one half of the common area.

I have therefore decided to grant the application to amend and to reject the applications offered in conflict therewith; also, to direct the cancellation of Williams's entry, erroneously allowed during the pendency of the company's application.

PRACTICE—REHEARING—NOTICE.

TIENSVOLD *v.* BELL.

An application for a rehearing, made by a contestee who satisfactorily shows want of notice of the former hearing, and a meritorious defense, should not be rejected because not served on the opposite party; but the contestee should be required to serve said party with notice of said application.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1893.

James D. Bell has applied for an order directing you to transmit to the Department the record in the case of Ferdinand E. Tiensvold against said Bell, involving his timber-culture entry for the NW. ¼ of Sec. 35, T. 32 N., R. 41 W., Chadron land district, Nebraska.

In his application he sets forth that said Tiensvold instituted contest against his timber-culture entry, on the allegation of failure to comply with the law during the year 1891; that no notice of said contest was ever served upon him; that notice was published in the "Rushville Standard," a paper printed thirty miles from the land, when it should have been published in the "Gordon Journal," within ten miles of the land; he knew nothing of the contest until after the hearing had been had, and decision rendered against him; that he had fully complied

with the timber-culture law during the year 1891, and all preceding years, and could have shown that such was the fact if he had known of the trial. His application is sworn to, and is accompanied by the affidavits of numerous witnesses who state that they assisted in plowing said land and planting tree-seeds upon the same in 1891, or that they were cognizant of the fact that such work was done.

The defendant applied for a rehearing, on the ground that due service of notice of the hearing had not been made upon him, and that if opportunity were afforded him he could show that he had fully complied with the law. This application was refused. Hence this application for certiorari.

One of the grounds upon which you refused his application for a rehearing was, that he had not served notice of said application upon the contestant. I find in the record that the notice of this application for certiorari has been properly served.

Under the circumstances hereinbefore set forth, and in view of the appellant's allegation, supported by his corroborated affidavit, that if he had received notice of the hearing he could have shown that he had fully complied with the law, the proper practice on your part would have been to direct him to serve upon the opposite party notice of his application for a rehearing. Inasmuch, however, as notice of the motion for certiorari has been served upon the opposite party, in which the facts of the matter have been fully brought to his attention, and as, from the facts presented, I am led to believe that an injustice would be done the defendant by the cancellation of his entry as ordered by your letter of July 20, 1892, I have to direct that the record in the case be transmitted to the Department for its consideration.

RAILROAD GRANT—INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. CO. *v.* RENIE ET AL.

The right of indemnity selection is defeated by the intervention of a settlement right or entry, after revocation of the indemnity withdrawal and prior to such selection.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1893.

The Northern Pacific Railroad Company has appealed from your decision of March 23, 1892, rejecting its application to select certain tracts of land in Olympia land district, Washington, as indemnity for lands lost within its primary limits, because prior to such application on the part of the company the said several tracts had become subject to the claims of settlers and entrymen under the land laws.

The following are the tracts applied for, together with the respective claimants therefor:

Lots 3 and 4, Sec. 7, T. 20 N., R. 8 W., entered under the homestead

law by Edward Renie, November 12, 1888, commuted to cash June 12, 1890.

* * * * * * *

[Description of twenty-six entries and filings omitted.]

Those lands are all within the indemnity limits of the grant to said company, the withdrawal for which was revoked August 13, 1887 (see Atlantic and Pacific R. R. Co., 6 L. D., 84, and note at foot of decision).

The company applied to select these tracts November 10, 1891, but, subsequent to the revocation of the order of withdrawal, and prior to the company's application to select, they had been entered and settled upon as above set forth. They were, therefore, not subject to the company's right of selection, and your judgment is correct. (See page 91 of case above cited; also Central Pacific R. R. Co. *v.* Dole, 8 L. D., 355.)

MINERAL LAND—PLACER CLAIM—STONE LANDS.

VAN DOREN *v.* PLESTED.

Land containing a deposit of sandstone of a superior quality for building and ornamental purposes, and valuable only as a stone quarry, may be entered as a placer claim under the general mining laws.

In the disposition of cases before the local office the register and receiver should give the testimony a thorough consideration, and set forth briefly in their opinion the facts on which their judgment is based.

Secretary Smith to the Commissioner of the General Land Office, June 9, 1893.

The land involved in this appeal is the NE. ¼, Sec. 14, Tp. 33 S., R. 64 W., Pueblo, Colorado, land district.

This tract was formerly covered by the homestead entry of one Crescencio Montoya, and the same was contested by W. A. Van Doren and William Plested. The former filed his affidavit April 1, 1888, alleging fraud in said entry, and the latter averring failure to comply with the law in the matter of residence and cultivation on the part of the entryman, and that the land was more valuable for a stone quarry than for agricultural purposes. This affidavit of contest is alleged to have been filed in the latter part of April, 1888.

A hearing was had, and the case finally decided by the Department September 26, 1889 (L. and R., 186, p. 362), wherein the concurring decisions of the register and receiver and your office were affirmed, holding said entry for cancellation because of failure to comply with the homestead law, but it was held that:

The question as to whether the land is mineral and subject to entry under the mineral laws, as held by your office, is not passed upon in this decision. Neither of the contestants appeal from your office decision. (In deciding the case you found the tract "to be mineral in character and subject to entry under the mineral laws.")

Should they, or either of them, make application to enter the land, the question as to its character and the preference right of entry as between them will then be presented for determination.

The local officers report that "all parties were notified of this decision by registered mail October 15, 1889."

It is stated in this same report that:

The records of this office further show that a petition of Van Doren's was filed prior to the decision of the local officers, praying that in case the land was decided to be mineral, he, because of having first filed application to contest, be allowed a preference right to enter twenty acres of the tract under the mineral laws. This was dismissed by the Hon. Commissioner, as no preference right to enter analogous to that under the pre-emption, is known under the mineral laws.

I do not find in the files, however, any papers referring to this; hence, I can not give the date.

On September 28, 1889, William Plested filed an application to enter the tract as placer mining ground, the same having been located as such by eight different persons, in April, 1888, and transferred to the applicant. The application was received and filed in the local office, and publication ordered October 14 following, as required under the rules.

On December 14, 1889, Van Doren filed a protest against Plested's application, alleging that he is the person who contested Montoya's entry; that he claims the right to enter said land as a homestead; that the land is more valuable for agricultural purposes than any other; that it is not mineral land; that Plested's application is not made in good faith, but for the purpose of defrauding affiant; that the various placer locations were not made in good faith, and he asks that a hearing may be ordered to determine the character of the land. Accompanying this protest was his application to enter the land as a homestead.

It is stated that on the same day Frederick Archibald presented his pre-emption declaratory statement for the tract, which was rejected, but on appeal he was permitted to intervene; also that "on January 6, 1890, said Plested filed his homestead application for said tract, alleging settlement October 12, 1889; this application was filed to secure title to the land, should it be adjudged non-mineral." I do not find any of the papers in connection with either of those matters in the files.

A hearing under the Van Doren protest was ordered, and, after service on the defendant, he filed a motion to dismiss the protest, on the ground that the issue involved had been adjudicated in the case of Van Doren *v.* Montoya. The local officers sustained the motion, but on appeal it is stated that you overruled the same and ordered the hearing to proceed.

By stipulation of attorneys, the testimony was taken before the clerk of the district court, at Trinidad, and transmitted to the local office. In rendering their decision the register and receiver, after reciting the

facts as shown by the records of their office, state that owing to insufficient clerical force, they are compelled to do the clerical work, and—

> It has, therefore, been found impossible for the officers personally to give the time necessary to examine the testimony to determine the preponderance of reliable evidence upon every proposition advanced by one and denied by the other or to examine the decisions to determine the weight of authority upon all the questions involved.
>
> Believing, however, that delay is practically a denial of justice, we decide in favor of the contestee, upon the arguments of counsel, together with memoranda of testimony by the contest clerk, and recommend that mineral application No. 251 of Wm. Plested be passed to patent.

Van Doren appealed, and you, by letter of August 11, 1891, reversed their decision, and held "that said tract is non-mineral land," that "it is simply a quarry of stone for general building purposes, and as such not subject to entry under the mineral land laws." You also decided that:

> Nothing herein is to be construed as an award of the land to either Van Doren, Plested, or Archibald, under the agricultural laws. Their respective rights will have to be determined hereafter in the usual manner.

Plested appealed, assigning as error, substantially, that your decision is against the law.

The only question presented by the record is as to the character of the land, and the appeal does not question your findings of fact, but simply claims that you erred in deciding that the case of Conlin *v.* Kelly (12 L. D., 1) should control the judgment in this.

The case at bar is almost exactly similar in all essential features to that of McGlenn *v.* Wienbroeer (15 L. D., 370). The lands join; the testimony as to its character is substantially the same, in some instances the same witnesses testified in both cases. In that case a distinction was drawn between it and Conlin *v.* Kelly, *supra*, and it was decided that the rule in the latter could not control in this. Hence, it is only necessary to say that it was error to apply the doctrine in Conlin *v.* Kelly to this character of cases.

The attempt of the protestant to show that the land is valuable for agricultural purposes was, in my opinion, far from convincing. It is shown that the land is on a mesa, rising abruptly from the Purgatoire river to an altitude of about four hundred and eighty feet above the river, and that the elevation of the mesa above the so-called low lands of the tract is from one hundred and fifty to two hundred and fifty feet. The character of the land on each mineral location is said to be very steep bluffs at the edge of the mesa from ten to sixty feet in height, below which is a talus of débris extending to the low land. The perpendicular bluffs are composed of massive sandstone, in stratified layers, from fifty to sixty feet in thickness. The talus, upon which it is claimed vegetation grows, is composed of earth with stones of various sizes, chiefly, however, of decomposed sandstone lying upon shale. The estimate of the various witnesses as to the amount of land that could,

under favorable circumstances, be cultivated varies from two acres to sixty, but I think a fair preponderance of the evidence shows that it would not exceed eight. None of it has ever been cultivated and certain it is that it can not be without irrigation, and I am satisfied from the testimony that it is a practical impossibility to ever successfully convey water upon the tract. And I think it is proved, by witnesses who have been engaged in the stock business in that vicinity for from ten to thirty years, that it possesses no value as a stock range in its present condition, and, granting that water could be found on or conveyed to it for stock to drink, I think the area that could be grazed is so small as to be wholly profitless.

On the other hand, it is indisputably shown that the sandstone is of a superior quality for building and ornamental purposes, and as such is extensively utilized, and that the land as a matter of fact is only valuable for a stone quarry. Therefore, following the rule announced in McGlenn *v.* Wienbroeer, *supra*, it was error in not permitting it to be patented as a placer.

Your judgment is therefore reversed.

I can not close this case without calling your attention to the lax manner in which the local officers arrived at their judgment. It matters not that they may, by accident or chance, have arrived at a proper conclusion in deciding the case. The fact that they admit, in the face of their peremptory instructions, that they did not examine the testimony to ascertain the facts disclosed is a practice too reprehensible in its nature to be passed over in silence.

Rule 37 (Rules of Practice) says:

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

This rule applies specifically to trials had before them. Subdivision 4 of rule 35, in regard to oral testimony taken before other officers, as in this case, provides:

> On the day set for hearing at the local office the register and receiver will examine the testimony taken by the officer designated, and render a decision thereon in the same manner as if the testimony had been taken before themselves.

Rule 51 prescribes:

> Upon the termination of a contest, the register and receiver will render a joint report and opinion in the case, etc.

These rules clearly and unmistakably require the local officers to examine the testimony in all cases where it is necessary, in order that they may render an intelligent judgment on the facts disclosed. They are required to write an opinion in the case. To enable one to do this certainly requires a familiarity with the evidence, and to render a judgment without such a knowledge is a travesty upon justice. The manifest injustice of such a practice is too patent for discussion. In matters of fact within their jurisdiction, the judgment of the register and

receiver is binding upon the parties subject to attack only by appeal. They should therefore give the testimony in all cases such thorough consideration as will aid them in arriving at a conclusion, and the facts upon which they base their judgment should be briefly set out in their opinion. This is for the double purpose of enabling the appellant to intelligently prosecute his appeal and the appellate tribunal to have the benefit of the opinion of the examining court. It has become a well established rule in this Department that the concurring decisions of the local officers and the Commissioner on questions of fact shall prevail, or, at least, have great weight, in the consideration of all appeals in this office. If the practice of the Pueblo office, as quoted above, were to prevail in the local offices, it would destroy the efficiency of this rule.

HOMESTEAD—SECOND ENTRY.

JOHN FRUNDT.

The amendment of section 2289 R. S., by section 5, act of March 3, 1891, does operate to confer the right to make a second homestead entry upon one who had theretofore entered a quarter section of public land, under the homestead laws

First Assistant Secretary Sims, to the Commissioner of the General Land Office, June 8, 1893.

John Frundt has appealed from your decision of January 7, 1892, sustaining the action of the local officers in rejecting his application to make homestead entry of the SE. ¼ of Sec. 6, T. 129, R. 49, Fargo land district, North Dakota.

The rejection was based upon the facts, (1) that he had before perfected a homestead entry; (2) that the tract he applied to enter is embraced in the prior homestead entry of one Wiley Marsh.

His appeal is based upon the contention that the 5th section of the act of March 3, 1891, "To repeal timber-culture laws, and for other purposes," so amended section 2289 of the Revised Statutes as to permit him, notwithstanding he has perfected one homestead entry, to make another.

An examination of said section, as amended, shows that it confers no rights in addition to those granted by the original section. The only provision added by the amendment is:

> 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.

This is a limitation of the homestead right, and not an enlargement of it. Some persons who might have made homestead entry under the original section are disqualified from so doing under the section as amended; but nobody who was disqualified under the original section, has such disqualification removed by the amended section. By both

the original and the amended section, a qualified settler was declared "entitled to enter *one quarter section*, or a less quantity, of unappropriated public land." The appellant has entered "one quarter-section of public land"—and his application to make another homestead entry was properly rejected.

Your decision is affirmed.

APPLICATION FOR SURVEY APPEAL ADVERSE CLAIM.

E. Y. BRASHEARS ET AL.

It is a discretionary matter with the Land Department whether the public surveys shall be extended over a specific tract of land; and an appeal will not lie from the Commissioner's refusal to allow an application for such action.

An application for survey should not be considered in the absence of notice to adverse claimants.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 10, 1893.

I am in receipt of your letter of October 1, 1892, transmitting certain papers filed by E. Y. Brashears, J. G. Albritton and T. J. Brashears, in the land office at Greensburg, Louisiana, among which is an appeal by said parties from your decision of July 30, 1892, refusing to direct a survey over certain lands in said district.

It appears from the papers before me, that the persons above named applied to have the lines of the government survey extended over a tract of land, designated as section "43," of T. 5 S., R. 3 E., in said Greensburg land district, and that on June 13, 1876, your predecessor rejected said application because said land had been segregated by a survey of a private grant.

No appeal was taken from this action, but on June 24, 1892, the attorney of the parties applied to the surveyor general of Louisiana for an extension of the lines of the public survey over the tract, in disregard of said decision. The surveyor general transmitted this application, and certain affidavits of the parties, to your office, and recommended the granting of the application, which asked to have the survey of the private grant "obliterated from the face of the township map". They aver in their affidavits, in support of the application, that they are settlers on the land, and that it is unsurveyed, etc. They do not mention any adverse claimant, but there appears with the papers a survey made by a deputy surveyor, and approved by the surveyor general of Louisiana, of this land, which said survey states on the plat that it was made "in favor of Robert Sibley, under John Albritton." There also appears a "Patent Certificate, No. 66," issued to Robert Sibley.

There is a paper, showing a transfer to Thomas Green Davidson, from Sibley, of the land in controversy, from all of which it appears

that there is an adverse claimant for the land. Were all that is claimed by the appellants, true, they have no ground of appeal.

It is a discretionary matter with the Land Department whether it will survey the land or not. In a matter entirely within the discretion of the Commissioner of the General Land Office, appeal will not lie from a ruling or refusal to act. See case of George K. Bradford (4 L. D., 269–270) Not only so, but in the matter before me, no adverse claimant has been notified of the application, or of the appeal, and according to the statements of the appellants they have no complaint against any one, and have presented no issue to be tried or determined.

Your decision does not deprive them of any existing valid right, nor deny them any legal right, therefore they have no ground of appeal, and their attempted appeal is dismissed.

CONTEST—RELINQUISHMENT—PREFERENCE RIGHT.

CUNNINGHAM *v.* LONGLEY.

A relinquishment of an entry under contest, and the intervening entry of a third party, will not defeat the preferred right of a successful contestant.

A successful contestant who tenders all the fees required by the local office at the time he applies to enter, loses no right, that can be taken advantage of by an intervening entryman, if the amount of such tender is less than the legal fees.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 10, 1893.

On April 20, 1885, Mary E. Stokes made homestead entry (No. 3678) for the N. ½ of the NE. ¼, the SW. ¼ of the NE. ¼, and the NW. ¼ of the SE. ¼ of Sec. 24, T. 22 N., R. 2 E., M. D. M., at Marysville, California.

On June 7, 1886, Albert Cunningham filed an affidavit of contest against said entry alleging abandonment. That case came by appeal to this Department, and was decided April 16, 1890 (unreported), in favor of the contestant. By your letter, of April 25, 1890, to the local officers, they were notified of said decision, the cancellation of said entry, and that Cunningham was allowed a preference right of entry. This letter was received by the local officers on May 1, 1890, when they notified Cunningham and Stokes of its contents, and that the former would be allowed the usual time to enter the land.

On April 30, 1890, Alexander P. Longley filed in the local office the relinquishment of said Mary E. Stokes to the land, and at the same time he was allowed to make homestead entry (No. 4234) for the same, subject to the preference right of Cunningham.

On May 14, 1890, said Cunningham appeared at the local office, claimed his preference right, and offered to make homestead entry of said land, in pursuance of the preference right which had been awarded to him. His application papers to make such entry were

duly made out, and he then and there tendered to the register and offered to pay all fees that might be due from him in the matter of exercising his preference right, or that the register might require from him, and at the request of the register he then and there showed him the amount of $21, which was all the register requested him to show. The register then declined to receive the same, and told Cunningham that no fees would be required of him until he was permitted to make his entry. Cunningham had not then paid the fee of one dollar for the cancellation of the entry of said Stokes. Said fee had not been demanded of him, and he had never refused to pay it. On June 13, 1890, he sent the sum of one dollar to the receiver in payment of said fee, which has remained in the custody of the receiver, subject to the cancellation of Longley's entry.

On said May 14, 1890, the local officers addressed a written notice to said Longley, reciting the facts, and requiring him to appear before them on June 20, 1890, and show cause why his entry should not be canceled, and Cunningham be allowed to make entry for said land. This notice was served on Longley May 15, 1890.

On May 20, 1890, L. C. Granger, the said register, died, and the vacancy in said office thus caused was not filled on June 20, 1890, the date appointed for said hearing, and no further proceedings took place under said situation.

On June 18, 1890, the attorney for Longley presented a written motion to dismiss said citation issued on May 14, 1890, but as said office of register was still vacant, said motion was not filed until July 18, 1890, when said vacancy had been filled.

On August 13, 1890, the local officers issued a new citation to said Longley, ordering him to appear before them on October 6, 1890, and show cause why his said entry should not be canceled, "as having been erroneously made in derogation of the preference right of Albert Cunningham."

On October 6, 1890, the parties appeared, and the attorney for Longley renewed the motion to dismiss, filed July 18, 1890, and the parties agreed upon a statement of facts, which is substantially embodied as a part of the foregoing recital. A letter of the late register, dated May 16, 1890, addressed to the attorney of Cunningham, was put in evidence.

On October 31, 1890, the local officers recommended that Longley's entry be canceled, and that Cunningham be permitted to exercise his preference right of entry.

On appeal, by letter of March 21, 1892, you affirmed their decision, and held the entry of Longley for cancellation.

An appeal has been taken to this Department.

The relinquishment of Stokes was filed, and the entry of Longley was made fourteen days after the decision of this Department in favor of Cunningham in his contest against Stokes and one day before the ar-

rival of the notice of that decision at the local office. Under these circumstances such relinquishment and entry could not defeat Cunningham's preference right of entry. Pike *v.* Atkinson (11 L. D., 65); Gardner *v.* Spencer (10 L. D., 398).

Cunningham appeared at the local office and claimed his preference right within the statutory period of thirty days after notice of said decision ordering the cancellation of Stoke's entry. He was entitled therefore to the exercise of a preference right of entry, under the second section of the act of May 14, 1880 (21 Stat., 140).

Inasmuch as Longley's entry was then erroneously upon the record, it was necessary to clear the record of that entry before Cunningham could be allowed to make entry, and the local officers took the proper course in citing Longley to appear and show cause why his entry should not be canceled, and that of Cunningham allowed. Conly *v.* Price (9 L. D., 490, 493); Boorey *v.* Lee (6 L. D., 643).

The second section of the act of May 14, 1880, provides that the register of a local office "shall be entitled to a fee of one dollar for the giving of such notice" of the cancellation of an entry, but does not specify when said fee shall be paid; neither does the circular of August 13, 1886 (5 L. D., 569). Inasmuch as Cunningham was ready, when notified of the cancellation of Stokes' entry, to pay all fees that should be demanded of him, and actually paid the said fee of one dollar on June 18, 1890, before the citation issued under which the present proceedings have taken place, neither the government nor Longley have any reason to complain. As he could not make the entry awarded to him until Longley's entry was canceled, he was not called upon to tender any more fees for making an entry which it was impossible for him then to make than the amount which he did tender, and which the local officers told him was sufficient. If he tendered one dollar short of the proper amount, as contended, he can make that up when he is allowed to actually enter the land. He should not be made to suffer for the inadvertence of the local officers. If the government gets the legal fees at the time when an entry is made, it gets all that it is entitled to have, and at the time they become due. The proper fees to be paid will be a matter for adjustment between the officers of the government and Cunningham when the latter makes his entry, and it will be a matter in which Longley will then have no special concern. The latter's entry should be canceled, and that of Cunningham should be allowed.

Your judgment is affirmed.

PRE-EMPTION SETTLEMENT—TRANSMUTATION.

EDWARD ENGSTER.

The right of a pre-emptor who initiates a claim by settlement prior to the passage of the act of March 2, 1889, to transmute under section 2, of said act, is not defeated by the fact that his declaratory statement erroneously shows his settlement to have been made after the passage of said act.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 13, 1893.

Edward Engster has appealed from your decision of July 8, 1892, rejecting his application to transmute into a homestead entry his pre-emption filing for the SW. ¼ of Sec. 30, T. 14 S., R. 37 W., Wa-Keeney land district, Kansas.

The ground of your rejection was that he had already had the benefit of one homestead entry, and that his pre-emption filing, having been made after the passage of the act of March 2, 1889, could not be changed to a homestead entry under said act.

The proviso to the second section of the act of March 2, 1889 (25 Stat., 854), says:

> That all pre-emption settlers upon public lands, whose claims have been initiated prior to the passage of this act, may change such entries to homestead entries, and proceed to perfect their titles to their respective claims under the homestead law, notwithstanding they may have heretofore had the benefit of such law.

The appellant files a corroborated affidavit, setting forth that when he executed his declaratory statement he was asked when he settled on the land; that, "not knowing that it would make any difference as to his rights in the premises," he answered, on the 9th of May, 1889; that in fact he made settlement upon and had resided on the land since January 28, 1889, and had improved said land, by building a house and in other ways, to the value of not less than one hundred and twenty-five dollars, prior to March 2, 1889—at which date he was residing on the tract; that at the date of executing said affidavit he is still residing on the land, and has placed thereon permanent and substantial improvement of a value of not less than four hundred and fifty dollars; and he asks to be allowed to correct his pre-emption application so that it will correspond with the facts as set forth in said affidavit. The question at issue is, whether this can be permitted.

This Department has repeatedly held that "a pre-emptor is not estopped from proving that his settlement was made at a different and earlier date than that alleged in his declaratory statement" (Northern Pacific R. R. Co. *v.* Stuart, 11 L. D., 143, and cases therein cited; same against Sales, 12 L. D., 299).

A case very nearly similar to the one now under consideration was that of Lewis Jones (reported in 12 L. D., 361). Jones alleged settlement *on* the 2d of March, 1889,—the day of the passage of the act per-

mitting the transmutation of pre-emption filings to homestead entries in cases where a pre-emption claim had been duly initiated *prior* to the passage of said act. Therein the Department held that it was competent for Jones to prove settlement prior to the day alleged in his pre-emption application, and he was permitted to correct the date of his settlement from March 2, to February 27, 1889.

In the case at bar, it appears to be clearly shown, by the affidavit of the applicant and six corroborating witnesses, that he settled upon the land in January, 1889, and has ever since resided upon and improved the same. He should therefore be permitted to amend his application accordingly; and as his pre-emption right was "initiated" by his settlement so made prior to the passage of the act repealing the pre-emption law, he should be permitted to transmute his pre-emption filing into a homestead entry under the second section of said act of March 2, 1889.

Your decision is reversed.

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

WHITNEY *v.* GRIFFITH ET AL.

The confirmation of an entry under section 7, act of March 3, 1891, for the benefit of one who in good faith buys the land prior to March 1, 1888, is not affected by the fact that the final deed correctly describing the land was not executed until after said date.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 15, 1893.

I have examined the record in the appeal of E. C. Whitney from your decision of May 12, 1892, confirming the pre-emption cash entry of Evan J. Griffith, for lots 1, 2 and 3, the SW. ¼ of the NE. ¼ and the W. ½ of the SE. ¼, Sec. 18, T. 24 N., R. 5 E., Seattle, Washington, under section 7 of the act of March 3, 1891 (26 Stat., 1095).

Griffith entered said land April 4, 1885. November 15, 1889, his entry was suspended by direction of your office and claimant required to furnish an additional non-alienation affidavit.

Griffith could not be found, but J. W. Edwards and Henry B. Loomis, transferees, both made affidavits that the land had not been alienated prior to the issuance of final certificate. At the same time (January 24, 1890), the local officers forwarded to your office an abstract of title showing that on May 20, 1885, Griffith conveyed a certain portion of his entry, containing 59.60 acres, described by metes and bounds, to Henry B. Loomis, and that on February 17, 1888, he conveyed the remaining portion to Morgan J. Carkeek.

In the deed to Carkeek the land is described as in township *25*. To correct this mistake, the entryman executed and delivered another deed correctly describing said land. This last deed was not executed until June 30, 1888.

On January 15, 1890, E. C. Whitney filed a verified protest against the issuance of patent on said entry, alleging that Griffith had never established a residence on the land, and had taken the same not for his own use, but for speculative purposes; that he had entered into an agreement to sell the same prior to making final proof, and had received a part of the purchase money prior to such proof. At the time of filing this protest, he also applied to make homestead entry, and asked a hearing to establish the charges in his protest.

Hearing was ordered and commenced on November 25, 1890.

The local officers found that the entry was sold to bona fide purchasers prior to March 1, 1888, and recommended that the entry be confirmed under section 7 of the act above cited.

By your letter you affirmed their action, and Whitney has appealed to this Department.

I do not find anything in the testimony going to show that the entry was made in the interest of another, nor that there was any sale or contract to sell it prior to final proof. Nor do I find anything to impeach the bona fides of the two purchasers, Loomis and Edwards.

Counsel for Whitney insist that because the final deed correctly describing the land was not made to Carkeek until June 30, 1888, his purchase and that of Edwards from him can not be confirmed under said act of March 3, 1891.

This contention can not be sustained. The land was sold to Carkeek February 17, 1888, but in making out the deed the land was misdescribed. That is to say, the land he actually sold was in township 24, but the deed of conveyance described it as in township 25. If Griffith had refused to correct the deed, or to execute another correctly describing the land sold, can it be doubted that a court of equity would have reformed the deed upon showing that through mistake the land had been wrongly described?

Such actions are of so frequent occurrence in courts of equity that a reference to authorities is deemed unnecessary. Such deed when reformed takes effect as of the date when executed, so a deed made to correct a mistake in a former deed is not a new conveyance, but is regarded in law as corrective of the former conveyance, and the title so perfected takes effect as of the date of the original deed.

A deed is but evidence of title, and, if through a mistake a transfer of title to real property is incorrectly evidenced by the deed of conveyance, it may always be corrected by a subsequent properly executed deed.

> There is no rule better founded in law, reason and convenience than this: that all the several parts and ceremonies necessary to complete a conveyance shall be taken together as one act and operate from the substantial part by relation. (Cruise on Real Property, Vol. 5, page 510.)

As to the other point raised by counsel for Whitney, that entries can not be confirmed in the hands of bona fide purchasers, when protests or

contests were pending on March 3, 1891, date of the act, it is enough to say that the instructions and decisions of the Department are to the contrary. Such protest or contest will defeat confirmation under the proviso to section 7, but not under the body of it. Axford *v.* Shanks, 13 L. D., 292.

The conveyance having been made prior to March 1, 1888, it comes within the provisions of section 7 of the act cited, and the entry must be confirmed.

The decision appealed from is affirmed.

PRE-EMPTION—FINAL PROOF—NOTICE.

CREASY *v.* HAMILTON.

Published notice of intention to make pre-emption entry of a tract on a day named, operates to save the rights of the pre-emptor, during the period so fixed, as against the intervening adverse claim of a homesteader.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 15, 1893.

On April 11, 1889, Henry Hamilton filed his declaratory statement, No. 10,171, for the SE. ¼ of Sec. 32, T. 25 S., R. 25 E., Visalia, California, alleging settlement thereon April 1, of that year.

On April 7, 1890, he gave notice of his intention to submit final proof. After due publication thereof, he submitted his final proof, October 25, 1890.

On May 24, 1890, George M. Creasy made homestead entry of the same land, and, when Hamilton offered final proof, Creasy appeared and protested against its allowance, on the grounds that Hamilton had settled on the land more than thirty days prior to his filing, and that he did not make proof and payment within one year from date of settlement.

The register and receiver dismissed the protest, and recommended the acceptance of the final proof and the cancellation of Creasy's entry. On appeal, you, by your decision of May 31, 1892, affirmed that action, and Creasy further prosecutes his appeal to this Department.

A careful examination of the final proof shows that the residence of Hamilton was practically continuous from date of his settlement, and that his improvements are ample to establish his good faith.

The land in question was embraced in desert land entry No. 485, made by one Stearns February 16, 1884. Hamilton brought a contest against the entry, but subsequently paid Stearns $500 for a relinquishment, and for the improvements, the most valuable of which was a well eight hundred feet deep. The relinquishment was filed April 11, 1889, and Hamilton made his filing immediately thereafter.

You state that the land in question is "offered land."

Section 2264 of the Revised Statutes of the United States is as follows:

When any person settles or improves a tract of land subject at the time of settlement to private entry, and intends to purchase the same under the preceding provisions of this chapter, he shall, within thirty days after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring his intention to claim the same under the pre-emption laws; and he shall, moreover, within twelve months after the date of such settlement, make the proof, affidavit, and payment hereinbefore required. If he fails to file such written statement, or to make such affidavit, proof, and payment within the several periods named above, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

The entry of Stearns being intact upon the records, no legal settlement, as that term is used and understood, could have been made prior to April 11, 1889, the date of the relinquishment.

An actual settler is one who goes upon the *public land* with the intention of making it his home under settlement laws, and does some act in execution of such intention sufficient to give notice thereof to the public.

United States *v.* Atterberry, *et al.*, 8 L. D., 173.

The land in question not being "public land" when segregated by Stearns's entry, the residence of Hamilton thereon, prior to the relinquishment, was either a tenancy or a trespass, and, although he alleged settlement prior to the relinquishment, yet, as a matter of fact, such settlement could only date from the time the relinquishment was filed. (Wiley *v.* Raymond, 6 L. D., 246.)

Hamilton, as above seen, filed his application to make final proof on April 7, 1890, being less than a year from date of his filing and more than six weeks prior to Creasy's entry.

Hamilton raises a question as to the correctness of your holding that the land was "offered land" at date of his filing; but, however that may be, it is certain that Creasy made his entry with full knowledge of Hamilton's residence and improvements, and with full knowledge that Hamilton had at that time made application to make final proof, and that the notice therefor had been published.

Contestant relied upon the fact that Hamilton had not within twelve months of his settlement "made the proof, affidavit, and payment" for the land, as required by the section above quoted.

Conceding that the land was "offered land" at date of Hamilton's filing and settlement, it is apparent that the "proof, affidavit, and payment" were not made within the prescribed time; but, as above seen, the notice of intention to make proof had been made, and the same was published before Creasy, who had full knowledge of these proceedings, had made entry.

You hold, on the authority of Ramage *v.* Maloney (1 L. D., 461), that notice of intention to complete an entry on a certain day thereafter would operate to save the rights of the applicant for that period, and prevent another party in the meantime from defeating the claim by an application to enter.

In this holding I concur. The entry of Creasy was improperly allowed, published notice having then been made by another to make pre-emption entry for the same land. (L. J. Capps, 8 L. D., 406.)

The judgment appealed from is affirmed.

TIMBER-CULTURE CONTEST—EXCESSIVE ACREAGE—PLANTING.

WEAVER *v.* PRICE.

A timber culture entry is limited in acreage to one fourth of the land embraced in the section, except where such entry is of a technical quarter section.

In adjusting two timber culture entries that together include an excessive acreage in a section, priority of entry determines priority of right.

A timber culture entryman may utilize the trees planted and cultivated by a previous occupant of the land, whose possessory right the entryman has purchased.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 15, 1893.

On the 17th of March, 1886, William J. Price made timber culture entry for lots 2, 3 and 4, and the SW. ¼ of the NW. ¼ of Sec. 24, T. 24 S., R. 36 W., Garden City land district, Kansas.

On the 23d of November, 1889, William B. Weaver filed an affidavit of contest against said entry, alleging that the entryman had not complied with the provisions of the timber culture law, and specifying in what particulars he had made default.

A hearing was appointed for February 14, 1890, which was continued to March 28, of that year, upon defendant's motion. On that day he moved that the service be set aside as insufficient. His motion was overruled, and the plaintiff then moved for a continuance on account of an absent witness. His motion was also overruled, and the case went to trial.

On the 20th of April, 1890, the local officers rendered their decision in the case, in which they found in favor of the defendant, as to the matters charged against his entry by the plaintiff. They further found that the section in question contained only 439.55 acres of land, and that Thomas Pearl had a timber culture entry thereon for lot 7, containing 34.35 acres, made on the 28th of March, 1885. That the entry of Price contained 138 acres, and that the two entries embraced 62.47 acres more than the number allowed to be entered under the timber culture law. They therefore recommended that Price be required to relinquish a sufficient amount to bring the entries within the limit.

The plaintiff moved for a review of their decision, in so far as the same was adverse to him, and upon that motion being denied, he moved for a rehearing, setting up as the grounds therefor, accident and surprise, errors in said decision, and newly discovered evidence. This motion was also overruled, and, within the time allowed therefor, both parties appealed to your office.

The decision of the local officers was affirmed by you, on the 12th of February, 1892, and the case is brought to the Department upon an appeal by the contestant from your decision. Price does not appeal, but he files a brief, in which he shows that Joseph Dillon made timber culture entry for the land covered by the entry of Price, on the 23d of November, 1881, which entry was a matter of record, at the time the entry of Pearl was made. That Dillon's entry remained of record until that of Price was made, he having filed the relinquishment of Dillon when he made his own entry. He insists that the entry of Pearl was illegally allowed, and that he (Pearl) should be required to relinquish instead of himself. In short, that for the purposes of this action, his entry should be considered as of the date of Dillon's.

This position is untenable. Except where settlement rights precede the entry, the interest of the claimant in the land dates from the time of his entry. While as between Dillon and Pearl, it might have been held that the entry of the latter was the one to be canceled, still Price can gain nothing by such holding, as the moment Dillon's relinquishment was filed, the entry of Pearl took effect, and thus became prior in point of time to that of Price.

The Department does not, in every instance, require that the quantity of land covered by timber culture entry shall be limited to one-fourth the land included in a section, but it allows such entry to embrace a technical quarter section, without reference to its relation to the entire section. In such a case, if the technical quarter section contained one hundred and sixty acres, and the whole section embraced only 439.55 acres, as in this case, the entry should not be disturbed. This doctrine was held in the case of James C. Garman (11 L. D., 378). This rule, however, would not avail Price, as his entry is not composed of a technical quarter section, but is made up of several contiguous lots. The Department can not afford him the relief asked for in his brief.

In his appeal to the Department, Weaver insists that it was error in the local officers, and your office, to allow Price credit for the trees planted and cultivated upon the tract by Dillon, and urges that in determining the question of Price's compliance with the law, the land planted and cultivated by him should alone be considered. He is in error in this position. In the case of Murphy *v.* Olsen (4 L. D., 291), it was held that "the claimant having purchased the right of a former entryman may avail himself of the planting already done."

The local officers in their decision, reviewed the testimony submitted at the trial, at considerable length, giving the substance of that offered by each party to the suit. From an examination of the record, I find that they very fairly state the facts established by the evidence, and I think the conclusion reached by them was justified. It was as follows:

In making a general summary of the evidence in the case, we are of the opinion that the plaintiff has not only failed to show that defendant Price failed during the third year of said entry to plow, plant and cultivate the required number of acres

of trees, tree seeds, nuts or cuttings, but gives testimony from his own witnesses that the very thing complained of was done by the defendant Price, or his authorized agents, which is fully corroborated by the testimony on the defense. The evidence while voluminous, and much of it conflicting, yet we think there is sufficient evidence in the case that indicates the absolute good faith of the entryman Price, to warrant us in dismissing the contest, and so hold.

You affirmed the decision of the local court, and I find no occasion for disturbing the judgment already rendered in the case. The decision appealed from is therefore affirmed.

HOMESTEAD ENTRY—EQUITABLE ACTION.

WALKER *v.* SNIDER.

It is only in cases where there is no adverse claim that the failure to make final homestead proof within the time prescribed by statute can be cured by reference to the board of equitable adjudication.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 16, 1893.

I have considered the case of Robert Walker *v.* Benjamin Snider upon the appeal of the latter from your decision of February 27, 1892, rejecting his proof, and allowing the homestead application of said Walker, for lots 1 and 2, Sec. 27, lots 1 and 2, Sec. 28, and lots 1 and 2, Sec. 29, T. 164 N., R. 56 W., Grand Forks, North Dakota, land district.

The record shows that on the 13th day of November, 1882, Snider made homestead entry for the land involved; that on the 10th day of October, 1883, he applied to make commutation proof and the 17th day of November, 1883, was fixed for making it; that on the 24th day of November, 1883, Walker filed a protest against such proof; that a hearing was had before the local officers and the case was decided by you and finally by the Department on appeal, February 12, 1886, which is reported in 4 L. D., 387, wherein the commutation proof of Snider was accepted.

In this proceeding it is claimed by Snider that at the time he received notice of the departmental decision he was not able to pay for the land; that he then decided to live on the land and again submit proof before the expiration of the seven years allowed to make it, should expire. The time allowed by law within which to make his proof expired on the 12th day of November, 1889; he took no steps toward proving up until the 22d day of November, 1889, ten days after the time allowed by law had expired, in the meantime, on the 14th day of said month, Walker filed in the local office his affidavit of contest against said entry, in which he charged that Snider: "Has wholly abandoned said tract in this: That he has without any good and sufficient reason therefor neglected and failed to make proof or advertise to make proof for said

tract within seven years from the date of the entry of the sale by him as a homestead; that said Benjamin Snider has never resided on said land, except during a portion of the first year after entry, and during the past three years. That said tract has not been cultivated and resided upon by said party as required by law, that this contestant is at the present time residing on said land, and has a good and valid right to said land." His affidavit of contest was accompanied by his application to enter said land under the homestead law.

On December 30, 1889, you ordered a hearing and instructed the register and receiver to permit Snider to submit proof after giving proper notice, and to allow Walker to come in and prove the charges contained in his contest affidavit. Persuant to your instructions Snider, on the 5th day of March, 1890, submitted his proof and at the same time Walker appeared and offered testimony in support of his contest.

The local officers recommended that Snider's proof "should be submitted to the board of equitable adjudication for its favorable action."

Walker appealed.

On the 27th day of February, 1892, you reversed the judgment of the register and receiver, rejected Snider's proof, held his homestead entry for cancellation and allowed Walker's application to make homestead entry for the land involved.

Snider appeals.

The contest of Walker having intervened before Snider took any action in respect to making final proof, the entry should not be submitted to the board of equitable adjudication. McCarthy *v.* Darcey, 1 L. D., 78. See also rule 33, of the rules governing equitable adjudication, 10 L. D., 503.

It is only in cases where there is no adverse claim that the failure to make final proof within the time prescribed by statute can be cured by reference to the board of equitable adjudication.

The Department has no authority to extend the time for making final proof beyond the lifetime of the entry. Henry Elmore, 10 L. D., 400; John C. Mounger, 9 L. D., 291.

While it is true that in the absence of any adverse claim the entry might be referred to the board of equitable adjudication where in good faith compliance with the requirements of the law as to settlement, residence, improvement and cultivation should be shown by the entryman. But this case is not brought within such rule for the reason that Walker, by his contest, is asserting an adverse claim, and the charge he makes as to failure to offer proof within the life of the entry is proven beyond question, in fact it is not denied. This is decisive of the case, but if it were not, the charge of failure to reside upon the land as required by law is not seriously denied by Snider in his testimony. The facts on this point are sufficiently stated in your decision. From a careful examination of the record, I conclude that your judgment was right; it is therefore affirmed.

PRE-EMPTION CLAIM—PARK RESERVATION.

JEFFERSON DAVENPORT.

Pre-emption settlement, and filing based thereon, do not confer a vested interest in the land, or any right upon the settler that will prevent subsequent disposition of the land by act of Congress.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 16, 1893.

Jefferson Davenport has appealed from your decision of July 16, 1892, rejecting his application for re-instatement of his pre-emption declaratory statement, No. 7888, for the W. ½ of the SE. ¼, and the E. ½ of the SW. ¼, of Sec. 11, T. 17 S., R. 30 E., Visalia land district, California.

The allegations of error are, (1) that "the decision is contrary to law;" (2) that you "erred in not holding that said pre-emption filing was improperly canceled;" (3) that you "erred in holding that said land is reserved for public domain."

The accompanying argument and affidavits set forth that he filed said declaratory statement on June 17, 1885; that within thirty days prior to said filing he had settled and established his home on said tract; that he followed it up by continuous residence, cultivation and improvement; that thereafter he built upon the same a house worth at least three hundred dollars, a barn worth at least one hundred and fifty dollars, cleared and cultivated thirteen acres of the land, enclosed a portion of it with a substantial fence, and made other valuable improvements; that he constructed a flume half a mile long for the purpose of conveying water upon said premises for the irrigation of the land and for stock and family purposes; that when he offered to make final proof upon the same the local officers refused to receive it, at one time because the Department had suspended the entry of lands in that vicinity, at a later period because Congress had included the same within the boundaries of a national park; that about April 23, 1891, your office canceled his pre-emption declaratory statement; that no notice of said cancellation was ever served upon him, but that he has reason to believe that a letter, bearing an endorsement showing that it came from the local land office at Visalia, and directed to affiant, came to the post-office at Three Rivers, about twenty miles from the land, at a time when the affiant was at work elsewhere to earn a livelihood—which letter, not being called for, was returned to the local office; that affiant's post-office address was Hay Forks, and not Three Rivers; that if he had received said letter, and if, as he now supposes, it contained information of the proposed cancellation of his filing, he would have shown good reason why it should not be canceled; and he prays for a re-instatement of said entry, that he may now furnish such reason.

No argument is submitted to show that there was any error in your ruling.

By act approved September 25, 1890 (26 Stat., 478), Congress set apart as a public park, among other lands described, "sections 31, 32, 33, and 34, township 17 south, range thirty east, M. D. M., California." By supplementary act of October 1, 1890 (26 Stat., 650, Sec. 3), Congress further reserved, "township 17 south, range 30 east, M. D. M., excepting the sections included in the previous act. The tract in question in the case at bar was included in the description quoted from the latter act, by which the same was "reserved and withdrawn from settlement, occupancy or sale under the laws of the United States."

In pursuance of the acts above cited, the Department held and directed, on April 6, 1891 (12 L. D., 326-330):

> It is not necessary to discuss the question of good faith on the part of these claimants, nor the question of their pecuniary loss or gain. It is the duty of the Department to execute the law; and in the performance of that duty, I must direct that those filings be canceled, and the applications to purchase be rejected. The principles announced above will apply in the case of pre-emption filings made prior to date of withdrawal, in which final proof and entry had not been made; and said filings must be canceled.

The above order of the Department was not issued of its own motion, but because the law left no alternative. A pre-emption filing does not convey a vested interest in the land, and is not such an appropriation thereof as reserves it from the operation of a subsequent act of Congress (Yosemite Valley case, 15 Wall., 77; 8 Opins. Atty. Gen'l., 72; 10 ib., 57; 11 ib., 492; 17 ib., 180). The fact that the pre-emptor had expended time and money in improving the land, and that he repeatedly applied to make final proof and payment, but that his applications were refused (because the land had been suspended from entry), does not, under the circumstances, add to the strength of his case. As was said by the U. S. supreme court in Rector *v.* Ashley (6 Wall., 142), and repeated in Frisbie *v.* Whitney (9 Wall., 187):

> The rights of a claimant are to be measured by the act of Congress, and not exclusively by what he may or may not be able to do; and if a sound construction of that act shows that he acquired no vested interest in the land . . . . . then, as claimant's rights are created by the statute, they must be governed by its provisions, whether they be hard or lenient.

The acts of Congress, and the decisions of the supreme court, have fixed the status of the land in question, and this Department is without jurisdiction over the same; and no matter what equities may be shown by the appellant, it is not within its power to afford him any relief in the premises.

Your decision is therefore affirmed.

PUBLIC SURVEYS--STATE SELECTIONS.

STATE OF MONTANA.

The extension of the public surveys is restricted, as a general rule, to townships within the range and progress of settlement.

An application of the State for the survey of a township, within the range and progress of settlement, with a view to making selections therein under the act of admission, may be allowed, though the land is not suitable for settlement and agriculture, and there are no settlers thereon; but care should be taken that an undue proportion of the sum set apart for surveys is not thus used to the exclusion of the survey of townships occupied by settlers.

Secretary Smith to the Commissioner of the General Land Office, June 17, 1893.

I am in receipt of your letter of April 20, 1893, in reply to departmental letter of April 14th, in relation to the bid of James Keerl and C. S. Hobbs for the survey of seven townships situated on both sides of the North Fork of the Flathead River, and immediately south of the international boundary line, Montana.

It seems to be clear that the object of the request of the State Board of Land Commissioners for the survey of this land, is for the purpose of selecting the same in satisfaction of the grants made to the State by the act of February 22, 1889, (25 Stat., 676) and thus secure the valuable timber thereon.

The townships in question are located a long distance from other surveyed land. The surveyor general states that supplies would have to be transported by pack animals from Columbia Falls, a distance of sixty miles. So far as the evidence before me indicates, the land is worthless for agricultural purposes, and there are no settlers within the vicinity of the same.

The survey of these townships can only be justified, if at all, by that portion of the act appropriating money for the survey of public lands, approved August 5, 1892, which provides:

> That in expending this appropriation, preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers and of lands granted to the State by the act approved February twenty-second, eighteen hundred and eighty-nine, and the acts approved July third and July tenth, eighteen hundred and ninety.

Under the public land laws, (Act of June 3, 1878, 20 Stat., 89) lands which are unfit for cultivation, but are chiefly valuable for timber, may be entered after the survey of the same, but under the provisions of the law for the survey of public lands, townships of this character cannot be surveyed unless settled upon, or upon the request of the State authorities, to allow the selection of lands in satisfaction of the grants made to the States by act of Congress.

The general rule which controls in the matter of the survey of public lands, is to survey the townships within the range and progress of

settlement. This is the rule which seems to be recognized by Congress, both in the provisions of the act relating to surveys heretofore recited, as well as in that portion of the act of Congress approved March 3, 1893 (27 Stat., 592), making appropriation for the survey of public lands, which provides:

> That the States of North Dakota, South Dakota, Montana, Idaho, and Washington, shall have a preference right over any person or corporation to select lands subject to entry by said States, granted to said States by act of Congress, approved February twenty-second, eighteen hundred and eighty-nine, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States; and 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 filing of the plat of survey of any township in any local land office, of said States.

It is clear to my mind, from these acts of Congress, that it was the intention of that body to protect the States in their efforts to secure the satisfaction of the grants made to them, but I see nothing in said acts to sanction a departure from the rule which prevails in the matter of surveys, viz, to restrict, as a general rule, the surveys to townships within the range and progress of settlement.

I therefore approve that portion of your suggestion, that the surveys desired by the authorities of the State of Montana, be restricted to townships thus situated.

You further suggest that,

> Although the lands applied for may not at present be occupied by settlers, the same should be adapted to agriculture, and accessible to settlers who may desire to locate thereon, ... When the State authorities make application for surveys, the same should embrace lands suitable to settlement and agriculture, and, so far as practicable, occupied in whole or in part by actual settlers.

I cannot concur in these views. By the 19th section of the act of February 22, 1889, making the grants to the States, it is provided:

> 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 respective states entitled thereto.

It thus appears that selections cannot be made until the lands are surveyed, and by act of Congress, those who settled prior to the return of the plat of survey to the local land office are protected; hence to refuse to make surveys of any townships except those suitable to settlement and agriculture, and which are occupied in whole or in part by actual settlers, would be a long step towards defeating the very object which Congress has so plainly indicated, viz, to enable the State to obtain the lands granted to her.

The State may lawfully claim any unappropriated public land, nonmineral in character, which may be entered under our public land laws, and it is not the desire, nor the intention of this Department to interpose any obstruction to her lawful efforts to obtain the satisfaction of her grants; all that can reasonably be required is, that she shall be on

an equal footing with her citizens in the matter of obtaining public lands to which she is entitled.

I am therefore of the opinion, that when the State makes application for the survey of a township of public land, non-mineral in character, and which is subject to entry under the public land laws, and which is situated within the range and progress of settlement, even though there are no settlers thereon, and the land is not adapted to agriculture, that application should be granted; care, however, should be exercised that no undue proportion of the amount apportioned to a State be used for the survey of townships applied for by the State authorities, to the exclusion of the survey of townships occupied by settlers.

Applications for the survey of isolated townships, distant from the range and progress of settlement for the purpose of obtaining the valuable timber thereon, as a rule should not be granted, and the application for the survey of the same isolated townships, which has formed the basis of this correspondence, should be rejected, but for the fact that there is not sufficient time between this and the close of the fiscal year to make this amount available for other surveys.

In view of the fact that this appropriation would lapse, if not expended upon this application, it is hereby approved.

The surveyor-general should submit all applications for survey at the earliest moment practicable, so that the appropriation may be properly apportioned, in accordance with the views expressed in this letter, and when applications are made on behalf of the State, not joined in by the settlers, it should be required to state approximately how much land it will probably select from the area covered by each application, in order that you may exercise discretion in granting its application.

You are authorized to amend the existing annual surveying instructions governing applications for surveys made by the State authorities, under their respective enabling acts, to conform to the suggestion herein contained.

HOMESTEAD—ADDITIONAL ENTRY.

SANDFORD J. JACKMAN.

The right to make an additional homestead entry of a contiguous tract accorded by section 5, act of March 2, 1889, is limited to cases wherein the original entry was made prior to the passage of said act.

The provisions of section 5, act of March 3, 1891, amending section 2289 R. S., and authorizing adjoining farm entries, are not applicable to additional entries.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 17, 1893.

I have considered the appeal of Sandford J. Jackman involving his application to enter under the homestead law the NW. ¼ of NE. ¼, Sec. 35, T. 15 N., R. 3 W., Guthrie land district, Oklahoma.

The record shows that on July 12, 1889, Horatio Day, as mayor, filed a town-site application for said land which was transmitted to your office August 12, following. and on July 23, 1889, Jackman made a homestead entry of the E. ½ of NE. ¼ and SW. ¼ of NE. ¼ in the same section and adjoining the land in controversy.

On June 8, 1891, Jackman made application for the tract in controversy as an additional homestead which was rejected by the local officers on the ground that he had exhausted his right, from which action Jackman appealed and on July 15, 1891, the case was transmitted to your office. November 14, 1891, while the matter was pending before you one George H. Hughes made application to enter said NW. ¼ of NE. ¼ as a homestead, which was rejected by the local officers for conflict with the town-site application and on account of the pending appeal of Jackman, whereupon Hughes appealed and the same was transmitted to your office February 5, 1892.

Under date of May 3, 1892, you considered both appeals and in the case of Jackman sustained the judgment of the local officers, but in the case of Hughes' appeal, it being alleged that the town-site people had never occupied their claim, you remanded his case to the local office for a hearing with due notice to all parties in interest.

The act of March 2, 1889 (25 Stat., 854) provides:

> That any homestead settler who has heretofore entered less than one quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry.

Thus it will be seen that as Jackman made his original homestead entry subsequent to the passage of said act he is not entitled to the right of making an additional entry thereunder.

In the argument of counsel for Jackman he relies mainly on the provisions of the act of March 3, 1891 (26 Stat., 1095) as authority for allowing the additional entry and quotes from section five of said act, as follows:

> And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

The portion of the act last quoted, only applies to persons who own land and has no reference whatever to additional homestead entries. In other words, it is the provision of law providing for the entry of adjoining farm homesteads and has no application to any other class of entries.

The right to make additional homestead entry under sections 5 and 6, act of March 2, 1889 (*supra*) is limited to cases where the original entry was made prior to the passage of said act. John B. Doyle (15 L. D., 221); John W. Cooper *et al.* (ib., 285). Or where the original entry

is made subsequent to said act, its provisions in relation to additional homesteads are not applicable. Lizzey Peyton (ib., 548).

In the case of Hughes' application, no appeal has been reported from your decision remanding the case to the local office for a hearing and therefore that question is not before the Department.

Your judgment so far as appealed from in the case at bar, is affirmed.

MINING CLAIM—PROTESTANT—APPEAL—HEARING.

NEVADA LODE.

A protestant against a mineral entry who alleges an adverse interest, and non-compliance with law on the part of the entryman, and whose application for a hearing on such charges has been denied, is entitled to be heard on appeal.

A charge of non-compliance with law against a mineral entry, made by a protestant, may properly form the basis of a hearing, but the protestant in such case is not entitled to set up his own claim to the land.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 17, 1893.

I have considered the appeal of J. W. Morehouse *et al.* taken from your judgment of September 1, 1892, dismissing their protest against mineral entry No. 1832 made May 28, 1892, by Walter S. Crismon and Peter J. Reid for the Nevada lode claim, lot 51, in Fish Springs mining district, Salt Lake City, Utah, also refusing to order a hearing on said protest.

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

On October 26, 1891, Crismon and Reid located the Nevada lode, and on March 22, 1892, applied for a patent. On May 28, 1892, they entered the tract, paying for it and receiving a final receipt therefor.

On August 1, 1892, J. W. Morehouse, Alma Hague and George Whitmore filed a protest against said entry, alleging a prior right to a part of the ground, and that the tract located by Crismon and Reid is not the land included in the survey and application for patent.

Protestants allege also that a notice was not posted in a conspicuous place on the claim, and that they did not receive notice; that claimants did not perform the work on the claim required by law to be done prior to entry; that they are the owners of and in possession and entitled to the possession of the mining claim known as the Galena No. 2, located prior to the location of the Nevada lode, to wit, on January 16, 1891, and duly recorded on February 16, following; that the survey and application for patent on the Nevada claim includes a part of the ground embraced in their prior claim; that while they were at work on their claim, the Galena No. 2, Crismon and Reid came to them and

stated that they were going to locate a fractional or wedge claim which lay between the said Galena No. 2 claim on the north, and the Utah claim * * * * on the south, that relying upon these representations by Crismon and Reid and upon the

recorded location notice of the said Nevada claim showing said Galena No. 2 claim to be the north boundary of said Nevada claim aforesaid, these protestants paid no further attention to said Nevada location, or to any alleged application for patent therefor.

On September 1, 1892, after considering the protest, you dismissed it, and refused to order a hearing, and protestants have appealed to the Department.

Applicants for a patent have filed a motion to dismiss the appeal, because of the fact that it was taken by mere protestants who are not entitled to the right of appeal.

This motion must be rejected on authority of the ruling made in the case of Weinstein *et al. v.* Granite Mountain Mining Co. (14 L. D., 68) and other cases therein cited.

The record in this case shows that publication was made in a proper paper from March 25, to May 27, 1892. No protest was filed, and it is shown by the surveyor's return that more than $500 was expended for development work on said claim prior to the application for patent.

It is shown by the papers on file that the same tract located by Crismon and Reid is embraced in their application for patent, and I am of the opinion that the excuse given by protestants for not filing their adverse claim during publication and bringing suit as required by law, is insufficient. It was said in the case of Weinstein *et al. v.* Granite Mountain Mining Co. (*supra*) that—

> Where there is no charge that the claimant has failed to comply with the terms of the mining laws, but an adverse claimant simply asserts a prior or superior right to the land as against the claimant, he must file his adverse claim "during the period of publication," and having done this "It shall be the duty of the adverse claimant within thirty days after filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession." (Sec. 2326, Revised Statutes). Congress thus removed from the jurisdiction of the Land Department, the determination of this question of mere right between individuals, but it did not take away the jurisdiction to try and determine whether the mining laws have been complied with. The last clause of section 2325 Revised Statutes especially excepts this. It says:
>
> "Thereafter no objection from third parties to the issuance of patent shall be heard, *except* it be shown that the applicant has failed to comply with the terms of this chapter."

The protest before me, however, charges more than a conflict between these rival claimants. It is asserted under oath by Morehouse, Hague and Whitmore that claimants "did not comply with the requirements of the statutes in such cases made and provided in that they did not themselves, nor did any one on their behalf, perform the work required by law to be done upon said Nevada claim prior to entry thereof.' They also allege that a "notice of said application for said Nevada claim was not posted in a conspicuous place upon said alleged Nevada claim during the period required by statute."

These allegations, if true, are sufficient to compel the cancellation of the mineral entry and defeat the application for a patent. Now, while

protestants are barred from setting up any claim to the tract because they failed to file their adverse claim, still they have a right to show, if they can, that applicants for patent have not complied with the law, and by so doing secure the cancellation of the mineral entry and thus make it necessary for claimants to begin over again, which would allow protestants to file the adverse claim during the publication of notice.

You will order a hearing between the parties, after due notice, at which protestants will be allowed to show, if they can, that claimants have not complied with the law; but they will not be allowed to show that they have any claim to the land.

Your judgment is accordingly reversed.

TIMBER CULTURE ENTRY—EXCESSIVE ACREAGE.

PLATT *v.* SLATTERY.

A second timber culture entry in a section cannot be allowed to embrace a fractional sub-division, if the acreage in both entries, taken together, amounts to more than one fourth of the whole section.

The discretion of the Commissioner of the General Land Office in allowing timber culture entries to stand that include a small excess in acreage, does not extend to an entry in which over one half of the sub-division entered is "excess."

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 20, 1893.

I have considered the case of Frank C. Platt *v.* William Slattery, on appeal by the latter from your decision of April 2, 1892, holding his timber culture entry for lot No. 1, Sec. 10, T. 24 S., R. 34 W., Garden City land district, Kansas, for cancellation, and allowing the former to file his pre-emption declaratory statement therefor.

It appears by the plat of the government survey of this township, that the Arkansas river, which is over eighteen chains wide, runs diagonally across the north-east part of this section, making fractional each of the quarter quarters of the NE. ¼, and taking part of the NE. ¼ of the NW. ¼ of the section. The river, which is meandered, covers 85.40 acres, leaving 554.10 acres of land in the section. One, Gardner H. Morgan had made timber culture entry for lots 2, 3 and 4, and the NW. ¼ of the NW. ¼ of the section, containing 127.60 acres, but on February 17, 1890, Slattery made timber culture entry for lot No. 1, containing twenty-seven acres, and on February 24, Platt offered his declaratory statement, alleging settlement on said lot No. 1 January 29, 1890, and he asked to be allowed to make a pre-emption filing for the same. This was rejected by reason of the timber culture entry of Slattery. Thereupon he filed an affidavit of contest against the entry, alleging prior settlement on the lot, and that the timber culture entry was illegal because it, with the entry of Morgan, was in excess of one-fourth of the section.

A hearing was ordered by the local officers, to determine the respective rights of the parties, and upon notice duly served, the same was had, and upon the hearing of the case, the local officers recommended the cancellation of Slattery's entry, from which action he appealed; you affirmed the decision below, and held the entry for cancellation, from which he again appealed.

In the appeal and argument it is insisted that you erred in holding that one quarter of a section, meant one quarter of the particular section, rather than one hundred and sixty acres.

There is a mistake in the evidence as to the area of the section of these several lots, and counsel claim that the excess of the four lots, and the quarter quarter section over the quarter of the section, is so small that it should not work the cancellation of the last entry, and he cites the case of Charles W. Miller (6 L. D., 339), where 181.81 acres in a section were allowed to be entered.

It appears that in that case the section contained 690.81 acres, and an entry for 101.81 acres had been made, when Miller sought to enter the W. ½ of the SW. ¼, containing eighty acres, and your office held that the law allowed only one hundred and sixty acres, regardless of the size of the section. The Department held that this was error, and that one-fourth of the section was the correct interpretation of the law, and the case of McCabe (4 L. D., 69) was cited in support of this view. In the latter case, two hundred and eighty acres were allowed for timber culture, but the section contained 1,421.68 acres, subdivided into lots, and as two hundred and eighty acres were less in area than one-fourth of the section, the entries were allowed to stand.

In the case of James C. Garman (11 L. D., 378) the question was fully discussed, and it was held that the proviso in the act "That not more than one quarter of any section shall be thus granted for a timber culture entry," implied a technical quarter section as surveyed, and the case of Andrew Johnson (10 L. D., 681), was cited, and distinguished from the Garman case. In the Johnson case it was held that as a lot sought to be entered, added to that portion of a section already covered by a timber culture entry, would be in excess of one quarter of the section, and the lands were not a "quarter section," that the entry for the lot could not be allowed. The case at bar is similar to the case of Johnson, and on the same principle applied therein, your decision will be sustained.

In the Miller case it is true that the eighty acres which was a legal subdivision added to the former entry, was a little over one-fourth of the section, but in the case at bar, the "excess" is 15.95 acres and is more than half the "legal subdivision" sought to be entered. This excess does not come within the maxim that "the law does not notice or care for trifling matters."

While in the discretion of the Commissioner of the General Land Office, an entry may be allowed to stand where the excess is trifling,

to allow an entry to stand where over half the subdivision is "excess," would be an abuse of discretion. This conclusion renders it unnecessary to consider the question of priority between these parties, as to which the evidence is conflicting and unsatisfactory. The judgment appealed from is affirmed.

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

JAMES P. MILLIKEN.

The confirmatory provisions of section 7, act of March 3, 1891, for the benefit of *bona fide* purchasers, extend to a pre-emption entry based upon a second filing.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 21, 1893.

On June 6, 1876, James P. Milliken filed declaratory statement No. 15,669, for the S. ½ of the SE. ¼, Sec. 15, T. 19 S., R. 4 W., Wa Keeney, Kansas.

On August 25, 1876, he made homestead entry for the N. ½ of the NE. ¼, Sec. 22, in said township, together with the land first above described—one hundred and sixty acres.

On November 2, 1885, he made a second filing, this time for the NE. ¼ of Sec. 25, T. 18 S., R. 41 W., upon which he submitted final proof, July 15, 1886, and on September 2, of that year, final certificate No. 2318 was issued therefor.

By your letter "G" of March 24, 1890, he was given opportunity to show cause why his cash entry should not be canceled, being based upon a second filing, and thus contrary to the provisions of section 2261 of the Revised Statutes.

In a letter addressed to the register, on December 1, 1890, he admitted having made the former filing, and in default of further showing, by parties in interest who had acknowledged receipt of notice, you, on March 6, 1891, canceled the entry.

It appears that on September 21, 1886, nineteen days after final certificate was issued, he sold the land to one Eli P. Williams, for the consideration of $410, and the latter sold the land to E. S. Swisher, on January 8, 1887, for the consideration of $1,200. These conveyances were by warranty deeds, which were duly recorded.

On March 9, 1891, Swisher filed in the local office his application for the reinstatement of the entry and confirmation thereof under the provisions of section 7, act of March 3, 1891 (26 Stat., 1095), alleging, under oath, that his purchase was in good faith and for a valuable consideration, and made before March 1, 1888.

On March 14, 1891, Joseph McMurtry presented his homestead application for the land alleging settlement February 21 of that year; this was rejected, on account of Swisher's pending motion for reinstatement, and McMurtry appealed.

On May 19, 1891, you refused Swisher's application for the reinstatement of Milliken's entry, and returned McMurtry's application for allowance. From that judgment Swisher appeals to this Department, claiming confirmation of entry under the act of 1891 (*supra*).

While Milliken's entry was based upon a second filing, and thus contrary to the provisions of section 2261 of the Revised Statutes, and invalid at the time made, yet there is nothing in the record which shows that the transferees had any knowledge of that invalidity. The entryman's sale to Williams, and also that of Williams to Swisher, were made before March 1, 1888. No adverse claim originated prior to final entry; a valuable consideration was paid for the land, and there is nothing in the record impeaching the bona fides of the purchasers, and no fraud is charged against them. The application to reinstate the entry was made within three days after your order of cancellation, and five days before McMurtry presented his homestead application.

All the conditions exist upon which confirmation is authorized by the 7th section of the act of 1891 (*supra*). George De Shane *et al.*, 12 L. D., 637.

You will therefore adjudicate the case, in accordance with said act and the instructions thereunder (12 L. D., 450).

The decision appealed from is accordingly reversed.

STONE LAND—AGRICULTURAL ENTRY.

HAYDEN *v.* JAMISON.

Land containing ordinary building stone is not excluded thereby from agricultural entry, though more valuable as a quarry than for agricultural purposes.

A homestead entry embracing land of such character is not of necessity made in bad faith, though made for the purpose of securing the stone, and may be perfected, provided the entryman makes his actual home on the land, improves the same, and shows some agricultural use thereof.

Secretary Smith to the Commissioner of the General Land Office, June 21, 1893.

Thomas Jamison has filed a petition for re-review of the case of Jamison *v.* Hayden (15 L. D., 276), sustained on review March 7, 1893. This petition is filed under the rule in Neff *v.* Cowhick, 8 L. D., 111.

Several grounds of error are alleged, the most material of which are that the original motion was for a rehearing, as well as review, and that only the review side of the motion was considered in the decision of March 7, 1893, and that a hearing as to the character of the land entered was had when that question was not properly in issue, and that Jamison has therefore not had his day in court upon that question.

It is also alleged that the facts brought out at such hearing did not justify the finding of bad faith upon the part of the homestead entryman.

A motion to strike out the petition for re-review has been filed by counsel for Hayden, upon the ground that all matters there alleged were passed upon in the first review decision.

I have carefully examined the record in the several proceedings in this case, and am of the opinion that error has been committed by the Department in its rulings; and, in the exercise of the supervisory jurisdiction vested in this Department, I consider it my duty when a substantial error is found to correct it, without regard to the means through which it was discovered.

The facts as presented by the record before me are as follows:

September 24, 1889, Jamison made homestead entry for the SW. ¼ of Sec. 6, T. 3 N., R. 70 W., Denver, Colorado.

Some time prior thereto, date not given, Hayden and members of his family had made placer mining locations upon all but forty acres of the tract, and, on January 10, 1890, Benjamin F. Hayden offered to file his mineral application for the land so located. His application was refused, on account of Jamison's entry. He then withdrew his application, and filed a contest against said entry, alleging that the land was more valuable for mining than agricultural purposes; that it was not settled upon and cultivated as required by law, and that the entry was made after there was a placer mining location made on the same, and that the said land was opened up in several places for stone-quarrying purposes disclosing building and flagging stones—all of which was known to Jamison at the time he made his entry.

Hearing was ordered, and on June 13, 1890, the local officers held that they had no jurisdiction over the case, because "There is nothing on file in this office to show that the contestant is entitled to consideration as a mineral claimant, proof of posting, certificate of location, etc., being absent."

They dismissed the contest.

Hayden appealed, and your predecessor reversed the action of the local office, and finding from the evidence that the land was more valuable for its minerals than for agriculture, held the homestead entry of Jamison for cancellation.

On appeal, this Department by the decision now sought to be reviewed found that the land was of little or no value for agricultural purposes, and that Jamison made his homestead entry for the sole purpose of securing the stone quarries thereon, and for that reason his homestead entry could not be considered as made in good faith.

From the testimony submitted at the hearing the land would appear to be of little value for farming purposes, but it is insisted by counsel for Jamison that the question as to the relative value of the land for mineral or agricultural purposes was not in issue at the hearing, because it is only when the contest is between a mineral and agricultural claimant that such relative value becomes material, and that Hayden having withdrawn his mineral application prior to bringing his contest, can

not be regarded as a claimant for the land, but only as a mere protestant, and as such could only be allowed to show non-compliance with the requirements of the homestead law on the part of Jamison, which having failed to do, his contest was properly dismissed by the local officers.

I do not care to discuss this question of practice, as I do not consider it necessary from the view I take of the law.

The testimony has been examined, and shows that the tract consists almost wholly of ledges of red sandstone, useful only for building purposes, in which is included paving and flagging. No other mineral substance is shown to exist on the entry.

The later rulings of this Department hold that the existence of such rock does not except the land from agricultural entry, even though it is much more valuable for quarrying than for agricultural purposes. Clark *et al v.* Ervin, 16 L. D., 122; Conlin *v.* Kelly, 12 L. D., 1; see also McGlenn, *v.* Wienbroeer, 15 L. D., 370. In the last case the stone was useful for many purposes other than building, and the mineral entry was allowed. Until the act of August 4, 1892, there was no statute allowing such lands to be entered under any of the mining laws.

Although your office, in the case of H. P. Benet, Jr., 3 L. D., 116, held that land chiefly valuable for building stone may be entered as a placer claim, that case was substantially overruled in the case of Conlin *v.* Kelly, *supra*, and I have not found any reported decision of this Department holding that such land could not be entered under the laws relating to agricultural entries. In fact, the instructions relative to the act of August 4, 1892, expressly state that *such act* does not "withdraw land chiefly valuable for building stone from entry under any existing law applicable thereto." (15 L. D., 360.)

Such land being subject to agricultural entry only, even if it should appear that Jamison's entry was made for the purpose of securing the stone quarries, it would not necessarily follow that it was made in bad faith, provided he complied with the homestead law as to residence, improvements, etc. No reason is perceived why he might not make a home for himself and family on land the chief revenue from which is building stone, rather than agricultural products.

I know of no statute, or regulation of this Department, requiring a homesteader to support himself and family solely from the agricultural products of his farm. Such a ruing would exclude from the benefits of the homestead laws all those who followed other pursuits than farming for a livelihood.

Whether land of this character, incapable of producing any agricultural crop and unfit even for grazing, would be subject to homestead entry need not be here discussed, further than to say that the entryman in his final proof would be required to show some cultivation of the land, or that it was used for grazing purposes. It was not necessary for Jamison to show at the hearing that he had cultivated the

land, for his entry was not made until September, 1889, and the hearing was had before the cropping season of the next year.

While I find from the evidence now before me that this land is chiefly valuable for building stone, I am not satisfied that it is entirely incapable of cultivation and unfit for grazing, and, as Jamison claims that he can produce evidence of its agricultural qualities, and that he failed to do so at the hearing because he understood that question not to be in issue, I think justice will be best subserved by giving him an opportunity to do so now.

I am further persuaded that this is the proper course to pursue by a letter in the record before me from the contestant, of date February 15, 1892, stating that the land embraced in the entry is very valuable ($300,000), that it contains, besides building stone, large deposits of fire-clay, limestone, marble and gypsum, and asking that he be allowed to prove this, if the placer claim can not be sustained.

If these minerals are found in paying quantities upon the land, it is subject to entry under the mining laws, as construed by this Department, and that fact, if proven, may very materially affect the rights of the agricultural claimant.

You will therefore reinstate the homestead entry of Jamison, and direct a hearing as to the character of the land, its capacity for agriculture, and the nature, value and extent of all deposits of a stone or mineral character found thereon, and re-adjudicate the question in the light of the evidence thus obtained.

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

CLEMENT *v.* CLEMENT ET AL.

The confirmatory provisions of section 7, act of March 3, 1891, for the benefit of *bona fide* incumbrancers, extend to a homestead entry made by one who had previously secured title to another tract under the homestead law.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 21, 1893.

I have considered the motion filed by Lydia A. Penrose, mortgagee, to remand to you the case of Joseph S. Clement *v.* James W. Clement and Lydia A. Penrose, mortgagee, involving homestead entry No. 11,978, commuted to cash entry No. 7618, of the NW. ¼ of Sec. 9, T. 113 N., R. 58, Watertown, Dakota, in order that you may dismiss the contest against said entry, and approve the same for patent under the provisions of section 7 of the act of Congress approved March 3, 1891 (26 Stat., 1095).

The grounds of said motion are that when final certificate and receipt issued in said case, on March 25, 1885, no protest or contest was filed against the validity of said entry, and not until July 3, 1887, which was more than two years after said entry was allowed; that said land was mortgaged to said Penrose, who in good faith loaned said entry-

man the sum of $570, on April 1, 1885, which is due and unpaid, and that notice of said mortgage was duly given to the local office, as shown by the affidavit accompanying the motion.

The record shows that said entry was made by said James W. Clement on July 11, 1883, and was commuted on March 25, 1885, final certificate No. 7618 issuing therefor; that a hearing was ordered upon the allegation of said Joseph S. Clement, son of said entryman; that the entryman was disqualified from making said entry, having made a former homestead entry in 1864, or 1865, at the United States land office at Des Moines, Iowa, of the north fractional half of the NE. ¼ of Sec. 4, T. 89 N., R. 17 W., containing forty-five and forty one-hundredths acres; that on December 7, 1887, the hearing having been adjourned until that day, said Penrose filed her affidavit alleging her interest in the land, requested to be allowed to intervene in said case, and objected to any further action in the case. Her objection was overruled by the local officers. From the evidence submitted, the local officers found that the entryman, said James W. Clement, had exhausted his homestead entry by a prior entry of public land under the homestead law, for which he had received patent, and recommended that his said cash entry should be canceled. On appeal, your office, on September 27, 1890, affirmed the decision of the local office.

An abstract of title, the correctness of which is certified to by P. W. Ware, register of deeds for Clark county, Dakota, shows that James W. Clement and Margaret A., his wife, on April 1, 1885, executed a mortgage on the land to Lydia A. Penrose for the sum of $570.

Although the proof shows that the said James W. Clement had made a prior entry for which patent had issued under the homestead laws, yet the land in question being subject to entry, and the entry having been allowed to one *in esse*, the facts above given bring the case within the confirmatory provisions of the act of 1891 (*supra*). Patrick Tracey, 13 L. D., 392; Jairus Lincoln, 16 L. D. 465.

The decision appealed from is hereby reversed, and the case is remanded for proper proceedings in conformity to these views.

TIMBER CULTURE PROOF—RULE 53 OF PRACTICE.

HUBER *v.* BURTLESS.

Final timber culture proof submitted concurrently with evidence taken under contest proceedings, and in part responsive thereto, may be considered under amended Rule 53 of Practice, where the charge as laid by the contestant is not sustained by the testimony introduced in his behalf.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 21, 1893.

On the 28th of May, 1880, Nehemiah Burtless made timber culture entry for the E. ½ of the SW. ¼, and lots 3 and 4 of Sec. 7, T. 2 N., R.

29 W., McCook land district, Nebraska. He died in January, 1889, having executed his last will and testament on the 26th of May, 1886, in which he gave and devised all his property, real and personal, to his wife, Lavilla J. Burtless, and appointed her executrix of his will. In case he outlived his wife he provided that all his property, real and personal, should go, at his death, to Paulena L. Burtless, an orphan girl adopted by himself and wife when she was three and a half years old.

On the 22d of July, 1890, Lavilla J. Burtless made final affidavit before the register of the local land office, and applied to perfect her claim to the land entered by her husband. She made oath that she was the widow of Nehemiah Burtless, who left no children surviving him, and that she was his only heir. That for a period of eight years, at least ten acres of said tract had been planted to trees, which had been cultivated, protected, and kept in a growing condition, and that there were at that time an average of over one thousand living and thrifty trees to, and upon each acre, aggregating in total the number of eleven thousand trees.

On the said 22d of July, 1890, William Huber appeared at the local office, and made oath that he was informed, and believed that Mrs. Burtless was about to make final proof that day, and alleged that for the last two years said tract had not been cultivated, and that there was not the number of trees growing on each acre, required by law. He asked that he might be allowed to appear and cross-examine the final proof witnesses offered by the claimant, and that said proof be rejected, and the entry canceled.

Prior to that time, Huber had filed an affidavit of contest against said entry, and a hearing had been appointed for the said 22d day of July, 1890. Both parties were therefore present at the local office on that day, in response to notice and the contestant produced two witnesses, who were sworn and testified in his behalf. They were then cross-examined by the counsel for claimant, and the case of contestant closed.

The claimant and one witness were then examined, their testimony being taken upon final proof blanks. The hearing was then "continued to August 2, 1890, at 10 o'clock, a. m., by agreement," according to the entry made by the local officers in the record of the case. They next made the following entry: "August 2, 1890, proof completed and case closed."

The proof taken on the 2d of August, 1890, was the testimony of George J. Frederick, Charles H. Jacobs, Frank Albrecht and Melvin H. Holmes, witnesses produced on the part of claimant. Their evidence was taken upon final proof blanks, as was the case with that of the claimant, and her witness, Aaron T. West, who were examined on the 22d of July, the day appointed for the hearing upon Huber's contest. Neither the claimant, nor any of her witnesses, were cross-

examined by the counsel for contestant, so far as appears by the record, although the answers to all the printed questions were unusually full and complete.

On the 22d of September, 1890, the local officers united in a decision, in which they said: "We find no cause for action, as claimant shows by proof, a full compliance with the law. We therefore dismiss contest, and recommend receiver's receipt to issue."

An appeal was taken to your office, and on the 8th of March, 1892, you affirmed the action of the local officers in dismissing the contest, and finding that the final proof offered by the defendant indicated a substantial compliance with the law, you informed the local officers that such final proof would be allowed to stand, and in the event of your decision becoming final, you directed them to issue certificate and receipt thereon, upon payment of the required fee. An appeal from your decision brings the case to the Department. The errors complained of in your decision, are specified as follows:

1. It was error to dismiss said contest under the proofs submitted at the contest, which proofs are sufficient to warrant the cancellation of said entry.

2. It appears from the decision appealed from that final proofs were offered after contest was initiated, and accepted and approved by the Commissioner, which said proofs were taken without notice to contestant, contrary to the Rules of Practice in such cases, which provide that when a contest has been initiated against an entry no further steps will be taken to dispose of the land covered by such entry during the pendency of said contest.

The objection first stated is not well taken, as the testimony submitted by the contestant at the hearing did not sustain his charges, and without a word of proof on the part of the claimant, the contest should have been dismissed. The plaintiff alleged, but failed to prove, a cause of action against the defendant, hence a non-suit was in order

Under these circumstances, is he in any way injured by the irregularities complained of in his second specification of errors?

The entry in question having been made prior to September 15, 1887, final proof could properly be made without publication of notice of intention to make the same. (9 L. D., 672).

Rule 53, of the Rules of Practice, as amended, (14 L. D., 250), provides that in all cases where a contest has been brought against an entry or filing on the public lands, and trial has taken place, the entryman may, if he so desires, submit final proof and complete the same, with the exception of the payment of the purchase money or commissions, as the case may be, and should the entry finally be adjudged valid, said final proof, if satisfactory, would be accepted, and final certificate issued, upon proper payment being made.

In the case at bar, contest had been initiated against an entry, the day of trial had arrived, and the plaintiff had submitted his evidence. To that extent trial had taken place. The defendant, in contradiction of the charges and testimony of the plaintiff, and in support of her claim, submitted the testimony of herself and witnesses. This testimony was

reduced to writing upon final proof blanks, and was afterwards submitted as the defendant's final proof in the case.

After you had dismissed the contest, which in effect adjudged the entry valid, you considered said final proof,and found the same satisfactory. You then provided for its acceptance, in case your judgment became final, and the entryman complied with the provisions of Rule 53, as amended. I think this brings the case within the provisions of that amended rule.

It would have been different, perhaps, had it been necessary to consider the testimony of the defendant and her witnesses in determining the contest charges of the plaintiff, as it was held in the case of Foltz *v.* Soliday (13 L. D., 663), that final proof could not be considered as part of the testimony in a case arising under a protest against the acceptance of said proof. That was a different case, however, from the one at bar, as the protest filed by the plaintiff on the 22d of July, 1890, against the defendant's final proof, cuts no figure whatever, the case being disposed of under his contest charges filed on the 22d of April, 1890.

In view of the utter failure of the plaintiff to sustain his charges against the entry in question, my conclusion is that he was in no way injuriously affected by whatever irregularities may have occurred in the disposition of the case by the local officers, or your office. When he failed to prove the cause of action alleged by him, he ceased to be a party in interest in the case, or in the subsequent proceedings, except that he still had the right of appeal. This right he has exercised, and his appeal has been carefully considered. It would not benefit him to require the defendant to submit new final proof, and I see no legal objection to accepting that already submitted. The decision appealed from is therefore affirmed.

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

JOHN L. MORRISON.

A pre-emption entry of Alabama iron land, based on a settlement and filing made prior to the passage of the act of March 3, 1883, by one who removed from land of his own in the same State to make such settlement, is confirmed by the proviso to section 7, act of March 3, 1891, if otherwise within the terms of said act.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 21, 1893.

On February 10, 1888, John L. Morrison made pre-emption cash entry for the north ½ SE ¼ and SW ¼ SE ¼ Sec. 30, T. 24 N., R. 11 E., Montgomery, Alabama.

On February 11, 1891, you held said entry for cancellation as to the SW ¼ of the SE ¼ Sec. 30, T. 24 N., R. 11 E., because said tract was

"covered by limonite ore and not subject to pre-emption entry before being offered at public sale, as directed in circular of April 9, 1883." Morrison has appealed from your judgment to this Department, and has also filed a motion asking to have the case disposed of under the provisions of section 7 under the act of March 3, 1891 (26 Stat., 1095).

The circular of April 9, 1883, referred to in your decision is found in 1 L. D., 655. It was promulgated under the act of March 3, 1883 (22 Stat., 487). This act provides as follows:

That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however,* that all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided, further,* that any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth eighteen hundred and seventy-two, entitled 'An act to promote the development of the mining resources of the United States,' in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

It was held by this Department in the case of Nancy Ann Caste (3 L. D., 169), that (syllabus),—

Where at the date of filing or entry no mineral was known to exist the fact that mineral is subsequently discovered will not operate to deprive a settler of the right to perfect his claim in case he complies with all legal requirements in regard to residence, cultivation and improvement of the land. Lands covered by bona fide perfected or inchoate settlement claims cannot be offered at public sale under said act.

And in the case of Thomas M. Knight *et al* (8 L. D., 297), it was said,—

I do not think it was the intention of Congress, as expressed in said act, that actual settlers who had settled upon and improved lands not known to be mineral in character, prior to the passage of the act, should be compelled to compete with others at a public sale in order to save their homes and improvements.

It is shown in the case above that Morrison settled upon the land in question, having moved from land of his own in the same State, and filed a pre-emption declaratory statement therefor in 1881, and made cash entry February 10, 1888.

The act of March 3, 1883, *supra*, provided that existing homestead entries, if legal in other respects, should pass to patent notwithstanding the passage of the act, and without reference to the act of May 10, 1872. Since the Department has held that one who has made a pre-emption filing and settlement is in as good a position under these laws as one who has made a homestead entry, and since Morrison filed his pre-emption declaratory statement and made settlement before the passage of the act of 1883, and is shown to have been an actual settler on the land ever since, his entry is not such an one as may not be confirmed under the proviso to section 7 of the act of March 3, 1891, supra. It was not held for cancellation by your office until more than two years had elapsed after the final receipt was issued, and no contest or pro-

test has ever been filed against said entry. It is therefore confirmed under the proviso of the act cited.

Your judgment is accordingly modified, and you are directed to issue a patent on the entry in question.

TIMBER LAND ENTRY—SECTION 452 R. S.

GILMORE *v.* SIMPSON.

The condition of the land at the date of purchase determines whether it is of the character contemplated by the act of June 3, 1878.

One engaged as an agent or attorney of others in securing information from the records of the local office for the benefit of such individuals, is not by such employment disqualified under section 452 R. S., to enter public land.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 22, 1893.

On July 27, 1889, Nora Simpson made timber land cash entry (No. 3367) of the N. ½ of the NW. ¼ and the SE. ¼ of the NW. ¼ of Sec. 26, T. 8 N., R. 9 W., at Oregon City, Oregon.

On March 8, 1890, Neil Gilmore filed an affidavit of contest against said entry, alleging in substance that said land was more valuable for agricultural than for timber purposes, and that on May 14, 1889, the time said Nora Simpson applied to purchase said land, she "was employed in" the local land office at Oregon City, by William T. Burney, the register of said office.

A hearing was appointed for May 14, 1890, at the local office, when the parties appeared and testimony was submitted.

On June 23, 1890, the local officers rendered their joint opinion that said land was chiefly valuable for its timber, and that said Simpson was qualified to make said entry, and was entitled to a patent for said land.

On appeal, by letter of February 6, 1892, you affirmed their decision and dismissed the contest.

A motion for review was filed by said Gilmore, and by letter of May 23, 1892, you re-affirmed your former decision as to the character of said land but you then found that said Simpson was "an employe of said office" at the date she entered said land, and was therefore disqualified to make said entry under the provisions of section 452 of the Revised Statutes; consequently you reversed your former decision of February 6, 1892, and held said entry for cancellation.

An appeal now brings the case to this Department.

Having examined the evidence I find that at the hearing the testimony on both sides was confined to the charge relating to the character of the land. It appears that the land is rough and uneven, cut up by gulches, with a second rate soil, and covered with a growth of timber consisting mainly of hemlock, spruce and fir trees.

The act of June 3, 1878 (20 Stat., 89), under which the entry was made, provides that lands "valuable chiefly for timber, but unfit for cultivation" may be sold as therein provided. In United States *v.* Budd (144 U. S., 154, 167), this statute was construed, and the court, in speaking of the scope of the act, say—

> Lands are not excluded by the scope of the act because in the future, by large expenditures of money and labor, they may be rendered suitable for cultivation. It is enough that at the time of the purchase they are not, in their then condition, fit therefor. The statute does not refer to the probabilities of the future, but to the facts of the present.

Judged by this rule the land in dispute must be considered to have been "valuable chiefly for timber, but unfit for cultivation" at the date when said entry was made. I concur in your two opinions and in that of the local officers upon this question of fact.

No evidence that Nora Simpson was disqualified to purchase said land, as charged, was introduced upon the trial. Apparently the contestant abandoned that part of his charge, for he submitted no testimony that she was ever employed in the local office by William T. Burney, the register, or by any one else.

The charge is that on May 14, 1889, she was "employed" in the local office by said Burney, as register.

By your letter of January 18, 1890, before this contest was initiated, you called on the local officers for a report as to her said employment.

The register and receiver each made a report, with the affidavit of the late register, said Burney, who was in office on May 14, 1889, and with the affidavit of the register who preceded him in that office.

The register, in his letter of February 1, 1890, says in response—

> As to "how long she has been employed in your office," the records of the office do not disclose the fact that she was employed, or at what time she commenced work in the office.

It appears from this report that there is no record evidence that she was an employé in the office, as charged, or upon the roll of government employés. The receiver, in his letter of March 8, 1890, says—

> Not at the date of the initiation of said claim nor at the final entry thereof, was she employed in this office, nor engaged in any business connected therewith, except in those cases where persons required information or services not within the power of the officials to furnish for any reason; then such persons secured her services and paid for them such sum as she and they should agree upon therefor. She was not paid as a clerk in the office nor under oath to perform any duties therein, nor was she required to account to the office in the matter of her business, but was at liberty to dispose of her time as her own will dictated.

William T. Burney, by his affidavit of March 7, 1890, swears that he was register of said office from January 1, 1886, to August 1, 1889, and that on or about March 1, 1888, Nora Simpson began to perform the services in the local office as already described, and continued to do so until November 5, 1889.

> That she was not in the employ of the government, nor ever sworn to perform any duties or business connected with said office, nor was she accountable to the

office or to the register, or receiver, for her services, nor ever received any remuneration from the government, or either of the officers of said office, for the same, as such, or otherwise, that I remember of.

This affiant was the register charged with having employed Miss Simpson in the local office.

L. T. Barin, by his affidavit of March 6, 1890, swears that he preceded said Burney in the office of register of said local office, and afterwards continued to practice law before the officers thereof, and that said Simpson "was not supposed to be, nor was, an employé of said office, enjoying only such privileges and rights as every other person was entitled, and had in fact, the advantages of."

These reports and affidavits made bef re the initiation of the present contest, furnish all the evidence upon the subject, and appear to me to negative the charge that on May 14, 1889, Nora Simpson was "employed" by the register of the local office.

Webster's definition of the verb "employ" is "To use as an agent, servant, or representative." Miss Simpson is reported to have rendered services as a copyist, in making copies of maps, plats, and other records of the local office, for parties outside of said office, upon their application, and not for the register or receiver, or any one connected with the office.

Section 452, of the Revised Statutes, upon which your decision is based, canceling said entry, provides as follows—

The officers, clerks and employés 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 office.

This provision prohibits a certain class of persons from the right to purchase land, which right is accorded to citizens generally. It may be properly classed, therefore, as a statute against common right.

Statutes against common right are those which operate exceptionally to the prejudice of particular persons; not laws of general application which happen to harshly affect a few individuals on account of their exceptional condition, but laws which do not have such an application; those which operate, when they apply at all, to a few, while the rest of the community are exempt. Such statutes are construed strictly. Sutherland on Stat., §366.

Again this statute further inflicts the penalty of a summary removal from office of the offender against its provisions. In all respects it is penal in character. Penal statutes are those which "impose any special burden, or take away or impair any privilege or right." Idem §358.

It is well settled that such statutes are to be strictly construed.

A penal statute cannot be extended by implication or construction. It cannot be made to embrace cases not within the letter, though within the reason and the policy of the law. Although a case may be within the mischief intended to be remedied by a penal act, that fact affords no sufficient reason for construing it so as to extend it to the cases not within the correct and ordinary meaning of its language." Idem, §350.

Such a statute should not be construed "by equity, so as to extend it to cases not within the correct and ordinary meaning of the expressions of the law." United States *v.* Sheldon (2 Wheat. 119, 121); see also Chase *v.* Curtis (113 U. S., 452).

This Department has construed the statute in question in accordance with the view that it is penal in its nature, and not to be extended by implication. In Grandy *v.* Bedell (2 L. D., 314), Secretary Teller, in construing this statute, says—

> It will be observed that the section quoted, and this is the only statutory provision bearing on the subject, does not extend to clerks in the district offices, but by its terms is confined to those employed in the General Land Office. Your office has, however, by rule, extended the operation of this statute so as to include clerks in the local office and this Department held in the case of the State of Nebraska *v.* Dorrington (Copp's L. L., 1882, p. 547), the defendant being at the time of making his timber culture entry a clerk in a local land office, that such fact was sufficient ground for the cancellation of the entry. But in the case now under consideration, the entry was allowed November 5, 1875, and since that time the claimant has apparently in good faith observed the requirements of the timber culture law so far as within his power. At the time of the contest the claimant was not an employé of the district office. Taking these facts into consideration, and the further one that he was not by express provision of law incompetent to make the entry, I am of the opinion that it should be permitted to stand.

Under this decision Miss Simpson "was not by express provision of law incompetent to make the entry" which she made July 27, 1889, and would not have been incompetent if she had been a clerk in the district office, so far as the express provision of the law affected her.

In the case of Richardson *v.* Linden (4 L. D., 77), Secretary Lamar held that the regulation of August 23, 1876 (2 C. L. L., 1448) prohibiting registers and receivers, their clerks and employés, "and those intimately and confidentially related" to them, from making entries of public land, could not "be made to defeat a statutory right."

This construction of the law was in force and effect when Miss Simpson made her entry on July 27, 1889.

On February 3, 1890, this Department, in the case of Herbert McMicken *et al.* (10 L. D., 97), extended the scope of the statutes so as to include an employé in the office of the surveyor general of Washington Territory as a branch of the General Land Office. In the case of Herbert McMicken, on review (11 L. D., 96, 98), it was considered as a fact of controlling importance that he received his compensation from the government appropriation. This decision was followed by the circular of September 15, 1890 (11 L. D., 348), which prohibited all officers, clerks, and employés in the local land offices, "or any persons, wherever located, employed under the supervision of the Commissioner of the General Land Office from entering any public land.

Miss Simpson was not paid by the government, and I do not think her case is governed by the decisions and circular last cited. Neither do I think that Miss Simpson was "employed under the supervision of the Commissioner of the General Land Office;" she had control of her

own time, and was employed only by persons outside of the local land office. She waived no statutory right by such employment, and no officer of the government had power to waive any right which she may have under the law, as held in Richardson *v.* Linden (*supra*).

The act of March 3, 1883 (22 Stat., 484), cited by you, provides—

> Sec. 2. That registers and receivers shall, upon application, furnish plats of diagrams of townships in their respective districts, showing what lands are vacant and what lands are taken, and shall be allowed to receive compensation therefor from the party obtaining said plat or diagram at such rates as may be prescribed by the Commissioner of the General Land Office.

This statute was construed by this Department in the case of Adolph Munter, (3 L. D., 174) as not excluding the public or individuals from free access to the records of the local offices for obtaining information, or making copies of the same, when the conduct of the public business would fairly permit it. The public, or individuals, have a right to employ attorneys or agents to do this business for them, especially by the permission of the local officers. Miss Simpson was so employed, and she forfeited no rights thereby.

Your judgment is reversed.

PRIVATE CLAIM—CONFIRMATORY STATUTES.

JESSE FISH.

In the adjudication of private claims the Department must follow statutory enactments, even though it be conceded that such enactments are in violation of treaty obligations.

The statutory provisions with respect to the confirmation of private claims in Florida contemplate that all such claims, whether founded upon perfect grants or incomplete titles, should be presented to the board of commissioners for confirmation, or to Congress for final action, and that all such claims, not finally acted upon by Congress, should be brought into the courts for adjudication; and a claim not confirmed by the commissioners, or by Congressional action, is barred if not asserted in the courts within the period specified.

Secretary Smith to the Commissioner of the General Land Office, June 22, 1893.

On July 16, 1870, Mr. Charles M. Furman addressed a communication to the Commissioner of the General Land Office, claiming to be the owner of Anastatia Island, in Florida, under a title derived from a Spanish grant, made prior to 1763, to Jesse Fish, and that the said grantee and his heirs have had continuous possession of said property from the date of the grant to the present time.

On August 2, 1890, you rendered a decision upon the claim of the heirs of Jesse Fish to said property, holding that the claimants having failed to comply with the acts of Congress providing for the confirmation of such grants, it has never been confirmed and has no validity before the land department.

From this decision the heirs of Jesse Fish have filed an appeal.

The appellants, as heirs of Jesse Fish, claim title to the whole of Anastatia Island, containing about 10,000 acres, under a grant from the Spanish government, made prior to 1763. They further claim, that said grant being a complete, perfect, and valid grant at the date of the treaty of February 22, 1819, between the United States and Spain, and having been so reported on December 31, 1825, by the Commissioners appointed under the act to ascertain and determine titles to lands in Florida under said grant, said land was never the property of the United States, and the complete title to the same is vested in the heirs of said Fish.

The act of May 8, 1822 (3 Stat., 709), provided for the appointment of commissioners to inquire into the justice and validity of all claims or titles to land in the Territory of Florida, under any patent, grant, concession, or order of survey made prior to the 24th day of January, 1818, which were valid under the Spanish government or by the law of nations and which had not been rejected by the treaty ceding the territory of East and West Florida to the United States. The act required all persons claiming title under such grant, or orders of survey, to file their claims with said commissioners, setting forth the situation and boundaries, if to be ascertained, with the deraignment of titles where they were not grantees or original claimants, and empowered the commissioners to examine into such claims, and, if satisfied that said claims are correct, to give confirmation to them; provided that the confirmation should only operate as a release of any interest of the United States, and that said commissioners shall not have power to confirm any claim or part thereof where the amount claimed is undefined in quantity, or shall exceed 1,000 acres, but in all such cases they shall report the testimony, with their opinions, to the Secretary of the Treasury, to be laid before Congress for its determination.

This act was amended by act of March 3, 1823 (3 Stat., 754), providing that the powers of the commissioners, appointed under the act of May 8, 1822, shall be confined exclusively to the examination of claims in West Florida, and authorizing the appointment of three commissioners to examine titles and claims to lands in East Florida under such grants and orders of survey. The 2d section of this act provided:

That, in the examination of titles to land before either of said boards of commissioners, the claimant or claimants shall not be required to produce in evidence, the deraignment of title from the original grantee or patentee, but the commissioners shall confirm every claim in favour of actual settlers at the time of session (cession) of the said Territory to the United States, where the quantity claimed does not exceed three thousand five hundred acres, where such deraignment cannot be obtained, the validity of which has been recognized by the Spanish government, and where the claimant or claimants shall produce satisfactory evidence of his, her, or their, right to the land claimed: And said commissioners shall have the power, any law to the contrary notwithstanding, of deciding on the validity of all claims derived from the Spanish Government in favour of actual settlers, where the quantity claimed does not exceed three thousand five hundred acres.

On December 31, 1825, the commissioners reported this claim to the Secretary of the Treasury, together with other claims that had been acted upon by said commissioners, among which were the following: Report No. 1 of claims not exceeding 3,500 acres, which had been confirmed by the commissioners; Report No. 2, of claims not exceeding 3,500 acres which had not been confirmed, but which were recommended for confirmation; and Report No. 3, being "Register of claims to land exceeding 3,500 acres in East Florida, which are founded on patents or royal titles derived from the spanish government, and which, in the opinion of the commissioners, are valid."

In "Report No. 3" appears the claim of the heirs of Jesse Fish, which was reported by the commissioners as a claim derived from a concession, or order of survey, filed June 19, 1795, to Jesse Fish, for 10,000 acres of land situated on Anastatia Island. These claims were reported to Congress February 21, 1826. (Am. State Papers, Vol. 4, p. 283.)

By act of February 8, 1827 (4 Stat., 202), all decisions made by the commissioners appointed to ascertain claims and titles to lands in the district of East Florida, and those recommended for confirmation under the quantity of 3,500 acres contained in the reports of the commissioners, submitted to Congress by the Secretary of the Treasury, on February 21, 1826, were confirmed.

By act of May 23, 1828 (4 Stat., 284), it was enacted that the claims contained in the reports of the commissioners of East Florida and recommended for confirmation by said commissioners shall be confirmed to the extent of the quantity contained in one square league, to be located within the limits of the original grant, and by section 2 it was enacted:

> That no more than the quantity of acres contained in a league square, shall be confirmed within the bounds of any one grant: and no confirmation shall be effectual until all the parties in interest, under the original grant, shall file with the register and receiver of the district where the grant may be situated, a full and final release of all claim to the residue contained in the grant.

The claim of Fish, being for a quantity greater than one square league, was controlled by the provisions of this act, and was only confirmed subject to the conditions therein named.

The heirs of Fish have never taken any action under said act, and, in the meantime, two other private land claims, based upon Spanish grants—to wit: the claims of Rodrigues and Sanchez—have been located on said island, and segregated from the public domain by the United States survey made in 1835, against which no protest was made by the heirs of Fish, nor, indeed, does it appear that any notice was taken of said claim from the time that it was presented to the commissioners until July 16, 1870.

It is insisted by appellants that their title to Anastatia Island is under a complete Spanish grant, which was so considered by the Spanish authorities and the United States commissioners, who reported

it to be valid for the full quantity granted. That the United States never having acquired any title to the land covered by said grant under the treaty with Spain, it could not impose any condition upon the grantees, and no act was therefore required on the part of the heirs of Fish or of the government to perfect their title.

The theory of their claim is that the act of Congress of May 23, 1828, which undertook to confirm all claims of this nature to the extent of a league square, provided the parties in interest released all lands in the grant in excess of a league square, is in violation of the obligation of the government as established by the treaty, and can not therefore affect the validity of their claim.

Even conceding that this claim was a valid grant from the Spanish government for the full quantity of 10,000 acres, or the entire area of Anastatia Island, and that the act of May 23, 1828, is in violation of the obligation of the treaty under which Florida was ceded to the United States, the departments as well as the courts are bound to follow the statutory enactments of its own government, and must be controlled thereby.

This question was fully considered by the supreme court in the case of Botiller *v.* Dominguez, 130 U. S., 238, in which the court held that no title to land in California, dependent upon Spanish or Mexican grants, can be of any validity which has not been submitted to and confirmed by the board provided for that purpose, under the act of March 3, 1851 (9 Stat., 631), or if rejected by that board, confirmed by the district or supreme Court of the United States.

In that case, as in this, it was claimed that the grant was a complete grant, needing no confirmation, and that the grantee was not compelled to submit the same for confirmation to the board of commissioners. The material and controlling question, decided by the court in that case and which must control in this, is, that if an act of Congress is in conflict with the treaty, the court is bound to follow the statutory enactment of its own government.

> If the treaty was violated by this general statute enacted for the purpose of ascertaining the validity of claims derived from the Mexican government, it was a matter of international concern, which the two States must determine by treaty, or by such other means as enables one State to enforce upon another the obligations of a treaty. This court, in a class of cases like the present, has no power to set itself up as the instrumentality for enforcing the provisions of a treaty with a foreign nation which the government of the United States, as a sovereign power, chooses to disregard. Botiller *v.* Dominguez, *supra.*

This language must apply with greater force to the action of the Department, whose duty it is to administer the laws as they are found in the statute books, and not to determine whether they are in violation of the Constitution, or of treaties with foreign nations.

If this claim comes within the provisions of the acts of February 8, 1827, and of May 23, 1828, its validity can not be recognized, for the reason that the claimants have failed to comply with the conditions pre-

scribed by the said acts. The purpose of the several acts providing for the adjudication of these claims was to separate *private* property from the public domain, to enable Congress to safely sell the vacant lands in the newly acquired territory, and "to accomplish this it was necessary that *all* claims of every description should be brought before the Commissioners, and that their powers of inquiry should extend to all." United States *v.* Arredondo *et al.*, 6 Peters, 691; United States *v.* Percheman, 7 Peters, 51; United States *v.* Clark, 48 Peters, 436–465.

All claims of every description whatever, whether arising under *patents*, *grants*, concessions, or orders of survey were required to be submitted to the board of commissioners for confirmation, or to be submitted to Congress for final action, before their validity could be recognized, and all claims reported upon by the commissioners, whether founded upon complete or incomplete titles, were subject to the provisions of the act of Congress of May 23, 1828, limiting the extent to which confirmation would be made, and providing that all claims to lands within the territory of Florida, embraced in the treaty between Spain and the United States, which had not been decided and finally settled, should be brought by petition before the court within one year from the date of said act, or be thereafter forever barred.

In the case of United States *v.* Percheman, *supra*, the claim involved was a complete grant subject to no condition. It was reported to Congress January 14, 1830, in a list, with other claims rejected for want of sufficient evidence of title. The act of May 26, 1830, confirmed all claims which had been recommended for confirmation by the commissioners, but took no action upon the list of rejected claims. A petition was filed by claimant in the supreme court for the district of East Florida, under the 6th section of the act of May 23, 1828. The court, after reviewing the several acts for the investigation and adjudication of these claims, says that "these commissioners seem to have been appointed for the special purpose of procuring promptly for Congress that information which was required for the immediate operation of the land office." The court further says:

> It is apparent that no claim was finally acted upon until it had been acted upon by congress; and it is equally apparent that the action of congress on the report containing this claim is confined to the confirmation of those titles which were recommended for confirmation. Congress has not passed on those which were rejected. They were, of consequence, expressly submitted to the court.

The grant to Percheman was a complete grant, subject to no condition, and, although it had been rejected by the board of commissioners, it was as much protected, until acted upon by Congress, as the Fish claim, which had been reported favorably.

The commissioners had no jurisdiction to confirm grants for more than 1000 acres, but merely to examine into and report to Congress such claims as are valid and ought to be confirmed. "No claim was finally acted upon until it had been acted upon by Congress."

In the case of United States *v.* Clark, *supra*, the court said:

> The grant which constitutes the foundation of the petitioner's claim, is a complete title, subject to no condition whatever, emanating from the governor of East Florida, who was the lawful authority of his Catholic majesty, for making grants and concessions of land, in that province. The decree of the district court, so far as it affirms the validity of this grant, is, we think, correct. But it appears to us to confirm the title of the petitioner to lands not comprehended within it.

If these were perfect grants, instrinsically valid, and not depending upon the sanction of the legislative or judical departments, it would have been unnecessary to file a petition to obtain the decree of confirmation, but for the provision of the act of May 23, 1828, which required all claims not finally acted upon by Congress to be brought before the court for adjudication.

It is apparent that when the court says, in the case of United States *v.* Wiggens (14 Peters, 334), that perfect titles made by Spain prior to January 24, 1818, are intrinsically valid, and need no sanction from the legislative or judicial departments of the government, it simply means that perfect claims do not derive their validity from confirmation, but there is nothing to indicate that it was not the intention of Congress to require *all* claims to be substituted to the proper tribunals appointed to ascertain what claims are perfect, and that claims not submitted in accordance with the acts would not be recognized. If this claim came within the provisions of the second section of the act of May 23, 1828, its validity was recognized only to the extent of one league square, and upon the condition that the claimant would relinquish all in excess of that quantity on or before May 26, 1831. If it did not come within the provisions of said section, then it was a claim not acted upon by Congress, and is barred by the failure to commence the proper proceedings in the courts within the time limited by the 6th section of said act of May 23, 1828.

From the facts shown by this record, I can see no reason for the recognition of this claim, which seems to have been practically abandoned from 1825 to 1870 by failure to perform any act required under the laws of Congress, and without protest against the action of your office in extending the public surveys over the island and restoring to the public domain all of said lands, except that part segregated and set apart as the private claims of Rodriguez and Sanchez, and in patenting to the State a large part of this land as swamp and overflowed.

In view of the foregoing, the decision of your office holding that said claim has no validity is affirmed, and the papers are herewith returned.

With the record in this case, your predecessor forwarded the application of various parties to enter lands on said island under the land laws of the United States, and in his decision he directed that, if the decision rejecting the Fish claim be affirmed, the applications will be returned to the local officers to act upon the same according to their merits and to settle all conflicts.

On February 14, 1891, my predecessor directed that action upon the applications referred to should be suspended until the end of the then existing session of Congress, in view of the following resolution, which had been introduced in the Senate on February 12, 1891:

Resolved, That the Secretary of the Interior be, and he hereby is, requested to suspend all further action in respect to admitting land claims under the laws of the United States on the island of Anastasia, Florida, during the present session of Congress, and until the expiration of the next session of Congress, unless Congressional action on the subject shall have been taken meantime.

On February 13, 1891, Senator Pasco requested that this resolution should go over without prejudice, stating that the probability is that it will not be further pressed, and such action was taken. It does not appear from the proceedings in the Senate that any further action was taken upon this resolution, and it being no longer necessary to suspend action upon the application filed in your office to make entry of these lands, as directed by said letter of February 14, 1891, the directions contained therein are hereby revoked, and you will take such action upon said applications as may be right and proper.

HOMESTEAD—FINAL PROOF—ADMINISTRATOR.

JOHN L. CARLSON'S HEIRS.

The administrator of the estate of a deceased homesteader has no authority to submit final proof for the benefit of the heirs.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 24, 1893.

I have considered the appeal of Lewis Tysdel, administrator of the estate of John L. Carlson, deceased, involving the homestead entry of said Carlson for the S. ½ of NE. ¼ and lot 1 of Sec. 4, T. 107 N., R. 59 W., Mitchell, South Dakota.

It appears that Carlson made entry of said land April 10, 1883, and a few days afterwards established his residence upon the land and continued thereon until the date of his death, November 9, 1888; that on November 22, 1889, the administrator made final proof on said entry and on December 14, following the local officers issued the final papers to the heirs of the deceased settler and in due course transmitted the same with the current returns to your office for approval and patenting.

Under date of August 20, 1890, you advised the local officers that said final proof had been rejected on the ground that proof made by an administrator, as such, can not be accepted, but directed that if one of the heirs of the deceased settler would execute a final affidavit, such heir being qualified as to citizenship, and file the same with the present proof the defect would be cured.

The local officers advised the administrator of the purport of your letter by registered letter, but no action was taken.

Under date of October 3, 1891, you held the entry for cancellation on the ground that said proof could not be accepted and also for the reason that patent could not be issued to an alien, said proof showing that there were no heirs residing in the United States, but that his father resided in Sweden. Again the administrator was notified by registered letter of this action but failed to respond.

On April 18, 1892, you canceled the entry in question with instructions to so advise the parties in interest, whereupon the administrator appeals and alleges substantially the following errors:

In assuming that the heirs of the said Carlson were aliens when the contrary is the fact. In holding substantially contrary to the fact that by virtue of a full compliance of law by Carlson as to residence and cultivation, the heirs have vested rights in the land, and that if the administrator had no right to make proof, then his acts and statements could not affect or be binding upon the heirs.

It is a well settled principle that the administrator of the estate of a deceased homesteader has no authority to make final proof for the benefit of the heirs. Sec. 2291, Revised Statutes provides that in homestead cases if the entryman be deceased, his widow may make the proof, or in case there is no widow the heirs or devisee may make the proof and if satisfactory shall be entitled to a patent.

In the case under consideration it appears that Carlson died intestate, and left no widow, but that he left heirs who are the proper persons to make the proof.

There is no evidence in this case, however, to show that the heirs of Carlson have ever been notified, either actually or constructively of your action as hereinbefore set forth, but on the contrary the local officers have in each case addressed the notice to the administrator.

In view of this fact and also of the further fact that the deceased settler had fully complied with the law for the period required by the statute and that the administrator states in his appeal that Carlson left heirs who are not aliens and may therefore be competent to make final proof; furthermore that there appears no adverse claim to this land and the question is simply one between the heirs and the government, I am of the opinion that further steps should be taken to serve legal notice on the heirs as to the action taken by you in the case, therefore you will direct the local officers to call upon the administrator for any information he may possess as to the present address of said heirs and thereafter serve upon them a rule to show cause why your decision canceling said entry should not remain undisturbed and in the event the heirs make answer to said rule, you will readjudicate the case according to its merits; otherwise your decision will stand affirmed.

HOMESTEAD—ACT OF JUNE 15, 1880—RELINQUISHMENT.

WAGSTAFF *v.* CULP.

A cash entry under section 2, act of June 15, 1880, made by one who had previously executed a relinquishment of the original entry, operates as an appropriation of the land, where it appears that said relinquishment was the result of a mistake, and that no adverse rights are claimed thereunder.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 22, 1893.

I have considered the appeal taken by John W. Wagstaff from your decision of June 6, 1892, rejecting his application, tendered November 28, 1891, at Salina, Kansas, to make homestead entry of the NW. ¼ of Sec. 11, T. 15 S., R. 5 W.

Said land lies within the limits of the grant to the Union Pacific Railroad Company by the act of July 1, 1862 (12 Stat., 489), as enlarged by the act of July 2, 1864 (13 Stat. 356).

By the third section of the act of July 1, 1862, there was granted to said company

every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed.

The line of said road was definitely located opposite said land on May 8, 1867. The land has never been "offered" for sale.

On March 22, 1866, David Salaerey filed pre-emption declaratory statement (No. 3628) for said land, alleging settlement March 19, 1866.

On June 20, 1866, George H. Hall filed pre-emption declaratory statement (No. 2964) for said tract, alleging settlement June 16, 1866.

As these filings had not expired at the date when the line of said road was definitely fixed, they had the effect of excepting the land from the operation of said grant, according to the express terms of the granting act. Union Pacific Ry. Co. *v.* McKinley (14 L. D., 237).

On October 4, 1871, Charles C. Culp made homestead entry (No. 11,597) of said tract, which was then properly subject to said entry.

On March 15, 1877, said Culp executed a relinquishment of his right to the land under his entry, for the reason alleged therein that "I am informed that the Kansas Pacific Railway Company claims the land aforesaid, and claimed the same before the date of my homestead entry." This relinquishment was in the form of an affidavit, duly signed and sworn to by said Culp. His entry was canceled September 14, 1877.

On April 11, 1877, the said company listed the tract and patent issued therefor December 31, 1877.

On July 3, 1891, said Culp applied to purchase the land under the second section of the act of June 15, 1880 (21 Stat. 237), and filed a

quitclaim deed of the Union Pacific Railway Company as successor to the Kansas Pacific Railway Company, executed June 17, 1891, by the president of said company, reconveying said land to the government of the United States whereupon the local officers accepted payment for said land from said Culp and issued final certificate (No. 5576) and receipt for the same.

Wagstaff's application to enter, tendered November 28, 1891, was rejected by the local officers for the reason that the land was covered by Culp's cash entry.

On appeal, you held that the language of said relinquishment indicated that it was not Culp's voluntary act, and as no rights had intervened between his relinquishment and his purchase, Wagstaff's application should be rejected.

The second section of the act of June 15, 1880, provides in part as follows—

> That persons who have heretofore, under any of the homestead laws, entered lands properly subject to such entry, ... may entitle themselves to said lands by paying the government price therefor, etc.

It is contended that by his relinquishment Culp forfeited the benefit conferred by said act.

In Rice *v.* Bissell (8 L. D., 606) it was held that one who has voluntarily relinquished his entry should not afterwards be allowed to set up a claim based upon said entry, unless upon a showing, as for instance of mistake in the execution of the relinquishment such as would justify the re-instatement of the original entry." In that case the entryman had sold his relinquishment for fifty dollars, and it was held that he was precluded from the purchase of the tract under the section above cited.

In Cole *v.* Reed (10 L. D., 588) the above doctrine is cited with approval, and it was held that as there was no evidence in the case "that the relinquishment of the original entry was obtained by fraud, or executed by mistake" the cash entry should be canceled.

In the present case there is evidence that the relinquishment was given under a mistake. No contest has been initiated, and no opportunity has been given to Culp to defend the validity of his entry. His relinquishment appears by its express terms to have been executed on account of the information that the railroad company made claim to the land. The company actually listed the land before the entry was canceled. There is no evidence that the company did not claim the land as alleged. The presumption is in favor of the validity of the entry. The company relinquished its title apparently for Culp's benefit, and to rectify its mistake, and repair the injustice done to him. Until the entry is shown to be invalid, Culp is entitled to the land.

Your judgment is affirmed.

TIMBER LAND ENTRY—APPLICATION.

MARY E. GARDNER.

Failure of a timber land applicant to personally examine the land before making application therefor, does not call for cancellation of the entry where the application is prepared under the instructions and personal supervision of the local officers, and no adverse claims exist.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 24, 1893.

I have considered the appeal of Mary E. Gardner from your decision of September 24. 1891, holding for cancellation her timber land entry No. 3891, of the S. ½ of the SW. ¼ and the S. ½ of the SE. ¼ of Sec. 23, T. 10 S., R. 38 E., La Grande, Oregon, made May 5, 1890, because she did not examine the land previous to filing her sworn statement for said land, citing as authority for said ruling the case of L. W. Walker (11 L. D., 599).

The record shows that the appellant on February 10, 1890, filed in said land office her sworn statement, alleging that she wished to avail herself of the provisions of the timber and stone act of Congress approved June 3, 1878 (20 Stat., 89) and desired to purchase said tracts; that she is a native citizen of the United States, 52 years of age, and by occupation a house keeper; "that from my personal knowledge (I) state that said land is unfit for cultivation, and valuable for its timber." The printed words in said statement—"I have personally examined said land and," have a blank line drawn through them, thus showing that the affiant did not mean to swear that she had "personally examined said land."

After due notice the applicant was allowed to make proof and payment for said land and cash certificate was issued by the local officers. In her testimony upon final proof claimant stated that she made inspection of the land "two weeks ago by passing over and examining it."

On May 7, 1891, you suspended said entry, for the reason that "the claimant states in her sworn statement dated February 10, 1890, that she had examined the land, knew it was unfit for cultivation, and valuable chiefly for timber, while in her final proof she testifies that she examined the land two weeks ago by passing over and examining it." You accordingly directed the local officers "to call upon claimant to furnish an affidavit explaining these conflicting statements."

On September 7, 1891, the local officers transmitted the affidavit of claimant, in which she alleges that when she made her sworn statement she went to the local land office and made known to the register her wish to enter a tract of land under the timber and stone act, and thereupon he filled out a blank and asked claimant if the land was more valuable for timber than for any other purpose; that he did not

ask her if she had been over the land before offering to file for it; that she was told that she did not have to go on the land before filing for it, and if she had known that such was the case, she would have gone on the same prior to making her sworn statement, and she did go on the land and examine it two weeks prior to making final proof; that she received information as to the character of the land through her sons.

On September 24, 1891, you rejected her proof and held her entry for cancellation, as aforesaid.

On October 27, 1891, the local officers transmitted a motion for review of your said decision of September 24, 1891, enclosing therewith a certified copy of claimant's sworn statement and her affidavit that she made the same in accordance with the instructions of the local land officers.

On November 20, 1891, you denied the motion for review, stating that your action "is in conformity with departmental decision in the case of L. W. Walker" (*supra*).

An examination of the entry papers tends to confirm the allegations of the claimant as to the information of the local officers, for that portion of the sworn statement wherein the applicant swears "I have personally examined said land" is stricken out, and hence the assertion in your said decision of May 7, 1891, suspending said entry, that claimant swears in her statement "that she had examined the land" is not borne out by the record, and this being so, the case of L. W. Walker (*supra*), which you cite as authority, does not sustain your conclusion. In that case the final proof of the applicant was rejected, and it was held that—"Where the applicant falsely states that he has personally examined the land and knows from his personal knowledge that it is of the character contemplated by said act, the right of purchase should be denied." The case at bar presents a very different state of facts, if the allegations of the applicant be true, and they are not denied. She did not swear that she had personally examined the land, and hence the very basis is wanting upon which the final proof was rejected in the Walker case (*supra*). Moreover, she made her sworn statement under the instructions of the local land officers, who prepared her sworn statement, and must have known that she had not "personally examined said land," and they accepted her final proof and payment for the land.

There is no adverse claim, and there is no evidence of bad faith on the part of the claimant. The land appears to be of the character contemplated in said act, and unless there be some other reason for suspending said entry than that shown in the record, it should be relieved from suspension and approved for patent.

Your decision is therefore reversed.

PRE-EMPTION ENTRY—SECTION 2260 R. S.

BOYCE *v.* BURNETT.

The inhibitory provisions of the first clause of Section 2260 R. S., extend to one who holds land under a contract of purchase, though the payments thereunder have not been completed at the date of settlement on the pre-emption claim.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 29, 1893.

On May 18, 1888, Amos J. Burnett filed his pre-emption declaratory statement for the NE. ¼, Sec. 34, T. 12 S., R. 28 W., Wa Keeney, Kansas, alleging settlement thereon the 17th day of the same month.

On July 6, 1888, Albert J. Boyce made homestead entry of the same land.

After due notice, Burnett submitted his final proof, on February 9, 1889, before the clerk of the district court of Gove county, Kansas, and on the same day Boyce filed his protest against its acceptance, alleging that Burnett had not established a bona fide residence on the land, and that he was holding the same for speculation, etc. The final proof and protest having reached the local office, a hearing was ordered.

On April 10, 1889, Boyce filed an additional charge, namely: that at date of Burnett's alleged settlement on the land, he was holding under contract of sale the whole of section 25, township 12 south, range 28 west, in the same land district.

After several continuances, the case was submitted on the depositions of sundry witnesses. The register and receiver decided that Burnett was not a qualified pre-emptor, because at date of settlement and also at date of his final proof he was the owner of Sec. 25, T. 12 S., R. 28 W., Kansas, "under and by virtue of a contract of purchase from the former owner thereof."

On appeal, your office, by decision dated December 15, 1891, reversed that action, stating:

> The defendant did not in my opinion, even if he had entered into a contract to purchase said section from the Union Pacific R. R. Company, or any other party, which is not established by competent evidence, have such a proprietorship in said section as to disqualify him under the first clause of section 2260, Revised Statutes, from completing his pre-emption entry.

A further appeal brings the case to this Department.

From the recitals in your said decision, it appears that said section 25 was selected by the Union Pacific Railroad company, July 2, 1886, approved for patent October 10, 1890, and patented April 9, 1891.

It appears from the deposition of Albert R. Heilig that he (Heilig) took the testimony in shorthand, in July, 1888, in a certain law suit between Burnett (claimant herein) and one F. B. Strong; that he made a complete and accurate transcript of the stenographic notes of the tes-

timony—three copies thereof being preserved; that Burnett testified on the trial in said law suit, and made the following statements, regarding his then ownership of and connection with said section 25:

> I purchased that (Sec. 25) on the 3d day of June, 1886, and paid a forfeit of $30, and held it for thirty days—that is, when I sent the money. It was bought by me on a contract made to me individually. I have carried it even since, paid taxes on it, and Strong has nothing to do with it.

Witnesses Pluty and Freytag also testified that Burnett told them repeatedly that he owned said section 25.

It will be noticed that the charge that Burnett owned said Sec. 25, at the time of his alleged settlement on the land in contest, was made two months after the original protest was filed, and Burnett insists (in his appeal from the register and receiver) that "he had no opportunity to prove said allegation false and had no notice of the amended complaint."

On September 11, 1891, he made an affidavit stating that at the time he made his final proof he was not the owner in his own right of any land, nor did any one hold in trust for him any land whatever.

In the case of Ole K. Bergen (7 L. D., 472), it was held that the prohibition in the second clause of section 2260 of the Revised Statutes extends to a removal from land held under a contract of purchase, although the payments thereunder had not been completed at the time of said removal.

The same principle would also apply as to the first clause of that section, which prohibits the right of pre-emption to one who is the proprietor of three hundred and twenty acres of land in any state or territory. David T. Petty, 13 L. D., 95. If, as a matter of fact, Burnett had a contract with the railroad company at the time he settled on the land in question, by the terms of which he would be entitled to the said Sec. 25 upon completing the payments therefor, the fact that no conveyance of the section had been made to him by the agents of the company at the time he made settlement on the land in question, would not relieve him from the inhibition contained in the first clause of section 2260. Such a contract may have been in existence, and he may have had the right to complete the payments on his contract, and yet he could say, as he did in his affidavit, "I was not the owner in *my own right* of any land in the United States."

If it be true that he made the statements under oath, above quoted, it would appear that he was disqualified from the right of pre-emption when he settled on the land in contest. The railroad company obtained title to the land, and if Burnett has a contract from the company, a consideration being paid therefor, by the terms of which he is to obtain title to said section 25, when all the payments have been made, he is disqualified.

It is true that the company did not own the land at the date when Burnett is alleged to have sworn that he purchased the right to buy.

The company did not select the land until one month later; but its right to select the land was then doubtless known, and it did select it, and received patent therefor; and in this respect the case differs from that of Mantle *v.* McQueeny, 14 L. D., 313, where it was held that a contract for the purchase of land does not bring the holder within the inhibition of section 2260 of the Revised Statutes, when the title to said land is not in the vendor named in the contract.

In the case just cited, it was alleged that McQueeny had a contract with the Northern Pacific Railroad Company for the purchase of a section of land, and that, while holding the contract, he could not pre-empt other lands. It appeared, however, that the company did not own the land, and therefore the contract for its sale could not be enforced; hence, he was not prohibited from pre-empting other land. Not so however in the case at bar, if Burnett really has such contract, capable of being enforced. Although the company did not own said section 25 at date of its alleged contract to sell the same to Burnett, yet the selection of the section was made prior to Burnett's alleged settlement on the land in controversy. The company, having subsequently obtained patent, would be estopped from denying that it owned the land when the alleged contract was made, and, if made, the same could be enforced in the courts, upon the performance by Burnett of his part of the contract.

There is nothing in the record, however, which discloses the form of the alleged contract between Burnett and the company.

Section 5 of the Statutes of Frauds and Perjuries (paragraph 3161 of the General Statutes of Kansas, 1889), provides that:

> No leases or interests of, in or out of lands, exceeding one year in duration shall at any time hereafter be assigned or granted, unless it be by deed or note, in writing, signed by the party so assigning or granting the same or their agents thereunto lawfully authorized, by writing or by act and operation of law.

It is not shown that there is such a contract in writing within the statute of frauds as would support a suit for specific performance on the alleged contract between Burnett and the company; and even the payment of the $30 on the contract would not take the case out of the statute of frauds, in the absence of a contract in writing. Northrop *v.* Andrews, 39 Kansas, 569.

From the facts disclosed in the record, it can not be satisfactorily determined as to Burnett's qualifications to enter the land in question. While the proof relating to his alleged contract to purchase the railroad land may not be sufficient to support a suit for specific performance, yet I think it is sufficient to put the Department upon further inquiry before allowing this entry to be made; and, inasmuch as Burnett claims to have had no opportunity to disprove the allegations as to his ownership of the railroad land, I deem it best to remand the case for a hearing, when he will be afforded that opportunity.

Evidence should be taken showing what contract, if any he had, with

the company as to the purchase of said Sec. 25, at the time he made settlement on the land in controversy, and whether such contract was a subsisting one when he offered proof, the nature of the alleged contract, and whether it was consummated. If it be shown at the hearing that the alleged contract had no existence in fact, and he had no personal interest in the railroad land which could ripen into proprietorship, his final proof will be returned to your office, and the case adjudicated on its merits.

The decision appealed from is accordingly modified.

HOMESTEAD—ADJOINING FARM ENTRY.

RUSH *v.* BAILEY.

A life tenancy in the original farm is not sufficient to support an adjoining farm entry.

First Assistant Secretary Sims to the Commissioner of the General Land Office, June 29, 1893.

I have considered the case of Isabella Rush *v.* James B. Bailey, on appeal by the former from your decision of May 19, 1892, rejecting her application to make adjoining farm homestead entry for the SW. ¼ of the SW. ¼, of section 7, T. 9 S., R. 11 E., Huntsville land district, Alabama.

The record shows that one, John F. Farmer had an entry of record for this land, and that on January 26, 1891, Mrs. Rush filed an affidavit of contest against it, alleging abandonment as the grounds of her charge. Upon due notice a hearing was had; Farmer made default, testimony was taken, and upon the case presented, the local officers recommended the cancellation of Farmer's entry. No appeal was taken, but before your office acted upon the matter, James B. Bailey filed the relinquishment of Farmer's entry, and made homestead entry for the land.

When the local officers discovered their inadvertence in allowing this entry, pending the contest, they wrote your office, transmitting the record in the case, and asked for an order directing what they should do, and by your office letter "H," of April 14, 1891, they were directed to advise Mrs. Rush that she would be allowed thirty days to make application to enter the land, and upon such application being made, a hearing was ordered, to determine the respective rights of herself and Bailey. There is no application found with the papers in the case, but the hearing was duly had, and upon the case presented, the local officers found in favor of Mrs. Rush, and recommended the cancellation of Bailey's entry.

From this action Bailey appealed, and you, upon considering the case, reversed their decision, rejected the Rush application and allowed

the entry of Bailey to remain intact, from which decision Mrs. Rush appealed.

The record and evidence in the case are such that but one question remains, to wit: Is Mrs. Rush qualified to make adjoining entry? It is quite clear that if she is qualified to make an adjoining farm homestead entry for the land, she should be allowed to do so, as her contest affidavit is shown to have been true, and the relinquishment should not be allowed to defeat her preference right; but her right to make the entry depends upon her title to the land on which she resides.

She is the widow of Frederick Rush, deceased. The will of her late husband, by duly certified copy, is in evidence. By the second item in said will the testator says, "I give and bequeath to my beloved wife Isabella, one hundred and twenty acres of land, to wit, ... to be set apart as a homestead for the term of her natural life," etc. It appears that other property was given her, and among this a five-acre tract of land, on which is a grist mill. The will directs the sale of certain other lands to pay testator's debts, and the excess, if any, to go to the benefit of his wife. He further directs how the homestead, mill, and other real estate, and any remaining money and chattels shall be distributed among his heirs, upon the death of his wife.

It is apparent from this instrument that Mrs. Rush is only a tenant for life by the devise of Frederick Rush, her late husband, the fee being in his heirs. Her attorney, however, claims that you erred in holding that she was not the *owner* of the land, and he insists that "she owns the land *absolutely*, during her life, and lives upon it", and therefore can make the adjoining entry.

In a later brief, filed in this Department, he claims that Section 2289, R. S., was amended by the act of March 3, 1891, (26 Stat., 1095) and by section 5 of said act the word "owner" is qualified by, and synony mous with the word "proprietor." I confess that I am unable to find in the amended statute any warrant for the latter proposition.

The paragraph relating to entries of contiguous land, in the section as amended, is identical with that of the original section; each uses the words "owning and residing on land", and "so already *owned* and occupied." I do not find that it uses the word "proprietor", or any words relating to title, except the words *owned* and *occupied*, which last is used as the equivalent of "residing on."

The contention that she is the owner is not maintainable under common law, or the law of Alabama, and not being the owner, she cannot make the proposed entry. Your decision is therefore affirmed.

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