

DECISIONS

OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JULY 1, 1888, TO DECEMBER 31, 1888.

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DECISIONS

RELATING TO

THE PUBLIC LANDS.

*Overruled so far as in conflict
29 L. R. 698*
PRIVATE CLAIM—SCRIP—ACT OF JUNE 2, 1858.

D. C. HARDEE.

The third section of the act of June 2, 1858, authorizes the issuance of scrip only in cases of confirmed private land claims, and requires satisfactory proof of such confirmation.

The third section of the act of March 3, 1819, expressly excepts from confirmation lands claimed or recognized under sections one and two of said act.

In the case of a claim depending for confirmation upon section 3, act of March 3, 1819, the confirmer, or his legal representative, must identify the land in order to determine whether it was covered by a claim under sections one or two of said act, and whether the claim thereto has been satisfied in whole or in part.

Secretary Vilas to Commissioner Stockslager, July 7, 1888.

I have considered the appeal of D. C. Hardee, as legal representative of Samuel Phares, from the decision of your office of January 31, 1887, denying his application for the approval and delivery by your office of the certificate of location, issued by the surveyor general of Louisiana, under the third section of the act of June 2, 1858 (11 Stat., 294), in satisfaction of the Louisiana private land claim of said Samuel Phares.

In 1803 the Louisiana Territory was ceded to the United States by France, and April 25, 1812, Congress passed an act "for ascertaining the titles and claims to lands in that part of the Louisiana territory, which lies east of the river Mississippi and island of New Orleans and west of the river Perdido." The act provided that "the lands within said limits shall be laid off into two land districts, between which Pearl River shall be the boundary, and for each of which districts a commissioner of land claims shall be appointed by the President."

These commissioners were charged, in the first place, with the duty of investigating and having a record made of all claims to lands within their respective districts, based upon "any grant, order of survey, or other evidence of claim whatsoever, derived from the French, British,

or Spanish governments," and were required to make abstracts thereof and forward them to the Secretary of the Treasury; and in section eight of the act it was further enacted :

That the said commissioners are hereby authorized and required to collect and report to Congress, at their next session, a list of all the *actual settlers* on land in said districts, respectively, who have no claims to land derived either from the French, British, or Spanish Governments, and the time at which such settlements were made.

James O. Cosby was appointed Commissioner for the district west of Pearl river, and pursuant to said section eight of said act, he reported, June 7, 1813, a supplemental list of settlers, among whom was Samuel Phares. (Am. State Papers, Vol. 3, p. 69, Green's Ed.)

Congress next passed the act of March 3, 1819 (3 Stat., 528), by the first section of which, certain claims to land derived from the Spanish or British governments, reported by the commissioners under the acts of 1812, are recognized as valid and complete titles, and by the second section, other claims founded on written evidence of title from the Spanish authorities, and reported by the said commissioners, though incomplete, are confirmed. By the third section of said act, a grant, as a donation, is made to a class of claimants and actual settlers who had no written evidence to sustain their claims, but who had actually inhabited or cultivated the lands claimed or settled on prior to April 15, 1813, and whose claims were comprised in the list of settlers reported by said commissioners; but it is provided, "that no lands shall be thus granted which are claimed or recognized by" sections 1 and 2 of said act.

The settlement of Samuel Phares appears to have been made in 1811 and his claim falls within the class designated in said third section of the act of March 3, 1819.

Under this act parties were "confined to the lands settled on and inhabited or cultivated, and the original settlement and inhabitation or cultivation fixed and determined the locality of the claim, and they were not permitted to go elsewhere and take up an equal quantity, and, as it sometimes happened, that the government, through inadvertence or mistake, disposed of the land embraced in the original claim," or from some other cause, it became impossible to locate thereon, Congress, to prevent the injustice which would otherwise result in such cases, passed the act of June 2, 1858, the third section of which concludes as follows :

Where any private claim has been confirmed by Congress and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor-general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States, subject to sale at a private entry at a price not exceeding \$1.25 per acre. * * * *

Under this provision of said act, the surveyor general of Louisiana in 1870, issued certificates of location on the claim of Phares, and the same were transmitted to your office for authentication. Your office denied the application for authentication of these certificates, upon the ground, that "the basis for indemnity in this case under the act of 1858 has not been established."

The act of 1858, as appears from the above quotation therefrom, authorizes the issue of certificates of location only in cases of "*confirmed*" private land claims, and requires "satisfactory proof of such confirmation." The claim of Phares depends for confirmation upon the third section of the act of March 3, 1819, which expressly excepts from its operation lands "claimed or recognized under sections one and two of said act." If the land claimed by Phares was "claimed or recognized" under either of said preceding sections of the act, then the claim of Phares thereto was not confirmed by the act and the issuance of the certificates of location was unauthorized by the act of 1858. The burden of proving confirmation of the claim is upon the confirmer or his legal representatives. In order to do this, it is absolutely essential at the outset to sufficiently identify the land or establish its *locus*. Until this is done, it can neither be determined whether the land is covered by a claim under sections one or two of the act of 1819, nor whether the claim thereto has been satisfied in whole or in part. Moreover, the definite location of the claim would seem to be necessary, to prevent the government from being defrauded by the duplication of claims by the original confirmer or their legal representatives. (Instructions of Commissioner Drummond of August 26, 1872, Land Office Report for 1873, p. 40.)

There is no evidence whatever in this case showing either the exact or approximate boundaries of the land claimed by Phares, or in any way identifying it; hence, no basis for indemnity under the act of 1858 is established. (John Shafer 5 L. D., 283.) The proof is, also, silent as to how Hardee, the alleged legal representative of Phares and in whose behalf as such representative the application is made, acquired title to the claim.

The decision of your office is accordingly affirmed.

PRE-EMPTION—RESIDENCE—JOINT ENTRY.

EDWARD J. DOYLE.

The purpose of the departmental rule requiring of the pre-emptor six months actual residence preceding entry is to secure an assurance of good faith on his part, and where good faith is otherwise sufficiently established, the object of the rule is attained, and a literal compliance therewith is not necessary.

In the event of settlement before survey, and award of joint entry, the parties are not authorized to divide equally the forty acre tract in conflict and thereafter enter the same in accordance with such partition; nor is there any authority under the law for such an entry.

In such a case the whole tract in conflict may be entered by either party on condition that he tenders to the other an agreement to convey to him that portion of the land covered by his occupation.

If both parties fail or refuse to make entry on the terms thus prescribed then they will be allowed to make joint entry under section 2274, R. S.

Secretary Vilas to Commissioner Stockslager, July 7, 1888.

I have considered the appeal of Edward J. Doyle from the decision of your office of September 15, 1886, rejecting his final pre-emption proof, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 8, and "W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ " of Sec. 9, Devil's Lake district, Dakota.

Doyle filed declaratory statement, No. 126, November 2, 1883, alleging settlement March 21, of that year. His proof shows, that he made settlement as alleged in his declaratory statement, March 21, 1883, and resided on the land from that time until May 1, 1883; that from the latter date to August 15, 1883, he slept on the land two or three nights each week and made such improvements thereon "as his very limited means would allow;" that from August 15 to November 1, 1883, he was confined to his bed by fever, and, being unmarried and without family, "had to be removed about six miles to the house of a friend to be cared for;" that from November 1, 1883, to January 1, 1886, he was on the land about half the time, and from the latter date to the time of his making final proof, July 23, 1886, a period of six months and twenty-three days, he was on the land all the time, except two weeks in the first part of January, and one week in July, during which week he was absent hunting his team which had run away; and that his absences, except during his said illness and the last named week when he was hunting his team, were necessary to enable him to earn a support, and, from the time of his said settlement on the land, he neither had nor claimed any other home. His improvements consisted of a frame house, ten by twelve feet, well built, a frame stable, a well, thirty acres of land broken, and six acres cultivated in crops—all valued at \$300.

The local officers rejected the proof, "on the ground of insufficient residence," and your office affirmed this action of the local officers, holding that, "In default of a continuous residence of six months next prior to date of proof, the proof must be rejected."

In this finding, I can not concur. The two weeks' absence in January, 1886, were in the first part of that month, and this left more than six months before the date of final proof, July 23, 1886. The week's absence in July, 1886, for the purpose of hunting his lost team, was entirely consistent with an intent to maintain his residence on the land, and, in legal contemplation, did not break the continuity thereof. Moreover, the purpose of the departmental rule, requiring of the pre-emptor six months actual residence preceding entry, is to secure an assurance of good faith on his part, and where good faith is otherwise

sufficiently established, the object of the rule is attained and a literal compliance therewith is not necessary. (Joseph Hoskyn, 4 L. D., 287; Israel Martel, 6 L. D., 566.)

Your office does not find that Doyle acted in bad faith, and, in my opinion, the proof leaves no room to doubt his good faith.

Doyle's declaratory statement embraced the "NW. $\frac{1}{4}$ " of the SW. $\frac{1}{4}$ of said Sec. 9, but one, A. A. Dion had filed a declaratory statement for the whole of said SW. $\frac{1}{4}$, and, it appearing that both claimants had settled upon and improved said tract prior to survey, this Department, on contest by Doyle of Dion's claim, held, "that the proper way to adjust the rights of the parties is to allow a joint entry of the tract in dispute, under Sec. 2274, Rev. Stat." (Doyle v. Dion, 4 L. D., 27.) But Doyle and Dion, disregarding the said departmental decision, agreed between themselves upon a division of the land as to which their claims conflicted, Doyle taking the W. $\frac{1}{2}$ and Dion the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of said SW. $\frac{1}{4}$, and under this agreement, Doyle embraced said W. $\frac{1}{2}$ in his proof and Dion made each entry of said E. $\frac{1}{2}$. Your office properly held, that this was "unauthorized by law and by the said decision in Doyle v. Dion," and held Dion's entry as to said E. $\frac{1}{2}$ for cancellation.

Section 2274 of the Revised Statutes provides that in such cases "it shall be lawful for such settlers to make joint entry of the land * * * or for either to enter into contract with his co-settler to convey to him his portion of said land after a patent is issued to him, and, after making said contract, to file a declaratory statement in his own name, and prove up and pay for said land, and proof of joint occupation by himself and his co-settler, and of such contract with him made, shall be proof of sole occupation and pre-emption by the applicant. * * *"

Under this statute, I direct that Doyle be permitted to make entry of the entire tract, upon condition that he tenders to Dion an agreement in writing to convey to Dion that part of the tract claimed and occupied by Dion, and if Doyle decline to enter into such agreement, then Dion may make entry of the entire tract, upon the condition, that he tender to Doyle an agreement to convey that portion of the tract in dispute claimed and occupied by Doyle. If both parties fail or refuse to make entry upon these terms and conditions, then they will be allowed to make joint entry, in accordance with the provisions of said statute. See Coleman v. Winfield, decided June 26, 1888 (6 L. D., 826).

The decision of your office rejecting Doyle's proof, as to the other land embraced therein, to wit, the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 8, is reversed.

MINING CLAIM—EVIDENCE OF DISCOVERY.

SILVER JENNIE LODE.

Evidence as to the discovery of the alleged vein or lode should be furnished showing the place where, and when such discovery was made, the general direction of the lode or vein, and all the material facts in relation thereto; and such evidence should be clear and positive, and based on actual knowledge and the witnesses' means of information be clearly set forth.

Secretary Vilas to Commissioner Stockslager, July 7, 1888.

I have considered the appeal of William N. Nason *et al.* from the decision of your office of January 8, 1887, holding for cancellation mineral entry, No. 66, for the "Silver Jennie Lode," Gunnison district, Colorado.

In view of the facts disclosed by the record in this case and which are recited in the decision of your office hereto attached, your office properly required, in the letter of March 2, 1886, that "If a vein or lode has actually been discovered within the claimed ground" evidence must be furnished showing "the place where, and when, such discovery was made, the general direction of the lode or vein and all the material facts in relation thereto, and must be clear and positive and based on actual knowledge of the facts," and, "the witnesses' means of information must be clearly set forth."

The claimant first petitioned for a modification of these requirements and filed in support of said petition the affidavit of Frank P. Tanner, one of the claimants, and attorney in fact for the others, dated April 19, 1886, which sets forth that "affiant believes that said vein" (the Silver Jennie Lode) "extends throughout said location, but that said vein does not crop out from the surface so that such fact could be determined without a great deal of additional development, and that such additional development would cost many hundreds, if not thousands, of dollars and would not aid at all in the working of said mine or assist materially in extracting ore therefrom."

This petition being denied, claimants, as a compliance with said requirements of your office, filed the affidavit of James J. Lockhart, one of their number, dated September 7, 1886, "that during the month of September, 1886, he made a careful examination of said mining claim; that a mineral bearing lode or vein was discovered on said location, as stated in the application for patent; that said vein or lode, as deponent has ascertained from personal observation thereof, extends in its onward course or strike into the ground claimed in said application, and the general direction of said vein or lode is along the center line of said location as shown by the official plat thereof now on file in the General Land Office."

Your office held this affidavit insufficient, and allowed claimant sixty days after notice of said ruling within which to make full compliance with the requirements in said letter of March 2, 1886, and thereupon

claimants filed affidavits of Frank M. Cobb, George J. Resson, and said James J. Lockhart, bearing the same date, October 5, 1886, and each in these words: "that he (affiant) is familiar with the ground claimed, having been upon and examined the same; that there has been discovered within the ground claimed in said entry a mineral bearing vein or lode, and that the vein or lode for which patent is claimed extends in its onward course or strike into said ground claimed."

These affidavits were, also, held insufficient by your office, and this presents the only question in this case. I am of the opinion that this ruling was correct. In the first place all these affidavits are evasive. The letter of March 2, 1886, called for evidence of a discovery of a vein or lode within the *ground now claimed*. The first affidavit of Lockhart states, that there has been such discovery "on location *as stated in the application for patent*," and the last three affidavits, that there has been such discovery "within the ground *claimed in said entry*." The "application for patent" referred to in the first affidavit only mentioned the discovery of the "Silver Jennie Lode," which is on another entry and not *on the land now claimed* in the present application, and part of the ground originally claimed in the entry in the case has been relinquished, so that the statement in the last three affidavits might be true and yet there might have been no such discovery on the *ground now claimed*.

Moreover, the requirement was for *evidence* of a discovery of a vein or lode on the claimed ground or that the "Silver Jennie Lode" extends into or through said ground. The response, if it be held to apply to the ground claimed, is a bare assertion that there has been such discovery and that said vein does so extend, and no fact is stated tending to establish the truth of these assertions. The affiants, also, state as their means of information, that they have been upon and examined the ground. This would not be sufficient if we are to credit the affidavit of Tanner, made in behalf of the claimants and quoted above, "that said vein does not *crop out from the surface* and the fact that it extends through said location *can not be determined without a great deal of additional development*, which would cost many hundreds, if not thousands, of dollars."

There was first, then, an abortive attempt on the part of the claimants to be relieved of the requirement of proof by a petition alleging facts tending to show that it was impracticable, if not impossible, to obtain such proof; in the next place, an evasive and otherwise wholly insufficient affidavit was filed as a compliance with the requirement, and lastly when this is rejected, and further time given for a proper response, three such evasive and insufficient affidavits are filed.

It appears also from the proof and official plat of survey, that these claimants are applicants for three entries (including the present application), each of which is based upon one and the same discovered vein or lode, and it is not shown that said vein or lode extends beyond the

boundaries of the "Spirit of the Times Lode Entry," on which it is admitted to have been discovered.

The decision of your office is affirmed, and the entry will be canceled.

TIMBER CULTURE CONTEST—DEFAULT CURED PRIOR TO NOTICE.

HUNTER *v.* HAYNES.

A contest should be dismissed when the default charged was not attributable to the neglect or bad faith of the entryman, and was cured on the day that notice issued for publication.

Secretary Vilas to Commissioner Stockslager, July 7, 1888.

I have considered the case of Millard F. Hunter *v.* Harvey R. Haynes, involving the SE. $\frac{1}{4}$ of Sec. 6, T. 21 S., R. 17 W., Larned, Kansas, on appeal by Hunter from your decision of October 13, 1886, dismissing his contest against timber entry, No. 5212, made by Haynes upon said tract.

Said entry, it appears, was made December 4, 1883.

The affidavit of contest was filed December 8, 1884, charging failure to break five acres, or any part thereof, during the first year after entry, or any time prior to the date of said affidavit of contest.

Notice issued by publication, citing claimant to a hearing to be had at the local office March 11, 1885. Said hearing was duly had April 6, 1885, to which date it had been continued, and both parties appeared with witnesses and submitted testimony. The register and receiver found in favor of the entryman, and held that the contest should be dismissed. Upon appeal, you affirmed the action below, and dismissed the contest.

A careful examination of the whole record discloses no good reason for disturbing your said action. The contest affidavit was filed four days after the expiration of the first year after entry. On the same day the requisite five acres were plowed. The entryman, in August, 1884, contracted with one Still to do the necessary breaking, paying him therefor in advance. This was nearly four months prior to the expiration of the first year after entry. Still, on December 6, 1884, employed another to do the plowing, and the person thus employed proceeded on December 8 to do the work, December 7, the intervening day, being Sunday.

Still testifies that the reason he did not have the breaking done sooner was because, having made inquiry at the local office as to when the year would expire, he had been informed that it would not expire until January 4, 1885, and he therefore supposed he was in time. At any rate, the requisite five acres had been broken prior to notice of the affidavit of contest. They were broken on the same day that said affi-

davit was made and filed. The entryman had nearly four months before made a contract and had paid the money to have the plowing done.

The sub-contract was made on Saturday, December 6th, to have it done immediately, and on Monday, December 8th, it was done. The notice of contest issued on that day for publication, contestant swearing that after diligent search and inquiry he was unable to ascertain the whereabouts of claimant. The first publication was on December 12, 1884. At that date the plowing had been done, and whatever of laches had existed had been cured. There was therefore at the date of notice no ground for contest.

I find nothing in the record to indicate that the entryman, Haynes, has acted otherwise than in entire good faith. Your decision, dismissing the contest, is accordingly affirmed.

TIMBER CULTURE CONTEST—APPLICATION.

KINGSBURY *v.* HOLT.

The contestant of a timber culture entry is not required to file an application to enter at the time of initiating contest. If successful he secures a preference right of entry under the second section of the act of May 14, 1880.

Secretary Vilas to Commissioner Stockslager, July 7, 1888.

I have considered the case of Dudley A. Kingsbury *v.* George L. Holt, on appeal by the latter from your office decision of August 24, 1886, wherein his timber culture entry, No. 357, for lots 2, 3 and 4, Sec. 6, T. 49 N., R. 82 W., Cheyenne, Wyoming, is held for cancellation.

The facts are sufficiently stated in your said decision, and reference is made thereto.

In the case of Bundy *v.* Livingston (1 L. D., 152), the Department held that section three of the act of June 14, 1878, restricts a contest against a prior timber culture entry to one who seeks to enter it under the homestead or timber culture law, and in the absence of any such application, there is no right of contest.

Section 29 of the circular approved by the Department July 12, 1887 (6 L. D., 284), after referring to Rule 1 of Practice, cited in your decision, provides that:

Contestants of timber culture entries since the adoption of the foregoing rules of practice are not required to file an application to enter the land at the time of the initiation of the contest, but the successful contestant secures a preference right of entry under the second section of the act of May 14, 1880 (21 Stat., 140).

This regulation overrules the decision in Bundy *v.* Livingston.

The rule of practice referred to took effect, as stated, on September 1, 1885. This contest was initiated on September 12 of the same year.

Your decision is affirmed.

REPAYMENT—TIMBER LAND ENTRY.

FALK STEINHARDT.

Repayment will not be allowed where a timber land entry is canceled because the land is not subject thereto, and it appears that the preliminary affidavit was made without examination of the land or knowledge of its condition.

Secretary Vilas to Commissioner Stockslager, July 7, 1888.

By your office decision dated Sept. 11, 1886, the timber land cash entry No. 2051 of Falk Steinhardt, made August 25, 1883, for the SE. $\frac{1}{4}$ Sec. 20 T. 6. N. R. 3 W. Oregon City land district, Oregon, was held for cancellation on the ground "that the land is not such as is subject to entry under the act of June 3, 1878."

It appears that a hearing was had in the case in July 1885, which had been previously ordered upon the report of special agent James A. McCormick, and in your said office decision it is stated that "from the testimony for the government, which is not contradicted by that for the defense, it appears that Steinhardt had never seen the land, and his witnesses to final proof had only a general knowledge as to the character of the land in the whole township, and not as to special tracts; and that said land, when cleared of its timber, would be well suited to agricultural purposes."

From said decision no appeal was taken, and the same having become final, your office on December 24, 1886, canceled said entry in accordance therewith.

On January 10, 1887, the local officers transmitted the application of said Steinhardt for re-payment of the purchase money, to wit, the sum of \$400, paid by him on his said entry. Your office, on January 20, 1887, denied said application, and advising the local officers that said entry was canceled as fraudulent, held that "the law governing the return of purchase money does not provide for re-payment in cases of fraud."

From this decision Steinhardt appeals, assigning as error, in substance, that there is no evidence showing or tending to show that said entry was fraudulent, or that the same was canceled by your office for fraud.

While it is true your said office decision of Sept. 11, 1886, does not expressly state that said entry was held for cancellation as fraudulent, yet the findings of fact therein, as hereinbefore stated, show that Steinhardt, at the date of his said cash entry, had never even seen the land covered thereby, and by his affidavit made preliminary to said entry, as required by section 2, of said act of June 3, 1878, he is shown to have sworn "that said land is unfit for cultivation, and valuable chiefly for its timber."

It is evident from these facts, that said affidavit was made by Steinhardt, without examination of the land or knowledge of its condition,

upon which to base the same, and this view is supported by the further fact, found by your said office decision, "that said land, when cleared of its timber, would be well suited to agricultural purposes." This state of facts I think, fully warrants the conclusion that said entry was obtained through fraud.

In the timber-culture case of Charles F. Coffin (6 L. D. 389) it was held that (quoting from syllabus) "on cancellation of an entry made for land not subject thereto, by reason of a natural growth of timber, re-payment will not be allowed where the entryman, without examination of the land or knowledge of its condition, made oath that the land was devoid of timber.

The preliminary affidavit required of the entryman, is the same under both the timber-culture and timber land laws, to the extent that the condition of the land must be set forth in each case, which necessarily implies a personal knowledge thereof on the part of the entryman.

Applying therefore, by analogy, the principle enunciated in the case just cited, to the case now before me, I think the decision of your office, denying the application of Steinhardt was right, and the same is therefore affirmed.

TIMBER CULTURE CONTEST—FIRE-BREAK.

HUPP *v.* OVERALL.

The absence of a firebreak in a locality liable to be swept by prairie fires is not in itself evidence of want of good faith, though it may be evidence of a want of that precaution which should characterize a prudent and careful man.

If the claimant is attempting in good faith to comply with the law, the loss of the larger portion of his trees by fire, does not warrant the cancellation of his entry, where it appears that no ordinary precaution could have prevented such loss.

Secretary Vilas to Commissioner Stockslager, July 7, 1888.

I have considered the case of Andrew Hupp, Jr., *v.* E. R. Overall, on appeal by the latter from your office decision of August 16, 1886, holding for cancellation his timber culture entry, No. 383, made May 7, 1878, on the SE. $\frac{1}{4}$ of Sec. 32, T. 24 N., R. 7 W., Neligh, Nebraska.

Hupp initiated contest April 21, 1885, charging that claimant had failed to replant the second five acres to tree seeds or cuttings between May 8, 1882, and the date of contest; that he failed to care for, cultivate or keep in a healthy, growing condition all the trees planted on the tract between said dates, and that he has failed to protect the trees from prairie fires.

Hearing was set for June 24, 1885, on which date both parties appeared with witnesses and counsel, and the case was proceeded with before the register and receiver, who, upon the evidence adduced, found for the claimant, and held that the contest was not sustained and should be dismissed.

Your office, by the decision appealed from, reversed that finding, and held the entry for cancellation, on the ground that there had not been cultivation, care and protection of the trees planted.

The charge of failure to plant is fully met by evidence showing that claimant had planted on said second five acres 14,500 trees in the spring of 1882; that on the same five acres were two replantings, one in 1883 of 4,000 trees, and a second in 1884 of 11,000 trees. It appears, however, that at the date when contest was begun there were growing of said planting and replantings not to exceed 800 trees.

Ordinarily such scant result might furnish a ground to seriously question the good faith of the entryman in the matters of proper planting, cultivation and care, but in this case the answer is made that an unusually severe prairie fire swept over the tract, destroying many of the trees. This fire occurred in the early spring of 1885, only a short time prior to the initiation of this contest.

Contestant claims that the entryman is entitled to no consideration, because of his loss of trees by said fire, for the reason that he had not protected from fire by having a fire-break around his trees.

The absence of a fire-break in a locality liable to be swept by prairie fires is not of itself evidence of want of good faith, though it may be evidence of a want of that precaution which should characterize a prudent and careful man.

It appears in this case, however, from the testimony of witnesses for contestant, as well as of those for claimant, that the fire referred to was a very violent and an unusually destructive one, by reason of the high wind prevailing at the time; that because of this fact an ordinary fire-break would have been no protection; that in some cases said fire leaped over breaks one hundred feet wide.

It is shown that there was cultivation of the trees each year, but as to the character of that cultivation the testimony is conflicting. It is admitted by claimant that the ground planted to trees was in places weedy, but it is stated that in such places it was not deemed advisable to destroy all the weeds, for the reason that if this were done, the soil being loose and sandy, the high winds would blow it away from the trees thus killing them.

If claimant was in good faith attempting to comply with the law under which his entry was made, I do not think that said entry should be canceled simply because a devastating fire had swept over the land and destroyed the major portion of his trees, it appearing that no ordinary precaution could have prevented such destruction.

Upon a careful examination of the whole record, I am unable to find that the evidence shows that there was on the part of claimant any such laches or omission to comply with the requirements of the law as to justify the conclusion that he had acted in bad faith, or that his entry should be canceled.

The decision appealed from is accordingly reversed.

RAILROAD GRANT—PRE-EMPTION FILING—PRACTICE.

MALONE *v.* UNION PACIFIC RY. CO.

The existence of a *prima facie* valid pre-emption filing at the date when the right of the road attached, excepts the land covered thereby from the operation of the grant.

The Commissioner of the General Land Office has authority to review a decision of his office *sua sponte*, and without notice to the parties, where such action is required to put the office in accord with its own records.

Secretary Vilas to Commissioner Stockslager, July 9, 1883.

I have considered the case of Wm. H. Malone *v.* The Union Pacific Railway Company, involving the N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, Sec. 7, T. 4 S., R. 67 W., Denver, Colorado, on appeal by Malone from the decision of your office, dated March 26, 1884, rejecting his homestead application for said land.

The tracts in question are within the primary limits of the grant to the above-named company, Kansas Division (formerly Eastern Division), by the acts of Congress approved July 1, 1862 (12 Stat., 489), July 2, 1864 (13 id., 356), and July 3, 1866 (14 id., 79). The withdrawal from sale for the benefit of this road became effective in this district December 25, 1866; and the road was definitely located May 26, 1870.

The record shows that one Ward Dennison filed pre-emption declaratory statement No. 2636 for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 6, and N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 7, T. 4 S., R. 67 W., September 21, alleging settlement September 20, 1866; that Thos. B. Morton filed pre-emption declaratory statement No. 3206 for the same land March 14, 1867, alleging settlement December 20, 1866; and that Edgar A. Farr filed pre-emption declaratory statement No. 2547 for the S. $\frac{1}{2}$ of lots 1 and 2 of SW. $\frac{1}{4}$ Sec. 6, and N. $\frac{1}{2}$ of lots 1 and 2 of NW. $\frac{1}{4}$ Sec. 7, same T. and R., Sept. 1, 1866, alleging settlement the same day. These filings were all canceled as the result of contests instituted against them by the railway company in 1872, that of Dennison being canceled May 9, 1874, that of Farr February 16, and that of Morton February 17, same year, and the land here in controversy was then awarded to the company. The notice to said pre-emptors of the pendency of said contest proceedings was by publication; none of them appeared, and the evidence adduced was *ex parte*, being on behalf of said company only.

This land was listed by the company April 28, 1883; and on the 31st of August following Malone made his homestead application, which was "rejected, for the reason this tract is claimed by the Union Pacific Railway Company." From this rejection he appealed to your office, on the ground that said tracts being covered by filings *prima facie* valid at the date of the withdrawal, and also at the date the grant to the company took effect, were thereby excepted from its grant.

Upon consideration of this appeal, your office on the 16th of Novem-

ber, 1883, overlooking the fact that the above mentioned claims of Morton and Farr had been rejected by it, their said filings canceled and the land in question awarded to the company in 1874, stated that said filings still remained of record and ordered a hearing to determine their validity at the date of the withdrawal and also at definite location of the road.

Your predecessor's attention having been called to these errors of record by letter from the attorneys for the road, he, thereupon, on the 26th of April, 1884, reconsidered and revoked the said decision of November 16, 1883, ordering a hearing in the premises, and approved the action of the local office in rejecting Malone's said homestead application.

From this last decision, Malone appealed to this Department, alleging two grounds of error, to-wit: "*First*, Because after ordering a hearing in the case, he (the Commissioner) reconsidered his action and rescinded said order, without notice to the claimant or his attorney. *Second*, In refusing to allow Malone's application to enter the land."

As to the first ground of error, it is true that under the rules of practice a motion for review or reconsideration of a decision of your office, or of this Department, should not be entertained until after due notice to the opposing party. In this case, however, the review of the case by your office on March 26, 1884, was in effect a review *sua sponte*, and was made to put itself in accord with its own records. Consequently, as to the first alleged error the appeal is without merit. *Parker v. Castle*—on review—(4 L. D., 84).

As to the second ground of error, it is insisted on behalf of the appellant that at the time the grant to the company took effect, the lands in question were covered by *prima facie* valid pre-emption declaratory statements, and hence were excepted from the grant by the terms of the granting act. And second, that the proceedings by which said filings were declared by your office to have been illegal and void, were merely *ex parte*, and therefore no bar to a subsequent thorough and proper investigation where the facts in the case may be fully looked into.

At the outset we are met by the claim of the company that "This case is *res adjudicata*; that it is no longer a question open to discussion in this Department; that it has been finally determined and must be forever at rest here." And second if the case is still within the jurisdiction of this Department, then it is insisted that the said filings covering the tracts at the date of the withdrawal and also at the definite location of the road, were *illegal* in their inception and void; and hence did not except such tracts from the operation of the company's agent.

The claim of the company that this case is *res adjudicata* is untenable. Against this contention, it is simply necessary to cite *Starkweather v. Atchison, Topeka and Santa Fe R. R. Co.* (6 C. L. O., 19); *White v. Hastings and Dakota Ry. Co.* (id. 54); *Griffin v. Central Pacific R. R. Co.* (5 L. D., 12); and *Chas. W. Filkins* (id., 49).

Having ascertained that the case is not *res adjudicata* the next and only remaining question to be considered is: Were the said pre-emption filings of record at the date of the withdrawal and also at the definite location of the road, such pre-emption claims as served to except the tracts covered thereby from the operation of the grant to the railway company within the meaning of the third section of the said act of July 1, 1862, as amended by the fourth section of the said act of July 2, 1864, making the grant.

Though the precise question in its present shape may not have been previously decided, I am of the opinion that the general principles governing all cases of this character are pretty well settled.

Said third section as amended by said fourth section provides:

That there be, and hereby is, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, . . . every alternate section of public land, designated by odd numbers, to the amount of ten alternate sections per mile, 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 * * *

Expressed in other language the precise question here to be determined is whether within the meaning of this section of the statute just quoted a *pre-emption claim* had attached to the lands in dispute at the time the line of the road was definitely fixed. An intelligent solution of this question necessarily involves a consideration of the pre-emption law, the use and purpose and the force and effect of the declaratory statement thereunder.

The original pre-emption law of September 4, 1841, allowed pre-emptions of surveyed lands, both offered and unoffered. In the case of unoffered lands no declaratory statement was required. In the case of offered lands the claimant was required within thirty days after his settlement to file his declaratory statement and within twelve months to make proof and payment for the land claimed by him. This declaratory statement was filed with the register and receiver, and operated to prevent any other sale of the land embraced within it than to the settler during the time allowed by law for him to make proof of his right of pre-emption and payment, unless it should be sooner proved and adjudged that he was not entitled to, or by failure to maintain compliance with the law had meantime lost, his pre-emption right. Its effect was so far to reserve the land from sale to others, a presumption of his preference right being raised by his filing, of such force that proof must be made sufficient to overthrow it before any other sale is permissible. *Johnson v. Towsley* (13 Wall., 72). The pre-emption act of 1843 introduced a new feature into the pre-emption law, and required the settler on unoffered lands to file his declaratory statement within three months after his settlement, and to make proof and payment for the land embraced in his claim at any time before the *commencement of the public sale* which shall embrace the land claimed (1 Lester 374), (2 Id., 241). This was the condition of the pre-emption law, so far as is

necessary to the determination of this case, at the time the filings in question were made.

On the 14th of July, 1870, Congress passed an act (16 Stat., 279), requiring pre-emption claimants to lands in Colorado to make proof and payment for the land claimed by them within eighteen months after the date prescribed for filing their declaratory notice shall have expired: "Provided, That where said date shall have elapsed before the passage of this act, said pre-emptors shall have one year after the passage hereof in which to make such proof and payment." The filings in question it will be observed, came within the proviso. Afterwards by the joint resolution of March 3, 1871 (id., 601), the time within which such settlers were required to prove up their claims was extended another year in addition to the time heretofore specified, so that the filings in this case did not expire by limitation until July 14, 1872, more than two years after the definite location of the defendant's road, and no attack had then been made upon any one of them by the defendant herein or by any one else.

As already stated the declaratory statement in the case of offered lands had the effect of reserving the land described in it from market for the time in which the party had the right to purchase. If such declaratory statement has the force and effect of a reservation or *quasi* withdrawal, it seems to me, on principle, that a declaratory statement for unoffered land (which is upon exactly the same footing) should have a similar effect. To be sure, the declaratory statement for unoffered lands would not operate to reserve the land embraced in it from sale, *unqualifiedly*, but does operate to reserve the land from other disposition, at least to the extent of subjecting all subsequent claims to it.

That a filing is considered at least as the record assertion of a pre-emption claim, is evidenced by the fact that the rule is to allow only *one* to any one individual. That is to say, if an individual files a pre-emption declaratory statement for a tract of land subject at the time to pre-emption, he can not thereafter abandon such filing, and pre-empt another tract of land. Again, that the filings here under consideration were considered as pre-emption "claims" is evidenced by the fact that the defendant herein instituted three separate suits to have them canceled. If they were of no force and effect, why take the trouble to cancel them out of existence?

Passing from principle to authority I find that in the case of *St. Paul and Pacific R. R. Co. v. Larson* (3 L. D., 305), this Department held that a *prima facie* valid pre-emption filing existing at the date of a withdrawal of lands for indemnity purposes is such a claim as will except the land embraced in it from such withdrawal.

From what has already been said, I am of opinion, that, in the language of the statute itself, a *pre-emption claim* had attached to the land in question and was in existence when the defendant's road was definitely located. True, such *claim* did not, like a homestead entry, oper-

ate as a segregation of the land from the public domain. But that is immaterial. For in the case of *Emmerson v. Central Pacific R. R. Co.* (3 L. D., 117 and 271) it was held that a mere settlement on land in railroad limits at the date of the definite location of the road was sufficient to except such land from the grant; and a settlement cannot in any sense of the term be held to operate as a segregation of the land from the public domain. It nevertheless was a claim, authorized by the law, and asserted in the manner required by the law; or such, at least, is the theory of that decision.

But it is contended on behalf of the defendant that the pre-emption claims referred to in the act are "lawful" claims. This contention is so thoroughly answered, and shown to be untenable, by the decision of the supreme court in the case of *Newhall v. Sanger* (92 U. S., 761), that nothing further need be said by me with reference to it. *Burlington and Missouri R. R. Co. v. Abink* (14 Neb., 95).

But it is said that there is no evidence that these parties, Dennison, Morton and Farr, or any one of them, ever settled or established a residence upon the land embraced in their respective filings. To this it may be answered that it need not be shown. Such settlement is claimed thereby, and the claim is of a right of pre-emption because of it. It is a universal principle of law, that men are presumed to act in accordance with the law. And when a pre-emption declaratory statement is filed in the local land office, the presumption, or the claim, is always that the party in whose name it is filed has already made settlement on the land. True, it very often happens that such filings do not ripen into perfect titles, because of the failure of the pre-emptor to perform the conditions required of him under law. But as was said in the "Dunmeyer case" (113 U. S., 629), "With the performance of these conditions the company had nothing to do." And the reason therefor is given by the court earlier in the same decision, as follows:

It is not conceivable that Congress intended to place these parties as contestants for the land, with the right in each to require proof from the other of complete performance of its obligation. Least of all it is to be supposed that it was intended to raise up, in antagonism to all the actual settlers on the soil, whom it had invited to its occupation, this great corporation, with an interest to defeat their claims, and to come between them and the government as to the performance of their obligations.

That the settled policy of the law is that a railroad company is precluded from inquiring into the validity of all claims to lands within its granted limits at the date of the definite location of its road is evidenced from the fact that in the case of *Newhall v. Sanger* (*supra*) the court went to the extent of holding that lands claimed under an alleged Mexican grant, which was *sub judice* at the time the railroad grant took effect, did not pass to the company, although it afterwards appeared that the alleged Mexican grant was forged and fraudulent. To the same effect see also *Southern Pacific R. R. Co. (Branch line) v. Colorado* (3 L. D., 88); and the same company *Bryant* (*id.*, 501), where

this Department held that a voidable State selection, existing at the time when the grant to the road took effect, excepted the land covered thereby from the operation of the grant.

When it is considered that all grants of this character are construed strictly against the grantee, that when doubts arise respecting the extent of such grants, the government is to receive the benefit of them, and when it is considered further that in the administration of the law a *prima facie* valid homestead entry, a voidable State selection of indemnity school lands, a mere claim of settlement without any filing at all, and even a forged and fraudulent Mexican grant, one and all have been considered sufficient to except land embraced therein from grants such as the one under consideration, I have no hesitancy in holding that the lands in question were also excepted from the grant to the defendant herein.

The case of *Freeman v. Texas Pacific R. R. Co.* (2 L. D., 550), and all other cases so far as they conflict with the views hereinbefore expressed are overruled.

The decision appealed from is reversed.

FINAL HOMESTEAD PROOF—DEATH OF ENTRYMAN.

WILLIAM H. BOWMAN.

A homestead entry, wherein final proof was made at the local office by the administrator of the deceased entryman's estate, and final affidavit executed outside of the land district by the heir of said entryman, may be submitted to the Board of Equitable Adjudication; it appearing that said heir was prevented by old age, bodily infirmity, and distance of residence, from making said proof within the land district.

Secretary Vilas to Commissioner Stockslager, July 9, 1888.

In the case of William H. Bowman, administrator of the estate of Kinsey T. Plummer, deceased, appealed from the decisions of your office, dated May 14, 1886, and December 1, 1886, the record discloses the following facts.

On March 28, 1881, said Plummer made homestead entry for the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ Sec. 24, and S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 13, T. 6 N., R. 5 E., B. H. M., Dakota Territory. His military service of over four years in the late civil war entitled him to a deduction of four years from the usual time required to perfect title under the homestead laws. He was a single man, and on or about February 7, 1885, departed this life intestate. On March 2, following, said Bowman was appointed administrator of his estate by the probate court of Lawrence County, Dakota, and as such administrator, after giving due notice of his intention so to do, tendered final homestead proof on behalf of the heirs of said decedent on May 15, 1885. This proof shows that decedent had on the land a house fourteen by sixteen feet, out buildings and stable, twenty-five acres

fenced and broken, and that he had cultivated twenty acres for four seasons; that the total value of his improvements was \$350.00 and that he had continuously resided on said land from April 1881, up to the time of his death, February 7, 1885.

In addition to making proof Bowman made the final affidavit required of homestead claimants and obtained the register's final certificate of entry "in behalf of the heirs of Kinsey T. Plummer, deceased."

The proof was rejected by your letter "C" of May 14, 1886, on the grounds that it could not be made by the entryman's administrator, and that the final affidavit must be made by an heir of the deceased, who is a citizen of the United States.

On October 13, 1886, before the clerk of the district court of Linn County, Iowa, Abram Plummer made affidavit that he is the father of Kinsey T. Plummer, deceased; that he is a citizen of the United States and a resident of said Linn County, and was eighty-six years of age on November 3, 1885, and that on account of his age and infirmity he cannot go to the Deadwood land office to make the required affidavit; and he asks to be allowed to make it before the clerk of the court of Linn County, Iowa. This affidavit is corroborated by his son, Talbert Plummer, and is accompanied by a final homestead affidavit made before the aforesaid clerk in which said Abram Plummer swears that he is the sole heir of Kinsey T. Plummer, deceased.

By your letter "C" of December 1, 1886, you held the final certificate issued to Bowman for cancellation, but allowed the original entry to stand subject to future compliance with law, and say "age and debility do not exempt an heir from compliance with the law in the matter of making final proof within the limits of the prescribed district."

There is no express provision of the statute which confers on the Commissioner of the General Land Office the authority to accept the proof made in this case, but to insist, under the facts shown herein, that final proof and affidavit must be made by the heir "within the limits of the prescribed district," and that distance of residence, old age, and bodily infirmity, afford no excuse for relaxing the rule generally enforced in such cases, would deprive an aged parent of property fully earned by his son and to which the father succeeds under the Dakota Code (page 909), as the only heir. The statutes have undertaken to provide for exceptional cases where for sufficient reasons the affidavit can not be made before the register. Section 2294 R. S. was designed for cases similar to this, and although it be not literally within the terms of that section the case is within its spirit, and one entitled to equitable consideration and relief.

Entertaining these opinions, I herewith return the papers in the case for the purpose of having it submitted to the Board of Equitable Adjudication, and in view of the delay already suffered, it should be so disposed of as soon as practicable.

The decision of your office is modified accordingly.

PRACTICE—APPEAL—RULE 48.

DOVENSPECK *v.* DELL.

Under rule 48 of practice, failure to appeal from the decision of the local office renders such decision (subject to certain exceptions) final as to the facts so far as the parties to the case are concerned, but the General Land Office is not thereby deprived of jurisdiction to pass on the evidence where the interests of the government require such action.

Secretary Vilas to Commissioner Stockslager, July 9, 1888.

I have considered the case of Nelson J. Dovenspeck *v.* Alfred B. Dell, on appeal by the latter from the decision of your office of December 24, 1886, holding for cancellation his mineral application, No. 723, for the SE. $\frac{1}{4}$ of Sec. 24, T. 3 N., R. 8 W., Helena district, Montana.

The contestant, Dovenspeck, it appears, failed to appeal from the decision of the local officers, and the appellant assigns, among other alleged grounds for reversal, that your office erred "in reversing the register and receiver when no appeal had been taken from their decision." This specification of error is based upon the 48th Rule of Practice, which provides, that "In case of a failure to appeal from the decision of the local officers, their decision" (with certain named exceptions) "will be considered final as to the facts of the case." This Department holds that this Rule "was only intended to apply to parties with reference to their rights between themselves," and while the failure of Dovenspeck to appeal may be treated as a forfeiture of whatever right he might have acquired by pursuing his contest to a successful issue, yet, as between Dell and the government, your office committed no error in exercising the jurisdiction to cancel the application of Dell, if the evidence, in the judgment of your office, showed the land was of such a character as not to be subject to entry under the mineral law. (See *Morrison v. McKisick* (5 L. D., 245; *Caledonia Mining Co., v. Rowen* (2 L. D., 714).

After careful examination of the entire record, I concur in the finding of your office upon the facts as to the character of the land, and the decision of your office is accordingly affirmed. The application of Dell will be canceled and the land held subject to the proper entry by the first legal applicant.

PRE-EMPTION FINAL PROOF; APPROXIMATION ENTRY.

J. B. BURNS.

Where the evidence of the witnesses was not taken before the officer designated it may be accepted, after republication, in the absence of objection to the entry.

A pre-emptor may enter a quarter section, platted as such, regardless of what may be the actual area thereof.

An entry however which embraces tracts lying in different quarter sections is limited in the acreage thereof, and must be required to approximate, as nearly as may be, one hundred and sixty acres.

An entry for more than one hundred and sixty acres cannot be referred to the Board of Equitable Adjudication for confirmation under rule 7, unless the quantity of land entered is as near as one hundred and sixty acres as existing sub-divisions will allow.

Secretary Vilas to Commissioner Stockslager, July 9, 1888.

I have considered the appeal of James B. Burns from your decision, dated December 17, 1885, suspending, on account of insufficient proof, his cash entry, No. 7754, for the E. $\frac{1}{2}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$, being lots 1, 2, 3 and 4, Sec. 18, T. 120 N., R. 66 W., Huron, Dakota, and requiring new publication and proof; also requiring claimant to relinquish one legal sub-division of said tract.

It appears that Burns made pre-emption filing for the land described September 26, 1883, the plat of survey having been filed in the local office August 19, 1882. December 17, 1883, he gave the usual published notice of his intention to make final proof before the register and receiver on February 26, 1884, and that his witnesses to prove his compliance with the law would appear on February 25, 1884, at Northville, before a notary public named in the notice. His own testimony was taken in exact accordance with the published notice, but that of his witnesses, while taken on the date named, was taken before a notary different from the one named in the published notice. On the proof thus taken the register and receiver allowed the entry, accepted claimant's money in payment for the land and issued final certificate.

Your office suspended said cash entry and required new publication and new proof because a portion of the proof made to wit, the testimony of the entryman's witnesses, had not been taken before the officer designated in the notice; and you also required claimant to relinquish one legal subdivision in order to make his claim more nearly approximate one hundred and sixty acres.

It appears that his entry as made embraces 189.68 acres. In thus reducing the area you allow the entrymen to hold that part of the land on which his residence and improvements are, provided to do so does not break the contiguity of the sub-divisions. Claimant appeals and urges that your decision was error on both the points above indicated.

On the day that the testimony of his witnesses was taken, to-wit, February 25, 1884, claimant made affidavit that the reason said testimony was not taken before the notary named in the notice of proof was that said notary was absent from the town in which his office was. In an affidavit filed with his appeal he reiterates the above statement more in detail. He also files the affidavit of the notary before whom his witnesses testified, who states, that the notary advertised to take the testimony was absent from Northville on the day on which said testimony was advertised to be taken; that therefore affiant (whose office is in the same town) took the testimony and that no one appeared to object. In addition appellant files the affidavit of the notary advertised to take the

testimony stating that he, the said notary, was necessarily absent from Northville on the day named in the notice.

Referring to your requirement that he relinquish one of the sub-divisions embraced in his claim, appellant states in his affidavit filed with his appeal, that he has improvements on each and every sub-division in his claim; that under the rule as to contiguity he can only relinquish lot 4, which is at the south end of the claim, his house being on lot 1, at the north end of said claim; that to relinquish said lot 4 he would lose five acres of breaking and his claim would be reduced to about 141 acres, and that he would be cut off from communication with the road which runs along the south line of his claim as now of record.

The claim as now of record gives him an excess of 29.68 acres over one hundred and sixty acres, while to relinquish Lot 4 would leave him with about 19 acres less than one hundred and sixty acres.

The proof as to settlement and improvement shows compliance with the pre-emption law, and I find nothing going to show that claimant has not acted in good faith.

I do not think the case is one which, on the record as it now stands, calls for new proof. Following the decision of the Department in the case of Richard Nolte (6 L. D., 622), claimant will, however, be required to give new notice, after which, if no one appears to object to the entry the proof already in the case may be accepted. Your decision on this point is modified accordingly, and you will direct an alias notice by new publication, for the purpose indicated.

This leaves for consideration the question raised by the excess of acreage.

It seems that the four lots differ but little in area. They contain, respectively, 46.35, 47.06, 47.78 and 48.49 acres, in the order of their numbers. So far as the acreage is concerned, therefore, it would make but little difference whether lot one or lot four were relinquished. In either case the area of the claim would be reduced to considerably less than one hundred and sixty acres. To relinquish lot four, the only one which he can relinquish without losing his buildings, claimant would have left 141.19 acres, or 18.81 acres less than one hundred and sixty, whereas if he be allowed to retain the entire claim as entered he will have an excess of 29.68 acres. In other words, by relinquishing said lot four, the entry would be made to approximate one hundred and sixty acres more nearly by 10.87 acres. To do this will take from him 48.49 acres, which he has entered and paid for in apparent good faith, and upon which he has five acres of breaking; and he states that it will cut him off from the public road running along the south end of his claim as now of record. This will doubtless work some hardship to him, but the Department can not go outside of the law to furnish relief.

Were the land embraced in appellant's claim all in one technical quarter section, there would be no question about his right to enter it

as a whole, notwithstanding the excess over one hundred and sixty acres. William C. Elson (6 L. D., 797).

It has long been a rule of the Land Department, "Where the excess above one hundred and sixty acres is less than the deficiency would be should a subdivision be excluded from the entry, the excess may be included, and the contrary when the excess is greater than the deficiency." H. P. Sayles (2 L. D., 88).

The Sayles case, however, changed the former practice in this, that it made the approximation rule apply to all cases, that is, to those where the land claimed all lay within a technical quarter section, as well as to those in which it lay in two or more quarter sections. So far as it was made applicable to claims lying entirely within a technical quarter section, the Sayles case and those following it were in effect overruled by my decision in the Elson case, *supra*, which adopted the doctrine enunciated by this Department in the case of C. G. Shaw, decided as long ago as July 11, 1871, (1 C. L. L., 309), and which was followed until the decision in the Sayles case, September 8, 1883.

The rule under the Elson case is, that a settler has a right to enter a quarter section platted as such, regardless of what may be the actual area thereof. This rule does not cover the case under consideration. The land embraced in this claim lies in two quarter sections and runs the full length thereof, north and south, along the west side.

Moreover, among the rules adopted for the guidance of the Board of Equitable Adjudication, I find that rule 7 provides for a reference to the Board of pre-emption entries of legal subdivision of a fractional section, which contain more than one hundred and sixty acres, but which are as near that quantity as the existing subdivisions will allow.

This case, can not be referred for equitable adjudication under the rule cited for the reason that the quantity of land entered is not as near one hundred and sixty acres as existing subdivisions will allow. It will be 10.87 acres nearer to that quantity after reduction by the cancellation of lot four.

I must therefore conclude that this Department is without authority under the law to furnish the relief asked with relation to acreage and that the area embraced in the entry must be so reduced as to bring it within the provisions of the law. As appellant's house is in lot one, the north lot, the above conclusion will necessitate the cancellation of lot four, the south lot.

Your decision as to this branch of the case is accordingly affirmed.

After republication, as herein indicated, you will, if no one appears to object, and upon relinquishment by claimant of said lot four, approve for patent the residue of the entry.

TIMBER CULTURE CONTEST—AGENT.

FLETCHER *v.* GATES.

The contestant is estopped from charging non-compliance with the timber culture law, where he, as the agent of the entryman, had undertaken to fulfill the requirements of said law.

Secretary Vilas to Commissioner Stockslager, July 9, 1888.

I have considered the case of Thomas Fletcher *v.* Alonzo Gates as presented by the appeal of the latter from the decision of your office, dated October 18, 1886, holding for cancellation his timber culture entry No. 28, of the N. $\frac{1}{2}$ SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 13, T. 8 N., R. 5 E., B. H. M., made February 27, 1880, at the Deadwood land office in the Territory of Dakota.

The record shows that said Fletcher, on June 9, 1885, filed his affidavit of contest against said entry, alleging that said Gates has wholly failed to comply with the requirements of the timber culture law as to the planting of trees, tree seeds, or cuttings.

A hearing was duly had and upon the evidence submitted by both parties, the local officers, on October 21, 1885, found that this was the second contest against said entry, the first having been decided in favor of contestant by the local officers, but on appeal their decision was reversed by your office for misdescription and defective notice. The local land officers also found that the testimony showed that said Gates through his agent, the contestant, who was his wife's brother, endeavored to comply with the timber culture law; that said agent failed to plant the trees, tree seeds, etc., as required by law; that five years after entry, no trees were growing on the land that were planted by Gates or by his said agent Fletcher; that it would hardly be possible for Gates to repair this laches within the life time of his entry, even if allowed to do so, and the entry should not be contested by any other party; that the government can not undertake to remedy the neglect of agents; that the testimony tends to show that the wife of Gates and her said brother were in collusion to obtain a forfeiture of said entry, and it is probable that Gates had notice of the same; that as it appears from the testimony of Fletcher (Ev. p. 19) that no trees were growing on said land "except what is growing by nature," and the field notes show that said section has thereon "a few cottonwood trees," said land is not subject to timber culture entry. The local officers, therefore, held that said entry should be canceled and the application of Fletcher to enter said tract should be rejected. On appeal your office affirmed the decision of the local land office so far as related to the cancellation of said entry, but held that the claim that the contest should be dismissed because the neglect to comply with the requirements of the law was caused by the failure of Fletcher to perform his agreement could

not be allowed, for the reason that said agreement was positively denied by Fletcher, and also because it was the duty of Gates to see that the law was complied with.

It has been the ruling of this Department that the contestant is estopped from charging insufficient cultivation where he had control of the land for that purpose. *Lucas v. Ellsworth* (4 L. D., 205). So, likewise, in the case of *Johnson v. Johnson* (*ibid.*, 158) this Department held that the wrongful act of an entryman, whereby the settlement rights of another claimant for the same tract were not protected by filing or entry, will not be allowed to inure to the benefit of such entryman.

The weight of the evidence shows that Fletcher agreed to plant and cultivate the required quantity of trees on said land. The claimant wrote to one of the witnesses, Whitehead, to see if Fletcher had planted the trees as he had promised, and if he had not done so, Whitehead was requested to plant the required number of trees. When Whitehead went to the claim to see if the necessary planting was done, Mrs. Gates, in the presence of Fletcher, as he thinks, said "We have already planted the trees according to Mr. Gates' orders on his tree claim. Fletcher is contradicted by the claimant, the witnesses Geo. M. Topliff, James Whitehead, Henry R. Brown, on material points, and the evidence shows Gates had no intention of abandoning his said claim.

The only evidence going to show that said section is not naturally devoid of timber, is the evidence of the contestant that there are no trees growing on said land "except what is growing by nature," and the field notes which show that "there are a few cottonwood trees" on said section. This does not affirmatively show that the land was not subject to entry at the date thereof under the rulings of the Department then in force. *Allen v. Cooley* (5 L. D., 261).

If the land was not subject to entry, or if the claimant has not in good faith complied with the law, then, unquestionably the entry is subject to contest, or the Department may of its own motion cause an investigation to be made looking to the cancellation of the entry. *Cleveland v. Dunlevy* (4 L. D., 121); *McMahon v. Grey* (5 L. D., 58).

It follows therefore, that since the bad faith of Gates is not shown, and the contestant is estopped by his own conduct from charging failure to comply with the requirements of said act, the contest must be dismissed.

The decision of your office is modified accordingly.

PRACTICE—SECOND CONTEST—APPLICATION.

KISER v. KEECH ET. AL.

To avoid unnecessary circuitry of action and consequent delay, the Department will determine rights presented by the record on appeal, where the parties in interest are present in court, although the questions thus presented have not been passed upon by the General Land Office.

*Overruled,
23 L. D. 119*

A second contest should not be allowed to proceed to a hearing while the first is pending. The proper practice in such cases is to receive the second contest, and hold the same, until the first has been determined, when in the event of success in the first, a hearing in the second would be unnecessary.

On the final cancellation of the entry in litigation under the first contest, the second contest should be dismissed.

An application to enter, filed by a second contestant with his affidavit of contest, operates to reserve the land, on judgment of cancellation under the prior contest, subject only to the rights of the first contestant.

Secretary Vilas to Commissioner Stockslager, July 11, 1888.

I have considered the case of John R. Kiser *v.* Cyrus F. Keech and Cyrus N. Purdy, as presented on appeal by Kiser from the decision of your office, dated October 15, 1886, dismissing his contest against the timber culture entry of Keech for the NW. $\frac{1}{4}$ of Sec. 20, T. 13 N., R. 38 W., North Platte land district, Nebraska, because of the prior cancellation of said entry, by virtue of the contest of one Otto S. Gore against the same.

The record shows that the contest of Gore was initiated on November 17, 1885, and hearing had at the local office on February 11, 1886; that default was made by Keech, and, as the result of such contest, his entry was canceled by your office on July 10, 1886; that Kiser's contest was initiated on March 13, 1886, and charges of contest being the same, substantially, as in the case of Gore, and hearing was had at the local office on May 11, 1886. Keech again made default, and, on June 22, 1886, the papers in the latter case were transmitted to your office, with the result aforesaid.

Kiser presented with his affidavit of contest an application, in due form, to enter the tract named, under the timber culture law. Gore has made no application to enter the land, and it is shown by the record that he had, prior to the initiation of his said contest, exhausted his right of entry under both the homestead and timber culture laws.

It also appears that, after the cancellation of Keech's entry by virtue of Gore's contest, as stated, to wit, on July 31, 1886, one Cyrus N. Purdy made timber culture entry for said tract of land.

A copy of the appeal herein was served upon said Purdy by registered mail, after which he filed his affidavit in the case, and is now a party to the record. His affidavit is, in effect, simply, that he made his entry in good faith, and that he did not pay or agree to pay to Gore any consideration for the land.

The specifications of error contained in Kiser's appeal amount, substantially, to a contention that his rights to the land in question are prior to those of Purdy, by virtue of the pendency of his said contest and application, at the time the entry of Purdy was made, and he asks that Purdy's entry be set aside and that his application to enter be allowed.

I see no cause for disturbing your office decision, dismissing the con-

test of Kiser, on the ground stated, for, the entry of Keech having been canceled prior to such dismissal, there was nothing remaining to further contest. Said decision was therefore manifestly right, and must be affirmed. Such affirmance, however, does not affect the question of prior right to the land in controversy as between the present parties litigant. This question has not been passed upon by your office, so far as the record shows, but, in order to avoid unnecessary circuitry of action and consequent delay, and inasmuch as the parties in interest are all before the court, I can see no good reason why the same may not now be passed upon and disposed of by this Department, instead of returning the case for further action by your office.

Kiser having presented his application to enter the land in question, along with his contest filed March 13, 1886, such application operated, upon the ascertainment of the default, to reserve the land, subject only to rights of the first contestant, Gore. The entry of Purdy was therefore made subject to the rights of both Gore and Kiser.

The local officers erred in allowing the contest of Kiser to proceed to a hearing while that of Gore was pending. The proper practice in such cases is to receive the second contest and hold the same until the first has been determined, when, in the event of success in the first, a hearing of the second would be unnecessary.

Gore having made no application to enter the land within the thirty days allowed successful contestants under the act of May 14, 1880, and the application of Kiser having been filed prior to that of Purdy, it is clear that the latter's rights are subject to those of Kiser, and you will therefore direct the local officers to allow the entry of Kiser, upon his original application therefor, if within thirty days from notice hereof, he shall show that he is qualified to make such entry; whereupon the entry of Purdy will be canceled, otherwise the same will remain intact.

TIMBER CULTURE CONTEST—EQUITABLE DEFENSE.

CAREY v. CURRY.

A timber culture contest must be dismissed, though the requisite number of trees are not growing on the land, where it appears that the entryman had duly complied with the law in good faith for a number of years, and the subsequent default was caused by a severe illness whereby the claimant was mentally and physically incapacitated for the transaction of business.

Secretary Vilas to Commissioner Stockslager, July 11, 1888.

In the case of George W. Carey v. Thomas Curry, involving the N. $\frac{1}{2}$ of the N. W. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the N. E. $\frac{1}{4}$ Section 23, T. 7 N. R. 18 E. North Yakima land district, Washington Territory. I have considered the appeal of the former from your office decision of October 1883 dismissing the contest.

The entry dates from November 21, 1878.

May 30, 1886 George W. Carey applied to file a preemption declaratory statement for said land. The application was rejected because Curry's entry was of record; whereupon Carey filed the necessary affidavit of contest, and a hearing was ordered.

The affidavit charges that "Thomas Curry has failed to plant and cultivate trees as required by the timber-culture act; and that at present there are no trees growing on the tract."

The hearing was had May 19, 1886, at which both parties appeared,—Curry by his guardian and Carey in person, and each with counsel.

From the testimony it appears that Curry built a house on the land in the fall of 1878 or spring of 1879 into which he moved with his family, consisting of three small boys, in 1880. Soon after making the entry he commenced improving the land and broke five acres and a little over, which he properly planted within the time prescribed by the timber-culture act. He enclosed thirty acres and cultivated more than half of it to crop. The testimony is somewhat indefinite as to the amount of seeds and cuttings planted the fourth year; but there seems to be no doubt that Curry had in entire good faith complied with all the requirements of the timber-culture act up to September 1883, by planting and cultivating and causing to grow, the requisite number of thrifty trees.

In September 1883, the entryman, Thomas Curry, was stricken with paralysis which rendered him perfectly helpless, speechless and unable to move, and affected his mind in such a manner that he was incapable of attending to his own affairs. He became an inmate of the hospital at Seattle, a charge to Yakima County. At the date of the hearing he was able to walk a short distance but his mind was so far affected that the was "as helpless as an infant", and he was still an inmate of the hospital.

November 12, 1883, J. H. Conrad was appointed guardian of the person and estate of said Thomas Curry, but he did not file his bond and qualify until February 1885, for the reason, as he states, that "perhaps Mr. Curry would be able to attend to his own business."

Although Conrad did not qualify until 1885, yet he endeavored to preserve Curry's right, but he states that he knew nothing of the requirements of the timber-culture law except what he learned from his neighbors. He, however, made several unsuccessful efforts to procure some one to attend to the place. On account of Mr. Curry's mental condition he could not learn what was his interest in an irrigating ditch which ran through the place and supplied the water necessary for the healthy growth of the trees. Other parties claimed the ditch and used the water for their exclusive benefit, and the result was that the trees on Curry's place, with the exception of probably less than one hundred languished and died.

After he learned the nature of his duties, Conrad applied for and se-

cured an extension of time for one year. Both Curry and Conrad acted in entire good faith, and it is stated that previous to his illness the improvements made by the former on the place were of the value of \$500 or \$600.

Since Curry was stricken with paralysis very little work has been done on the claim. The receiver found that he had no jurisdiction to consider the case in other than its legal aspect, and therefore felt constrained to hold "that the trees have not been planted and cultivated as required by the timber-culture law" and recommended that Curry's entry be canceled and that the contestant be allowed to file. The register simply found that "the law has not been complied with."

October 21, 1886, you reversed the finding of the local officers, and dismissed the contest. You hold that Curry has shown good faith; that the equities are strongly in his favor and that the failure, if any, was due to the "act of God" and for that reason excusable, and you cite several decisions of the Department in support of your opinion. I affirm your decision dismissing the contest.

REPAYMENT—DOUBLE MINIMUM EXCESS.

THOMAS KEARNEY.

Repayment is provided in case double minimum price has been paid for land afterwards found not to be within the limits of a railroad grant.

Secretary Vilas to Commissioner Stockslager, July 11, 1888.

October 14, 1885 Thomas Kearney made pre-emption cash entry—2377—for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Section 4, T. 8 N., R. 4 W., Vancouver land district, Washington Territory, paying therefor at the rate of \$2.50 per acre.

Kearney made application to have repaid to him the sum of \$200 overpaid on said entry; and by letter of March 1, 1887, you denied the application on the ground that the law governing the return of purchase money does not provide for repayment in cases like this, where persons have paid too much money on their entries, if the title may be confirmed. The tract entered is within the limits of the lands granted to aid in the construction of a railroad and telegraph line from Portland to Astoria and McMinnville in the State of Oregon. Said grant was declared forfeited by the act of January 31, 1885 (23 Stat., 296), and the lands embraced therein were restored to the public domain and made subject to disposal under the general land laws of the United States as though said grant had never been made. July 8, 1885, the Department issued a letter of instructions based on the provisions of said act wherein it was stated, that the price of all land within the restored limits was fixed at \$1.25 per acre. (4 L. D., 15.)

Kearney made cash entry October 14, 1885. At that time the price of the land was \$1.25 per acre. He was erroneously charged \$2.50 per acre, and paid \$200 more than he should have paid.

When the entry was made and double minimum price paid for the land it was not, and since the date of the forfeiture had not been, within the limits of a railroad grant. It had ceased to be double minimum and had become single minimum land and when the local officers charged \$2.50 per acre they not only disregarded the terms of the letter of instructions above referred to but the following language in the act forfeiting the grant:

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 portions of said road, is hereby reduced to one dollar and twenty-five cents per acre.

Besides providing for repayment in cases where entries have been erroneously allowed and cannot be confirmed, the second section of the act of June 16, 1880, (21 Stat., 287), further provides, "and in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to the heirs or assigns."

It being found that the land entered was not when entered, within the limits of a railroad land grant, it follows that the application of Kearney falls within the provisions of the act above quoted. I, therefore, reverse your decision and direct the repayment to Thomas Kearney of the excess of one dollar and twenty-five cents per acre overpaid by him on his pre-emption cash entry No. 2377.

SECOND FILING—OSAGE LAND.

SCHENCK *v.* TREBILCOCK.

A second filing will not be allowed where the first failed through the fault of the pre-emptor.

When a person, having the qualification of a pre-emptor, makes one legal filing on Osage land, he cannot make a second, for the reason that by making the first filing he has divested himself of the qualifications of a pre-emptor.

Secretary Vilas to Commissioner Stockslager, July 11, 1888.

I have considered the case of John Schenck *v.* James H. Trebilcock involving the SE. $\frac{1}{4}$ of section 29, T. 26, S. R. 23 W. Garden City land district, Kansas. (Osage Indian trust and diminished reserve land) on appeal by the latter from your decision of November 26, 1886, rejecting his proof and holding his filing for cancellation.

It is admitted that Trebilcock filed declaratory statement for the SW. $\frac{1}{4}$ of section 27, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ section 28, T. 31 S. R. 24 W. Kansas, April 26, alleging settlement April 23, 1884.

He claims that said filing was illegal because it was not preceded by settlement and hence cannot affect the legality of the second filing.

Admitting that the settlement was not on the land filed for, it was within the power of the claimant to cure the defect by making settlement upon it at any time before the attachment of an adverse claim. It is not contended that there was any adverse claim, and no reason is shown why he did not make settlement upon the land filed for.

Moreover if he desired the land upon which he had made settlement he could have applied for permission to amend his filing. So far as the record shows there was no reason for preventing the amendment.

When Trebilcock made his declaratory statement he stated that he had made settlement upon the land described therein April 23. It appears that said statement was not a true one.

To permit Trebilcock to make a second filing would be to allow him to take advantage of his own wrong.

Either by making settlement on the tract described in his filing or by amending his filing to embrace the tract actually settled upon, he could have had a filing capable of ripening into an entry. He did neither, but abandoned the tract on which he was living, and filed, and moved on the land in controversy.

In the case of *George Osher* (4 L. D. 114) it was held that where the record showed that the applicant had made one filing under which, through his own fault, he failed to make final proof the restoration of the pre-emption right would be denied.

Section 2261 R. S. is as follows:

"No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract."

In the case of *Baldwin v. Stark* (107 U. S. 463) the supreme court of the United States, construing said section, held that when a party has filed a declaration of intention to claim the right of preemption, he cannot thereafter, at any future time, file a second declaration for another tract.

In the case of *Cowan v. Asher*, recently decided (6 L. D. 785), it was held that a second filing is not permissible except in cases where the claimant through no fault of his own was unable to perfect entry under the first.

The second point made by the appellant is that the law under which the Osage lands are disposed of contains no provision forbidding the making of a second filing. The act of May 28, 1880 (21 Stat. 143), provides that the Osage trust and diminished reserve lands shall be "subject to disposal to actual settlers only having the qualifications of a pre-emptor."

"The exercise of a right due alone to a pre-emptor is necessarily the exercise of a pre-emption right." Case of *Todd Knepple* (5 L. D. 537).

When a person having the qualification of a pre-emptor makes one legal filing on Osage land he cannot make a second, for the reason that by making the first filing he has divested himself of the qualifications of a pre-emptor.

For the reasons stated, I affirm your decision holding Trebilcock's filing for cancellation.

REPAYMENT—CASH ENTRY.

W. J. CHAMBERS.

Repayment may be allowed of money paid for land in excess of the area actually embraced within the entry.

Secretary Vilas to Commissioner Stockslager, July 11, 1888.

I have before me the appeal of William J. Chambers from your office decision of February 14, 1887, refusing repayment of \$10.75 paid by him, in making cash entry No. 45,400, on account of a quantity of 8.60 acres of land, part of the quantity of forty acres for which said entry was originally allowed on the erroneous supposition that the tract entered contained forty acres, whereas it in fact contained but 31.40 acres.

On June 29, 1886, Chambers made said cash entry for the E. $\frac{1}{2}$ of Lot 3, in the NW. $\frac{1}{4}$ of Sec. 6, T. 29 N., R. 8 W., 5th P. M., Ironton district, Missouri. It being supposed that the tract so entered contained forty acres, the receiver charged and Chambers paid the legal price of forty acres, namely \$50. The true area, however, was 31.40 acres, and on February 7, 1887, the receiver, by authority of your office, corrected the cash certificate thereto issued by him, so as to make it show that the entry had been made for only 31.40 acres, at \$1.25 per acre, or \$39.25 in all.

Your refusal to make repayment of the money exacted and paid for land erroneously assumed to have been included in said entry, is based upon the ground that "the law authorizing repayments does not provide for return of the excess when parties have paid too much money on their entries if the title may be confirmed". But in my opinion this case is one in which, as respects the 8.60 acres mistakenly supposed to be included in the tract, the "entry was erroneously allowed, and the title cannot be confirmed." To that extent the statute literally applies, and the corresponding proportion of the purchase money ought to be repaid.

Your said decision is accordingly reversed.

Overruled so far as in conflict, 13 L. D. 13
 HOMESTEAD—ADJOINING FARM ENTRY—ACT OF MAY 14, 1880.

PATRICK LYNCH.

Credit for residence on the original tract may be allowed, under the act of May 14, 1880, in the case of an adjoining farm entry.

Secretary Vilas to Commissioner Stockslager, July 11, 1888.

Patrick Lynch established residence in 1871 upon the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 5, T. 19 S., R. 2 W., S. B. M., Los Angeles district, California, and purchased the same at pre-emption cash entry February 20, 1874. On February 19, 1883, he applied to make adjoining farm entry of the W. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of the same section, township and range. On July 8, 1884, he offered final proof for the tract last described, which the local office rejected on the ground that proof of citizenship was not satisfactory.

The proof was in due course of proceeding transmitted to your office, which, on October 9, 1884, decided:

Without considering the question as to citizenship at this time, I have to state that the proof is rejected because not properly made. The entry is dated February 19, 1883, and claimant must show compliance with the requirements of the statute for five years subsequent thereto.

Claimant, according to his final proof presented, had (prior to offering said proof) occupied, cultivated and improved the tract since 1875—more than nine years. The reason why he did not earlier make application to enter was because the tract was within the limits of the withdrawal for the benefit of the Texas Pacific Railway Company, and according to the former rulings of your office the entry of odd sections was not allowed. It having afterward been decided, however, that tracts occupied at date of such withdrawal were not affected thereby, he made application and proof as above stated. He contends that his case comes under the third section of the act of May 14, 1880 (21 Stat., 140):

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 his right shall relate back to the date of settlement, the same as if he settled under the preemption laws:

In my opinion this contention is correct. I can see no reason why the act of May 14, 1880, should not apply to an adjoining farm entry as well as to an original homestead entry for a full quarter section. Had the claimant made entry of one hundred and sixty acres, and shown residence thereon and cultivation thereof for nine years, there can be no question that the provisions of the third section of the act of May 14, 1880 would have been applicable (in the absence of any intervening adverse right). As the claimant was debarred by the fact of *owning and residing upon a forty-acre tract* from making [adjoining] homestead entry of more than one hundred and twenty acres, the act of May 14,

Overruled 13 L. D. 13

1880, is as applicable to the entry of one hundred and twenty acres as it would have been to an original entry of one hundred and sixty acres.

The only remaining question in the case is that of the sufficiency of claimant's proof of citizenship.

The local officers held "that the proof of citizenship is not sufficient and not in accordance with the rules of the General Land Office, which require a certified copy of the certificate of citizenship." As I find among the papers in the case the claimant's original certificate of citizenship in connection with and a part of his proof upon making pre-emption entry of the first forty acre tract, a certified copy of such certificate is not necessary.

For the reasons herein given, I reverse your decision, and direct that patent issue to claimant on the proof already made.

OSAGE LAND—SECTION 2262, R. S.

SUSAN HUNTSMAN.

The law providing for the sale of Osage land does not require, as the pre-emption law does, an affidavit before entry, that the entryman has not made any contract whereby the title he may obtain will inure to the benefit of another.

Secretary Vilas to Commissioner Stockslager, July 11, 1888.

December 23, 1886, you rejected the proof made by Susan Huntsman on the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Section 17, the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Section 18, T. 33 S. R. 16 W. (Osage Indian trust and diminished reserve land), Larned, Kansas, on the ground that having made a contract to sell the land Huntsman could not make the affidavit required by section 2262, Revised Statutes.

In the case of *United States v. Woodbury* (5 L. D., 303) it was held that the act providing for the sale of the Osage land does not require, as the pre-emption law does, the making of an affidavit before entry can be allowed, that the entryman has not made any contract whereby the title he might obtain will inure to the benefit of another.

Section 2262 not applying to Osage lands your decision was erroneous. It is accordingly reversed.

FINAL PROOF—SOLDIERS' HOMESTEAD—GUARDIAN,

EDWARD BOWKER.

Final proof made by a guardian, after his ward has reached his majority, cannot be accepted.

Secretary Vilas to Commissioner Stockslager, July 17, 1888.

I have before me the appeal of Edward Bowker from your decision of December 30, 1886, holding that as he, Bowker, came of age on the 31st day of January, 1882, final proof made December 1, 1883, by his former

guardian, under section 2307 of the Revised Statutes, cannot be allowed, and that the final certificate No. 1660, issued on such proof, must be canceled. The land involved is the NW. $\frac{1}{4}$, sec. 26, T. 139 N., R. 63 W., Fargo district, Dakota.

After a careful examination of the case I see no reason for disturbing your said decision, and the same is accordingly hereby affirmed.

As was held in the case of David Thomas (4 L. D., 331) "the cancellation of the certificate issued upon the proof submitted by the guardian can not, however, bar the right of the beneficiary to make the final affidavit and submit proof," with all the rights and privileges he (would) have had if proof had been offered by him at the date it was offered for him by his guardian."

You will therefore direct the register and receiver to notify Bowker of his right so to make proof within ninety days after notice hereof.

HOMESTEAD CONTEST—DIVORCED WIFE—RESIDENCE.

GATES v. GATES.

The residence of a settler is presumed to be where his family resides.

The contest of a divorced woman against the homestead entry of her former husband, on the charge of abandonment, must fail where the evidence shows that during his absence from the land his family continued to reside thereupon, and that upon his return thereto, the contestant forcibly and unlawfully retained possession thereof.

Secretary Vilas to Commissioner Stockslager, July 19, 1888.

I have considered the appeal of Alonzo Gates from your decision of October 15, 1886, holding for cancellation his homestead entry of February 27, 1880, for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 13, and NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 24, T. 8 N., R. 5 E., B. H. M., Deadwood land district, Dakota.

Contest was instituted by Frances E. Gates June 27, 1885, alleging abandonment, change of residence and failure to settle upon and cultivate said tract.

Contestant is the divorced wife of claimant, having filed her complaint April 3, 1885, alleging desertion and non-support, and was granted a decree of divorce June 27, 1885, the proceeding being *ex parte*, and upon the day that her decree was granted she instituted contest, alleging abandonment of said tract from October 3, 1882.

The evidence taken at the hearing in the contest before the local office discloses the following facts:

Claimant settled upon the tract in 1878, and commenced plowing. He made his homestead entry February 27, 1880; erected a house, variously estimated at from \$900 to \$1,500. He married the contestant at Deadwood, Dakota, December 5, 1880, and took her to his homestead in the spring of 1881, where she has ever since resided continuously.

Settlement, residence, improvement and cultivation appear to be conceded by contestant, but she alleges that claimant abandoned his homestead and deserted her on the third of October, 1882.

This claimant denies, but admits his absence from about October 3, 1882, until about the time of the commencement of this contest, when he returned to his house upon the tract, where he found the house locked, and he was compelled to remove a staple to obtain entrance. That, after having entered his house with the intention of remaining, he went out to look over the tract, and on his return to the house he found the door barricaded and his entrance opposed by his wife. His improvements, in addition to his house, which was large and contained four rooms, consisted of a granary, corral, a stable about one hundred feet long, ice house and over a hundred acres of breaking. The personal property upon the place in 1882, belonging to claimant consisted of farming tools, a reaper, wagon, span of horses, two cows, chickens, eight hogs, calves, a colt, a pony, one hundred and seventy-two bushels of corn, two hundred bushels of potatoes and some sixteen to twenty tons of hay—all of which property contestant appears to have had the benefit of.

The claimant seeks to excuse his personal absence from the tract from October, 1882, until the summer of 1885, upon the ground of business necessity.

It appears, that while living upon this homestead with his wife, claimant was engaged in the lumber business as a saw-mill proprietor; that in the conduct of his business it became necessary to remove his saw-mill and logging outfit to Montana. Having failed to secure a contract at the National Park and other points on the Northern Pacific road, he finally located his mill at Livingston, Montana, some five hundred miles from his homestead. Claimant appears to have been considerably in debt about the time of removing his mill property to Montana, his indebtedness amounting to between \$4,000 and \$5,000, and the removal appears to have been made for the purpose of realizing on his saw-mill property, and extricating himself from his financial embarrassment. In reference to his intention, he says: "I never had any intention of stopping in that country," referring to Montana; "I always calculated to come back." "I have been trying to sell the mill ever since I have been there. Have tried to sell it or trade it for cattle, for the purpose of getting home again. I have had no other home than the one on Belle Fourche River, the land in question."

The testimony shows that claimant sent money home to his said wife during his absence, wrote to her, but received no reply, paid her bill for drugs and medicine, and engaged his friends to look after her. In comparing his wife's condition with his own, he testifies: "I calculate she was independent, and I was mighty hard up. I didn't call upon her for a five cent piece and was struggling along."

The evidence shows that contestant was the owner in her own right

of three hundred and twenty acres of land, for which her husband paid \$1,300. This property was cultivated by tenants of contestant, she receiving two-fifths of the crops. In addition, she received the entire proceeds of the homestead, which was cultivated by her brother, she receiving two-fifths of the crops. Some two thousand bushels of wheat, besides other crops, were raised upon the homestead in 1883. I can not find that contestant suffered for lack of support. Her means appear to have been sufficient to suitably supply her needs. One of her principal witnesses is her brother, who is engaged in contesting a timber culture claim of claimant, yet his testimony fails to show that contestant suffered for lack of adequate means of support.

Up to the date of obtaining her divorce and instituting contest, contestant was holding possession of the homestead and occupying the premises of claimant as his wife. Her residence up to June 27, 1885, was therefore based upon the settlement and residence of her husband. *Bray v. Colby* (2 L. D., 78). Her residence was his residence, "His acts affecting the claim are her acts, his abandonment her abandonment, his neglect her neglect." *Vance v. Burbank* (101 U. S., 514).

Bearing in mind the principles that the burden of proof is upon the contestant, and that contestee has also the benefit of the presumption that his residence is presumed to be where his family resides; I do not think that contestant has sustained her charge. The large amount of improvements made on the premises by contestee and his apparent good faith, his absence even for the period of nearly three years, explained as they are by the circumstances of the case, do not justify the conclusion that he had abandoned the tract. As was stated by the Department, in the case of *Higgins v. Mills* (3 L. D., 22); "the homestead law is a practical law, and is so devised that it may have a practical enforcement. The law itself provides its own evidence of good faith in improvement, cultivation and residence, if these exist as facts, the law is satisfied."

When this case was before your office, January 21, 1885, on the final proof of contestant as the deserted wife of claimant, you decided that she utterly failed to substantiate the claim of desertion, and rejected her proof, resting your decision upon the case of *Bray v. Colby* (2 L. D., 78), heretofore cited.

One of the rules announced in that case is:

That when the entryman has established a residence and placed his wife upon the land, no one but his wife shall be heard to allege the desertion in proof of his change of residence, or abandonment, during the period of seven years from date of entry, provided that she maintains a residence on the land.

In discussing the rules there announced, the Department said:

Since only the family can actually know that the entryman's absence is a desertion, only they should be heard to allege it. Since the Land Department holds that excusable absence does not forfeit the homestead right, it is bound to regard absences as excusable until the contrary is shown, and to treat the land as the entryman's home, so long as his family occupy it.

This was announced as the law of the Department January 29, 1884. At this time claimant had occupied his homestead tract a year prior to entry, and continued to reside upon it for over two years after entry, making a continuous residence of over three years before she even charges abandonment. Claimant's present status is that of a *feme sole*, and her rights as contestant must rest upon the same ground as that of any other contestant, and can not be either enlarged or abridged by reason of her former marital relation with contestee. Under the rule heretofore cited in the case of *Bray v. Colby*, no other contestant could be permitted to allege or offer evidence of desertion in proof of the entryman's change of residence or abandonment. Claimant testifies that he never intended to abandon the land, and such appears to have been his declared intention as communicated by him to others during his absence. He frequently referred to his return home, and his return appears to have been delayed by his failure in disposing of his saw-mill and logging outfit. As soon as he succeeded in leasing them, he appears to have returned to his homestead, where he was confronted by contestant, who, being in possession, forcibly opposed his entrance to his own house. Her action in this regard was unlawful and unauthorized, and she should not now be permitted to allege his absence from the tract when she forcibly and unlawfully detained the same. Having failed to show that claimant's absence constituted an abandonment of the homestead, her contest must fail.

Your decision, sustaining the contest and holding claimant's homestead entry for cancellation, is reversed.

PRE-EMPTION—SECOND FILING.

GEORGE M. SIMPSON.

The right to make a second filing may be properly allowed where the first, through mistake, was made for land not included within the settlement of the pre-emptor, and his right of amendment was defeated by a prior adverse claim covering the larger portion of the land embraced within his settlement.

Secretary Vilas to Commissioner Stockslager, July 19, 1888.

On April 21, 1879, George M. Simpson filed pre-emption declaratory statement for the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, Sec. 7, T. 2, R. 34, and the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 12, T. 2, R. 35, and N. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, Sec. 13, T. 2, R. 35, Kirwin land district, Kansas, alleging settlement March 20, 1879.

The local officers, on April 4, 1880, forwarded the application of Simpson to amend his said filing so as to embrace, instead of the foregoing, the corresponding tracts in township 3 of ranges 34 and 35, same series, alleging that his settlement was made on the latter described land, but that through the mistake of the party who made out his papers, his application and filing became of record, calling for the wrong township.

On April 27, 1880, your office rejected said application, as to all the land therein described, except the SE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, Sec. 12, for the stated reason that the same was not subject to entry at that date, because it was covered by the homestead entry of one S. M. Rodgers, made October 16, 1874; but held that Simpson was entitled to amend so as to include said remaining subdivision, if he should so desire.

It also appears that said remaining subdivision was covered by the homestead entry of one H. W. Evans, made January 3, 1880.

On August 27, 1886, the local officers at North Platte, Nebraska, forwarded to your office the application of said Simpson, asking that his said original filing be canceled, so as to clear the record, and that his right of pre-emption be restored to him, in order that he may be allowed to file for the NW. $\frac{1}{4}$ of Sec. 21, T. 16 S., R. 43 W., North Platte series.

In his said latter application, Simpson states that he did not amend his original filing as allowed by your office letter of April 27, 1880, so as to embrace the one subdivision therein mentioned, for the reason that the same would have been valueless to him, inasmuch as his improvements were all on another subdivision of the tract he had originally endeavored to obtain; and also that he would have become involved in litigation with Evans, by reason of his said homestead entry covering said subdivision, if he had made such amendment.

On January 25, 1887, your office rejected said application, and the case is now before me on appeal from this decision.

Simpson insists that his settlement on the tract he first sought to enter was made in entire good faith, and that, inasmuch as his filing was, through mistake, placed of record for the wrong tract, he has never had the benefit of the "one pre-emptive right" allowed by statute, and should not now be deprived of the same, by reason of his said mistaken and futile filing.

In the case of Hannah M. Brown (4 L. D., 9), it was held that "when the law restricted persons otherwise qualified to 'one pre-emptive right,' it meant a right to be enjoyed in its full fruition; not that a fruitless effort to obtain it should be equivalent to its entire consummation. So, when the law declares that a party having filed a declaration of intention to claim such right as to one tract of land should not file a second declaration as to another, it meant the filing on a tract open to such filing, and whereon the right thereby claimed could ripen into entry." See also the case of Goist v. Bottum (5 L. D., 643).

It is very clear that Simpson has never enjoyed "in its full fruition," the "one pre-emptive right" to which he is entitled. His filing, through a mistake, was placed upon land on which he had never settled, and which he never sought to obtain under the pre-emption law. He was defeated in his efforts to amend such mistaken filing so as to embrace the tract settled upon, as stated, by the discovery of a prior adverse claim to three-fourths thereof, and his excuses for leaving the remaining

one-fourth are reasonable, and such, I think, as justify his act in this respect. An amendment of his filing could not have been allowed in its entirety, as asked for, because of the existence of the prior homestead entry covering the larger portion of the tract sought to be embraced. Simpson was not bound to persist in adhering to his claim to this tract after he discovered that there was a prior adverse claim thereto. His case, in my opinion, comes clearly within the rules established by the authorities above cited, and he is not therefore within the inhibition of section 2261 of the Revised Statutes.

Your said office decision is accordingly reversed, and Simpson will be allowed, upon his offering in due form a relinquishment of his existing filing, to make a new filing for the tract last applied for, as stated.

TIMBER ENTRY—REPAYMENT.

HARRY BANE.

On the cancellation of a timber entry, for the reason that the land was not properly subject to such appropriation, repayment may be allowed if it appears that the entry was not fraudulent in character.

Secretary Vilas to Commissioner Stockslager, July 19, 1888.

I have considered the appeal of Harry Bane from your decision of November 4, 1886, and February 26, 1887, declining to recommend the return of the purchase money paid on his timber land entry, No. 1567, for the NE. $\frac{1}{4}$ of Sec. 13, T. 23 N., R. 45 E. Spokane Falls land district, Washington Territory, made April 14, 1884.

His application for repayment is rejected because, as stated by your office letter, his entry was canceled "for fraud." Whilst this may have been one of the reasons, it was not stated in the letter ordering the cancellation. That order was stated to have been made because Bane failed to appeal from the decision of the register and receiver. Subsequently, in your office letter of June 24, 1886, it is said that the entry was canceled because the land was not of the character contemplated by the act of June 3, 1878 (20 Stat., 89). The reason for the adverse finding of the register and receiver is not stated, nor is that finding in the record; but I conclude it was based upon the ground that the land was not timber in character.

The testimony taken at the hearing, ordered on report of special agent, as related in your office letter on June 14, 1886, is calculated to create a serious doubt as to the character of the land; and the conclusion arrived at by your office is based upon what was considered a fair preponderance of testimony. It is apparent that it is a question about which men might honestly differ. Bane, himself familiar with the land, seems at one time to have been in doubt on the subject, for he states that he first made homestead entry thereof but afterwards believing it

to be properly timber land, made in good faith, the entry which was canceled.

You state that his witnesses testified at the hearing that an ordinary crop could not be raised upon the land, while the witnesses for the government were of the opinion that such crop could be raised, basing their opinion on the fact that crops were raised on similar land in the vicinity.

Immediately upon the entry being canceled the entryman executed a relinquishment of his right of appeal, and made application for a repayment of the purchase money and fees. The entry not being fraudulent his application for repayment should be allowed.

Your decision is therefore reversed.

PRACTICE—CONTEST AFFIDAVIT—JURISDICTION.

STROUT v. YEAGER.

A contest affidavit is in the nature of an information, and when it is accepted, notice issued, and service made thereof, jurisdiction is acquired.

First Assistant Secretary Muldrow to Commissioner Stockslager, July 20, 1888.

On October 14, 1884, Adrian Yeager filed declaratory statement alleging settlement the day before upon SE. $\frac{1}{4}$, Sec. 23, T. 3 N., R. 32 W., McCook, Nebraska.

He made proof in support of his claim on June 25, 1885, and cash entry June 29, following.

On February 24, 1886, Frank H. Strout initiated contest against said entry. At the hearing had in pursuance of your office letter of April 5, 1886, the parties appeared by counsel. No testimony was submitted by the claimant, and on that in behalf of the contestant the local office finding the evidence to be not sufficiently clear to warrant a recommendation to cancel the entry, and that the affidavit of contest (made before a circuit court commissioner) was "sworn to before a relative who is also attorney and a principal witness in the case," dismissed the contest.

By decision dated December 2, 1886, your office reversed the action below, rejected the claimant's proof and held his entry for cancellation, allowing contestant the statutory preference right to enter the land.

From this claimant appeals here.

The contestant's affidavit of contest sets out that the claimant did not maintain a residence on the land and that before making proof he sold or contracted to sell the same.

The claimant averred in final proof that he established actual residence on the land, December 19, 1884 and that the same was continuous; that he built a house fourteen by sixteen feet, dug a well, broke five

acres which he did not cultivate, and that his improvements were worth \$150.

From the testimony submitted it appears that the walls of a sod house about ten by twelve were put up in the fall or early winter of 1884, that the roof was not put thereon until after February 15, 1885, that the improvements were worth about forty dollars, that in the latter part of February, 1885, the claimant had a bed, stove and table hauled to the tract, and that from early in the fall of 1884, until March, 1885, he lived in the town of Culberson, some three miles distant, where he worked as a jeweler.

Considerable testimony was introduced to the effect that the claimant had stated prior to making proof, that he had sold the land and that he would be paid therefor when he made the entry. The abstract of title submitted in evidence shows that on June 30, 1885, the day after his cash entry he transferred the land by warranty deed.

It further appears from the testimony that shortly after making cash entry the claimant's vendee hauled the former's furniture to Culbertson, where the same was, on July 2, 1885, sold it at auction and on the day following (July 3), the claimant left the country.

It appears from the record that H. B. Strout before whom the affidavit of contest was made subsequently represented the contestant. This is not material. The Department has held in *Gottself v. Swinson* (5 L. D., 657), that a contest affidavit is in the nature of information and when it is accepted, notice issued and service made, jurisdiction is acquired. Furthermore, I am satisfied from the record that the claimant failed to comply with the law in the essential requirements of residence and good faith.

Your decision is accordingly affirmed. This disposition of the case renders it unnecessary for me to pass upon that part of your decision which refers to the form of the claimant's proof and the sufficiency of his published notice thereof.

PRACTICE—REVIEW—PRIVATE LAND CLAIM.

CHARLES B. MCMANUS.

Where notice of a decision rendered by the Commissioner of the General Land Office has not been given, his successor in office may properly review said decision on motion for reconsideration.

Secretary Vilas to Commissioner Stockslager, July 21, 1888.

On the 31st of January, 1879, the surveyor general for the district of Louisiana submitted for the approval of your office two certificates of location, No. 422, A. and B., each for three hundred and twenty acres,

and both together for six hundred and forty acres, issued by him on the same day under section 3 of the act of June 2, 1858 (11 Stat., 294) in satisfaction of the confirmed and unlocated private land claim of Charles Bergeron, entered as No. 496 in the report of the old board of commissioners for the eastern district of the Territory of Orleans, (American State Papers, Green's ed. Vol. 2, p. 363).

This claim it appears was confirmed by said board, acting under authority of the act of Congress approved March 2, 1807 (2 Stat., 440), and certificate of confirmation issued January 3, 1812.

The claim for certificates of location acted upon by the surveyor general as above stated, was filed by Charles B. McManus, claiming as the legal representative of the confirmee by purchase at public sale. The surveyor general further reported that no order of survey ever issued respecting this original claim, and that had such orders issued, its survey would have developed total conflict with other titles. He therefore issued the certificates of location, or scrip as such certificates are commonly called.

May 2, 1879, your office having under consideration the matter thus presented held said scrip for cancellation on the ground that confirmation by the board acting under the act of 1807, was not confirmation within the meaning of the 3rd section of the act of 1858.

The matter thus rested until the 27th of April last when the attorney for McManus addressed a letter to your office asking information as to the status of the case. May 10, following your office by letter informed said attorney, in reply to his inquiry, of the action of your office under date of May 2, 1879, holding for cancellation the scrip which had been issued by the surveyor general in satisfaction of the claim of Charles Bergeron, and that no appeal had been filed, nor had any report after said decision been received from the surveyor general relative thereto.

On the same date (May 10, 1888), your office addressed a letter to the United States surveyor general at New Orleans, asking him to examine his records and report whether proper notice of said decision was given and whether an appeal or notice of appeal had been filed.

May 15, 1888, that officer replied that he could find nothing in the records of his office showing that the claimant or his attorney had ever been notified of your said office decision of May 2, 1879. He further stated that said decision was on file properly endorsed, and that in addition to the formal endorsement appear the following notations in the hand writing, as he is informed, of the then chief clerk: "The attorney in this case has replied that he will take no further action in the case," and in pencil, "Chas. B. McManus notified J. L. Bradford."

May 24, 1888, there was filed in your office a motion for review of your said office decision of May 2, 1879. Said motion set out that until a few days previously thereto no notice of said decision of May 2, 1879, had ever been received. The affidavits of McManus, the claimant, and

Bradford, the attorney, are filed with said motion in corroboration of the statement therein relative to notice. June 12, 1838, your office denied said application for review and on the same date by a letter to the attorney stated that the surveyor general of Louisiana had "been instructed to give proper notice of said decision in order that appeals may be filed, and the claims be brought before the Department of the Interior on their merits." The reasons assigned by your office decision for denying the motion for review do not go to the merits of the case, but rest on the position taken by your office that it will not review and overrule the decision of the former Commissioner upon the identical record which formed the basis of that decision.

Under the circumstances I do not think the position of your office in the matter is tenable. Having found, as your office decision does, that due notice of the decision of 1879, had never been given, and having directed that notice be given, your office by such action for the first time fully promulgated that decision.

Any motion or application recognized by the rules of practice and filed within the time allowed by said rules, after notice, is proper, and is entitled to recognition and action on its merits.

The decision in this case was not final in your office until after appeal, or until after the time allowed for repeal and the time allowed for appeal could not commence to run until notice had been duly given.

It follows from your office finding as to notice, that the motion for reconsideration was entitled to recognition and action by your office on the questions therein raised.

The papers in the case are returned herewith for the action of your office on the motion for review and reconsideration of the decision of May 2, 1879.

HOMESTEAD ENTRY—AMENDMENT.

JAMES BRADY.

An application for amendment should set forth specifically what efforts were made to learn the true description of the land desired, how the alleged mistake occurred, and show that every reasonable precaution had been used to avoid such error.

Acting Secretary Muldrow to Commissioner Stockslager, July 21, 1888.

I have considered the appeal of James Brady from the decision of your office of December 3, 1886, denying his application to amend his homestead entry, made September 6, 1886, on the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 26, and N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of Sec. 35, T. "26" N., R., 10 W., Niobrara, Nebraska, so as to make it embrace, in lieu of said land, the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. "26," and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 35, in T. 32 N., R. 10 W., in said district.

The appellant's application sets forth that he intended to enter the last named tract in township 32 and his entry on the first named tract in township 26, was by mistake; that he discovered his mistake just before he reached his home on his way back from the local office, after making his entry, which office was distant thirty-five miles from his home, and on the next day, September 7, 1886, he returned and made said application to amend. The alleged mistake, it will be observed, relates not only to the township but, also to the smaller subdivisions of the land, and the land embraced in the entry forms a square, while that proposed to be substituted is in the shape of an L. It is stated in the application, that Brady had "carefully examined the land before entry" and well knew the land he intended to enter. If so, he knew its shape to be that of an L, and if he understood the meaning of the letters and figures designating the subdivisions of the land in his entry, he knew that the land therein described constituted a square and consequently was not the land he intended to enter. If he was ignorant of the meaning of those figures and letters, he was negligent in not informing himself before he employed them in making his entry.

The application, moreover, is silent as to what efforts he made to find out the correct numbers of the land before entry, how he happened to make the alleged mistake, and what brought it to his attention on his way home from the local office. I am of the opinion that it was insufficient and properly denied.

It is stated, however, in an affidavit filed by Brady with his appeal to this Department, "that he has valuable improvements, consisting of a frame house, fourteen by sixteen feet, one story high, reasonably worth \$100.00, and a good spring of water, and is residing on said tract" embraced in his proposed amendment. The local officers found that he had acted in good faith, and it, also, appears that no adverse claim has intervened. You will, therefore, direct the local officers to forthwith notify Brady, to file with them, within thirty days after such notification, his own affidavit, with such additional evidence as can be procured, showing the mistake of the numbers of the tract intended to be entered, and that every reasonable precaution and exertion had been used to avoid the error, and to transmit the evidence so filed, together with their written opinion, both as to the existence of the mistake and the credibility of each person testifying thereto, to your office; whereupon, if you are entirely satisfied that the mistake has been made and that every reasonable precaution has been taken and exertion made to avoid it, you will allow the amendment.

The decision of your office is modified accordingly.

PRACTICE—TIMBER CULTURE CONTEST—RELINQUISHMENT.

KURTZ *v.* SUMMERS.

A relinquishment, made after an affidavit of contest against the entry had been placed of record, but before issuance of notice thereon, and without knowledge of said contest, does not inure to the benefit thereof.

A pre-emption filing, offered after cancellation of the entry on a relinquishment thus made, should be allowed, subject to the rights of the contestant.

The preferred right of the contestant in such a case depends upon his subsequently establishing the grounds of cancellation as charged in his affidavit of contest.

First Assistant Secretary Muldrow to Commissioner Stockslager, July 21, 1888.

I have considered the case of Lewis Kurtz *v.* Fred E. Summers, involving the NW. $\frac{1}{4}$ of Sec. 1, T. 111 N., R. 63 W., Huron Series, Dakota Territory, on appeal by Kurtz from the decision of your office of January 5, 1887, by which the homestead entry of Kurtz, No. 10744, on said land is allowed to stand but is made subject to the pre-emption filing, No. 17,167, of Summers thereon.

Herschel K. Summers, the brother of the pre-emptor, Fred E. Summers, made timber culture entry for said land November 28, 1882.

November 13, 1885, the appellant, Kurtz, filed an affidavit of contest, alleging failure of said timber culture entryman to comply with the requirements of the law during the first and second years after entry. On the next day, (November 14, 1885,) after the filing of this affidavit, Fred E. Summers, filed the relinquishment of Herschel K. Summers, which was placed on record by the local officers and the entry canceled, and on the same day also offered his said pre-emption declaratory statement (alleging settlement, November 14, 1885) which was rejected by the local officers, but two days thereafter, November 16, 1885, was accepted and filed. November 18, 1885, Kurtz having been notified by the local officers of the cancellation of the timber culture entry of Herschel K. Summers, made his said homestead entry, claiming a preferred right of entry as contestant.

Fred E. Summers, had been negotiating with Herschel K. Summers for some months prior to the initiation of said contest for the purchase of the latter's relinquishment of his timber culture entry, and had finally given him \$60.00 therefor, being at the rate of \$6.00 per acre for the ten acres of land broken and cultivated by him on the tract, and, at the date of the relinquishment, no notice of the contest had been issued and the Summers testified they had no knowledge whatever thereof. The relinquishment appears to have been made in good faith for the said consideration and not in consequence of said contest. The entry of Herschel K. Summers having been canceled on his relinquishment thus obtained, the filing of Fred E. Summers, which accompanied the relinquishment should have been received, and was subsequently properly

allowed, subject to whatever rights the contestant may have had in the premises. *Mitchell v. Robinson* (3 L. D., 546). A hearing upon the allegations of the affidavit of contest was had, after due notice, September 30, 1886, at which both sides introduced testimony, and the local officers found that said allegations were not sustained and decided against the contestant, and, on appeal, your office affirmed the finding of the local officers.

The evidence shows that Herschel K. Summers, had five acres broken the first year and cultivated to oats the second year and an additional five acres broken the second year.

I therefore, concur in the finding of your office and the local officers, as the allegations of the affidavit of contest only apply to the first and second years after entry.

As Kurtz could only acquire a preferred right of entry, under the circumstances of this case, by prosecuting his contest to a successful termination, it follows, that, having failed therein, he has no such right, and there was no error in subordinating his entry to the filing of Fred E. Summers.

The decision of your office is accordingly affirmed.

TIMBER CULTURE CONTEST—EVIDENCE OF DEFAULT.

PHELPS *v.* RAPE.

Failure to have trees growing within the time required by the statute is not conclusive evidence of default on the part of the entryman, but it is *prima facie* evidence of such default, and casts upon him the burden of showing that such failure was without fault on his part.

First Assistant Secretary Muldrow to Commissioner Stockslager, July 21, 1888.

I have considered the case of O. B. Phelps *v.* Edmond T. Rape, on appeal by the latter from the decision of your office dated December 22, 1886, holding for cancellation his timber culture entry, No. 670, for the SW. $\frac{1}{4}$ of Sec. 14, T. 11 S., N. 23 E., Visalia district, California.

The entry was made, April 24, 1882, and Phelps first initiated contest July 6, 1885, which was dismissed without prejudice by the local officers on the grounds of insufficiency of the affidavit and defective service of notice. On the day of said dismissal, October 9, 1885, Phelps filed a new affidavit of contest, alleging, substantially, bad faith on the part of the claimant, and failure to plant and cultivate trees, seeds, or cuttings, as required by the law. Hearing was had after due notice November 17, 1885.

The claimant, as is shown by the evidence, complied with the requirements of the law during the first and second years after entry, but he failed to plant any trees, seeds, or cuttings, during the third year, which ended April 24, 1885. About April 10, 1885, he plowed five acres which

had not previously been cultivated or broken, and after the expiration of the third year, about May 1, 1885, he planted tree-cuttings on said five acres. The ground was so hard that it was necessary to use a crowbar to make holes of sufficient depth to receive the cuttings. These cuttings failed to take root and died, which is attributed by most of the witnesses to insufficient preparation of the ground, and the lateness of the season when the planting was done, coupled with the heat and dry weather. Some of the claimant's witnesses testify that the cuttings were killed by the grasshoppers, but it appears that they withered and commenced to die before the grasshoppers came. During the month of July, 1885, (the third month of the fourth year after entry), after the claimant had learned that a contest had been or was about to be begun, he attempted to cure his default for the third year, by marking out rows with a cultivator on five acres of land, that had been broken the first year, cultivated the second year and was then sown to wheat. The rows were made through the growing wheat, and locust-seed were sown therein, but they failed to grow. The wheat was not harvested, but was destroyed by four or five hundred hogs which were pastured on the land during a portion of the cropping season of 1885.

It is contended by the claimant that his default in failing to plant trees, seeds, or cuttings during the third year, was cured by what he did during the fourth year or prior to the initiation of the present contest, October 9, 1888.

Planting the cuttings, May 1, 1885, on the five acres which had not been broken the first year, nor cultivated the second, as required by the law, and which did not grow, can not be relied on by the claimant as curing his default. This planting was not only done after the expiration of the year in which it should have been done, but on ground unprepared as the law directs. Here was a double default, to which, according to the evidence, the failure of the cuttings to grow was—in part, if not entirely—attributable. The locust-seed sown in rows among the wheat in July, 1885, also, failed to grow. While the failure to have trees growing is not conclusive evidence of default on the part of the claimant, yet it is *prima facie* evidence of such default, and casts upon him the burden of showing that such failure is without fault on his part. No attempt is made by the claimant to exonerate himself, and the failure of the locust-seed to grow is attributed by some of the witnesses to the planting in the dry season, when there had been no rain, and to the manner of the planting in the midst of the wheat.

It, also, appears that in the spring of 1885, the claimant through a real estate agent offered his claim for sale at a stated price, but before the commencement of the second contest withdrew it from market and afterwards told said agent that the withdrawal was only pending the contest.

The failure to comply with the law the *third* year after the entry has not been cured by what was done the *fourth* year, and the conduct of

the claimant, on the whole, does not evince an intent on his part to comply in good faith with the requirements of the law.

The decision of your office is accordingly affirmed.

PRACTICE—PREFERENCE RIGHT—NOTICE.

LUNDY *v.* HOEBEL.

An entry of land apparently free from the preference right of a successful contestant, is presumptively legal, and should not thereafter be canceled without due service on the entryman of the notice required in contest cases under the rules of practice.

Jurisdiction is not acquired by the local office in the absence of due and legal service of notice.

First Assistant Secretary Muldrow to Commissioner Stockslager, July 21, 1888.

In the case of William H. Lundy *v.* August W. Hoebel, appealed by Hoebel from the decision of your office, dated October 19, 1886, the record discloses the following facts:

Lundy contested the homestead entry of one Aaron Everhard for the SE. $\frac{1}{4}$ Sec. 23, T. 113 N., R. 25 W., Watertown district, Dakota, and, by the decision of your office, dated September 15, 1885, procured the cancellation of said entry. On January 2, 1886, Hoebel made timber culture entry, No. 11,400, for said tract of land. On March 22, following, Lundy presented his affidavit and the affidavit of C. J. Thomas, his attorney in this case, and in the said contest against Everhard, denying the receipt of notice of said cancellation, and asked to be allowed to enter said land. On the same day a notice to August W. Hoebel, St. Paul, Minnesota, was given by publication in a newspaper, to appear at the local office, May 20, 1886, and show cause why his entry should not be canceled and Lundy's application allowed. Two days afterwards, a copy of said notice, enclosed in a registered letter and addressed to said Hoebel, at St. Paul, Minnesota, was mailed at De Smet, Dakota. There is nothing in the record to show that this letter was ever received by Hoebel, or that a copy of said notice had been posted in the register's office or on said tract of land. No affidavit or other evidence of the non-residence of the appellant, or that any effort whatever had been made to obtain personal service on him, before said publication was made, is found in the record.

On the day fixed for hearing, appellant, by his attorney, entered a special appearance, and moved that the proceeding against him be dismissed, because he had not been served with notice as required by law and the rules of practice. The motion was overruled, and appellant made no further appearance in the case.

The evidence of Lundy not having received notice of the cancellation of the Everhard entry, in addition to the aforesaid affidavits of Lundy

and his attorney, consists of the register's certificate that the only notice given of said cancellation by the local office was sent to A. N. Waters, Esq., of De Smet, Dakota, and the affidavit of Waters, dated March 31, 1886, that he received and returned to the land office said notice, and that he was not Lundy's attorney in said contest case against Everhard. These affidavits could not be received as evidence at a hearing, if objected to by the appellant. On this evidence Lundy's entry was allowed by the local officers. In which action your office concurs, and holds appellant's entry for cancellation.

Where, as in this case, the cancellation of an entry has been procured by a contestant, and more than three and a half months thereafter such contestant has not come forward to signify his intention to exercise his preference right of entry, and the tract of land embraced in the canceled entry, after such period, is entered by a third party, such entry is presumptively legal, and should not be canceled without due service on the entryman of the notice required in all contest cases by rules of practice in force in this Department.

The attempted service of notice in this case was unauthorized and conferred no jurisdiction on the local officers over the person of the defendant and consequently no jurisdiction to hear and determine the matter submitted to them on the *ex parte* affidavits furnished by Lundy. Appellant is entitled to his day in court, and to an opportunity to show cause why his entry should not be canceled.

The decision of your office, holding his entry for cancellation on the ground that it conflicts with Lundy's, is therefore erroneous. The action of the local officers in overruling appellant's motion to dismiss was proper, but the case should have been continued for service of notice on the defendant.

For the reasons given, Lundy's entry will be suspended, and a day fixed by the local officers for a hearing in the case, giving him a reasonable time, after receipt of notice of this decision, to secure service on Hoebel, whose entry in the meantime will remain of record.

The decision of your office is accordingly reversed.

TIMBER CULTURE ENTRY—PRELIMINARY AFFIDAVIT.

ALBERT D. BOAL.

A timber culture entry, made through an agent, and without the preliminary affidavit required by the statute, is illegal; but the defect may be cured by filing an affidavit properly executed, which will, when made, be held to relate back to the date of the entry.

Acting Secretary Muldrow to Commissioner Stockslager, July 21, 1888.

In the matter of the application of Albert D. Boal to perfect timber-culture entry No. 5,487 for the NE. $\frac{1}{4}$ Sec. 17, T. 9., R. 40 W., North

Platte district, Nebraska, before me on appeal from the decision of your office dated December 13, 1886, the record discloses the following facts :

Said entry was made October 11, 1884, and is illegal in that Boal did not make the affidavit required of an applicant by section two of the act of June 14, 1878, (20 Statutes 113), either before the register or receiver, or any other officer authorized to administer oaths in the district where the land is situated. In fact he did not take the required affidavit in said district or elsewhere.

The entry was made through the agency of one Fred C. Powers. On September 7, 1886, special agent George B. Coburn obtained from Boal an affidavit in which he says that he did not go to Nebraska to make entry but signed the papers in Illinois; that the entry was made in good faith and with the intention of raising trees on the tract and that he had no knowledge of the timber-culture law and supposed the entry was perfectly regular.

On September 28, 1886, said special agent reported the facts in the case to your office and recommended "cancellation of entry unless claimant desired to perfect same by filing legal affidavit, in which case he should be allowed a reasonable time for that purpose, upon promptly signifying his desire so to do." He further says—"I think he (Boal) did this in good faith not knowing the requirements of the timber-culture law."

On October 9, 1886, the register at North Platte, Nebraska, transmitted to your office Boal's application—signed September 30,—to be allowed to file the affidavit required by law to make the entry valid. In this application, which is sworn to by the applicant and corroborated by the oath of James F. Boal, applicant states, that about October 5, 1884, he was informed by his father James F. Boal,—who had been looking at land in Keith County, Nebraska that he, (Jas. F.,) had been informed by Fred C. Power, that residents of Illinois without going to Nebraska, or appearing before the land officers, could make legal timber-culture entries; that said Powers was a land agent and locator and if affiant desired would send him papers to sign and return and he (Powers) would make filing in full compliance with the timber-culture law; that he received and signed the papers in Illinois and returned them to Powers with fee inclosed, and received from Powers receiver's receipt No. 5487 dated October 11, 1884; that he took the claim in good faith and has complied with the law as to plowing and cultivation, and that he had no knowledge that the entry had not been made in full compliance with law until informed to the contrary by Coburn.

Claimant's entry was held for cancellation on the report of special agent Coburn, and in the decision appealed from his application is denied on the ground that if he "was misled and deceived as he avers, it was through no fault of the United States, but presumably due to his

ignorance of the law (which he is supposed to know) which does not excuse his error."

All men are presumed to know the law and the general rule unquestionably is that ignorance of law is no excuse. Some exceptions, however, have been made to this rule, where ignorance really existed and no intentional wrong has been done, and no actual fraud perpetrated. In the case of *Ferguson v. Hoff* (4 L. D., 491) ignorance of the same provision of the timber culture act shown in this case was excused. Appellant will be allowed sixty days from receipt of notice of this decision within which to make the required affidavit. When made, it will relate back to the date of entry.

The decision of your office is therefor reversed.

PLACER MINING CLAIM—EXPENDITURE.

TRICKEY PLACER.

Work done on a ditch outside of a placer claim, and prior to the location thereof, cannot be accepted in proof of the required expenditure, where it is apparent that such ditch was not made for the purpose of developing the claim.

Acting Secretary Muldrow to Commissioner Stockslager, July 21, 1888.

I have considered the appeal of The Alice Mining Company from the decision of your office of January 27, 1887, holding for cancellation the mineral entry of said company No. 2751, for the E. L. Trickey Placer claim, located in the SW. $\frac{1}{4}$ of Sec. 2, S. $\frac{1}{2}$ of Sec. 3, N. $\frac{1}{2}$ of Sec. 10, and NW. $\frac{1}{4}$ of Sec. 11, T. 3 S., Range 74 W., 6 P. M., Upper Fall river mining district and Central City land district, Colorado.

Your office hold the entry for cancellation upon the grounds, that "it does not appear that the expenditure required by Sec. 2325, U. S. Revised Statutes, has been made upon this claim, and in addition thereto, it is not satisfactorily shown that any mineral has been discovered therein."

In response to a letter from your office dated October 19, 1886, the surveyor general certifies that the value of labor and improvements upon this claim is not less than \$500, and that said improvements consist of "a one-half interest in a mining ditch 8,000 feet in length in earth and rock, starting from Fall River." From the approved plat of survey it appears that said ditch is situated entirely outside of the limits of the "E. L. Trickey Placer claim" and runs through a large part of the "Texas Placer claim", which is contiguous to and north of the "Trickey Placer Claim", and the deputy surveyor in his report states that "no workings have been done on the claim itself (the Trickey Placer), but a ditch has been constructed from a point on Fall River, about a mile above the claim, and runs within a short distance of the north

side of the claim, and that said ditch was built for the purpose of working this and other claims, and that any part of the "Trickey Placer claim" can be reached by the ditch described above.

The "Trickey Placer claim" and the "Texas Placer claim" are both owned by appellant and a one-half interest in the said ditch, which is estimated to have cost \$5,000, is allotted to each.

It further appears, however, that said ditch was constructed during the period of time from May to December, 1881, inclusive, and the claim involved in this case (Trickey Placer) was not located until nearly three years thereafter, August 1, 1884. It is difficult to understand how the ditch could have been built in part for working this claim so long a time before the location thereof. It certainly seems improbable, that costly improvement would have been made for the development of a claim not located and which was suffered to remain unlocated for nearly three years, during which it was subject to location and entry by outsiders not interested in said improvements. There is no explanation of this circumstance in the record.

The cases, in which work done outside the claim, has been held to be "as available for holding the claim as if done within the boundaries thereof," are cases where the work has been done in whole or in part, for the purpose of prospecting or developing the particular claim involved in the controversy. *Chambers v. Harrington* (111 U. S., 350).

It is true the deputy surveyor reports that the ditch "was built for the purpose of working this and other claims," but this is a matter as to which he doubtless had no personal knowledge and his statement was evidently based upon those of interested parties.

Without passing upon the question whether the work relied on in this case could be held as available for holding the claim if it had been done after the location thereof and in part for its development, I am of the opinion, that under the circumstances of this case and in the absence of all explanation, it should not be so held. The purpose of the law in requiring improvements, was to compel "every person who asserted an exclusive right to his discovery or claim to expend something of labor or value on it as evidence of his good faith and to show that he was not acting on the principle of the dog in the manger." *Chambers v. Harrington, supra.*

To allow claims upon which as in this case, no work whatever has been done and which are and for an indefinite time may continue to be wholly unused for mining purposes, to be tacked on from time to time to improvements made long before their location, would open the door and let in the evil which the law was designed to remedy.

This claim embraces all the land between said "Texas Placer" and the Fall River and extends 250 feet beyond said river, no work had been done upon it, and it does not appear that mineral has been discovered on it.

These facts clearly indicate that the claim was not located for placer mining thereon, but with a view to the ownership and control of the banks of the river, which runs through the entire length of the claim, parallel with and about two hundred and fifty feet from its southern boundary.

The decision of your office is affirmed.

MINING CLAIM—SCHOOL LAND—RES JUDICATA.

BOULDER AND BUFFALO MINING Co.

Though the language of a decision may in terms purport to definitely settle the question as to whether a certain section of land was excepted from the school grant because of its known mineral character, yet such question is in fact only *res judicata* as to the land actually involved in the case wherein such decision was rendered.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

In the matter of the application of the Boulder and Buffalo Hunter Consolidated Mining Company, for patents on entry No. 141, Buffalo Hunter mineral claim, and entry No. 142, Boulder lode mineral claim, appealed from the decision of your office, dated Jan. 14, 1887, the record discloses the following facts.

Said claims are in the E. $\frac{1}{2}$ N. W. $\frac{1}{4}$, and the N. W. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Sec. 16, T. 22 S., E. 72 W. 6. P. M. Pueblo Colorado land district. After giving the notice and making the proof usually required in such cases, said entries were allowed on December 31, 1883, and the register's final receipts therefor obtained.

The survey of said township was approved February 10, 1872, and said section sixteen, was returned as agricultural land. The State of Colorado, notwithstanding her presumptive right to the land covered by said entries under the grant to the State of the 16th and 36th sections for school purposes, had no special notice of the proceedings taken by said mining company, and was not made a party defendant therein. It seems to have been taken for granted by said company that the mineral character of the land in said section had been authoritatively settled in the case of *Town-site of Silver Cliff v. the State of Colorado* decided December 15, 1879, by Acting Commissioner Armstrong (Copp's M. L. 279), and the company, at the time of making proof, tendered no evidence of the mineral character of the land entered; nor was there any demand or suggestion on the part of the local officers that such proof was necessary.

On February 16 and 17, 1886, your office held said entries for cancellation, on the ground that the evidence on file did not show that the land entered "was known to be valuable for mineral prior to the date

of the admission of Colorado as a State, to wit, August 1, 1876," and that said land "passed to the State under the provisions of the act of Congress approved March 3, 1875."

Subsequently appellant made a motion for review in your office, and asked that said entries be passed to patent on the evidence in the case, and in support of its motion insisted that the case of *Town-site of Silver Cliff v. The State of Colorado*, determined the character of the land in said section sixteen, and that it did not pass to the State for school purposes. Appellant further asked—if its position as to the effect of said decision was not deemed correct,—that further time be given it to enable it to show that the mineral character of the land entered, was known long before the admission of Colorado, and consequently that it did not pass to the State under the provisions of said act of March 3, 1875.

The decision of your office from which this appeal is taken, denied the motion for review and failed to grant appellant leave to make supplemental proof in support of its claim.

The language used by the Assistant Commissioner, in deciding the case of *Townsite of Silver Cliff v. The State of Colorado*, is very broad and might quite naturally warrant the conclusion that the character of all the land in said section sixteen, had been authoritatively adjudicated and determined. The language used is as follows :

The declaration of the claim of the town was filed, and after due notice to the State, a hearing was had, commencing May 8, 1879, to determine the character of the land in said section sixteen, and whether it was known as mineral land prior to survey. * * * At said hearing all parties were present. The testimony submitted shows beyond a reasonable doubt that the land was known as mineral as early as 1864, and that at different times between that date and 1878 various parties prospected the land, took out specimens of mineral, some of which were assayed and found to yield a good return in silver with traces of gold. The State cross-examined the witnesses but introduced none. * * * The *land in question* is clearly not within the grant to Colorado for school purposes, but is government land, and subject to sale only under her laws.

In said townsite decision there is no description given of "the land in question" in that case, but an inspection of the record in said case shows that only the south half of said section was in controversy, and the language of the Assistant Commissioner must be construed as applying only to the land in said south half.

Your decision, so far as it holds appellant's proof insufficient, is therefore concurred in. No good reason however can be discovered for refusing to allow appellant to make supplemental proof on giving due notice to the State of Colorado, of its intention so to do, and of its application for patents for said land. Appellant will therefore be allowed sixty days from receipt of notice of this decision within which to institute the proper proceedings in the premises against said State.

The decision of your office is modified accordingly.

RAILROAD WITHDRAWAL—ACT OF JUNE 22, 1876.

FLORIDA RY. & NAVIGATION CO. v. BOARDMAN.

The act of June 22, 1876, which repealed the statute prohibiting the disposal of public lands in Florida otherwise than under the homestead law, did not operate to relieve lands from the effect of a subsisting railroad withdrawal; nor did the "offering," under the proclamation of July 13, 1878, of lands thus withdrawn affect their status as, by the terms of said proclamation, "lands reserved for railroad purposes" were expressly excepted from the lands to be offered.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

I have before me the appeal of the Florida Railway & Navigation Company from your decision of November 3, 1886, holding for approval Charles A. Boardman's cash entry No. 1339, of February 7, 1881, for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ Sec. 15, T. 10 S., R. 24 E., Gainesville district, Florida.

As your said decision states, the tract in question "is within the fifteen mile, indemnity limits of the grant of May 17, 1856 (11 Stat., 15), for the Florida Railroad Company—now Florida Railway and Navigation Company—a withdrawal for the benefit of which was ordered in the year 1856."

Your said decision adds, however, that "said land was offered on November 9, 1878, under act of June 22, 1876, in compliance with the President's proclamation No. 837, dated July 13, 1878;" that "on February 7, 1881, the same was purchased by Charles A. Boardman, in connection with the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 22, of the township specified, per cash entry No. 1339," and that "the land in question has not been selected for railroad purposes."

Upon this basis of fact you hold that "Mr. Boardman's entry, having been made subsequent to said offering, and prior to the withdrawal of March 26, 1881, was properly admitted."

But in my opinion the so-called offering of 1878, did not really, in law, affect the status of the tract in question.

Both at the date of said "offering"—November 9, 1878—and at the time of Boardman's attempt to purchase—February 7, 1881—the withdrawal for the benefit of said grant was subsisting in full force and effect (Atlantic, Gulf, and West Indies Transit Railroad Co., 2 L. D. 561; Florida Railway and Navigation Co., 5 L. D., 107); and neither the "act of June 12, 1876 (which, by the way, became law on July 4, 1876) nor the "proclamation of the President, No. 837," in any way authorized the land officers to make the attempted sale to Boardman in disregard of said withdrawal.

The act referred to simply repealed the previously existing statute forbidding the disposal of the public lands otherwise than under the homestead law. It neither revoked the withdrawal itself, nor excepted the land in question from the operation of the withdrawal.

The President's proclamation, on the other hand, expressly excepted from among the lands to be offered, "lands reserved for railroad pur-

poses." This exception, in view of the withdrawal mentioned, should have prevented the attempted "offering" of the tract afterwards included in Boardman's entry.

Under such circumstances I cannot concur in your statement that "the government saw fit to exercise its right to sell the tract in question, and offered the same in 1878, thus in effect revoking the withdrawal of 1856."

Your said decision is accordingly reversed.

PRE-EMPTION ENTRY—RESIDENCE.

DANIEL LOMBARDI.

The fact that land is not inhabitable throughout the entire year will not preclude its purchase under the pre-emption law.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

This is an appeal by Daniel Lombardi from your office decision of January 3, 1887, wherein you affirm the action of the local office in rejecting his pre-emption proof submitted November 13, 1886, under his declaratory statement filed March 17, 1884, alleging settlement in 1874 upon W. $\frac{1}{2}$, SW. $\frac{1}{4}$, Sec. 4 and N. $\frac{1}{2}$, SE. $\frac{1}{4}$, Sec. 5, T. 12 N., R. 15 E., Sacramento, California.

The plat of said township was filed March 25, 1876.

The claimant averred on final proof taken by the county clerk of El Dorado county that he settled and established residence on the land in June, 1874, that his improvements consisted of a house of hewed logs twenty by thirty feet, stable, corral, milk house, fencing, about four acres broken, total value \$600, that he used the land for grazing stock and raising hay and that his residence had been continuous "except when compelled to leave on account of snow."

From the further testimony of the claimant and witnesses to his final proof, it appears that after his settlement in June, 1874, he inhabited the land from about June 1, to November 1, of each year, that in consequence of the heavy snows, the tract being of great altitude, he removed with his stock to the lower foot hills.

The claimant stated that he did not own other land but let his stock "run on unclaimed land during the winter;" also that the tract in question was his only home.

The action of both the local and your office, is based upon your office decision of July 10, 1886, in the case of Clough v. Morrow. In this case Morrow a homestead entryman, contested the right of Clough, a pre-emption claimant, to make cash entry. Without passing upon the merits of the controversy, your office, finding from the testimony that the land was inhabitable only four or five months during the year, held that it was not subject to entry under any law requiring continuous residence. In this I cannot concur.

The statute does not prohibit pre-emption entry upon land of like character to that involved herein. While it is true that the claimant is required to show a continuous residence, the department has repeatedly held that absences which do not impeach his good faith may be excused. This claimant, in my opinion, settled upon the land with the honest intention of making it his home, he has established and for twelve years has continued his occupancy of the same and has put valuable improvements thereon. His absences, although extended, have been the result of a cause beyond his control. They are fully accounted for and do not in any manner indicate that he has acted with fraudulent intent.

The entry should be allowed. Your decision is reversed.

HOMESTEAD ENTRY—RESIDENCE—NATURALIZATION.

A. R. ARCHIBALD.

Residence alleged under the homestead law is not consistent with the maintenance at the same time, in another State, of the residence required as a pre-requisite to citizenship under the naturalization laws.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

The record in this case shows that on December 9, 1882, A. R. Archibald made homestead entry for the N. W. $\frac{1}{4}$, Sec. 23, T. 149 N., R. 66 W., Devil's Lake land district, Dakota, and that he commuted the same to cash entry No. 35, on December 1, 1883.

The commutation proof of the claimant shows that he established his residence on the land on May 15, 1883, and that he and his family, a wife and one son, have resided thereon continuously since that date. He was "absent a few times on business," but his family was on the land all the time. His improvements consist of a frame dwelling house twelve by fourteen feet, with an addition ten by twelve feet in size, and 15 acres of breaking, valued at \$250. He swears that he is a naturalized citizen of the United States, but no record evidence of such fact accompanied his proof.

On February 1, 1887, your office rejected this proof because of claimant's short residence and slight improvements, and for the reason that no record evidence of his naturalization had been furnished, and there upon his cash certificate was held for cancellation, but his original entry was allowed to stand subject to his making new proof showing full compliance with the law in every respect.

From this decision claimant appeals. With his appeal he offers the required record evidence of his naturalization, showing that prior to the date of his original entry he had declared his intention to become a citizen of the United States as required by law, and that on November 12, 1883, he was duly admitted to citizenship by the district court of Hennepin county, Minnesota, upon taking the oath prescribed and furnishing the proof required by law.

His final proof, aside from the question of his citizenship, appears on its face to be satisfactory. His residence on the land is shown to have been continuous for the required period of six months prior to the time of making proof, and his improvements are quite as extensive as are usually found in such cases.

He was required, however, by the third clause of Sec. 2165, Revised Statutes, to prove to the satisfaction of the court which admitted him to citizenship, as aforesaid, that he had resided within the United States five years, at least and within the State or Territory where such court is at the time held, one year at least, and he seems to have furnished this proof. By it he must necessarily have shown and his certificate so recites that he was a resident of the State of Minnesota for one year previous to the time of his admission to citizenship, as stated. It is evident that the one year here referred to, must mean the year next preceding the date of said naturalization. This period covers the time during which he asserts, in his final proof that he resided continuously on his claim.

The residence required by the naturalization laws is a domiciliary residence, and the same in character, as that required of a claimant under the homestead law. The claimant here, could not therefore, have maintained a residence in the State of Minnesota, under the naturalization laws, and also the required residence on his homestead claim in the Territory of Dakota, at one and the same time.

Upon the state of facts, thus disclosed, the case is one, I think, that requires further investigation on the question of claimant's alleged residence on the land, and his proof and cash entry are for that purpose suspended.

You will, therefore, direct the local officers to call upon him to furnish supplemental evidence satisfactorily explaining, if he can, the apparent conflict in his present showing, as herein pointed out, and if within sixty days from notice hereof he shall make the required explanation to the satisfaction of your office, his proof will be approved and passed to patent, otherwise the same must be rejected, but without prejudice to his submitting new proof within the lifetime of his original entry, showing full compliance with the law in all respects.

Your office decision is accordingly modified.

FINAL PROOF—PUBLICATION—ACT OF MARCH 3, 1879.

The paper to be designated for the publication of final proof notice must be a *bona fide* newspaper in general circulation, published nearest the land for which proof is to be made, whether such paper is published in the county where the land is situated or otherwise.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

On November 18, 1886, the register and receiver of the land office at San Francisco, California, addressed to your predecessor, Hon. W. A. J.

Sparks, then commissioner, a letter for the purpose of obtaining from him his construction of the provisions of the act of March 3, 1879, (20 Statutes at large p. 472) regarding the notice of final proof.

In reply, your predecessor by letter dated November 30th construing the said statute, instructed the said local officers, that the newspaper selected for the publication of the applicant's intention to make final proof should be the *bona fide* paper in general circulation published nearest the land for which the proof is to be made, irrespective of the fact, whether the paper is published in the county in which the land lies or not.

The local officers, excepting to this construction of the statute instituted an appeal to this Department.

It might be said, that your office letter of November, 1886, is not a decision in a case pending, nor are the local officers in a position to appeal; they are not parties but public officers, bound to execute their official duties under the direction and instruction of your office; but the allowance of said appeal may be taken as equivalent to a request on the part of your office for a departmental expression of opinion on the question involved.

The local officers argue with great stress, that the paper designated for the publication of the notice of final proof should be one published in the county wherein the land is situated, though such paper might not be the one published nearest to the land; and the reason given is that the inhabitants of a county will take and read their own county paper in preference to the paper of another county. This may be true, but the words of the statute are clear and precise and permit of but one interpretation. The act of March 3, 1879 (20 Stat., 472) provides—

Upon the filing of such notice, the register shall publish a notice, that such application has been made, once a week for the period of thirty days in a newspaper to be by him designated as published nearest to such land.

The practice has been in conformity with the plain requirements of the statute. (See circular of April 21, 1885, 12 C. L. O., 34.) The paper designated must be a *bona fide* paper in general circulation "published nearest the land geographically measured." See also circular approved August 1, 1884, (3 L. D., 52); David B. Wellman, (5 L. D., 503).

The instructions expressed in your office letter of November 1886, are accordingly approved.

PRACTICE—CONTESTANT—NOTICE; TIMBER CULTURE.

UPPENDAHL *v.* WHITE.

The personal attendance of the contestant at the hearing is presumptively essential to the proper presentation of his case, and a contest should be re-instated where it was dismissed in the absence of the contestant; and such absence was the fault of the claimant.

A notice of contest properly served on the defendant, containing a description of the land, the charge against the entry, the contestant's name, and the time and place fixed for the hearing is not fatally defective because of a misnomer of the defendant occurring in said notice, as the process is amendable in that respect, either before or after judgment.

Motions for continuance are addressed to the sound discretion of the local officers. The cancellation of an entry is warranted where the evidence shows that after the lapse of six years no trees are growing on the land, and no excuse or explanation is offered for such failure.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

In the case of John Uppendahl *v.* Ada E. White, appealed from the decision of your office dated November 10, 1886, reference is made to said decision for a statement of the case and the material facts disclosed by the records.

Appellant insists:

1st. That the testimony is insufficient to justify the forfeiture of the entry;

2nd. That the re-instatement of the case on November 26, 1884, and March 26, 1885, was error;

3rd. That over-ruling the motions made by claimant at the hearing September 30, 1885, to dismiss the case for want of service, and to continue it because of the absence of material witnesses; was also error.

The contest in this case was commenced six years—less 27 days—after the entry was made, and the evidence clearly shows that there were then no trees growing on the tract. This evidence in the absence of any explanation or excuse on the part of the entryman for her failure to meet the requirements of the timber-culture law is sufficient to justify the cancellation of the entry.

Appellant's agent prevented the contestant from being present at the time fixed for the hearing in July, 1884, by having him arrested on a criminal charge and it will be presumed, in the absence of all testimony to the contrary, that his presence was essential to the proper presentation of his case. In less than two weeks he made application to have the case re-instated and a hearing ordered, which on the showing made by him was allowed November 26, 1884. The facts fully warranted this action of the local officers.

At the hearing fixed for March 26, 1885, at 10 o'clock A. M., service on the claimant was not had in time and there was no appearance entered for her. Contestant not appearing at the hour the contest was dismissed by the local officers. At 2.30 o'clock P. M. of the same day contestant by his attorney asked that the case be re-instated and continued for service, which request on the showing made was granted. This was not error.

The citation in this case was to "Ida" E. White, and it is contended that its service on "Ada" E. White was not good. The motion to dismiss on this ground was properly overruled. The process contained

a description of the land entered by her and a notice that the entry was contested by Uppendahl, the grounds of the contest, and the time and place fixed for the hearing. The misnomer did not warrant her in disregarding the service of notice as the process in this respect was amendable either before or after judgment. (Code of civil procedure, Dakota, Sec. 142 p. 43). Or can I say that the local officers committed any error in refusing the continuance asked for by appellant. Motions for continuance are addressed to the sound legal discretion of the trial court, and as appellant failed to show due diligence in preparing for her defense I cannot find that such discretion has not been exercised in this case, nor that any manifest injustice has been done appellant.

The decision of your office herein is accordingly affirmed.

PRE-EMPTION ENTRY--RESIDENCE.

MARY A. SHANESSY.

There is no rule of law, or of the Department, which requires the pre-emptor's continuous actual personal presence on his claim for six months immediately preceding the offering of his proof. He is required to show a six months continuous residence during such period; but such a residence is entirely compatible with temporary absences which are satisfactorily explained.

First Assistant Secretary Muldrow to Commissioner Stockslager, July 24, 1888.

In the appeal of Mary A. Shanessy from the decision of your office, dated July 19, 1886, reference is made to said decision for a detailed statement of the case.

In the new final proof tendered by the pre-emptor on January 13, 1885, she and her witnesses testify that for more than six months prior to that time she has continuously made her home on the land claimed. Testimony elicited by the cross-examination of these witnesses, and by the examination of other witnesses, shows that during this time she has not been actually present on her claim more than about thirty days. Her proof was recommended for acceptance by the local officers but was rejected by your office, on the ground that "under the present practice of this office the pre-emptor must show a continuous residence of six months next prior to the date of proof." In view of the evidence found in this case, you seem to construe the phrase "*continuous residence*" as meaning continuous actual personal presence. If such construction were correct, your rejection of said proof would have been proper. But I do not concur in said construction. There is no rule of law or of the Department which requires the pre-emptor's continuous actual personal presence on his claim for six months immediately preceding the offering of his proof. What the pre-emptor is required to

do is to show a six months' continuous residence during such period. But such a residence is entirely compatible with temporary absences, which are satisfactorily explained. (Israel Martel, 6L. D., 366; William Thompson, id., 576).

In the case of *Shanessy v. Bond*, decided by the Secretary January 8, 1884, on appeal from the Commissioner's decision of June 15, 1883, the finding of facts by the Secretary as to appellant's residence is as follows:

The claim of Bond that Shanessy was not resident on the land is not sustained. It satisfactorily appears that she resided continuously thereon from the date of her filing (January 2, 1880,) to the date of her mother's death in May following. Thereafter she visited her father (who resided about one mile distant) once a week to work and iron for him, usually remaining at his house one night, and visited him occasionally at other times, but always returning to and occupying the land as her home. She has a house and other improvements sufficient to meet the requirements of the law.

It is conceded by your office, and borne out by the testimony, that Mrs. Shanessy's absences during the seven months immediately preceding her tender of final pre-emption proof were "rendered necessary by her poverty." During her absences she was at work for wages earning a living for herself and family.

The evidence in this case, taken in connection with the facts found by the Secretary, January 8, 1884, is sufficient, in my opinion, to show appellant's good faith, and her application to make pre-emption cash entry will be allowed.

The decision of your office is therefore reversed.

PRACTICE—CONTINUANCE—TIMBER CULTURE.

SMITH *v.* SMART.

An affidavit for a 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 said witnesses.

The entryman is responsible for the negligence of his agent in planting.

While failure to secure the requisite growth of trees would not in itself conclusively establish the charge of non-compliance with law, yet proof of such failure casts upon the entryman the burden of showing that it was not attributable to any fault or negligence on his part.

Secretary, Vilas to Commissioner Stockslager, July 24, 1888.

I have considered the case of Edwin L. Smith *v.* Wellington F. Smart, on appeal by Smith from the decision of your office of November 17, 1886, dismissing his contest of the timber culture entry of Smart for SE. $\frac{1}{4}$ of Sec. 9, T. 107 N., R. 64 W., Mitchell district, Dakota.

Smart's entry was made, May 25, 1881, and on August 12, 1885, about four years and two and a half months after the entry, Smith initiated contest, alleging substantially as ground of contest, failure on the part of Smart to comply with the requirements of the timber culture law during the third and fourth years after entry.

The testimony was taken by a Commissioner October 15, 1885, and hearing had before the local officers, October 25, 1885. The claimant by his agent, A. B. Smart, filed the following affidavit for a continuance:

That Mathew Shepard, R. Wiley, and Eugene Coleman are material witnesses in this case; that I saw Mathew Shepard and R. Wiley, yesterday, who said they could not attend the contest today but could later; that about one month ago, I saw Eugene Coleman, who said he would come when I wanted him and about a week ago I wrote him that I should want him today, but he is not here; that said witnesses are all residents of this county and I believe said witnesses can be had at the time to which it is sought to have the trial postponed.

The affidavit then sets forth what the absent witnesses would testify to and the materiality thereof.

The local office denied the continuance, and your office expresses the opinion that the affidavit was sufficient and therefore the local officers erred in this ruling.

It appears from the affidavit of Mathew Shepard, one of witnesses mentioned in the affidavit for continuance, that the said agent of Smart who made the affidavit and who was authorized by Smart to represent him in the conduct of the case, consented to the absence of said Shepard and also, of Wiley, another of said witnesses. Shepard in fact appeared on the day the affidavit for continuance was made, and testified, and Wiley might have done so but for such consent. The statements in the affidavit for continuance as to the third witness, Eugene Coleman, may have been true and yet he may have been absent by the consent or procurement of the affiant after writing the letter to him.

Rule 20, of Practice sub-division (1) requires that such affidavits shall "show," that "one or more of the witnesses is absent without the consent or procurement" of the party applying for the continuance. The affidavit should expressly negative, that the absence of the witnesses is by the consent or procurement of the applicant, and support this statement by facts showing "the exercise of proper diligence to procure the attendance of the absent witnesses."

Seeing a witness the day before the trial or mailing a letter a week before, may or may not be the exercise of proper diligence to procure his attendance; it depends upon circumstances, such as the proximity or remoteness of residence of the witness from the place of trial, the mail facilities and the occupation and condition in life of the witness. A witness who might be unable to attend on a day's notice, might do so, if notified earlier, and a letter mailed to a witness particularly in the rural districts—a week before the trial, might not be received by him until after the trial or too late to enable him to attend. The affidavit states, that the two witnesses who were seen the day before the trial, said they could not attend. The cause of this inability should have been given, so that it could be determined whether it was removable by reasonable effort on the part of the applicant for the continuance.

Motions for continuance are addressed to the sound discretion of the local officers, and I am of the opinion, that discretion was properly exercised in this case in the denial of the motion.

Your office, while holding that the local officers erred in refusing to grant the continuance, proceeded to pass upon the merits of the case as disclosed by the evidence, and reversing the ruling of the local officers, dismissed the contest. As stated at the outset, the ground of contest alleged was substantially failure to comply with the requirements of the timber culture law during the third and fourth years after entry.

The proof shows that during the third year after entry (which ended May 25, 1884), A. B. Smart, as agent of the claimant, had ten acres of the land backset and five acres planted in ash and box-elder seed. The five acres so planted were first planted in corn and afterwards the tree seeds were planted among the corn by putting them in holes about four feet apart, made by a sharpened stick. The witness who did the planting, testified, that the seeds were so wormy as to be materially damaged; that he called said Smart's attention to this at the time of the planting, telling him that he did not think they would grow, and Smart told him, to "mind his own business." The tree seeds in fact failed to grow.

In April of the fourth year (which ended May 25, 1885) the ten acres were replowed and planted in wheat and ash seeds. The planting was done with a "clipper press wheat drill" and the tree seeds, and wheat were sown together in drills an inch deep and four feet apart. The witnesses, testified that this was not the usual way of planting tree seeds, and that the harvesting of the wheat was done with a "Twine binding harvester" and not in such a manner as to protect small trees, if any had been growing on the land, and the height of the stubble after harvesting was from three to four inches. There was no cultivation of the land after the tree seeds were planted, and there were no trees growing on said land at the date of initiation of contest August 12, 1885. The seed planted this year was good. The season was favorable for growing trees and ash seed planted on the same section and in the immediate vicinity did well that year.

The claimant resided in Massachusetts and intrusted to A. B. Smart, as his agent, the superintendence and management of his tree-claim as well as of his defense to the contest. Information of the defective quality of the tree-seed planted the third year communicated to the agent binds the principal, and the latter is responsible for the negligence of the former in planting such seed. The planting of seed, so defective as to render it improbable that it will germinate, with knowledge of its defective character, and which does not in fact germinate, unless the failure to germinate can be clearly traced to some other cause than the defect in the seed, is not such a planting as will satisfy the requirement of the timber culture law.

I am, therefore, of the opinion, that the allegation of failure to comply with the law during the third year was sustained. Was this failure cured by what was done upon the ten acres the fourth year?

The statute requires the land to be cultivated to crop or otherwise the year preceding the planting of the tree-seed, and the year the tree-seeds are planted, it is contemplated that the land shall be devoted primarily if not exclusively to the planting and growth of such seed.

The land is set apart for the culture of timber, and the use of the land for other crops must be in subordination to or promotive of that object. In this case the land was planted the fourth year in wheat sown in drills with the tree-seed, and the wheat was harvested with no precaution taken to protect the young trees, if there were any. The wheat crop seems to have been the primary object of the claimant's care the fourth year as the corn crop was the third. Sowing tree-seed in drills with wheat was shown by the evidence to have been an unusual mode of planting such seed. Seed of the same kind (ash) planted (it is presumed in the usual manner) that spring on the same section of land and in the immediate vicinity of the land planted by claimant, did well and the evidence does not disclose any cause for the failure of the claimant's seed to grow, unless it be the unusual mode in which they were planted or the destruction of the young trees in harvesting the wheat. While failure to have trees growing on the land would not alone conclusively establish the charge of non-compliance with the law, yet proof of this fact would cast the burden upon the claimant of excusing such failure or of showing that it was not attributable to fault or negligence on his part?

I am of the opinion that the failure in this case is inexcusable and that the facts are inconsistent with a *bone fide* attempt on the part of the claimant (through his agent) to comply with the requirements of the law. The decision of your office is accordingly reversed.

MINING CLAIM—PLACER—MINERAL PAINT ROCK.

CHARLES A. BARNES.

A tract containing "a valuable deposit of mineral paint rock in place," is not subject to entry as a placer claim.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

I have considered the appeal of Charles A. Barnes from your office decision, dated November 11, 1886, which was an approval of the action of the local officers rejecting his application to purchase as mineral land the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 28, T. 13 S., R. 62 W. Pueblo, Colorado, containing twenty acres, more or less.

Said decision was based upon the ground that "there is no evidence whatever of compliance with the mining laws or official regulations thereunder."

Applicant filed his application in the local office September 26, 1885, setting out that the tract applied for "contains a valuable deposit of mineral paint rock in place, and affiant prays that he may be allowed to pay the government price for said tract, as required under the laws for the disposal of public lands containing valuable mineral deposits."

So far as the record discloses, he has done nothing beyond the mere filing of the application, as above, and the tender of purchase money for the land. There is no evidence of development, or that any improvements have been made, nor does it appear that any notice of application was given by publication and posting as required.

In short, the application, while purporting to be a mineral application, is, on the record, rather in the nature of an application to make private cash entry of twenty acres of land which is not subject to such entry. If treated as a mineral application, it is not only without any evidence of compliance with the mining laws or regulations, but it is inconsistent in itself, for the statement of the applicant, under oath, is that the "tract contains a valuable deposit of mineral paint rock *in place*." This would constitute it a lode claim, if at all a mineral claim within the meaning of the law, but it is for twenty acres of land which amount could be taken only as a placer claim.

Your office action rejecting the application was proper, and the decision appealed from is affirmed.

PRACTICE—APPEAL—CERTIORARI.

JENNIE M. TARR.

An appeal will not lie from the action of the Commissioner of the General Land Office requiring a claimant to furnish an additional affidavit in support of his entry; but only from final action in the case, upon the refusal or failure of the entryman to comply with such requirement.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

Jennie M. Tarr has filed an application to have certified to the Department her appeal from the action of your office of May 28, 1887, alleging the following facts:

That on October 8, 1884, she made cash entry No. 10637, Huron series, for the north-west quarter of section twenty-five township one hundred and eleven, range sixty-nine.

That on May 26, 1887, the Honorable Commissioner of the General Land Office, by his letter "C" of that date, suspended said cash entry and required the claimant to furnish an affidavit, stating the number, cause and duration of all absences from said land during the six months immediately preceding date of entry proof, Sept. 29, 1884.

That on the 15th day of September 1887, the said Jennie M. Tarr, filed an appeal to the Hon. Secretary of the Interior from the action of said Commissioner.

That on June 7th 1888, the Hon. Commissioner refused to entertain said appeal, for the reason that his action of May 26th 1887, was not a final one, and on that day held said cash entry No. 10637, for cancellation.

An appeal will not lie from the action of the Commissioner of the General Land Office requiring a claimant to furnish an additional affidavit in support of his entry, but only from his final action in the case upon the refusal or failure of the entryman to comply with said request.

If it is true as alleged by applicant that your office, by letter of June 7, 1888, held said entry for cancellation, said decision is subject to appeal by the entryman within the time prescribed by the Rules of Practice after notice of said decision, but you committed no error in refusing to transmit her appeal from the interlocutory order of May 26, 1887.

The application is refused.

SETTLEMENT RIGHTS—TRESPASS.

CHRISTIAN *v.* STRENTZEL.

Settlement rights, to the detriment of a party in possession under color of title, cannot be acquired by acts of trespass.

First Assistant Secretary Muldrow to Commissioner Stockslager, July 24, 1888.

I have before me the record in the case of William E. Christian *v.* John Strentzel, B. R. Holliday and the State of California, involving the validity of Christian's homestead claim to lots 5 and 6 in section 25, and lots 1 and 2 in section 36, T. 2 E., R. 3 W., Mount Diablo Meridian California, appealed by Strentzel from the decision of your office dated July 2, 1886.

The contest in this case arose on Christian's tender of final homestead proof, May 6, 1884, and a hearing was had April 30, and May 1, 1885. The State of California made default, and Holliday filed a relinquishment of his claim, and asked that his filing be canceled without prejudice. This leaves Strentzel the only claimant to any part of the land included in Christian's entry, and his claim is confined to lot 5 of said section 25.

The material facts touching the question which of these parties has the superior right to said lot are as follows:

Lots 5 and 6 were formerly embraced with the claimed limits of the El Sobrante grant and from 1867 up to about March 23, 1882, had been fenced and in the possession of Strentzel under claim and color of title, he having a small undivided interest in said grant. The limits of said grant, as established by the decision of the Secretary of the Interior of February 23, 1882, did not include said lots, and Strentzel, on May 13, 1882, located with Valentine scrip the land in controversy, the same then being unsurveyed. The township plat of survey was filed December 10, 1883, and on the same day Strentzel's said location was adjusted to the proper legal subdivision, to wit, to said lot 5.

Christian's entry was made December 14, 1883, and the evidence shows that he settled on land just outside Strentzel's enclosure, on what are now lots 1 and 2 in said section 36, as early as February 28, 1879. On or about March 23, 1882, he entered Strentzel's enclosure without permission and built an eight by eight shanty near the fence on said lot 6. He had a short time prior to this, for the first time, notified Strentzel that he claimed the land inside the enclosure, since designated as said lots 5 and 6. Christian has no improvements whatever on said lot 5, nor has he ever cultivated or exercised any acts of ownership over it. The principal part of said lot susceptible of cultivation has, since 1867 been cultivated by Strentzel, and been in his actual possession as a part of his home farm.

The facts stated are shown by a clear preponderance of the evidence, and as their legal effect is not impaired by any other evidence found in the case, they constitute all the facts necessary to be considered in determining the rights of the respective parties involved herein.

Christian's settlement in 1879 on the unsurveyed land in section 36, gave him no rights as against a party in possession under color of title to the enclosed land in section 25, nor did his intrusion on Strentzel's possession in 1882, give him any such rights. Said actual entry was made by breaking appellant's close, and was an unlawful trespass on his possession. Settlement rights to the detriment of a party in possession under color of title, cannot be acquired in this manner. (*Atherton v. Fowler*, 96 U. S., 513; *Coleman v. Collins et al.*, 10 C. L. O., 199; and *Turner v. Bumgardner*, 5 L. D., 377).

Strentzel's location will therefore remain intact, and Christian's entry, so far as it affects said lot 5, is directed to be canceled.

The decision of your office herein is modified accordingly.

PRE-EMPTION—SETTLEMENT—2260, R. S.

BOOTH *v.* SHORT.

A pre-emptor is not relieved from the inhibition of section 2260 R. S., by a prior pretended transfer to his wife of the homestead, from which he removed when he settled on his pre-emption claim.

Secretary Vilas to Commissioner Stockslager, July 24, 1888.

I have considered the case of William H. Booth *v.* Samuel P. Short, on appeal by Short, from your office decision of June 10, 1886, rejecting his final proof and holding for cancellation his pre-emption filing for the NW. $\frac{1}{4}$, Sec. 20, T. 1 N., R. 25 W., Bloomington, Nebraska land district.

Short filed pre-emption declaratory statement for said land March 26 1884, alleging settlement March 1, and on September 22, 1885, made

final proof thereunder, against the acceptance of which Booth, who on April 7, 1884, made homestead entry for said tract, filed protest alleging that the claimant removed from and abandoned a residence on land of his own in that State to settle on this land; that the protestant made homestead entry for said land April 7, 1884, and that at that time claimant was not living on the land in controversy, nor had he any improvements thereon except what were put there several years before. A hearing was had the testimony being taken before a notary public. The local officers decided in favor of Booth. Upon appeal to your office said decision was affirmed and the pre-emption filing of Short was held for cancellation.

The testimony shows that Short made homestead entry for the tract adjoining the one in controversy upon which final certificate issued in 1880. He with his family, lived on that tract until about April 15, 1884, when he took up his residence on the tract which he now seeks title to under the pre-emption law. He claims to have sold his homestead tract to his wife, and conveyed the same to her by deed dated January 10, 1884. This deed was recorded April 28, 1884. The consideration mentioned in said deed is \$200 and it is made subject to a mortgage for \$200. Short claims that at the time of the sale to his wife he retained the possession of the land for two years; and the testimony shows that during the time covered by his final proof he used the homestead tract keeping his stock there and that he continued to improve it. He refuses to give his reasons for selling. When asked why he sold his only answer was, "Because I wanted to." These things all go to impeach the *bona fides* of this transaction between Short and his wife, and to show that it was simply a pretended transfer for the purpose of enabling Short to execute the affidavit required of pre-emption claimants, and therefore his filing was illegal. Under the authority cited in your office decision, being the case of *Aultman Taylor & Co. v. Obermeyer et al.* (6 Nebraska, 260), it is doubtful if the deed from Short to his wife, even if made in good faith, operated to divest Short of title to the homestead tract so as to relieve him from the inhibition of Sec. 2260, R. S.

In that case it was said :

By the common law neither the husband nor wife could convey lands to each other. And our law still regards them in relation to each other as one person notwithstanding the statute enlarging the rights of the wife. The deed which Obermeyer attempted to make directly to his wife, in law was absolutely void.

Short's filing being illegal it becomes unnecessary to decide whether he had, prior to the entry of Booth, done anything on the land that amounted to a settlement thereon, the testimony relating to that question being conflicting and contradictory.

Your said office decision rejecting Short's final proof and holding his pre-emption filing for cancellation is affirmed.

PRE-EMPTION FINAL PROOF—SUPPLEMENTAL PROOF.

H. L. HENRY.

A period should be fixed for submitting supplemental proof, where the statutory life of the filing has expired.

First Assistant Secretary Muldrow to Commissioner Stockslager, July 25, 1888.

I have before me the appeal of Harrison L. Henry from your decision of December 7, 1886, rejecting the final pre-emption proof offered by him on July 6, 1884, for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 14, and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Sec. 23, T. 46 N., R. 62 W., Huron district, Dakota, and allowing him "a reasonable time in which to furnish supplemental proof, showing full compliance with legal requirements."

After a careful examination of the case I see no reason for disturbing your said decision, except that, as the statutory life time of Henry's filing has expired, a period should now be fixed within which, if at all, proof shall again be made.

You will therefore direct the local officers to give, immediately, written notice to the claimant; that his proofs heretofore submitted are rejected, and that his entry will stand canceled unless within sixty days from the service of such notice, he shall furnish proof satisfactorily showing full compliance with the law in good faith, and that upon failure to furnish such proofs within the time limited, they will cancel the entry accordingly; and that upon receipt of such further proofs as shall be proffered within the time, they will promptly report the same to you, with their opinion thereon.

Your decision is modified accordingly.

MINING CLAIM—MINERAL LAND—EXPENDITURE.

JOHN DOWNS.

The existence of mineral, in such quantities as to justify expenditures in the effort to secure it, should be established as a present fact, in order to bring the land within the class subject to mineral entry.

The proof should show that the improvements have been made for the purpose of developing the particular claim applied for.

Secretary Vilas to Commissioner Stockslager, July 28, 1888.

I have examined the appeal of John Downs from the decision of your office, dated November 24, 1886, holding for cancellation his mineral entry, No. 735, as a placer mining claim, including the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 17, T. 3 N., R. 7 W., made November 28, 1881, at the Helena land office, in the Territory of Montana.

The record shows that said Downs, on August 1, 1881, filed in said office his application for patent for said land as a placer mining claim, and, there being no protest filed or objection made, the local officers received payment for said land and issued certificate therefor.

The proof as to improvements upon which said entry was allowed is, the affidavit of the claimant, who swears that the value of the same equals fifteen hundred dollars, and they consist of "ditching, bar mining, and reservoir;" also the joint affidavit of Jacob H. Seepie and Charles Huss, who swear that they are well acquainted with the location and extent of said claim, and that the value of the labor and improvements placed thereon by said Downs equals the sum of "five hundred dollars, and consists of ditching, bar mining, and reservoir, costing at least fifteen hundred dollars."

Counsel for claimant, on June 23, 1884, and November 14, 1885, submitted additional evidence, tending to show that the land is mineral in character.

On November 8, 1886, the local officers transmitted the report of the United States deputy surveyor as to the character of said claim. On November 24, 1886, your office considered the papers in said cases and held the entry for cancellation, for the reason "that the land is not shown to be of the character for which a mineral patent may issue, and five hundred dollars are not shown to have been expended in its development."

The United States deputy mineral surveyor, upon his examination of said claim, reports "that the soil is of a sandy character, composed of disintegrated granite, apparently the country rock of the mountains to the eastward; that the mineral value of the land has not yet been proven, but is believed to be equal to that of the many other tracts which have been extensively worked in this district; that the land possesses no value for agricultural purposes, as well on account of its great altitude, as from the poverty of its soil; that the land has no present value for municipal or townsite purposes. . . . That there is no timber upon the claim. . . . That there exists no surface or underground workings of either placer or lode within the boundaries of the claim. . . . That the surface of the claim is underlaid by a deep bed of gravel bearing placer gold; that its successful working as a placer depends upon the united action of the owners of the continuous chain of placer claims along Silver Bow Creek (flowing southwestward one quarter mile west of the northwest corner of the claim) in building a bed rock flume. It is believed that this, when done, will enable the claimants to successfully open and develop this placer claim. . . . That if this land does not prove valuable for placer purposes, it is entirely worthless. . . . That the expenditures placed upon this claim by the applicant and his grantors exceeds (\$500) five hundred dollars, and that said improvements consists of a mining ditch, two by four and 5,280 feet long, constructed during the era of high prices preceding the date of

mining application No. 962, and believed to have cost upwards of \$500. This ditch is a spur from Noyes and Barnards' large mining ditch, about one quarter mile to the east, and enters the claim one hundred and twenty-five feet north of the southeast corner, and following the south margin of the depression before mentioned crosses the south boundary of the claim about three hundred and fifty feet west of said corner, and running westward near the south boundary re-enters the claim one thousand feet west from the southeast corner. Thence, it maintains a generally west north-west course and crosses the west boundary about five hundred feet north of the southwest corner."

Your office held that, although it appeared that said ditch crossed said claim, yet it "is not shown to contribute to its development."

The appellant insists that the evidence submitted is sufficient to warrant a finding that the land is mineral in character, and that the required amount has been expended to develop said claim, but, if it should be held otherwise, he "is willing to make such further developments as you may deem necessary," and he asks that he may be allowed to submit further evidence in case the proof already furnished shall not be deemed satisfactory.

By Sec. 2319 of the U. S. Revised Statutes, it is provided that "all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase under regulations prescribed by law."

It has been repeatedly held by this Department that it must appear that the land applied for is at the time of the application mineral in character, and that it is not enough to show that adjoining tracts are mineral, or that the tract applied for may in the future develop the presence of mineral. *Commissioners of Kings County v. Alexander*, and cases cited (5 L. D., 126).

In the case of *Deffeback v. Hawke* (115 U. S., 404), the United States supreme court, after stating the provisions of law relative to the sale of mineral lands, said: "It is plain from this brief statement of the legislation of Congress, that no title from the United States to land known at the time of sale to be valuable for its minerals, of gold, silver, cinnabar, or copper, can be obtained under the pre-emption or homestead laws, or the townsite laws, or in any other way, than as prescribed by the laws specially authorizing the sale of such lands"

We say 'land known at the time of sale to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral' in the sense of the statute is applicable."

The same court, in the case of the *Colorado Coal Company v. United States* (123 U. S., 307), quoted from *Deffeback v. Hawke* (*supra*), and applied the rule enunciated therein to coal lands claimed to be reserved

from sale under the pre-emption law under the term "known mines." The court said:

We hold, therefore, that to constitute the exception contemplated by the pre-emption act under the head of 'known mines' there should be upon the land ascertained coal deposits of such an extent and value as to make the land more valuable to be worked as a coal mine, under the conditions existing at the time, than for merely agricultural purposes. The circumstance that there are surface indications of the existence of veins of coal does not constitute a mine. It does not even prove that the land will ever be, under any conditions, sufficiently valuable on account of its coal deposits to be worked as a mine. A change in the condition occurring subsequently to the sale, whereby new discoveries are made, or by means whereof it may become profitable to work the veins as mines, can not affect the title as it passed at the time of the sale. The question must be determined according to the facts in existence at the time of the sale.

Applying the principle announced in said decisions to the case at bar, it is quite evident that the proof as to the mineral character of said land is insufficient.

The report of the U. S. deputy mineral surveyor expressly states that "the mineral value of the land has not been proven," and while he states that "the claim is underlaid by a deep bed of gravel bearing placer gold," he also states that the successful working of said claim as a placer will depend upon the building of a bed rock flume, and, when this is done, it is believed that the claimant can "successfully open and develop this placer claim." Besides, the surveyor also reported that there had been "no surface or underground workings of either placer or lode within the boundaries of the claim." So far as this record shows, there has not been a dollar's worth of mineral taken from said claim or disclosed thereon, nor is it shown how much gold there is in the "deep bed of gravel" underlying the surface of said claim.

I think, also, that the proof as to improvements is not sufficiently explicit. It is not shown that the ditch built across said claim was placed there for the purpose of developing said claim. It does appear that said ditch was placed on the claim prior to the filing of the application for patent, namely, August 1, 1881, and the report of the surveyor, dated April 5, 1886, shows that no use has been made of said ditch for the working of said claim. The proof should show that the improvements have been made for the purpose of developing the particular claim applied for. See circular, approved September 23, 1882 (1 L. D., 685); *Smelting Company v. Kemp* (104 U. S., 655). Although said proof is deficient, since there is no protest filed and no evidence of bad faith on the part of said applicant, I am of the opinion that his request to be allowed to furnish satisfactory evidence of the mineral character of said claim, and of the value of the improvements placed thereon for its development, should be granted.

The decision of your office is modified accordingly, and the applicant will be allowed sixty days from notice hereof within which to submit the supplemental proof required. In case he fails to do so within the time allowed, his entry will be canceled.

TIMBER CULTURE ENTRY—"DEVOID OF TIMBER."

CANDIDO *v.* FARGO.

A timber culture entry will not be canceled on the ground that the land is not "devoid of timber," where said entry was allowed in accordance with departmental rulings then in force, and the entryman subsequently proceeded in due compliance with law.

Secretary Vilas to Commissioner Stockslager, July 28, 1888.

I have considered the case of Packiota Candido *v.* Charles G. Fargo, as presented by the appeal of the latter from your office decision of November 9, 1886, holding for cancellation his timber culture entry, No. 779, of the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 17, T. 9 N., R. 2 E., B. H. M., Deadwood, Dakota.

It appears that said entry was made May 24, 1884, and that Candido initiated contest June 27, 1885, charging that "said tract is not composed of prairie land, nor land devoid of timber, but that in said section 17 there is a large quantity of growing timber; also that said Fargo did not plow five acres on said land for the year ending May 24, 1885, nor up to this time, and has not to this date complied with the timber culture laws."

Hearing was ordered and had at the local office July 30, 1885, both parties being present.

On the evidence adduced, the register and receiver found, as to cultivation, in the following language: "Fargo has complied with the timber culture law since making entry. There appears no reason to question his good faith in making entry, nor in cultivation." As to the charge that the tract is not prairie land, they find that there are from "150 to 400 scrubby trees growing along the bed of a creek in Sec. 17, almost useless for all purposes," and that, except for your office decision of May 25, 1885, in the case of Dotson *v.* Thomas (12 C. L. O., 71), the entry would be sustained on authority of Bartch *v.* Kennedy (3 L. D., 437), and numerous other decisions of this Department.

Following the rule laid down in the above cited case of Dotson *v.* Thomas, however, in which your predecessor held that land in a section containing any timber whatever was not subject to entry under the timber culture law, the register and receiver found for contestant, because of the few trees growing on section 17, as above stated.

On appeal, your office found from the evidence that the law had been complied with in the matter of breaking, but finding that there are on the section about two hundred trees, the conclusion was reached that the entry was illegal, and it was accordingly held for cancellation.

On appeal it is contended that said decision of your office was error:

1. In deciding that the land embraced in the section was not land devoid of timber within the contemplation and meaning of the timber culture act.

2. In deciding that Fargo's entry was not in all respects legal and valid.

3. In not deciding, inasmuch as the rulings and decisions of the land department in force at the time when said entry was made, permitted and encouraged the making of timber culture entries upon land such as that embraced in the section in question, that said entry was protected by said rulings as being the interpretation of the law at that time.

4. In adjudging that said entry should be held for cancellation.

Appellant concludes by asking that your said office decision be overruled and reversed, and that the contest in this case be dismissed.

Upon an examination of the evidence, I find no trouble in arriving at a conclusion as to the facts. It is clear that claimant had at the date of the initiation of contest done the requisite amount of breaking, and that so far as his acts were concerned, he had met the full requirements of the law as to breaking and cultivation. It is admitted by him that there are on the section, in which his entry was made, about one hundred and fifty scrubby trees, along and between the banks of a creek, which runs through or across a corner of said section. The finding of your office that there are about two hundred of such trees is, I think, not far from the fact. These trees are of scrubby growth, unfit for making lumber, but would make firewood.

Upon a full consideration of the whole record, I am satisfied that the exceptions to your office decision appealed from are well founded.

Under the rulings of this Department, in force at the date of the entry, the tract was undoubtedly subject to the timber culture entry as made by Fargo. *Blenkner v. Sloggy* (2 L. D., 267); *Wheelon v. Talbot* (id., 273); *Box v. Ulstein* (3 L. D., 143); *Bartch v. Kennedy* (id., 437).

Since said entry was allowed by the local land officers in accordance with the construction of the timber culture law by the Department then in force, and upon the faith of such entry the claimant has proceeded to comply with the law, it is not in harmony with the principles of justice to deprive him of the fruits of his labor. *Allen v. Cooley* (5 L. D., 261). Fargo having made his entry upon land subject to entry under the timber culture law, as construed at the date of said entry, and the evidence showing that since the date of entry, he has complied with the law, I am of the opinion that the contest should be dismissed, and that the entry should remain intact, subject to future compliance with law.

Your office decision is accordingly reversed.

CONFLICTING SETTLEMENT RIGHTS—NOTICE.

HEMSWORTH *v.* HOLLAND.

The notice given by settlement and improvement extends only to the quarter section as defined by the public surveys.

Secretary Vilas to Commissioner Stockslager, July 23, 1883.

The land involved herein is the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 4, T. 16 N., R. 20 W., Grand Island, Nebraska.

This tract was embraced in the homestead entry of one Pendleton P. Lee, made September 28, 1883, for the NW. $\frac{1}{4}$ of said Sec. 4.

On March 29, 1884, James Holland initiated contest against the entry mentioned. On April 12, 1884, Edgar A. Hemsworth presented the relinquishment of Lee and at the same time made application to file declaratory statement for the land in question and the S. $\frac{1}{2}$, SE. $\frac{1}{4}$ Sec. 33, T. 17 N., and range aforesaid.

The records of your office show the tracts last named to be contiguous.

The local office held the relinquishment so presented for special affidavit to explain why it was given, and rejected Hemsworth's said application to file.

On May 16, 1884, Holland submitted testimony in support of his contest (Lee making default) and the same was on June 4, following, sustained by the local officers. On June 25, 1884, Hemsworth again presented Lee's relinquishment accompanied by the required affidavit. Thereupon the local officers "dismissed the said contest but rejected the application of Hemsworth to file as aforesaid for the reason that the same conflicted with the preference right of Holland."

On July 26, 1884, Holland (having been notified by the local officers on June 26th, 1884, that his said contest was sustained) filed declaratory statement alleging settlement on July 23, of the same month.

On August 16, 1884, your office on appeal by Hemsworth from the rejection by the local office of his application to file, directed that the same be allowed "subject to the prior "right" of Holland."

It appears from the records of your office that Hemsworth filed such declaratory statement August 25, 1884, alleging settlement October 16, 1883, and also that he made homestead entry on September 15, 1884, for the land embraced in his said filing to wit: S. $\frac{1}{2}$, SE. $\frac{1}{4}$, Sec. 33, T. 17 W., and W. $\frac{1}{2}$, NW. $\frac{1}{4}$, Sec. 4, T. 16 W.

Upon Hemsworth's application for hearing your office on July 7, 1885, found that Holland's contest was premature and that he acquired no preference right thereby and directed a hearing to determine the rights of the parties "by virtue of settlement and improvements". From the foregoing no appeal was taken. Upon the testimony submitted before a notary public, the local officers on February 6, 1886, sustained the filing of Holland.

On July 24, 1886, your office affirmed the action below and held the entry of Hemsworth for cancellation so far as it related to the land involved.

From this decision Hemsworth appeals.

Hemsworth testified that he made settlement October 16, 1883, upon S. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said Sec. 33, with the intention of securing Lee's relinquishment of his said homestead entry, when he proposed to file for the tract named together with the W. $\frac{1}{2}$, NW. $\frac{1}{4}$ of Sec. 4, i. e., the tract involved, that failing to obtain said relinquishment he applied on No-

ember 7, 1883, to file declaratory statement for said S. $\frac{1}{2}$, SE. $\frac{1}{4}$ and also E. $\frac{1}{2}$, SW. $\frac{1}{4}$ section 33, that on April 6, 1884, he learned by "a decision from Washington" that he could not file for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, and thereupon on April 7, 1884, he forwarded to the local office, Lee's relinquishment together with his said application to file for S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 33 and the W. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 4.

His improvements consisting of a board house twelve by fourteen feet, pig pen, chicken house, well forty-seven feet deep, some ten acres cultivated and a number of trees planted, are on the SE. $\frac{1}{4}$ of section 33. He states that he has no improvements on the land in dispute, and that he has resided on his claim since May 3, 1884.

Holland established residence on the NW. $\frac{1}{4}$, Sec. 4, some time between August 15, and 28, 1884, occupying a house which he had previously built. He said residence was thereafter continuous. His improvements are on the land in dispute and consist of a frame house fourteen by eighteen feet and ten feet high with tin roof a cave, well and some three acres of breaking; total value between \$375 and \$400.

Counsel for the appellant insist that Hemsworth is entitled to the land in question by virtue of his application of April 12, 1884, to file therefor and that Holland is concluded by his failure to appeal from your office finding of July 7, 1885, that his contest being premature, he acquired no preference right thereby, and that his filing in July, 1884, was without effect. I have not deemed it necessary to pass upon the questions raised by this contention. The sole question presented by this record is that of the respective rights of the parties by virtue of settlement and improvement. Hemsworth's claim to this particular tract did not appear of record until August 25, 1884, when he filed declaratory statement as stated. The local office find in effect that Holland settled upon and improved the land without the knowledge of Hemsworth's claim. Holland seems, prior to the hearing on his contest against Lee's entry, to have known that Hemsworth held the relinquishment of the same. He testified that he refused Hemsworth's offer to sell him said relinquishment, but that finally, as a consideration for the same, he agreed in the event of his said contest being successful, to dig a well on the land and allow Hemsworth to use it, that upon his arrival at the local office he found no such relinquishment, although Hemsworth had previously said it was there, and that he "then felt as if I had been duped."

Hemsworth stated that he offered the said relinquishment to Holland on the condition (agreed to by Holland) that he would put a well on the land in dispute and allow him (Hemsworth) to use it for five years, and that he told Holland—"I will give you an order on the Register . . . to give you the relinquishment when you arrive there May 16, 1884."

Holland swears that he had his house in the course of construction and his well dug before he received notice that Hemsworth claimed the land.

The evidence satisfies me that the finding of the local office in this regard was correct. The homestead entry of Lee was canceled on June 4, 1884, and Holland became the first claimant of record by his declaratory statement filed July 26, following.

Whatever rights Hemsworth can obtain to this tract must result from his settlement in October, 1883, and subsequent residence upon the S. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 33. That he has no such right against those which Holland has acquired by virtue of his filing and actual settlement prior to notice of his, Hemsworth's, claim, is plain. The department has held that the notice given by settlement and improvement extends only to the quarter section as defined by the public surveys. (L. R. Hall 5 L. D., 141). Hemsworth's rights, if he has any, are confined to the SE. $\frac{1}{4}$ of Sec. 33.

For the reasons stated, I concur in your conclusion that the filing of Holland should remain intact, and that the entry of Hemsworth, so far as it relates to the land in dispute, should be canceled.

Your decision is affirmed.

DESERT LAND ENTRY—FINAL PROOF.

RILEY GARRETT.

Final proof may be accepted and the entry sent to the Board of Equitable Adjudication, in the absence of an adverse claim, where reclamation is not effected within the statutory period but such delay is satisfactorily explained.

Secretary Vilas to Commissioner Stockslager, July 28, 1888.

I have considered the appeal of Riley Garrett from the decision of your office, dated December 30, 1886, rejecting his application for extension of time in making final proof and holding for cancellation his desert land entry No. 111 of the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and Lot 2 of Sec. 6, T. 33 N., R. 99 W., and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 31, T. 34 N., R. 99 W., made June 28, 1883, at the Evanston land office, in the Territory of Wyoming.

The record shows that your office on November 19, 1886, directed the local office to require said Garrett to show cause why his entry should not be canceled for failure to make proof within the time required by law. In response thereto the local land office forwarded the duly corroborated affidavit of the entryman alleging that the reason he had not been able to reclaim all of said land, was on account of the mistake of the deputy surveyor of the county, who was employed to survey a water ditch on said land, and the entryman requested that he be allowed one year's additional time to comply with the law and make final proof on said tract.

Your office, on December 30, 1886, held that it had no authority to extend the time of making final proof, and held said entry for cancel-

lation. On appeal, the claimant has filed a duly corroborated affidavit averring that said land can only be irrigated by bringing water thereon from a point five miles distant; that he had made arrangements for obtaining water to irrigate said land, and that by reason of a mistake in the survey of the ditch, and through no fault of the claimant, the land has not been fully reclaimed within three years from the date of said entry.

The claimant further avers that he took said entry in perfect good faith and has expended on said land, in labor and improvements, the sum of \$500.

I concur with you that your office has no authority to grant an extension of time within which the claimant may make final proof. But it by no means follows that the entry must necessarily be canceled for failure to make final proof within the statutory period, in the absence of an adverse claim, if the claimant shows a reasonable excuse for the delay. His final proof, if it shows full compliance with the law as to reclamation (even where such reclamation was made subsequently to the statutory period), in the absence of any adverse claim, may be accepted after the expiration of the time designated by law. Such has been the ruling of the Department, and I see no reason for changing the same. *Larson v. Parks* (1 L. D., 487): *Fraser v. Ringgold* (3 L. D., 69): *Alexander Toponce* (4 L. D., 261): *Dunlap v. Raggio* (5 L. D., 440).

The decision of your office must be modified, and you will direct the local land officers to advise the claimant that he will be allowed sixty days from notice thereof, within which to offer final proof showing full compliance with the requirements of the desert land law, as to reclamation, etc., and the same, if offered, will be duly considered.

If said proof shall show full compliance with the requirements of the law, and a satisfactory explanation of the delay in making said proof, the case may be submitted to the Board of Equitable Adjudication for its consideration. See case of *Alexander Douglas* (6 L. D., 548).

HOMESTEAD ENTRY—INDEMNITY SELECTION.

RUDOLPH NEMITZ.

An entry should not be allowed of land embraced within a pending railroad indemnity selection; but if thus allowed it will not be canceled, but treated as an application to enter, and held subject to the company's claim under its selection.

Secretary Vilas to Commissioner Stockslager, July 28, 1888.

I have considered the appeal of Rudolph Nemitz from your office decision of July 8, 1886 holding for cancellation his adjoining farm homestead entry for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 33, T. 116, N., R. 29, W., Benson, Minn., land district.

This land is within the ten mile (granted) limits of the Hastings and Dakota Railway under act of July 4, 1866 (14 Stat. 87), under which

act the rights of the grantee are held to have attached June 26, 1867, the date when the map of definite location was accepted.

It is also within the twenty-mile indemnity limits of the St. Paul, Minneapolis and Manitoba Ry. Co. under the act of March 3, 1865, (13 Stat. 526). It is said in your office decision that this tract "was selected on account of the grant last mentioned November 14, 1866, and the selection was intact upon the official records at the date of the attachment of rights under the Hastings and Dakota grant and accepted the land from the operation of the latter."

On September 23, 1885, Nemitz made adjoining farm homestead entry for said tract. Afterwards the Hastings and Dakota Ry. Co. filed a relinquishment of all its claim to said land. The facts concerning this relinquishment are in all material respects similar to those in the case of Halgrin Tostensen decided by the Department on the 23d day of June, 1888 (6 L. D., 820), and your office decision herein should be modified as to this question in accordance with the views expressed in that decision.

While it was error on the part of the local officers to allow an entry for this land while the application of the St. Paul, Minn. & Man. Ry. Co. to select the same as indemnity was pending, and they should only have received it as an application to enter, yet since it has been allowed I can see no good reason for cancelling it provided the selection by the company should for any reason be rejected, but it may be considered as if it were an application to enter and remain intact upon the record subject to the company's claim under its selection, which claim you will cause to be adjudicated as speedily as possible.

Your said office decision is modified accordingly.

MINING CLAIM—LOCATION—SURVEY.

LINCOLN PLACER.

An official survey must be made in accordance with the location notice upon which the survey is ordered; and this rule is applicable to amended, as well as original locations.

An entry, allowed upon a survey that did not follow the amended location, should not be canceled, but a new survey should be made in conformity with said location.

The claim as amended is an entirety, and it is not necessary that the improvements should be upon any particular part thereof.

The report of the surveyor as to the character of the land is sufficient in the absence of anything bringing in question the *bona fides* of the claimant, or tending to show that the ground added by the amendment is valuable, or is sought for any other than mining purposes.

Secretary Vilas to Commissioner Stockslager, July 28, 1888.

I have considered the appeal of The Alice Mining Company from the decision of your office of January 12, 1887, holding for cancellation

the mineral entry, No. 2748, of said company for the Lincoln placer claim, survey No. 2080, Upper Fall River mining district and Central City land district, Colorado.

The last amended location notice referred to in your office decision was made and sworn to August 1, 1884, but it was not recorded until 2 P. M. of August 5, 1884, the day on which the survey was begun and ended. The location was made, but your office presumes it was not recorded, before the survey, the record being silent as to whether the survey was before or after 2 P. M. But whether made before or after the location notice had been recorded, it was irregular, because, as stated in your office decision, it was not made "in accordance with the location notice upon which survey had been ordered," as such surveys are directed to be made in the letter of instructions to surveyors-general, dated November 20, 1873. (Copp's U. S. Mineral Lands, Ed. of 1881, p. 68; see, also, letter of September 13, 1878, *ib.*, p. 71, and case of "Sulphur Mine and Sulphur King Mine," *ib.*, p. 248.) In said letter of November 20, 1873, surveyors-general are instructed "to require the applicant for survey to furnish a copy of the original record of location, properly certified to by the recorder having charge of the records of the mining locations in the district where the claim is situate, and cause all official surveys of mining claims to be made in strict conformity to the lines established by the original location as recorded;" and it is said, "A survey made in accordance with the dictation of parties in interest and not in accordance with the location upon which it is ordered, is a private and not an official survey, and has already caused great confusion and been productive of great injury to *bona fide* claimants." It is insisted by counsel for appellant, that this rule was intended only for original locations; but the reason of the rule, and therefore the rule itself, is applicable to amended as well as original locations. The entry, however should not be canceled on account of this irregularity, but a new survey should be ordered to be made in conformity to said last amended location.

In the case of Sulphur Mine and Sulphur King Mine, *supra*, it is said: "While the application for a patent of the claim thus surveyed should not be rejected solely on account of said irregular proceeding, I am of the opinion that, before a patent issues, an actual survey of the claim on the ground should be made subsequent to the recording of the notice of location, as provided by law." In that case, the survey was made even before the location.

In reference to the mineral character of the land, the surveyor reports that "the ground has prospected well in gold in various places," and the value of the labor done and improvements made upon the claim for mining purposes is shown to be largely more than five hundred dollars. This applies to the last amended location of the claim, as, after careful comparison, I find said location and the survey to substantially correspond.

Your office holds as one ground of cancellation of the entry, that "it is not satisfactorily shown, that mineral has been discovered within the ground claimed in addition to the ground originally located, or that any improvements have been made thereon." The claim as amended is an entirety and it is not necessary, that the improvements should be upon any particular part thereof, and the report as to the mineral character of the claim is sufficient, in the absence of anything bringing in question the *bona fides* of the claimant, or tending to show that the ground added by the amendment is valuable or is sought for any other than mining purposes.

You are, therefore, instructed to direct the local officers to allow the claimant to obtain an order of survey, based upon and to be made in accordance with the last amended location, and thereupon apply for patent in conformity to law. The decision of your office is modified accordingly.

MINING CLAIM—ADVERSE PROCEEDINGS.

MEYER ET AL *v.* HYMAN.

An entry allowed prior to the final disposition of adverse proceedings must be canceled and the parties placed *in statu quo*, where it appears that such adverse claim is still asserted and remains undetermined.

Secretary Vilas to Commissioner Stockslager, July 28, 1888.

I have considered the case of William B. Meyer *et al.* and Jerome B. Wheeler *et al. v.* David M. Hyman, involving the latter's mineral entry, No. 14, for the "Durant Lode Mining Claim," Glenwood Springs district, Colorado, on appeal by the said plaintiffs from the decision of your office of January 15, 1887.

August 11, 1881, Hyman made application for patent on said mining claim and during the period of publication of notice of said application, Meyer *et al.* and Wheeler *et al.*, respectively, filed adverse claims, and within thirty days thereafter, brought suits in the district court of the 5th judicial district of Colorado, for the county of Pitkin, against said Hyman, to determine the right of possession to said claim. (Revised Statutes, 2326.)

These suits remained pending in the said district court of Colorado until October 1, 1883, when, on the petition of Hyman, they were duly removed to the circuit court of the United States for Colorado.

On January 29, 1885, after said cases had been so removed, the attorneys for said adverse claimants (plaintiffs in said suits), without their knowledge (as they allege), ordered the clerk of said district court of Colorado to enter orders upon the records of said court of dismissal of said suits, and, thereupon, Hyman procured from said clerk a certificate, that there was then no suit pending in said district court involving the right of possession of the "Durant Lode Mining Claim" (the claim in dispute), and, having filed this certificate in the Land Office, made application to enter said claim, and, on the faith of said certifi-

cate, said entry was allowed by the land officers, February 4, 1885. The adverse claimants, as soon as they heard of these proceedings, made motions to vacate said orders of dismissal and to re-instate said causes on the docket of said court, which motions, after hearing and argument thereon, were granted by the court, and said causes, respectively, were re-instated, February 14, and May 11, 1885. There is no explanation in the record in this case of the conduct of the parties and action of the district court, recognizing said suits as still pending in said court after their removal therefrom. The proceedings in said court after said removal would seem to be *coram non judice* and void.

On March 21, 1885, W. B. Meyer *et al.* filed with the local officers a protest, and, August 14, 1885, J. B. Wheeler *et al.*, a petition, reciting the above facts, and asking that said entry of said mining claim so obtained be canceled, and this protest and petition were duly forwarded to your office. On June 22, 1886, there was received at your office from the clerk of said United States circuit court certified copies of judgments in said suits, rendered by said circuit court December 7, 1885, in favor of the defendant, Hyman, awarding to him the ground in contest, and on December 7, 1886, your office, relying upon said certificates of judgment as showing the then status of said causes in said court, dismissed the said protest and petition of said adverse claimants; but, evidence having been filed in your office, December 18, 1886, of the re-instatement of said causes after judgment set aside in said circuit court on May 6, 1886, and that they were still pending and undetermined in said court, your office, by the decision of January 15, 1887, reviewed said decision of December 7, 1886, dismissing said protest and petition, and recalled the same and held that Hyman's entry should remain suspended until said suits were finally determined. Meyer *et al.* and Wheeler *et al.* now appeal from said decision, on the ground that the entry should have been canceled and not merely suspended.

Sec. 2326 (Revised Statutes) provides, that "Where an adverse claim is filed all proceedings, except the publication of notice and making and filing the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived." At the time Hyman's entry was allowed, February 4, 1885, the suits of the adverse claimants were pending and undetermined in the circuit court of the United States for Colorado, to which they had been removed on the petition of Hyman, and the adverse claims had been in no way waived. The allowance of said entry was, therefore, contrary to the above provision of the statute.

As authority for suspending and not canceling the entry, the case of the Gunnison Crystal Mining Company (2 L. D., 722) is cited in the decision of your office. In that case, there were two applications for patent, and the claimants under the second application, having adversely the first and brought suit in support of the adverse, prematurely entered the ground in conflict before the suit had been decided, and,

it being afterwards decided in their favor, and the claimants under the first application having acquiesced in the judgment by taking no appeal therefrom and conforming their entry thereto by eliminating the tract in dispute, it was held, that there was no longer any conflict between the claimants, and, hence, that the question at issue was one solely between the second (or adverse) claimants and the government, and the entry being otherwise unobjectionable and there being no useful purpose to be subserved by the cancellation of the entry, that it was "competent for the department to sanction the same."

I can discover no analogy between that case and the present. At the date of the decision of your office, the suits between the parties were still pending and undetermined, and there was no acquiescence in the claim of Hyman or waiver of their adverse claims by the adverse claimants. The conflict still existed between Hyman and the adverse claimants, and the issue was between them, and not between Hyman and the government.

Furthermore, the conduct of Hyman, in filing in the land office the certificate of the clerk of the district court of Colorado, that there was no suit involving the claim in dispute then pending in said court, and, on the faith of such certificate inducing the land officers to allow his entry, when on his own petition said cases had been removed from said court to the United States circuit court and were then, as he must be held to have known, pending in said last named court, and in subsequently, June 22, 1886, procuring the dismissal of the protest and petition respectively of the adverse claimants, on the strength of judgments in his favor in said circuit court which had been previously, May 6, 1886, vacated—exposes him to the charge of practicing an imposition on the land officers, in order to obtain an unfair advantage over the adverse claimant; and this charge derives further support from the fact, shown by the evidence, that Hyman has set up said entry so obtained as evidence in his behalf in another suit, in said United States circuit court, between himself and some of said adverse claimants, involving large interests, and known as the "Durant-Emma case."

I am of the opinion, that the parties should be placed in *statu quo* by a cancellation of the entry, and so direct.

The decision of your office is modified accordingly.

RAILROAD GRANT—PRE-EMPTION FILING.

MILLICAN *v.* NORTHERN PACIFIC R. R. Co.

A pre-emption filing of record, which had attached at the date of withdrawal on general route, and when the line of road was definitely located, excepts the land covered thereby from the operation of the grant, and the company cannot question the validity of said filing.

Secretary Vilas to Commissioner Stockslager, July 28, 1888.

I have considered the case of James K. Millican *v.* the Northern Pacific Railroad Company, as presented by the appeal of the latter from

the decision of your office, dated April 8, 1886, rejecting its claim to the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 25, T. 13 N., R. 17 E., North Yakima land district, in the Territory of Washington.

The record shows that a hearing was duly had upon the application of Millican to make timber culture entry of said land, alleging that the same was excepted from the grant to said company by act of Congress, approved July 2, 1864 (13 Stat., 365), by reason of the claim of Edward Wilson.

The hearing was fixed for January 26, 1886, and due notice given to both parties. The company did not appear, but Millican was present and offered testimony tending to sustain said allegations.

Upon the evidence submitted the local office decided that said tracts were excepted from said grant, and recommended that said timber culture application be allowed.

On April 8, 1886, your office examined the papers in said case, and found that said tracts are in an odd numbered section, within the limits of the withdrawal on general route for the benefit of said company, dated July 18, 1879, and also of the withdrawal, on the filing of the map of definite location, dated May 24, 1884; that said Wilson filed his pre-emption declaratory statement, No. 2962, for said land on May 2, 1879, alleging settlement thereon April 21, same year; that he also filed a second declaratory statement for said tracts on March 3, 1883, alleging settlement same day; that the evidence shows that Wilson built a house upon said land about May, 1879, resided therein and improved his claim for about one year, when, according to the testimony of one witness, "he seems to have neglected it;" that upon making said second filing, he returned to said land, cultivated and improved it, and built another house and dug another well; that said second filing is invalid, but the claim under the first filing still of record is good, "except as against another settler," and served to except said land from the operation of the grant to said company.

From the foregoing, it is apparent that the claim of the company was properly rejected, for, at the date of the withdrawal on general route, and also when the line of the road was definitely located, there was a pre-emption filing of record, which had attached to the land in controversy, and the company can not question the validity of said filings. *William H. Malone v. Union Pacific Railway Company* (7 L. D., 13.)

The decision of your office rejecting the claim of said company is affirmed.

COMMUTED HOMESTEAD—FINAL CERTIFICATE.

SAMUEL H. VANDIVOORT.

The official acts of the register and receiver are subject to supervision and may be approved or disapproved by the Commissioner of the General Land Office. A final certificate, until approved by the General Land Office, is only *prima facie* evidence of equitable title.

The right of commutation depends upon prior compliance with the homestead law.

If the cash entry fails the original entry falls therewith.

Where good faith is not manifest from the final proof, and bad faith does not affirmatively appear, the cash entry will be suspended with the right to submit new final proof within the life of the entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, July 30, 1888.

I have considered the appeal of Samuel H. Vandivoort from your decision, dated January 3, 1887, rejecting the final proof in his commuted homestead entry of the SE. $\frac{1}{4}$ of Sec. 1, T. 106, N., R. 62 W., 5th P. M., Mitchell, Dakota, and holding for cancellation his cash certificate issued by the local office on said final proof.

It appears that Vandivoort made homestead entry of the tract described December 15, 1884, and that he made final proof and commuted to cash entry (final certificate No. 14,044) August 8, 1885.

Your office upon reaching the case for action was not satisfied with the proof, and by letter of July 26, 1886, to the register and receiver, directed them to call upon claimant to furnish his affidavit corroborated by at least two disinterested persons having personal knowledge of the facts sworn to showing the number, duration and causes of all absences from the tract. You also required him to state whether he had maintained his residence upon the land since making final proof, and what improvements if any, he had made on said tract since said final proof.

The register and receiver reported that claimant was duly notified of the above requirements and that no response had been received.

You thereupon by the decision appealed from held his cash certificate for cancellation, but allowed the original entry to remain intact subject to future proof, and directed the local officers to so notify claimant.

From that decision he appeals to the Department, and urges in substance that his proof having been made after due notice and having been accepted by the register and receiver as satisfactory, those officers having received his money and issued final certificate, said certificate is final and conclusive as against the government, whose agents the register and receiver are, and is equivalent to patent, especially in the absence of any charge of fraud.

He instances the rule as to principal and agent and contends that it is applicable in his case and is binding upon the government. It is too well settled to call for argument or citation that the official acts of the register and receiver are subject to supervision and may be approved or disapproved by your office. A final certificate is, until approved by your office only *prima facie* evidence of equitable title.

It may be suspended or it may canceled, and when this is done there is no right to patent, except upon the production of proof satisfactory to your office, unless on appeal the action of your office is overruled by the Department. It is therefore clear that the position contended for by appellant is untenable. Upon an examination of the final proof I find

no good reason for disturbing or interfering with the requirement of your office that supplemental proof be furnished. The proof as to the number, duration and causes of the absences is not sufficiently specific and while bad faith is not shown the evidence is not of a character to warrant a satisfactory conclusion that claimant has acted in good faith. His refusal or failure to furnish supplemental affidavits certainly adds no strength to his case. I concur in that part of your decision declining to accept the proof in its present condition. I do not, however, agree with that portion of your decision which holds for cancellation the final certificate and at the same time allows the original entry to stand subject to further proof. The right of commutation depends upon prior compliance with the homestead law. If the cash entry fail the homestead entry falls therewith. *Greenwood v. Peters*, (4 L. D., 237); *Oscar T. Roberts* (5 id., 392).

This is a case of insufficient evidence of good faith, not of affirmative evidence of bad faith. It is, therefore, a case in which the final certificate should be suspended, not canceled, since cancellation of the certificate would involve the cancellation of the original entry.

The proof being unsatisfactory, but bad faith not being affirmatively shown, I so far modify your decision as to direct the suspension instead of the cancellation of the final certificate in this case, and that appellant be notified that he may at any time within the lifetime of his entry, make such proof either supplemental or new as may properly be accepted.

PRE-EMPTION FINAL PROOF—WITNESSES.

CASSIUS C. HAMMOND.

Final proof cannot be considered without the testimony of at least two witnesses as to the settler's qualifications and compliance with law.

Secretary Vilas to Commissioner Stockslager, July 30, 1888.

I have considered the case of Cassius C. Hammond in which, by your office letter of March 21, 1887, you modified the decision of the local officers at Bismarck, Dakota, in rejecting final proof of said claimant upon pre-emption declaratory statement upon W. $\frac{1}{2}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 18, T. 130 N., R. 70 W., said modification preserving to the said Hammond the right to offer new proof of his continuous residence prior to date of your letter.

It appears from the evidence that said entryman is clerk of the court of the county in which said land is situated, and that for the two months immediately preceding the presentation of his final proof he had been at the county seat some four miles distant from the land, performing the duties of said office, but going out to his claim on Saturday and remaining over Sunday.

Under the rulings of this Department (A. E. Flint 6 L. D., 668), I am of the opinion that the other evidence being sufficient, the discharging by entryman of the duties of said office, should still be counted as continuous residence.

The difficulty in the case, to my mind, is the recantation by the witness Briggs, on November 1, of his testimony of October 30, previous, which left the local officers in the predicament of having to act upon a case in which applicant was corroborated by a single witness, while a rule of the Department under Sec. 2263 of the Revised Statutes, provides that "Final proof, in addition to the affidavit (of claimant) must consist of the testimony of the claimant corroborated by that of at least two witnesses, taken separately, to the facts constituting his qualifications, and his compliance with the law as to settlement, inhabitancy, improvement, non-alienation, etc."

Two witnesses therefore being jurisdictional, the local officers could not legally accept his final proof.

The record contains no implication of bad faith on the part of the claimant, and as he must have long since completed the necessary residence, as construed in the Flint case, and as your decision provides for the claimant's right to present new evidence of continuous residence, your said office decision is accordingly affirmed.

TIMBER CULTURE CONTEST—FORFEITURE.

ANDREWS *v.* CORY.

Where the rights of a third party are not involved, the government will not insist on a forfeiture of the rights of the entryman unless bad faith is shown on his part.

Secretary Vilas to Commissioner Stockslager, July 30, 1888.

In the case of Millard J. Andrews *v.* William H. Cory, appealed by Cory from the decision of your office dated November 29, 1886, the record shows the following facts:

On May 5, 1879, said Cory made timber culture entry for the SW. $\frac{1}{4}$ Sec. 2, T. 138 N., R., 55 W., Fargo district, Dakota, and on May 26, 1884, Andrews initiated this contest against said entry. Hearing was duly had July 18, and September 1, 1884, before the register and receiver.

The allegations of the contest affidavit are "that the said William H. Cory has failed to plant five acres of said tract to trees, tree seeds, nuts, or cuttings during the third year of the existence of his said entry, and also failed to plant five acres of said tract to trees, tree-seeds, nuts, or cuttings during the fourth year of the existence of his said entry, and also failed to cultivate said tract during the fifth year of his said entry. That the said Wm. H. Cory has not planted any part of said tract to trees, tree-seeds, nuts or cuttings up to the present time as required by law."

From the testimony taken at the hearing I find the following facts:

Within the first year after entry five acres of said tract were plowed. Within the second, this five acres was cultivated to crop, (oats) and five additional acres were plowed. Within the third, the second five acres plowed was cultivated to crop, (oats) and the first five acres planted to ash and box-elder seed. This planting was done between the first and fifth of May, 1882, and the ground had not been cultivated since the oats were harvested in the summer of 1881. The land was marked with a plow in rows four feet apart, and the seeds dropped in the furrows, covered with a hoe and the furrow then dragged. This ground received no further cultivation that year or up to July the following year at which time it was badly overgrown with weeds and grass.

Only about five per cent of the number of trees that should have been on the ground were to be found in July, 1883, and four of the five acres were then plowed and the few trees on it turned under with the weeds and grass.

In May, 1883, and not later than the 5th of the month, the second year's breaking, which had been put in oats the third year, was planted to ash and box-elder seed. Before planting, the ground was plowed and dragged and marked with rows four feet apart each way. From two to four seed were dropped in each hill and covered with the foot, and the covering finished with a crusher. Nothing more was done with this piece that year, and this planting having also proved a failure, not more than one tenth of the seed having grown, the entire ten acres was plowed in the spring of 1884 and prior to May 5. This was the condition of the claim at the time of the institution of the contest. It has since been re plowed and harrowed for the purpose, as testified to by the entryman and his agent, A. S. Lowry, of getting it in proper condition to plant to trees in the fall. Said Lowry also testified that in the fore part of May, 1884, he wrote to the land officers at Fargo, Dakota, in relation to getting an extension of a year's time to get the ground in proper condition for planting; that an answer to his letter was received but that he neglected to make a formal sworn application for such extension.

The foregoing are the material facts bearing on the matter under consideration.

The decision appealed from reverses the decision of the local officers dismissing the contest and holds that the entryman was in default at the time contest was initiated and, the entry should be canceled.

The evidence in my opinion shows that the five acres on which the first planting of tree-seeds was done, had not been properly prepared for such planting and no reason is given why this five acres was not replanted, as it should have been, some time during the summer or fall of 1883. This is the only failure or default on the part of the entryman which is clearly shown by the evidence, and a failure to properly plant,

and replant the first five acres plowed is not charged in the contest affidavit. The contestant herein has wholly failed to prove a single allegation made by him, and having so failed he has no right to insist on a forfeiture of the claim because of some default not charged in his contest affidavit. The question, therefore, of whether the partial failure to comply with the requirements of the timber culture law shown in this case—and that by testimony not relevant to the issue made by contestant—is sufficient to warrant a forfeiture of appellant's improvements and right of entry, becomes a question solely between the entryman and the government. Where the rights of a third party are not involved the government does not usually insist on such a forfeiture unless bad faith is shown on the part of the entryman, or such gross carelessness and utter indifference to legal requirements as would clearly warrant the inference of a want of good faith. The evidence in this case does not, in my opinion, show or warrant the inference of bad faith on the part of the entryman, and his entry will therefore remain of record.

The decision of your office is therefore reversed.

INDEMNITY—SCHOOL SELECTION—CERTIFICATION.

THE STATE OF CALIFORNIA.

A school selection, of land subject thereto according to the official surveys, approved and duly certified, precludes the allowance of another selection in lieu thereof, until such certification shall be set aside by proper authority.

Secretary Vilas to Commissioner Stockslager, July 31, 1888.

This is an appeal by the State of California from your office decision dated December 28, 1886, declining to reconsider your office decision of February 27, 1886, holding for cancellation State indemnity school selection No. 1391, for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 14, T. 1, N., R. 11 W., S. B. M.

Your said office decision of February 27, 1886, held said indemnity certificate for cancellation for the following reasons, viz:

The official plat of T. 1 N., R. 5 W. S. B. M., on file in this office shows that section 36 thereof contains 243.51 acres of public land in place, the balance 396.49 acres being within the rancho.

In satisfaction of the latter amount, selections have been made as follows. R. & R. No. 1391 for Lot 1, Sec. 10 and Lots 1, 2, and 3, SE. $\frac{1}{4}$, NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and S. $\frac{1}{4}$ SW. $\frac{1}{4}$ Sec. 11, T. 2 S., R. 1 W., containing 270.56 acres, made April 22, 1864, in lieu of the NE. $\frac{1}{4}$, N. $\frac{1}{4}$ NW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 36, T. 1 N., R. 5 W., S. B. M., approved November 24, 1871, in clear, list No. 1; and R. & R. No. 2299, for the NW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 17, and SE. $\frac{1}{4}$ Sec. 18, T. 7 N., R. 29 W., made July 24, 1869, in lieu of the SE. $\frac{1}{4}$, Sec. 36, T. 1 N., R. 5 W., S. B. M., approved July 1, 1870.

The deficit in said school section has been more than satisfied and no additional selections upon the basis therefore should be allowed.

It was subsequently suggested in the argument of counsel that a portion of this indemnity school selection was included in another Mexican

grant, rancho "Paso de la Tyera," and in your office letter to the local office, of December 28, 1886, refusing to reconsider the cause, you say, "The grounds for asking a reconsideration of the decision of this office referred to as set forth in the communication of the States Attorney, are, that a portion of the lands selected per R. & R. 1391, and approved as above stated, viz Lot 1 of Sec. 10 and W. $\frac{1}{2}$ of Sec. 11 (except 120 acres) are within the limits of a Mexican grant, rancho "Paso de la Tyera," which was patented May 22, 1873; and hence that the selection, so far as relates to the last above mentioned tracts and the approval thereof, was void and of no effect."

Your said office decision states further that,

It is true as stated, that a portion of the selection R. & R. No. 1391 is now shown to be within the limits of the grant referred to; at the time the selection was made and approved however, the official plat on file in this and the local office, showed the same to be public land unsurveyed, being outside of the limits of the grant as therein defined.

Hence, having according to the official plat of survey, been public land at the time of its selection and approval, this office has no authority to set aside the listing, nor to certify another selection upon the same basis, until the former one has been legally set aside.

I must therefore decline to reconsider the decision of February 27, last, as requested by the attorney for the State.

It appearing from your said office letter of December 28, 1886, that selection No. 1391 was approved and certified to the State, and it being conceded by the counsel for claimant in his argument, that said selection was approved and certified to the State by clear list No. 1, dated November 24, 1871, this Department has now no jurisdiction until said certificate shall be set aside by the proper authority.

Your decision is, therefore, affirmed.

SETTLEMENT--TRESPASS--PRE-EMPTION.

LAGIER *v.* HUNTER.

Settlement rights can not be acquired by trespass upon the rightful possession of another; and a growing crop of grain on land is quite as much notice of possession, as an inclosure thereof would be.

The right of pre-emption is not lost through recognizing the title of another to the land in question, and holding the same as his tenant, when such action was the result of erroneous decisions of the Land Department, and the pre-emptor re-asserted his claim as soon as he learned that the land was in fact open to entry.

Secretary Vilas to Commissioner Stockslager, August 1, 1888.

I have considered the appeal of Jean Lagier from your office decision of December 1, 1886, rejecting his proof and holding his pre-emption filing of June 22, 1886, upon the NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 24, T. 3 S., R. 14 W., S. B. M., Los Angeles land district, California, for cancellation,

and holding the homestead entry of Robert J. Hunter, made May 19, 1886, for the same tract intact.

It appears from the record that Lagier settled upon the tract in question in 1876, and made application to file his pre-emption declaratory statement for the same and offered final proof and payment at the local office which was refused for the reason that the tract had been selected and approved to the State of California, as indemnity for certain sixteenth and thirty-sixth sections lost to the State by reason of said sections being included within the survey of certain Mexican grants.

From this action Lagier appealed to your office whereupon your office affirmed the decision of the local office which decision asserted title in the State to the tract in question. Thereupon Lagier rented the land from one O'Connor, who succeeded to the supposed title of the State and has since occupied the land as his tenant and has continued to cultivate the same.

It is conceded by your office that your said decision and the decision of the local office were erroneous, that said land had been erroneously listed to the State and was in reality government land and open to settlement and survey.

May 19, 1886, Hunter made homestead entry of said tract and immediately proceeded to erect a house thereon in the midst of a growing crop of wheat, belonging to Lagier. This was the first notice that Lagier had that the tract did not belong to his landlord O'Connor, or that it was government land or that your decision rejecting his pre-emption declaratory statement was erroneous.

He thereupon, to wit, on the 22nd day of June, 1886, filed his declaratory statement for the tracts, alleging settlement 1876, and in accordance with the notice made proof July, 1886, to the acceptance of which Hunter protested.

The register and receiver rendered their opinion August, 10, 1886, awarding the tract to Lagier upon the grounds that he had used due diligence to ascertain his right to the premises and was not charged with *laches*; that his possession was sufficient to put Hunter upon notice and inquiry.

Hunter having appealed from the decision of your office, you reversed the decision of the register and receiver, upon the ground that Lagier had no legal claim to the tract and does not seem to be entitled to equitable relief in the matter; that he was entitled to no greater consideration than he would have been had he made no former application to enter the land.

I can not concur in your conclusion. If the tract had been enclosed by a fence and Hunter had broken down the fence in order to make an entry upon the land every one would recognize at once the fact that in so doing he was a trespasser, but the growing crop of grain was quite as much notice to Hunter of Lagier's possession as a fence would have been and Hunter's entry under the circumstances was as clearly a trespass as it would have been had he broken a fence to make it.

This is not a case in which the tenant may not dispute his landlord's title. Lagier's original possession of the tract was not obtained from his landlord, but was based upon what is now conceded by your office to be his legal right, he having been prevented from exercising that right by the erroneous decision of the local office and your office, and having re-asserted his right immediately upon learning that the land was subject to entry, can not be said to be guilty of *laches*. His case is clearly the stronger in equity and I am of the opinion that his proof in other respects being sufficient, his filing and proof should be allowed and the homestead entry of Hunter canceled.

Your decision is hereby reversed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

J. S. CONE.

The second section of the act of June 15, 1880, should not be construed to permit an entryman, or his attempted transferee, to purchase land covered by an entry which depended, for its inceptive right, upon false and fraudulent statements, and forged documents, or where such entry was canceled as fraudulent prior to the passage of said act.

The case of George W. Maughan overruled.

Secretary Vilas to Commissioner Stockslager, August 1, 1888.

I have considered the appeal of J. S. Cone from the decision of your office, dated October 13, 1886, refusing his application to purchase under the act of Congress approved June 15, 1880, (21 Stat., 237), the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 26, T. 14 N. R. 16 W., M. D. M., San Francisco land district, California.

The decision appealed from states that said tract was "entered as a soldier's additional entry, 2192, November 10, 1875, in name of William Farmer;" that said entry was canceled by your office on March 27, 1877, for the reason "that said entry was based on forged and spurious papers, and as said entry was invalid and illegal," the application to purchase under said act of Congress must be rejected.

The decision appealed from does not state what particular papers upon which said entry is based are "forged and spurious." An inspection of the entry papers, however, shows that said Farmer applied at said local office to enter said tract as a soldier's additional homestead, claiming the right to enter said land, by virtue of his service in the army of the United States, in Company H, Eighth Regiment Missouri State Militia Cavalry Volunteers. The applicant filed a paper claimed to be a copy of his discharge, stating that he enlisted in said company on April 14, 1862, to serve three years, and was discharged from the service of the United States on April 13, 1865, at Springfield, Missouri, by reason of expiration of term of service.

The record also shows that the register of the land office at Springfield, Missouri, certified, on October 15, 1875, that said Farmer filed on November 6, 1865, his homestead application for Lot 7 and the E. $\frac{1}{2}$ of Lot 6 of the NW. $\frac{1}{4}$ of Sec. 1, T. 24, R. 20, and on November 19, 1870, made final proof upon the same, and final certificate No. 148, was issued thereon. There also appears in the entry papers a certificate from the Secretary of War, dated August 2, 1876, that "the name William Farmer is not borne on the rolls of Company A, Eighth Regiment Missouri State Militia, Cavalry Volunteers, as shown by the records of this Department."

Upon the proof presented, the local officers allowed the entry and issued final certificate, No. 5618, for the tract applied for, on November 10, 1875.

The appellant claims the right to purchase said land under the provisions of the second section of said act, and contends that the entryman, by his attorney in fact, N. P. Chipman, on January 3, 1876, conveyed or attempted to convey to him said land by a *bona fide* instrument in writing; that, if there was any fraud in the procurement of said entry, the applicant was no party thereto; that throughout he has acted in good faith, and he now seeks to complete the entry under the second section of said act.

The second section of the act of June 15, 1880, reads:

That persons who may have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bona fide* instrument in writing, may entitle themselves to said lands by paying the government price therefor, etc.

It appears from the papers in the case, that said entry was made upon false and fraudulent evidence; that the entryman never was a member of said company, as alleged by him; and this fact is not denied by the transferee.

The construction of this section has not been altogether uniform by your office and this Department. The original circular, paragraph 10, approved October 15, 1880 (7 C. L. O., 141), by my predecessor, Secretary Schurz, prescribed that under the second section of said act, transferees would be allowed to enter only when "the original homestead entry was a valid entry under the homestead laws."

On August 25, 1881, your office decided, in the case of George W. Maughan (1 L. D., 25), that:

It is now held by this office that a party having made entry of land properly subject to such entry, prior to the passage of the act of June 15, 1880, is entitled to make cash entry of the land, under the second section of said act, although the homestead entry may have been invalid in its inception.

The decision of your office was affirmed by my predecessor, Secretary Teller, on April 28, 1882.

In the case of John W. Miller (*ibid.*, 57), on June 3, 1882, Secretary Teller decided that, "The act of 1880, section two, specifically grants the right of purchase in all cases where the land was properly subject to the original entry, limited only by the proviso that 'this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead law.'"

In the case of Thomas F. Weaver (*ibidem*, 53), this Department held that said section recognized a right to purchase by those "to whom the right of those having so entered for homesteads may have been attempted to be transferred by *bone fide* instrument in writing," and that "to insist upon all the technical niceties of a legal form of deed would work great injustice, even if warranted by law;" that if the writing attempting the transfer be evidently made in good faith, its precise form is immaterial.

The foregoing rulings were substantially embodied in the departmental circular of March 1, 1884 (p. 16), which allows entry under said section, "provided it was originally subject to entry, and provided it had not been subsequently entered by any other person under the provisions of law."

In the case of William French, 2 L. D., 238—on review—this Department held that the additional homestead entry made by said French "was illegal at its inception, because the service upon which the right to make such entry was based, was not in the army of the United States." But it was also held in said decision that "the present holder of the right of William French, upon showing his possession of said right by *bona fide* instrument in writing, will be entitled under the provisions of the foregoing law (June 15, 1880,) to purchase said lands."

In the case of the Northern Pacific Railway Company *v.* Burt (3 L. D., 490), my predecessor, Secretary Lamar, held that under the second section of said act:

It matters not that Burt's entry was canceled, the right of purchase is specifically granted by said act, where the land was properly subject to the original entry, and is not excluded by the proviso.

In the case of Gilbert *v.* Spearing (4 L. D., 465), Secretary Lamar held that:

It has been uniformly decided by this Department, that the right of purchase under said section depended upon three conditions, to wit: (1) That the entry was made prior to June 15, 1880; (2) That the land entered was "properly subject to entry," and (3) That the land has not been subsequently entered or the right of entry has not been subsequently acquired by some other person. *Gohrman v. Ford* (8 C. L. O., 6); *John W. Miller* (1 L. D., 57); *Bykerk v. Oldemeyer* (2 L. D., 51); *Whitney v. Maxwell* (*ibid.*, 98); *Pomeroy v. Wright* (*ibidem*, 164).

The case of *Gohrman v. Ford* (*supra*) was overruled by Assistant Secretary Hawkins in the case of *Freise v. Hobson* (4 L. D., 580), in which he held that, an application to purchase under the second section of said act, made after the initiation of a contest against the original

entry, should be suspended until the final disposition of said contest. It was also stated in said decision :

That the spirit of the act of June 15, was to afford relief to those who had violated the law, or failed to comply with it, but certainly did not contemplate that an entryman should invoke its aid to the detriment of one who had faithfully followed the law.

Again, in the case of *Hollants v. Sullivan* (5 L. D., 115), Acting Secretary Muldrow decided that the entryman had the right to purchase the land covered by his entry, although the affidavit upon which the entry was allowed was illegal, because made before an officer not authorized to take the same, and that the illegality of the affidavit could be cured by the filing of a properly executed affidavit. It was also stated in said decision that

It was long held by your office, and that view has been sustained by the Department (see case of *George W. Maughan*, 1 L. D., 25), that purchase may be made under section two of the act of June 15, 1880, although the entry was void at inception. I do not stop here to consider the correctness of the view thus enunciated, for it is not necessary in this case, but refer to it to show the extent to which the Department has gone in administering the act of June 15, 1880.

In the case of *George E. Sandford* (5 L. D., 535), Acting Secretary Muldrow, construing said section, held that it conferred "a right to purchase, by cash entry, lands theretofore entered under the homestead laws, in the same way, and without other restrictions than are imposed in the case of ordinary private cash entry; that is to say, the land must be subject to such sale and the price must be paid." The Acting Secretary further said :

"This has been the uniform construction which this second section of said act has received in the land department, from its passage to the present day, and I do not see how any other could have been placed upon it."

See also *Holmes v. Northern Pacific R. R. Company* (5 L. D., 333); *McLean v. Northern Pacific R. R. Co.* (*ibid.*, 529); *Northern Pacific R. R. Co. v. Dudden* (6 L. D., 6).

But in the case of *J. B. Haggin* (6 L. D., 457), Acting Secretary Muldrow decided that:

If the so-called entry was made without the authority of the party in whose name it was made, it was fraudulent and void at its inception. Such an entry does not come within the act of June 15, 1880, however innocent the applicant to purchase may be of participation in, or knowledge concerning the fraud. The doctrine of innocent purchaser does not apply in such cases, but that of *caveat emptor* does.

After a careful consideration of said act, I am clearly of the opinion that the second section should not be construed to permit an entryman, or his attempted transferee, to purchase land covered by an entry which depended for its inceptive right upon false and fraudulent statements and forged documents, or where such entry was canceled as fraudulent prior to the passage of said act.

The case of *George W. Maughan* (*supra*) and other cases, in so far as they conflict with the views herein expressed, are overruled.

Said decision of your office is accordingly affirmed.

PRACTICE—APPEAL—RULE 48.

LINDGREN *v.* BOO.

In the absence of an appeal, the decision of the local office is final as to the facts, unless the case falls within one of the exceptions to Rule 48 of Practice. And this is true although the said decision may rest on evidence not as satisfactory as desirable, and that the appellate tribunal might have arrived at a different conclusion, if an appeal had been taken.

Secretary Vilas to Commissioner Stockslager, August 1, 1888.

I have considered the case of John Lindgren *v.* Nels G. Boo, on appeal by the former from your office decision of August 28, 1886, dismissing his contest against the pre-emption filing of Boo for the SW. $\frac{1}{4}$ of Sec. 12, T. 3 N., R. 34 W., McCook, Nebraska land district.

Boo filed his pre-emption declaratory statement for said land October 23, 1885, alleging settlement on the same day.

On February 17, 1886, Lindgren filed affidavit of contest against said filing alleging "that the said Nels G. Boo has not established an actual residence on the land described since date of entry to the present time, that said tract is not settled upon and cultivated as required by law; that said Nels G. Boo has wholly abandoned said land."

A hearing was ordered and set for April 15, 1886. Boo was personally served with notice thereof on March 11, 1886, but made default. The testimony of the contestant and one other witness was taken, upon which the local officers found "from the testimony presented it appears that the land embraced in said D. S. No. 2626 has been wholly abandoned, claimant never establishing an actual residence thereon nor improving the same in any way;" and decided that the filing should be canceled.

Due notice of this decision was given the defendant but no appeal was taken therefrom.

When the case came up for examination in your office it was said, "no appeal having been filed under Rule 48 of Practice said decision has become final as to the facts, but upon review of the testimony I find that Boo made his settlement at time he claims, put up a house, ten by twelve, and broke about ten acres. Also that he remained upon the tract until some time in November 1885, and that he has only been absent some few months. I find further that after the initiation of the contest he returned to the tract."

Under this finding of facts it was decided that there was no such evidence of bad faith as would justify the cancellation of the filing, and therefore, the decision of the local officers was reversed and the contest dismissed.

From that decision Lindgren appealed, contending that the finding of the local officers became final in the absence of appeal therefrom, and that it was error in your office to consider the testimony since the case did not come within either of the exceptions to rule 48 of Rules of Practice.

It is not stated in your said office decision under which of the exceptions this case is supposed to have fallen, nor am I able to discover that it properly falls within any of those exceptions.

While the testimony upon which is based the findings of the local officers that the pre-emptor had wholly abandoned the land, and had never established an actual residence thereon is not as full and satisfactory as is desirable, and even though the appellate tribunal might have arrived at a different conclusion as to the facts established by the testimony yet the defendant having, by his failure to appeal, acquiesced in that finding your office was not justified in interfering with that finding unless the case came within one of said exceptions to rule 48.

Your said office decision is therefore reversed and the filing of said Boo will be canceled.

REPAYMENT—ADVERSE TITLE.

ABRAHAM HAYS.

The patent having rightfully issued, there is no authority for repayment to one holding thereunder who claims such repayment by virtue of another title derived through a different source.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 1, 1888.

This case comes before me on appeal from your office decision of February 12, 1887, refusing repayment of the purchase money paid for the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 11, T. 8 N., R. 7 W., St. Stephens Meridian, Jackson, Miss. land district.

It appears from the record that on the 16th day of November 1860, W. J. Trigg, of whom claimant is grantee, made cash entry of said land paying \$2.50 per acre, and that patent for the same was issued to said Trigg May 1, 1861, but that the same has never been delivered to him and remains on file in the General Land Office.

It appears, from an intimation in the argument of counsel that the application is made for the reason that claimant has purchased said land from the State of Mississippi as swamp land.

Said land was selected and reported to the General Land Office February 8, 1854, as swamp and overflow land.

Said land is within the six mile (granted) limits of the land granted to the States of Illinois, Mississippi and Alabama, in aid of the construction of a railroad from Chicago to Mobile, by act of Congress approved September 20, 1850, and therefore, being an odd numbered section did not pass to the State of Mississippi by the swamp land grant (1 Lester, 521; 2 C. L. L., 1069 and 1071), as suggested in your decision.

Under the facts shown in the record, and the law as construed by the decisions of the Department, this case does not come within the provisions of section 2362 of the Revised Statutes.

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

Nor does it come within the further provision for repayment in certain cases provided in act of June 16, 1880. (21 Stat., 287.)

It would seem that this applicant has hastily purchased from the State of Mississippi, land which already belonged to himself as grantee of the person to whom patent issued, and as the patent has long since been rightfully issued, this Department has no jurisdiction to order repayment.

Your said decision is accordingly affirmed.

Overruled so far as in conflict, 16 L. R. 229
RAILROAD GRANT—WITHDRAWAL—INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. Co. v. MILLER.

The grant of July 2, 1864, provided for a statutory withdrawal when the map of general route was filed. This statutory withdrawal became effective in Washington Territory when the map of July 30, 1870, was filed and approved. The statutory withdrawal, once exercised, was thereby exhausted, and could not be repeated, and it continued in duration until the definite location of the road.

It therefore follows that the filing and acceptance of an amended map of general route was without authority of law, and the executive withdrawal, made by the order of the Commissioner of the General Land Office, on the filing of said map was without validity or sanction of law.

The language in section six of the granting act, which expressly directed that the homestead and pre-emption laws should be "extended to all other lands on the line of said road when surveyed, excepting those hereby granted to said company," was a mandate effectually prohibiting the exercise of the executive authority to withdraw any "lands on the line of said road;" and an order, made on definite location, continuing in effect, for indemnity purposes, such a withdrawal is in violation of law and without effect, except as notice of the limits within which the company would be entitled to select indemnity.

A tract of public land not within the limits of the statutory withdrawal on general route of 1870, but falling within the indemnity limits on definite location, was free from the operation of the grant, and subject to appropriation under the general land laws, until such time as properly selected by the company under the direction of the Secretary of the Interior.

No absolute right to granted lands exists, and no right of selection for lands lost from the granted lands can possibly arise, until the definite location of the line is made.

The fee simple of lands to which the Indian title had not been extinguished, along the line of said road and within the limits of the grant, passed to this company by virtue of its grant, subject only to the right of Indian occupation, which the government could at its pleasure extinguish, and said lands therefore afford no basis of claim to select others in lieu thereof.

The opinions of the Attorney General are merely advisory, and do not in anywise oblige the heads of Departments who have sought them, to follow them contrary to their own independent judgment.

Secretary Vilas to Commissioner Stockslager, August 2, 1888.

This appeal brings up the decision of your office refusing to cancel the homestead entry of Guilford Miller, for the S. E. $\frac{1}{4}$ of Sec. 21, T. 15, N., R. 42, E., in the Walla Walla land district, Washington Territory.

This entry was made on the 29th of December, 1884, but Miller claims his settlement to date from June 15, 1878. The Railroad Company insists that the settlement and entry give him no rights, because the land is within the indemnity limits of its land grant and had been withdrawn from market before the settlement, and so continued withdrawn until after the time of the entry, and because it has been selected in lieu of deficiencies in the grant.

After the appeal had brought the case from your office to this Department, my immediate predecessor, on the 9th of October, 1886, transmitted the papers to the Attorney-General for his opinion upon the points involved. On the 14th of March, 1887, the Attorney-General's opinion was received, in response to that request, to the effect that the withdrawal was valid and operated to exclude the land from settlement and entry, and that Miller's entry should, therefore, be canceled. After receiving that opinion no further action was taken by this Department, and it remains for me to dispose of the appeal. I have given the facts and the points of law involved careful consideration, and it appears that material facts were not shown in the papers transmitted to the Attorney-General, and that a different conclusion might probably have been reached by him, had all these facts been before him. I do not suppose that it is obligatory upon me to decide in accordance with that opinion, for this and other reasons which I shall discuss; and, after careful examination, my convictions of the right of the case are so strong that I am unable to do it. Under the circumstances, I will state the facts fully and the reasons for the judgment I am compelled to enter.

The Northern Pacific Railroad Company was incorporated under act of Congress, approved July 2, 1864, (13 Stats., 365) and was thereby

Authorized and empowered to lay out, locate, construct, furnish, maintain and enjoy a continuous railroad and telegraph line with appurtenances, namely, beginning at a point on Lake Superior, in the State of Minnesota or Wisconsin; thence westerly by the most eligible railroad route, as shall be determined by said company, within the territory of the United States, on a line north of the forty-fifth degree of latitude to some point on Puget Sound, with a branch via the valley of the Columbia River to a point at or near Portland, in the State of Oregon, leaving the main trunk line at the most suitable place not more than three hundred miles from its western terminus.

Its grant of land was made in section 3 of that act in the following words:

That there be, and hereby is, granted to the 'Northern Pacific Railroad Company,' its successors and assigns, for the purpose of aiding in the construction of said railroad and telegraph line to the Pacific coast, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores, over the route of said line of railway, 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; and whenever, prior to said time, any of said sections or parts of sections shall

have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections.

The provisos to the grant not affecting this subject are omitted.

In the 6th section it was further enacted,

That the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed, except by said company, as provided in this act; but the provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights, and the acts amendatory thereof, and of the act entitled "An act to secure homesteads to actual settlers upon the public domain," approved May twenty, eighteen hundred and sixty-two, shall be, and the same are hereby, extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company. And the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale.

The 8th section declared every grant and privilege given to be conditioned on the work of construction being commenced within two years, and to be fully completed by July 4, 1876. By the joint resolution of May 7, 1866, (14 Stats., 355) "the time for commencing and completing the Northern Pacific Road and all its several sections" was "extended for the term of two years." By joint resolution of July 1, 1868, (15 Stats., 255) the 8th section of the original act was amended so as to require the company to commence the work within two years from July 2, 1868, and to complete the whole by July 4, 1877.

By joint resolution of April 10, 1869, (16 Stats., 57) it was enacted:

That the Northern Pacific Railroad Company be, and hereby is, authorized to extend its branch line from a point at or near Portland, Oregon, to some suitable point on Puget Sound, to be determined by said company, and also to connect the same with its main line west of the Cascade mountains, in the Territory of Washington; said extension being subject to all the conditions and provisions, and said company in respect thereto being entitled to all the rights and privileges conferred by the act incorporating said company, and all acts additional to and amendatory thereof: *Provided*, that said company shall not be entitled to any subsidy in money, bonds, or additional lands of the United States, in respect to said extension of its branch line as aforesaid, except such lands as may be included in the right of way on the line of such extension as it may be located: *And provided further*, That at least twenty-five miles of said extension shall be constructed before the second day of July, eighteen hundred and seventy-one, and forty miles per year thereafter until the whole of said extension shall be completed.

In 1870, by joint resolution, approved May 31st, (16th Stats., 378) the company was authorized to bond and mortgage the road

And also to locate and construct, under the provisions and with the privileges, grants, and duties provided for in its act of incorporation, its main road to some point on Puget Sound, via the valley of the Columbia River, with the right to locate and construct its branch from some convenient point on its main trunk line across the Cascade mountains to Puget Sound; and in the event of there not being in any State or Territory in which said main line or branch may be located, at the time of the

final location thereof, the amount of land per mile granted by Congress to said Company within the limits prescribed by its charter, then said Company shall be entitled, under the direction of the Secretary of the Interior, to receive so many sections of land belonging to the United States, designated by odd numbers, in such State or Territory, within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency, on such said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, preserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four. And that twenty-five miles of said main line between its western terminus and the city of Portland, in the State of Oregon, shall be completed by the first day of January, *anno Domini*, eighteen hundred and seventy-two, and forty miles of the remaining portion thereof each year thereafter, until the whole shall be completed between said points: *Provided*, that all lands hereby granted to said company which shall not be sold or disposed of or remain subject to the mortgage by this act authorized, at the expiration of five years after the completion of the entire road, shall be subject to settlement and pre-emption like other lands, at a price to be paid to said company not exceeding two dollars and fifty cents per acre; and if the mortgage hereby authorized shall at any time be enforced by foreclosure or other legal proceedings, or the mortgage lands hereby granted, or any of them, be sold by the trustees to whom such mortgage may be executed, either at its maturity or for any failure or default of said company under the terms thereof, such lands shall be sold at public sale, at places within the States and Territories in which they shall be situated, after not less than sixty days previous notice, in single sections or subdivisions thereof, to the highest and best bidder: *Provided further*, That in the construction of said railroad, American iron or steel only shall be used, the same to be manufactured from American ores exclusively.

The foregoing presents, I think, all the legislation upon which the right of the company arises, or which it is necessary to refer to with verbal accuracy.

The first action in respect to the location of the route of the road, so far as the records of the land office disclose, was a letter by Josiah Perham, then President of the company, under date of the 6th of March, 1865, to the Secretary of the Interior, stating that

Under authority from the Board of Directors of the Northern Pacific Railroad Company I have designated on the accompanying map in red ink the general line of their railroad from a point on Lake Superior in the State of Wisconsin, to a point on Puget Sound in Washington Territory, via the Columbia river, adopted by said company as the line of said railroad, subject only to such variations as may be found necessary after more specific surveys,

and asking that it be filed in the General Land Office and the lands granted to the Company marked and withdrawn from sale in conformity to law. On the 9th of March, in the same year the Secretary (Mr. Usher) transmitted the map to the Commissioner of the General Land Office with a letter stating that he thought

That the odd-numbered sections along the line for ten miles in width on each side in Minnesota and Wisconsin, and for twenty miles in width on each side along that part of the line extending through the territories westward to Puget Sound, may be withdrawn as requested, as preliminary to the final survey and location of said railroad,

unless the Commissioner should perceive some objection to it. This map was a very general indication of a line as "a practicable" railroad

line, as surveyed by Governor Stevens, and indicated in the territories of Dakota and Montana another line as "worthy an examination for a railroad route." The map bears no mark of approval and the line indicated on it is not marked with sufficient definiteness to indicate through what townships even, much less sections, the line of the road would pass. There is not even sufficient representation of the topographical features of the country to define the location, except on portions of the line. On the 22d of June following, the Commissioner of the General Land Office, in a communication to the Secretary (Mr. Harlan) states that the late Secretary enclosed to his office a diagram showing the proposed route, accompanied by a request for withdrawal of land, but as no withdrawal was ordered no action had been taken, and then sets forth at length his objections to the proposed action, the objection being based in large part upon the insufficiency of the map as a definition of the location and the inconvenience which would follow a withdrawal upon such a conjectural line. No further action appears to have been taken in reference to this map.

On the 30th of July, 1870, the company filed in the Department two maps showing the proposed general route of the road; one exhibiting that portion beginning on Lake Superior at the mouth of the Montreal river, and extending thence to a point on the right bank of the Columbia river, opposite the mouth of the Walla Walla river in Washington Territory; the other, that portion extending from the point at the mouth of the Walla Walla river along the course of the Columbia to about the first range line west of the Willamette principal meridian, and thence north to the point where the international boundary first touches the tide waters of the Pacific ocean. These maps were accompanied by the affidavit of the Chief Engineer of the company, giving full descriptive notes, and by the certificate of the President that the certified portions of the line of route were so far definitely fixed by resolution of the Board of Directors of the company on the 8th of July, 1870, as to make it the duty of the President to request the Secretary to withdraw or to withhold from sale or settlement, the public lands to which the company was entitled on either side of the lines of their road so described as aforesaid in the certificate of their Engineer in Chief, and requesting withdrawal accordingly. These maps, with the accompanying notes, defined with sufficient precision and certainty the line of the road in Washington Territory, and, the Engineer states, were the result of surveys and explorations made for the purpose of determining the proper location of the road. By a letter dated the 13th of August, 1870, the Secretary (Mr. Cox) transmitted the maps as "showing the designated route of the Northern Pacific Railroad," and ordered the Commissioner to—

immediately direct the proper local land officers in the States of Wisconsin and Minnesota to withhold from sale, pre-emption, homestead and other disposal the odd-numbered sections not sold, reserved, and to which prior rights have not attached, within twenty miles on each side of the route, and in like manner direct those officers

in Washington Territory to withhold such odd-numbered sections as lie south of the town of Steilacoom. The unsurveyed as well as surveyed lands will be included in the reservation, and you will direct the local officers to give notice accordingly; and as the township plats are received by them, they will make the proper notes of reservation thereon.

The withdrawal will take effect from the receipt of the order at the local office.

On the 15th of August the Secretary wrote the Commissioner as follows:

Referring to my letter of the 13th instant, directing a withdrawal of lands on account of the Northern Pacific Railroad Company, to be made in Wisconsin and Minnesota, and the territory of Washington, I now direct that in the State of Oregon, the odd-numbered sections falling within twenty miles of the route of said road be withdrawn, conformably to the instructions of my said letter.

On the 16th of August he wrote the Commissioner again as follows:

Upon a further examination of the Railroad Surveys of Governor Stevens, in Washington Territory, and the surveys of Puget Sound by the U. S. Coast Survey, I have concluded to extend the withdrawal in that Territory for the Northern Pacific Railroad Company as far north as Seattle. You will issue instructions accordingly.

On the 20th of September, in the same year, the Commissioner transmitted to the register and receiver at Vancouver, in Washington Territory, a diagram showing the designated route of the Northern Pacific Railroad, and an order—

To withhold from sale or location pre-emption or homestead entry all the *odd* numbered sections of public lands falling within the limit of 20 miles as designated on this map;

and also to increase the price of the even numbered sections to two dollars and fifty cents per acre; the order to take effect from the date of its receipt, which was acknowledged October 17, 1870. On the 21st of November, in the same year, the Commissioner wrote the same land officers that the Secretary having ordered the withdrawal of twenty additional miles on each side of the line of the railroad in their district, he enclosed a map showing the extent of such additional withdrawal, and directing them—

To withhold from sale or location, pre-emption or homestead entry, all the *odd* numbered sections of land falling within the additional limit of twenty miles as indicated on the map;

and also to increase the price of the even numbered sections to two dollars and fifty cents per acre; the order to take effect from the date of its receipt, which was acknowledged December 8, 1870.

These withdrawals extended from the east line of Washington Territory westwardly along the line of the general route so fixed through the Territory. The line of general route so established, and upon which the withdrawals were ordered and made, entered the Territory near the southeast corner thereof, at a point about ten miles north of the Oregon line, and thence ran nearly due west to the junction of the Walla Walla and Columbia rivers, and thence as before stated to be shown on the second map.

Notwithstanding this action of the company and the Department,

by which the line of the general route was once fixed and withdrawals ordered in accordance with the act of Congress, again in 1872, on the 16th of February, the company filed another map in the Department, and the President of the road in transmitting it stated it to be "A map of the preliminary line of road of this company, from the Red River of the North to the Columbia, at the mouth of the Walla Walla river," requesting that the lands along said route may be withdrawn from settlement and sale. On the 21st of the same month, the Secretary (Mr. Delano) wrote the Commissioner of the General Land Office as follows:

I transmit herewith, for appropriate action, a map of the preliminary route of the Northern Pacific Railroad (received yesterday, with letter of 16th inst. from J. Gregory Smith, Esq., Prest of the Co.) from the crossing of the Red River of the North, at Fargo, in Dakota, to a point opposite the mouth of the Walla Walla river, Washington Territory, a distance of about 1448 miles.

A postscript was written on the margin of this letter, as follows: "P. S. Before you take final action please confer with the Department."

On the 30th of March, in the same year, the Acting Commissioner of the General Land Office (Mr. Curtis) wrote the register and receiver at Walla Walla, as follows:

The Northern Pacific Railroad Company having filed a corrected map of the line of their road in your district, I herewith transmit a diagram showing the amended line with the 40 mile limits shaded pink, and in blue pencil the limits of former withdrawal.

You are directed to withhold from sale or location, pre-emption or homestead entry, all the surveyed and unsurveyed *odd* numbered sections of public lands falling within said amended limits.

You will also increase in price to \$2.50 per acre the *even* numbered sections within those limits, and dispose of them at that ratibility and under the pre-emption and homestead laws only, no private entry of the same being admissible until these lands have been offered at the increased price.

You are also directed to restore to homestead and pre-emption entry at \$1.25 per acre, the odd sections in former withdrawal, but now falling outside of the south 40 mile limits of said road.

This restoration will be made after 30 days public notice, which you will give by advertisement in the newspaper of the largest circulation in your district.

The order of withdrawal was directed to take effect upon its receipt, which they were requested to acknowledge without delay, and which was acknowledged by letter dated April 22, 1872. The new line of general route so designated on the map last aforesaid, entered the Territory at a point about one hundred and eight miles north of the point at which the line designated by the map of 1870 crossed the eastern boundary, and thence ran in a general southwesterly direction to the mouth of the Walla Walla river, where it joined the line of 1870. It thus appears that, after having once filed a map of general route, and after a withdrawal accordingly had once been made, the Company filed another map of general route, not of definite location, and again, with no written instructions from the President or the Secretary, other than has been stated, the Acting Commissioner of the General Land Office or-

dered another withdrawal of a belt of land forty miles in width on either side, in a considerable degree entirely distinguished from the first.

Besides this action on the main line, it may be briefly mentioned that in 1873 a map of general route of a branch line from a point on the eastern boundary of the Territory, west of Lake Pend d'Oreille, in Idaho, to Tacoma, lying entirely north of the main line, was accepted by the Department and a withdrawal ordered of eighty miles breadth thereon; that this was followed by another amended map of general route of this branch line accepted by the Department in 1876; and again by still another such in 1879, and by withdrawal thereon. These do not affect the land claimed by Miller, however, and only serve to illustrate the consequences of the theory of authority in the Land Office, to make such withdrawals, which is discussed later.

No further action touching that region of the Territory east of the Columbia, appears to have been taken in the Department or the Land Office, or by the railroad company, until the year 1880, when, on the 4th of October, the map of definite location of the railroad was filed in the General Land Office, extending from the east as far west as to the mouth of the Walla Walla river; which definite location was duly approved, and in accordance with it the road has been constructed. From the mouth of the Walla Walla westward as far as Vancouver no definite location has been made nor any road constructed, a distance above two hundred miles, although the public lands in the odd-numbered sections have remained in reservation along the general route fixed by the map of 1870, by virtue of the legislative withdrawal put in effect by the Department upon the approval of that map, as I have already stated.

The line of definite location in Washington Territory crosses its eastern boundary some miles south of the point where the line of general route, claimed to have been re-established by virtue of the map of 1872, entered it, runs westerly to a point near Spokane Falls, crossing there that second line of general route, and thence departs from that line so far north-westerly as that the average distance of the line of definite location therefrom between Spokane Falls and the mouth of the Walla Walla river is some fifteen to twenty miles.

Upon the acceptance by the Department of the line of definite location, as so established, by a letter of the Commissioner of the General Land Office (Mr. Williamson) to the register and receiver at the land office at Walla Walla, in the Territory, those officers were instructed that the company had filed its map of definite location on the 4th of October, "on which last named date by the terms of the grant the right of the company attached to the odd sections in the 'granted' or forty-mile limits according to the definite location," to which was added the following:

I enclose herewith a diagram showing the line of road, as definitely located, the corresponding forty-mile limits designated by *blue* lines, and the fifty-mile limits designated by *vermilion* lines.

The diagram also shows the former withdrawals ordered by letter of March 30, 1872, for the main line, and the letter of July 3, 1879, for the branch line. The former on the line of general route within the limit of forty miles, designated by a *brown* line. The said withdrawals of 1872 and 1879, will remain effective as heretofore except as hereinafter set forth.

The only effect of this adjustment as to lands in your district is as follows: The even numbered sections, to the east of the road, and lying between the blue line marked "40-mile limits" and the vermilion line marked "50-mile limit" heretofore held at double the minimum price, you will now reduce to minimum (\$1.25 per acre), under the pre-emption laws. The odd numbered sections lying between the vermilion line marked "50-mile limit" and the brown line marked "40-mile limit (temporary)" heretofore withdrawn, you will restore to entry at the minimum rate, and the even numbered sections in the same limit will also be subject to pre-emption at the minimum rate.

Under the act of March 3, 1879, homesteads on the reserved even numbered sections will be permitted to the full extent of 160 acres, irrespective of the limits in which the lands entered may be situated. In order to carry the above restoration into effect, you will cause a notice to be published in the newspaper having the largest circulation in your district, that upon a day to be fixed by you and not less than thirty days from date of notice the lands to be restored will again become subject to pre-emption and homestead entry.

At the same time the Commissioner by letters to the officers of the Colfax and the Yakima Districts, directed withdrawal of all odd numbered sections within the limits of fifty miles from the line of definite location.

No other order withdrawing or revoking withdrawal of lands for the road in the eastern part of Washington Territory appears to have been made, except as stated; but on the 15th of August, 1887, all indemnity withdrawals for the benefit of the road theretofore made by the Executive were revoked by the Department with the President's approval.

The land claimed by Guilford Miller was entirely without the limits of the withdrawal made upon the line of general route in 1870; it fell within the forty-mile limits of the line of general route filed in 1872, and it lies without the limits of forty miles from the line of definite location, and between the forty and fifty-mile limits, thus falling within the indemnity belt.

The Northern Pacific Railroad Company filed in the United States Land Office at Spokane Falls, Washington Territory, on the 15th of December, 1883, a list of lands (marked list No. 2 of selections of public lands made by the Northern Pacific R. R. Co., inuring to it under the grants of July 2, 1864, and May 31, 1870, within the indemnity limits of the Colfax, Spokane Falls, land district) which it claimed to select from the indemnity limits; in such list a total number of six hundred and fifty tracts, aggregating 59,548.74 acres, is claimed; and the one hundred and forty-ninth number is the quarter section homesteaded by Miller. This selection list was accompanied by no statement showing what lands were lost from the granted limits in lieu of which selections are claimed, and no fact was stated beyond the mere claim of selection to justify it. The register and receiver allowed and approved the filing on the 17th of December, and appear to have dated it upon that day.

On the 26th of October, 1887, the company filed in the Walla Walla land office, Washington Territory, a list called a "specification of losses in place covered by indemnity selections, list No. 2, Spokane Falls land district, now Walla Walla in part, Washington Territory." It begins with a declaration of selection specified as being numbers 1 to 650 inclusive, in the following words: "All those certain tracts or parcels of land embraced in selection list number two, comprising in the aggregate 59,548.74 acres;" then follows a specification of lands, lying north of the base line and east of the Willamette principal meridian within forty miles of the line of the railroad describing thirty different tracts as having been patented or certified, or otherwise taken up on claims, amounting in total to 4,011.04 acres. No further definite specification of losses is made, but there follows a list generally of certain sections indicated by numbers and unsurveyed in three townships; and then a specification of all odd-numbered sections in three other townships, in the Yakima Indian reservation, aggregating in all, as stated in the list, 55,680 acres, making a total of alleged losses of 59,691.04 acres. But it is obvious that this latter gross specification does not disclose the true description or acreage of any lost land with accuracy, the alleged acreage being computed at the rate of six hundred and forty acres to the section, without reference to actual quantity; and the sections being only guessed at in a large degree. The 4,011.04 acres, specifically shown to have been excepted from the grant, would be entirely satisfied by the appropriation in compensation of the first fifty or sixty numbers of the tracts listed in the original list number two.

No action has been taken by the General Land Office or the Department in approval, or determination, of this claim of selection; but the whole matter is open for such decision as may be proper.

The foregoing statement embraces all the facts known to exist which are regarded in any wise material to the proper determination of the controversy.

The alleged date of the first settlement by Miller is not contradicted by any proofs offered, and for the purposes of this opinion, it may be accepted as true. If there be any question of his right upon the facts, which must be further inquired into when final proofs shall be offered, it can be subsequently determined. Nothing has yet appeared that should affect the views I take of the case as it stands.

Two general questions are presented; the first, whether upon these facts Miller must be denied the benefit of his alleged settlement or of his homestead entry, because in contravention of law as applicable to the condition of the land when made; the second, whether the selection of the company ought in any case, to be approved to the deprivation of his claim under that entry.

1. This grant to the Northern Pacific Railroad Company, as made in section three, above recited, was like other railroad grants of similar character, a grant *in praesenti*, and, undoubtedly, is to be interpreted

and governed by the now established principles applicable to such dispositions of the public domain. If there were nothing else in the act affecting the question, it would be comparatively easy to determine it. But a peculiarity in legislation of this character is found in the sixth section of the act, in which a provision authorized the "general route" to be fixed, and required lands to be surveyed for forty miles in width on both sides of the entire line so fixed, and directed that the odd-numbered sections granted by the act should not be liable to sale or entry or pre-emption before or after they were surveyed, except by said company. In the language of the supreme court, in *Buttz v. Northern Pacific R. R.*, (119 U. S., 71)

The act of Congress not only contemplates the filing by the Company, in the office of the Commissioner of the General Land Office, of a map showing the definite location of the line of its road, and limits the grant to such alternate odd sections as have not, at that time, been reserved, sold, granted, or otherwise appropriated, and are free from pre-emption, grant, or other claims or right; but it also contemplates a preliminary designation of the general route of the road, and the exclusion from sale, entry, or pre-emption of the adjoining odd sections within forty miles on each side until the definite location is made.

The facts which have been recited, show beyond all reasonable question that the privilege given to the company of fixing, first, a line of general route, upon the basis of which the odd-numbered sections within forty-mile limits on either side were to be withdrawn from sale or entry or pre-emption before and after survey, was fully exercised by the company in Washington Territory, from the eastern boundary to the mouth of the Walla Walla river, and thence along the Columbia to the first range line west of the Willamette principal meridian, and thence north to the international boundary, by its filing and the Department's approval of its maps of location on the 30th of July, 1870. These maps and the action taken thereon fully met every requirement of the statute in that behalf. The company, by resolution fixed this line as the basis of withdrawal, made its formal request that the land should be withdrawn thereon, the line was plainly and sufficiently described, the Department accepted it, and applied the statutory consequence by directing the local land officers in Washington Territory to withdraw the odd-numbered sections along that line as far north as the town of Steilacoom, first, for a width of twenty miles on either side, and, later in the same year, within the limit of an additional twenty miles; and also by increasing the minimum price of the even-numbered sections within the same limits to two dollars and fifty cents per acre. Thus the action of the company and of the Department co-operated to give official determination to the fact upon which the statute became applicable, both to withdraw the odd-numbered sections and to double the minimum price of the even-numbered sections, and both effects were formally recognized and declared. It can not be doubted that, had no other action been taken before the line of the road for construction was definitely located, this action in regard to the line of the general route

of 1870, must have remained continuously operative upon all lands within the limit of forty miles on either side of the line so established. So obvious is this, indeed, that from the mouth of the Walla Walla river, westwardly along the Columbia, that withdrawal remains to this day obligatory and operative by force of the statute and of that location.

If authority be wanting to so manifest a proposition, it is found in the following language of the supreme court in the case already referred to :

The general route may be considered as fixed when its general course and direction are determined after an actual examination of the country or from a knowledge of it, and is designated by a line on a map showing the general features of the adjacent country and the places through or by which it will pass. The officers of the Land Office are expected to exercise supervision over the matter so as to require good faith on the part of the company in designating the general route, and not to accept an arbitrary and capricious selection of the line irrespective of the character of the country through which the road is to be constructed. 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 such 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.

By virtue of that withdrawal the odd-numbered sections within forty miles of all that portion of the route lying east of the Columbia remained for nearly two years, at least segregated from the public domain, and all purchasers of the even-numbered sections were required to pay the double minimum price for the land they bought. And the homestead of Guilford Miller lies outside of the lines of this reservation and is entirely unaffected by the statute as applied to the line of general route by the company and the Department.

II. In 1872, the company undertook to exercise a second time, in the eastern part of Washington Territory, this peculiar privilege of fixing a general route, and the question is, what effect, in law, is to be given to this action so far as it affects the claim of Miller.

The new line is entirely distinct and different from the one which had been located, being so far distant on the eastern boundary of the Territory, that even the forty-mile limits do not overlap. The order of withdrawal was made by the Acting Commissioner, not by the Secretary, and can be presumed to have been known to the Secretary only upon supposition that the marginal postscript upon his letter of transmittal was observed by that officer, unless by virtue of a general presumption that all acts of the Commissioner are to be taken to be the acts of the

Secretary, a presumption not warranted by law. The maps, or plat, of route were required to be filed with the Commissioner of the General Land Office, not the Secretary, and his duties are prescribed by law, though subject to supervision by the Secretary.

I think this withdrawal of the Acting Commissioner must be deemed invalid; to the extent, at least, that it could not deny to a settler the right given to him otherwise by the statutes. The power of the President to reserve any portion of the public domain to some authorized public purpose is undeniable; and it is also well settled that the action of the head of a Department may be presumed to be the action of the President when taken according to law, and when it is to be presumed the President directed it. (*Grisar v. McDowell*, 6 Wall., 380; *Wolsey v. Chapman*, 101 U. S., 769; *Wolcott v. Des Moines Co.*, 5 Wall., 688.)

The extent to which the supreme court has gone in its decisions, and the extent which the reason of the thing supports, appears to be that the President may, in execution or furtherance of a public purpose committed, generally or specially, by Congress to the Executive to effectuate, when in his judgment such action is desirable to the accomplishment of that purpose and will not infringe any limiting provision of statute governing the particular case, withdraw or withhold by his order any portion of the public domain from the operation of the general laws for its disposition, and devote it to such public use subject to review by Congress; and also that, *in such a case*, the order of the Department or Land Office will be conclusively presumed to have been directed by him, without proof of the fact and probably irrespective of it. Thus, many of the reservations for the care of the Indians have been established; and thus are sustained withdrawals of land grants in furtherance of the construction of railroads, where no legislative direction has manifested the will of Congress. The principle does not, however, contemplate an arbitrary or capricious suspension of the statutes, much less the contravention of a particular mandate, expressed or clearly implied, even by the President's direct act. But it ought not to be presumed, and it seems to me it cannot rightfully be, to support the act of an inferior executive officer, that the President of the United States directed the withdrawal of public lands beyond the clearly expressed purpose of a statute or contrary to the clear implication of the negative force of a statute. Such a presumption cannot be rightfully imputed to him, whose official oath obliges, and whose highest function is, to faithfully execute the laws; and if he himself were to make a withdrawal under such circumstances, its validity would be open at least to grave question.

In this case, the legislature undertook to direct with explicitness the condition and extent of the preliminary withdrawal. The legislative will having been expressed with definiteness, it must be taken to have been exhaustively expressed, and that direction implies that no other withdrawal should be made. The force of the act of Congress is as much negative as affirmative, and equally obligatory in both aspects.

Having provided the condition upon which a withdrawal of the public domain should be operative upon a preliminary general route for the benefit of this company, without any latitude of authority for any other, the legislative will must be regarded as exclusive of any other. The effect of the statute of 1864, when it became operative by the filing and acceptance of a map fixing the general route, was not to be interrupted by any official of the government. No provision was made that its mandate, that the odd sections should "not be liable to sale, or entry, or pre-emption, except by the said company," should be terminated as to the particular lands to which it became applicable, at the will of a Department officer, and applied to other and entirely different lands. The duration of that withdrawal was, as the supreme court has said in the case referred to, "until the definite location is made."

And in addition to this plain inference, are the explicit words of the statute that—

The provisions of the act of September, eighteen hundred and forty-one, granting pre-emption rights and acts amendatory thereof, and of the act entitled "An Act to secure homesteads to actual settlers upon the public domain," approved May twenty, eighteen hundred and sixty-two, shall be and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company.

If the land of Guilford Miller became, or is, in any correct sense, on the line of road, these words were made applicable to it, when they were made applicable at all, by the fixing the line of general route; and being once applicable, they were not repealable by any action of the Department. This point will become important in another aspect of the case.

This peculiar privilege given to this company to lay a line of general route as a basis for withdrawal of its granted lands, to be followed at some later time by fixing a line of definite location for the purpose of construction, is analogous to a franchise given by a special charter to a railroad company to locate and build a railroad between designated points. Of such franchises it has always been held that one location, definitely fixed, exhausts the franchise, and that a chartered company cannot, after one exercise of such a privilege, again re-locate, and reconstruct its line. (*Pierce on R. R.*, pp. 254; *Mason v. R. R. Co.*, 35 Barb., 374; *People etc. v. R. R. Co.*, 45 id. 73; *Del. Can. Co. v. R. R. Co.*, 9 Paige, 28; *State v. Turnpike Co.*, 10 Conn.)

The same rule has been applied to the franchise given in these acts of Congress, granting public lands, to definitely fix a line of location. In the case of *Van Wyck v. Knevals* (106 U. S., 366) the supreme court said:

Until the map is filed with the Secretary of the Interior the company is at liberty to adopt such a route as it may deem best, after an examination of the grant has disclosed the feasibility and advantages of different lines. But when a route is adopted by the company and a map designating it is filed with the Secretary of the Interior and accepted by that officer, the route is established; it is, in the language of the act, definitely fixed, and cannot be the subject of future change, so as to affect the grant, except upon legislative consent.

There is nothing in the fixing of the general route to require a different governing principle from the fixing of the final location. The consequences declared by the statute to attach in the one case, as much attach as in the other; and so soon as the statute has thus become applicable, its force is unchangeable but by the creator of it, and there is an end of the privilege.

If this interpretation of the act of Congress be correct, it must follow that the Department, much less the Acting Commissioner of the General Land Office, could not alter it by any action of its own. In every just sense, the so-called withdrawal by the Department is only a notification to the public of the effect of the act of Congress itself. The law was exhaustive; the Department could only act to give application to its provisions to the land and notice to the world thereof. And so the supreme court said in the case of this company already referred to, of the withdrawal made on another portion of the line—

This notification did not add to the force of the act itself, but it gave notice to all parties seeking to make a pre-emption settlement that lands within certain defined limits might be appropriated for the road.

This reading of the statute limits the power of the Commissioner as much in one aspect as the other; he could neither by his order terminate, suspend or alter the vigor of the expressed will of Congress in respect to what lands were to be withdrawn, or for what period to remain so; nor could he by his order give any added force to a law which *proprio vigore* accomplished independently of, and prior to, his order, all which could be effected. To hold otherwise would be to declare that the force of the act of Congress was terminable, or alterable, with respect to the specific lands to which it related, at the pleasure of the Commissioner of the General Land Office; a conclusion for which neither this act, nor any other statute, furnishes the least foundation. He could not restore to the market, rightfully, lands which the act of Congress had withdrawn for a period the duration of which extended by clear and necessary implication beyond the time when he undertook to restore them; and, if he could not restore those lands to market by his order, contrary to that statute, it is impossible to uphold the exercise of an assumed authority, in the face of the plan and purposes of this act to withdraw again another belt of eighty miles in width. The law intended that but one such belt should be withdrawn before definite location should give fixity to the grant. To permit him to withdraw another is manifestly to recognize an act contrary to the purpose of the Congress.

The lands west from Walla Walla to Kalama along the line of the general route of 1870 cannot be regarded as having been withdrawn, by force of the act of Congress, since the date of the establishment of that line, as has been and still remains the accepted consequence by the Department and the company of the action then taken unless the same consequence adhered to the line between the eastern boundary of

the Territory and the mouth of the Walla Walla, equally well fixed at the same time equally recognized by the Department, and to which the consequences were by Department declaration equally applied. It cannot be true, under this act, that its force abides as to the lands west of the Columbia and was terminated by the action of the Commissioner as to the lands east of the Columbia, unless it be true that the Commissioner could suspend or alter a law of Congress.

This interpretation of the statute, as affecting the authority of the Land Office, results from the application of well-established canons of construction, and is arrived at without respect to the *argumentum ab inconvenienti*. If, however, attention be directed to the serious and inequitable consequences which such a theory so pursued necessarily involves, it becomes still more impossible to suppose that the Congress could ever have designed such effects. The projected line of this railroad extended from east of the Mississippi river to the Pacific ocean, leaving open to the company's choice any route north of the 45th parallel of latitude. If what was done in the eastern portion of Washington Territory were legally done, it might have been as well inflicted upon any portion of that entire expanse of the northwestern country. A line of general route is fixed by the company, accepted by the Department, and the act of Congress declared applicable, so that half of the public lands are withdrawn from the use of settlers throughout a belt of eighty miles wide, and the other half are to be purchased only at double minimum price. Such a condition of things remains for years, the road, meantime, not being constructed; a serious blight upon progress and settlement is necessarily inflicted; but many, adventurously pushing into the new country and expecting the coming of a railroad, buy lands at the price fixed upon the basis of such an expectation. Is all this to be rendered worse than vain at the mere option of the company, with the compliance of the Land Office, and another belt of eighty miles in width to be again marked with these effects? The Commissioner undertakes, indeed, to unloose the withdrawal of the lands within the first, and to open them to market; but they are necessarily left charged with the cloud already placed upon them and with the injustice arising from the disappointment to those who have paid a double price in reliance upon a justifiable expectation.

It must be noted, also, that unless the restriction on the power to change and re-locate the line of general route be applicable to the first location, there is no limitation, whatever. If the second location and withdrawal were authorized, so was the third, or any number.

Instead of this great enterprise proving an inducement to settlement and a promoter of development, under such a course of action it could not but be a mighty agent of wrong to individuals and injury to the public, retarding instead of accelerating the course of advancing civilization. These consequences were *a priori* so obvious and the privilege proffered to this company, within its strictest limitations, so extensive

and unusual, that it must be regarded as having been clearly within the legislative purpose to confine the exercise of such a privilege strictly to its boundaries as expressed by the act, with no latitude of authority in any officer of the government to amplify and enlarge them.

The conviction of the correctness of the foregoing propositions is so strong in my mind that I feel entirely content to rest upon them the affirmance of the conclusion reached by your office upon other grounds; it being apparent from the facts stated that, unless the withdrawal of 1872, was valid to forbid the exercise by a settler of the rights given by the pre-emption and homestead laws upon any public lands otherwise subject to them, Miller secured by his settlement in 1878, and his residence thereafter such a right as would prevent the selection by the company, if otherwise valid, from attaching to the quarter section taken by him. But there are other points involved in this cause which require discussion; and if my conclusions in the foregoing particulars be wrong, I think his rights are still to be supported, and the claim of the company to select this land to be denied, upon other foundation.

III. The Attorney-General, in his opinion of the 14th of March, 1887, proceeded in entire want of information, so far as the opinion discloses of the establishment of the line of general route and the withdrawal thereupon, in the year 1870; and he bases his conclusion upon the assumption that the general route was fixed, and the withdrawal made, for the first time, in 1872. This lack of information resulted from the fact that the decision of your predecessor (Mr. Sparks) from which the appeal was taken, does not in any wise disclose the first location of the general route which I have discussed; and no information of it was given to the Attorney-General in the case submitted to him.

It was therefore upon the erroneous assumption that he was dealing with the first and only exercise of the privilege of establishment of general route, that he proceeded in every part of his opinion. He first discusses the validity of the Land Office withdrawal, and in respect thereto he says:

The withdrawal just adverted to does not rest upon any express statutory provision requiring it, but upon a general authority in the Land Department, the existence of which has been recognized by Congress (Act of March 27, 1854, chap. 25; Rev. Stat., sec. 2281) and repeatedly affirmed by the supreme court (*Wolcott v. Des Moines Co.*, 5 Wall. 681; *Riley v. Wells*, unreported, Dec. Term, 1869; *Williams v. Baker*, 17 Wall., 144; *Wolsey v. Chapman*, 101 U. S., 755; See also 8 Opin. 246; 16 Opin. 87), and may now be regarded as too well established to be questioned. It appears, moreover, to be in entire harmony with the provisions of the land grant act, which, as already intimated, in effect made a corresponding withdrawal, and it accords with the practice of the Land Department in like cases. But the existence of a statutory withdrawal, including the same lands, which had previously taken effect, may suggest the inquiry whether the Department withdrawal referred to had any legal efficacy as such. In other words, did it operate as a withdrawal, when the lands covered thereby were thus already withdrawn? The answer is, that if the act of the Department was within the competency thereof—and of this there appears to be no room for doubt—its validity and force were not affected by the fact that it embraced the same subject matter and was directed to the same end as the statute. It operated

concurrently with the statute, and the lands may properly be deemed to have been withdrawn as well by the one as by the other. Although, as remarked by the court in *Buttz v. Northern Pacific R. R. Co.*, *supra*, it did not add to the force of the statute itself in that regard, yet it gave notice to all parties seeking to make a pre-emption or homestead settlement that lands within certain defined limits might be appropriated for the road, and was "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." Viewed in the above light, I arrive at the conclusion that the withdrawal of March 30, 1872, was valid and efficient for the purpose intended.

Inasmuch as the ground upon which I place the conclusion that the withdrawal of 1872, was invalid was in no manner considered by the Attorney-General, there remains no occasion for any argument in dissent from the view taken by him, as above exhibited; and if the case turned upon this point, I should long hesitate to arrive at a conclusion in opposition to so eminent and able an authority. I will venture, notwithstanding, in respect to the theory of independent force in the departmental withdrawal, to direct attention to the language of the supreme court already quoted *in haec verba* in respect to this particular action, that it "did not add to the force of the act itself," but simply gave notice of the consequences of the act.

Yet it is so familiar a rule that the opinions of the courts even, are not to be regarded as declaratory of the law, except as applied to the particular facts before them, and it is so obvious that the conclusions before enunciated are in no conflict with this opinion of the Attorney-General, that I ought to feel, for that reason, at liberty to follow my own convictions upon the case. But, in addition to that, it ought to be stated that the Attorneys-General have never looked upon their opinions as in any wise obliging the heads of Departments who may have sought them to follow them contrary to their own independent judgment; and the difference of opinion implies no want of that respect due to the recognized learning and official position of that officer. It only implies obedience to convictions, which it is the duty of the officer, upon whom action is devolved, to possess before he acts, and the perception of which depends upon his mind and not another's.

Said Attorney-General Crittenden to the Secretary of the Interior:

The opinions of the Attorney-General are merely advisory. * * * I may say confidently no law has made it binding on you. (5 Opin., 390.)

Said Attorney-General Black (9 Opin., 36) to the Postmaster-General:

The duty of the Attorney-General is to advise, not to decide. A thing is not to be considered as done by the head of a Department merely because the Attorney-General has advised him to do it. You may disregard it if you are sure it is wrong. He aids you in forming a judgment on questions of law, but still the judgment is yours, not his. You are not bound to see with his eyes, but only to use the light which he furnishes in order to see the better with your own.

A similar view was expressed by Attorney-General Cushing (7 Opin., 700); and by Attorney-General Speed, (11 Opin., 470.) And in accord-

ance with this doctrine there are many precedents in this Department of action by the Secretary contrariwise to advice of the Attorney-General, in which he was unable to concur. These opinions of the Attorneys-General, these precedents, and the plain reason of the thing, make it obligatory upon me, although with diffidence and with deference, to pursue the course of action which I regard to be my duty.

I remark this more particularly because in the next point to be discussed I find myself more nearly at variance with the other portion of the opinion referred to.

IV. It has been seen from this statement of the facts, that, when the line of definite location was made and approved, the Commissioner of the General Land Office, while assuming to make no withdrawal of the lands within the indemnity limits, beyond forty and within fifty miles distant from the line of definite location, yet refrained from revoking the withdrawal of so much of the indemnity limits as happened to fall within the withdrawal made in 1872, upon the basis of the second establishment of a general route; and the Attorney-General, in the opinion referred to, used the following language upon the validity and effect of such continuance in reservation by the order of November 17, 1880, viz. :

That withdrawal, when ordered, embraced only the odd sections within the forty mile limits; but part of these lands having subsequently fallen within the indemnity limits, the point now is whether thereafter such part still continues in reservation. Upon this I hold the affirmative; being of opinion that when public lands have once been withdrawn from private appropriation under the general land laws by competent authority, they do not again become subject to such appropriation until restored to entry by like authority. This is understood to be a settled rule of the land-law system, and is (as well as the executive power of withdrawal) recognized by Congress (see section 1 of the act of April 21, 1876, chap. 72).

The result to which the foregoing leads is, that at the date of the order of November 17, 1880, the tract in question was still subject to the withdrawal referred to. That order, indeed, assumes the continuation of such withdrawal as regards lands that fell out of the forty mile limits as above, in formally restoring to entry some of these lands while continuing the withdrawal as to others. So far as appears no restoration of the said tract took place then or thereafter up to the time of its selection by the company.

Such tract being thus in a state of reservation during the period which intervened between the filing of the plat of definite location and the selection by the company, it was not during that period (nor was it prior thereto from the filing of the map of general route) open to homestead settlement, and therefore no rights thereto adverse to the claim of the company were acquired by Miller by his alleged settlement.

I remark that in some of the papers submitted the order of November 17, 1880, is dealt with as if it originated a new withdrawal, and the question is much discussed whether it was competent to the Land Department to withdraw from pre-emption or homestead settlement lands lying within the indemnity limits of the grant, after those limits had become established by the filing of the plat of definite location of the road.

In denial of the authority of the Department to withdraw in such a case, it is urged that the provision in the 6th section of the act, extending the pre-emption and homestead laws "to all other lands on the line of said road, when surveyed, excepting the lands hereby granted to said company," in effect prohibited a withdrawal of any lands within the indemnity limits.

Assuming that its terms comprehend all lands within such limits, I do not understand the provisions referred to as having that effect. It does nothing more than declare what was already enacted by general laws. By these laws all unappropriated public lands, surveyed or unsurveyed, were thrown open to pre-emption and settlement, and all such lands, when surveyed, were thrown open to homestead settlement, before the passage of the land-grant act. The provision of the latter produced no modification of the previous law as regards the lands mentioned, nor did it place any restriction upon the exercise of the executive power of withdrawal theretofore existing.

After the indemnity limits were fixed by definite location of the road, a right of selecting "lieu lands" within such limits, under the direction of the Secretary of the Interior, accrued to the company under the 3d section of the act; and it would seem to be within the general power just mentioned, and also within the discretionary authority specially conferred upon the Secretary of the Interior by that section, to place in reservation those lands to which the right of selection is limited, for the purpose of adjusting the grant and effectuating its objects.

This view assumes, apparently, that the lands within the indemnity limits, as fixed by the definite location of the road, are not to be regarded as withdrawn by any force of the statute itself independently of departmental action, and also that, but for a concurrent departmental withdrawal of the lands, within forty miles of the general route, lands which by force of the statute stood withdrawn as being within the prescribed distance of the general route, would not after the definite location of the road remain withdrawn, unless they then fall within the granted limits. In other words, it appears to proceed upon the theory that, upon the definite location of the line of the road, the lands granted immediately vested in the grantee so that no withdrawal of them was longer necessary; and that the preliminary withdrawal made by the statute instantly ceased its operation upon the definite location of the road, so that the grant became definite. This theory of the statute appears to me to be correct. It corresponds with what the supreme court said of it as already quoted. The withdrawal upon the line of general route enacted in the sixth section must have some period of termination, and it plainly was designed by Congress that it should be operative only to secure the lands granted, and proceeds upon the supposition that the general route would probably be in the end finally accepted, substantially, as the definite location. The declaration of the sixth section is not that all the lands in odd-numbered sections within forty miles of the entire line of the general route shall be withdrawn; but the declaration is that "the odd sections of land *hereby granted* shall not be liable to sale," etc. Thus, the meaning of the act appears to be that the provisional line of general route should, in the first place, be taken as the line upon which the grant was made, and, during the period while no other line was fixed than such line of general route, the lands in the odd-numbered sections within forty miles should be taken as the granted lands, and, therefore, they are declared by the statute to be the "hereby granted" lands; but, when this line should come upon maturer consideration to be "definitely fixed" the grant should shift accordingly and the lands "hereby granted" would then be such as should be found

within the odd-numbered sections of forty miles on either side. Thus, no withdrawal, by force of the act, could continue after definite location, since no withdrawal, properly speaking, was otherwise made than as the lands upon either side of the general route were, provisionally, assumed to be the granted lands. It would seem, therefore, necessarily to follow that the assumption of the Attorney-General's opinion in respect to the proper interpretation of the act in this particular, is beyond criticism. It follows from this, as he assumes, that unless there were a departmental withdrawal of lands within the indemnity limits, they remain open to settlement, not being withdrawn by the act.

The consequence which he derives fails, as a matter of course, if the departmental withdrawal were invalid and ineffectual for the reasons which I have previously discussed.

But I find it difficult to accept his conclusion, even if it be assumed that the withdrawal upon the line of general route of 1872, must be regarded as within the authority of the granting act, and that the change of the line of general route from the one established in 1870, to that of 1872, must be regarded as legally fixed and that the act became applicable thereto so as to cause a withdrawal to follow accordingly. I am unwilling to accept the conclusion that there was any force whatever, independently of the statute, in the order of the Acting Commissioner of the 30th of March, 1872; or that, properly construed, it was designed to mean any more than a direction to the local officers to comply with the granting act. I have drawn particular attention to the language of the act to show that it did not, in terms, withdraw the lands from sale or location but it declared the lands "hereby granted" not to be liable to sale. Proceeding upon the assumption that the grant was defined by the line of general route, the lands were not salable because they had been, after that line was fixed, conditionally granted, and because that line of general route was to be taken provisionally as being the same as that authorized to be definitely located under section three of the act. The term "withdraw", therefore, is not accurate, and is misleading because it is otherwise employed in the usage of the Land Office, and then means to withhold from sale lands of the United States which would otherwise remain salable. And it is for this reason, I suppose, that the supreme court used the language already referred to in which this letter of the Acting Commissioner is denominated a "notification" and it is said that it did not add to the force of the act itself.

In my opinion, and it is with great deference that I present it, the granting act not only did not authorize a withdrawal of lands in the indemnity limits, but forbade it. The difference between lands in the granted limits, and lands in indemnity limits, and between the time and manner in which the title of the United States changes to and vests in the grantee, accordingly as lands are within one or the other of these limits, has been clearly defined by the supreme court and it is sufficient to state the well settled rules upon this subject.

As to the lands in the primary, or granted, limits :

The title to the alternate sections to be taken within the limit, when all the odd sections are granted, becomes fixed, ascertained and perfected in each case by this location of the line of road, and in case of each road, the title relates back to the act of Congress. (*St. Paul R. R. v. Winona R. R.*, 112 U. S., 726; *Mo., Kans. & Tex. R. R. Co. v. Kans. Pac. R. R. Co.*, 97 U. S., 491, 501; *Van Wyck v. Knevals*, 106 U. S., 360; *Cedar Rapids Co. v. Herring*, 110 U. S., 27; *Grinnell v. R. R. Co.*, 103 U. S., 739.)

As to indemnity limits :

The time when the right to lands becomes vested, which are to be selected within given limits under these land grants, whether the selection is in lieu of lands deficient within the primary limits of the grant, or of lands which for other reasons are to be selected within certain secondary limits, is different in regard to those that are ascertained within the primary limits by the location of the line of the road. In *Ryan v. Railroad Co.*, 99 U. S., 382, this court speaking of a contest for lands of this class, said : "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was for that purpose ;" and the reason given for this is that "when the road was located and maps were made the right of the company to the odd sections first named became fixed and absolute. With respect to the lieu lands, as they are called, the right was only a float, and attached to no specified tracts until the selection was actually made in the manner prescribed."

The same idea is suggested, though not positively affirmed, in the case of *Grinnell v. Railroad Co.*, 103 U. S., 739.

In the case of the *Cedar Rapids Railroad Co. v. Herring*, 110 U. S., 27, this principle became the foundation, after much consideration, of the judgment of the court rendered at the last term. And the same principle is announced at this term in the case of the *Kansas Pacific Railroad Co. v. Atchison, Topeka & Santa Fé Co.*, *ante*, 414.

The reason of this is that, as no vested right can attach to the lands in place—the odd-numbered sections within six miles of each side of the road—until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made. It may be a long time after the line of the road is located before it is ascertained how many sections, or parts of sections, within the primary limits have been lost by sale or pre-emption. It may be still longer before a selection is made to supply this loss.

The consequence of this difference is, that until a valid selection by the grantee is made from the lands within the indemnity limits, they are entirely open to disposition by the United States or to appropriation under the laws of the United States for the disposition of the public lands. There is nothing to the line bounding the indemnity limits to distinguish lands within it from any other public lands ; the only purpose of that being to place a boundary upon the right of selection in the grantee to make good losses sustained within granted limits. This effect has been most explicitly declared by the supreme court in the case of the *Kansas Pacific Railroad Company v. The Atchison, Topeka, and Santa Fé Railroad Company* (112, U. S., 414) and in other cases. In that case, the court said of an order of the Commissioner of the General Land Office similar to this, so far as applicable to indemnity limits :

The order of withdrawal of lands along the probable lines of the defendant's road made on the 19th of March, 1863, by the Commissioner of the General Land Office, affected no rights which without it would have been acquired to the land nor in any respect controlled the subsequent grant.

It also said of the indemnity limits under discussion there :

For what was thus excepted from the granted limits other lands were to be selected from adjacent lands, *if any then remained, to which no other valid claims had originated.* But what unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of deficiency within the ten-mile limit, was alone conferred, not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made, the lands from which the deficiency was to be supplied, had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government, subject to its disposal at its pleasure.

It was in view of this difference and its consequences that the language of the granting act was employed by Congress, by which it was explicitly provided that the provisions of the pre-emption and homestead laws "shall be, and the same are hereby extended to all other lands on the line of said road, when surveyed, excepting those hereby granted to said company." If lands within the indemnity limits are to be regarded as "on the line of said road," this declaration appears to me prohibitory of any withdrawal, for the benefit of this road. It might be that such lands could be withdrawn for some other public purpose, within executive authority to provide for, such, for example, as to constitute a reservation for Indians. But this language was introduced into the same section which declared the granted lands not to be liable to sale, etc., and, immediately following that declaration, and in the same sentence, so as obviously to mark the legislative intent to make clearly distinguishable the lands beyond the granted limits as being liable to disposition under those laws. Having so explicitly declared, it was not necessary to add a prohibition upon executive officers against withdrawal for the benefit of the road. It gave to any person entitled under the pre-emption or homestead laws to take any such lands, the absolute right to acquire any proper quantity thereof, in accordance therewith; and this right an executive officer could not deprive the settler of. The act as much makes that his right, as it makes it the right of the company to take the others.

I cannot be satisfied with the idea that this language was so introduced in immediate qualification of and distinction upon the words rendering lands in the granted limits "not liable to sale or entry," for the mere purpose of declaring "what was already enacted by general laws." The general laws applied without this declaration, and they applied more extensively than this would apply them, since by the general laws entries of other kinds might, if conditions concurred, be also made. The aim of this language was, as I am forced to read it, towards the availability to settlement of all lands not granted. It was a vast grant, and even as so limited, a threatening shadow to fall on the settlement of the Northwest. Well might Congress say, "the lands granted you shall have, but you shall tie up no more from the actual settler to the prevention of development."

It may be claimed that the words, "all other lands on the line of said road," do not embrace lands within the indemnity limits. That construction would seem still more to deny the Commissioner's power to withdraw them; since it cannot be supposed Congress intended him to withdraw lands not on the line of the road. But the phrase immediately after employed in the section—"the reserved alternate sections"—when speaking of the lands to which the double minimum price must be attached, seems to indicate clearly that Congress had, in the use of the former, a more comprehensive meaning than simply to include by it the lands of the even-numbered sections within the granted limits.

The supreme court appears to have fairly set this question at rest in the case of *The United States v. Burlington, etc., R. R. Co.*, 98 U. S., 339, where it is said of the similar point raised in respect to the line then under consideration :

And the land was taken along such line in the sense of the statute, when taken along the general direction or course of the road within lines perpendicular to it at each end. The same terms are used in the grant to the Union Pacific Company, in which the lateral limit is twenty miles; and if a section at that distance from the road can be said to be along its line, it is difficult to give any other meaning than this to the language. They certainly do not require the land to be contiguous to the road; and if not contiguous, it is not easy to say at what distance the land to be selected would cease to be along its line.

The general rule alluded to in the opinion that lands once properly withdrawn by executive order remain so until restored to market by like order or by statute is not questioned. But every such general rule yields to the will of the legislature in a particular case; and the considerations presented are designed to show the grounds of my opinion that the legislation is in this case particular and exhaustive.

Inasmuch, however, as I cannot regard the original order of withdrawal in 1872 as obligatory to deny Miller's rights for the other reasons given, it is unnecessary further to press the argument that when his land fell within the indemnity limits of the road it was open to his appropriation under the homestead law, until selected by the company.

V. In the view I have taken, it may not be necessary now to dispose of the claim of the company to select this land, other than to say it has been validly entered under the homestead law by Miller, and any right it may have must be subject to his right to make final proof.

Yet I think it proper to draw your attention to the manner in which this claim of selection has been made. And, first, I think it should be observed that a mere claim of selection, not based upon such foundation as the law and the regulations of the Department require, cannot give a right; the selection must be one which is both well-founded in the necessity for it and the manner of making it, and, therefore, one within the direction and approval of the Secretary of the Interior. In this case, the original selection list gave no indication of the basis upon which a right of selection of this tract could be claimed. It proceeded upon the assumption that the company might "select" as many lands

as it saw fit, and make proof of its losses afterwards. This practice was, indeed, permitted for some time in the General Land Office, and thus it has happened that some railroad companies have selected, in lieu of lost lands, and procured certification of, lands much in excess in acreage of their losses for which the selections were admissible. It was also specially allowed in the case of this company. But it was so allowed only upon condition that the basis was subsequently to be supplied, and no selection was valid until approved after such basis should be determined. It was thus only a question of the order of procedure.

This practice was of doubtful validity, at least to give a right from date of first selection, and was changed some time since, by departmental regulation. The act is explicit that, whenever, prior to the definite location of the line,

Any of said sections or parts of sections shall have been granted, sold, reserved, occupied by homestead settlers, or pre-empted, or otherwise disposed of, other lands shall be selected by said Company *in lieu thereof*, under the direction of the Secretary of Interior, etc., etc.

Manifestly it was necessary to point out the section, or the part of a section, which had thus been lost to the grant, and the manner of its loss, in order to authorize the taking of another tract of land in place of it. The Department ought, before approval of a selection, first to determine whether the land lost to the grant was so previously appropriated as to furnish the basis of a selection, and it ought to be particularly shown for what specific lands lost, specific selections were made. Until these facts appear, the company has not established the right to appropriate from the body of lands open to its choice, but is confined to those specifically granted.

In accordance with this rule, my predecessor (Mr. Lamar) on the 4th of August, 1885, approved a circular from your office to the local officers, in which they were directed as follows :

Before admitting railroad indemnity selections in any case, you will require preliminary lists to be filed specifying the particular deficiencies for which indemnity is claimed. * * * Where indemnity selections have heretofore been made without specification of losses, you will require the companies to designate the deficiencies for which such indemnity is to be applied before further selections are allowed.

It was in obedience to the last clause that this company filed on the 25th of October, 1887, the list of particular deficiencies upon which the claim of selections in list number two before mentioned, was based. That list excellently illustrates the necessity for the rule mentioned. Since 1883, the claim of this company to take the 58,000 acres in list number two has remained a cloud upon all the lands embraced within it. Yet when called upon to specify particular lands lost from the granted limits, for which such a right of selection can exist, only 4,011 acres are shown, except by claiming indemnity for about 55,000 acres of lands, for the most part not particularly defined, lying within the Yakima Indian Reservation. But that Indian reservation lies about two hundred miles south-westerly from the land of Miller; north of, and

opposite to, that portion of the main line along the Columbia river, embraced in the map of general route of 1870. Those lands stand yet only as provisionally granted, the line of road has not yet been definitely located, and no construction, whatever, has been begun upon it. The company may, perhaps, in the exercise of the right of definite location, so change the main line of its road that the Yakima Indian reservation shall not be within the granted limits of the main line. In order to do this, it would not be necessary to make so radical a departure as was made from that line by the definite location east of the Columbia river. But, discarding that supposition, no absolute right to granted lands exists, and no right of selection for lands lost from the granted lands can possibly arise, until the line of definite location is made. It is unnecessary to elaborate so clear a proposition.

The larger part of the lands of the Yakima reservation are within the forty mile limits of the main line general route, and so far the foregoing observations are sufficient to exclude them as a basis of selection. They are also, it is true, within forty miles of the amended branch line of 1879. It may, perhaps, be sometime claimed that selections can be made from the indemnity limits of the main line for deficiencies in the granted limits of the branch line. This claim does not now appear to be necessarily involved, as these lists are made, and will not, therefore, be discussed, it being sufficient now to say that, at least, it appears to me sound discretion would deny approval of such selections, if the right exist at all, until the indemnity limits of the branch line are shown to be exhausted.

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 entire extent, then, to which a right of selection can now be accorded to this company, upon the basis upon which they have claimed it in this list, is to indemnify the loss of about 4,011 acres. If the lands which they have chosen to select in this list number two, be applied in the order in which they have named them for selection, to this deficiency, the entire right is satisfied by the lands in the first fifty or sixty tracts designated; while the land of Guilford Miller is, as has been stated, the one hundred and forty-ninth tract claimed. There does not appear, therefore, from any showing yet made by the company, that it has any right, whatever, to claim this land because of anything lost from the granted limits; nor has it, to this time, made any such claim, other than in this list number two.

Meantime, whatever may have been the validity of the order of withdrawal, it was revoked on the 15th of August last. If I were bound to regard Miller's homestead entry as irregular, because in conflict with the subsisting withdrawal at the time it was made, yet, inasmuch as that withdrawal has entirely ceased, and no objection remains in any right of the company, or otherwise, so far as known to the Department, to his taking this land, and, inasmuch as his settlement and long residence (assuming his claims in respect thereto will be established by final proofs) entitle him to equitable consideration, it would appear to be not an improper exercise of discretion to now direct the allowance of his application for a homestead entry.

I do not, however, for the reasons already so elaborately given, find myself under any necessity to sustain his claim upon any tender principles of merely equitable nature. He stands, in my judgment, upon a solid legal foundation in his claim upon the government to the recognition of his rights as a homesteader, and his entry should remain intact.

Your decision to this effect is affirmed.

PRACTICE—PRE-EMPTION CONTEST.

BROWER *v.* SPRAGUE.

Only in exceptional cases should contests be allowed against pre-emption claims before offer to make final proof.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 2, 1888.

This is an appeal from your office decision of February 8, 1877, affirming the refusal of the local officers to allow the contest of said Brower against the pre-emption declaratory statement of Emma Sprague for SW. $\frac{1}{4}$, Sec. 24, T. 1 N., R. 44 W., Denver land district, Colorado.

Brower first presented his affidavit for contest June 29, 1886, but for irregularity of affidavit the local officers rejected the said application. On August 30, 1886, the same was amended and refiled and again rejected.

On October 5, 1886, Sprague presented final proof which was rejected by the local officers, and from which Sprague appealed, and on January 5, 1887, she formally withdrew her appeal and signified her desire to abide by the decision of the local officers.

In view of this action of Sprague your office by said letter of February 8, 1887, dismissed her application to enter and also Brower's application to contest Sprague's right to pre-empt. You did not, however, pass upon the issues presented by Brower's appeal, viz: was the refusal to allow Brower to contest, solely upon the ground that his affidavit was sworn to before the register of the land office at McCook, Nebraska, in accordance with law.

In view of the conclusion I have reached in this case upon another ground, it is not necessary to decide whether or not a register of a local land office has authority to administer oaths in connection with the entry or purchase of any tract of public lands even though said lands are outside of his local district.

The local office properly refused to entertain his affidavit of contest, as said Brower was undertaking to contest a mere declaratory statement.

Contests against pre-emption claims unless in exceptional cases should not be permitted before offer to make final proof. *Bailey v. Townsend* (5 L. D., 176); *Percival v. Doheney* (4 L. D., 134).

Therefore as Sprague has withdrawn her appeal from your said decision and no right claimed by her is to be decided in this action and as the attempt of Brower to inaugurate a contest was prematurely brought, your said office decision is affirmed.

PRE-EMPTION FINAL PROOF—RESIDENCE.

LIZZIE B. LARKIN.

Evidence showing a sufficient period of residence warrants the conclusion that the land was taken for a permanent home, where it does not appear that the settler had any other home, and nothing in the character of the improvements on the land is inconsistent with the claim of an actual home thereon.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 2, 1888.

This is an appeal from your office decision of February 11, 1887, holding for cancellation claimant's pre-emption cash entry for the SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, W. $\frac{1}{2}$ SW. $\frac{1}{4}$, and SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 22, T. 152, N., R. 62 W., Grand Forks district Dakota, for the reason that the improvements made are insufficient to establish the fact that the land was taken for a home.

The evidence shows that the improvements consisted of a house six by eight feet, well and twelve acres of breaking, valued at \$125.

The claimant filed declaratory statement March 18, 1884, and alleged settlement July 1, 1882. The township plat was filed March 17, 1884.

The proof shows she was a single woman and that she did not become twenty-one years of age until May 16, 1884, but that when she made said filing she was not aware that it was necessary for her to be twenty-one years of age in order to make filing on public lands: She further swears that she made said filing in good faith and without intention to prevent other qualified settlers from settling thereon. On October 14, 1886, her final proof was rejected by the local officers for the reason "that at the time of filing she was not twenty-one," which decision was reversed by your office, on her appeal, on the ground that, "under the

present practice of this office, a filing made by a party before attaining his majority, may stand in satisfaction of his pre-emption rights, provided no valid claim intervenes prior to the date of the removal of his disqualification," and the proof was returned for the further consideration of the local officers, with the suggestion that, "It may be remarked that the improvements are not, it would seem, of a sufficiently substantial character to lead to the conclusion that the land is taken for a permanent home."

Upon this suggestion and without further proof the local officers rejected claimant's proof for the reason above given and by your said office letter of February 11, 1887, you affirmed their decision.

The witness Avery, whose affidavit was filed in the final proof, testified on cross-examination; that he had lived near the said land from May 1884, that claimant had resided thereon most of the time from that date until April 1, 1886, after which date she had lived there all the time without interruption. "I have been on her claim and at her house many times. Her house is in plain view from mine, I know positively that she has resided there as I have stated and has improved and cultivated the land as stated. Claimant is obliged to support herself by her labor."

The other witness, George Hipple, on cross-examination corroborated this in every particular.

The improvements mentioned in final proof affidavits are frame house six by eight feet, and twelve acres broken.

The question of the age of claimant at date of filing being decided by your said office letter of December 30, 1886, it only remains to review the latter decision, viz: "that the improvements made are insufficient to establish the fact that the land was taken for a home."

In *West v. Owen*, (4 L. D., 412,) it is held that

In order for an individual to establish residence on a tract of public land as required under the homestead law, it is necessary that there be a combination of act and intent upon his part, the act of occupying and living upon said tract and the intention of making the same his home to the exclusion of a home elsewhere.

Upon reading the case it will be observed that the entryman had never established his home upon said land at all, but that he lived most of the time with his family in Marion, Iowa, and only made occasional visits to the land which was occupied by his tenant.

In *Elliott v. Lee* (4 L. D., 301), the entryman had never *established* a residence, but had merely stayed all night once in a shanty erected on the land by some prior settler, and that six months from the date of his homestead entry, and hired ten acres of breaking done. In this case it was held that the evidence did not show that the entryman had *established* a residence on the land.

In the *Van Ostrum* case (6 L. D., 25), the entryman's family occupied another home between one-fourth and half a mile from the land claimed and never removed to the alleged homestead at all.

In case of Lulu Marshall (6 L. D., 258), it was held that a continuous presence of two months only, with erection of a house and six acres of breaking not cultivated to crops was sufficient, it being shown that subsequent absence was on account of illness.

In *Van Gordon v. Ems*, (6 L. D., 422) it was held a claim of residence was not consistent with the substantial maintenance of a home elsewhere, the evidence showing that the pre-emptor had another home in the immediate neighborhood in which he resided with his family most of the time.

In case of F. H. Sellmeyer (6 L. D., 792), this office said, "A person can not have the *bona fide* intent to make a home on two different tracts at the same time."

In each of these cases the decision of this Department was based upon the fact that the evidence in the case showed a real home at some other place or other facts incompatible with the conclusion that claimant had established an actual home upon the land claimed.

Under the evidence in this case I cannot concur in your decision, there being no showing or indication that claimant had any other home, or that anything in the character of her improvements was inconsistent with its being her actual home, more especially as the evidence shows her continual personal presence for more than six months, and most of the time for more than four years, which is of itself evidence of permanency at least during that length of time.

Your decision is, therefore, reversed.

PRACTICE—DISMISSAL—INTERVENING CONTEST.

ROUSCH ET AL. *v.* FORSYTH.

The wrongful dismissal of a pending contest in the local office, and the intervention of a second contest, will not defeat rights asserted under the first, when said dismissal was not brought about through any fault of the first contestant.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 2, 1888.

This case comes before me on appeal by contestant Henry Davies from your office decision of August 31, 1886, and from your office letter of November 12, 1886, refusing a reconsideration of your said decision.

It appears from the record that on December 11, 1885, Peter J. Rousch filed his contest affidavit against the homestead entry of Edward Forsyth, involving NW. $\frac{1}{4}$, Sec. 33, T. 118 N., R. 72 W., made April 7, 1884 at Huron, Dakota land office, alleging that said homestead claimant had not resided upon the tract for more than six months.

March 3, 1886, was fixed for hearing but neither party appeared and contest was dismissed by the local officers.

On the same day, and after the dismissal of said contest, Henry Davies filed a contest against the said homestead entry.

March 5, 1886, counsel for Rousch filed a motion for re-instatement of his contest, which was sustained and time for hearing was extended for sixty days. On April 12, 1886, Rousch filed a motion for continuance which was sustained and June 4, 1886, fixed for hearing.

May 4, 1886, Davies filed a motion to reconsider the re-instating of Rousch's contest, and on May 8th said motion was sustained and Rousch's contest again dismissed.

From this decision Rousch appealed to the Commissioner of the General Land Office, and upon this appeal your office by said letter of August 31, 1886, reversed the said decision of the local officers and re-instated the Rousch contest, deciding further that the "Davies contest may remain on file subject to the final determination of Rousch's contest."

By your letter of November 12, 1886, you overrule the motion of counsel for Davies to reconsider your said office decision and Davies appeals.

The question at issue is whether or not Davies became, as a matter of law, first contestant upon the dismissal of the Rousch contest on March 3, 1886, and whether by such dismissal his rights as contestant became superior to the rights of Rousch.

It appears from the evidence that no attempt had been made to have the notice of contest served on Forsyth at the date set for the hearing, viz: March 3, 1886, for the reason, that a defect was discovered in the jurat of the notary public to the affidavit of contest, and the clerk of the local office who had charge of contest matters agreed with Rousch's attorney that notice should not issue until after said defect was cured, that he destroyed the notice written up but failed to erase the entry on the records of the office showing that notice had issued; that such defect in the jurat was cured within thirty days, but the local officers failed to issue notice fixing time for hearing of contest and undertook to hear the same on the day originally set therefor, viz: March 3; and it does not appear that either Rousch or his attorney, was informed of the time for such hearing.

It will be observed that this is not a case of defective notice, but of no notice at all.

Counsel for appellant bases his claim on the alleged fact that he filed his contest upon a statement made to him by the local officers that Rousch's contest having been that day dismissed, there was no other contest pending for said land. This would doubtless be true had Rousch's contest been rightfully dismissed, but the said dismissal having been found to be wrongful and Rousch not having been shown guilty of any laches which brought about the same, he must be placed in *statu quo*, and his rights cannot be prejudiced by such wrongful dismissal.

Counsel for appellant rely upon *Mangin v. Donovan* (3 L. D., 565), as "establishing the practice, that if a contestant fails to appear at the

hearing he loses all rights under his contest if another contestant has intervened."

While this may be the rule of practice in the abstract it is not applicable to this case, for the reason that Mangin, the contestant (*supra*), had due notice but failed to appeal because "a land agent told him it was not necessary."

I can see no sufficient ground for disturbing your said decision, which is accordingly affirmed.

RAILROAD GRANT CONFLICTING SETTLEMENT CLAIMS.

NORTHERN PAC. R. R. CO. *v.* EVANS.

The failure to file a declaratory statement will not defeat a settlement right as against the United States, and the land covered thereby will be excepted from the operation of a withdrawal for the benefit of a railroad company attaching after the inception of such settlement right.

A claim, resting on settlement, improvement, and occupancy, existing when the withdrawal on general route took effect, serves to except the land covered thereby from the operation of such withdrawal.

Secretary Vilas to Commissioner Stockslager, August 4, 1888.

The Northern Pacific Railroad Company appeals from your office decision dated December 11, 1886, holding that the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 21, T. 6 N., R. 36 E., La Grande, Oregon, were excepted from the grant to said company, of July 2, 1864 (13 Stat., 365).

The tracts in question are within the forty mile limits of the statutory withdrawal for the benefit of said company, on map of general route of its road, filed August 13, 1870.

No map of definite location of said road, opposite to this land, has, as yet, been filed, nor has that part of the road been constructed.

On November 12, 1885, the defendant, Thomas J. Evans, made application to file pre-emption declaratory statement for the land in controversy, accompanied by the affidavits of himself and two corroborating witnesses, alleging that the said tracts were covered by a settlement claim prior to and on the 13th day of August, 1870, which excepted them from the operation of the statutory withdrawal which took effect on that day.

The company being notified of said application, appeared by counsel and filed its objection to the allowance thereof, and thereupon the local officers ordered a hearing to determine the rights of the respective parties litigant.

The hearing was accordingly had, and upon the testimony taken, the local officers found for the claimant, Evans, holding that the land in dispute was not included in the said withdrawal for the benefit of the

company. On appeal from this finding your office affirmed the same and rejected the company's claim to the land.

The testimony in the case shows that one Stephen Cottichu settled on the land in the year 1862, and made valuable improvements thereon. He built a log house, dug a well, fenced about one hundred acres and broke thirty-five or forty acres. In the year 1865 he sold his improvements and possessory right to one Alfred Evans, the father of defendant, and present claimant, who, it appears, occupied, claimed and improved the said land until the year 1868, when he sold the improvements then existing thereon, together with his possessory right, to his said son, the defendant.

The defendant settled upon the land in October, 1868, and remained in possession of, and occupied, cultivated and improved the same, from that time up to the date of the hearing.

It is further shown that defendant's improvements on the land were worth, on August 13, 1870, about \$800, and at date of hearing, by reason of the additions made thereto in the meantime, such improvements were worth about \$1500. Defendant swears that he settled on the land with the intention of claiming the same under the pre-emption law, and it is shown that he applied to file therefor in the spring of 1871, but his application was then rejected by the local officers, because of the supposed effect of said withdrawal of August 13, 1870. He erected a dwelling on the land in the spring of 1883, and appears to have established his residence therein soon thereafter, and from that time to date of hearing, he resided on the land, together with his family, consisting of a wife and five children, continuously. He is also shown to have been a qualified pre-emptor in all respects.

The sole question presented for determination in this case, is whether the land in question was, at the date of said withdrawal for the benefit of the company, August 13, 1870, free from a pre-emption or other claim? If it was free from such a claim at that date, it comes within the operation of such withdrawal; if not, the withdrawal did not effect it.

Now, while Evans had no pre-emption claim of record at the date when said withdrawal took effect, it nevertheless is shown that he had a *claim* upon the land which he had acquired by his settlement thereon in October, 1868, and by his purchase from his father at the same time, of certain valuable improvements previously made thereon by the latter and another and prior pre-emption claimant by the name of Cottichu. True he did not establish actual residence on the land until the year 1883, but he continuously exercised acts of ownership thereof, and occupied, cultivated and improved the same from the date of his settlement as stated, until the time of the hearing. He applied to file for the land in 1871, and was denied, as shown, but notwithstanding this fact, he adhered to his claim to the land and continued to improve it.

His acts taken all together, I think, furnish strong and convincing proof of the truth of this statement; that at the date of his settlement

and purchase, as shown, it was his intention to claim the land and to acquire title thereto under the pre-emption law. He was in possession of and claiming the land prior to and at the date of said withdrawal, and there being no adverse settlement claim, it was within his power, under the law, during the period of his possession to have made and perfected a pre-emption claim to the land. This is what he endeavored to do in 1871, as stated.

It is well settled by departmental rulings that the omission to put a claim of record, while it might defeat such claim as against a subsequent settler who duly files, will not defeat it as against the United States, and the land covered thereby will be excepted from the operation of any withdrawal for the benefit of a railroad company attaching subsequently to the inception of the settlement right. See case of *St. Paul, M. & M., Ry. Co. v. Klosterman*, decided April 26, 1888 (not reported); *Trepp v. N. P. R. R. Co.* (1 L. D., 380); *Emmerson v. Central Pac. R. R. Co.* (3 L. D., 117 and 271); *Pointard v. Central Pac. Railroad Co.* (4 L. D., 353); *Ramage v. Central Pac. R. R.* (5 L. D., 274).

In the case under consideration I think that Evans had, by his settlement and purchase of improvements as shown, and by his subsequent occupancy, cultivation and improvement of the land, made such a settlement as indicated his purpose to make the tract his home, and such as gave him a right, as between himself and the government, to take the land under the pre-emption law. Besides, he swears that such was his intention and is in no sense contradicted.

I must, therefore, hold that he had such a claim to the land as excepted it from the operation of the withdrawal mentioned.

Your office decision rejecting the claim of the railroad to said tracts is therefore affirmed.

FORT SANDERS MILITARY RESERVATION.—EXECUTIVE ORDER.

MORTIMER N. GRANT ET AL.

An order setting apart lands for penitentiary purposes would not operate to relieve said lands from a prior military reservation; but such second appropriation of the land, made by the authority of the Interior Department, with the concurrence of the War Department, and for a purpose not inconsistent with the original withdrawal, would be conclusive as against any other appropriation of the land.

A reservation thus created for penitentiary purposes, would not, in the absence of express words indicating such intent, be held to have been abrogated by an act of Congress relieving said land from the military reservation.

Acting Secretary Muldrow to Commissioner Stockslager, August 4, 1888.

I have considered the several appeals of Mortimer N. Grant and Eleanor M. Corthell from your office decision of May 10, 1886, rejecting their several applications to enter certain lands under the desert land

act. Their applications were made to the register of the Cheyenne land office, February 24, 1886; Mortimer N. Grant for the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$ of SW. $\frac{1}{4}$, Sec. 32, T. 16 N., R. 73 W.; Eleanor M. Corthell for the W. $\frac{1}{2}$ of NW. $\frac{1}{4}$ of the said section, township and range, Cheyenne land district, Wyoming.

Thereupon, February 28, 1886, the register at Cheyenne, for the reason that "an examination of the plats reveals the fact, that the United States Penitentiary for Wyoming is situated on NE. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of the same section," referred the said applications to your office, requesting instructions in the matter.

Your office in letter to the local officers of Cheyenne land district, dated May 10, 1886, states :

"In a communication of the Department, addressed, August 4, 1871, to M. C. Brown, Esq., Superintendent of Construction, Wyoming Penitentiary, Laramie City, W. T., by R. B. Cowen, Acting Secretary, is the following paragraph :

The penitentiary will be located on a tract of land containing six hundred and forty acres, within the Fort Sanders military reservation, in the Territory of Wyoming, and designated by the Commissioner of the General Land Office as the east half of Sec. 31 and W. $\frac{1}{2}$ of Sec. 32 of Township 16 north, Range 73 west, being the site selected by the Commissioners for that purpose by Governor Campbell, pursuant to an act of said Territory, approved December 8, 1869.

"From this paragraph, it appears that the tracts therein described are reserved for the purpose indicated. Therefore the land embraced in said application being a portion of the land thus reserved, is not subject to entry. You will reject the application and notify the party in interest of the contents hereof."

The said applications were therefore rejected and the applicants appealed to this Department.

The tracts in question formed a part of the Fort Sanders reservation, established by Executive orders of January 7, 1867, and June 28, 1869.

By act of Congress, approved June 9, 1874, the said tracts, together with other lands, were eliminated from said reservation, and made subject and liable to the operation of the laws of the United States in the same manner and to the same extent, as if the said lands so eliminated had never been included within the limits of the said reservation.

By act of Congress, approved January 22, 1867 (14 Stat., 377), the net proceeds of the internal revenue of the territories of Nebraska, Washington, Colorado, Idaho, Montana, Arizona and Dakota, for the term of three years, were set aside and appropriated to and for the purpose "of erecting, under the direction of the Secretary of the Interior, penitentiary buildings, in said several territories, at such places therein as have been or may be designated by the legislatures thereof and approved by the Secretary of the Interior."

The Territory of Wyoming was organized by act of Congress, approved July 25, 1868, and in an act, approved July 15, 1870 (16 Stat.,

314), Congress provides and appropriates "For the erection of penitentiary buildings in the Territory of Wyoming, forty thousand dollars, or so much thereof as shall be necessary: *Provided*, That the said sum be set apart from the proceeds of collections of internal revenue tax in that Territory, to be appropriated for said purpose only, and expended under the direction of the Secretary of the Interior."

The legislature of the Territory of Wyoming, by act of December 8, 1869, and through duly authorized commissioners, appointed by the governor of said Territory, under the provisions of the said act, designated the east half of Sec. 31, and the west half of Sec. 32, T. 16 N., R. 73 W., as the site for the erection of penitentiary buildings for the said Territory. Secretary Delano, February 13, 1871, addressing J. C. Campbell, Governor of Wyoming Territory, referring to the erection of such buildings and the selection of a site for the same, writes:—

The act of 1870, was but a continuation of the policy inaugurated by the act of January 22, 1867 (ref. Vol. 14, page 377). This latter act expressly requires that the sites of the penitentiary buildings in the territories therein named should be approved by the Secretary of the Interior. The act of 1870, prescribes that the fund shall be expended under his direction. This provision, by clear implication, and in the absence of any preceding legislation with regard to the other penitentiaries, requires that the site should receive his sanction. . . . The buildings when completed will be the property of the United States, and I shall make the contract therefore and appoint a superintendent of construction. . . . The following action will be my approval of the site, and to that end a duly certified copy of the legislative act, designating it, is indispensable.

By your office letter of April 20, 1887, addressed to the local officers, at Cheyenne, Wyoming Territory, you state, among other matters, as follows: "On August 4, 1871, the east half of section thirty-one (31) and the west half of section thirty-two (32), township sixteen (16) N., range seventy-three (73), Wyoming, were designated and set apart by the Acting Secretary of the Interior, with the consent of the Secretary of War, as a site for the United States Penitentiary for Wyoming."

The consent of the Secretary of War, referred to above, was given August 1, 1871.

It may be conceded that the order setting apart these lands for penitentiary purposes would not operate to relieve said lands from the prior reservation made for military purposes, yet it does not follow, that such second appropriation of said lands, made by the authority of this Department and with the concurrence of the War Department, and for a purpose not inconsistent with the original withdrawal, would not be conclusive as against any other appropriation of the land. The reservation thus created for penitentiary purposes can not, in the absence of express words indicating such intent, be held to have been abrogated by the act of Congress, which relieved said land from the military reservation. The said applications of the appellants were therefore properly rejected.

Your decision is accordingly affirmed.

HOMESTEAD DECLARATORY STATEMENT—APPLICATION.

MARIA C. ARTER.

By the filing and abandonment of a soldier's homestead declaratory statement, the right to make homestead entry is exhausted; and there is no distinction in this particular between a filing made by the soldier himself, and one by his widow, or the guardian of his minor children.

A legal application to enter, while pending, withdraws the land embraced therein from any other disposition until final action thereon.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 4, 1888.

I have considered the appeal of Maria C. Arter from the decision of your office of March 23, 1887, affirming the action of the local officers in rejecting her application to make homestead entry on the SW. $\frac{1}{4}$, Sec. 35, T. 32 N., R. 17 W., Valentine district, Nebraska.

The appellant made such application under the general homestead law March 1, 1887, and it was rejected by your office on the ground, first, that applicant had exhausted her homestead right by filing October 12, 1883, as widow of a deceased United States soldier, a soldier's declaratory statement, No. 48, for another tract of land—to wit, the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 34, T. 32, R. 17, in said land district. This filing was made under Sections 2304 and 2307 of the Revised Statutes, and was subsequently abandoned, no further proceedings being had thereunder.

By the filing and abandonment of a soldier's homestead declaratory statement, the right to make homestead entry is exhausted. *Stephens v. Ray* (5 L. D., 133); Circular of December 15, 1882, Sub-div. 4, 1 L. D., 648; General Circular of March 1, 1884, p. 22. There is no distinction in this particular between a filing of such declaratory statement by the soldier himself and such filing by his widow or the guardian of his minor children.

The application of the appellant was also rejected by your office on the further ground that "the application of one A. A. Brubaker, to enter the same land, was pending on appeal" to this Department. "A legal application to enter, while pending, withdraws the land embraced therein from any other disposition until final action thereon." *Pfaff v. Williams et al* (4 L. D., 455); *Davis v. Crans et al* (3 L. D., 218).

The decision of your office is affirmed on both of said grounds.

PRACTICE—EVIDENCE—REHEARING.

SUTTON ET AL. v. ABRAMS.

The statements of a party to his attorney are not admissible in evidence as against the interest of such party, and an offer to prove such statements would therefore not furnish any ground for a new trial.

A new trial will not be granted on the ground of newly discovered evidence, where such evidence tends simply to discredit or impeach a witness; nor unless it is of that character as to necessarily cause the trial court to arrive at a different conclusion.

In motions for rehearing, resting on alleged newly discovered evidence, it should be shown that such testimony could not have been discovered by due diligence, and the facts relied upon to show such diligence should be specifically set forth.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 2, 1888.

On December 1, 1887, the attorney for David H. Sutton and Henry A. Hockett, filed a motion asking for a review of departmental decision of October 26, 1887 and for a rehearing in the case of said parties against David A. Abrams, involving the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 8, and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of Sec. 9, T. 5 S., R. 84 W., Glenwood Springs, Colorado land district.

Said departmental decision awarded the land in controversy to Abrams and held for cancellation the pre-emption filing of Hockett as to the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section 8, and also the pre-emption filing of Sutton as to the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of said section 8, and the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$ of said section 9.

The motion now under consideration was made "on the ground of newly discovered evidence, viz: the testimony of Charles A. Hinckley, Robert Matthews and William F. Wood, which shows that the settlement of contestee was not made in good faith, but for speculative purposes and that the filing by him was therefore void" and the affidavits of the witnesses named are filed with said motion. The motion is verified by the affidavit of R. A. Burton, attorney for the applicants wherein he says, "the facts set forth as a basis for rehearing, re-examination and review were not known by him, nor by the contestants as he is informed and believes, at the time of the hearing had before the local office."

On December 6, 1887, the attorney for Abrams filed an argument against granting the motion for a rehearing, urging that Mr. Burton not being engaged in the case at the time of the trial before the local officers, could have no personal knowledge of the efforts to obtain this testimony at that time and was therefore not the proper person to make the affidavit required in such cases; that it is not alleged, that due diligence was used to discover the evidence now desired to be introduced, that this evidence is not in fact newly discovered and that Hinckley, whose affidavit is one of those filed in support of the motion, was Abrams' attorney at the time the statements he swears to in his affidavit are alleged to have been made, and as such attorney conducted the trial of this case before the local officers.

On January 7, 1888, the attorneys for Abrams filed affidavits contradicting the statements made in the affidavits in support of said motion.

On January 14, 1888, there was filed in support of said motion the affidavit of J. A. Ewing, setting up that he was one of Sutton's attorneys, that he had from time to time during the entire contest as to this land consulted with said Sutton and knew at all times the facts known by Sutton; that he knows that the facts set forth in the affidavits of

Hinckley, Matthews and Wood were not known to Sutton, or the affiant, and that they could not have been discovered by due, ordinary or reasonable diligence, at the time of the hearing before the local office, and that he makes this affidavit as the attorney of said Sutton because of his (Sutton's) death. On March 3, 1888, the attorneys for Sutton filed the affidavit of Wm. E. Goodal in support of their motion for a rehearing.

The evidence upon which the motion is based is to the effect that Abrams, in his life time and about the time he made his filing, had told these parties that one Dr. Eyer, of Leadville, Colorado, was interested with him in the claim, that said Eyer was furnishing the money to improve the claim and was to have one-half of it after patent was issued. It also tends to show that Abrams in paying for work and improvements on the place, frequently gave orders on said Eyer who paid the same.

Goodal, one of the witnesses whose affidavit was filed states that, he did certain work for Abrams and received in payment therefor an order on Dr. Eyer of Leadville, who paid the amount thereof. Upon his cross-examination in the trial of this case Abrams was asked if he did not pay Goodal for work by an order on Eyer, and answered that he did, and admitted the same as to other parties, so that these statements can not be called newly discovered evidence since the fact was admitted on the hearing.

The other newly discovered evidence consists of the testimony of Hinckley, Matthews and Wood, to the effect that Abrams had stated to them that Eyer was to have an interest in the land covered by his pre-emption claim. It appears that Hinckley at the time of the statements he refers to, was acting as attorney for Abrams and that the statements, if made, were made to him or in his presence in the capacity of such attorney. This testimony would not be admissible on a new trial, and therefore, his affidavit does not furnish grounds for a new trial.

From an examination of the testimony taken at the hearing in this case it will be seen that the plaintiffs endeavored to show that there was an agreement between Abrams, the defendant, and Eyer, by which Eyer was to furnish money for the improvements on Abrams' claim, and in consideration thereof was to have one-half the land embraced in this claim. On cross-examination Abrams was asked if there was not such an agreement between him and Eyer, and positively denied it. He explained the business relations existing between him and Eyer by saying, that they had an agreement by which Eyer furnished a certain number of cattle which he, Abrams, cared for and that they shared in the increase of those cattle, and that Eyer still owed him something as his part of the profits of that undertaking. The testimony now proposed to be submitted would tend to contradict the testimony of Abrams, who has since died, but would not necessarily establish the fact that Abrams' filing was illegal, nor would it necessarily change the findings on this question.

It is a well established rule that a new trial will not be granted on the ground of newly discovered evidence where such evidence tends simply to discredit, or impeach a witness nor unless it is of that character as to necessarily cause the trial court to arrive at a different conclusion.

Even if the testimony relied on for gaining a new trial in this case was competent and sufficient, the motion does not show what diligence was used to discover this prior to the trial, nor is it shown when the testimony was first discovered, nor is it shown or even stated that Hockett, one of the contestants, did not know of the testimony prior to the trial. His affidavit is not filed nor is any reason given for not filing it.

In motions of this kind it must be shown that said testimony could not have been discovered by due diligence, and the facts relied on to show due diligence should be set forth in the motion.

For the reasons herein set forth the application for a new trial and a rehearing is denied.

COMMUTED HOMESTEAD ENTRY—FINAL PROOF—EQUITABLE ADJUDICATION.

JOHN R. PAYNE.

In the absence of any protest against the entry, or adverse claim, it may be sent to the Board of Equitable Adjudication, on filing new final affidavit, where the testimony of the claimant and his final affidavit were taken prior to the day fixed therefor in the published notice.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 2, 1888.

I have considered the appeal of John R. Payne from your office decision of March 11, 1887, rejecting his final proof under homestead entry for Lots 2 and 4 and the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 14, T. 151 N., R. 61 W., Grand Forks land district, Dakota.

Payne made homestead entry for this land September 19, 1884, and advertised to make final commutation proof thereunder on October 1, 1886, before H. D. Fruit, probate judge and ex-officio clerk of probate court of Nelson county, Dakota. The claimant's testimony was, however, taken on September 18, 1886, he filing therewith his affidavit stating "that the reason he appears on this the 18th day of September, 1886, at Dakota, Dakota Territory to have testimony taken in support of his homestead proof for Lots 2 and 4, and the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 14, T. 151 N., R. 61 W., is that affiant will be temporarily absent at the time set for taking affiant's proof on account of being necessarily called away to settle up an estate of a deceased relative in England. Affiant further swears that he leaves all his stock on said land in care of his agent on said land and that affiant fully intends to return to said land and to continue to cultivate same and to reside thereon."

The testimony of the witnesses to the final proof was taken at the time and place specified in the published notice. This proof was rejected because the "evidence and final affidavit of claimant was not taken on the day designated in his published notice of intention to make final proof."

Upon appeal to your office the action of the local officers was approved; said proof was rejected with the proviso that "the claimant may proceed to republish and submit the proof already taken, filing therewith a new final affidavit, and his own testimony taken on the day fixed."

The final proof submitted shows improvements on the land to the value of \$700, and a continuous residence for two years immediately preceding the date of said proof; and that the claimant when he started to England on September 19, 1886, left on his claim all his farm machinery and stock. In an affidavit dated April 18, 1887, and filed with the appeal from your office decision, the claimant states that he was then residing on the land and had fifty acres thereof in crop, and that all his stock, farm machinery, household goods and personal effects had been on the land ever since the offering of final proof.

Although the claimant's testimony was submitted prior to the date fixed therefor by the published notice, yet the testimony of the witnesses being taken at the time and place fixed, an opportunity was given to all interested to appear and object to said proof. It appears from the papers before me that no one objected to said proof, and that there is no adverse claimant for the land. Under all the circumstances of this case it seems to me that justice will be done and the rights of all parties in interest properly protected by allowing the claimant to complete his entry by filing within sixty days of notice hereof, a new final affidavit and making payment for the land at the same time, upon which said entry should be submitted to the Board of Equitable Adjudication for action thereon. Or if he so prefer the claimant may re-advertise and submit new final proof at any time within the life of his original entry.

Your said office decision is modified in accordance with the views herein expressed.

PRACTICE—ENTRY—TIMBER LAND PURCHASE.

GROVE v. CROOKS.

During the pendency of a case on appeal, the local office should take no action affecting the disposal of the land until instructed by the Commissioner of the General Land Office.

A filing should not be allowed for land while it is covered by the homestead entry of another.

An application to purchase under the act of June 3, 1878, must be rejected, unless it appears that the land would be unfit for ordinary cultivation if it was cleared of timber.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 6, 1888.

I have considered the case of Luther E. Grove *v.* William H. Crooks, as presented by the appeal of the latter from the decision of your office, dated March 23, 1886, rejecting his application to purchase, under the act of June 3, 1878 (20 Stat., 89), the S. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 33, T. 5 S., R. 21 E., M. D. M., Stockton land district, in the State of California.

The record shows that said Crooks filed his timber land application, No. 43, for said land, on November 11, 1882; that one Sidney F. Hadsell filed his pre-emption declaratory statement, No. 11,063, for said tracts on July 11, 1881, alleging settlement thereon July 7th same year; that one Alvin M. Acton filed his pre-emption declaratory statement, No. 12669, for said land on October 6, 1884, alleging settlement thereon July 10th, same year; and that said Grove made homestead entry, No. 4197, of the land in question on July 19, 1884, alleging settlement July 10th, same year.

A contest was had between said Crooks and Hadsell, which was finally determined by departmental decision, dated December 17, 1884 (3 L. D., 258), wherein it was held that Hadsell had the prior claim, and that Crooks application should be subject thereto; that if Hadsell failed to make the required proof, "Crooks may proceed to show the character of the land, and prosecute his case under the act of June, 1878."

It appears that Grove was allowed to make homestead entry of the land, after the publication of notice by Crooks, and that Acton was allowed to file for said land after the entry of the same by Grove. This action of the local officers was irregular. Grove should not have been permitted to make entry of said land while the case of Crooks *v.* Hadsell was pending in this Department. See Rule of practice No. 53. Acton should not have been allowed to file for said land so long as the same was covered by Grove's said entry. *James et al. v. Nolan* (5 L. D., 526).

It further appears that at the request of said Crooks, all parties in interest were duly notified to attend a hearing to be held before the local and officers, on May 22, 1885, and show cause why the timber applicant should not be allowed to enter said land. The hearing was duly had, and from the evidence submitted by both parties, the local land officers found that Hadsell sold his improvements to Grove on July 19, 1884, for the sum of ten dollars; that Grove repaired the house and fence, and planted a few vegetables; that his own statement shows that Grove carried his blankets to said claim and slept thereon ten or twelve nights in July or August, 1884, while he was repairing the house; that in the latter part of August, 1884, Grove went to San Francisco and obtained employment until December, when he obtained leave of absence and slept on the land, one night, and he had not been again upon the land up to the date of hearing; that he has had no furniture in the house, except a stove put there by his father in October or November,

1884; that Grove voted in San Francisco in November, 1884, having registered as a voter in September prior thereto; that six witnesses testified concerning the character of the land, two of whom, namely Grove and his father, may be considered parties in interest, and due allowance should be made in weighing their testimony; that the testimony of F. H. Gould, county surveyor, shows that a portion of said land is rocky, all of it hilly, except one or two places along the creek; that the land is covered with heavy timber, and is chiefly valuable for the same; that there are not more than five acres on each forty that can be cultivated, and not more than fifteen acres on the whole tract that can be profitably cultivated; that two thirds of said land might produce a crop if cleared, but it would cost more to clear the land than it is worth; that the witness Flemmons thinks that not more than fifteen acres of the land could be profitably cultivated; that the witness LaTouche changed his opinion as to the character of the land, from that given by him at a former hearing; that his cross-examination, as well as that of O'Neal, shows that, although they have attempted to farm land similar in character and near to the tracts in question, yet they have not succeeded in deriving any profit therefrom; that the contestant and his father believe that three-fourths or two-thirds of the land in question could be cultivated, if cleared.

The local officers further state in their opinion that most of the land entered in the immediate vicinity of the land in controversy has been entered as timber land, and they hold "that the land in contest is unfit for ordinary cultivation, valuable, chiefly, for its timber," and that the filings of Hadsell and Acton and the entry of Grove should be canceled.

Your office, on appeal, held that the timber land applicant had failed to show "that the land in question, at the date of the application, was unfit for cultivation and without improvements other than those excepted by the act."

From an examination of the testimony, I am of the opinion that the land in question is not subject to entry as timber land. The witness Gould, upon whose evidence the local officers lay special stress, in answer to the question, "How much of this land is subject to cultivation, for a crop, without first removing the timber?" testified (Ev. p. 19), "There are little spots here and there in several places, but really I don't believe you will find more than five acres of land that is not covered with rock and timber;" that there are not, in his judgment, five acres on each of the forty acre tracts that "could be cultivated at present." In answer to the question, "In your judgment, except the two small spots of about five acres that you speak of, would this land produce a crop if cleared and cultivated," Gould answered (Ev. p. 20), "I am inclined to think it would, judging from the character of the soil." Being asked "about what portion", the witness replied, "two-thirds of it could be cultivated; would raise a crop, that is, the soil is such." Gould was a witness for the timber applicant, and his evidence as to the character of the soil is

corroborated by the witness is for the entryman. Since the applicant has failed to show that the land would be unfit for ordinary cultivation if it was cleared of timber, his application must be rejected. *Spithill v. Gowen* (2 L. D., 231); *Rowland v. Clemens* (ibid., 633).

While the evidence shows that the land is not subject to entry under the act of June 3, 1878, it is also proven that the homestead entryman has not complied with the law in good faith. This is shown by the very short time spent on the land, the meager improvements made, and the fact that while claiming to reside on said land, he voted in the city of San Francisco, many miles away, and in a different precinct from that in which said land is situate. The homestead entry should be canceled. *Showers v. Friend* (3 L. D., 210); *Merritt v. Short* (ibid., 435).

Acton having failed to appear at said hearing, or appeal from the decision of the local office, his said filing should be canceled, and the land held subject to the claim of the first legal applicant.

The decision of your office is accordingly modified.

ADDITIONAL TOWNSITE ENTRY.

MORGAN CITY.

An additional townsite entry cannot be allowed to a town that holds, under its former entry, more land than its present population would entitle it to enter.

Acting Secretary Muldrow to Commissioner Stockslager, August 6, 1888.

I have before me the appeal of Samuel Francis, mayor of Morgan City, from your decision of January 18, 1887, holding for cancellation said city's (additional) townsite cash entry for the SE. $\frac{1}{4}$, Sec. 36, T. 4 N.; R. 2 E., Salt Lake City, Utah.

Section 4 of the act of March 3, 1877 (19 Stat., 392), under which said additional entry was made, provides, that (any) such additional entry shall not together with all prior entries be in excess of the area to which the town may be entitled at the date of the additional entry by virtue of its population as prescribed in section 2389 of the Revised Statutes.

It appears by the record that "at the date of the additional entry" Morgan City had only six hundred inhabitants; a number which, under section 2389 of the Revised Statutes would entitle it to no more than six hundred and forty acres in all. The town, however, already holds, under its former entry, eight hundred and eighty acres, or two hundred and forty acres more than its present population would entitle it to get.

It is clear, therefore, that the allowance of the additional entry would cause the town's holding to be still more largely "in excess of the area to which the town (was) entitled at the date of (such) additional entry by virtue of its population."

Your said decision, cancelling such excessive entry, is accordingly affirmed."

HOMESTEAD ENTRY—RESIDENCE.

PATRICK MANNING.

Residence on land and presence thereon are not synonymous or convertible phrases.

Actual presence on the land is necessary in the first instance in order to acquire residence, as the entryman must go on the land for that purpose, but continuous presence thereafter is not essential to the continuity of such residence.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 6, 1888.

I have considered the appeal of Patrick Manning from the decision of your office of December 7, 1886, rejecting his final proof and suspending his homestead entry No. 999, for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 30, T. 23 N., R. 38 E., Spokane Falls district, Washington Territory.

The claimant made said homestead entry, March 27, 1880, and final proof thereon August 15, 1885.

The proof shows that the claimant went upon the land in August, 1880, and built a house, and "during the years 1880-1-2, he was on the land about two or three months each year, never being absent more than three months at a time and then remaining on the land two or three weeks," and since May, 1883, about two years and three months before making proof, he lived upon the land all the time. He was a single man with no means of living or improving his claim except his daily labor, and his absences during the years 1880-1-2, were necessary to enable him to make a living and improve the land. His improvements consisted of lumber dwelling house, twelve and one half by sixteen feet, with one door and one window; a stable, cellar, corral, well, twenty-five acres broken, and two hundred and forty rods of fence—of the total value of not less than \$500. He cultivated one acre the first year, eight acres the second, ten acres the third year, and at date of proof had twenty acres under cultivation. He has had no other home since going upon the land in August, 1880.

The local officers accepted the proof and issued final certificate August 20, 1885. Your office held the proof insufficient, mainly on the ground that residence was not established until May, 1883, the date at which his continuous and uninterrupted presence upon the land commenced. In this I do not concur. "Residence is established from the time the settler goes upon the land with the *bona fide* intention of making his home there to the exclusion of one elsewhere." *Grimshaw v. Taylor*, 4 L. D., 330.

The extent and character of the claimant's improvements, the increase each year after the first in his acreage under cultivation, his continuous presence upon the land the two years and three months preceding his proof, and the fact that he had no other home, all combine to show clearly that when he went upon the land in August, 1880, and built his

dwelling his intention was "to make his home there to the exclusion of one elsewhere," and, hence, that he then established residence upon the land. He was actually upon the land, it is true, but a comparatively short period of time during the first three years, but his absences were with the intent of returning and necessary to enable him to live and to improve the land; hence, they were not evidence of an intent to abandon, and the residence which he had established was not lost or forfeited by such absences.

It is stated as one ground of the decision of your office that the claimant's "residence" was not "continuous" doubtless meaning thereby, that his actual presence upon the land was not continuous. Residence on land and presence thereon are not synonymous or convertible phrases. Actual presence on the land is necessary in the first instance in order to acquire residence as the entrymen must go on the land for that purpose; but continuous presence there after is not essential to the continuity of such residence once acquired. Residence having been established, subsequent absence *animo revertendi* and for a purpose which the law recognizes as a sufficient excuse for such absence, does not indicate an intent to abandon, and without such intent, the legal continuity of the residence is not broken, as, in such cases, the act and intent must concur.

If further evidence of the good faith of the claimant in this case were required, it is furnished in the affidavit which he files with his appeal to this Department, dated March 7, 1887, and corroborated by two witnesses, from which it appears that since making his proof he has lived upon the land uninterruptedly and put additional improvements thereon of the value of \$300.

The decision of your office is reversed and the entry will be passed to patent.

PRACTICE—SUCCESSFUL CONTESTANT—ACT OF JUNE 15, 1880.

SCHABER *v.* HOYT.

Where the successful contestant is apparently disqualified to enter the land, a cash entry thereof, under the act of June 15, 1880, made pending contest, will not be canceled, but suspended, and due opportunity given the contestant to assert his claim to a preferred right of entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 6, 1888.

I have before me the appeal of James Hoyt from your decisions of July 3, and July 31, 1886, holding for cancellation his homestead entry No. 1459, and cash entry No. 1704, for the SW. $\frac{1}{4}$, Sec. 19, T. 19 S., R. 21 W., Wa-Keeney district, Kansas.

Said homestead entry No. 1459 was made May 9, 1878.

Contest was instituted against the same, on the ground of abandonment, by Hilger Schaber, and notice of hearing under said contest, for June 22, 1885, was given by publication. At the hearing Hoyt did not appear, but Schaber and two other witnesses testified in support of the contest.

On January 16, 1886, the local officers decided in favor of the contestant, and on February 25, 1886, the entryman appealed.

On July 3, 1886, you affirmed the decision of the local officers in favor of contestant, and held the original homestead entry for cancellation.

On July 31, 1886, you held said cash entry No. 1704, for cancellation, "for the reason that said homestead entry was adjudged forfeited by this (your) office July 3, 1886, on the charge of abandonment made by Hilger Schaber April 22, 1885, and also because said cash entry was made pending contest in the case of Schaber *v.* Hoyt (13 Copp, 30)."

It was no doubt irregular to allow the cash entry during the pendency of Schaber's contest; but, as the suspension, pending a contest, of the contestee's right to purchase under the act of June 15, 1880, is insisted on solely for the sake of the contestant's preference right to enter in the event of his succeeding—and as the contestant here, Hilger Schaber, is apparently shown by the records of your office to be disqualified to enter the tract in question (he having it would seem already used his homestead, pre-emption, and timber culture rights) the irregularity is in this case a merely technical one, which need not be held fatal. The utmost that in my opinion should be done, under the circumstances, is to hold Hoyt's cash entry subject to such right to enter as Schaber may show himself qualified to exercise and shall actually offer to exercise within thirty days from and after notice to him of this decision.

Your said decision is modified accordingly.

PRACTICE—RECONSIDERATION—RES JUDICATA.

FRANCIS PALMS ET AL.

A final decision by the Secretary of the Interior is conclusive as to departmental action on the question therein involved, and will not be disturbed by his successor in office where no new question is presented for consideration.

Secretary Vilas to Commissioner Stockslager, August 7, 1888.

I have considered the appeal of Francis Palms, Ephraim A. Lynn, William S. Adams, George Riley and Frederick Keefer, transferees, from the decision of your office, dated March 11, 1887, refusing to re-instate military land warrants, Nos. 1, 2, 3, 4, 5, 6, 7 and 8; issued on account of the military services of Dan. Drake Henrie, under the provisions of the act of Congress approved January 26, 1849 (9 Stat., 755).

The record shows that said warrants were canceled by the Hon. Commissioner of Pensions, on July 13, 1871, pursuant to a request of

your office, dated March 18, 1871, for the reason that they had been erroneously issued, because your office, on February 17, 1849, issued two special warrant certificates of one section each, authorizing said Henrie, or his assignees, to enter free of cost one section of any of the public lands subject to private entry, which warrants were delivered to said Heurie, thus satisfying the provisions of said act relating thereto.

It further appears that upon the appeal of the transferees, the action of the Hon. Commissioner of Pensions, canceling said warrants, was affirmed by my predecessor, Secretary Delano (Pension Records, Vol. 1, p. 330); that, on the petition of the attorney of the assignees, my predecessor, Secretary Schurz, on June 19, 1879 (Pension Records, Vol. 6, p. 29), declined to re-open the case, as to the law, or the facts, on the ground that the same was *res judicata*. Your office declined to reconsider the case, for the reason that the decision of the Commissioner of Pensions has been twice affirmed by the Secretary of the Interior, and the case has passed in *rem judicatam*.

From the foregoing, it is quite evident that your office has no jurisdiction to review and revoke the adjudications of this Department.

The precise question presented here was passed upon by my predecessor, Secretary Schurz, who declined after the lapse of six years to re-open the judgment rendered by Secretary Delano. The objection urged against the decision of Secretary Delano, namely, that it was made inadvertently and without full knowledge of all of the material facts in the case, and did not state any reason for his decision, is without force, for if the question of the rights of the innocent purchasers of said warrants was not properly presented, it was the exact question involved, and must have been decided by the Secretary, as the appeal was taken by the transferees, claiming to be innocent purchasers.

The United States supreme court has repeatedly decided that a question properly involved, and which might have been raised and determined in a former case, is barred by a decision therein. *Stockton v. Ford* (18 How., 418); *Aurora v. West* (7 Wall., 82); *Moore v. Horner* (2 L. D., 594). But there can be no question that my predecessor, Secretary Schurz passed upon the exact question presented by the appellants, on precisely the same state of facts, and refused the petition of the appellants. This action is conclusive upon the Department. *Rancho Corte De Madera Del Presidio* (1 L. D., 232); *Higgins v. Wells* (3 L. D., 21); *Mansfield v. Northern Pacific R. R. Company* (*ibid.*, 537); *State of Oregon* (*ibid.*, 595); *Rancho San Rafael De La Zanja* (4 L. D., 482). In the last named case my predecessor, Secretary Lamar, said :

It is unnecessary to determine what conclusion I might reach, if the question as to the issue of the order was before me as an original question; but having been passed upon by my predecessor, with all the facts and law before him that are now submitted to me, I do not deem it consistent with good administration to reconsider his action. Unless the principle of *res judicata* is recognized, administrative action may become involved in chaos; the labors of the Department would become too cumbrous to admit of their intelligent discharge; uncertainty would cloud every inchoate title, and, in many instances, vested rights would be endangered.

See also the case of Henry A. Pratt *et al.* (5 L. D., 185.)

The application for the re-instatement of said warrants must be denied. The appeal in said case is dismissed.

RAILROAD GRANT—HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

NORTHERN PAC. R. R. CO. *v.* TAYLOR.

A cash entry, made under the act of June 15, 1880, and subsisting at date of definite location, excepts the land covered thereby from the operation of the grant, and this without regard to any subsequent decision as to the validity of such entry.

Secretary Vilas to Commissioner Stockslager, August 7, 1888.

I have considered the case of the Northern Pacific Railroad Company *v.* Jacob B. Taylor, on appeal by the former from your office decision of November 1, 1886, holding that the following tracts of land, viz: the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 31, T. 15N., R. 18 E., North Yakima, Washington Territory land district, were excepted from the grant to said company of July 2, 1864 (13 Stat., 365).

This land is within the limits of the withdrawal made on the filing of said company's branch line of road which took effect July 13, 1879. It is also within the granted limits of said grant as determined by the map of definite location of said road west from Yakima City filed May 24, 1884.

On January 2, 1877, Taylor filed pre-emption declaratory statement for said land, alleging settlement thereon December 23, 1876, which filing still remains of record uncanceled.

On June 20, 1879, Taylor made homestead entry for the same land, which entry was canceled September 18, 1880, upon the filing by Taylor of a relinquishment dated May 26, 1880, and acknowledged September 4, 1880. On October 9, 1883, said Taylor made application to purchase said land under the provisions of the second section of the act of June 15, 1880 (21 Stat., 237), which application was approved by the register, whereupon the applicant paid the purchase price for said land and cash certificate issued bearing date of February 7, 1884. This entry remained intact on the record at the date of the filing of the map of definite location. It is admitted by the appellant that Taylor's homestead entry under the rulings of the Department, excepted the tract from the withdrawal on general route, but it contends that his relinquishment after the passage of the act of June 15, 1880, was a complete waiver of any right he had under that law, and the admission by the local officers of his entry under said law, was an illegal act without authority of law, and said entry was consequently void and could not operate to defeat the company's claim. This contention cannot be sustained. This entry so long as it remained of record, served to segregate the land covered thereby from the public domain, and this without regard to any subsequent decision as to its validity.

The question as to the validity of this entry so far as the records before me show has not yet been determined in your office.

I concur in the conclusion reached in your office decision, that Taylor's cash entry prevented the attachment in the company, of any right to the land covered thereby, on the filing of the map of definite location, and the same is hereby affirmed.

RAILROAD GRANT—SELECTION—PRE-EMPTION FINAL PROOF.

CENTRAL PAC. R. R. CO. v. GEARY.

A pending selection of record entitles the railroad company to special notice of intention to submit final proof and make entry of the land.

Final proof should not be received, or considered, while the land for which it is offered is covered by a pending indemnity selection.

Secretary Vilas to Commissioner Stockslager, August 7, 1888.

I have considered the case of the Central Pacific Railroad Company v. John Geary on appeal by the former, from your office decision of November 3, 1886, affirming the action of the local officers and allowing Geary to make pre-emption entry of the NW. $\frac{1}{4}$ of Sec. 27, T. 36 N., R. 1 W., M. D. M., Shasta California land district.

This tract is within the indemnity limits of the grant of July 25, 1866 (14 Stat., 239) to the California and Oregon Railroad Company, now the Central Pacific Railroad Company, Oregon branch, as shown by said company's map of definite location filed August 5, 1871. The lands in the indemnity limits were withdrawn by letter of August 25, 1871, received at the local office September 6.

Township plat was filed in the local office August 17, 1883.

On November 27, 1885, one Jennie V. Frisbie made application to purchase the SW. $\frac{1}{4}$ NW. $\frac{1}{2}$, and the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section, as timber land.

On January 5, 1886, Geary filed pre-emption declaratory statement for the NW. $\frac{1}{4}$ of said section alleging settlement November 23, 1885.

On January 7, 1886, the Central Pacific Railroad Company applied at the local office to select as indemnity the land covered by Geary's filing, which application was rejected, and appeal taken to your office which appeal was still pending there at the date of your office decision of November 3, 1886 now under consideration.

On January 18, 1886, Geary filed his affidavit alleging that said land was more valuable for agricultural purposes than for the timber thereon and asking that a hearing be ordered to determine the character of the land.

Hearing was ordered for March 3, 1886, and notice thereof duly served on the timber land applicant. On that day Frisbie made default. Geary appeared with his witnesses and the attorney for the

Central Pacific R. R. Co. appeared and filed protest against the hearing and against the allowance of either Geary's or Frisbie's claim, alleging that said company had not been served with legal notice of said hearing and that said lands being within the withdrawal in favor of said company were not subject to disposal as public land.

Testimony respecting the character of the land was submitted and the local officers decided "that the land in question is agricultural in character and fit for cultivation." No appeal was taken from that decision. The local officers, it seems, did not pass upon the protest filed by the railroad company nor has any thing been done to determine the questions raised thereby.

On June 24, 1886, Geary after giving notice therefor by posting and publication submitted final proof under his filing which proof was by the local officers approved. The claimant paid the purchase money for the land and final certificate was issued to him.

In your office decision approving the action of the local officers it is said, "No appearance was made in behalf of the Central Pacific Railroad Company, when Geary submitted proof, to contest his claim in response to his published and posted notice of his intention to make the same and by such failure to appear, said company waived its claim in the premises and is barred from objecting to subsequent action on the entry by this office—(Forrester case, 1 L. D., 475—St. P. M. M. Ry. Co. v. Cowles 3 L. D., 226—A. & P. R. R. Co. v. Buckman, 3 L. D., 276.)"

The company appealed from that decision.

It is claimed on behalf of the appellant that the local officers had no authority to allow an entry on said land while it was withdrawn, that the company being a claimant of record by reason of its application to select said lands should have been specially cited to appear and contest Geary's right to the land, and that it was error in your office to hold that the company had waived its claim to the land by its failure in the absence of special notice, to appear and contest Geary's claim. I cannot concur with your office in the conclusion that the company has waived its claim to this land. It had filed a formal protest against the allowance of an entry therefor, and it had selected this land as indemnity. This selection by the company constituted it an adverse claimant of record, and as such adverse claimant of record it should have been specially notified of the intention of Geary to submit final proof.

It was error to hold that the company had by its failure in the absence of such special notice to appear when Geary offered his final proof and object to its acceptance, waived its claim to the land and was barred from objecting to subsequent action on the entry. It was also error to receive or consider Geary's final proof while the claim of the company to said land was pending undetermined in your office. Geary's claim should have been held to await the disposition of the company's selection.

I find from an examination of the records of your office that the company's appeal has not yet been disposed of. In order that the respective claims of Geary and the railroad company may be properly considered and determined the case is returned to your office. If the company's claim should upon such consideration be rejected Geary should not be required to make new final proof, but that already made may, if satisfactory, be accepted.

RAILROAD GRANT—EXTENT OF GRANT.

ST. PAUL, M. & M. RY. CO.

Under the grant of March 3, 1857, as extended by the act of March 3, 1865, the right to take lands as granted lands, is confined to the ten mile limit.

Secretary Vilas to Commissioner Stockslager, August 7, 1888.

I have examined the appeal of the St. Paul, Minneapolis and Manitoba Railway Company, from your office decision of October 21, 1886, rejecting its application to select certain lands under the grant by act of March 3, 1857 (11 Stat., 195, as extended by act of March 3, 1865 (13 Stat., 526).

The lands embraced in said selections are as follows :

* * * * *

Total area 2,079.70 acres.

These tracts are all outside the ten mile granted limits and the application was made to select them as granted lands under the authority of the decision of the United States supreme court in the case of the Winona and St. Peter R. R. Co. v. Barney (113 U. S., 618), decided March 2, 1885, where it was held that the additional grant made by act of March 3, 1865, was one of quantity to be selected within the limits named. Before the case reached your office that ruling was changed in the decision of March 1, 1886, in the same case (117 U. S., 228), where it was held that the grant was one of land in place, and not one of quantity.

Under the authority last cited said company could not take lands outside the ten mile limit as granted lands and said selection was for this reason properly rejected.

In the decision of your office said selection was discussed as an application to select indemnity land and the right of the company to take these lands as indemnity was passed upon.

In its appeal from the action of the local officers the company states distinctly that these lands are not claimed as indemnity but as granted lands. It was therefore unnecessary to discuss the questions that might have come into the case if the application had been to take these tracts as indemnity, and the ruling of your office upon those questions has not been passed upon here.

For the reasons herein set forth your office decision rejecting the application under consideration is affirmed.

PRIVATE LAND CLAIM—INDEMNITY.

MCDONOGH SCHOOL FUND.

The third section of the act of March 3, 1819, confirmed the amount claimed by the parties named in the commissioner's list referred to therein; and indemnity is not authorized for any land in excess of the amount so claimed and confirmed.

Secretary Vilas to Commissioner Stockslager, August 8, 1888.

On October 12, 1885, the duly authorized attorney for the "John McDonogh School Fund, City of New Orleans," legatee of John McDonogh, deceased, made application to the surveyor-general at that place for certificates of location to be issued in pursuance of the third section of the act of June 2, 1858 (11 Stat., 294), in satisfaction of the certain private land claim of Brown and McDonogh, and designated in the "supplementary list of the number of actual settlers in that part of Louisiana which lies east of the river Mississippi and island of New Orleans and west of Pearl River," dated June 7, 1813, by James O. Cosby, commissioner, as No. 184 (American State Papers, Gales and Seaton's Edition, Vol. 3, p. 76).

The applicants having produced sufficient evidence of authority, the surveyor-general issued and on April 24, 1886, transmitted for your approval two certificates of location, designated as 447 A and 447 B, for 80 and 20.37 acres, respectively, "in part satisfaction of the confirmed and partially located land claim to Brown and McDonogh, confirmed for six hundred and forty acres by act March 3, 1819, being certificate No. 87, and entered as No. 184 in James O. Cosby's supplemental list, etc.

August 12, 1886, your office declined to authenticate these certificates and held the same for cancellation. From this action the applicant appeals.

The record contains a copy of notice, dated St. Helena, September 27, 1814, addressed to James O. Cosby, commissioner, etc., by John McDonogh and Shepherd Brown to the effect that they claimed

Four hundred arpents of land on the east side of the river Amite, about one league from its mouth (being within your district), by virtue of the settlement rights of John Tuley and Peter Sides, made in the month of February, 1802; etc.

This copy is duly certified by the register as "a true copy of a notice on file in this office" for the claim of Brown and McDonogh, designated as "No. 184" on the supplemental list by Cosby, commissioner, as aforesaid.

Section three of the act of March 3, 1819, *supra*, provides:

And be it further enacted, That every person, or his or her legal representative, whose claim is comprised in the lists, or register of claims, reported by the 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 the 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.

September 8, 1830, the register and receiver of the land office at St. Helena issued their certificate No. 87, which states:

In pursuance of the act of Congress passed March 3, 1819, entitled an act for adjusting the claims to land and establishing land offices in the district east of the Island of New Orleans, we hereby certify that Brown and McDonogh are entitled to a section of land situate in the parish of St. Helena, claimed by inhabitation and cultivation, and so reported by the commissioner in his report of actual settlement claims.

The register and receiver, on the same day, September 8, 1830, issued an order of survey in accord with said certificate. This order was amended by a subsequent order of survey, issued February 3, 1854, and the claim was finally located as Sec. 52, T. 8 S., R. 6 E., and Sec. 37, T. 9 S., R. 6 E., Greensburg district, Louisiana, containing an aggregate of 539.63 acres.

The applicants contend that the said claim No. 184 was confirmed for six hundred and forty acres and scrip should issue under the act of 1858, for the difference between that amount and the amount so located, *i. e.*, 100.37 acres. I fully concur in your conclusion that this can not be allowed.

Section three of the act of 1819, *supra*, provides that the parties named in the commissioners' list of actual settlers shall be entitled to a grant for the land *claimed* or settled on before April 15, 1813.

The act further provides 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.

The commissioner's list herein describes claim 184 of Brown and McDonogh as one settlement claim acquired by purchase, but in no way does said list indicate the amount of land claimed.

The act of March 1819, *supra*, confirmed the amount *claimed* by the parties named in the commissioner's list referred to. Clearly, therefore, the confirmation to Brown and McDonogh was for the amount claimed in the said notice of September 27, 1814, to wit, four hundred arpents, or 340.28 acres. See John Shafer (5 L. D., 288).

This claim being confirmed only to the extent of 340.28 acres, its subsequent certification and location in the manner stated was erroneous. Instead of the government being liable for the idemnity claimed, this record shows that claim No. 184 has received 199.35 acres more than the amount to which it was legally entitled.

Your decision is affirmed.

OSAGE INDIAN LAND—FINAL PROOF.

REED v. BUFFINGTON.

Overruled,
7 L. D. 110
(49 L. D. 360)

Failure to submit final proof within six months after Osage filing renders the right of entry thereunder subject to intervening adverse claims.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 8, 1888.

This cause comes before me on appeal of Jennie Buffington from your office decision of February 17, 1887, holding for cancellation her filing for SE. $\frac{1}{4}$, Sec. 7, T. 28, S., R. 16 W., Larned land district, Kansas.

The land in question is Osage Indian trust and diminished reserve lands. These lands have been the subject of several acts of Congress.

In the Woodbury case (5 L. D., 307) it was held that the act of May 28, 1880, applied as well to those who should settle upon such lands after the passage of said act, as to those who were actual settlers at the date of the passage thereof, but who had failed to comply with the provisions of law theretofore governing the entry of such lands.

The record in this case shows that Reed filed his declaratory statement October 16, 1884, alleging settlement July 29, 1884, and that Buffington filed her declaratory statement for the same tract December 3, 1884, alleging settlement September 4, 1884. Buffington made proof May 8, 1885, and Reed May 14, 1885.

It will be observed that Reed offered his final proof nearly seven months after his filing, and that Buffington made her proof only a few days over five months after filing, each however, filed within the time required after settlement.

Upon protest by Reed against the acceptance of Buffington's proof, hearing was had by agreement of parties and the evidence introduced shows substantially the correctness of a finding in your said office letter of February 17, 1887, viz: "Both parties appear to have the qualifications of pre-emptors upon the public land, and each was an actual settler at the date of his offer of proof."

I cannot, however, concur in your said decision that the land in such a case must go to the one who was the first actual settler.

Under the act of May 28, 1880, the Department formulated instructions governing the entry and sale of such lands, and on June 23, 1881, the register and receiver of the local office (5 L. D., 309) were instructed that filing should be made within three months after settlement and final proof submitted within six months after filing, which requirements are still in force, as will be seen by reference to circular of April 26, 1887, (5 L. D., 581).

Now any failure to comply with the law and with the requirements of the Department as above set out, on the part of a claimant, would operate to subject his filing or settlement to that of an intervening claimant who had fully complied with the law.

In this case while the evidence shows that Reed's settlement was prior to that of Buffington in point of time, yet as decided in *Rogers v. Lukens* (6 L. D., 111), "he could only maintain such priority by due compliance with law."

In *Rogers v. Lukens* (*supra*) it was held that, a failure to make final proof within six months after filing, would subject claimant to the rights of an adverse claimant.

It appearing without contradiction in this case that Reed's time for making proof had expired before proof was offered by Buffington, and that the filing of said Buffington was made less than six months prior to the offer of her proof the right to enter must be awarded to her, subject to her completion of the entry in due form.

Your said office decision is accordingly reversed.

ENTRY—APPLICATION FOR AMENDMENT.

CHRISTOPH NITSCHKA.

Although the provision in section 2372 R. S., which requires in the case of an application for amendment the written opinion of the register and receiver as to the existence of the mistake, and the credibility of the witnesses testifying thereto, is not in terms applicable to timber culture entries, yet a similar rule may be properly applied, not only to such entries, but to all classes of claims to which said rule was not made specially applicable by said statute.

Directions given for the formulation of a circular in conformity with the views herein expressed.

Pending applications will be adjudicated upon their merits, and under the practice heretofore prevailing; but where the evidence therein is not found satisfactory under the former rulings, such cases may be remanded to the local office for further evidence to be furnished and passed upon under the regulations as herein provided.

A timber culture entry may be amended so as to take the lands intended to be entered, where a satisfactory explanation of the mistake is furnished.

Secretary Vilas to Commissioner Stockslager, August 8, 1888.

I have examined the case presented by the appeal of Christoph Nitschka from your office decision of September 28, 1886, rejecting his application to amend his timber culture entry, No. 4649, made December 1, 1885, for the NE. $\frac{1}{4}$ of Sec. 25, T. 189 N., R. 69 W., Aberdeen Dakota, so as to have it describe the NW. $\frac{1}{4}$ instead of the NE. $\frac{1}{4}$ of said section.

Said application was made in June, 1886, under oath, corroborated by two witnesses, and sets out the following facts:

Appellant, at the date of his application to enter, intended to enter the NW. $\frac{1}{4}$ of the section described, and supposed he was entering that quarter; that so supposing he proceeded to and did make improvements on said NW. $\frac{1}{4}$, breaking thereon ten acres; that the NE. $\frac{1}{4}$ is in

a lake and can not be used for farming purposes; that he is a Russian-German and unable to speak, read or write the English language; that the error or mistake must have been made by the United States land office at Aberdeen, or by the agent who prepared his papers, and having acted in good faith and in ignorance, for the reasons above given, he asks that his entry as of record be amended as indicated.

Your office decision concludes that "the claimant must abide the entry as made, as no considerable hardship, it appears, will result therefrom."

With his appeal, the claimant filed another corroborated affidavit, reiterating his former statement that "he meant to file on the NW. $\frac{1}{4}$ of Sec. 25, T. 129, R. 69, which is the tract he chose when looking for land in November, 1885; that acting under the impression that his entry papers described the NW. $\frac{1}{4}$ he proceeded to make improvements on said NW. $\frac{1}{4}$ and broke ten acres thereof before he learned of the mistake; that said mistake occurred by reason of his inability to read or understand English; that he had lived in the neighborhood for about four and a half months previous to his entry, and well knew the land which he wanted to enter, to wit, the NW. $\frac{1}{4}$ of said section 25; that the NE. $\frac{1}{4}$ of said section is nearly all in marsh, too wet to be plowed and at the time of his said appeal, water is standing on it; that only about ten acres of it is fit for plowing, which fact was well known to him when he selected the NW. $\frac{1}{4}$ as the tract which he would enter; that he told the agent which tract he wanted, to wit, the NW. $\frac{1}{4}$ of said section 25, and the mistake occurred through no fault of his.

In this connection, it may not be amiss to review, to some extent, the practice and rulings of the land department relative to amendments of record claims.

There has never been any doubt of the propriety of permitting amendments in certain cases. The chief questions have been, and are, under what circumstances and on what sort or character of evidence should they be allowed.

As long ago as March 3, 1819, Congress, by an act of that date (3 Stat., 526; Sec. 2369 R. S.), provided for change or amendment of *private cash entries*, where mistake had been made through fault of the government officers, or error in the public records.

The act of May 24, 1823 (4 Stat., 301), extended the above provisions to cases where patents have issued or may issue. This provision is embodied in section 2370 of the Revised Statutes.

By act of March 3, 1853 (10 Stat., 256), the provisions as above stated were further extended, so as to be made applicable to errors in the location of land warrants. This provision is now to be found in section 2371, Revised Statutes.

May 24, 1824, an act was passed providing for the correction of mistakes made by the entryman himself, in certain cases, where he had wrongly described the tract intended to be entered. The provisions of

said act were incorporated in section 2372 of the Revised Statutes, which reads as follows:

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

March 11, 1858, Secretary Thompson having before him a case which in effect presented an application to amend a pre-emption filing, ruled that an error in a declaratory statement may be corrected before the inception of an adverse claim (1 Lester, 402). In that case there was an adverse claim to the land covered by the second filing, or, as it may more properly be termed, an application to amend. Said adverse claim, however, was not initiated until after the application to amend, and said application to amend was allowed.

With respect to homestead entries, your office, under date of June 5, 1872, issued to registers and receivers circular instructions in the following language:

Hereafter, when parties make application to be allowed to amend their respective homestead papers, on the ground that they do not describe the land they intended to apply for, and have actually settled upon; or in case they relinquish their entries, in view of prior conflicting claims, you will, in all cases, require them to file papers with you as follows; and, in all cases, you will require their papers to be filed before transmitting the applications:

1st. The affidavit of the party setting forth that he had, within six months from date of his original application, actually settled on described tract, giving in full the character of the improvements made.

2d. Said affidavit to be corroborated by those of two witnesses.

3d. If a party desires the cancellation of his entry on account of a prior legal claim having attached to the land so entered, you will require—

1st. The filing of his affidavit, giving the number, date, and nature of the prior claim, and the extent of the improvements, if any, which may have been made.

2d. The facts, as alleged in said affidavit, to be corroborated by two witnesses.

3d. In transmitting the papers to this office you will, in each case, make a joint report. (1 C. L. O., 26.)

In the case of Thomas C. Marks, who had made a homestead entry in conflict, in part, with a prior cash application, your office, under date of February 20, 1875 (1 C. L. O., 180), allowed him to amend by retaining so much of the land embraced in his original entry as did not conflict with the cash application, and to take, in lieu of that in conflict, an adjoining tract which was free.

In the case of Jefferson Newcomb, decided by this Department January 12, 1876 (2 C. L. O., 162), it was ruled, in substance, that where by mistake the homestead entry papers failed to properly describe the land intended to be entered, the intention in making the application is a proper subject of inquiry, and if mistake was actually made, the entryman "should be allowed full opportunity and a reasonable time after discovery to rectify the error, and secure to himself the fruits and avails of his labor, performed in good faith and in strict compliance with the requirements of law. . . . His case is like that of a pre-emptor, who, being entitled to the land embracing his residence and improvements, has misdescribed the same in his filing, and is always allowed to amend, unless by gross laches, negligence, or by some act or declaration, amounting to an estoppel, he has himself barred his right, in favor of an adverse interest."

August 8, 1878, your office, in a circular relative to changes of entry (5 C. L. O., 134), quoted sections 2369, 2370, 2371 and 2372 of the Revised Statutes, cited *supra*, and proceeded to define their scope and purpose. That circular stated, among other things, that section 2372 of the Revised Statutes

Applies to all classes of entries, and also embraces cases where the error was *not* occasioned by any act of the surveyor or of the land officers, but restricts changes of entry to cases in which the tract erroneously entered does not in quantity exceed one-half section, and where the certificate of the original purchaser has not been assigned or his right in any way transferred.

Change of entry may thereafter be allowed in accordance with these provisions, in respect to either of the following classes of cases, viz:

- Purchases at public sale.
- Private entries.
- Pre-emption entries.
- Military bounty land-warrant locations.
- Scip locations, etc.

A change of entry, when allowed, will be made from the tract erroneously entered to that intended to have been entered, if vacant; but if not vacant, the change may be made to any other tract liable to entry.

The application must, in all cases, be made by the party making the original entry, or, in case of his death, by his legal representatives, *not being assignees or transferees*.

The applicant must file an affidavit showing the nature and particular cause of the error, and that every reasonable and proper precaution had been used to avoid it, accompanied by the best corroborative testimony that can be procured. The oath of the party interested is not of itself sufficient.

The affidavit must also show that the land erroneously entered has not been transferred or otherwise encumbered.

This evidence, together with your joint opinion as to the existence of the mistake,

and the credibility of each person testifying thereto, will be forwarded for the decision of this office.

Where a patent has not been issued you will require the surrender of the duplicate receipt, or certificate of location (as the case may be), accompanied by the affidavit of the party that he has not sold, assigned, nor in any way encumbered the title to the land described in the application, and that said title has not become a matter of record.

I fail to find any decision of your office or of the Department which applied the requirements above quoted as those of Sec. 2372 of the Revised Statutes to homestead or timber culture entries, or to pre-emption filings.

In *Neubert v. Middendorf*, decided by this Department April 2, 1883 (10 C. L. O., 34), it was said that the right to amend a homestead entry "is recognized by the practice of the Department to obtain the correction of a misdescription in the original papers, growing out of accident or mistake, clerical or otherwise, when the settlement of the party is *bona fide* upon a particular tract, and he is in danger of losing his actual home and improvements. . . . Technical objections should not be invoked to defeat such right."

In the case of *Thomas Hammill*, decided by the Department July 27, 1883 (2 L. D., 36), the same rule was stated, and the application to amend homestead entry was allowed, on the corroborated statement of the entryman as to his intention.

In *Sederquist v. Ayers*, decided August 28, 1883 (2 L. D., 575), the general right of amendment was recognized by the Department, but the application was denied in that particular case for want of due diligence and because a valid adverse right had intervened prior to the application to amend.

In *Northern Pacific Railroad Company v. Curry*, decided February 19, 1884 (2 L. D., 852), the Department recognized the right to amend a timber culture entry, and amendment was allowed. See also *Goyne v. Mahoney* (2 L. D., 576); *Johnson v. Gjevre* (3 L. D., 156); *Brown v. West* (*id.*, 413).

In these and in other cases which might be cited, no particular rule seems to have been followed by which any particular method of procedure was required of applicants for amendment. Each case was decided on its merits as presented, independently of and without the application of any specified rule as to the form or character of the evidence. Ordinarily, if no adverse claim appeared, the evidence consisted of the affidavit of the applicant, corroborated by two or more affiants. Thus, the practice continued, until October 25, 1884 (3 L. D., 161), when this Department approved a circular, prepared by your office, which reads as follows:

The very large number of applications for changes of entries and filings and for new entries or filing under the pre-emption, homestead, timber culture, and other acts, render it necessary to advise you that the allowance of such applications is, as a rule without authority of law.

It occasionally happens that an error has been made in the description of land ap-

plied for, but that such error is as universal as would be implied by the frequent applications for a change to another tract is not to be presumed.

You will exercise the greatest care and discrimination in accepting such applications, and you will hereafter in every case require applicant to prove that the tract was erroneously entered by a mistake of the true numbers of the tract intended to be entered, and that every reasonable precaution and exertion had been used to avoid the error, and showing particularly how the same occurred. You will require corroborative testimony upon these points. The affidavit of the party in interest uncorroborated by other testimony will not be deemed sufficient.

You will also require satisfactory evidence, by sufficient affidavit or affidavits, that applicant has not assigned, transferred, sold, or disposed of, nor agreed to sell, assign, transfer, or dispose of any right or interest under said erroneous entry or filing, nor received or been promised any consideration whatever for abandoning said land or for relinquishing his claim thereto, and that he has not executed any relinquishment thereof, nor agreed to do so, and that his application for a change of entry is not made for the purpose of enabling any other person to enter the originally entered tracts.

In the case of a pre-emption entry or filing, or a homestead entry made upon allegation of existing residence upon the land, applicant will be required to prove to your satisfaction that he was actually residing upon the tract to which change is desired, at the date of such filing or entry, and that he intended to enter that land, and did not know that his application or filing embraced other or different land.

You are authorized to reject applications for insufficiency of proof, or when you are satisfied that the same is not made in good faith or that no actual mistake has occurred. If appeal is taken you will transmit the testimony with your opinion in writing. In all other cases you will transmit the testimony, together with your joint written opinion both as to the existence of the mistake and the credibility of each person testifying, and your recommendation in the case.

You will bear in mind that every person is restricted by law to one entry under the pre-emption, homestead, timber culture, timber land, and desert land laws.

Applications for second entries or filings, or changes amounting to second entries or filings, under these laws should not be allowed where the defect in the original entry or filing was one that the party himself might have avoided by the exercise of due diligence and proper compliance with law. Non-compliance with law, or alleged ignorance or misinformation in regard to the requirements of the public lands laws, or want of a proper examination of the land, or the alleged existence of prior adverse claims of which the subsequent entryman had notice, or was bound to take notice, are not valid reasons for change of entry or for the allowance of new or second entries or filings for different land.

The existence of a pre-emption filing or declaratory statement for a tract of land, proof not having been made, is not a bar to the entry of the land by another person, and is not sufficient ground upon which to base an application for a change of entry or for a new entry of other land by a party who has made entry over such filing. You will not receive or transmit to this office applications based upon that ground.

Second pre-emption filings for different land are not permissible when the land originally applied for was subject to pre-emption at date of filing, and applications for such second filings will not be received or transmitted.

This circular was in force only about four months, when it was by the Department expressly revoked in the case of Crail Wiley, decided February 27, 1885 (3 L. D., 429). In that case it was said that :

the Department did not deem it advisable to deny by arbitrary rules the right of settlers to apply voluntarily for such amendment as will enable them to secure the right to their homes, where clerical mistakes or conflicting claims have been made to their prejudice. It is the duty of this Department to aid rather than obstruct the prosecution of settlement rights, and all cases should be fairly heard and adjudged upon their merits, without the restriction of technical regulations.

This decision restored the practice which had prevailed prior to the circular of October, 1884 (*supra*), of receiving and passing upon applications to amend pre-emption filings, and homestead and timber culture entries, on such evidence as might be offered, and on their merits, as shown by the evidence in each case, without regard to its form or manner of presentation. In other words, an application to amend, on the ground of error or mistake, might be allowed on *ex-parte* affidavits, if therefrom it appeared that the applicant had acted in good faith, that he had exercised ordinary care and diligence, and the records showed that superior rights would not be interfered with.

The difficulty in fixing and attempting to follow literally in every case an unbending rule, in regard to amendments and changes of entries, is illustrated by the case of Mathias Florey, decided by my predecessor, Secretary Lamar, August 27, 1885 (4 L. D., 112).

In that case the entry was so changed as to permit the applicant, who was a timber culture entryman, to change his entry so as to take an adjoining and entirely different tract of land, and one which originally he had not intended to enter.

The mistake which had occurred was due in part to the local office and in part to the claimant, and on the peculiar facts, as shown by the record and the statements of applicant, his application was allowed.

In the case of Henry E. Barnum, decided by this Department March 11, 1887 (5 L. D., 583), it was ruled that the right of amendment should be recognized where the entry as of record was not for the tract intended to be entered, and due care and prudence had been exercised. In that case the applicant averred that being a stranger in the country, he had employed a "land locator," who appeared to be familiar with all the land thereabouts, who, after applicant had selected the tract which he desired to enter and to which he asked to amend, gave him as the description of the same what proved to be the description of another and different tract. Applicant was corroborated in his statement by the "locator," and the decision, after finding that the applicant had acted in good faith, and that his mistake was such an one as is liable to be made by a man exercising ordinary care and prudence, directed the allowance of the application.

March 2, 1887 (5 L. D., 534), the Department, in the case of Daniel Keese, although denying his application on the facts presented, which showed a change of mind after original entry, used the following language:

The Department has always permitted the amendment of an entry, in the sense of the correction of an incorrect record (where an error had been made whereby the record failed to describe correctly the land which the claimant intended to enter), provided no superior adverse right intervened prior to the application to amend.

The case of Christian Zyssett, decided by the Department November 23, 1887 (6 L. D., 355), was similar to the Barnum case, cited *supra*, except the latter was a homestead, while the former was a timber culture

entry, and his application, which stated that he was misled by a mistake of the person who located him, was allowed, his statements being corroborated by the affidavits of two persons.

In the case of A. J. Slootskey, decided by me January 31, last (6 L. D., 505), though it was held that the application could not be treated as one to amend, because it was for a tract different from that originally intended to be entered, the following language was used :

If this application had been to amend the original entry, in accordance with the original purpose of the entryman, so as to designate the tract he had intended to enter, and if no intervening right inconsistent with his proposed entry had been established, I think the application to amend should have been granted; certainly, if he satisfactorily excused his contribution to the mistake, this would have been the rectification of an error without injury to the rights of others, and would have been demanded upon the plainest principles of equity and the established usages of the Department, as shown by various decisions.

The case of William Barr, decided by me April 25th last (6 L. D., 644), was that of an applicant to amend timber culture entry, so as to describe the land which he intended to enter. The application, which was duly corroborated, set out that a mistake had been made by the notary who prepared the entry papers, he having made a mistake in the number of the township; that as soon as applicant received the receiver's receipt, he returned the same to the notary and requested him to have the error in description corrected.

My decision in that case ruled that, if the allegations of the applicant be true, the change in the entry as desired should be allowed; but your office having expressed a doubt as to the existence of an error as alleged, and the record failing to show that the evidence had been submitted to the register and receiver, or that they had transmitted an opinion therein as to the existence of the mistake and the credibility of each person testifying thereto, I directed the return of the application and evidence for the opinion of the local officers on the points indicated. In doing this, reference was made to the requirements of section 2372 of the Revised Statutes, the rule in which, I stated, did not apply by the terms of the section to timber culture cases, inasmuch as they were later provided by law, but "may well be applied to them in proper cases, out of due caution." In other words, while the statute (2372 R. S.) does not specifically apply to and operate upon timber culture entries, the reasons thereof may be appropriately applied to such cases, and the Department may therefore properly make a rule containing a requirement relative to applications to amend timber culture or homestead claims similar to that contained in said section 2372 of the Revised Statutes.

The laws providing for the disposal of public lands constitute one general system intended for the development of the country and the benefit of its citizens. They are consequently to be construed *in pari materia*, and the rules and regulations under which they are administered should be as nearly uniform as the several methods of disposal will permit, with a view to securing satisfactory evidence of compliance with the law and of good faith in each case.

I therefore reiterate what was said in the Barr case, *supra*, that in proper cases a rule similar to that contained in section 2372 of the Revised Statutes relative to mistakes, may properly be and should be applied to timber culture cases, and not only to timber culture cases, but to all classes of claims, to which it is not made specifically applicable by said section of the law.

You will accordingly please formulate and forward to the Department for approval a circular in conformity with the views herein expressed, which circular will govern immediately upon its promulgation and receipt at the several land offices.

Pending applications will be considered and acted upon on their merits, and in the light of the evidence found in each case. Should that be such as to warrant the conclusion in any case that a mistake was actually made; that the applicant was not guilty of inexcusable carelessness or negligence, and that he has acted in good faith, amendment may be allowed on the evidence submitted and under the practice heretofore prevailing. Should the evidence in any case, however, not be deemed satisfactory, when considered under former rulings, such case should be remanded to the local office for further evidence, to be furnished and passed upon by the register and receiver, in accordance with the views herein expressed and in compliance with the circular to be issued as directed.

In the case immediately under consideration, your office expresses no doubt as to the fact of the mistake, nor as to the good faith of the applicant, the decision appealed from simply stating that "the claimant must abide the entry as made, as no considerable hardship, it appears, will result therefrom."

Upon the showing made by appellant, as set out in the opening pages hereof, I am of the opinion that he from the first intended to take the NW. $\frac{1}{4}$; that a mistake occurred in making the record of the entry, which is satisfactorily explained, which under the circumstances is excusable, and which may properly be corrected as asked, if to do so does not interfere with any superior adverse right.

Your office decision is accordingly reversed, and the application will be granted, subject to the condition above mentioned as to an adverse claim.

RAILROAD GRANT—ENTRY—ORDER OF CANCELLATION.

ANDERSON *v.* NORTHERN PAC. R. R. CO. ET AL.

The cancellation of an entry by the order of the Commissioner of the General Land Office takes effect as of the date when the decision is made; and the fact that such order was not noted on the records of the local office until after the definite location of the road, though made prior thereto, would not operate to defeat the operation of the grant.

Secretary Vilas to Commissioner Stockslager, August 9, 1888.

On June 3, 1884, Christian Anderson offered declaratory statement for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 21, T. 132 N., R. 42 W., Fergus Falls, Minne-

sota, alleging settlement the same day. The local officers rejected the filing on account of the claim of the St. Paul, Minneapolis and Manitoba Railway Company. Anderson appealed.

Your office by letter of July 16, 1885, found that the tract is within the granted limits of the road now known as the St. Paul, Minneapolis and Manitoba Railway, formerly St. Paul and Pacific, St. Vincent Extension, and within the indemnity limits of the Northern Pacific Railroad; that the former road was definitely located December 19, 1871, and that one John Green made homestead entry for the tract, No. 5359, St. Cloud series, July 28, 1868, which was canceled on the records of the local office January 4, 1872; that this entry subsisting at the date of definite location of the St. Paul road excepted the land from the grant for that line, that the Northern Pacific road can have no claim to the tract, as the law does not allow one road to go into the granted limits of another to seek indemnity, and allowed the filing of Anderson to go on record.

Both companies appealed.

It appears from the records of your office that the judgment of cancellation of said entry was made by the Commissioner December 14, 1871, five days prior to the definite location of the St. Paul road. Prior thereto testimony had been submitted before the local officers on the allegation that the entryman Green had abandoned his entry. The local officers on the testimony submitted recommended that the entry, with certain others in like situation, be canceled. Your office thereupon by said letter of December 14, 1871, notified the local officers that the respective claims of said entryman "have been adjudged forfeited." No appeal was taken therefrom.

Your office in the decision appealed from in effect holds that the cancellation of Green's entry did not take effect until the local officers noted the cancellation on their records.

This question was disposed of in my decision of March 1, 1888, in the case of John H. Reed (6 L. D., 563), as follows:

The only other question presented in this case is, at what date was George C. Reed's entry canceled and the land restored to the public domain? There is no question as to the authority of the Commissioner of the General Land Office to cancel an entry, and his judgment of cancellation can be vacated and set aside by the appellate tribunal only at the instance of the entryman, or his legal representatives.

When, therefore, a final judgment of cancellation is rendered by the Commissioner, the entry in question is thereby canceled, and the land then becomes subject to appropriation under the provisions of the laws relating to public lands. A judgment is final as to the tribunal rendering it, when all the issues of law and fact, necessary to be determined, have been disposed of so far as that tribunal had power and authority to dispose of them.

Following the rule stated in that case it is held that the cancellation of Green's entry took effect as of the date of the Commissioner's decision, December 14, 1871. At the date of definite location therefore the land was free and passed to the St. Paul company. This disposi-

tion of the case renders it unnecessary to pass on the right of the Northern Pacific to select land within the granted limits of the other road, and no ruling is made on that question. The filing of Anderson is rejected. Said decision is modified accordingly.

POSSESSORY RIGHTS -SOLDIERS' ADDITIONAL HOMESTEAD ENTRY.

WACHTER ET AL. v. SUTHERLAND.

The assertion of a possessory right to land does not confer any right thereto under the settlement laws. 1820571

A soldier's additional homestead entry will not be disturbed where it appears to have been made under the interpretation of the law then in force and recognized by the Department, although under the changed construction of the law such entry would not now be admissible.

Secretary Vilas to Commissioner Stockslager, August 9, 1888.

I have considered the case of J. F. Wachter and J. W. Campbell v. James Sutherland, on appeal by the latter from your office decision of September 11, 1886, holding for cancellation his pre-emption filing for the SW. $\frac{1}{4}$ of Sec. 2, Tp. 2 S., R. 2 W., M. D. M., San Francisco, California land district.

Township plat was filed July 8, 1878. On that day Wachter made soldier's additional homestead entry for the north half of said tract. On the same day Campbell made soldier's additional homestead entry for the south half of said tract. On October 7, 1878, Sutherland filed pre-emption declaratory statement for said SW. $\frac{1}{4}$ of Sec. 2 Tp. 2 S., R. 2 W., alleging settlement December 23, 1865.

By letter of your office of January 5, 1882, the local officers were directed to issue final certificates in the above mentioned soldiers' additional homestead entries, together with a number of other entries of the same character which was done January 17th, of that year.

Sutherland advertised to offer final proof under his filing, fixing October 1, 1884, as the day for making said proof. Upon a protest by the homestead claimants, a hearing was had and the local officers awarded Sutherland the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section; and advised the cancellation of his filing as to the rest of the land covered thereby.

From that decision both Sutherland and Wachter appealed. In your office it was decided that Sutherland was not entitled to enter any portion of said tract and his filing was held for cancellation.

In 1871, Sutherland and one Charles Ramage bought from one Crymble his improvements on a tract of land of about five hundred acres and embracing a part of the tract in controversy. They occupied said land together, being engaged in cattle raising until 1874, when Sutherland sold to Ramage his interest in the cattle and all the land occupied by them, except the particular tract in controversy, which he claims he re-

served for himself, intending to take it under the pre-emption law when it should be declared government land. He, however, took no steps to make a settlement there until after the homestead entries before mentioned had been made. On July 11, 1878, he stayed all night on this land in a tent placed there by Ramage without his (Sutherland's) knowledge. In his testimony Sutherland said in regard to this occurrence, Ramage told me there was a tent there and told me to go and sleep in it. I don't know who the tent belonged to." He was next on the land two or three weeks later and staid in the tent all night. In September of that year he had a frame house eight by ten feet put on the land and stayed there occasionally, up to the spring of 1883, when he claims he begun a continuous residence there. At the time he first stayed all night on this land he was making his home with Ramage, and took his supper there that day and his breakfast the next morning. Sutherland was at this time blind and it was impossible for him to live on the land without some one with him. For years prior to making his filing he had made his home with Ramage and others in the neighborhood and continued this mode of life for at least about five years after making his filing. It is clear that Sutherland had not at the date of said soldier's additional entries any valid claim to said land under the settlement laws, nor had he acquired any such claim at the date said entries were approved by your office and final certificates issued thereon.

It is contended that the entries of Wachter and Campbell are invalid and illegal. The certificates of your office showing that Campbell and Wachter were each entitled to an additional homestead entry not exceeding eighty acres, bear dates respectively of November 1, 1877, and February 28, 1878. On August 24, 1877, Campbell appointed William H. Meade, his attorney to locate at any land office any land he might be entitled to under section 2306, of the revised statutes of the United States, etc.

On February 6, 1878, Wachter appointed D. H. Talbot, of Sioux City, Iowa, his attorney to obtain the approval of his claim for an additional entry and authorized said Talbot to locate for him at any land office in the United States such lands as he might be entitled to enter and giving him full power of substitution, etc. On June 13, 1878, Talbot substituted and appointed William H. Meade in his place, under the power granted by the said power of attorney. On July 8, 1878, Meade, it seems, appeared at the local office and located the land embraced in these entries and at the same time filed all the necessary papers and exhibits. These entries were made on the same day and under similar circumstances as the entry of George Thomas, the validity of which was considered and passed upon by this Department in the decision rendered December 16, 1886, in the case of *Oliver v. Thomas et al.* (5 L. D., 289). It was held in that case that when the entry there under consideration was made, it was the practice to allow entries made under similar circumstances and having been made and allowed under the rulings then

in force, and not being in conflict with the law as then interpreted, should be allowed to stand. The entryman complied with all the regulations of the Department in the matter of his entry and he should not be prejudiced now, because those regulations have been changed. I perceive no good reason for changing the rule laid down in that case and under the authority of that case the entries here under consideration must be allowed to stand.

Your said office decision is affirmed.

DESERT LAND ENTRY—FINAL PROOF—PUBLICATION.

WILLIAM G. RUDD.

Proof which does not show reclamation cannot be accepted, although it may appear that the entryman has attempted in good faith to reclaim the land.

Proof showing what has been done in the matter of reclamation since the submission and rejection of the original proof, cannot be treated as supplemental, but is new proof, and due publication of notice should be made prior to the submission thereof.

Secretary Vilas to Commissioner Stockslager, August 8, 1888.

I have considered the appeal of William G. Rudd from your decision of December 29, 1886, rejecting his final proof in the matter of his desert land entry, No. 1068, for the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 20, the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$, the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 29, T. 29 N., R. 62 W., Cheyenne, Wyoming.

The record shows that Rudd made his original entry of the land described November 19, 1883, and made the first payment of twenty-five cents per acre as required by law. November 19, 1886, he offered final proof which was on the same day rejected by the local officers "because the land is not shown to have been irrigated or reclaimed."

Claimant appealed to your office, which, after stating that he on November 13, 1886, relinquished of the land claimed by him as above, the following subdivisions, to wit, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ Sec. 29, amounting to 120 acres, because it was hilly, affirmed the action of the local officers rejecting his proof as to the residue. The relinquishment left his claim containing an area of 360 acres. He appeals from your said decision rejecting his proof. In his appeal he admits that he had not reclaimed the land nor conducted water thereon as required by law, but avers that as the proof shows that a large amount of work had been done with a view to reclamation of the land by conducting water thereon, and since the failure to conduct water upon said land within the time required by law was owing to no fault of his, but was caused by matters over which he had no control, therefore said proof should have been accepted as satisfactory and as evincing his good faith. The contention of appellant cannot be sustained.

A showing of his intentions, however good they may have been cannot avail in the absence of proof showing that what the law requires to be done in the matter of reclamation has been done.

It appears from the proof which was offered and which the local office and your office rejected, that ditches had been dug to conduct water upon the land but that no water had been so conducted.

The reasons assigned for the failure are that the water from which appellant expected to get his supply was by another company, different from the one which was to supply him, conducted away by ditches to other lands and that he was thus deprived of its use; that the matter of the right of the respective companies to the water was in litigation in the courts; that while so in litigation the prairie dogs and gophers burrowed under and through his ditches so that when water could be procured they would not contain nor conduct it as desired; also that while awaiting the result of said litigation the dam which had been constructed to store and turn the water to his ditches was washed away and had to be repaired. All these things while a misfortune for appellant, would not justify the land department in accepting proof which fails to show reclamation as required by law. The action of your office in rejecting the proof offered was therefore correct.

The appeal from your decision on rejecting said proof also contains the following alternative petition, to wit: in case the proof cannot be accepted on appeal, then claimant asks that his entry be not canceled but that he be allowed to submit additional proof showing full reclamation of the tract in question.

Since the case came here on appeal, additional proof has been furnished and is now with the papers in the case. It was made November 30, 1887, before the local office, and consists of sworn statements by three affiants, setting forth that they are familiar with the land claimed by Rudd as desert land, having been upon and assisted in ditching and irrigating it; that it has been irrigated, reclaimed and rendered productive, etc.

Said proof cannot properly be treated as proof supplemental to that originally offered. It is rather in the nature of new proof because it covers a new period of time and shows a new state of facts, viz: what has been done since the original proof was offered and rejected. At the date when said original proof was offered, publication of notice of intention to make final proof was not required in desert land cases.

On June 27, 1887, however, a circular relating to desert land entries was issued by your office with the approval of the Department requiring among other things, that

Before final proof shall hereafter be submitted by any person claiming to enter lands under the desert land act, such person shall be required to file a notice of intention to make such proof which shall be published in the same manner as required in homestead and pre-emption cases. (Paragraph 13 of Circular (5 L. D., 703.)

The additional, or more properly speaking, the new proof in this case was offered on November 30, 1887, about six months after the promul-

gation of the circular above mentioned. Not having been made in conformity with the requirements of said circular it cannot properly be considered.

Your decision rejecting the proof originally offered is affirmed and the papers transmitted are returned herewith. You will remand the case to the register and receiver with direction to require new final proof to be made after publication and in accordance with the other requirements of the circular of November 30, 1887, *supra*, which proof may be made and offered at any time within sixty days from receipt of notice hereof. More than three years having elapsed since the original delaration of intention to reclaim the tract, the case will, should new proof be offered, be referred to the Board of Equitable Adjudication for action under rule 30 of the rules governing said Board (7 L. D., 799).

MINING CLAIM—SURVEY—HEARING.

EMMA LODGE.

A hearing may be allowed for the submission of evidence in explanation of an apparent discrepancy between the survey and the claim, as marked out upon the ground and described in the location.

Secretary Vilas to Commissioner Stockslager, August 8, 1888.

By letter of October 14, 1886, you held for cancellation mineral entry No. 64, made August 25, 1884, by Levi Smiley for the Emma Lodge mining claim, on the ground that "the survey is not in accordance with the original location of October 5, 1878, nor with the amended location of September 8, 1879, nor with the stakes found upon the ground, all of which embraces different ground."

On appeal from said decision it is urged that the same was made without giving the owners opportunity to explain the alleged discrepancies or to be heard as to the effect of such discrepancies as there may be, and affidavits are filed to the effect that in point of fact the survey correctly represents the claim as "staked upon the ground, held, worked, and claimed." And, unless patent can now issue, a hearing is prayed for, to establish these facts.

While it is clear that as the field notes and plat of survey on their face indicate a discrepancy between the land surveyed and the claim as staked out upon the ground, and described in the location, no patent can on this record issue, the allegations made in the papers on appeal seem to me to justify the granting of the hearing prayed for as alternative relief.

Your said decision is modified accordingly.

HOMESTEAD ENTRY- RESIDENCE.

MARY E. BAILIFF.

After the settler has in good faith established a residence on the land, to the exclusion of a home elsewhere, absences rendered necessary by the sickness of a parent may be properly excused.

Secretary Vilas to Commissioner Stockslager, August 8, 1888.

I have considered the appeal of Mary E. Bailiff from the decision of your office of December 21, 1886, rejecting her final proof and holding for cancellation her final certificate, No. 6077, and homestead entry, No. 20,042, for the E. $\frac{1}{2}$ of NE. $\frac{1}{4}$, and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 20, T. 106 N., R. 59 W., Mitchell district, Dakota Territory.

The claimant was the widow of a soldier, who served three years in the army of the United States during the late war, and was honorably discharged at the expiration of his term of service, and as such, she was entitled to a deduction of said three years from the time of residence, otherwise required to perfect title. Her entry was made, May 23, 1882, and, October 2, 1885, about three years and four months after entry, her final proof was offered and approved by the local officers and final certificate issued thereon.

The improvements of claimant consist of a house, ten by twelve feet, a well and fifteen acres of breaking, of the total alleged value of \$150.00, and, as stated in your office decision, she "established actual residence, September 15, 1882."

It appears from a supplemental and corroborated affidavit filed by her with her proof, that from September 15, 1882, the date of her establishment of residence, to the latter part of October, 1883, a period of a little more than a year, she remained continuously on the land. At the latter date, she was summoned to attend her mother, who had been an invalid for fourteen years, and had suddenly grown worse and was not expected to live. She obeyed this summons, and remained with her mother, nursing her and attending to her wants, until January 1, 1884, when she returned to the homestead tract and lived there until the latter part of May, 1884. She was then again called to the bedside of her mother, where she was detained until August 1, 1884. From the date last named to March 1, 1885, she lived upon her claim. From March 1, 1885, to June, 1885, and, also, during July, 1885, she was in attendance upon her mother, and the remainder of the time, until final proof was made, October 2, 1885, she was on her claim.

It appears, then, that from the time of her establishment of residence on the land, September 15, 1882, until she made her final proof, October 2, 1885, a period of about three years and seventeen days, she lived upon her claim about two years and two months, and was absent in attendance upon her mother, from time to time, as above stated, about ten months.

The claimant states that she left said land only for the purpose above stated, and that she did so on the urgent entreaty of her parents—sometimes, by letter, and sometimes, by telegram. She is corroborated in her statements by the affidavits of the two physicians, who attended her mother, and who state, that her mother was an invalid of long standing, who at times grew worse and at such times was expected to die, and that on these occasions, the claimant would be sent for to nurse her mother, and that claimant obeyed these calls and faithfully cared for her sick parent, and her services were necessary and very beneficial, and when her mother was temporarily relieved and out of danger, she returned to her claim.

The proof being unsatisfactory to your office, the claimant, in response to a call for a corroborated affidavit, showing “whether or not she had maintained continuous residence since the date of her final proof,” filed, September 27, 1886, an affidavit, duly corroborated, “that since making final proof she has not maintained a continuous residence upon said land, for the reason that she had been obliged to be absent from said land to care for her mother, who was an invalid and who died, June 15, 1886 and since the death of her mother, she has been compelled to care for her father, who is an old man and left alone with no one to care for him except her; and that she has not alienated said tract nor any part thereof, and has fifteen acres of said land cultivated to crops each year and forty acres fenced, and a good habitable house upon said land.”

Your office holds, that the fact, that the mother’s illness had been of long duration when the entry was made, shows that the claimant “well knew it would be impossible for her to properly comply with the homestead law in the matter of residence and cultivation,” and, therefore, she never intended making the tract her home to the exclusion of every other, and that this view is strengthened and corroborated by the further fact, shown by her last affidavit, that since her mother’s death she sets up as an excuse for continued absence from the land, “that she has to take care of her father, who lives in a distant State (Iowa), though she declares at the same time, that her house upon the claim is a habitable one.”

In this finding, I can not concur. The nature of the mother’s malady is not stated, but the fact, that it had become chronic and had lasted so long without fatal result, necessarily relieved the claimant’s mind of immediate apprehension. It seems, also, that the disease did not necessitate the claimant’s attendance all the time, but only at intervals of considerable duration. She lived on the tract over a year after establishing her residence, before she was summoned to her mother’s bedside, and, while the illness had become chronic at the date of the entry, it does not appear that previous to that time, it had been characterized by those dangerous attacks, which occurred at intervals of varying duration after the entry. I am of the opinion that the claimant established

residence in good faith, September 15, 1882, with the intent to make the tract a permanent home to the exclusion of every other, and that her absences thereafter, and prior to her proof, being in obedience to calls of filial duty, are not evidence of an intent to abandon.

The decision of your office rejecting the proof and holding the entry and final certificate for cancellation is reversed, and the entry will be passed to patent.

COAL ENTRY CONTIGUOUS TRACTS SECTION 2347 R. S.

C. P. MASTERTSON.

A coal entry made under section 2347 R. S., must be restricted to contiguous tracts of land.

Where a statute has received interpretation by long continued usage and practice in the proper bureau or department empowered to enforce it, so that such construction must be deemed generally known and accepted, similar words and phrases in a subsequent statute, with reference to the same subject matter, will be construed as having been used in the sense in which those in the former statute have been interpreted.

Secretary Vilas to Commissioner Stockslager, August 10, 1888.

C. P. Masterson made coal entry for the SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 34, T. 16 N., R. 6 E., Olympia, Washington Territory.

The entry embraces three tracts of land separate from each other. The tracts are not only non-contiguous, but they do not corner.

You held the entry for cancellation as to two of the tracts, allowing the claimant to designate which of the two tracts shall be canceled. From this action claimant appealed, alleging error in holding, that the act of March 3, 1873 (Sec. 2347, R. S.), restricted entries thereunder to tracts contiguous or compact in form.

The sole question presented in this case is, whether coal entries may be made of separate tracts, non-contiguous, or whether the rule of contiguity applies as in other cases.

The act of March 3, 1873 (17 Stat., 607), provides that:

That any person above the age of twenty-one years, who is a citizen of the United States, or who has declared his intention to become such, or any association of persons severally qualified as above, shall, upon application to the register of the proper land-office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not otherwise appropriated or reserved by competent authority, not exceeding one hundred and sixty acres to each individual person, or three hundred and twenty acres to such association, upon payment to the receiver of not less than ten dollars per acre for such lands, where the same shall be situated more than fifteen miles from any completed railroad, and not less than twenty dollars per acre for such lands as shall be within fifteen miles of such road.

The pre-emption law provides that every person possessing the qualifications therein named may enter, "by *legal subdivisions*, any number of acres not exceeding one hundred and sixty acres, or a quarter sec-

tion of land," and further provides that no person shall be entitled to more than one pre-emptive right.

The coal land law provides, that every person, possessing the qualifications therein named, may enter "by *legal subdivisions* any quantity of vacant coal lands of the United States not exceeding one hundred and sixty acres, to such individual person," and the act authorizes only one entry by the same person.

There is in this respect very little difference in the phraseology of the two acts. They both authorize an entry of any quantity of lands by legal subdivisions, not exceeding one hundred and sixty acres, and both restrict the entryman to one right of entry.

In administering the pre-emption law, the Department has always required that the several legal subdivisions comprising the entry shall be contiguous.

In the circular issued by the Department September 15, 1841 (1 Lester, 360), providing rules and regulations for the purpose of carrying into effect the act of September 4, 1841 (5 Stat., 453), it is provided that tracts liable to entry under said acts are :

First. A regular quarter section

Second. A fractional section, containing not over one hundred and sixty acres.

Third. Two *adjoining* half-quarter sections (in all cases to be separated by a north and south line, except on the north side of townships, where the surveys are so made as to throw the excess or deficiency on the north and west sides of the township) of the regular quarters mentioned in the first designation; or, two *adjoining* eighty-acre subdivisions of the irregular quarters found on the north and west sides of townships, where more than two such subdivisions exist, or the excess may render them necessary, provided in the latter case the aggregate quantity does not exceed one hundred and sixty acres.

Fourth. Two half-quarter or eighty-acre subdivisions of a fractional or broken section, *adjoining* each other, the aggregate quantity not exceeding one hundred and sixty acres.

Fifth. A regular half-quarter and an *adjoining* fractional section, or an *adjoining* half-quarter subdivision of a fractional section, the aggregate quantity not exceeding one hundred and sixty acres.

Under these regulations entries of quarter quarter sections were not allowed, unless it was a residuary forty acre lot, that is, a forty acre tract remaining after the sale of the other portions of the same quarter section, pursuant to the act of April 5, 1832 (4 Stat., 503), allowing such minor subdivisions, but if such entries embraced two or more subdivisions, they were required to be contiguous. The reason for this was, because the act of April 5, 1832, provided that no person should be permitted to enter more than one half quarter section in quarter quarter sections, but this was repealed by the act of May 8, 1846 (9 Stat., 9), and thereafter entries comprising quarter quarter sections were allowed under the same regulations allowing entries of *adjoining* half sections.

Again, the act of March 3, 1843 (5 Stat., 619), provided for joint entries, where two or more persons were residing on the same quarter

section, or fractional section of land, no reference being made in the act to contiguity.

The circular of May 8, 1843 (1 Lester, 370), providing rules and regulations for the execution of this law, requires that:

Where the persons cultivating do not abandon the tract resided on, a *joint entry* by all the residents may be made of such tract and other "*contiguous unoccupied lands*, by legal subdivisions," to the extent of as many times one hundred and sixty acres, in the whole, as there are residents on the first mentioned tracts entitled under the same law. . . . The "*contiguous*" unoccupied land referred to in this section of the act is to be understood as land separated from the tract resided on, by a line only, not land in the neighborhood as near as may be; and where there is no such contiguous land, by reason of its being rightfully claimed by, or in the occupation of others, the right fails. Such *contiguous* land is to be embraced in the same certificate with the land on which the claimants reside.

The pre-emption law has been uniformly administered under these rules. As said by the Secretary, in the case of *Svang v. Tofley* (6 L. D., 621):

It is a regulation of this Department, co-existent with the pre-emption law itself, that the tracts embraced in an entry under that law must be contiguous (citing *Hugh Miller*, 5 L. D., 683).

This requirement was made evidently for the reason that it is contrary to public policy and the theory of the land laws to allow an entry to be comprised of separate legal subdivisions, where persons are restricted to one entry, and I can see no reason why the rule should not apply with equal force in the administration of the law, authorizing entries of coal lands—the phraseology of both acts in this particular being similar.

Besides, where a statute has received interpretation by long-continued usage and practice in the proper bureau or department empowered to enforce it, so that such construction must be deemed generally known and accepted, similar words and phrases in a subsequent statute, with reference to the same subject-matter, will be construed as having been used in the sense in which those in the former statute have been interpreted, because Congress is taken to have so employed them.

Section 2351 of said act provides that—

The Commissioner of the General Land Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

Under this authority, rules and regulations were adopted, which declare—

1. Sale of coal land is provided for:

By ordinary *private entry* under section 2347;

By granting a preference right of purchase, based on priority of possession and improvement under section 2348.

It is contended by appellant that, as to entries made under section 2347, "the term ordinary private entry can only refer to the rules governing the disposition of agricultural lands by private entry the only restriction being as to quantity."

The term, "ordinary private entry," as used in said rules, has no reference to the rules governing the disposition of lands by private cash entry under section 2357 of the Revised Statutes.

In the sale of public lands under section 2357, the purchaser is not restricted, either as to quantity, or the number of entries. He may under one application purchase one or more legal subdivisions in one section of the township, and in another application purchase another one or more legal subdivision in the same or a different section of the township. Hence, a rule limiting each private cash entry to tracts lying contiguously to each other, could accomplish no good result. Having the right to purchase an unlimited number of non-contiguous legal subdivisions, under the different applications, the purchaser is not prohibited from embracing in one application any number of legal subdivisions, whether they are contiguous or not. But where the purchaser is restricted to one entry of a limited quantity of land, a rule requiring that such entry shall be of a single body of land, being practical and in harmony with the general policy of the land system, is not, in my opinion, in derogation of any legal right. It can not be questioned that the value of the remaining subdivisions may be greatly affected by allowing selections of the most valuable legal subdivisions throughout the township, and for this reason it is the policy of the government to require such entries to be made in one body, where such rule can be practically enforced.

I affirm your decision.

FINAL COMMUTATION PROOF—NEW FINAL PROOF.

MARCUS J. DE WOLF.

On the rejection of commutation proof and suspension of the cash entry, because made during the pendency of a contest, the new proof, though confined to the same period as that embraced within the former, may be accepted, and held to apply, by relation, to the date of the suspended entry and rejected proof.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 10, 1888.

I have considered the appeal of Marcus J. De Wolf from the decision of your office of November 15, 1885, rejecting his final proof and holding for cancellation his cash entry, No. 11,032, and homestead entry, No. 18,042, for the NE. $\frac{1}{4}$ of Sec. 22, T. 105 N., R. 61 W., Mitchell district, Dakota Territory.

De Wolf made said homestead entry March 1, 1882, and, November 9, 1883, he made commutation proof and said cash entry. At the time the cash entry was allowed, contest of the homestead entry, by one Rachel W. Stroud, was pending, and your office, by letter of September 18, 1884, sustained said contest and held the homestead entry for cancellation, and suspended the cash entry and proof, "because im-

properly allowed pending final determination of said contest." De Wolf appealed therefrom and this Department, February 25, 1886, reversed the action of your office in sustaining said contest, and holding the homestead entry for cancellation, but concurred in the suspension of the cash entry and proof, because of the pendency of said contest at the time of their allowance; and directed that "The cash entry will remain *suspended*, and the claimant will be allowed to make new commutation proof, after due notice, showing full compliance with the law." (Stroud v. De Wolf, 4 L. D., 394).

De Wolf made said "new proof" June 2, 1886, upon which the local officers rendered dissenting opinions; the register holding it insufficient and recommending the cancellation of both entries, and the receiver holding, that it "fulfilled the requirements" of this Department in the decision in said contest case of Stroud v. De Wolf and should be accepted.

Your office, in the decision now appealed from, concurring with the register, rejected the proof and held the entries for cancellation.

This proof does not show, that the claimant or his family resided on the land from November 11, 1883, two days after the first proof was made, and is a substantial reproduction of the said proof first made. It relates to and covers the period of time from the date of the homestead entry to November 11, 1883, two days after the date of the first proof and cash entry, November 9, 1883, and is to the effect, as stated in the decision of your office, that "the claimant established residence on the tract, August 2, 1882, having that day completed a twelve by sixteen house thereon, and has broken and cultivated twenty acres—his improvements being worth \$300.00; that his wife and two children resided continuously on the land from the latter part of August, 1882, to November 11, 1883, except from October 29, 1882, to April 27, 1883, when they were in Madison, Wisconsin, to enable the children to go school and that his wife might be treated by the family physician; that claimant himself was absent from August 3, 1882, to March 13, 1883, and from that time to June 20, 1883 and from July 4, 1883, to November 1, 1883, and his absences were for the purpose of carrying on his business as a vendor of picture frames in Madison, Wisconsin." It further appears that the claimant is a man of very limited means.

This proof is substantially the same as the proof introduced on the hearing of the contest case of Stroud v. De Wolf, *supra*, in reference to which this office held, that:

The fact that claimant continued to do business at Madison is not sufficient to disprove the positive testimony of witnesses that his residence was upon the land in question. It is conceded that claimant built a comfortable house on the land, and remained there two weeks; that his family lived on the land up to the time of the contest, with the exception of temporary absence which is accounted for; that the improvements and cultivation are sufficient to show compliance with the requirements of the law. The evidence is not sufficient to warrant the conclusion that the claimant never settled in good faith on said tract or established his residence thereon. Grimshaw v. Taylor (4 L. D., 330).

The cash entry made November 9, 1883, while improperly allowed pending the contest, was not void, and accordingly said entry was not canceled, but only suspended by your office. The above proof, now under consideration, as stated before, relates to said cash entry and covers the period of time from the homestead entry to said cash entry.

Commutation of homestead entries is allowed where the "homestead settler does not wish to remain five years on a tract" (General Circular of March 1, 1884, p. 16), and may be made "at any time before the expiration of said five years." Revised Statutes, section 2301.

The claimant paid the government the consideration required by the law, the proof then offered showed compliance with the law to the date thereof, the entry was allowed by the local officers and cash certificate issued, and the contest (by reason of which the entry was suspended) was subsequently found to have been groundless and was dismissed.

Moreover, the question is one between the government and the citizen, and, if the claimant was in fault in attempting to commute his homestead entry pending a groundless contest thereof, the officers of the government are *in pari delicto* in receiving the claimant's money and admitting said entry.

Under the circumstances I am of the opinion that the proof last offered should be held to apply by relation to the date of the suspended cash entry, and proof first offered, and inasmuch as it shows substantial compliance with the law in good faith to said date, that it should be allowed.

The decision of your office, holding said entries for cancellation, and rejecting said proof, is, therefore reversed, and the cash entry will be passed to patent.

DESERT LAND ENTRY—SURVEY; PRACTICE.

W. L. RYNERSON.

In the case of a desert land entry made prior to survey, the entryman is entitled, on survey of the township, to have his claim properly described by legal subdivisions.

Though a contestant fails to prosecute an appeal, and thus abandons the contest, the Department may in the interest of the government, consider the evidence submitted with a view to determining whether the entry should be canceled or a further investigation ordered.

Secretary Vilas to Commissioner Stockslager, August 13, 1888.

I have considered the appeal of William L. Rynerston from your office decision of November 24, 1886, refusing his application to amend his desert land entry No. 211, so as to embrace therein the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 31, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ Sec. 32 T. 13, S., R. 11 E., Las Cruces, New Mexico land district.

Rynerson made his desert land entry September 23, 1883, for a tract of land described by metes and bounds as follows: commencing at a monument at a point one mile due east of the NE. corner of the SE. $\frac{1}{4}$ of Sec. 1, T. 14 S., R. 10 E., thence east four hundred and forty yards, thence north four hundred and forty yards, thence east eight hundred and eighty yards, thence north eight hundred and eighty yards, thence east four hundred and forty yards, thence north four hundred and forty yards, thence west eight hundred and eighty yards, thence south four hundred and forty yards, thence west four hundred and forty yards, thence south four hundred and forty yards, thence west four hundred and forty yards, thence south eight hundred and eighty yards, to place of beginning.

On November 15, 1883, Rynerson filed his application to amend said entry alleging that the former description was obtained by a private survey, that after his original entry was made the land was surveyed by a deputy U. S. surveyor, when it was found that the description in his application was wrong and did not describe the land he intended to enter, and that the land covered by the description in his entry was unfit for cultivation, being situated on low hills over which water could not be taken and asking that his entry be amended to read as follows: commencing at NE. corner of T. No. 14, south range No. 10, east of the N. M. Pr. Mer. thence north twenty chains, thence east forty chains, to initial monument of claim, thence east forty chains, thence north twenty chains, thence east twenty chains, thence north twenty chains, thence east sixty chains, thence north twenty chains, thence west sixty chains, thence south twenty chains, thence west sixty chains, thence south twenty chains, to place of beginning containing three hundred and twenty acres."

This application was allowed by your office June 4, 1884, and the proper entries were subsequently made by the local officers on their records.

On December 3, 1884, there was filed in your office affidavit alleging that the land covered by Rynerson's entry was not desert in character and that his entry was therefore fraudulent. Upon this affidavit a hearing was duly had before the local officers who decided in favor of the entryman. An appeal was filed, although Brown, the contestant, afterwards wrote to the local officers that the appeal was not authorized by him; that he was satisfied with their decision and would not further prosecute the contest. The case was, however, considered in your office and the contest dismissed because the testimony did not refer to the land described in Rynerson's amended entry, and no appeal was taken from that decision.

On August 12, 1886, Rynerson filed another application setting forth that after making his entry a government surveyor had the contract to subdivide townships 13 and 14 south range, 11 east, that after this subdivision had been made he (Rynerson) hired a surveyor to survey the

tract actually taken by him and to furnish him a description upon which his application to amend was made, that after the survey subdividing said townships was made and before the work was accepted it was discovered that a mistake had been made and the work had to be done over, and new corners established. After this resurvey was made Rynerson employed a surveyor and went with him and caused to be made a survey of the lands claimed by him and then in his possession. As a result of this survey it was discovered that the lands originally intended to be entered and to which his original declaration applied, were embraced in the following description, to wit: the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 31, and the NW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ and the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 13, T. 13 S., R. 11 E.

The local officers after an examination of the facts became convinced that this last description covered the lands intended to be embraced in the original entry and thereupon adjusted said entry accordingly on the records of their office. He also sets forth that said description embraces the lands which he had been in possession of ever since making his entry and that he had in good faith expended large sums of money in constructing ditches, reservoirs, and irrigating canals for getting water upon this land, that much of the land has been fenced and is now under cultivation and asks that his entry be amended to embrace the lands last above described, and upon which the records of the local office show it to have been made. This application was denied by your office apparently because the testimony taken at the trial in the contest heretofore mentioned, showed that the land applied for was not desert land.

The record in this case shows that Rynerson at the time of making his entry took possession of and has ever since then been claiming a certain tract of land. When the township was subdivided, he found that the starting point for the description by metes and bounds, had been wrongly described and at once applied to amend this entry relying upon the survey made in subdividing the township for data in fixing his starting point. This petition was allowed and the entry was amended in accordance therewith. It was, however, found that the survey upon which the entryman had relied in making the amendment was wrong and it was set aside and a new survey made. The entryman in his present application is seeking to have the land which he took possession of under his original entry and which he has since that time been in possession of and upon which he has expended considerable time and money in his efforts to reclaim and improve it, properly described on the records. His failure to have it properly described by the former amendment seems attributable alone to the mistake in the survey of the township. The entryman should not be made to suffer for this mistake but should be allowed now to do that which he was by that mistake prevented from doing under his former application, *i. e.*, to ap-

ply to the land he claims under his desert land entry the proper description by legal subdivisions.

While the contestants in the contest heretofore mentioned have failed to appeal from your office decision dismissing that contest and have thereby abandoned the same, yet it is in the interest of the government for this department to consider the testimony taken at the hearing held, with a view of determining whether or not said entry should be canceled. The facts established by the testimony submitted at that hearing are substantially as follows: The land embraced in this entry lies along and upon both sides of a small stream known as the Tulerosa river. Adjacent to this stream there is a small strip of land varying in width from ten yards to one hundred yards which is low and unfit for cultivation without drainage, grown up with tule and with some willow and cottonwood bushes growing on it. It is stated that this low land after being rendered fit for cultivation by drainage could not be successfully cropped without artificial irrigation. The amount of this character of land in the entry is not definitely fixed but is estimated as from five to ten acres. The other land in the entry is rolling and rises from the bottom land in some places abruptly leaving a bank ten to fifteen feet in height and in other places by more gradual slopes. On this upland there is a growth of native grasses affording some pasturage but not sufficient to render it profitable for hay. There are on these slopes also some cedar, juniper and mesquite bushes. The preponderance of the testimony shows that none of this upland could be successfully cultivated to any crop without artificial irrigation and in order to irrigate it, it would be necessary to construct a ditch, from some point on said river at least one mile and probably a greater distance above the land embraced in said entry. It is also shown that one who could control the water front embraced in this entry would thus be enabled to control a large section of country that affords very good pasturage. This entry and that of John H. Riley adjoining it on the south and extending down the river embrace the same character of lands, and together extend along said river for a distance of two to three miles. While this testimony is not perhaps sufficient to justify an order at this time for the cancellation of this entry, yet it is sufficient to cause an investigation to be made in behalf of the government to determine whether the land covered thereby is desert land within the meaning of the law, and also to determine whether the entry complies with the requirements as to compactness. You will therefore cause such investigation to be made and if deemed necessary a hearing should be had at which testimony both against and in support of the locality of said entry may be submitted.

Your said office decision is accordingly modified.

COAL LAND ENTRY—SECOND DECLARATORY STATEMENT.

JOHN McMILLAN.

The failure of the entryman to apply for leave to file a second declaratory statement, being satisfactorily explained, and it appearing that such filing would have been authorized, and that no adverse claims exist, it is accordingly authorized *nunc pro tunc* and the entry based thereon confirmed.

The statute provides that only one entry shall be made by the same person; but this prohibition does not relate to the filing of the declaratory statement provided for, as is the case in the pre-emption laws.

Secretary Vilas to Commissioner Stockslager, August 13, 1888.

I have before me the appeal of John McMillan from your office decision of February 28, 1887, holding for cancellation his coal entry No. 7, made May 3, 1884, for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 16 N., R. 18 W., Santa Fe district, New Mexico.

Said entry was based upon coal declaratory statement No. 97, covering the whole of the SW. $\frac{1}{4}$ of said section, and executed and filed April 11, 1883; and the ground of your action is that said McMillan had previously—to wit, on June 19, 1832—filed another coal declaratory statement No. 61, covering the SE. $\frac{1}{4}$ of the same section.

Such declaratory statement No. 61 not having been canceled, and it not appearing that McMillan ever applied to be allowed a change of filing, you hold that "in view of paragraph 9 of the circular approved by the Honorable Secretary July 31, 1882", said entry must be canceled. The paragraph cited says that "one person can have the benefit of one entry or filing only."

The circumstances under which the second filing in this case was made, are thus set forth by McMillan himself, in an affidavit dated May 17, 1887:

Some time after (he filed D. S., No. 61, for the SE. $\frac{1}{4}$ of Sec. 34) he learned that a prior filing had been made for said tract, by one John J. Phelan (Coal D. S., No. 56; made May 31, 1882). On hearing this, deponent went to the Land Office again, and explained his case to the register and receiver, and they advised him that he could contest said Phelan's filing No. 56, or that he had not had the benefit of the coal land laws and could file on another tract: On this advice deponent filed coal D. S., No. 97, for the SW. $\frac{1}{4}$ Sec. 34, T. 16 N., R. 18 W., April 11, 1883; He (deponent) was then in actual possession of said land and has been in continuous and uninterrupted possession from that time until the present, and is now in possession. On the 3d of May, 1884, he made cash entry (No. 7) of the same, and paid the government its price; He has made valuable improvements in developing the same, and in such developments and improvements he has expended fifty thousand dollars and upwards; said improvements consist in shafts, tunnels, drifts (&c.) and all the necessary machinery for such improvements in and about such coal land. He has built up a good trade in the coal business and made permanent improvements on said land relying on the good faith of the government to perfect his title. Should his title not be perfected by issuance of his patent, his business will be materially ruined (and) his earnings of the past five years taken from him without any fault, bad faith, or laches on his part, so far as he has been advised in the premises. He was never

advised by the officers of the local land office, when he made his final proof or at any other time that it was necessary for him to file a relinquishment or cancellation of the coal D. S., No. 61 (or) he would have done so, and he is now ready and willing to do so, and herewith tenders the relinquishment in due form.

The relinquishment thus tendered is on file with the affidavit just quoted from. The ex-register corroborates the allegations as to the advice given to McMillan.

In another affidavit, dated December 17, 1886, McMillan swore "that he, in making his filing, declaratory statement No. 97, for a different tract than the tract described in declaratory statement No. 61, acted in good faith, upon competent advice and because his improvements were made upon the tract contained in declaratory statement No. 97, and the coal upon that tract, W. $\frac{1}{2}$ SW. $\frac{1}{2}$, Sec. 34, T. 16 N., R. 18 W., was of better quality, easier handled more valuable and in much larger quantity than upon SE. $\frac{1}{4}$ " of said section.

The prior claim of Phelan to the SE. $\frac{1}{4}$ having been in the way, McMillan would have been allowed, on application to change his filing to a vacant tract. His not having applied is explained and excused by his having been advised by the local officers in effect that the failure of his first filing of itself entitled him to file again for a different tract.

No adverse claims to the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ having intervened, and McMillan's good faith not being impeached, and his improvements on the tract actually entered being very valuable the authorization of the filing for said last mentioned tract the W. $\frac{1}{2}$ SW. $\frac{1}{4}$ —may be and is hereby made *nunc pro tunc* and the cash entry No. 7, on the basis thereof, confirmed.

It is unnecessary to go further in this case, and the question is reserved for further consideration when it shall arise, whether in *any* case a mere *filing* will defeat a second entry. The statute says a qualified person shall "have the right to *enter*" etc., "upon payment to the receiver" etc., but provides that "only one entry" shall be made by the same person. This prohibition does not relate to the *filing* of the declaratory statement provided for, as is the case in the pre-emption law.

Your decision is accordingly reversed.

RAILROAD GRANT—INDEMNITY SELECTION—SETTLEMENT RIGHT.

NORTHERN PAC. R. R. CO. *v.* WALDON.

A homestead settlement right, existing at the date of indemnity selection, excepts the land covered thereby from the operation of such selection, and warrants the rejection thereof.

Secretary Vilas to Commissioner Stockslager, August 13, 1888.

I have considered the case of the Northern Pacific Railroad Co. *v.* John S. Waldon, on appeal of said railroad company from your office decision of June 17, 1886, allowing homestead entry to be made by said Waldon for W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 5, T. 30 N., R. 79 W., Bismarck, Dakota.

The said land is not within the granted limits of the said railroad company, but is within the fifty mile indemnity limit, and was included in the land selected by said company January 8, 1885, under the act of July 2, 1864.

On April 6, 1886, Waldon, who is qualified to enter, applied at the local office to make homestead entry of said land presenting the necessary affidavit and tendering the proper fees.

His application was refused by the local officers for the reason that said land had been selected by said railroad company on March 7, 1885.

From Waldon's affidavit filed with said application, it appears that on July 25, 1884, he went upon said land for the purpose of effecting a settlement and began his improvements thereon, and that he began the erection of this house thereon August 2, 1884; that said house is two stories high and twenty-four by fifty feet; that he dug and curbed a well, built stables and made other permanent improvements amounting in value to \$2500.

That said land had not been surveyed at the time of such settlement and improvement and was not in fact surveyed until December 13, 1884, township plat being filed December 26, 1884.

That at the time he made such settlement and improvement, he intended and still intends in good faith to make said land his permanent home and residence, and to enter and acquire title thereto under the homestead laws.

The claim of the railroad company is based upon the fact that Waldon failed to make his entry within three months after the filing of the township plat in the local office and that his right so to do became extinguished. The township plat was filed December 26, 1884, and consequently no question of Waldon's rights could arise before March 26, 1885.

The railroad company made its selection of indemnity lands, including the land in controversy, January 8, 1885, within a few days after the filing of the township plat and before the expiration of the three months allowed the settler for making entry.

Waldon being a settler upon said land at the date of its selection by said railroad company, and there being at the time no legal reason why his settlement should not ripen into a title, said land did not pass to the said railroad company by the same being included in their list of selections No. 26.

A settlement right, existing at the date when the grant became effective, excepts the land covered thereby from the operation of the grant.

These principles are so well settled by decisions of this Department that the citation of authorities is unnecessary. While the same rule is not declared by the statute to apply to selections, yet it is provided that no selection shall be operative until approved by the Department, and it may well be laid down as a rule that what was esteemed by the Congress as sufficient to prevent land passing by the grant shall be sufficient to deny approval of a selection.

The fact of Waldon's bona fide settlement and actual residence upon the land at the time said railroad company made its selection, which fact is practically conceded by the railroad company, with a legal right at that time to make homestead entry, is sufficient to deny the right of selection claimed, and the consideration of the other questions raised becomes unnecessary.

Your said decision is accordingly affirmed.

RAILROAD GRANT--STATE RELINQUISHMENT.

ST. PAUL M. & M. RY. CO. v. MOLING.

By the acceptance of the terms fixed by the State legislature, in extending the time for the completion of the road, the company relinquished all rights in lands to which it had not acquired full and legal title, and that were occupied by actual settlers prior to the passage of said act, and authorized the Governor of the State to reconvey such lands to the United States.

Secretary Vilas to Commissioner Stockslager, August 13, 1888.

The St. Paul, Minneapolis and Manitoba Railway Company appeals from your office decision of date November 1, 1886, holding for cancellation its selection of the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, Sec. 29, T. 131 N., R. 39 W., Fergus Falls, Minnesota.

The land in question is within the ten mile granted limits of the grant to the State of Minnesota of March 3, 1857 (11 Stat., 195), as amended by act of March 3, 1865 (13 Stat., 526), for the benefit of the St. Paul, Minneapolis and Manitoba Railway Company (St. Vincent Extension), and is also within the thirty mile indemnity limits of the grant to the Northern Pacific Railroad Company of July 2, 1864 (13 Stat., 365).

The rights of the St. Paul, Minneapolis and Manitoba Railway Company attached on filing map of definite location of the St. Vincent Extension, December 20, 1871. The indemnity lands of the Northern Pacific Railroad Company were ordered withdrawn by letter of your office, received at the local office January 10, 1872.

The tracts in dispute were listed by the St. Paul, Minneapolis and Manitoba Railway Company, on account of the St. Vincent extension, October 28, 1879, and such listing is still intact upon the official records; but the land has never been certified to the State as enuring to the benefit of the company under said grant.

On November 24, 1883, August Moling applied to file pre-emption declaratory statement for the land in controversy, alleging settlement thereon August 1, 1872, and basing his right to make such filing on an act of the legislature of the State of Minnesota, approved March 1, 1877. (See Special Laws Minn., 1877, p. 257.) Upon the presentation of said application the local officers ordered a hearing to ascertain the facts respecting the applicant's settlement and residence on the land. Notice of said hearing was duly given to said Moling and the St. Paul, Minne-

apolis and Manitoba Railway Company, and the same was regularly had on February 8, 1884.

Upon the testimony taken, the local officers found that Moling had settled on the land in controversy prior to the date of the passage of the said act of March 1, 1877, by the legislature of Minnesota, and that the same was thereby excepted from the operation of the grant to the company—and they thereupon held that Moling's application to file should be allowed.

On appeal by the company, from this finding, your office affirmed the same, and held the company's listing of the tracts involved for cancellation.

The testimony in the case shows that Moling erected a dwelling house on the land and did some breaking in the year 1871; that he resided on the land during a part of the year 1872, cultivating the same, and established his permanent residence thereon early in 1873, which he maintained continuously up to date of the hearing. He was legally qualified to make a pre-emption entry, and had on March 1, 1877, improvements on the land worth from \$500 to \$600.

The company of which the present company is the successor, having failed to build its road within the time first prescribed, the legislature of Minnesota, by the act of March 1, 1877, aforesaid, provided, among other things, for an extension of time within which the road could be built, imposing certain conditions and limitations to the enjoyment of the privilege therein granted.

Among the conditions and limitations imposed by said act was the following:

SEC. 10. The Saint Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim or demand in or to any piece or parcel of land lying or being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company, or their successors or assigns, upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption or homestead filing or entries—not to exceed one hundred and sixty acres to any one actual settler; and the Governor of this State shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the lands upon which they actually reside, from the United States, as homesteads or otherwise, and upon the acceptance of the provisions of this act by said company, it shall be deemed by the Governor of this State as a relinquishment by said company of all such lands so occupied by such actual settlers; and in deeding to the United States such lands, the Governor shall receive as *prima facie* evidence, of actual settlement on said lands, the testimony and evidence or copies thereof heretofore or which may be hereafter taken in cases before the local United States land offices, and decided in favor of such settlers.

The portion of the company's road opposite the land in controversy was not constructed until after the passage of said act of March 1, 1877, and it thus appears that, at the date of the passage of said act, by the

legislature of Minnesota, the "legal and full title" to this land had not been perfected in the railway company.

On June 23, 1880, the Governor of Minnesota, acting under and by virtue of the authority vested in him by said act, executed to the United States a deed of relinquishment covering a quantity of lands in the limits of the St. Vincent grant, for the benefit of certain settlers therein named. Among the tracts conveyed by said deed is the tract here in controversy, and the beneficiary named is the present applicant.

From the foregoing, it will be seen that the facts of this case are in all material respects similar to those of the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Chadwick, decided by this Department September 6, 1887 (6 L. D., 128).

This case comes within the principle of the decision in that case, and is therefore ruled in accordance therewith. See also case of St. Paul, M. & M. Ry. Co. *v.* Morrison, decided December 26, 1885 (4 L. D., 300). Your said office decision, rejecting the company's claim to the land in dispute, is accordingly affirmed.

It is proper further to state that the Northern Pacific Railroad Company does not, so far as the record shows, make any claim to the land in dispute.

DESERT LAND CONTEST—RIGHT OF SUCCESSFUL TESTAMENTANT.

WELCH *v.* DUNCAN ET AL.

On the cancellation of an entry under contest, the land covered thereby is at once open to settlement and entry, subject only to the preferred right of the successful contestant.

During the period accorded the successful contestant for the exercise of his preference right the application of another to enter may be allowed subject to the right of the contestant.

The right conferred on the successful contestant by section 2, act of May 14, 1880, is a personal right which can not be transferred to another.

A preferred right of entry can not be acquired through a contest prosecuted in the name of another.

The fact that the homestead applicant failed to tender the fees and commissions, and file his preliminary affidavit, will not defeat his right of entry where the application was rejected on the ground that the land was excluded from entry by the preference right of a successful contestant.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 13, 1888.

In the matter of desert land entry No. 1833, made June 9, 1886, by Robert G. Welch, for Sec. 8, T. 11 N., R. 3 W., Salt Lake meridian, Utah, appealed by Welch from the decision of your office, dated November 2, 1886, holding said entry for cancellation, the record discloses the following facts:

On January 29, 1883, desert land entry No. 671 for said section was made by one Malissa Groot.

On February 18, 1886, one Lea Owsley initiated a contest against said entry, and against desert land entries Nos. 48, 49, 668, 670, 673, 674, 676, 678 and 679, all of which entries were made January 29, 1883, except the first two, which were made May 17, 1877. You state in said decision that these ten entries cover 5,880 acres.

Hearing in each of said contest cases was set for April 19, 1886. On April 10, Malissa Groot executed a relinquishment to the tract of land above described and asked therein that said desert land entry No. 671 be canceled.

On the day fixed for hearing in the said contest cases initiated by Owsley, this relinquishment, together with a relinquishment in each of said cases, except No. 679 which was filed June 26, 1886, as appears from said office decision, was filed in the local land office. All of said entries were subsequently canceled, and on June 3 and 4, 1886, all the cancellations noted on the records of the local land office, except in entries 679 and 674, which were canceled respectively July 16, and on August 31, 1886.

Entry No. 671 for the above described section eight having been canceled and the cancellation noted in the local office on June 3 or 4, the following named parties on June 8, 1886, applied to make homestead entries in said section eight,—to wit:

Charles Duncan for the NE. $\frac{1}{4}$
 " Smith " " NW. $\frac{1}{4}$
 Wm. H. Evans " " SE. $\frac{1}{4}$
 Hiram (Hiram?) Smith " SW. $\frac{1}{4}$

Each of said applications was rejected by the receiver of the local land office on the ground that Owsley had a preference right of entry. Afterwards, but on the same day, the above named parties, together with other parties similarly situated, asked, by their attorney, that they each be "allowed to make said entries as asked, subject to the preference rights of contestant Owsley; that is to say, on the condition that such entries be relinquished hereafter so far as they may conflict with the preference rights of contestant when he shall exercise the same." Still failing to secure favorable action, the above named applicants and others, on June 9, filed a protest in the local land office "against the allowance of any filings or entries of any kind upon said tracts by any other parties" while their said applications were pending. Afterwards, and on the same day, June 9, 1886, the appellant, Robert G. Welch, was allowed to make desert land entry No. 1833 for the above described section eight. This entry was made with the approval of contestant Owsley, who has made no application to enter any part of said section or of any of the lands covered by said several canceled entries.

On July 6, following, each of the above named homestead applicants duly appealed to the Commissioner from the action of the local office rejecting his application and allowing Welch's entry. Answers to said appeals were filed July 28, on behalf of Welch.

An affidavit of Lea Owsley is attached to said answers, and asked to be made a part thereof, in which he says, that on February 18, 1886, he filed a contest against desert land entry 671 made by Malissa Groot on the above described section eight, and "on the same day made a number of other contests against other desert land entries and succeeded in obtaining the cancellations." He further says:

I now on oath declare that I made the contest against desert entry No. 671 for and in behalf of Robert G. Welch so as to save the expense of litigation if so many contestants and witnesses would have to appear, and which I individually could and did accomplish. That said contest was not made by me for the purpose of speculation, nor for the acquisition or holding a large body of land, but solely for the purpose of cancellation of desert land entry No. 671 for and in behalf of the said Robert G. Welch, and to enable him to make entry for the said contested land under the act of May 14, 1880.

Your predecessor in office, Commissioner Sparks, held that on the cancellation of said entry, No. 671, and said other canceled entries, "the lands covered thereby were subject to entry by the first qualified applicants," and Welch's said desert land entry, and certain other enumerated entries made subsequent to June 8, 1886, were held for cancellation.

It is stated in the argument submitted in behalf of Welch that he and the parties who made desert land entries Nos. 1828, 1829, 1830, 1831, 1832, 1834 and 1835, on the same day his was made, were in reality the contestants in said cases, "they using Owsley to make complaint and thus save great expense in clearing the record of abandoned entries;" and appellant contends that it would not be just or right to allow others to avail themselves of his labor and capital, and that the rejection of said homestead applications "by the register and receiver was strictly in accordance with the spirit and intent of the second section of the act of May 14, 1880."

Appellant contends further, that the contestant, Owsley, not only had a preference right to enter any particular tract of the land he caused to be restored to the public domain, but that he could waive that right and confer its benefits on another party selected by him; that he (Owsley) "controlled all such lands for thirty days . . . or until he voluntarily waived such right (preference right of entry) and immediately upon such waiver the land was open to the first legal applicant, and not until then;" and that he was the first legal applicant after waiver by Owsley, and therefore entitled to enter said section; that the Commissioner erred in holding that any application to enter any of said lands (made within thirty days after notice to contestant Owsley) could legally be allowed, "until the contestant is fully satisfied by entry or waiver."

I cannot assent to the correctness of the doctrine contended for by appellant, and can discover no material error in the decision of your office herein.

The section of land in controversy having been restored to the public domain by the cancellation of Malissa Groot's entry, it became at

once open to settlement and entry, subject only to Owsley's preference right. If he did not possess the qualifications of a pre-emptor or entryman, or possessing such qualifications did not choose to exercise his preference right, then said land was subject to settlement or entry, as other public land, free from any right of contestant of whatever character. The law does not confer on the successful contestant a right to control such land for thirty days after notice, nor the right during such period to select a particular party and by waiver of his preference right at an opportune moment confer on such party the benefits conferred by law on the successful contestant. Such a doctrine is not sanctioned by law or by sound public policy. The right conferred on a successful contestant by section 2, act of May 14, 1880 (21 Stat., 140) is a personal right which can not be transferred to another.

The aforesaid applicants, if qualified, should have been permitted, on June 8, 1886, to enter the several tracts applied for subject to Owsley's preference right. *Shanley v. Moran* (1 L. D., 162); *Alonzo Phillips* (2 L. D., 321); *Boory v. Lee*, 6 L. D., 643).

The claim that the contest prosecuted by Owsley against said entry No. 671 was in reality appellant's contest can not be recognized. To make it his contest it should have been prosecuted in his name.

Appellant further objects that said homestead applicants have not shown themselves to be qualified entrymen, and that they did not tender the usual fees and commissions to the officers and that, therefore, their applications were not legal.

Their applications being rejected on the ground stated, the tender of fees and commissions would have been an idle formality, and the usual affidavit of qualification may yet be made.

Should any of the aforesaid applicants fail to show that he was qualified to make homestead entry at the time appellant's entry was allowed, such failure would leave his said entry intact to that extent, and to that extent only.

The decision of your office holding appellant's entry for cancellation unconditionally is modified accordingly.

OMAHA LAND--DATES OF PAYMENT.

WACLAV HRUBY.

A claim for Omaha land based on settlement and filing made after the time fixed by the proclamation under the act of August 7, 1882, and prior to the passage of the act of August 2, 1886, falls within the second proviso of the latter act; and the first payment on such claim is not due until two years from the passage of said act.

Secretary Vilas to Commissioner Stockslager, August 13, 1888.

By letter of February 18, 1887, your office affirmed the action of the local officers at Neligh, Nebraska, in rejecting the proof and application

of Waclav Hruby to pay interest due under his Omaha declaratory statement—No. 545—made September 15, alleging settlement September 10, 1885, for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, and SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 25, T. 24 N., R. 5 E. The rejection was made on the ground that claimant was “in default for more than sixty days from August 2, 1886.” Claimant appealed.

Proof was made December 29, 1886, before the county clerk of Cumming county, Nebraska, and January 10, 1887, claimant tendered the accrued interest due on \$1,320 (the appraised price of the land) from September 10, 1886, to January 10, 1887.

On August 7, 1882, an act was passed providing for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska (22 Stat., 341), in the following manner:

SEC. 2. That after the survey and appraisement of said lands the Secretary of the Interior shall be, and he hereby is authorized to issue proclamation to the effect that unallotted lands are open for settlement under such rules and regulations as he may prescribe. That at any time within one year after the date of such proclamation, each *bona fide* settler, occupying any portion of said lands, and having made valuable improvements thereon, or the heirs at law of such settler, who is a citizen of the United States, or who has declared his intention to become such, shall be entitled to purchase, for cash through the United States public land office at Neligh, Nebraska, the land so occupied and improved by him, not to exceed one hundred and sixty acres in each case according to the survey and appraised value of said lands as provided for in section one of this act; *Provided*, That the Secretary of the Interior may dispose of the same upon the following terms as to payments, that is to say, one-third of the price of said land to become due and payable one year from the date of entry one-third in two years, and one-third in three years, from said date, with interest at the rate of five per centum per annum; but in case of default in either of said payments the person thus defaulting for a period of sixty days shall forfeit absolutely his right to the tract which he has purchased and any payment or payments he might have made.

March 19, 1884 the Secretary of the Interior issued public notice that the lands in townships 22 and 25 north, ranges 5, 6, and 7 east, in said reservation, would be thrown open to settlement on Wednesday, April 30, 1884 at 12 o'clock noon. The regulations require the filing of a declaratory statement within thirty days from date of settlement, and some time within one year from April 30, 1884, the settler must make actual entry of the land, submit final proof and make payment thereon.

As Hruby did not initiate or perfect his claim within the time prescribed by this act the payments in his case are not governed by its provisions.

On August 2, 1886, an additional act governing the disposition of said lands was passed, (24 Stat., 214) as follows:

That the Secretary of the Interior is hereby authorized and directed to extend the time of the payments of the purchase money under the sales made under the two acts one entitled “An Act to provide for the sale of the remainder of the reservation of the confederate Otoe and Missouri tribes of Indians in the States of Nebraska and Kansas, and for other purposes”, approved March third, eighteen hundred and eighty-one, the other entitled “An act to provide for the sale of a part of the reservation of the Omaha tribe of Indians in the State of Nebraska, and for other pur-

poses", approved August seventh, eighteen hundred and eighty-two, as follows, The time of each payment shall be extended two years beyond the time now fixed by law: *Provided*, That the interest now due on said payments shall be paid annually at the time said payments are now due: *Provided also*, That all persons who have settled or shall settle upon said Omaha lands and who have filed their declaratory statement or, who may make bona fide settlement improvement and filing prior to the date of the passage of this act and subsequent to the date authorized by proclamation of the President in pursuance of the act aforesaid for such settlement filing and improvement in all other respects except as to time in conformity with said act may make the first payment as therein required two years from the date of the passage of this act, and the second payment one year thereafter and the third payment two years thereafter but the interest required thereon by law shall be paid annually on the date of the passage of this act *Provided*, That all other provisions in the acts above mentioned, except as changed and modified by this act shall remain in full force: *Provided further*, That no forfeiture shall be deemed to have accrued solely because of a default in payment of principal or interest becoming due April thirtieth, eighteen hundred and eighty-six, if the interest due upon said date shall be paid within sixty days after the passage of this act.

The case of Hruby is governed by the second proviso of said act. He settled and filed *subsequent* to the time fixed by the proclamation under the former act, and *prior* to the passage of the latter. His first payment therefore by the express letter of the law, did not fall due before two years from the passage of the latter act.

Said decision rejecting the proof and offer of payment as stated is accordingly reversed.

UTE INDIAN LANDS--WHITE RIVER MILITARY RESERVATION.

HENLY C. ROCK.

The establishment of the White River military reservation on lands subject to disposition under the act of June 15, 1830, providing for the sale of the Ute reservation, did not operate to defeat or impair the trust created by said act, but had the effect to merely suspend the execution thereof.

On the abandonment of said military reservation, the land embraced therein became subject to disposal under the act of June 15, 1880, and not under the law providing for the sale of abandoned military reservations.

Secretary Vilas to Commissioner Stockslager, August 13, 1888.

Henly C. Rock made pre-emption cash entry for the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ (Lot 2) and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ (Lot 3), Sec. 4 T. 1 S., R. 93 W., Glenwood Springs, Colorado. Declaratory statement was filed April 14, 1885, alleging settlement May 26, 1884.

On February 2, 1887, the local officers transmitted the application of Rock to purchase adjoining tracts under the act of July 5, 1884 (23 Stat., 103), providing for the disposal of abandoned military reservations, alleging that he has lived upon and improved said lands since May 26, 1884, with the intention of filing for them when they should be surveyed, and that he could not file for said lands at the time he filed for his adjoining pre-emption claim because said lands were then within the limits of the military reservation known as "Camp on White River."

Said reservation has now been abandoned and placed under the control of the Department of the Interior, the survey thereof having been accepted by your office April 1, 1887.

You rejected said application by letter of October 13, 1887, upon the ground that if Rock was qualified in all other respects, his settlement made in May 1884, did not bring him within the terms of the act of July 5, 1884, and his application must therefore be refused.

On December 27, 1887, Rock filed a motion for review of your decision upon which no action seems to have been taken by your office, and on February 8, 1888, the local officers forwarded to your office an application to amend his pre-emption declaratory statement supported by affidavits showing that he settled upon said tract about December, 1882, instead of May 26, 1884, as stated in his original application; that said land was settled upon, together with the land embraced in his pre-emption entry, in good faith for the purpose of securing a home under the general laws, supposing at the time that it was not within the limits of the reservation. That in October, 1884, he tendered his declaratory statement for said tract which was rejected by the register because one of the subdivisions fell within said reservation. That in April 1885, he again filed said declaratory statement, but when he came to prove up he was only allowed to make proof and payment for seventy-two acres, and that he then applied to purchase the remaining eighty-two acres, but his application was rejected because he had not brought himself within the terms of the act of July 5, 1884.

By letter of April 20, 1883, you submit all the papers in this case to this Department "for instructions as to whether the lands within the late abandoned military reservation are to be disposed of under the act of July 5, 1884, or under that of June 15, 1880 (21 Stat., 199), providing for the sale of the Ute reservation in Colorado."

Said act of June 15, 1880, after providing for the sale of said reservation to the United States and for the allotment of certain lands to the Ute Indians, further provided:

And all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal¹ of the public lands, at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead law; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States for all sums paid out or set apart under this act by the government for the benefit of said Indians, and then to be applied in payment for the lands at one dollar and twenty-five cents per acre which may be ceded to them by the United States outside of their reservation, in pursuance of this agreement. And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians, in the proportion hereinbefore stated, and the interest thereon shall be distributed annually to them in the same manner as the funds provided for in this act.

Under this provision these lands are held and deemed to be public lands of the United States and subject to disposal under the *laws providing for the disposal of the public lands* at the same price and on the same terms as other lands of like character, the only exception being that they shall not be subject to entry under the homestead law for the reason, that they are to be disposed of in trust for the benefit of said Indians. But while said lands are subject to disposal under existing laws, they cannot be sold at private cash entry until a public offering and until offering has been made of said lands they are subject to entry only under the pre-emption law, or other laws authorizing sales for cash.

The White River military reservation was established by Executive order April 26, 1881, after the creation of the trust by the act of June 15, 1880. The establishment of this reservation did not defeat or impair the trust, or change the *status* of the land, but had the effect merely to suspend and prevent the disposal of land within said reservation during its existence, and when abandoned and placed under the control of the Secretary of the Interior, the land became subject to disposal under the act of June 15, 1880, and not under the act of July 5, 1884. (L. V. Bryant, 3 L. D., 296; *Wenig v. Frost*, 6 L. D., 175 and 539.)

No ruling is hereby made upon the application of Rock, and the papers are herewith returned to your office for decision thereon under the instructions herein given.

PRIVATE CASH ENTRY—SWAMP SELECTION.

HENRY W. SAGE.

That a tract of land had been embraced within a list of swamp selections would not exclude it from private entry, where it appeared from the field notes of survey, that the land was not subject to selection, and the claim of the State was not noted of record.

Secretary Vilas to Commissioner Stockslager, August 13, 1888.

I have considered the appeal of Henry W. Sage from your office decision of March 18, 1887, holding for cancellation his private cash entry—No. 6625—as to the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, Sec. 24, T. 34 N., R. 3 E., Eau Claire land district, Wisconsin, for the reason that said tract was not subject to ordinary cash entry because it was claimed as swamp land by the State of Wisconsin.

The township was offered April 20, 1869, and June 11, 1886, Henry W. Sage made cash entry for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 12, and the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 24, of the township and range above described.

In the adjustment of the swamp land grant the State of Wisconsin agreed to accept the field notes of the survey as the basis on which to determine the character of the land. At the time the private entry was allowed the said State had filed in your office a list of the tracts of

land which it claimed under the grant. The tract in controversy was embraced in said list, but an examination of the field notes showed that it was not swamp and overflowed land within the meaning of the act and the claim of the State was, consequently, rejected November 30, 1886. From this action no appeal was taken. The land in question, was never certified to the State and there was no notation on the records of any claim thereto.

The question for determination is whether the claim to this land asserted by the State, which was afterwards found not to be valid, operated to withdraw it from private cash entry. You decide in the affirmative, but I cannot agree in your conclusion. The tract was regularly offered for sale and has not been withdrawn. The register of the local office writes that a careful examination of the records of the office fails to disclose that there was ever made any entry, filing or selection for the tract in question other than the private cash entry of Mr. Sage; and the Treasurer of Wisconsin writes that the land is not State land. Such being the facts the entry of Mr. Sage should remain intact.

Your decision is reversed.

PRACTICE—HOMESTEAD CONTEST—ACT OF JUNE 15, 1880.

SMITH *v.* FERGUSON.

The suspension of the right of purchase during the pendency of contest is for the sole benefit of the contestant. A purchase under said act, while a contest is pending, is good as against the government, and all persons except the contestant. An entry thus allowed should not be canceled, but should be suspended, and held subject to the exercise of the preference right of the contestant.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 14, 1888.

I have considered the appeal of John B. Smith, in the case of John B. Smith *v.* Joseph Ferguson, from your office decision of January 3, 1887, rejecting his application to make homestead entry for the NW. $\frac{1}{4}$, Sec. 32, T. 21 S., R. 23 W., Larned, Kansas land district.

It appears from the record that on April 27, 1885, said Smith filed an affidavit of contest alleging abandonment against Ferguson's entry made December 5, 1878.

The contest was tried July 24, 1885, Ferguson making default, the local officers recommended that the homestead entry be canceled for abandonment, but as there was an incomplete proof of service of notice, allowed an appeal to be taken on September 7, 1885, to your office. This appeal has never been decided formally but was probably included in your said decision of January 3, 1887, and is consequently included in this appeal to this office.

On October 12, 1885, Ferguson made cash entry of said tract under the act of June 15, 1880, the contest being still pending on appeal and on June 14, 1886, the appeal being still undecided, Smith applied to the

local officers to make homestead entry of the same, but such application was rejected.

From such rejection Smith now appeals.

When the contest was inaugurated the right to purchase under the act of June 15, 1880, was suspended pending the same, in so far as the purchase can affect any rights of the contestant under the law.

This, however, does not affect the rights of such cash entryman as against the government, or against the claim of any person other than the contestant, said Ferguson having the right as against all persons except Smith to make such purchase.

In your said decision you say :

The allegation of abandonment appears to be proved. I must therefore hold the homestead entry for cancellation therefor, and also hold the cash entry for cancellation under the rule in the case of *Freise v. Hobson* (4 L. D., 580).

As the cash entry of Ferguson is good against all the world except the preference right of the contestant it is not proper that his cash entry should be absolutely canceled, even though the evidence sustains your conclusion, that "the allegation of abandonment appears to be proved," which I concede it does.

If for any reason Smith should fail to avail himself of his preference right, or if it should appear that he is not qualified to make entry, then the cash entry of Ferguson should not be canceled.

Should Smith under his preference right make an entry and perfect the same the said cash entry of Ferguson should be canceled but not otherwise.

Ferguson's cash entry will therefore be suspended pending the exercise of his preference right by Smith within thirty days after notice to him of this decision. Should he fail to exercise such right Ferguson's entry will stand.

Your said decision is therefore modified.

PRE-EMPTION—SECTION 2360, REVISED STATUTES.

FRANK E. CROSIER.

A person who removes from land of his own, acquired under the homestead law, to reside on a pre-emption claim, in the same State or Territory, is within the second inhibition contained in section 2360 of the Revised Statutes.

That the homestead was under mortgage at the time of the removal therefrom will not operate to relieve the pre-emptor from the inhibition of the statute.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 14, 1888.

I have considered the case of Frank E. Crosier, as presented by appeal from the decision of your office, under date of June 12, 1886, rejecting his final proof and holding for cancellation his pre-emption filing, covering the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 14, T. 6 N., R. 11 W., Bloomington district, Nebraska, for the reason that he had removed from land of his

own in the State of Nebraska, acquired under the homestead law, to reside on his pre-emption claim.

It appears from the record that on the 24th day of September, 1873, said Crosier filed homestead declaratory statement for the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the N. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of said section; that on March 9, 1874, he made homestead entry for same, and on February 11, 1879, final certificate was issued to him; that on February 25, 1884, he filed his declaratory statement for said first mentioned tract, alleging settlement on the same date; that on September 29, 1884, Amanda Chapman made timber culture entry for the same tract, and on March 20, 1886, after duly published notice, claimant made final proof under his said pre-emption declaratory statement, before the clerk of the district court of Adams county, Nebraska.

From this proof it appears that claimant resided continuously on said claim for the period of two years next preceding the date of making proof, and that his improvements, made thereon since filing, consist of a frame dwelling house, fourteen by twenty-six feet, and one and one half stories high, with an addition, a frame stable and frame granary; a wind mill, some fruit trees, a fence enclosing the whole tract and twenty-four acres, which remained unbroken at the date of his filing, reduced to cultivation, and that the same, in the aggregate, are worth from \$700 to \$800. That there were other improvements on the land when he settled upon it, which he had purchased of one Tappan, and that at the date of making proof, the whole of said tract was under cultivation.

It also appears from said proof, that claimant removed from his said homestead and took up his residence on the claim in question.

This proof was submitted to the local officers, and on March 24, 1886, they rejected the same, because it appeared that claimant had removed from land of his own in the same State to make settlement upon this claim, and claimant appealed.

In support of his appeal, under date of April 9, 1886, he filed his sworn statement, corroborated by the affidavits of two other persons, setting forth, in substance, that prior to the date of his said filing, claimant had resided for several years, on his said homestead, but owing to poor crops and various misfortunes, he was obliged to mortgage the same for a loan of \$1200, and being at the same time, indebted to a party in the east, he gave him a mortgage for \$950, on the same tract, making in all, \$2150, in mortgages, which was the full value of the land. That claimant offered to sell the same to the second mortgagee, for the amount of said two liens but he refused to take it at that price. That under these circumstances, claimant made his filing for the tract in question, considering that he had no longer any interest in his said homestead, as he had virtually deeded it away and he supposed he had a perfect right to the benefits of the pre-emption law at the time he made his filing; and that the same was made in good faith.

An abstract of title accompanied said sworn statement, showing

successive mortgages on said homestead from March 15, 1875, to September 26, 1884. An additional statement of claimant is also submitted in support of his said appeal, in which he states that he paid \$1000 for the improvements purchased by him as aforesaid, making in all, \$1700 or \$1800 expended by him on the pre-emption claim. The record does not disclose any contest on the part of Chapman, nor any objection by her to the acceptance of claimant's proof.

It has frequently been held, and is now the established rule of this Department, that a person who removes from his residence on land of his own, acquired under the homestead law, to reside on a pre-emption claim, in the same State or Territory, is within the second inhibition contained in section 2260 of the Revised Statutes, and that his pre-emption filing is consequently illegal and void, and no rights can be acquired under it. See cases of *John Longnecker* (1 L. D., 535); *Goyne v. Mahoney* (2 L. D., 576); *McDonald v. Fallon* (3 L. D., 56); and *Clayton M. Reed* (5 L. D., 413).

It is shown by the abstract of title above referred to, that said mortgage for \$950 was not given until September 26, 1884, more than six months after Crosier had, according to his said final proof, removed to and taken up his residence on his pre-emption claim; so that, at the date of his removal from his homestead the then existing mortgage thereon, did not according to his own showing amount to the value of the land covered thereby.

There can be no question, therefore, that claimant in removing from his said homestead did remove from "land of his own," notwithstanding the existence of the aforesaid mortgage of \$1200, to reside upon his said pre-emption claim; and applying to this case the rule laid down in the cases above cited, which has been uniformly followed in a long line of departmental decisions, it would seem that there is no relief for him, although the case is one of peculiar hardship.

I therefore concur in your conclusion that claimant's filing was illegal and must be canceled, and the decision of your office is accordingly affirmed.

FINAL PROOF—NOTICE—TRANSFeree.

MILo ADAMS.

The published notice must state definitely before whom, and at what place the final proof will be made.

Republication of notice may be made by a transferee, and the proof submitted by the claimant accepted in the absence of protest, where the first publication was insufficient, but due compliance with law appears in other respects, and the present whereabouts of the claimant cannot be ascertained.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 14, 1888.

I have considered the appeal of Milo Adams, transferee of Frank R. VanDusen, from your office decisions of November 11, 1885 and August

23, 1886, rejecting the latter's final proof under homestead entry No. 2038, for NW. $\frac{1}{4}$ of Sec. 20, T. 113 N., R. 68 W., Huron land district, Dakota.

VanDusen made his homestead entry March 3, 1883, and his final commutation proof September 11, 1883 before the clerk of the district court of Hand county, Dakota. The local officers accepted the proof and final certificate was issued.

It appears that the published notice for the making of the final proof was defective, for it failed to state before whom, or at what place such proof would be made.

The notice in this case says, "the proof will be made before the judge or clerk of a court of record in and for Hand county, Dakota Territory.

Such notice is insufficient and the proof was properly rejected. Jacob Semer (6 L. D., 345).

The affidavits accompanying the appeal show that VanDusen after transferring the land has left the Territory of Dakota, and that his whereabouts cannot, after diligent inquiry, be ascertained. To require the claimant to give notice anew of his intention to submit final proof would, therefore, answer no purpose.

While the legal requirements regarding the final proof of claimant cannot be disregarded, unnecessary hardship should not be inflicted upon innocent parties. Inasmuch as the final proof of VanDusen and the supplementary affidavits show his compliance with the law regarding residence and improvements, and his qualification as a homesteader, I direct that notice of final proof may be given anew by the transferee and that, if at the time appointed by such notice no protest or objection is filed, then the proof heretofore made may be accepted; should a protest or objection be filed then a hearing must be had to ascertain if Van Dusen had fully complied with the law during the time covered by his final proof.

Your decision is modified accordingly.

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PRACTICE—NOTICE—JURISDICTION—ABANDONMENT.

STAYTON *v.* CARROLL.

Jurisdiction is acquired by due service of notice upon the claimant, and if there has been no legal notice to the claimant, then there is no authority in the local office to adjudicate his rights.

A contest charging failure to establish residence and abandonment must fail, where, prior to legal service of notice thereof, the entryman had cured his laches.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 15, 1888.

I have considered the case of Charles F. Stayton *v.* Michael Carroll, as presented by the appeal of the latter from the decision of your of-

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office, dated August 21, 1886, holding for cancellation his homestead entry of the SE. $\frac{1}{4}$ of Sec. 23, T. 20 S., R. 27 E., made August 16, 1882, at the Visalia land office, in the State of California.

The record shows that said Stayton filed his affidavit of contest against said entry on December 24, 1883, and attempted to perfect service of notice by publication. A hearing was had upon the testimony submitted by the contestant, the claimant not appearing, the local land officers held that said entry should be canceled. The claimant subsequently entered an appearance specially and moved that said contest be dismissed because no notice had been served upon him. Your office, on February 14, 1885, held that the claimant had not been duly notified, and the proceedings were accordingly set aside and the local land officers were "directed to resume proceedings from the point of departure from the requirements of practice." Thereupon, at the request of contestant, a notice was issued and duly served by the contestant upon claimant to appear before the local land officers and furnish testimony relative to the charge of abandonment of said entry. The parties appeared and offered testimony. After the evidence was submitted the claimant moved to dismiss said contest, for the reason that the testimony showed that any failure of the claimant to establish residence upon said tract was cured long prior to the service of legal notice upon him. The local land officers granted said motion for the reason that the contestant by his attorney, insisted upon having an alias notice issued in accordance with the decision of your office; that at the time of service of said notice the claimant "was living in good faith upon the homestead land and had been so living for more than one year." On appeal your office, on August 21, 1886, reversed the action of the local land officers and found that the claimant failed to establish his residence upon said land until March, 1884, more than eighteen months subsequent to date of entry and "he offers no explanation whatever for his failure to meet the requirements of the statute in this respect;" that except to dig a well claimant made no improvements upon the land until subsequent to the first hearing; that the testimony taken at the rehearing fully substantiates the evidence submitted at the first hearing, and in the absence of any excuse furnished by the claimant for his absences, said entry must be forfeited.

There is no conflict in the testimony. The evidence submitted shows that the claimant was absent in Texas engaged in herding sheep for more than six months after making said entry; that prior to his departure he contracted to have a house moved upon the land and forty acres broken; that claimant broke thirty acres besides the forty acres which had been broken on said land in his absence and paid for by him; that the entryman returned to said land on March 3, or 4, 1884, and was residing in good faith thereon from that time to the date of first hearing, March 20, 1884, and has been continuously residing upon said land up to the date of second hearing.

It has been repeatedly held by this Department, that jurisdiction is acquired by the due service of notice upon the claimant, and if there has been no legal notice to the claimant, then there is no authority in the local office to adjudicate his rights. *Houston v. Coyle* (2 L. D., 58); *Thorpe et al. v. McWilliams* (3 L. D., 341); *Winans v. Mills et al.* (4 L. D., 254); *Shinnes v. Bates* (*Ibid.*, 424); *United States v. Raymond* (*Ibid.*, 439); *Gotthelf v. Swinson* (5 L. D., 657); *Harkness v. Hyde* (98 U. S. 476).

The entryman had cured his laches prior to the service of notice of contest and hence the allegations of the contestant that the claimant had abandoned his homestead claim or failed to establish his residence thereon were not true at the time of service of notice.

The decision of your office must be and it is hereby reversed.

COMMUTATION PROOF—GRAZING LANDS.

MARY A. TAYLOR.

Proof of the requisite improvements to secure pasturage and the production of grass, may be properly accepted in lieu of the usual proof of cultivation, where it appears that the land is better adapted to grazing purposes than to the cultivation of crops that require tillage of the soil.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 15, 1888.

In the case of Mary A. Taylor, appealed from the decision of your office, dated July 9, 1886, rejecting her commutation homestead proof and holding her entry for cancellation, the record discloses the following facts:

On August 2, 1882, Mary A. Taylor, widow, made homestead entry, for the S. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 9, T. 115, R. 62, at the Watertown, Dakota, land office, having prior thereto made affidavit that her settlement on said tract was commenced May 15, 1882, and that her improvements consisted of a frame house, eight by sixteen feet, and one hundred and sixty rods of wire fence. On January 8, 1883, she made commutation proof—which was accepted by the local officers—and on the 15th of the same month paid for the land and received her final certificate.

Appellant's proof not being satisfactory to your office, she was required by your letter of November 6, 1885, to the local officers, to furnish a special affidavit, duly corroborated, showing, "whether or not she has since the date of her commutation proof maintained an actual residence upon the tract, and describing all her improvements, and giving the value of each, also showing the kind of stock, if any, as well as the number and value of each kind, owned by her, upon said tract." The local officers were also directed to advise Mrs. Taylor "that she can not

obtain title to the land until she satisfies this office that she desires the land in good faith for her permanent home, and that all legal requirements have been observed." The required affidavit was duly made. It and the commutation proof show, that appellant commenced an actual residence on said tract June 1, 1882, and resided thereon continuously up to the date of making proof, a period of seven months and a few days; that said tract is bottom land bordering on the James river, which runs through it, and that it is rocky and uneven, and chiefly valuable for grazing purposes—for which she designs it—and the advantages it affords for reaching water; that appellant has a prairie farm of one hundred and sixty acres adjoining this tract and which is destitute of water; that the two tracts make a good farm for mixed farming, and that disconnected with another tract, the land in question is comparatively worthless. Appellant swears that all these facts were made known to the local officers at the time she made proof and payment for the land, and that no deception was used by her in the matter; that since making proof she has lived within forty rods of said tract and that she was not aware the law required her to live on the land after she had commuted her homestead to a cash entry.

Appellant's improvement and their estimated values are, house, eight by sixteen, \$50.00; barbed wire fence \$200.00; and she cut and put up on said land during her residence thereon some forty tons of hay.

The decision appealed from holds that, "the homestead law was not passed to enable parties to obtain land in the manner and for the purpose indicated," and that said proof should be rejected and the original and cash entries canceled.

The proof in this case shows that said tract of land was not taken for the purpose of tillage, or cultivation, in the ordinary sense of these terms, and no actual settlement, in such sense is shown. It further shows that said tract is illy adapted for tillage and the raising of grain or other agricultural crops, requiring the breaking and cultivation of the soil. But raising stock and grass is an agricultural pursuit, and the evidence shows the kind of improvement and cultivation of this tract requisite to secure pasturage, stock water, and the production of grass. Appellant maintained an actual residence of over six months on the land described before making proof and cash entry, and there is nothing to indicate that the land has not been taken for her exclusive use and benefit.

It is believed that under the interpretation heretofore given by this Department to section 2301 of the Revised Statutes, her proof of settlement, inhabitancy, improvement and cultivation, is sufficient.

The decision of your office rejecting her proof and holding her entry for cancellation is therefore reversed, and said entry will be passed to patent.

SOLDIERS' HOMESTEAD DECLARATORY STATEMENT- AGENT.

HERZOG *v.* NEVILLE.

A soldiers' homestead declaratory statement, filed by an authorized agent, and accepted by the local office, will protect the homesteader, although said agent may not have the power of attorney required by the departmental regulations.

Secretary Vilas to Commissioner Stockslager, August 15, 1888.

On April 2, 1881, George Herzog filed declaratory statement, alleging settlement June 15, 1874, upon lot 2, Sec. 18, T. 47 N., R. 4 W., Shasta, California. From the statement of the local officers, it appears that this tract was embraced in the homestead entry of one John F. Bloomenchamp; that Herzog presented his relinquishment for the same on March 28, 1882, and that this relinquishment being returned for correction, was duly filed on April 24, 1882.

On March 15, 1882, Herzog presented his application to make soldier's homestead entry upon the SE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, lot 4, Sec. 18, and NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, lot 1, Sec. 19, in same town and range. This application was rejected by the local office, for the reason that the affidavit failed to show a residence upon the land as required by section 2294 of the Revised Statutes. Thereupon, as stated by the local officers, Herzog's attorney sent "a soldier's homestead declaration for the same land, signed by said attorney as his attorney in fact, which was duly filed March 28, 1882."

Herzog subsequently (April 26, 1882), made the said required affidavit before the clerk of the Siskiyou county court. This affidavit was, however, not received at the local office until August 14, following, when the said application to enter was allowed.

On May 13, 1882, John Neville filed pre-emption declaratory statement, alleging settlement March 21, 1882, upon the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, and lot 4, Sec. 18, and lot 1, Sec. 19.

On April 23, 1883, Neville submitted proof, in due form, at the local office, and on the same day Herzog appeared and produced testimony.

On April 24, 1883, and during the pendency of the hearing Herzog applied to so amend his filing as to embrace therein all the land claimed by the claimant Neville. This application was denied.

The local officers transmitted the record "without the usual award in such cases." They found, however, that Herzog was the first settler on the land.

The testimony on behalf of the claimant (Neville) shows that, on March 2, 1882, he wrote to said Bloomenchamp, his father-in-law, accepting the latter's offer to sell him certain improvements on the land for \$250; that on March 7, 1882, Bloomenchamp, acting for the claimant, hauled some lumber to the tract; that the claimant went on the land March 20, 1882, and on the following day built a house thereon, in

which he slept that night; that he remained on the land until May 26, 1882, when, in consequence of the sickness of his wife and child, he went to San Francisco, where, owing to the death of his child, he remained some two or three months; that after his return he built (in the fall of 1882) another house, sixteen by sixteen feet, in which he has resided continuously; that himself and wife took some of their meals at his father-in-law's (Bloemenchamp's) house, some three hundred yards distant; and that his improvements consist of two houses, some twenty acres cultivated, thirty acres in summer fallow, and some fencing—value \$300.

From the testimony on behalf of Herzog it appears that, after living upon his pre-emption claim, *i. e.*, Lot. 2, Sec. 18, for some eight years, he abandoned the same, on account of conflict, as stated; that when he made his said soldier's application, he found that he had failed to bring "certificate of my pre-emption" (presumably receiver's receipt), but that his certificate of abandonment (presumably relinquishment) for said lot 2 was forwarded to the local office on March 16, 1882, that he went on the land March 17, 1882, dug out a few rocks; on the 18th he laid two boards in position for a foundation, and same day put up a notice to the effect that he had "filed a soldier's homestead" thereon, and on the 19th placed two more boards, thereby completing the said foundation. He then returned to said lot 2, where he seems to have remained until April 3, 1882, when he moved his family into a small rail house, that he had placed upon the land, in which they remained about a month, when he bought a log out house, sixteen by eighteen feet, from a neighbor, which he moved on the land, and in which he has since resided continuously.

Herzog testifies that his improvements consist of a house stable, chicken house, three acres fenced, two acres plowed and put in garden, some fruit trees and rail fence.

On cross-examination, Herzog stated, that he had never executed or delivered a power of attorney to W. J. Nichols, who, as attorney in fact, signed his soldier's declaratory statement, filed March 28, 1882, as aforesaid.

Without considering the suspicion, which the evidence, in my opinion, creates, that the claimant Neville filed for land in the interest of his father-in-law Bloemenchamp, I am disposed to concur in the finding that the contestant Herzog was the first settler on the land.

It becomes, however, material to determine whether or not Herzog acquired, by virtue of his soldier's declaratory statement, signed and filed by his attorney on March 28, 1882, a valid claim of record.

Should it be held that this filing was illegal and of no effect, it would be necessary to find that Herzog's claim did not properly appear of record until August 14, 1882. This being more than three months after the date of his settlement, he could acquire no rights against the intervening claim of Neville. If, however, the said filing is valid, then

the rights of Herzog, who commenced his settlement and improvement of the land within the statutory period, and who has continued his residence thereon, should prevail.

Section 2309 of the Revised Statutes provides that a soldier's declaratory statement may be filed "as well by an agent as in person."

The departmental regulations, prevailing at time mentioned (see p. 21, Circular, approved October, 1880), required the agent who made such filing to "produce a duly executed power of attorney from the principal desiring to make the entry, who will be bound by the selection his agent may make, the same as though made by himself." It would, therefore, seem that the purpose of this regulation was to establish beyond a question the fact that the filing was the act of the principal.

In this case, while the attorney was without such power of attorney, the evidence shows that he was empowered to act. Herzog swears that he "authorized him to do business for me the best way he knew how."

Now, while it may have been an irregularity in the local officers to have accepted the soldier's declaratory statement from the attorney, who failed to produce the prescribed evidence of authority, I am of the opinion that when they did accept it and it became filed in the local office, it was sufficient to give notice of Herzog's intention with regard to the land named therein. Herzog's subsequent acquiescence in the act of his attorney, as indicated by his settlement, residence and improvement of the land, gives to his said soldier's declaratory statement the same force and effect as if he had filed in person.

In accordance with the views expressed, I concur in the conclusion reached in the decision appealed from.

It only remains for me to say that Herzog's said application to so amend his filing as to include therein land to which the rights of Neville had attached, was properly denied.

Your decision is affirmed.

REVIEW—JURISDICTION.

CAYCE *v.* ST. LOUIS & IRON MOUNTAIN R. R. CO.

The Department will not take jurisdiction where such action involves the consideration of a question finally determined by a decision of the Supreme Court of the United States.

Secretary Vilas to Commissioner Stockslager, August 15, 1888.

This record presents a motion for review, filed by William H. Cayce, in the case of Cayce *v.* St. Louis & Iron Mountain railroad company decided by this Department November 25, 1887. (6 L. D., 356.)

In that case it was held that the record presented no ground for disturbing the former action of the Department in certifying the tract in dispute to the State of Arkansas for the benefit of said road, and the ap-

plication of Cayce to make homestead entry for the same was rejected. In reaching that conclusion the Department said: "Every question that might now be presented seems to have been fully passed upon by the court" in the case of *Nix v. Allen* (112 U. S., 129).

It appears that in 1846 one Mrs. Nix settled upon and took possession of the NE. $\frac{1}{4}$, Sec. 30, T. 15 S., R. 28 W., Camden land district, Arkansas, and on April 22, 1853, filed her pre-emption declaratory statement alleging settlement April 1, 1853; and that on March 31, 1854, she made pre-emption cash entry for only a portion of said tract, viz: the NE. $\frac{1}{4}$ of said NE. $\frac{1}{4}$, and a patent therefor issued to her. William H. Cayce herein seeks to make homestead entry of the remnant of Mrs. Nix's original claim, viz: the W. $\frac{1}{2}$ and the SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said section on the ground that said last described land was excepted from the operation of the railroad grant, within the limits of which it lies, by the claim of Mrs. Nix.

On February 9, 1853, Congress passed an act granting lands to the State of Arkansas to aid in building a railroad from a point on the Mississippi opposite the mouth of the Ohio to the Texas boundary line near Fulton, in Arkansas. The grant was of even sections along the line and the land in controversy lies in one of such sections. The line of the road was definitely located opposite said land as found by your office on August 11, 1855.

The granting clause of said act is as follows:

That there be and is hereby granted to the States of Arkansas and Missouri, respectively, for the purpose of aiding in making the railroad and branches as aforesaid, within their respective limits, every alternate section of land designated by even numbers, for six sections in width on each side of said road and branches; but in case it shall appear that the United States have, when the line or route of said road is definitely fixed by the authority aforesaid, sold any part of any section hereby granted, or that the right of pre-emption has attached to the same, then it shall be lawful for any agent or agents, to be appointed by the governor of said State to select subject to the approval aforesaid, from the lands of the United States most contiguous to the tier of sections above specified, so much land in alternate sections or parts of sections as shall be equal to such lands as the United States have sold, or to which the right of pre-emption has attached as aforesaid, which lands, being equal in quantity to one-half of six sections in width on each side of said road, the States of Arkansas and Missouri shall have and hold to and for the use and purpose aforesaid.

It will be noted that the only exception from the grant was of such of the even sections as should, upon definite location of the line, be found to be *sold* or to which the *right of pre-emption* had attached. The precise question presented therefore is: Had Mrs. Nix a right of pre-emption to this land on August 11, 1855, the date of definite location?

This question involves a further recital of the facts in the case.

It appears that on September 28, 1858, Mrs. Nix conveyed the forty acre tract entered by her as above recited, to her son John B. Nix, who with his mother continued to reside on said tract, at the same time used and cultivated some parts of the adjoining tracts now in dispute. The actual residence of both however until the mother's death in 1863, and

thereafter the home of the son was on the forty acre tract patented to Mrs. Nix as aforesaid.

On January 16, 1855, the State of Arkansas transferred said grant so far as it relates to this land, to the Cairo & Fulton railroad company, of which the present claimant company is the successor.

On July 13, 1857, the Commissioner of the General Land Office certified the land here in dispute to the Cairo company which company on May 14, 1875, sold and conveyed it to one Thomas Allen, who thereupon brought suit in ejectment against John B. Nix to recover possession of the same and obtained judgment against him.

Nix brought a suit in equity, in the circuit court of the United States, to enjoin the execution of that judgment and the case reached the supreme court of the United States on appeal. (*supra.*)

After reciting the facts of the case that court said :

The settlement and claim of Mrs. Nix were made under the act of September 4, 1841, (5 Stat., 453) and in that statute it was expressly provided (sec. 10) that 'no person shall be entitled to more than one pre-emptive right by virtue of this act.' When, therefore, Mrs. Nix, on the 31st of March, 1854, made her pre-emption entry of the NE. $\frac{1}{4}$ of the quarter section on which she settled, and as to which she filed her declaratory statement in 1853, she, in law, abandoned her settlement on the other three-quarters of the quarter section for the purposes of pre-emption, and surrendered all the pre-emption rights she ever had in them. This is clearly shown by the provisions in sec. 13, 'that before any person claiming the benefits of this act shall be allowed to enter such lands' he shall make oath 'that he has never had the benefit of any right of pre-emption under this act.' The right of pre-emption is the right to enter lands at the minimum price in preference to any other person, if all the requirements of the law are complied with. The prior settlement, declaratory statement and proof are not the pre-emption, but only the means of securing the right of pre-emption. By entering the forty acres in 1854, Mrs. Nix exhausted the one right of that kind which the law secured to her, and she could not claim another. She could have entered the whole one hundred and sixty acres at that time if she wished to, and had the money, but such an entry would have required two hundred dollars, and she had but fifty. The fifty would pay for forty acres, and so she bought that and gave up the rest. The law made no provision for entering a part of the quarter section at one time, and saving a right to enter the remainder at another.

The court refused the injunction.

In view of that decision I am of opinion that the question whether Mrs. Nix had a right of pre-emption in said tract on the 11th day of August, 1855, is not open for me to pass upon. The supreme court of the United States have settled the exact question by deciding that she had no right of pre-emption at that time. It seems to me it would be somewhat strange after Thomas Allen had recovered in a suit of ejectment the possession of these three forties and turned Mrs. Nix's representative and heir out of possession and after the supreme court had refused at the suit of such heir to interfere with that decree, for the Department to take jurisdiction of the case and issue patent to somebody and start him into a lawsuit. I cannot regard it as within our jurisdiction at all.

Without entering further into other phases of the case, the motion for the reasons herein stated is denied.

RAILROAD GRANT—RIGHTS AT DEFINITE LOCATION.

HASTINGS & DAKOTA RY. CO. *v.* McCLINTOCK.

The right of the company, under its grant, attached to lands that were disembarassed at the date of definite location, notwithstanding such lands were reserved at the date of the grant.

Secretary Vilas to Commissioner Stockslager, August 15, 1888.

On January 19, 1883, Charles McClintock applied to make homestead entry for the SE. $\frac{1}{4}$, Sec. 13, T. 115, R. 31, Redwood Falls, Minnesota. The application was rejected by the local officers. By letter of October 8, 1883, your office found that the tract is within the granted limits of the grant for the Hastings & Dakota railroad by act of July 4, 1866 (14 Stat., 87); that on April 15, 1865 one Philip Shaw, had made homestead entry for said tract, which was canceled on relinquishment on August 4, 1866; and held on the authority of the case of *White v. Hastings & Dakota Ry. Co.* (6 C. L. O 54), that a homestead entry subsisting at the date of the grant though canceled prior to the time the grant became effective excepted the tract so covered from the grant, and therefore that the tract in controversy was excepted from said grant. Your office, however, instructed the local officers not to allow any entry for the land until instructed.

The company alone appealed.

While it seems your office ruling on the legal question involved was fully justified by the case cited the doctrine therein announced has been departed from in the subsequent case of *Rees v. Central Pacific R. R. Co.* (5 L. D., 62) and on review, (*idem* 277), wherein it was held that the right of the company attached to lands that were disembarassed at the date of definite location, notwithstanding they were reserved at the date of the grant.

The question there presented was in all material respects similar to that here. It does not appear that any claim to said tract intervened between the cancellation of Shaw's said entry and the attachment of the company's rights. On the authority of said *Rees* case your action rejecting the claim of the company as stated is reversed, and the order forbidding entry of the tract is affirmed.

Said decision is accordingly modified.

SCRIP LOCATION—RETURNS OF THE SURVEYOR GENERAL.

ALEXANDER GRIGGS ET AL.

Under a scrip location patent duly issued. It is now alleged that by an error in the original survey a large part of the land described in the patent did not in fact exist, and application is accordingly made for permission to surrender the patent, pay cash for the land actually conveyed, and for a return of the scrip.

The application is denied, as the original survey must be accepted as correctly showing the true area of the land, in the absence of proof showing that at the time of the location, the land taken in satisfaction of the scrip, was not, as a fact in place and of the area designated on the official plats of survey.

Secretary Vilas to Commissioner Stockslager, August 15, 1888.

I have considered the appeal of Alexander Griggs and M. L. McCormick from your office decision of January 8, 1887, rejecting their application to be permitted to surrender the patent for the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and lots 4, 5 and 6 of Sec. 25, T. 155 N., R. 51 W., Grand Forks, Dakota, located with scrip, to pay cash for the land actually in their possession and to have the scrip delivered to them.

The record shows that February 16, 1874 Hans Fletcher attorney in fact, located Red Lake and Pembina half breed scrip—No. 246—issued to Augustine St. Germain upon the land above described. April 10, 1875, a patent was issued for said land in 152.35 acres in the name of St. Germain.

June 25, 1883, the local officers transmitted a statement, under oath, by Alexander Griggs and Michael L. McCormick, that they had become possessed of said land (which, it appears borders on the Red River of the North) in February 1875, and that thereafter, by a private survey, they found but sixty of the one hundred and fifty-two acres, embraced in said location which they could designate, locate or describe as their property; that the difference as to the quantity of land embraced in said locations is not the result of a change in the course of the river, but of an error in the original survey of the lands; that, in fact but a small portion of the land above described ever existed. Therefore, they say, they are ready and willing to execute a deed to the United States for said land, relinquish all claim to the patent and pay the regular price per acre for the actual number of acres in said tracts, provided the United States cancel the patent and surrender to them the said piece of scrip.

December 28, 1883, your office declined to comply with the request of Griggs and McCormick holding that the proper course for them to pursue to procure redress was to apply to the party from whom they purchased the lands. From this decision an appeal was taken, and July 2, 1884, Secretary Teller rendered a decision in which he said:

Their claim that the government has been paid for more land than it sold and that by force of circumstances they are the sufferers appears to be true, and in my view they have an equitable right to relief, if all the facts which they set up are sustained by evidence and if the Land Department can give it.

But they have not filed a copy of their deed from St. Germain or an abstract of title, nor have they stated that they have not or cannot obtain and redeliver the patent to the United States or that the grantor will not give them relief. The facts referred to being verified if they can re-deliver the patent, I think that a new patent may issue for the correct amount of land for which they may pay cash and thereupon the scrip which has not been satisfied may be delivered to them. If they cannot redeliver the patent I think your office may properly prepare a bill for Congress authorizing them to deed the land to the United States and otherwise adjust their interest in an equitable manner.

This decision was communicated to the parties in interest and February 17, 1885, the local officers transmitted the patent issued to St. Ger-

main for the land in question, together with a duly authenticated abstract of title and a copy of the deed from St. Germain, by his attorney in fact Fletcher, to Charles M. Loring; and also a copy of a deed from Charles M. Loring to Alexander Griggs and Michael L. McCormick. Said papers were transmitted in accordance with the Secretary's decision, and they show that Griggs and McCormick own the land. They further state that they can secure no relief from their grantor.

By letter of January 8, 1887, you hold the decision of Secretary Teller left for your determination, in the first instance, the question whether the Land Department had power to grant the relief sought; and you decide that the land having been surveyed and disposed of according to law, and patent issued for the quantity or area ascertained by the survey, the Land Department has no authority to take back the patent and dispose of the land anew as containing a less area than that legally ascertained by the original survey, according to which survey the location was made and the patent accepted by the locator. Moreover if the plan suggested could be carried into effect, you say that you know of no authority of law to allow an entry of the land for cash, without a previous proclamation and offering of the land at public sale as required by section 2357, Revised Statutes.

There is nothing in the record to show that this land was not in place when the location was made. It is embraced in the returns of the surveyor general and the record of the survey made under his direction, is evidence of the highest character, and no private survey can be allowed to overcome it. There is filed in this case a plat of survey made years afterwards by a private surveyor corroborating the statements made by the appellants. They have also a diagram of a survey made November 1877, by Charles Scott, deputy United States surveyor, differing very little from the private survey. But there is nothing in the record before me to show that the land located with the scrip was not in place *at the time of the location*, or to show that the first survey was not a correct one when made. The land is situated in a bend of the Red River and between the date of the location and the second survey the river may have changed its bed; but whether or not the discrepancy can be accounted for in this way, the original survey will be accepted as correctly showing the true area of the land in the absence of proof showing that, at the time of the location the land taken in satisfaction of the scrip was not, as a fact, in place and of the area designated on the plats of the survey filed in the local office. Such evidence is not in the record before me.

I therefore affirm your decision denying the application.

PRIVATE CLAIM—SECTION 7, ACT OF JULY 23, 1866.

WELCH *v.* MOLINO ET AL.

The right of purchase under the seventh section of the act of July 23, 1866, is assignable, and, in the absence of any adverse claim, should be accorded to one who, in good faith, buys a tract of land and enters into possession thereof after the final survey of the grant excluding said land therefrom.

Secretary Vilas to Commissioner Stockslager, August 16, 1888.

I have considered the appeal of Samuel B. Welch from the decision of your office, dated March 18, 1887, rejecting his application to purchase under the seventh section of the act of Congress, approved July 23, 1866 (14 Stat., 218), Lot 6, Sec. 3, Lots 5, 6, 7, 8, 9, 10 and 11, and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 4, and Lots 1 and 8, Sec. 5, T. 1 S., R. 3 W., M. D. M., San Francisco land office, in the State of California.

The record shows that the township plat of survey was filed in the local land office on December 10, 1883. On October 8, 1884, Welch offered his said application to purchase, but prior thereto some of the other parties had filed for, entered or located some portion of the land included in said application.

A hearing was ordered, and the parties in interest appeared and those whose claims conflicted with said application waived their rights as against the claim of Welch. Upon the proof submitted by Welch, the local land officers found that the contestants had waived all right to the land actually claimed by Welch, and that his application should be allowed.

No appeal was taken from the decision of the register and receiver, but your office, on March 18, 1887, considered the papers in said case, and held that the application should be denied, because the land in question was excluded from the Sobrante grant by the final survey, approved by your office on August 11, 1883, and the purchase by Welch was not made until September 8, 1884, and hence the land was not subject to purchase under the seventh section of said act.

The evidence shows that in January, 1859, one H. Houston purchased the land in question from the assignees of the grantees of the Mexican government by metes and bounds; that Houston took possession of the land, enclosed it with a good fence, and resided thereon, with his family, until 1869, when he died; that on November 1, 1869, the widow of said Houston in her own right, and as executrix of the last will and testament of said Houston, deceased, conveyed said lands to Horatio G. French; that said lands were duly conveyed through different owners to said Welch, who went into possession thereof on September 8, 1884. So far as Welch is concerned, there is no adverse claimant, except the United States.

The question at issue is, whether a party who purchases and enters the possession of a tract of land, after the final survey of the grant

excluding the land, can be permitted to purchase under the seventh section of said act. In other words, is the right of purchase assignable?

The seventh section of said act provides:

That where persons in good faith and for a valuable consideration have purchased lands of Mexican grantees, or assigns, which grants have subsequently been rejected, or where the lands so purchased have been excluded from the final survey of any Mexican grant, and have used, improved, and continued in the actual possession of the same as according to the lines of their original purchase, and where no valid adverse right or title (except of the United States) exists, such purchasers may purchase the same after having such lands surveyed under existing laws, at the minimum price established by law, upon first making proof of the facts as required in this section, etc.

It is strenuously urged by the appellant that said act is remedial, and should be so construed as to allow his said application, although his purchase was made subsequent to the final survey.

From the record before me, I think there can be no doubt that said Houston, in his lifetime, was entitled to purchase said land, under said section, and that his right of purchase was assignable, unless there is some inhibition in the act itself.

In the case of *Myers v. Croft* (13 Wall., 296), the United States supreme court, considering the pre-emption right, said:

This was the right to pre-empt a quarter section of land by settling upon and improving it, at the minimum price, no matter what its value might be when the time limited for perfecting the pre-emption expired. This right was valuable and, independently of the legislation of Congress, assignable:

citing *Thredgill v. Pintard* (12 How., 24); *Lamb v. Davenport* (18 Wall., 307); *Hussey v. Smith* (99 U. S., 20).

In the case of *Wilson v. California & Oregon Railroad Company* (1 C. L. L., 471) this Department held, upon the principle ruled in *Myers v. Croft*, *supra*, that the right conferred by said seventh section is alienable and is descendible. It appeared that Wilson claimed by virtue of his purchase, subsequent to survey; that he used, improved and continued in the actual possession of the land in accordance with the lines of his original purchase, and that the possession of his grantor was in all respects in full compliance with the provisions of said act. His application was allowed.

The local land officers find that the applicant, Welch, has acted in entire good faith. He paid over ten thousand dollars to his grantor for said land, containing only 276.59 acres, and since there is no adverse claim, other than the United States, I am of the opinion that his application to purchase should be allowed.

The decision of your office must be, and it is hereby, reversed.

PRACTICE—CONTEST—SPECIAL AGENT; SETTLEMENT.

KRUGER *v.* DUMBOLTON.

A special agent is without authority to receive contests, and contest papers placed in his hands can in no sense be considered, or treated, as filed within the meaning of the law.

While an entry stands of record, settlers on the tract covered thereby can secure no right by virtue of such settlement as against the record entryman, or the United States; yet as between the parties who have thus settled, the settlement first made in point of time is entitled to the higher consideration.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 16, 1888.

I have considered the case of Julius Kruger *v.* Mary Dumbolton, *nee* Butterfield, involving the N. $\frac{1}{2}$ of NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 32, T. 110, R. 61, Huron, Dakota, on appeal by Kruger from your office decision, dated November 12, 1885, holding his pre-emption filing for cancellation.

It appears that one Frederick Tafft had made timber culture entry May 7, 1880, for the tract described, and that said entry was canceled on relinquishment September 24, 1883. On the same day (September 24, 1883,) Kruger filed pre-emption declaratory statement, No. 6562, for the tract, alleging settlement August 27, 1883.

October 3, 1883, Butterfield made homestead entry covering said tract, and on the 31st of March, 1884, she, having married in the meantime, offered final commutation proof in the name of Dumbolton, which she now bears.

Kruger filed protest against the acceptance of said proof, alleging that he as the prior settler had a superior claim to the land under his pre-emption filing, and also that Dumbolton had not complied with the homestead laws in the matter of residence.

A hearing was ordered and had, at which both parties were present in person and by counsel. A number of witnesses were examined, and a large amount of testimony was taken, upon examination and consideration of which the register and receiver found in favor of the homestead claimant, on the ground of priority of settlement.

Kruger appealed to your office, which also decided in favor of the homestead claimant, but upon a different ground, to wit, for the reason that she had by virtue of her contest a preference right of entry. Hence the appeal now before me.

The local office found that the homestead claimant made her settlement August 24, 1883, and that she was the prior settler.

Your office, on the other hand, in the decision appealed from, found that Kruger made settlement August 27, 1883, and that appellee did not settle till the day following, to wit, August 28, 1883. Said decision also finds that both parties have complied with the law in the matter of

residence, though Kruger had, at the date of hearing, made no cultivation of the tract.

It is seen from the foregoing that both parties settled upon the tract prior to the cancellation of the Tafft timber culture entry. Your office decision stated, in substance, that if the case were to be determined on the question of settlement the equities would control, since both parties were on the land at the date of the cancellation of the Tafft timber culture entry, and the land would be awarded to the prior settler in fact; but said decision found that this contest had been practically decided by your office letter "C", addressed to the local office, under date of October 10, 1884.

A copy of said letter is not in the record before me, but the decision appealed from states that:

From said letter it appears that on the 28th of August, 1883, Mary Butterfield presented a contest against the timber culture entry aforesaid, alleging fraud in the entry, relinquishment and abandonment of the same; that without action on your (the register and receiver's) part the papers passed into the hands of a special agent of this Department; that on September 24, 1883, a relinquishment, executed on the day previous, was presented at the office and cancellation made. The special agent aforesaid failing to take appropriate action in the premises, they were returned to you (the register and receiver) by his successor; thereupon Butterfield filed an application to have her contest go to record as of the date of its presentation; that said relinquishment inure to her benefit and she have the preferred right to enter the tract.

The application and the papers were forwarded by you for the consideration of this office March 8, 1884. On the 10th of October, 1884, my predecessor granted said application. The following paragraph appears in said decision, viz: "The allegation of abandonment was sufficient to have sustained the contest, if true. The production of the relinquishment, dated prior to the filing of contest, is the best possible proof of the truth of said allegation, and consequently the cancellation of the entry should inure to her benefit."

An examination of the records in your office discloses the fact that the relinquishment by Tafft of his timber culture entry was executed August 23, 1883, and not September 23, 1883, as stated in the above quotation from your office decision.

Your office letter of October 10, 1884, above referred to, was written in the case of Butterfield *v.* Tafft, and is not binding upon Kruger, who claims the land and who was not a party to that record. If he can show that your office erred in allowing Butterfield's contest to go of record as having been filed August 28, 1883, or if he can show that as a matter of fact it was not filed until after September 24, 1883, the date of Tafft's relinquishment, he is entitled to the benefit of such showing.

In such case Butterfield, now Dumbolton, could claim no preference right or other benefit, by virtue of her contest affidavit, for the reason that after the filing of the relinquishment of Tafft and the cancellation of his entry on September 24, 1883, there was nothing to contest. On this point your office letter of October 10, 1884, (*supra*,) shows that the contest affidavit had not as a matter of fact gone of record prior to that date, for said letter directed that it be placed of record as of August 28,

1883, when presented. Neither had it gone into the hands of the local officers, or of either of them.

Dumbolton at the hearing in the trial of this case testified on direct examination :

I think it (the contest) was filed with a detective at the land office.

When asked on cross-examination—

“Why did you file it with detective James?”

she answered,

“That was my choice.”

Q. You had some reasons for it?

A. Yes.

Q. What were the reasons?

A. Because I wanted it to go to Washington before the General Land Office.

Q. Is it customary to file contests with the special agents?

A. I am not qualified to answer that question.

The evidence, I think, clearly shows that the contest of Mary Butterfield, now Dumbolton, against the Tafft entry, was not filed, nor intended to be filed in the local office August 28, 1883, nor at any date prior to September 24, 1883, the date of Tafft's relinquishment.

It further shows that it was placed in the hands of a special agent of your office, where it remained until after your office letter of October 10, 1884, herein referred to, pursuant to which it was made of record, as has been stated.

The evidence on this point in this record I find to be corroborated by examination of the files of your office in the case of *Butterfield v. Tafft*.

Since the special agent was without authority to receive contests, a contest placed in his hands could in no sense be considered or treated as filed within the meaning of the law. “In every case of application for a hearing an affidavit must be filed by the contestant with the register and receiver, fully setting forth the facts which constitute the grounds of contest.” Rule 2 of Rules of Practice.

It is not necessary to discuss the reasons for such rule; they are obvious.

It must be concluded that at the date of Tafft's relinquishment and Kruger's filing (September 24, 1883), Butterfield, now Dumbolton, had on file no contest against the Tafft entry, and therefore she acquired no preference right by virtue of her contest affidavit to enter the land in question.

The only question left for determination, then, is, which party, Kruger or Dumbolton, has the superior claim to the tract by virtue of settlement?

As has been shown, both made settlement before the cancellation of the Tafft entry, and both were on the land at the date of said cancellation.

It has been ruled by this Department that, although while an entry stands of record, settlers on the tract covered by such entry can secure no rights by virtue of their settlement as against the record entryman,

or the United States; yet, as between the parties who have thus settled, the settlement first made in point of time is entitled to the higher consideration. *Geer v. Farrington* (4 L. D., 410); *Wiley v. Raymond* (6 L. D., 246). *Tarr v. Burnham* (id., 709).

On the question of priority of settlement in this case, I find the testimony very conflicting, and much of it irrelevant and utterly without bearing upon the matter in issue. But, upon carefully weighing the testimony in point, I have no difficulty in concurring in the conclusion reached by your office that Kruger was the prior settler. I think it is clearly established that Dumbolton, *nee* Butterfield, did not make settlement until after August 27, 1883, on which date the evidence shows that Kruger made his settlement by purchasing and hauling on to the tract a load of lumber for the purpose of erecting a house, which he soon after did.

Having concluded, first, that Butterfield, now Dumbolton, had no contest on file against the Taft timber culture entry at the date of its cancellation by relinquishment, and, second, that Kruger was first in time in the matter of settlement, it must be held that Kruger has the superior right, and therefore that Dumbolton's commutation homestead proof can not be accepted. Her entry, however, will be allowed to remain of record, subject to Kruger's right to make final proof on his pre-emption claim, which he will be required to do within sixty days after notice of this decision.

Your office decision is modified accordingly.

HOMESTEAD ENTRY—PRE-EMPTION CLAIM.

ARTHUR P. TOOMBS.

A homestead entry, made while the entryman has a pending unperfected claim under the pre-emption law, is not void, but *prima facie* valid, and only becomes voidable by the subsequent maintenance of the pre-emption claim.

An entry thus voidable will be canceled, and the right to make new entry for the same tract denied, where the entryman perfects the pre-emption claim, and, pending subsequent application for the right to make new entry, submits commutation proof under the first.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 16, 1888.

I have considered the appeal of Arthur P. Toombs from your decisions of November 19, 1886, and January 31, 1887, holding for cancellation his homestead and commuted cash entries, embracing the SE. $\frac{1}{4}$ of Sec. 18, T. 31 S., R. 23 W., Garden City land district, Kansas, and rejecting his application to have said cancellation made without prejudice, so that he might be allowed to re-enter said tract.

It appears from the record that appellant, on June 14, 1884, filed pre-emption declaratory statement, No. 211, for lots 3 and 4, and the E. $\frac{1}{2}$

of SW. $\frac{1}{4}$ of said Sec. 18, on which claim he made final proof and cash entry, No. 238, March 10, 1885.

While his pre-emption claim was pending, to wit, August 9, 1884, he made homestead entry of the tract in question. Having learned that his said homestead entry was illegal, because made while his pre-emption claim was pending, he on August 4, 1885, filed his application, stating, under oath, corroborated by two affiants, that before making homestead entry, as aforesaid, he made diligent inquiry as to its legality, and was informed that the local office at Garden City had ruled that such entries were allowable; that, acting on said advice, he made the homestead entry before he had made final proof and received final certificate on his pre-emption claim.

In view of these facts, he asked to be allowed to re-enter the same tract as a homestead.

November 16, 1885, before action by your office on the application as above, Toombs made commutation cash entry of the tract under the provisions of Sec. 2301 of the Revised Statutes.

Your office, by its decision of November 19, 1886, held for cancellation said homestead and commuted cash entries as illegal, because the homestead entry was made while appellant was claiming other land under the pre-emption law. Thereupon claimant applied to your office for a further consideration of the matter; and a ruling upon that part of his former application which asked the privilege of a new entry. Said application stated that the cancellation of the entries by your office was correct and in accordance with the wishes of claimant; that what he wants is a recognition of his right to make a new homestead entry.

January 31, 1887, your office considered said petition, and rejected the same. Hence the appeal to this Department.

It is urged therein that the homestead entry was void and in legal contemplation never had any existence. This contention can not be sustained.

The entry was on its face valid, and might have ripened into complete title. Had appellant abandoned his pre-emption claim and gone upon the homestead, and complied with the homestead law, his entry could not have been successfully assailed. It was not therefore void, and it became voidable only as a result of his own acts. He did not abandon his pre-emption claim, but remained on the same and made final proof and received final certificate therefor seven months and one day after he had made his homestead entry.

He lays much stress upon the fact that the local officers with full knowledge of his pre-emption claim allowed him to make homestead entry, and because of such allowance, and the holding of the local office at that time that a homestead entry could legally and properly be made by one having a pending pre-emption claim, he claims strong equities, and that having been so misled, the equities should protect him.

The view referred to as having been held by the Garden City land office for a time seems to have grown out of the fact that because a homestead entryman had six months after entry within which to actually go upon and occupy the land entered by him, therefore he could at the same time have a pre-emption filing on one tract and a homestead entry on another, provided the dates of filing and entry were so arranged that he could prove up on his pre-emption claim before the expiration of the six months within which he must go upon his homestead claim. It is scarcely necessary to say in this connection that this view is not in consonance with the law, and that it has never been so held by the Department.

Appellant is not in position to claim any equities, because of the view of the law entertained by the local office, and of the fact that that office allowed his homestead entry knowing that he had, at the date of said entry, a subsisting pre-emption filing, for not only did he fail to prove up on his pre-emption claim and go on to his homestead claim within six months after making his homestead entry, but after he had learned that his homestead entry was illegal and after he, because of such information, had applied to have it canceled with permission to him to be allowed to make a new entry of the same tract, he continued to assert said homestead claim and commuted the same to cash entry. As has been stated, he did not make final proof on his pre-emption claim until March 10, 1885, which was over seven months after the date of his homestead entry. If the proofs in his pre-emption claim are to be accepted, his actual residence on his homestead claim could not have commenced until a date subsequent to March 10, 1885, and consequently not until considerably more than six months after entry.

If this were the only fact apparently adverse to appellant, it might perhaps be susceptible of such explanation as to justify favorable action on equitable grounds, but when to this is added the fact that, after he had admitted the illegality of his said homestead entry, and had applied to have said illegality cured by cancellation and a new entry, he proceeded while said application was pending in an attempt to acquire title under said invalid homestead entry, by commuting the same to cash entry, it seems to me he is by his own act estopped from pleading such equities as might otherwise have been entitled to consideration.

Having asked for one remedy on equitable grounds, he proceeded to apply another which was ineffective, and which tended to show want of good faith in his application to have his invalid entry canceled and a new entry allowed.

Upon a careful consideration of the whole record, I find no good reason for disturbing the action of your office, holding for cancellation appellant's homestead and commuted cash entries and refusing to allow him to make a new homestead entry.

The decisions appealed from are accordingly affirmed.

PRIVATE ENTRY—EQUITABLE ADJUDICATION.

FRANK V. HOLSTON.

In the absence of an adverse claim, a private cash entry for land included within a prior swamp selection, may be submitted to the Board of Equitable Adjudication, where the selection was subsequently canceled, and good faith is manifest.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 16, 1888.

I have considered the appeal of Frank V. Holston from the decision of your office, dated August 2, 1886, holding for cancellation his private cash entry No. 4360 as to the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$ of Sec. 34, T. 43 N., R. 3 W., made March 22, 1886, at the Bayfield land office, in the State of Wisconsin.

Your office held said entry for cancellation for the reason that said tract had been previously selected by said State "as swamp land," and thereby withdrawn from private cash entry. An inspection of the records of your office shows that the selection of said tract by said State was held for rejection by your office on June 26, 1883, because "the field notes of the U. S. Survey do not show that said land is swamp and overflowed." The State, after due notice, waived its right of appeal, and the selection was finally canceled by your office on July 22, 1886.

The local land officers under date of October 25, 1886, report that the tract covered by said entry was in the same status as the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of said section, which was entered by one A. J. Whitman and patented May 9, 1885, some months prior to the entry of the land in question by the appellant; that both of said tracts were in said list of State swamp selections and, as your office by letter dated July 27, 1883, had directed that Whitman's entry be allowed, and the same had passed to patent, the local officers fully believed that appellant should be allowed to enter said tract; that no fraud was practiced by appellant, and, as there is no adverse claim of record, the register and receiver recommended that said entry be submitted to the Board of Equitable Adjudication.

The appellant submits a letter from the chief clerk of the office of the Commissioner of Public Lands in said State, dated February 3, 1886, prior to the date of said entry, in which he states that the State has no claim to said tract.

The entryman alleges that he made said entry in good faith; paid his money for the land, and he now asks, if said entry was not properly allowed by reason of said swamp selection, since the selection has been canceled, and there is no adverse claim to said land, that his entry be submitted to the Board of Equitable Adjudication.

There is nothing in the record to indicate that said entry was not made in good faith, and, in my judgment, it should be referred to the

Board of Equitable Adjudication under the appropriate rule. Such reference is accordingly directed. See *Pecard v. Camens* (4 L. D., 152).

The decision appealed from is modified in accordance with the views herein expressed.

TIMBER CULTURE ENTRY—AMENDMENT.

ALOYS ECK ET AL.

The right of amendment will be denied, where the failure to obtain the tract desired was the result of relying solely on the statements of a land locator, and the entryman made no personal inspection of the land previous to entry.

Acting Secretary Muldrow to Commissioner Stockslager, August 17, 1888.

I have before me the several appeals of Aloys Eck, Ignatz Eck and Martin Berns, from your office decision of December 14, 1886, disallowing their several applications to amend their respective timber culture entries.

Aloys Eck applies for permission to amend his timber culture entry made February 13, 1886, from the NE. $\frac{1}{4}$ to the SE. $\frac{1}{4}$, Sec. 31, T. 26 S., R. 35 W.

Ignatz Eck applies for permission to amend a like entry made the same day from the NW. $\frac{1}{4}$ to the SW. $\frac{1}{4}$ of Sec. 32, T. 26 S., R. 35 W.

Martin Berns applies for permission to amend a like entry made the same day from the SE. $\frac{1}{4}$ of Sec. 30, T. 26 S., R. 35 W. to the SE. $\frac{1}{4}$, Sec. 19, same township and range. All of land district Garden City, Kansas.

The various applications were made on the 21st day of August 1886; and based upon similar facts. It appears that in each case the respective entrymen, relied on the knowledge and judgment of one E. W. Keyser, a land locator.

In the case of Aloys Eck, the said Keyser represented to the former that he, Aloys Eck, was being located when he made his said entry, in a valley; that after location it was discovered, that the said valley was on the SE. $\frac{1}{4}$ section 31, T. 26 S., R. 35 W.; that, in fact, the said NE. $\frac{1}{4}$ of said section the tract he actually entered, was wholly sand hills not fit for agricultural pursuits or the raising of trees; that the said Aloys Eck intended to enter the said valley and not the said sand hills.

In the case of Ignatz F. Eck, the said Keyser represented to the former, that he Ignatz F. Eck, was being located in a valley, that after location it was discovered that the said valley was on the SW. $\frac{1}{4}$ of section 32, T. 26 S., R. 35 W.; that, in fact the said NW. $\frac{1}{4}$ of said section, the tract he actually entered, was wholly sand hills not fit for agricultural pursuits or the raising of trees; that the said Ignatz F. Eck intended to enter the said valley and not the said sand hills.

In the case of Martin Berns, the said Keyser represented to the former, that he, Martin Berns, was being located in a valley, that after

location it was discovered that the said valley was on the SE. $\frac{1}{4}$ of section 19, T. 26 S., R. 35 W., that in fact, the SE. $\frac{1}{4}$ of section 30, same township and range, the tract he actually entered was wholly sand hills, not fit for agricultural pursuits, or the raising of trees; that the said Martin Berns intended to enter said valley and not the said sand hills.

It appears in each of the said applications that at the time of these various locations the weather was stormy and the earth covered with snow. In each case the respective applicant is corroborated in his statements by the other two appellants. Upon this evidence the entrymen ask for the amendment of their respective entries.

The right of amendment is recognized when the entry was not for the tract intended and due care and prudence has been exercised. Henry E. Barnum (5 L. D. 583).

In the cases under consideration the evidence fails to show any proper care on the part of the entrymen in making their respective selections; they seem to have acted solely upon this advice of the man Keyser, that the land by them selected respectively was situated in a valley; before entry they did not visit the land, they did not make personal inspection of the same, the land was not pointed out to them. No mistake was made in describing the respective tracts the parties intended to enter, but they wholly relied upon the representations made to them by the said Keyser regarding the character of the land. That the weather was stormy and the earth covered with snow at the time cannot excuse their want of care and prudence in making selections of land that now prove to be undesirable.

Your decision is affirmed.

LOCAL OFFICERS—ENTRY—ALTERATION OF RECORD.

EATON *v.* SHAFER.

The government is not bound by the illegal acts of its officers. The local officers have no authority, by mere erasure, to change an entry of record from one tract of land to another.

Acting Secretary Muldrow to Commissioner Stockslager, August 17, 1888.

Elliot S. Eaton made timber culture entry for the NE. $\frac{1}{4}$ of section "24," T. 102, R. 68, Mitchell land district, Dakota, on March 4, 1882. Subsequently on a date which does not appear of record but which Eaton swears to be the 9th or 10th of April 1882, his entry was changed by erasure on his register's receipt from section 24 to section 32. This change was made by O. T. Letcher, described in an affidavit as the chief clerk of the office, and at the hearing as the register. The entry was also changed from section 24 to 32 on the plat books of the office by erasure. The change was made to avoid conflict with the prior timber culture entry in the same section made by D. G. Grippin.

From the date of said change the entry of Eaton was of record in the local office as for the northeast quarter of section 32, while on the records of the General Land Office it has always been for the northeast quarter of section 24, having on both records the same number viz: 7779.

By letter of June 12, 1882, Eaton's timber culture entry was held for cancellation because of conflict with the prior entry made by D. G. Grippin for the NW. $\frac{1}{4}$ of section "24;" and upon report by the local officers, that no response had been made after due notice given of the action of July 12, the said entry was canceled by letter of June 18, 1883.

February 13, 1884 Thomas Shafer made homestead entry for the NE. $\frac{1}{4}$ of section 32, T. 106, R. 68, and began his settlement and improvements May 20th following. By letter of August 5, 1884, the local officers forwarded the corroborated affidavit of Eaton, setting forth a prior claim to the tract covered by Shafer's entry, under his timber culture entry No. 7779. It appeared from this affidavit that Eaton made his entry in section "24" as above stated. He subsequently called at the local office in person to find whether or not his entry was all right and was informed by O. T. Letcher, chief clerk of the office that there was already a timber culture entry in section "24," but that if he, Eaton, would leave his receipt he would change it to a tract where none had been entered. This clerk thereupon made Eaton's entry appear upon the receipt and plat book of the local office as made in section "32," erasures appearing upon the office records as reported by the local officers in letter dated August 5, 1884. Eaton claimed to have cultivated eleven acres in the season of 1884, and that he has since 1882, in good faith cultivated and improved said NE. $\frac{1}{4}$ of section "32;" that the first intimation he ever had of anything being wrong with the claim was during the spring of 1884, when Thomas Shafer took possession of the land by virtue of his homestead entry; that he employed an attorney to look after his rights and then for the first time found the letter of June 18, 1883, cancelling his timber culture entry for conflict with Grippin's entry in section 24; that he never supposed he had any right to the NE. $\frac{1}{4}$ of Sec. 24; and he asks that his rights in the NE. $\frac{1}{4}$ of section "32" (for which he has had receipt for over two years) be protected and he asks to amend his entry to make it cover the NE. $\frac{1}{4}$ of section "32."

Upon consideration of the matter by letter of December 30, 1884, it was held:

Said timber culture entry was made during a period when the local officers were authorized to make changes in entry papers with the consent of the entryman. In this case it would seem that the failure to correct the application of entry was an oversight on the part of the register. Eaton appears to have acted in good faith and in compliance with the law. His improvements upon the tract in section "32" were notice to Shafer of its appropriation. In view of the circumstances it would seem that he is entitled to relief.

Shafer was notified that he would be allowed to show cause why his entry should not be canceled and Eaton's timber culture entry re-instated.

December 3, 1884, Shafer published notice of his intention to make proof on January 10, 1886. The proof was accordingly made on that day and shows improvements, consisting of a frame house, frame barn, well, cow-shed, root house and twenty acres of breaking, valued at \$500, and continuous residence by himself and family from May 27, 1884.

Against the acceptance of this proof Eaton filed a protest; and the local officers ordered a hearing in order to determine "which has the superior right to the tract." At the hearing testimony was given as to the improvements each had made upon the tract and as to the circumstances of their entries. Eaton repeated substantially the statements contained in his affidavit above referred to, and Shafer testified that he was assured by various parties including the chief clerk of the land office that his entry was all right. He saw some breaking, but did not until some time afterward learn who had made it, and his neighbors to whom he applied for the information could not tell him.

The local officers rendered a decision in favor of Eaton. They say:

It is a common principle of law that when a party does every thing incumbent upon him under the law, that he shall not suffer from the ignorant or illegal act or neglect of the local office to perform their duties. I am unable to see, therefore, that Eaton is in default or that he has waived any of his rights and equities to the claim in controversy. Shafer's homestead entry should be canceled.

Your decision of February 7, 1886, reverses the finding of the local officers, awards the superior right to Shafer and holds:

Eaton's original application, and the records of this office have always shown his timber culture entry to be made in section "24," and no other entry has ever been recorded in the NE. $\frac{1}{4}$ of section "32" except Shafer's homestead. If, as will appear from decision of December 30, the local officers were at one time authorized to make changes in entry papers I do not find that they were ever vested with the authority to change an entry that had been duly recorded both on the records of the local and General Land Office. It may be that Eaton has acted innocently in the matter, although he has attempted to sell the claim, but his acts are none the more so than those of Shafer, who made his entry upon a tract which your office at that time, as well as the records of this office showed to be vacant. Both parties are doubtless entitled to equitable consideration and in the initiation of their respective claims they seem equally so; the law therefore must prevail. Shafer having made the only legal entry for section 32, this office recognizes his superior right to the tract and decision is rendered accordingly.

Both parties seem to have acted in entire good faith, and one must suffer from the erroneous action of the local officer. I concur in your opinion that that one must be Eaton. The government is not bound by the illegal acts of its officers; and the local officers had no power, by mere erasure, to change Eaton's entry from one section to another. If, as stated in your letter, such changes were some times made, the provis-

ions of the circular of March 10, 1880, should have been followed. From that circular I quote :

Therefore, if it has been your practice, after an entry or declaratory statement has been permitted, to allow the party making the same to relinquish the tract and substitute other lands therefor, at any time prior to the expiration of the month during which the entry or filing was made, you are informed that such practice must not be continued except in case of clear illegality or mistake.

Eaton's entry does not present as strong equities as those permitted by the practice forbidden by the circular. He did not relinquish the entry in section "24" and substitute an entry in section "32," nor did he apply to have his entry changed until, as he testifies, more than a month had elapsed from the date upon which it was made. Moreover when his entry was canceled by letter of June 18, 1883, he did not appeal. Both the law and the equities in the case being with Shafer I affirm your decision awarding him the superior right to the tract.

RAILROAD GRANT—ACT OF APRIL 21, 1876.

CATES *v.* HASTINGS & DAKOTA Ry. Co.

The right of the company under its grant attached to lands that were disencumbered at the date of definite location, notwithstanding they were reserved at the date of the grant.

The phrase "at a time subsequent to the expiration of such grant" used in section 3, act of April 21, 1876, has reference to the date at which the road should be completed, and not to the time when by legislative or judicial action a forfeiture might be declared.

An entry made within the limits of a railroad grant, at a time subsequent to the expiration of such grant, is confirmed by the third section of the act of April 21, 1876.

Secretary Vilas to Commissioner Stockslager, August 18, 1888.

The E. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 31, T. 116, R. 32, Benson, Minnesota, lies within the granted limits of the grant for the Hastings & Dakota railroad made July 4, 1866, the map of definite location of which was filed June 26, 1867.

It appears that on May 24, 1865, one Merit B. Case made homestead entry for the tract, which was canceled January 22, 1867; that on March 16, 1878, Arnold Cates made homestead entry No. 8249, for the same which was canceled May 21, 1881, by your office under the ruling then in force as announced in the case of Kniskern *v.* Hastings & Dakota Ry. Co. (5 C. L. O., 50), which held that an entry made under section 2293, Revised Statutes by a single man in the military service of the United States, who had not made a *bona fide* settlement and improvement on the tract, was illegal, and would not defeat the right of a railroad company attaching during the existence of such entry.

This ruling was adhered to but a short time, and it is now the established ruling of this Department and of the courts that a homestead

entry subsisting at the date of the attachment of the company's rights will except the land covered thereby from the operation of the grant.

Cates' entry was therefore wrongfully canceled.

In the case of *Whitnall v. Hastings & Dakota Ry. Co.* (4 L. D., 249), it was held that, (syllabus)

Although under a decision that became final the claim of an entryman was rejected and the land awarded to the railroad company, it now appearing that the company has no valid claim to the land, thus leaving the question between the government and the entryman, he is allowed to make new entry for the land.

On April 6, 1883, Cates was allowed to make homestead entry No. 11,411 for the tract, and on May 19, 1883, he made final proof and received final certificate.

By your office decision of March 7, 1884, the tract was awarded to Cates on the ground that the said homestead entry of Case subsisting at the date of the *grant* excepted the tract from the operation thereof, citing the case of *White v. Hasting & Dakota Ry. Co.* (6 C. L. O., 54).

The company appealed.

While it seems your office ruling on the legal question involved was fully justified by the case cited, the doctrine therein announced has been departed from in the subsequent case of *Rees v. Central Pac. R. R. Co.*, (5 L. D., 62) and on review, (*idem* 277) wherein it was held that the right of the company attached to lands that were disembarassed at the date of definite location notwithstanding they were reserved at the date of the grant.

The question there presented was in all material respects similar to that here. As the entry of Case was canceled prior to definite location, the ruling of your office cannot be sustained on the ground stated.

Another consideration however presents itself.

The grant for the *Hastings & Dakota road* provided :

That if said roads are not completed within ten years from the acceptance of this grant the said lands here granted and not patented shall revert to the United States.

The grant was accepted by the State March 7, 1867. (Pub. Domain 804).

The time limited for the completion of the road therefore expired March 7, 1877, prior to Cates' entry. The road had not then been completed.

Section 3 of the act of April 21, 1876, (19 Stat., 35), provides :

That all such pre-emption and homestead entries which may have been made by permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land grant at a time subsequent to expiration of such grant, shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such claims to a patent therefor.

In the case of *Wenzel v. St. Paul, M. & M. Ry. Co.* (1 L. D., 333), it was held that in using the language "at a time subsequent to the expiration of such grant" Congress has reference to the dates named in the various granting acts to railroads, as the dates at which the roads should be completed, and not to the time when by legislative or judicial

action a forfeiture might be declared, and further that a settlement and filing made under the pre-emption laws, or lands within the limits of a railroad grant, at a time subsequent to the expiration of such grant, is an entry which is confirmed by the third section of the act of April 21, 1876.

This ruling was followed in the case of *Alabama & Chattanooga R. R. Co. v. Clabourn* (6 L. D., 427), in which it was said that under the third section of the act of April 21, 1876, an entry, in other respects satisfactory to the Department, should not be rejected because of a prior withdrawal, if at the time of such entry the grant under which the withdrawal was ordered had expired by lapse of time.

The proof shows that Cates has resided continuously on the tract since 1878, and has valuable improvements.

On the authority of the cases above cited the conclusion reached by your office awarding the tract to Cates is affirmed.

HOMESTEAD - SOLDIERS' DECLARATORY STATEMENT.

ROBINSON *v.* PACKARD.

The law does not permit a person to hold one tract of land as a pre-emptor, and at the same time hold another as a homestead entryman, for the reason that both the pre-emption law, and the homestead law require residence, and a person can not maintain two residences at one and the same time.

If a soldiers' declaratory statement is illegal because filed when the claimant was residing on a tract claimed under the pre-emption law, such illegality may be considered as cured by subsequent entry under such filing, after the submission of pre-emption final proof, and in the absence of any intervening right.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 18, 1888.

In the case of *Zury Robinson v. Harlan P. Packard*, involving the SW. $\frac{1}{4}$, Sec. 4, T. 116 N., R. 64 W., Huron land district, Dakota. I have considered the appeal of the latter from your office decision of May 1, 1886, adverse to him.

Harlan P. Packard filed soldiers homestead declaratory statement for said tract July 2, 1881, and made homestead entry thereon December 31, 1881, and commuted the same to cash entry December 28, 1882.

June 29, 1881, Packard made settlement upon the SE. $\frac{1}{4}$, Sec. 5, of the township and range above named and on July 6, 1881 filed his declaratory statement therefor, and October 19, 1881 gave notice of his intention to make final proof upon his pre-emption claim.

Zury Robinson filed a protest against said proof charging fraud and bad faith, upon which a hearing was ordered by the local office December 31, 1881, on which day Packard tendered proof. The case coming up for final determination the Department decided February 11, 1884, that no fraud had been shown and that the proof was sufficient to justify

the allowance of the cash entry. Cash entry—No. 7932—was, accordingly made March 1, 1884.

Pending the determination of the sufficiency of the proof submitted by Packard on his pre-emption claim, he on the day he made the proof and before entry was allowed, perfected his soldiers declaratory statement for the SW. $\frac{1}{4}$, Sec. 4, which he had filed July 2, 1881, by making entry thereof December 31, 1881.

The local officers found that Packard's soldiers declaratory statement was illegal because it was made while he was living on and before he had proved up on his pre-emption claim. They decided in favor of Robinson. You decide that Robinson's alleged residence was a mere pretense, and that Packard's homestead declaratory statement was illegal and the original and cash entries based upon it were also illegal.

In view of his good faith, however, you allow the original entry to stand subject to future compliance with the law. I concur in your conclusion as to Robinson. The testimony shows that in October, 1881, (his entry bearing date August 25, 1881) Robinson built a small house on the tract but merely made a pretense of living there by sleeping in the house at very rare intervals between October 1881, and May 1882. After May 1882, he abandoned even the pretense of living on the place. His homestead entry should be canceled.

The Department has frequently ruled that while a homestead entryman has six months within which to establish his actual residence upon the tract embraced in his entry, the law regards his residence as commencing from the date of his entry and if residence after entry is shown to be elsewhere the entry is illegal. It has never recognized the right of a person to at the same time claim one tract as a pre-emptor and another as a homestead entryman for the reason that both the pre-emption law and the homestead law require residence, and a person cannot maintain two residences at one and the same time. *Krichbaum v. Perry* (5 L. D., 403); *Rufus McConliss* (2 L. D., 622); *J. J. Caward* (3 L. D., 505); *Collar v. Collar* (4 L. D., 26); *Austin v. Norin* (4 L. D., 461).

But the law is different in regard to soldiers homestead entries. They are allowed to locate the land in person or by agent by filing a declaratory statement and to make entry within six months thereafter. If the declaratory statement in this case was illegal because, when made, the claimant was residing on a tract claimed under the pre-emption law, such illegality may be considered cured when he made entry, after he had submitted proof on his pre-emption claim, in the absence of any intervening right, as the case of *Mann v. Huk* (3 L. D., 452) rules can be done in case of filing by aliens.

If Packard's filing was illegal such an intervening right was the homestead entry made by Robinson; and if he had made *bona fide* settlement and improvement upon the land his would have been the superior claim to the tract. But the testimony shows that he did not comply with the law and your decision holding his entry for cancellation

was a proper one. Robinson's claim being out of the way and the parties being the United States and Packard, in view of the latter's good faith and valuable improvements, the irregularity of his filing will not be insisted upon. *Snyder v. Ellison* (5 L. D., 354.)

The holding of two claims at the same time naturally raises a doubt as to Packard's good faith, but this doubt goes to the bona fides of his inhabitancy on the pre-emption claim and was resolved in his favor by the decision of my predecessor. There is nothing to indicate bad faith in relation to the homestead entry.

The cash entry is approved.

DESERT LAND ENTRY—RELINQUISHMENT—PREFERENCE RIGHT.

MARY STANTON.*

On relinquishment of a desert land entry the land covered thereby is held open to entry and settlement without further action on the part of the Commissioner of the General Land Office.

A desert land entry may be allowed subject to the preference right of a successful contestant.

Secretary Vilas to Acting Commissioner Stockslager, March 15, 1883.

I have before me the appeal of Mary Stanton from your decision of August 5, 1886, affirming the action of the local office at Cheyenne, Wyoming, in rejecting her application to make desert land entry of Sec. 8, T. 13 R. 66 W., "because of conflict with desert land entry 632."

The said last mentioned entry ("desert land entry 632") was made by Frederick J. Stanton on the 25th of May, 1883.

March 17, 1886, Wm. Constantine applied to contest said entry on the ground that the land was not really "desert," etc.

March 18, 1886, the register and receiver issued notice of said contest, and personal service was effected April 5, 1886, the hearing being set down for May 7, 1886, at the Cheyenne land office.

March 23, 1886, said Frederick J. Stanton filed a relinquishment of his entry (632), and at the same time, as agent for Mary Stanton, made application to enter the same tract in her name under the desert land act.

March 25, 1886, the register and receiver rejected said application, because of conflict with Frederick J. Stanton's entry (which they declined to cancel on the relinquishment until after action by the Commissioner).

August 5, 1886, on appeal from the local officers, your office sustained their action, on the ground that the cancellation of a desert land entry upon relinquishment must first be ordered by the General Land Office. From this decision of your office the present appeal was taken.

It is the ruling of this Department that a desert land entryman is a "pre-emption claimant" within the meaning of the provisions as to such

* Not reported in Vol. VI.

claimants in the act of May 14, 1880 (21 Stat., 140), *Fraser v. Ringgold* (3 L. D., 69). Accordingly when Frederick J. Stanton filed a written relinquishment of his claim in the local land office, the land covered by such claim should have been held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office. (See section 1 of the act of May 14, 1880, *ubi supra*.)

Mary Stanton's application should have been allowed, but subject to the preference right accruing to Constantine upon the filing of the relinquishment after the initiation of his contest. *Jefferson v. Winter* (5 L. D., 694).

Your said decision is modified accordingly.

RAILROAD GRANT—SETTLEMENT RIGHT.

NORTHERN PAC. R. R. CO. *v.* FITZGERALD.*

To establish the allegation that a tract of land within the primary limits of a grant was excepted therefrom by reason of settlement thereon, it must be shown that there was, at the date when the right of the grantee attached, a valid subsisting settlement, made by one having the legal qualifications to perfect the claim initiated by such settlement.

Secretary Vilas to Commissioner Stockslager, June 15, 1888.

I have considered the case of the Northern Pacific Railroad Company *v.* Thomas Fitzgerald, on appeal by the former from your office decision of September 15, 1886, holding that the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 33, T. 28 N., R. 36 E., Spokane Falls land district, Washington Territory, was excepted from the grant to said company, of July 2, 1864. (13 Stat., 365.)

The right of the company attached to this land, if at all, upon the filing of the map of definite location October 4, 1880.

On July 6, 1885, Fitzgerald filed in the local office his application to make homestead entry for this tract, and in support thereof filed his corroborated affidavit, alleging, in effect, that said tract was excepted from the grant to the Northern Pacific Railroad Company by reason of a settlement thereon by Matthew Damon, existing at date of filing map of definite location.

A hearing was had August 19, 1885, before the local officers to determine the facts. The company made default, and the only testimony offered was that of the applicant and the two witnesses, who had corroborated the former affidavit. The local officers found that the testimony was not sufficiently definite to show that said land was excepted. There was no appeal from that decision.

When the case came up for examination in your office, it was held that the facts showed conclusively that the tract was excepted from

* Not reported in Vol. VI.

the grant, the decision of the local officers was reversed, and the claim of the company rejected.

The local officers based their decision against Fitzgerald upon the fact that the testimony submitted did not show that Damon was a qualified pre-emptor, or that Damon, if qualified, was in actual possession of the tract at the date the rights of the road attached. There is not one word in the testimony concerning Damon's qualifications to take the land under any one of the land laws, and all that is shown as to his actual possession or occupancy of that tract is the statement of Fitzgerald, formally corroborated by the other two witnesses, that "settlement was made upon said land September 28, 1880, by Matthew Damon, who built a house thereon and resided therein, and that said premises have been occupied continuously ever since."

I do not think the facts here shown are sufficient to justify the conclusion that said tract was excepted from the grant. It devolves upon one claiming that a certain tract within the primary limits of a grant was excepted from the operation thereof, by reason of a settlement thereon, to show that there was thereon at the date the right of the grantee road attached, a valid existing settlement made by one having the legal qualifications to perfect the claim initiated by such settlement. This has not been done in this case. Your said office decision is therefore reversed, and Fitzgerald's application is denied.

The facts brought out in this case, while not sufficient to justify the conclusion, at this time, that the tract was excepted from the grant, are sufficient to call for an investigation on the part of the government as to the status of the land at the date the right of the road attached, if at all, for the purpose of determining whether said land was granted. You will therefore cause such an investigation to be made and upon the facts elicited thereby, you will determine the right to said tract as between the railroad company and the United States.

PRE-EMPTION SETTLEMENT—CITIZENSHIP.

JACOB H. EDENS.*

The disability of alienage is removed when the settler becomes a citizen, and, in the absence of any adverse claim, his right to the land relates back to the date of his settlement, notwithstanding the fact that he was an alien when it was made.

Secretary Vilas to Commissioner Stockslager, June 15, 1888.

I have considered the appeal of Jacob H. Edens from your office decision of May 15, 1886, rejecting his final pre-emption proof for the SW. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Section 22, N. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of Section 27, T. 32 R. 47 W., Valentine, Nebraska.

* Not reported in Vol. VI.

Edens filed his declaratory statement for said land April 28th, alleging settlement April 18, 1885, and made proof January 26, 1886.

The proof was rejected by the local officers for the reason that it does not show that the claimant was under twenty-one years of age at the time of his fathers naturalization, nor that Claus Peter Edens was his father; and for the further reason that the value and character of the improvements taken in connection with the matter of residence are not sufficient to warrant the conclusion that the claimant is acting in entire good faith in complying with the pre-emption laws.

By letter of May 15, 1886, you affirm the action of the local officers in rejecting the proof.

March 10, 1886, Edens made an affidavit that he was born March 2, 1851 in Denmark, and came, during his minority, to this country. It has been his belief that his father, Claus Peter Edens, became naturalized during his minority. Under this impression he has exercised the right of a citizen for the last fourteen years.

It appears, however, that the father of the claimant did not become a citizen of the United States until 1877, five years after the son became of age. Upon making this discovery the claimant, after due application, was admitted to citizenship March 10, 1886.

Without deciding whether proof made by an alien will be accepted, there is no doubt under the rulings in the cases of Ole O. Krogstad (4 L. D., 564), Mann *v.* Huk (3 L. D., 452) and Kelly *v.* Quast (2 L. D., 627), that the defect of alienage was cured when the claimant became a citizen in March, 1886, and, in the absence of any adverse claim, his right to the land relates back to the date of his settlement, notwithstanding the fact that he was an alien when it was made.

The proof, however, is not satisfactory. He went upon the land the first week in June 1885, and, with the exception of one months absence in November owing to his father's sickness and death, his residence was continuous until January 26, 1886, when proof was made. The improvements consist of a house, sixteen by twenty, a stable and nine acres of breaking are valued at \$80. The only crop raised was four bushels of potatoes. In view of the meagre nature of the improvements and especially of the cultivation and of the fact that proof was made after less than eight months inhabitancy and its being unsatisfactory to the local officers, the proof does not convince me that the claimant has complied with the requirements of the law. I, therefore, concur in the findings of the local officers and in the decision of your office, in this respect. The claimant will be permitted to make new proof, which ought to be easy if he has conducted himself in entire good faith.

You will therefore direct the local officers to give immediately, written notice to the claimant that his proofs heretofore submitted are rejected, and that his filing will stand canceled unless within sixty days from the service of such notice, he shall furnish proof satisfactorily showing full compliance with the law in good faith, and that upon failure to furnish

such proofs within the time limited they will cancel the filing accordingly, and that upon receipt of such further proofs as shall be proffered within the time they will promptly report the same to you, with their opinion thereon.

Your decision is accordingly modified.

TIMBER CULTURE FINAL PROOF—FINAL CERTIFICATE.

CHARLES N. SMITH.

A final certificate issued on timber culture proof prematurely made, should not be canceled, but suspended, pending further compliance with law.

Secretary Vilas to Commissioner Stockslager, July 19, 1888.

I have before me the appeal of Charles N. Smith, heir of Gilbert Smith, deceased, from your decision of December 10, 1886, rejecting the final proof offered by him under timber culture entry No. 633, and holding for cancellation final certificate No. 33, for the NE. $\frac{1}{4}$ of Sec. 14, T. 116 N., R. 53 W., Watertown district, Dakota.

By the proof it appears that the planting of five and one-eighth acres of the total of ten and one-eighth planted, did not take place until May 1881, while said proof itself was made in May, 1886, only five years later.

Under the ruling in the case of Henry Hooper (6 L. D., 624), that "the eight years of cultivation required under the timber culture law must be computed from the time the required acreage of trees, seeds or cuttings shall have been planted," the proof in this case was premature and must be rejected; but the final certificate should be suspended instead of canceled, the heirs being entitled to proceed under the entry.

Your said decision is modified accordingly.

HOMESTEAD COMMUTATION—NEW PROOF.

LOUIS W. BUNNELL.

Payment of the purchase price, and compliance with the requirements of the law as to residence, cultivation, and improvement, are the matters of substance which authorize commutation of a homestead entry.

On the rejection of commutation proof because irregularly submitted, with leave to make new proof, such new proof, though covering the same period as the former and showing the same facts, may be accepted *nunc pro tunc*, if taken after due notice and in conformity to the other regulations prescribed for making proof.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 13, 1888.

I have considered the appeal of Louis W. Bunnell from the decision of your office of December 13, 1886, rejecting his final proof and holding

for cancellation his homestead entry, No. 13,590, and commutation entry, for the SW. $\frac{1}{4}$, Sec. 1, T. 131, R. 56, Fargo district, Dakota.

The claimant made said homestead entry October 12, 1883, and commuted it November 7, 1884, by location of two eighty acre military bounty land warrants. It appeared from his commutation proof offered November 7, 1884 (the date of said commutation entry) that he "built a house upon the land about September 16, 1883, and furnished it comfortably and began his actual residence about September 20, 1883;" that he was a single man with no family, and lived upon the land, with the exception of the winter, from November 10, 1883, to March 13, 1884, when he was absent wintering his stock, and from August 22, 1884, to November 7, 1884 (the date of his proof and commutation entry) when he was "at work in harvest and threshing to earn money to support himself through the coming winter." His improvements were a dwelling, twelve by fourteen feet, with sides of matched flooring, shingle roof and lumber floor, and one door and window; a frame barn, twenty by twenty-four feet; a well and twenty-two acres of breaking,—of the total value of \$380. On the land he had a full supply of all necessary farming implements.

The local officers accepted this proof and allowed the entry. At the time of making this entry (November 7, 1884) the claimant executed two mortgages on the land, one to Elizabeth S. Clark for \$425, and the other to J. A. Murray for \$65.87, for the purpose, as stated by him in an affidavit subsequently filed, "of making proof and payment for said tract."

After his proof had been accepted and entry allowed, the claimant went to reside with his parents at Denver, Illinois.

On September 23, 1885, about ten and one half months after said proof had been accepted and said entry allowed, and when the claimant was residing with his parents in Denver, Illinois, your office rejected said proof, "because, (1st) The notice of intention to make proof was not published in the newspaper designated by the register. (2d) The claimant's testimony was not taken on the day advertised or before the officer named in the notice. (3d) The testimony of the claimant's witnesses was not taken on the day advertised; and, (4th) The evidence as to residence was not satisfactory."

The rejection of the proof on the first *three* grounds was proper and necessary, but I do not agree with your office in holding that "the evidence as to residence was unsatisfactory." His improvements were of the value of \$380, and of a character indicating an intent to make the tract a permanent home; his house was comfortably furnished as a home and a full supply of suitable farming utensils was kept on the land. He established residence and his absences thereafter to the date of proof were satisfactorily excused; and on the whole, the facts established by said proof show, in my opinion, a substantial compliance with the law in good faith to the date of said commutation entry.

Your office, however, having rejected this proof allowed the claimant to make new proof, and on November 2, 1886, he again made proof. This proof was the same as the first, except that it showed, that after making the first proof, November 7, 1884, he went to live with his parents in Denver, Illinois, and remained there until September 23, 1886, about a month and ten days before he made the last proof. He was put to considerable expense in returning to the land at this time and making said proof, and his return was for the purpose of making said proof and with no intention of remaining thereafter. He had mortgaged the land as above stated, but had never sold or absolutely disposed of it, and in 1885 (after his proof was made) he had the land cultivated.

The claimant makes no pretense of intending further residence on the land, and relies on his compliance with the law to date of commutation entry and first proof, November 7, 1884. To the question propounded to him on cross-examination, when making his second proof, "Why do you not avail yourself of the full time allowed by law before making proof and payment?" He replied, "My circumstances would not permit me to make proof on full time;" and he further states that he was supporting his aged father and mother at their home in Illinois.

The law authorizes a homestead entry to be commuted "at any time before the expiration of the five years," on paying a specified consideration and "making proof of settlement and cultivation as provided by law granting pre-emption rights." R. S., Sec. 2301.

No other consideration is demanded and no other condition annexed. The claimant in this case shows, by both his first and second proof, substantial compliance with the law in good faith to the date of his commutation entry, November 7, 1884. At that date, then, he was authorized by the statute to commute his homestead entry, and he made proof of compliance with the law and paid the government the required consideration.

In publishing notice of the intention to take this proof and in taking it certain fatal errors caused by a *bona fide* mistake of the claimant, were committed, and the proof, though sufficient in itself, had to be rejected. When your office permitted the second proof to be taken, the commutation entry stood as suspended and not canceled. The question then is, should this second proof relate to the date of the commutation entry, November 7, 1884, or to its own date, November 2, 1886?

Payment of the consideration and compliance with the requirements of the law as to residence, cultivation and improvement are the matters of substance, which authorize the commutation of a homestead entry. The present case differs from those in which the proof first offered is deficient in itself in not showing conformity to the law in the essential matters of residence, cultivation and improvement. In the latter cases, in the absence of bad faith, new proof may be allowed,

showing full compliance with the law subsequent to the time covered by the first proof. The proof is then strictly new proof. But where, as in this case, the proof first offered was substantially sufficient and was accepted and entry allowed by the local officers, but subsequently and after the lapse of a considerable period of time, said proof was rejected by your office, being subject to such rejection because of the non-observance of the rules regulating the production of such proof, and no bad faith is imputed to the claimant, and he has paid the required consideration, and, the entry being merely suspended, leave has been granted to make proof in support thereof—under such leave, proof of the same facts as those established by the first proof may be re-offered, and should be accepted *nunc pro tunc*, if taken after due notice and in conformity to the other regulations prescribed for making proof.

In the case of Noah Herrell (6 L. D., 573), the claimant (Herrell) after making premature homestead proof had ceased to reside upon the land, and the homestead proof having been rejected as such, he petitioned that said proof be considered and accepted as commutation proof and he be allowed to make payment for the land and thus acquire title thereto. Your office denied the petition, on the ground, substantially, that compliance with the law as to residence and cultivation should be shown to the date of the proof and payment. But this Department held that, "Where good faith is clearly apparent and a substantial compliance with the regulations is shown, an exception may be justified, especially under those requirements which govern the manner of the proof, but do not affect its quality;" and that the petition of Herrell should be granted, inasmuch as it appeared, among other things, "that he was then" (at the date of said homestead proof) "qualified in all respects and properly prepared under the regulations to make commutation." In the present case, the errors committed by the claimant in offering his first proof were the result of a *bona fide* mistake, and his good faith is unquestioned, the proof offered was subject to rejection because of the non-observance of requirements governing the manner and not the quality of the proof, and the claimant at the time of offering said proof was fully qualified and entitled to make commutation.

I am of the opinion, that under the peculiar circumstances of this case, the proof last offered was sufficient.

The decision of your office, rejecting said proof and holding said entries for cancellation is, therefore, reversed, and the commutation entry will be passed to patent.

RAILROAD GRANT - LEGISLATIVE WITHDRAWAL SETTLEMENT.

BARR *v.* NORTHERN PAC. R. R. CO.

August 13, 1870, the map of general route was accepted. November 16, 1872, a declaratory statement, covering the land in question, was filed alleging settlement June 24, 1870. *Held*, that the fact of settlement as alleged is not established by the filing, and that a hearing is required to determine the status of the land when the legislative withdrawal became effective.

Secretary Vilas to Commissioner Stockslager, August 15, 1888.

I have considered the appeal of the Northern Pacific Railroad Company from the decision of your office, dated May 12, 1886, rejecting its claim to the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 13, T. 18 N., R. 4 W., Olympia land district, Washington Territory.

An inspection of the records of your office shows that said tracts are in an odd numbered section within the limits of the withdrawal upon the acceptance of the map of general route August 13, 1870, by the said company under its grant by act of Congress approved July 2, 1864 (13 Stat., 365). Said tracts are also within the granted limits of the withdrawal upon the filing of the map of the definite location of its road on May 14, 1874.

The decision of your office fails to give the dates of said withdrawals, but rejects the claim of the company for the reason that "all claim of the Northern Pacific Railroad Company (is) eliminated by a valid, subsisting claim." Said decision states that the records of your office show "that on June 24, 1870, said Barr filed declaratory statement No. 2249, for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 13, and the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$, Sec. 24, T. 18 N., R. 4 W., that on May 13, 1875, he transmuted said N. $\frac{1}{2}$ (of the) NE. $\frac{1}{4}$ of Sec. 24 to homestead entry, No. 2257, upon which final certificate issued July 18, 1881. But it appears from an inspection of said records that it was on November 16, 1872, instead of June 24, 1870, that Barr's said declaratory statement was filed, though alleging settlement June 24, 1870.

In the protest of said company, it is alleged that said Barr, subsequent to said filing and prior to the definite location of the road, relinquished his claim to the tracts in the odd numbered section, and a hearing is requested that they may have an opportunity of proving the same by oral testimony, because the records of said local land office had been destroyed by fire. But your office held that said filing served to except the land in question from the claim of the company, and that his said application should be allowed.

The land in question became fixed as granted on August 13, 1870, the date of the acceptance of the map of general route, and it was under the provisions of the sixth section of the granting act, subject only to be thrown back, if the definite location left it out of the granted limits. But the land remained within the granted limits upon the definite loca-

tion of the road, and it has belonged to the company from the date of the act, unless an actual settlement was made thereon prior to, and was subsisting on the land on August 13, 1870. Such a settlement is not proven by Barr's allegation made in his filing two years later, that he settled on said land June 24, 1870.

A hearing should be had to determine the status of the land in controversy on August 13, 1870, the date when the legislative withdrawal became effective. You will accordingly direct the local officers to order a hearing, after due notice to the parties in interest, at which said Barr may prove, if he can, the allegation of settlement as made in his said filing.

Upon receipt of the testimony, together with the opinion of the register and receiver thereon, you will re-adjudicate the case.

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

SOLDIERS' ADDITIONAL HOMESTEAD—MISSOURI HOME GUARD.

CHAUNCEY CARPENTER.

The right to make soldiers' additional homestead entry does not extend to members of the Missouri Home Guard.

If the entry is invalid by reason of the want of due military service, the subsequent purchaser can occupy no better position than the entryman.

An invalid entry should not be submitted to the Board of Equitable Adjudication.

The act of May 15, 1886, authorizing the Secretary of War to issue certificates of discharge to members of the Missouri Home Guard, did not have the effect to confer upon members of such service additional homestead rights.

Secretary Vilas to Commissioner Stockslager, August 18, 1888.

I have considered the appeal of counsel for Chauncey Carpenter, transferee, from the decisions of your office, dated July 28, 1884, and March 3, 1885, holding for cancellation soldier's additional homestead entry, No. 10,829, final certificate No. 3430, of the NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of Sec. 12, T. 20 S., R. 24 E., and Lot No. 1 of Sec. 22, T. 27 S., R. 37 E., Gainesville, Florida, land district, made in the name of James M. Wyrick. Said entry was held for cancellation, for the reason that the military service of the entryman was performed in the Missouri Home Guards, and, for that reason, he was not entitled to the right of soldier's additional homestead, under the decisions of this Department.

Your office, also, held that the allegation of the transferee that he had purchased said land in good faith for a valuable consideration, and without any knowledge of any defect in the title, even if true, would not warrant the submission of said entry to the Board of Equitable Adjudication for its consideration.

Counsel for appellant have filed no brief in the case, but they allege in their appeal that your office erred. (1) In holding that the entry should not be submitted to the Board of Equitable Adjudication. (2) In de-

ciding that patent should not issue on said location; and (3) In holding said entry for cancellation.

There can be no question, if the entry is invalid by reason of the want of due military service, that the subsequent purchaser can occupy no better position than the entryman. This is the settled ruling of this Department. *C. P. Cogswell* (3 L. D., 23); *R. M. Sherman et al.* (4 L. D., 544); *United States v. Johnson et al.* (5 L. D., 442).

If the entry is invalid, then it should not be submitted to the Board of Equitable Adjudication. *R. M. Chrisinger* (4 L. D., 347).

This Department, on January 3, 1880, in the case of *Wilson Miller* (6 C. L. O., 190), affirmed the decision of your office, holding that members of the Missouri Home Guards were not entitled to make soldier's additional entries. This ruling was adhered to in the case of *William French* (2 L. D., 235) wherein it was stated that :

William French was a member of the Missouri Home Guards, and as such was not entitled to the benefits of Sec. 2306 of the Revised Statutes. An additional homestead entry made by him was illegal at its inception, because the service upon which the right to make such entry was based was not in the army of the United States.

It is clear, therefore, that, under the construction placed upon said section by the Department, said entry was illegal.

By act of Congress, approved May 15, 1886 (24 Stat., 23), it is provided :

That the Secretary of War be, and is hereby, authorized and directed to furnish upon their several applications therefor, a certificate of discharge to each and every member of the Missouri Home Guards, whose claims for pay were adjudicated by the Hawkins Taylor commission, under the act approved March 25, 1862, and the several acts supplementary thereto.

In the case of *Smith Hatfield et al.* (6 L. D., 557), this Department did not find it necessary to rule upon the effect of said act of 1886, and expressly declined to indicate its effect upon the future departmental action, relative to such additional entries.

It appears that since 1880, the decision of the Department has stood not only unreversed, but, in 1882, it was distinctly re-affirmed, that the men enrolled in the organization called the "Missouri Home Guards" were not in the army of the United States, and not entitled, therefore, to the benefit of the provisions of the homestead laws relating to soldiers who "served in the army of the United States." It may be doubted whether they can be properly characterized as a State organization, as there is some evidence which tends to show they were irregularly raised under authorization of the President for service in Missouri. They never appear, notwithstanding, to have formed a part of "the army of the United States," the organization of which was provided for by law, and, if in the service of the United States, appear to have been irregulars, and not to have been in "the army" provided for by law. So far as is ascertainable, their engagement limited their service to home defense. But, however this might appear to me, if it were a new question, I can not feel at liberty, in view of the grave doubt

affecting the matter, to disturb a course of decision, which has stood so many years, during which the Congress could easily have set the subject at rest, if the decision had been at variance with its purpose. It having been thus determined that these troops were not in the army in 1861, it can not be found that the act of 1886, put them into it *nunc pro tunc*. It simply provides for certificates of discharge; and it would most unreasonably strain the act, to impute to it the purpose to include within the provisions of the homestead laws, those who had been uniformly denied the privileges of it. Had such been the purpose of Congress, it can hardly be doubted it would have been more directly expressed.

The decision of your office is affirmed.

RAILROAD GRANT—STATUTORY WITHDRAWAL—SETTLEMENT RIGHT.

Modified, 18 S. R. 824
NORTHERN PAC. R. R. CO. v. BOWMAN.

In determining whether a tract of land is free from a pre-emption, or other claim, or right, under the grant of July 2, 1864, the validity or lawfulness of such claim is not material.

A claim acquired through the occupancy, improvement, and cultivation of a qualified homesteader, existing at the date of withdrawal on general route, serves to except the land covered thereby from the operation of said withdrawal.

Secretary Vilas to Commissioner Stockslager, August 18, 1888.

The Northern Pacific Railroad Company appeals from your office decision, dated December 18, 1886, holding that the SW. $\frac{1}{4}$, Sec. 27, T. 1 N., R. 32 E., La Grande, Oregon, was excepted from the grant to said company of July 2, 1864, (13 Stat., 365)

The tract in question is within the forty mile limits of the statutory withdrawal for the benefit of said company, on map of general route of its road filed August 13, 1870.

No map of definite location of said road, opposite this land, has ever been filed, nor has that part of the road been constructed.

On November 18, 1886, Walter S. Bowman applied to file pre-emption declaratory statement for the land in controversy, accompanying his application by certain affidavits setting forth that the tract was settled upon and claimed, prior to and on August 13, 1870, by one John W. Bowman, and was thereby excepted from the withdrawal on general route.

A hearing was thereupon ordered by the local officers, which appears to have been regularly had, and upon the testimony submitted they found for Bowman and against the company.

Upon appeal from this finding your office sustained the same and rejected the company's claim to the land. The testimony in the case shows that the land in controversy was occupied, cultivated in part,

and used for grazing purposes by said John W. Bowman from 1865, until 1877 or 1878, when he sold his improvements and possessory right to his brother, Henry Bowman, father of the present claimant. During this time said John W. Bowman lived in a house situated on or near the line between this land and another portion of the same section. In addition to his cultivation of a part of the tract in dispute, he put about one hundred acres thereof under fence in the year 1867. It also appears from the record of your office, that on June 27, 1870, said John W. Bowman filed his pre-emption declaratory statement for the W. $\frac{1}{2}$ SE. $\frac{1}{4}$, and SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$ of said section 27, same township and range, alleging settlement October 1, 1862; that on July 10, 1871, he transmuted the same to homestead entry No. 412, and on May 25, 1872, he commuted his homestead to cash entry No. 187. He obtained patent for the land upon certificate of such cash entry September 13, 1872.

The sole question presented by the record is, was the land in question free from a *pre-emption*, or other *claim* or *right*, at the date of said statutory withdrawal of August 13, 1870. If it was free from such a claim or right at that date, it came within the operation of such withdrawal; if not, the withdrawal did not affect it.

The company asserts in defense of its supposed rights in the premises that said Bowman could not have been lawfully "claiming" said land during the period of his occupancy, cultivation and improvement thereof as stated, because he must necessarily have been living on and "claiming" the tract covered by his said pre-emption filing, for which he secured title in 1872, as shown. In answer to this it may be said that the question as to whether the claim of said Bowman was a lawful claim, can not enter into the consideration of the case or have any influence in the determination of the issue involved. It is sufficient if he had a *claim* to the land in dispute at the date mentioned of such nature as the act defines and any question as to the lawfulness or validity of such claim is immaterial. *Newhall v. Sanger* (92 U. S., 761); *Kansas Pacific Ry. Co. v. Dunmeyer* (113 U. S., 629).

Now while it is true that said Bowman had no claim of record for said land at the date when said withdrawal took effect, it is nevertheless shown that he had a *claim* upon the same, acquired by his occupancy, cultivation and improvement thereof, as shown, and he appears to have continued to exercise acts of ownership over the land until long after the date of said statutory withdrawal he had such notorious, exclusive possession as would have sustained an action of trespass *quare clausum* against any intruder who did not connect himself with the government, the owner of the title. Bowman had not, at that date, exhausted his right of entry under the homestead law, and prior to the transmutation of his pre-emption filing, on July 10, 1871, as stated, he could have entered the land in dispute as a homestead if he had so desired, there being no intervening adverse settlement claim thereto. Besides that he was in possession of and *claiming* the land prior to and at the date

of said withdrawal, he had been in exclusive occupation of it for years, had about one hundred acres fenced against all intruders, and his possession was in connection with his home, although it does not appear that the house in which he lived was actually on the particular quarter section, being on or near the line. It seems to me this is such a case as the Congress contemplated by the excepting phrase "occupied by homestead settlers." To limit that term to those only who had made a previous homestead entry, then the necessary first legal step to the acquisition of land under the homestead laws, would narrow and restrict the rule designed, as I think, to be provided for the protection of the adventurous pioneers of the new and unsurveyed territory in which the road was projected.

Upon consideration of the whole case I am constrained to hold that his claim was such as served to except the land from the operation of said withdrawal.

In this respect this case comes within the principle of ruling in the cases of Northern Pacific Railroad Company *v.* Thomas J. Evans (7 L. D., 131), and same against John C. Arnold (not reported), decided by this Department August 4, 1888, and reference is hereby made to those cases.

The decision of your office rejecting the company's claim to the land is accordingly affirmed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

CENTRAL PAC. R. R. CO. *v.* ENGRAM.

The provision in the granting act that "the Secretary of the Interior shall withdraw from sale public lands *herein granted* on each side of said railroad so far as located and within the limits before specified," renders unauthorized any withdrawal beyond the granted limits.

An entry allowed for unselected land, lying within the limits of an indemnity withdrawal, subsequently revoked, will not be disturbed.

Secretary Vilas to Commissioner Stockslager, August 18, 1888.

This is an appeal by the Central Pacific Railroad Company from your office decision of December 9, 1886, sustaining the pre-emption cash entry of William Engram, made April 27, 1886, for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 23, T. 43 N., R. 1 W., M. D. M., Shasta, California.

The facts are sufficiently stated in your said decision and reference is made thereto.

The granting act of July 25, 1866 (14 Stat., 239), after having granted in the second section twenty alternate sections, ten on each side, per mile of road, and provided for selections in place of stated deficiencies within ten miles further, proceeds to direct that "the Secretary of the Interior shall withdraw from sale public lands *herein granted* on each side of said railroad so far as located and within the limits before speci-

fiel." This is a specific direction to withdraw the lands within the granted limits and according to the view I have felt compelled to take rendered any withdrawal beyond those limits unauthorized; the reasons for which view are shown in the case of the Northern Pacific Railroad Company *v.* Guilford Miller (7 L. D., 100), recently decided. The entry was allowed by the register and receiver and approved by your office. I cannot find it invalid. Besides the stated withdrawal of August 25, 1871, if ever validly effective for the California and Oregon (now Central Pacific Railroad Company) was revoked by departmental decision of August 15, 1887 (6 L. D., 92), and the lands embraced therein restored to the public domain for settlement; and the records of your office show that the tract in question has not been selected by the company and I therefore find from the record before me no reason for disturbing the existing entry. *Phillips v. Central Pacific R. R. Co.* (6 L. D., 378). I prefer these grounds to base the affirmance of your decision upon, to the alleged waiver by the company mentioned by you, upon which I will express no opinion.

Your decision is affirmed.

SMITH HATFIELD ET AL.

Motion for review of departmental decision rendered March 1, 1886 (6 L. D., 557), overruled by Secretary Vilas, August 18, 1888.

RAILROAD GRANT—ATTACHMENT OF RIGHT.

BLAIR *v.* HASTINGS & DAKOTA RY. CO. ET AL.

Under the grant of July 4, 1866, the right of the road attached to land free at date of definite location, although such land was reserved at the date of the grant.

Secretary Vilas to Commissioner Stockslager, August 18, 1888.

I have considered the case of Luke P. Blair *v.* James Oleson and Hastings & Dakota Ry. Co., on appeal by Oleson and said company from your office decision of September 11, 1886, holding that Lots 1, 2, 3, and 4 Sec. 33, T. 116 N., R. 30 W., 5th P. M., Benson, Minnesota land district, were excepted from the grant in aid of said road of July 4, 1866 (14 Stat., 87), and also rejecting Oleson's application to make homestead entry therefor.

These tracts were within the limits of the withdrawal made on filing map of general route of said road June 11, 1866 notice of which withdrawal was received at the local office August 8, 1866. They are also within the primary or granted limits of said grant, as shown by the map of definite location of said line of road which was accepted by the Secretary of the Interior June 26, 1867.

On February 25, 1865, one W. G. Putnam made homestead entry of the land in controversy, which entry was canceled September 15, 1866, upon his relinquishment.

On July 9, 1878, Luke P. Blair applied to make timber culture entry for said land which application was denied "for the reason that the tract is within the limits of the grant to the Hastings & Dakota Railway Company and is withdrawn from entry" from which decision Blair appealed to your office.

On January 6, 1885, and while Blair's appeal was yet pending Oleson applied to make homestead entry for said land which application was refused by the local officers because of the pendency of Blair's appeal.

In your office it was decided that inasmuch as said land was covered by a homestead entry at the date of the grant, although said entry had been canceled prior to the filing of the map of definite location, it was excepted from the operation of the grant, that the reason assigned by the local officers for the rejection of Blair's application was not sufficient, that the rejection of Oleson's for the reason stated was proper, and it was said that a hearing should be ordered to determine the character of the land with a view of ascertaining whether or not it was subject to entry under the timber culture law.

In support of your office decision the case of *White v. Hastings & Dakota Ry. Co.* (6 C. L. O., 54) is cited, and it is contended that as between that decision and the decision in the case of *Rees v. Central Pac. R. R. Co.* (5 L. D., 62), there is no conflict, it is said: "The difference between the rulings is accounted for by the different language used by Congress in making the respective grants." I cannot agree with this conclusion. The grant to the Central Pacific company is of "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 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," and that to the State of Minnesota for the Hastings & Dakota road is of "every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road" and it is provided that "in case it shall appear that the United States have, when the lines or route of said roads are definitely located sold any section or part thereof granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same," the Secretary shall cause to be selected lands in lieu thereof. While the wording of these two grants is somewhat different the effect is the same.

The case under consideration comes within the rule laid down in the case of *Rees v. Central Pac. R. R. Co.* (5 L. D. 62), and the land in controversy here must be held to have passed to the appellant company under said grant of July 4, 1866.

This being true the applications of Blair to make timber culture entry and of Oleson to make homestead entry must both be refused.

Your said office decision is modified in accordance with the views herein expressed.

SWAMP LAND INDEMNITY.

STATE OF MICHIGAN.

The State is not entitled to indemnity for lands which do not appear, from the field notes of survey, to be swamp lands within the true intent and meaning of the granting act.

Secretary Vilas to Commissioner Stockstager, August 20, 1888.

I have considered the appeal of the State of Michigan from your office decision of September 25, 1886, holding for rejection the claim of said State for indemnity under the acts of March 2, 1855, and March 3, 1857, for the tracts designated in your said decision, for the reason that said lands are not of the character contemplated by the act of September 28, 1850, as shown by the plats and field notes of government surveys on file in your office.

The act of September 28, 1850 (9 Stat., 520, Sec. 2479 R. S.), granted to the State of Michigan "the whole of the swamp and overflowed lands, made unfit thereby for cultivation" situate in said State and remaining unsold at the date of the act.

Under the acts of Congress, approved March 2, 1855, (10 Stat., 634) and March 3, 1857 (11 Stat., 251), incorporated into the Revised Statutes as section 2483, it was provided that when the authorized agent of the State shall make due proof before your office that any of the lands purchased by any persons from the United States, prior to March 3, 1857, and after the date of the grant to the State, were swamp lands, within the true intent and meaning of the swamp land grant, the purchase money shall be paid over to the State wherein said land is situate.

Indemnity was also allowed where swamp lands have been located by warrant or scrip, and it was further provided that the decision of your office upon the question of indemnity shall be first approved by the Secretary of the Interior.

The act of March 3, 1857, *supra*, confirmed to the several States their selection of swamp lands which had then been reported to the Commissioner of the General Land Office, so far as the lands were then "vacant and unappropriated and not interfered with by an actual settlement." Indemnity is granted to the several States for swamp lands that have, since the date of the grant, been purchased from, or located by land warrant or scrip of the United States, and lands so disposed of cannot, as a fact, be vacant and unappropriated. The said act does not, therefore, apply to indemnity lands, and the claim of the State must conse

quently rest upon the act of March 2, 1855, granting indemnity. Said act provides that upon "due proof" that lands that were swamp within the true intent and meaning of the act of 1850, have been disposed of, indemnity shall be granted to the State. Under the agreement with the State of Michigan, the field notes of the survey are to be taken as the basis of the adjustment of the swamp land grant (1 Lester 542). The field notes of survey on file in your office show that the tracts for which indemnity is claimed are not swamp lands, "within the true intent and meaning of the act", and the State of Michigan is, therefore, not entitled to indemnity therefor.

Your decision is accordingly, affirmed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL—SETTLEMENT RIGHT.

JOSEPH D. EVANS *v.* NORTHERN PAC. R. R. CO.

As there was no authority for the withdrawal of February 21, 1872, based upon the map of amended route, and the sixth section of the granting act prohibited any withdrawal for indemnity purposes, it follows that land embraced within such withdrawals was not thereby excluded from entry under the homestead law. An indemnity selection should not be allowed for land included within a pending application to make homestead entry.

Secretary Vilas to Commissioner Stockslager, August 20, 1888.

I have considered the appeal of Joseph D. Evans from the decision of your office, dated October 18, 1883, rejecting his application, dated May 15, 1883, to make homestead entry of the SW. $\frac{1}{4}$ of Sec. 33, T. 16 N., R. 44 E., W. M., Colfax (now Spokane Falls) land district, Washington Territory.

Said decision of your office states "that said tract is within the limits of the grant of July 2, 1864, (13 Stat., 365) to the Northern Pacific Railroad Company. The withdrawal of the odd numbered sections based upon the filing of the map of amended route took effect February 21, 1872. It also falls within the fifty mile, or indemnity limits of the withdrawal on definite location of the road, notice of which was received at the local office December 2, 1880." Your office further found that there was no other claim of record for said tract, and held that the application of Evans must be rejected, for the reason that at the date of his alleged settlement June 4, 1880, and ever since, the land has been withdrawn for indemnity purposes, and hence it is not subject to settlement and entry.

In the case of said company against Guilford Miller (7 L. D., 100), I held, after a careful consideration of the whole matter, that there was no authority for the withdrawal of February 21, 1872, and that the sixth section of the granting act prohibited any withdrawal for indemnity purposes. It follows, therefore, that at the date of the application of

Evans, the land was subject to entry under the homestead laws, and that the decision of the local office and your office, rejecting said application, was erroneous.

Irrespective of the question of withdrawal for indemnity purposes, Evans' settlement is alleged to have been made June 4, 1880, before the definite location of the road, and as this is not disputed, was, therefore, a subsisting claim at the date of definite location.

The company does not claim in this case any right by virtue of a selection of said land, but an inspection of the records of your office shows that said tract was selected by the company on March 20, 1884 (per list No. 3). This selection should not have been allowed by the local land officers, because it was made subsequently to the application of Evans, which served to reserve the land from any subsequent disposition, so long as it remained undetermined. *Ontonagon & Brule River Railroad Company v. Le Claire* (6 L. D., 649); *Northern Pacific Railroad Company v. Myrstrom* (*ibid.*, 666). Evans' said application having been made prior to the claim of the company, and the land being subject to the same, should be allowed, and the selection of said tract should be canceled.

The decision of your office is modified accordingly.

NEFF *v.* COWHICK.

Motion for review of departmental decision rendered May 11, 1888 (6 L. D., 660), overruled by Secretary Vilas, August 21, 1888.

HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT.

O'CONNELL *v.* RANKIN.

The execution of the preliminary affidavit before a clerk of court, when the requisite residence on the land had not been acquired, will defeat all rights under the entry, in the presence of a valid intervening adverse claim.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 21, 1888.

This case comes before me on the appeal of J. O'Connell, in the case of *J. O'Connell v. Luther D. Rankin*, from your office decision of March 28, 1887, permitting the said Rankin to amend his affidavit of homestead entry for the NE. $\frac{1}{4}$, Sec. 34, T. 147 N., R. 69 W., Bismarck, Dakota land district.

It appears from the record that said Rankin made homestead entry March 25, 1885; that he was an unmarried man and had not prior to that time established an actual residence on the land; that he purchased the improvements of one Erickson thereon, consisting of a house

and twenty-two acres of breaking, and Erickson filed a relinquishment; that said Rankin made affidavit of entry before the clerk of the court of a county other than that in which the land is situated.

Rankin had never made any settlement himself on said land at the time of his homestead entry, and never attempted to do so until May 13, 1885, and the contest in this case was inaugurated by affidavit filed May 8, 1885, by said O'Connell; the allegations of contest being that, "said Luther D. Rankin does not, and never did reside on said tract of land, nor made settlement thereon, and never has in any way improved or cultivated the same; that said tract is not settled upon and cultivated by said party as required by law; that the affidavit upon which said entry is based was made before a clerk of the court; that the same alleges residence upon and improvement of said land by said Rankin and that the same to that extent is false and fraudulent."

Until after the inauguration of this contest it is clear from claimant's own testimony that he had established no residence upon the land and had not even seen it. It is equally clear that his affidavit was made before the clerk of the court by advice of his attorney, who also misled him in regard to the necessity of establishing his residence thereon.

You say, "I do not think the claimant should be deprived of his entry and the valuable improvements thereon by reason of the defect in his affidavit. He appears to have honestly believed that he could legally make the affidavit as he did. He is hereby allowed to make before either of you, and file a proper affidavit."

You cite also in support of your said decision *Thompson v. Lange* (5 L. D., 248), and *Roe v. Schang* (5 L. D., 394).

These cases will not under the facts in this case support your decision.

In the case of *Thompson v. Lange*, Lange had filed a supplemental homestead affidavit fifteen days before the contest was instituted, which cured the defects in his original entry, and such defect might be cured before the intervention of an adverse claim; and in *Roe v. Schang*, the insufficiency of such affidavit was not put in issue in the contest nor alleged in the appeals.

In the case under consideration however, Rankin had filed no supplemental affidavit, and the irregularity, or defect in his original entry is directly in issue.

In *Brassfield v. Eshom* (6 L. D., 722), it was held that a similar defect could be cured before the intervention of an adverse claim.

Eshom in said case had moved upon the land with his family before the filing of Brassfield's affidavit of contest and it was held that Eshom's entry, "although originally defective and voidable, was cured by his subsequent settlement, residence and improvements, as shown, and the same having been thus cured prior to the institution of said contest of Brassfield, the latter cannot be held in this respect to have acquired any rights thereunder."

In the case under consideration however the contest affidavit was filed before claimant ever saw the land or made any attempt to establish his residence thereon, and the preference rights of contestant have therefore intervened.

Section 2294 of the Revised Statutes provides,

In any case in which the applicant for the benefit of the homestead, and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a *bona fide* improvement and settlement have been made, is prevented by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, it may be lawful for him to make the affidavit required by law before the clerk of the court for the county in which the applicant is an actual resident and to transmit the same, with the fee and commissions, to the register and receiver.

Rankin not being married and neither himself nor any member of his family being residents upon said land at the time his affidavit was made before the clerk of the county, and as such defective entry was not cured prior to the intervention of O'Connell's rights as contestant, Rankin's entry was illegal and must be canceled.

Your said decision is therefore reversed.

DESERT LAND ENTRY—COMPACTNESS—EQUITABLE ADJUDICATION.

JOSEPH HIMMELSBACH.

An amendment of the entry will be required where the rule as to compactness has not been observed; and such an amendment, when made after the lapse of the statutory period for reclamation and proof thereof, should only embrace land already reclaimed.

Rule 29 of Equitable Adjudication is applicable where the failure to make proof and payment within the statutory period was the result of ignorance, accident, or mistake, and no adverse claim exists.

Rule 30 of Equitable Adjudication is applicable where failure to reclaim the land and make proof and payment within the statutory period was the result of ignorance, accident, or mistake, or of obstacles which could not be overcome, and no adverse claim exists.

Secretary Vilas to Commissioner Stockslager, August 21, 1888.

I have considered the appeal of Joseph Himmelsbach from the decision of your office of September 25, 1886, sustaining the action of the local officers in rejecting his proof and suspending his desert land entry, No. 42, for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 31, and SW. $\frac{1}{4}$ of Sec. 30, T. 32 N., R. 99 W., and SE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, and E. $\frac{1}{2}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 25, T. 32 N., R. 100 W., and SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 24, and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 23, T. 32 N., R. 100 W., Evanston district, Wyoming Territory.

The entry was made, September 13, 1879, and August 7, 1886, claimant having relinquished as to the NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, Sec. 31, offered proof and tendered payment as to the balance of said land.

The tract, after said relinquishment, was, as appears from the plat thereof, nearly two and a half miles in length and from a quarter to a half mile in width, running in a northwesterly direction through parts of four sections of land, and lying in a zigzag line so as to form a narrow strip.

This, in the language of the general circular of March 1, 1884 (p. 35), is "a gross departure from all reasonable requirements of compactness." The circular of instructions to local officers of September 3, 1880, expressly applies to entries of desert lands made before its issuance, and provides that such entries made on "lands not compact in any true sense" will be suspended by your office and "the parties called upon to amend their entries so as to conform to law; failing to do which, after proper notice, such entries will be held for cancellation." (7 C. L. O., 138).

No excuse being offered for this failure to observe the requirement of compactness, your office, pursuant to said circular, properly required the claimant to amend his entry "so as to conform to law."

But, it further appears, that proof of reclamation was not made and payment for the land tendered until about four years after the statutory period for making such proof and payment had elapsed, and said proof does not show whether the land was reclaimed within the statutory period or thereafter. The entry, therefore, after it is properly amended, will have to be submitted to the Board of Equitable Adjudication for confirmation, under either Rule 29 or 30 of the "additional rules" of equitable adjudication, of April 28, 1888 (6 L. D., 799)—under the former, if the land was reclaimed within the statutory period, and under the latter, if not reclaimed within that period. Those rules authorize the submission of desert land entries to the Board for confirmation in the following cases:

29. All desert land entries in which the final proof and payment were not made within three years from the date of entry, but in which the claimant was duly qualified, the land properly subject to entry under the statute and subsequently reclaimed in time according to its requirements in which the failure to make proof and payment was the result of ignorance, accident, or mistake, and in which there is no adverse claim.

30. All desert land entries in which neither the reclamation, nor the proof and payment were made within three years from date of entry, but where the entryman was duly qualified, the land properly subject to enter under the statute, the legal requirements as to reclamation complied with, and the failure to do so in time was the result of ignorance, accident, or mistake, or of obstacles which he could not control, and where there is no adverse claim.

In order to avail himself of the benefit of Rule 29, the claimant must show that his failure to make proof and payment within the statutory period "was the result of ignorance, accident, or mistake," and under Rule 30, that his failure to reclaim the land and make proof and payment within said period, "was the result of ignorance, accident or mistake, or of obstacles which he could not control." Neither rule applies where there is an adverse claim.

The entry in this case, therefore, must in the first place, be amended "so as to conform to law" in the matter of compactness, and in the second place, the claimant must make proof of facts bringing the entry within the provisions of one or the other of the above rules, so that it may be submitted thereunder to the Board of Equitable Adjudication for confirmation.

The amendment can only embrace land already reclaimed at the date thereof.

You are instructed to direct the local officers to allow the claimant, within ninety days after notice hereof, to file such amendment and make payment for the land and proof of reclamation in support of the amended entry, and, also, proof bringing said entry within the purview of one or the other of said rules, when the same will be submitted for confirmation to the Board of Equitable Adjudication.

The decision of your office is modified accordingly.

DURESS—ABANDONMENT—FINAL PROOF.

PLATT ET AL. v. GRAHAM.

It is not necessary that there should be actual personal violence to constitute duress.

It may be effected by that degree of constraint or danger, either actually inflicted, or threatened and impending, which is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness.

Temporary absences from the land that indicate no intention of abandonment may be excused after the establishment of a *bona fide* residence.

Proof taken before business hours, on the morning of the day advertised, is irregular and defeats the object of the notice, and in such a case new proof will be required.

Secretary Vilas to Commissioner Stockslager, August 22, 1888.

I have considered the appeal of John H. Graham from your decision of August 17, 1886, rejecting his final proof for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 25, T. 33 S., R. 16 W., Larned land district, Kansas, and awarding the tract to the contestants.

Graham filed Osage declaratory statement August 9, alleging settlement May 10, 1884. His first act of settlement consisted in staking out his claim, and commencing a dug-out—which last he subsequently abandoned, being in doubt whether it was within the limits of his claim—and the commencement of a second dug-out near the centre of his claim which he was engaged in completing between May 10, and about June 19, 1884, when he went to Harper, Kansas, about sixty miles distant, on account of the sickness of his mother; but soon after returned and remained until some time in August following, when he again went to Harper with his father. This visit to Harper appears to have been caused by sickness of his father and sister. He returned to his land several times between August and November, and exercised acts of ownership. On the 5th or 7th of November, he, and his father, supplied themselves with pro-

visions and returned to their tract, and commenced plowing. Some four acres had been broken upon this tract by claimant, between the date of his settlement and July 16, following. While engaged in plowing he was attacked by John W. Platt, one of the plaintiffs in this case, and by the threats, menaces, and intimidations of Platt, Tennison, and others, under the leadership of one Flato, was driven from the land in question. The land had been enclosed by a wire fence, by said Flato, a member of the cattle-firm of Flato & Platt, after claimant's settlement and prior to November 7, which enclosure embraced four sections, including the land in question. Plaintiffs, Platt and Tennison, were in Flato's employ as cattle-men, or "cowboys," and had made the following filings which covered the land in question, namely:

Platt filed his Osage declaratory statement for the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, of said section, November 24, 1884, alleging settlement September 23, 1884. Tennison filed his Osage declaratory statement for the NW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, of Sec. 25, and the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, of Sec. 24, said township and range. Tennison thus covered the north eighty, and Platt the south eighty, of claimant's tract.

On September 24, 1884, Graham advertised, by the usual notice, his intention to make final proof before George H. Sexton, a notary public at Sexton, Kansas, November 15, 1884. He arrived there with his witnesses on the night of the 14th, preceding the day advertised for making final proof, when he was advised that Flato and his party, including the plaintiffs Platt and Tennison, and six others, were camped back of Sexton's house, and claimant and his party were advised by Sexton's clerk to conceal themselves, and not make known their presence, and he conducted claimant and his witnesses to a place some distance from Sexton's house, where they camped for the night. Claimant and his witnesses appear to have been intimidated by the presence of Flato and his party; and their fears appear to have been participated in by the notary public, who waited upon claimant and his witnesses at four o'clock on the morning of the 15th, and advised him that it would be necessary for him to take his proof then if he took it at all, giving as an excuse therefor press of business. Claimant and his witnesses were also informed that Sexton had been offered one hundred dollars by Flato to prevent claimant from making his final proof. Claimant demurred to making proof at that hour, but was advised by the notary public, who claimed to have knowledge of the law, that it would be perfectly legal and proper to make his proof at that time. Proof was accordingly hurriedly made, at four o'clock on the morning of November 15, 1884. Immediately upon making proof claimant and his witnesses departed, avoiding Flato, Platt, Tennison, and others of their party.

Upon learning that claimant had made proof, Platt and Tennison filed protest, which was forwarded to the local office, whereupon a hear-

ing was ordered, at which voluminous testimony was taken. An examination of this testimony discloses the fact that claimant established his residence in good faith and with the intention of making it his home, on the 10th of May, 1884; that he resided upon the tract until about the 19th of June, improving the same and exercising all the ordinary acts of ownership, when he left and went to Harper, where his brother and sister resided. He returned to his land the last of July or the first of August; and about the 19th of August, 1884, he again went to Harper, with his father, who was taken sick and required his attention. Claimant also suffered from sickness (typhoid fever).

The circumstances are sufficient to excuse his absence from the land. His residence was legally established upon the land May 10, 1884 (See *Grimshaw v. Taylor*, 4 L. D., 330). The evidence fails to show any abandonment or intention on the part of claimant to abandon the land at any time. All the improvements upon the lands are not shown to be of the value testified to upon the final proof; but it is testified to by the witnesses on final proof of the hearing that the mistake of one hundred dollars in the valuation was the mistake of the notary public, they having placed the valuation of the improvements at \$150 instead of \$250, as inserted by the notary.

Claimant appears to have been the victim of a conspiracy on the part of plaintiffs, acting under the direction of Flato, to prevent his acquiring title to the land in question. The evidence of collusion and duress on the part of plaintiffs is manifest. The fact that there was no actual personal violence used is immaterial. The scene when the claimant returned with his father to resume the cultivation of the tract in question was well calculated to excite fear in the mind of persons of ordinary firmness. "Duress" is defined by the elementary authorities as constituting that degree of constraint or danger, either actually inflicted or threatened and impending, which is sufficient in severity or apprehension to overcome the mind and will of a person of ordinary firmness. See *Brown v. Pierce* 7 Wall., 214-5; *Underwood v. Ives* (2 L. D., 602.)

Neither Platt nor Tennison made filings until after they had ejected the claimant and his father from the tracts within the enclosure of Flato, heretofore referred to. Flato located both plaintiffs upon their respective claims, and appears to have supplied them with the necessary assistance to effect their settlements. Both plaintiffs, although owning no stock of their own, erected corrals as a portion of their improvements on their respective tracts. Both were in the employ of Flato and his co-partner. Their testimony that they took up the tracts for their own use and benefit can have little weight, in view of the surrounding circumstances, and the acts of the parties.

Claimant is shown to be an "actual settler" within the meaning of section 2283. He went upon the land for the purpose of seeking a home and he has the qualifications of a pre-emptor. See *United States v. Woodbury* (5 L. D., 303).

The evidence shows good faith on the part of claimant, and fails to sustain the allegations of contestants. The contest should therefore be dismissed. The proof is, however, defective. Proof taken at four o'clock a. m., of the day advertised is irregular and defeats the object of the notice.

Graham will therefore be allowed sixty days after receipt of the notice of this decision to re-advertise and submit new proof showing due compliance with the law.

Your decision is reversed.

PRACTICE—NOTICE—ATTORNEY.

CLARK *v.* SHUFF ET AL.

Notice to the 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.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 22, 1888.

Aaron T. Dungan made timber culture entry March 3, 1879, for the NW. $\frac{1}{4}$, Sec. 28, T. 21 S., R. 24 W., Larned, Kansas. His relinquishment of said entry, dated February 21, 1882, is endorsed upon his receiver's receipt, together with his acknowledgment thereof, made April 4, 1885.

On April 10, 1885, John R. Shuff initiated contest against said entry, and the local officers ordered a hearing to be held on June 25, 1885. Neither party appearing, the contest was dismissed. On July 28, 1885, Shuff again presented an affidavit of contest, which, as shown by the register's endorsement thereon, was "not received, office being closed on account of fire."

From a transcript of the records of the local office, transmitted February 17, 1886, it appears that one Oscar T. Pressen initiated contest against the said entry October 1, 1885, that hearing was set therefor January 10, 1886, and that "plaintiff filed motion to continue and case continued till March 5, at 10 A. M. Defendant in default."

March 15, 1886, the entry of Dungan was canceled by relinquishment, and on the same day Everett H. Clark made timber culture entry for the land in question.

On April 21, 1886, your office, referring to a letter dated October 31, 1885, addressed to the Hon. Commissioner by said Shuff, wherein he stated that his attorneys "have defrauded me out of the land," re-instated his (Shuff's) contest and dismissed that of Pressen. From this action Clark appeals.

Messrs. Morris and Morris, attorneys, who initiated contest for Shuff, forwarded to your office their affidavit, dated January 11, 1886. This affidavit sets forth that they notified Shuff by letter, dated April 10, 1885, addressed to him at Arthur, Kansas, that the hearing upon his

contest was set for June 25, 1885; that the local office and that of affiants were in the same building; that the register promised affiants that no action would be taken without notice to affiants, in any case in which they were docketed as attorneys; that during said day of hearing one of the affiants was engaged in the trial of another case in said local office; that they were subsequently informed that the case of Shuff *v.* Dungan had been dismissed for default at 4 P. M. on said day; that on the next day, June 26, 1885, the register refused the affiant's application to re-open the case; that on the same day they notified Shuff of the dismissal of his contest, and that since then they have neither seen nor heard of Shuff, except by your office letter of November 17, 1885.

The said affidavit further sets forth that the contest docket shows that by a clerical error one P. C. Hughes was docketed as Shuff's attorney, instead of affiants. They also aver that they instituted in good faith, as attorneys, the said contest of Pressen, and that they had caused personal service of the said contest of Shuff to be made upon Dungan.

This affidavit also shows that Shuff's attorneys had received notice of the hearing mentioned, and it being well settled that notice to the attorney of record is notice to his client, it necessarily follows, that, in law, Shuff was notified of the day of hearing. Neither he nor his attorneys having appeared in the case at the time set for hearing, the local officers were justified in dismissing the contest for default. If Shuff has been injured by the neglect of his attorneys, his remedy, if any he have, must be sought in the courts and not before the Land Department.

Shuff's contest having been properly dismissed, and no appeal from such dismissal having been taken at the time Dungan's entry was canceled on relinquishment, and Pressen's contest being also dismissed without appeal, the said entry of Clark should be allowed to stand.

Your office decision is reversed.

DESERT LAND ENTRY—FINAL PROOF.

ADAM SCHINDLER.

The final proof must show what proportion of each legal sub-division has been irrigated; and if deficient in that respect, supplemental proof will be required. On submitting final proof relinquishment will be required of such legal subdivisions as have not been substantially reclaimed.

Secretary Vilas to Commissioner Stockslager, August 22, 1888.

I have before me the appeal of Adam Schindler from your decision of July 3, 1886, holding for cancellation his Desert Land Entry, No. 56, made March 12, 1880, for the S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 23; S. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 24, T. 4 N., R. 2 W., Boise City district, Idaho.

Proof was made October 10, 1882, and on June 25, 1884, your office, construing that proof to mean that "only one-third of the land has been irrigated and reclaimed," required "supplemental proof showing more thorough irrigation," and afterwards, on July 3, 1886, for want of such

further proof, made the decision first above mentioned and from which the appeal is taken.

In answer to the question,—“Has the whole tract been irrigated and cultivated by you in any one season?” the claimant said: “Not the whole tract. About 45 acres have been *cultivated*. A portion of the land, fifty acres, lies on a high bend, and is broken and can not be irrigated.” This does not, especially when taken in connection with the remainder of the proof, really bear the construction put upon it by your office,—that “only one-third of the land had been irrigated and reclaimed.” What is said is that only forty-five acres had been *cultivated*, and that *fifty acres*, owing to their being high and broken land could not be irrigated, thus implying that *all* but these inaccessible fifty acres had been “irrigated.” And in other portions of the proof the entryman swears as follows :

I have conducted water sufficient to irrigate all of the land and have cultivated a portion of it. A sufficient amount of water has been taken on the land to irrigate the entire tract. *A portion of each legal subdivision* has been irrigated for three seasons since I made entry. I have a supply of at least three inches to the acre. A sufficient amount has been conducted that (*sic*) portion of each subdivision to raise good crops. The water is conducted to and through the entire length of the land by a ditch eleven feet wide at the bottom and is taken from Boise River. (It is) distributed over the land by flooding and through ditches running from the main ditch and cut with a plow. There was no natural water supply upon the land or any portion of it. No portion of the land would produce any kind of crop without irrigation. All the grains and vegetables grown in this latitude can now be grown upon the land. In 1880, cultivated thirty acres and raised three hundred bush. wheat, two hundred bush. barley, one hundred bush. oats, and one hundred or more of potatoes and other vegetables. In 1881 and 1882, about four hundred bush. oats, two hundred bush. wheat and barley, and three hundred bush. potatoes each year. A portion of each legal subdivision was cultivated I own one-fifteenth interest in a ditch carrying four thousand inches of water. I was one of the original locators of the ditch (Record evidence herewith furnished).

As this proof fails to show what *proportion* of each legal subdivision has been irrigated, supplemental proof will be required in accordance herewith, together with a relinquishment of those legal subdivisions (if any) of which there has not been substantial reclamation.

Should such relinquishment destroy the contiguity of the entry, the entryman will be allowed sixty days from notice, in which to elect which contiguous tracts he will retain.

Your decision is modified accordingly.

SECOND HOMESTEAD ENTRY—APPLICATION.

W. H. MILLER.

A petition for leave to make a second homestead entry will not be considered in the absence of a formal application for a specific tract of land.

Secretary Vilas to Commissioner Stockslager, August 22, 1883.

On February 5, 1886, on the petition of William H. Miller that an illegal homestead entry therefore made by him, be canceled, and he be

allowed to enter the same tract under the homestead law, your office ordered the cancellation of the illegal entry, but declined to allow Miller to make another entry, on the ground that, inasmuch as he, Miller, had exercised his pre-emption right, there was "no occasion" for his making a homestead entry.

On April 19, 1888, this Department, citing the case of Fremont S. Graham (4 L. D., 310), modified your said decision so far as to hold that the question whether or not Miller should be allowed to make a homestead entry, should be decided only when (if ever) he, Miller, should actually "apply" to make such an entry of some particular tract.

By letter of May 10, 1888, you "call the attention" of the Department to the fact that in Miller's petition he mentions "the land covered by his canceled H. E." as the "particular tract" of which he wishes to make entry.

This mention of a particular tract, in the petition for restoration of the homestead right, was not overlooked; but the view was entertained that, although asked with express reference to the tract mentioned, the question raised by Miller was really one of those "hypothetical" ones, which, as was said in the Graham case, "the Department has as a rule refused to consider."

To this view I must still adhere. Miller has not actually "applied," in due form of law, to make the entry which he wishes to have leave to make, and a favorable decision upon his petition would not constitute an approval of entry-papers duly filed, but only an announcement in advance that, if he should thereafter, at his option, "apply" for the tract in question in the way prescribed by the statute and the regulations, such an application would be approved. A reference to section 2290 of the Rev. Stat., and to the circular of March 1, 1884, will suffice to show that Miller's petition "for a restoration of his homestead right" is in no sense an actual present "application" to make entry, such as final action could be taken on.

The departmental decision of April 19, last is therefore adhered to, and the papers transmitted with your said letter of May 10, 1888, are herewith returned.

SWAMP LAND—ACCRETION; JURISDICTION.

THE MIDDLE GROUNDS.

As the tract in question belongs either to the owner of the adjacent land, or passed to the State under the swamp grant, the Department will take no action in determining the ownership thereof, as the question involved lies properly within the jurisdiction of the courts.

Secretary Vilas to Commissioner Stockslager, August 23, 1888.

In the Saginaw Bay in Michigan, which is a navigable arm of Lake Huron of some forty or fifty miles in length, and ten miles or more in

width, there was, when the government survey was made in the year 1853, an island, now called Mai-Sou Island, which was surveyed in fractional lots as lying in sections 5, 7, 8, 17 and 18, township 16, N., range 9, E., containing altogether 174.22 acres. This land was patented by the United States on the 14th of February, 1868, to a pre-emption settler, and the title under that patent has since been transferred to H. H. Warner.

The plat of the government survey also shows that at some considerable distance, a mile and a half to two miles, to the northeast, two small marshy islets of land appeared, of such inconsiderable size and so wet that no distinct plat of them as parts of any section was made, but the surveyors simply marked them as "wet marsh." Necessarily, therefore, if this survey was any indication of the fact, these small plots of wet marsh passed to the State under the swamp land act of September 28, 1850. That act was a present grant and vested the title to all the swamp and overflowed lands of this character within the limits of the State in the State upon its passage. Whether or not a tract of land passed to the State by virtue of that grant, depends simply upon the question, what was the character of the land at the time, as being swamped or overflowed? A special agreement has been made with Michigan, (1 Lester, 542) as with some other States, whereby the field notes of the government survey are to be conclusively taken as the basis of determination of swamp and overflowed land in that State and of adjustment under the grant. That renders the determination easy in this case; but were it not so, the question might be tried and answered by a court and jury, upon the oral proof of witnesses able to state the facts so as to authorize a verdict.

R. R. Co. v. Fremont Co. (9 Wall., 89); *R. R. Co. v. Smith* (9 Wall., 95); *Buena Vista Co. v. R. R. Co.* (112 U. S., 165, 176).

This recital of the facts shows that all of the title of the United States to the swamp and overflowed lands mentioned, being such as were shown by the plat and field notes of the survey, passed to the State in 1850, and that all the title of the United States to Mai-Sou Island passed to the patentee in 1868. Thus the jurisdiction of the Interior Department over these granted lands was terminated as to Mai-Sou Island, at least (*United States v. Shurz* (102 U. S., 378)). Whatever jurisdiction remained in the Secretary of the Interior in regard to the swamp and overflowed land which passed to the State of Michigan, is to be found in section 2480 of the Revised Statutes, which is based on the act of September 28, 1850, (9 Stats., 519) the second section of which provided that it should be the duty of the Secretary

As soon as it may be practicable after the passage of this act, to make out an accurate list and plats of the lands described as aforesaid, and transmit the same to the Governor And at the request of said Governor cause a patent to be issued to the State therefor.

On the 24th of February last, you made a report to this Department relative to a survey made in September, 1887, by Henry Strudwick, of

certain ground in Saginaw Bay, embracing the swamp and overflowed grounds called the "wet marsh" in the government survey, and other land then apparently lying in an irregular shape between that wet marsh and Mai-Sou Island. This ground is now known as the "Middle Grounds" and it is alleged by Mr. Warner, at least, (and in this he is supported by the government survey) that this new ground has been formed by the corrosive action of the water upon Mai-Sou Island and the deposit of sediment between that island and the "wet marsh." Your report concludes that the land surveyed as last above mentioned must be regarded as an accretion to Mai-Sou Island. Upon the other side, the State of Michigan contends, as I understand its claim, that either this ground was in existence at the time of the government survey and should have been then mentioned as swamp, or that it has been formed by accretion since to the wet marsh islands lying out some distance as indicated by the survey to the northeast of Mai-Sou Island. It is contended by the State that the Department should determine the question and should award a patent to the State for all this ground as being conveyed under the grant of 1850, or as having accrued to what ought to be surveyed under that act. Upon this question of fact a large number of affidavits to and giving the *ex parte* statements of the affiants have been filed in support of the different contentions of the parties. It is very obvious that such a question as this ought not to be determined by such a mode of proof. If this land was in fact, or any part of it, formed by way of accretion to Mai-Sou Island, the Department clearly has no jurisdiction over the question or to take any action in any form. It appears to me equally true that if this land was formed by accretion to the swamp and overflowed land existing at the time of the passage of the act of 1850, the Department has also no jurisdiction to inquire into the fact and make any grant of this land as swamp and overflowed, to the State. At the most, the jurisdiction of the Department must be confined to making a list and plat of the land as it existed in 1850, to be transmitted to the Governor. Whatever change has taken place in the condition of things since 1850, does not belong to the Department to inquire into. It is not equipped with the proper means of ascertaining the facts, nor was it ever designed by Congress, as I think, that any such inquiry should be committed to the Department. The rights of the State of Michigan to the swamp and overflowed ground mentioned, as it existed on the 28th of September, 1850, are easily to be established before a court, and no other proof of its title is required than that act and the evidence of witnesses to show the condition of the ground as swamp and overflowed; and, as between the State and United States, no other action is required than adjustment according to the plat and field notes. So, whatever additional land may have been gained by the State, if any, by the alleged accretion, belongs to the State by virtue of its title in the swamp and overflowed ground to which it has been added. All these ques-

tions can be far better determined by a judicial tribunal than by this Department, even if it were conceded that any right remains in the Department to make the inquiry. No action of the Department is necessary to install the State with such a title as to maintain its rights in court; while, on the other hand, it may be that the Department might do a serious injustice, if upon such unsatisfactory evidence it were to undertake to determine the fact as against the owner of Mai-Sou Island, who claims the ground by accretion to that island; and it would thereby violate the rule or basis of adjustment agreed on with the State. I do not think, therefore, that any further action should be taken by the Department in this matter, but that the parties should be mutually left to such proceedings in the courts as they may be advised to take in the maintenance of their respective claims.

The survey which you have ordered appears to have been applied for by Mr. Kerr in December, 1884, with the view of bringing the middle grounds into the market for disposal under the laws and regulations relating to the disposition of lands embraced in fragmentary surveys; and upon this application Strudwick was directed to make the survey under special instructions. On the 1st of May, 1885, the Commissioner of the State land office made application for an extension of the public surveys over these middle grounds, which application was denied because of the pending survey by Strudwick. In 1886 the counsel for the State were informed by your office, it appears, that the instructions to Strudwick had been rescinded and further action discontinued. In March, 1887, Mr. Warner filed his application in the Department, setting up his claim by accretion. This was referred to your office for report, which, being made, stated that your office was unable to decide whether the middle grounds were accretions to Mai-Sou Island or formed a distinct island of marsh land, and concluded with an expression of opinion that

the departmental authorization of the survey, under date of April 4, 1885, of the islands described in the Kerr application, might well be revoked, and the whole matter left as an open question for consideration upon broader and better facts connected therewith.

On this report, the Department, under date of March 25, 1887, declining to concur in the recommendation, directed "that the necessary steps be taken to have the survey made at once;" and concluded as follows:

After it the survey has been made, the right of all parties in interest will be duly considered; and this order is not intended in any manner to alter or impair any interest which any person may have in the ultimate determination of the case. The question as to what interest the United States government, the State of Michigan, or other claims have to the lands in controversy, will be fully considered hereafter.

There appears nothing in the action taken to preclude the Department now from taking the action which seems to me to be proper, and I therefore direct that all further proceedings under the surveys and

in this matter be discontinued and the parties be left to the maintenance of their rights in the courts of law having jurisdiction of the matter in such way as they may be advised.

PRE-EMPTION ENTRY—RESIDENCE.

WILLIAM S. KELLY.

The removal of the pre-emptor's dwelling to an adjoining tract, and his occupancy thereof, prior to final proof, will not defeat the right of purchase, where good faith is manifest, and such removal took place after four years residence on his pre-emption claim, and was rendered necessary by annual inundation of the latter tract.

Secretary Vilas to Commissioner Stockslager, August 23, 1888.

By letter of November 18, 1886, your office sustained the decision of the local office rejecting the proof of Wm. S. Kelly made October 9, 1886, for his pre-emption claim on W. $\frac{1}{2}$ SE. $\frac{1}{4}$, and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 27, T. 1 N., R. 2 W., Gunnison land district, Colorado. Kelly had filed declaratory statement October 12, 1882, alleging settlement September 26, 1881.

On the 4th day of October 1886, the local officers rejected claimant's proof "for the reason that he has not lived upon his pre-emption claim continuously during the last six months preceding his making final proof."

On the 21st of October, 1886, said Kelly duly filed his appeal herein.

It appears from the evidence of the claimant that he commenced to live upon the land in September, 1881, and in about three months his family came, and that he at once built a log house containing two rooms, two doors and three windows, and with a board floor; that he also built a log stable capable of stabling six horses, dug a well, erected other out buildings, two stock corrals, and three miles of wire fence, besides procuring an interest in the irrigating ditch some twelve miles long by which the land was to be irrigated, said to be worth sixteen thousand dollars, besides dykes, irrigating ditches and other improvements.

It also appears that at the time he offered his final proof he had eighty acres of said land in actual cultivation (crops) and the remainder fenced for pasture.

It also appears that from the time of his settlement in September, 1881, until October 1885, the claimant and his family continuously occupied the house on said land; but that the same being low bottom land on Grand river was subject to overflow, and after several overflows from said river and the irrigating ditches above his land, submerging his claim more or less, claimant purchased some fifty acres high land adjoining the said pre-emption claim and in October 1885, removed his buildings thereto, and thereafter continued to possess, occupy and cultivate his said claim, but to have his dwelling house upon such pur-

chased land adjoining. It further appears that, before removing his buildings to such adjoining high land, he undertook to prevent the overflow of his claim by building dykes, but was prevented by an injunction suit brought by an adjoining claimant on the ground that such dykes would increase the overflow upon his land.

In case of Israel Martel (6 L. D., 566) it was held, that six months residence upon a pre-emption claim, is not a provision of the statute but a rule of the Department, and "is for the purpose of testing the good faith of the claimant."

No such test of the good faith of claimant can be necessary under the evidence.

The same doctrine is laid down in *Keith v. Grand Junction* (6 L. D., 633) and *Noah Herrell* (6 L. D., 573).

In *Grimshaw v. Taylor* (6 L. D., 254), it is said, "The absence of the entryman or his family from the land may be satisfactorily explained when it is evident that the entry was made in good faith and for the purpose of acquiring a home."

In *Arnold v. Langley* (1 L. D., 439), it is held that "a *bona fide* pre-emption claim should not be rejected because the claimant's house was by mistake beyond the lines of the survey bounding his land." In this decision again the following language is used, "His expenditures of time and money upon the place during a period of three or four years prior to entry, sufficiently indicates in my opinion, his good faith. It is true he did not inhabit the land, yet his purchase included a dwelling which it appears he had no means of knowing was not upon the land."

This was followed in *Talkington's Heirs v. Hempfling* (2 L. D., 46), and by an unbroken line of decisions since.

In *Miller v. Ransom* (3 L. D., 368), the defendant had established a residence but was driven off by the violence and threats of a contestant, and it was held such failure to reside upon the land was excusable. And this case was Osage lands on which claimant was required to be an actual settler.

The evidence showing the utmost good faith, and that claimant after making very valuable improvements merely moved his buildings to high land adjoining to avoid danger of floods but still continued to use and farm his pre-emption claim, I am of the opinion that it comes within the rule laid down in the cases above cited, and that claimant's proof should therefore be accepted and patent issue upon proper payment being made.

Said decision is accordingly reversed.

PRE-EMPTION ENTRY—AMENDMENT.

EZRA A. BARTON.

The exercise of the right of pre-emption for eighty acres, precludes the allowance of an amended entry for an adjacent eighty acre tract, which was not included with in the original claim for the reason that it was then supposed to not be subject to such appropriation.

Acting Secretary Muldrow to Commissioner Stockslager, August 25, 1888.

I have considered the appeal of Ezra A. Barton from your office decision of April 21, 1887, rejecting his application to amend his pre-emption cash entry, No. 69, so as to make it embrace one hundred and sixty acres, instead of eighty acres, the quantity which he now holds.

It appears from the record that Barton, on November 29, 1878, filed his pre-emption declaratory statement for the S. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 26, T. 2 N., R. 3 E., Bozeman, Montana, alleging settlement same day. He offered proof and payment April 4, 1881, which were accepted and final certificate, No. 69, issued on that day. Patent issued on said entry October 20, 1882.

August 28, 1886, Barton, the pre-emption claimant and patentee, filed in the local office his application to be allowed to amend his cash entry, made as above, so as to have it include, in addition to the land described as already entered and patented, the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$, Sec. 25, in the same township and range. Said application was forwarded to your office, which, upon consideration thereof, rejected the same, on the ground that Barton having once exercised his pre-emption right by his entry of April 4, 1881, had exhausted the same, and to allow the application would be to permit a second exercise of the pre-emption privilege. Your action thus taken was evidently, though you do not say so, based upon section 2261 of the Revised Statutes, which provides that :

No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259 ; nor where a party has filed his declaration of intention to claim the benefits of such provisions for one tract of land shall he file at any future time a second declaration for another tract.

The application under consideration sets out that the entryman originally settled on the tract which he seeks to include in his entry, at the same time and in connection with his settlement on the tract actually filed for and entered ; that he was precluded from applying therefor, because the land being in an odd section, was at that time regarded as included in the grant to the Northern Pacific Railroad Company ; that he has continued to use, occupy and cultivate said tract, in connection with that entered by him, and because of said occupancy and use he asks to be allowed to amend so as to include the land in his pre-emption entry.

He cites, in justification of his application and as authority for the action which he asks, the case of *Holmes v. Northern Pacific Railroad* (5 L. D., 333), in which permission was given to amend a homestead

entry after patent had issued, and claims that under that decision his application should be allowed.

The two cases are very different. In that case, Holmes' original entry, final proof and final certificate included the tract covered by his application to amend. When said case came up for action in your office, the entry, in so far as it embraced land in the odd section, was held for cancellation, because of conflict with the withdrawal for the grant to the Northern Pacific Railroad Company, and on appeal the Department, in 1881, affirmed said action. The amendment was applied for in 1886 and allowed in January 1887, by the decision cited.

In that case Holmes had done everything possible for him to do. He had entered the tract, proved up on it, got final certificate, and when your office took action adverse to him, had pressed his claim on appeal before the Department. In asserting his rights he left no stone unturned, and he was finally rewarded for his diligence.

The facts are very different in this case. Applicant, Barton, has never until now asserted a claim to the tract in question. He did not include it in his original filing. He made final proof, omitting any reference to it, and now has complete title by patent for just the land to which he originally asserted his claim. He has thus exercised his pre-emption privilege, and by his said filing and entry has exhausted his pre-emptive right. His application must be, and it is hereby, denied.

Your decision is affirmed.

PRACTICE—CONTEST—REHEARING.

HOLLIDAY *v.* HARLAN.

An offer to sell is not a good ground of contest against a timber culture entry. A rehearing will be directed where collusion between the claimant's attorney and the contestant prevented a hearing on the merits.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 25, 1888.

I have considered the appeal of Martin R. Harlan from your decision of December 22, 1886, holding for cancellation his timber culture entry for the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$, NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 23, T. 3 N., R. 31 W., McCook land district, Nebraska.

It appears from the record that Martin R. Harlan made timber culture entry on above tract November 24, 1883, and that Alexander G. Holliday instituted contest against said entry April 16, 1886. The grounds alleged in the affidavit of contest and the notice are, "that the said Martin R. Harlan has taken said land for speculation, that he has offered the same for sale."

The case was set down for trial on the first of September following, but at contestant's request was adjourned until the third of that month. At the hearing both parties, their witnesses and their counsel appeared.

Claimant's counsel moved to dismiss the proceedings on the ground that the local officers had no jurisdiction as the statements in the affidavit of contest are conclusions of law and not allegations of fact. This motion was overruled. Contestant testified that claimant "repeatedly offered said timber culture right to the land for sale, both verbally and in writing, at figures varying from six hundred to one thousand dollars, and has sold therefrom about two hundred dollars worth of stone for building purposes." In proof of the first allegation contestant submitted letters written by claimant to Taylor, his attorney with a view to dispose of the timber culture entry. C. B. Shute corroborated contestant's testimony as to claimant's offering his claim for sale by producing a letter from him making a similar offer.

After the examination of these witnesses the case was adjourned until one o'clock P. M., same day, when as neither party appeared, the same was closed. Defendant's counsel put in no defense although urged by his client to do so. Hence neither claimant nor any of his witnesses was examined, although ready to testify in behalf of the entryman.

September 6, 1886, the receiver rendered a decision "from said testimony presented, it appears that the land embraced in said timber culture entry has repeatedly been offered for sale and is held for speculative purposes." In a decision of the same date signed by both land officers, it was held that claimant "had taken said land for speculation and has offered the same for sale." From this decision claimant appealed September 14, 1886, and on December 22 following, you affirmed the action of the local officers and ordered that claimant's timber culture entry be held for cancellation. From this decision an appeal was taken January 2, 1887.

February 19, 1887, claimant filed an application for a rehearing and on March 12th following, you denied the application.

From your decision refusing a rehearing claimant appealed March 23, 1887. He at the same time filed supplemental showing for rehearing.

March 21, 1887, contestant moved to dismiss claimant's appeal on the ground "that no service of appeal notice was made on either contestant or his attorney."

There is nothing in the record to show that notice of appeal from the decision of the local officers or of appeal from your decision has ever been served upon either the contestant or his attorney.

From the testimony in this case and the affidavits submitted by claimant upon his application for a rehearing, it appears that contestant was the father-in-law of one W. Z. Taylor, who was previously attorney for the entryman. As such attorney Taylor wrote claimant a number of letters stating that one Galen Baldwin offered to pay \$750 for this claim. Taylor, in order to assist Holliday in contesting this claim, gave him the answer received in reply to Baldwin's alleged proposals to purchase claimant's relinquishment; the admission of which

letters was not objected to by claimant's attorney. Baldwin swears he never made Taylor any offer in connection with this claim.

At the time this contest was initiated claimant was absent in Kansas, and first heard of it by a letter received from Taylor about the end of May. Taylor did not state in his letter who had contested the entry, but on meeting claimant in August, asked him if he knew who the contestant was. He replied that he did not. Taylor assured claimant that the contest brought by Holliday, who is the father of his wife, was a friendly one and brought to protect his interests and that it would be taken off before it came to a hearing. Claimant complied with the provisions of the timber culture act in good faith and did not know of any grounds for a contest.

On the Sunday before trial Taylor told claimant he could not prevail upon his father-in-law to withdraw the contest. In this emergency claimant employed one J. N. Lucas, as his attorney. Claimant alleges that at the time of the trial Lucas was intoxicated; that he refused to put in any defense and acted in collusion with contestant. In support of the latter charge he mentions that Lucas, although acquainted with the practice in the district land courts, served upon contestant or his attorney no notice of the appeal taken from either your decision or that of the local officers.

Taylor made an affidavit corroborating the affidavit of contest and it appears that his law partner joined contestant and himself in an effort to deprive claimant of his entry. It also appears that claimant paid \$250 for the relinquishment of a former claimant; that he has a good house upon the land in which he resides with his family; also a barn, stable, well and pump; and that he has made other extensive improvements and complied with the provisions of the timber culture act. There is a deposit, covering about two acres, of soft magnesia lime stone on one corner of the tract. Claimant sold some of this stone and devoted the proceeds to the improvement of his claim. Taylor, during claimant's absence, seems to have taken a large quantity of said stone and appropriated the proceeds to his own use.

Even if the facts testified to at the trial by contestant and his witness be accepted as true, they would not justify the cancellation of claimant's entry. It is not sufficient to prove that the entryman had repeatedly offered the land for sale. That would not of itself necessarily contradict the affidavit required by law. It does not follow that the applicant did not make the affidavit honestly, and afterwards by reason of change of circumstances wish to dispose of his improvements and interest in the claim. See *Sims v. Busse et al.* (4 L. D., 369) An offer to sell is not a ground of contest. *White v. McGurk et al.* (6 L. D., 268). See also case of *Gilbert E. Read* (5 L. D., 313,) in which the same principle is affirmed.

Whilst the offer to sell, accompanied by other circumstances, might tend to show the claimant had taken the land for speculation, it would

not, of itself, and especially after the lapse of so long a period, show that the entry was made in bad faith. The offer to sell might have this effect if the circumstances related back to the date of entry or to some time closely connected with it.

This case, however, is not on appeal upon its merits as the notice of appeal in each instance was not served upon either contestant or his attorney.

Claimant charges J. N. Lucas, his attorney, with gross negligence, fraud, and collusion. His alleged intoxication on the day of trial, his refusal to put in a defense when requested to do so, and his neglect to serve notice of either appeal on contestant or his attorney, would seem to justify this imputation. Where there has been collusion between an adverse claimant and the claimant's attorney, which has prevented a hearing on the merits, rehearing is allowed. *Nichols v. Benoit*, 2 L. D., 583.

The facts in this instance are analogous to those in the case just cited. Claimant is an ignorant man, unaccustomed to legal proceedings and has endeavored in good faith to secure his rights to the land in dispute.

In view of claimant's apparant good faith in complying with the provisions of the timber culture act, in view of the money and time expended in making valuable and extensive improvements upon the tract in question, in view of the fact that most of the testimony produced against him was contained in confidential communications to his attorney, and in view of all the other facts and circumstances already referred to, I am of opinion that claimant should be allowed a rehearing.

The case is therefore remanded to you for a hearing before the local officers, and the same will then be readjudicated upon the testimony submitted at such hearing. His entry, in the meantime, is to remain intact.

MINERAL LAND SURVEYOR GENERAL'S RETURN—BURDEN OF PROOF.

CUTTING *v.* REININGHAUS ET AL.

The burden of proof is upon an agricultural claimant for land returned as mineral; but the presumption as to the character of the land is not forcible where it appears that, after long continued mining operations over a considerable part of the land, it has been abandoned by mineral claimants as no longer profitable.

On issue joined as to the character of land, the question to be determined is whether as a present fact it is mineral land, and more valuable for mining than agriculture.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 25, 1888.

By letter of November 24, 1886, in the contest of Richard Cutting *v.* Richard Reininghaus *et al.*, involving the question as to whether or not the SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, and NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 9, and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$, and NW. $\frac{1}{4}$

SW. $\frac{1}{4}$, Sec. 10, T. 1 S., R. 14 E., Mt. D. M., Stockton land district, California, was more valuable for agricultural than mineral purposes, your office reversed the decision of the local officers holding the same to be agricultural and directed said officers to hold the entry of Cutting for cancellation.

At a hearing upon the contest held at the local office December 7, 1883, it appeared that the agricultural claimant, a single man, settled upon said land in 1879, built a house and plowed some four acres, dug a well and made other improvements, up to the time of offering proof to the amount of \$250; that he moved upon the land in 1883 and had resided continuously thereon thereafter.

He did not offer to prove up within thirty-three months of his alleged settlement, but as his good faith is practically conceded no question is raised upon this point, there being no adverse agricultural claimant. The claimants under the mineral location, although neighbors of agricultural claimant, had staked off no claim and posted no notice until two days before Cutting was to offer his final proof. The whole contest was upon the single question as to whether said land was more valuable for mineral than for agricultural purposes, and, as the same were marked "mineral" by the surveyor general in the plat filed in the local office, the burden of proof is upon the agricultural claimant.

The evidence is undisputed to the effect that mining operations, more or less extensive, were carried on in the vicinity and including a portion at least of this land, during several years immediately preceding 1870, or 1871, the mining being of the kind known as placer mining, and a ditch and reservoirs dug to bring water necessary for the purpose; and at least thirty-seven acres of the land in dispute so thoroughly worked out as to leave the surface entirely denuded of soil and the bed rock exposed; that mining operations upon said land after 1870, or 1871, practically ceased except in a desultory and unorganized manner in the rainy season, and except some prospecting by single individuals occasionally.

When we come however to consider the evidence of the present mineral, or agricultural value of the land, and which use the land is the more valuable for, we meet conflicting testimony, but there are a few facts which, if kept in view, will aid us in reaching a proper conclusion.

First.—No one has contradicted the testimony of Frank B. Kranken, that seventy acres of said land is susceptible of tillage by the plow, and capable of producing from a ton to a ton and a half of hay per acre according to the season—worth \$16 per ton, amounting at the lowest estimate to \$1,120, for the value of the hay which might be raised thereon; and that so much of the remainder of said land had not been denuded of soil and laid bare to the bed rock would in a good season produce about eight hundred pounds of feed per acre, worth about \$10 per ton, which would bring the value of the agricultural products up to a very neat figure indeed.

Second.—Five witnesses, all more or less expert in placer mining have testified in regard to their personal efforts to obtain gold in paying quantities, and one of them who prospected each ten acre lot of the tract testifies, that he could not make thirty cents or even “two bits” per day, and two others testify that they could not find gold in paying quantities at any place on the tract.

Reininghaus, one of the mineral location claimants, testifies that in 1881, he had some Chinamen employed for a short time who made 75 cents to \$1 per day, and another witness testifies that he hauled some of the dirt to water and washed it making good wages—.

This land having been reported mineral upon the plat, it is presumptively mineral until the contrary appears, but it seems to me that if land has been mined over carefully until the soil has been washed from the surface of thirty-seven of one hundred and sixty acres, and has then been abandoned, there is not a strong *prima facie* case in favor of its still being mineral land within the meaning of the law; the fact to be ascertained being whether or not it is *now* mineral land and more valuable for that purpose than for the purpose of agriculture. *Cleghorn v. Bird* (4 L. D. 478). To constitute mining land it must be “land which it will pay to mine by the usual modes of mining.” *California Mining Co. v. Rowen* (2 L. D., 719).

The mere fact that portions of the land contain particles of gold, would not necessarily impress it with the character of mineral land, it must at least appear that it contains metal in such quantities as to make it available and valuable for mining purposes.

A narrower construction would operate to reserve from the uses of agriculture, large tracts of land which are practically worthless for any other purpose. *Alford v. Barnum* (40 Cal. 484).

As it certainly appears from the clear weight and preponderance of the evidence, that said land will produce at least hay in paying quantities, and as it further appears from prospecting done by witnesses that by the ordinary methods mining thereon will not pay, I am constrained to hold that said lands are now agricultural in their character.

Your office decision is accordingly reversed.

PRACTICE NOTICE ADMINISTRATOR; RESIDENCE.

HUCK *v.* THE HEIRS OF MEDLER.

Notice to an heir, who is also an administrator of the deceased entryman, may be regarded as notice to such party in both capacities.

A claim of residence is not compatible with the maintenance of a home elsewhere.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 28, 1888.

I have considered the case of *Cæsar Huck v. the heirs of Dorothea Medler, deceased*, on appeal by said heirs from your office decision of

February 8, 1887, holding for cancellation pre-emption cash entry, No. 841, made in the name of the heirs-at-law of said Dorothea Medler, and embracing the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, and the N. $\frac{1}{2}$ NW. $\frac{1}{4}$, Sec. 34, T. 2 N., R. 17 E., The Dalles, Oregon.

It appears from the record that Dorothea Medler filed pre-emption declaratory statement for said tract May 6, 1881, with allegation of settlement May 4th, same year.

Said pre-emption claimant having died in the fall of 1883, final proof was made on May 9, 1884, by Julius Wieseck, as administrator and heir, and on the same day final certificate, No. 841 issued in the name of the heirs, as has been stated.

March 8, 1886, Huck filed his affidavit of contest, charging that the original claimant Dorothea Medler, abandoned her claim and changed her residence therefrom more than six months prior to her death; that she caused her house thereon to be removed therefrom more than six months before her decease; that at the date when final proof was made by the administrator, there was no dwelling house on said claim, and had not been since the removal of deceased claimant's house as above stated; that said tract was not settled upon, improved and cultivated as required by law; that said administrator in making final proof swore falsely in regard to the residence of the deceased claimant on the tract.

Said affidavit of contest was by the register and receiver transmitted to your office, which, after consideration thereof, directed that a hearing be ordered to determine the facts.

In accordance with said instructions a hearing was ordered "in the name of the heirs of Dorothea Medler, deceased," and was had in June, 1886. At the opening of said hearing, the administrator objected to the proceedings, 1st, on the ground that the local office was without jurisdiction to try the matter in issue, and, 2nd, for the reason that the proceedings appear to be against the estate of a deceased person and not against the administrator or personal representative. The hearing proceeded notwithstanding these objections, and quite a large amount of testimony was taken. Upon the testimony so taken, the local officers held that the allegations in the affidavit of contest were sustained. They accordingly found for contestant and recommended the cancellation of the cash entry.

From said finding an appeal was taken to your office. Said appeal contained the averments that the proceedings were against the heirs, and that proof of service of notice upon said heirs or any of them was not shown; also that while the record showed an administrator, he was not made a party to the proceeding; that the evidence taken on final proof, although a part of the record, was not considered by the local officers in making up their judgment; that the decision and finding of the local officers were contrary to the law and the facts in the case.

Your office decision, after stating that the administrator was present and without objection conducted the case on behalf of the heirs, and

that the case appeared to have been regularly tried with full opportunity to present all the facts, overruled the objection, holding that even if otherwise well taken, it came too late. Your said office decision then proceeded to a consideration of the facts as shown by the record, and upon said facts sustained the finding of the register and receiver and held the cash entry for cancellation upon the ground that Dorothea Medler, the deceased pre-emption claimant "never had an actual continuous residence upon the land."

From that decision the case comes here on appeal filed in behalf of the heirs at law of said deceased pre-emption claimant.

Said appeal urges:

1st. That your said office decision was error in holding that the appearance of Julius Weiseck, the administrator, was a waiver of notice to the heirs at law.

2nd. That no notice was ever given, or service made on said heirs.

3rd. That the decision erred in holding that the evidence did not support the claim in regard to residence.

As to the first ground of objection, I do not understand that your office decision anywhere held that there was a waiver as averred. On the other hand the administrator being present when the case was called for trial, objected to proceeding, not because there was no notice nor proof of notice to the heirs, but because the proceedings were against the heirs and because he as administrator was not served with notice. He was present during the trial and was without objection from any quarter allowed to conduct the case for the heirs.

No question of waiver of notice to the heirs was raised at the trial, nor by your office decision. On the contrary, your said office decision found that the case had been "regularly conducted with full opportunity to present all the facts."

The administrator who conducted the case for the heirs is himself an heir and consequently may, so far as he is concerned, be regarded as having been present at the trial, both as administrator and heir. He, as well as other heirs, was on the stand and testified in the case on the issues of fact relative to settlement and inhabitancy.

I conclude, upon an examination of the record, that the case was regularly tried after notice to the heirs. The administrator being at the same time an heir, may be treated as having been notified in both capacities.

The first and second grounds of objection to your office decision, are, for the reasons stated, without force and must fail.

This leaves for consideration only the question whether or not the charge as to settlement and inhabitancy is sustained by the record.

A building or shed called a house was moyed upon the tract a few days before the deceased claimant made her filing. Wieseck, administrator and heir, (son) testified "I knew her to live in the house several days off and on." Said building appears to have been really an open

shed which could scarcely, if at all, be regarded as habitable even by a strong, robust person. Claimant was an aged and feeble woman unable by reason of her age and feebleness to endure even ordinary hardships. Moreover, the so called house was used as a shelter for a threshing machine, a use incompatible with residence, especially by a delicate and enfeebled old lady, such as the pre-emptor is shown to have been.

This building was, in the fall of 1882, moved to the land of Weiseck (son and administrator) adjoining the claim in question.

A second house was built in the fall of 1883. The exact location of this house, and also its character and use, are matters in dispute and concerning which the testimony is conflicting.

I agree with your office in its finding that the preponderance of the evidence shows said house to be on the land of Wieseck and not on the claim in question. The evidence tends strongly to show that it was used by Wieseck as a smoke-house prior to the death of the pre-emptor, and that it was never intended to make it a place of residence by the deceased claimant or any one else. She died in the fall of 1883 the same fall that said house (or smoke-house) was erected. Her death occurred at the house of her son Wieseck.

Upon a full consideration of the entire record in the case I am satisfied that the deceased claimant never, within the meaning of the pre-emption law, inhabited the tract covered by her filing and that the entry based upon said filing was not made in good faith. Her home, or place of residence from the date of filing to the date of her death, was clearly with one or the other of her sons who lived in the immediate vicinity of the tract, and not on said tract as said sons and heirs attempt to make it appear.

Your office decision holding for cancellation the cash entry is accordingly affirmed.

SCHOOL LAND- INDEMNITY SELECTION.

STATE OF CALIFORNIA.

The State is entitled to make selections in lieu of school land covered by settlement claims at date of survey. When the right of selection has been exercised, the title to the tract selected passes to the State, which is, at the same time, divested of all right to thereafter claim the land used as the basis of such selection, whether the settlement claim therefor is made good or not.

Acting Secretary Muldrow to Commissioner Stockslager, August 28, 1888.

This is an application for certiorari, based upon the refusal to transmit the appeal of the State of California from the decision of your office of February 7, 1887, rejecting the application of the State to select, as indemnity school land, the SW, $\frac{1}{4}$ of Sec. 27, T. 15 N., R. 1 E., H. M, California.

The material facts shown by the application and exhibits thereto attached are as follows:

The township plat of T. 15 N., R. 2 E., was filed in the local land office October 9, 1884. On November 20, following one James P. McEvoy filed pre-emption declaratory statement for the N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. "36," in said township, alleging settlement June 1, 1883. On the same day (November 20, 1884,) the State made selection (No. 47) of the SW. $\frac{1}{4}$ of Sec. 27, T. 15 N., R. 2 E., H. M. (the land in controversy), in lieu of that part of Sec. 36, settled upon by Mc- McEvoy prior to survey, and afterwards sold the land selected.

Subsequently, it was ascertained that McEvoy had abandoned his claim and would not make final proof therefor, whereupon the State, claiming that the tract settled upon by McEvoy becoming unincumbered property of the State for which it would not be entitled to indemnity, reselected said SW. $\frac{1}{4}$ of Sec. 27 as indemnity for 155.64 acres of school land lost in fractional township 48 N., R. 12 W., H. M., and 4.56 acres lost in fractional township 19 N., R. 3 E., H. M., as amendatory of their original selection. This selection was numbered 60.

Your office, by letter of March 30, 1886, rejected this reselection, upon the ground, (1) that it was prematurely made, as the time had not expired in which McEvoy would be allowed to make final proof; and (2) because the State was entitled to 195.94 acres as indemnity in fractional township 48 N., R. 12 W., and that therefore the selection was informal in this, that it included the deficiency of 4.56 acres in fractional township 19 N., R. 2 E., as an additional and unnecessary basis for said reselection.

No appeal was taken from this decision, and on July 27, 1886, the State made formal application to amend original selection No. 47, by substituting as a basis therefor the fractional deficiencies specified in the reselection No. 60. Your office, by letter of February 7, 1887, refused said application, and held that by the decision of March 30, 1886, selection No. 60 was rejected because the land selected was covered by selection No. 47, and that the question as to whether the State would be allowed to amend selection No. 47 by substituting a different basis was then decided, and that such decision having become final by failure to appeal therefrom, it is therefore "not entitled to appeal from the action herein taken."

The State, however, filed appeal from said action, upon the ground that the decision of March 30, 1886, rejected the reselection upon wholly different grounds from the rejection of the application to amend, made by the decision of February 7, 1887. You declined to entertain and transmit said appeal, whereupon the State files this application to have the record certified to the Department.

It is unnecessary to pass upon all the questions presented by this application, because it is clearly shown by the application that the State

is not entitled to make a reselection of the tract in controversy, as the selection originally made, upon the basis of that part of the school section settled upon prior to survey, was a valid selection. By the act of selection the title of the State became vested in the tract so selected, and all right to the basis was by said act completely divested, so that the title could not thereafter vest in the State, although the settler may have failed "to make good his claim."

The seventh section of the act of March 3, 1853 (10 Stat. 244), provides:

That where any settlement by the erection of a dwelling house or the cultivation of any portion of the land shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed. . . . other land shall be selected by the proper authorities of the State in lieu thereof.

This provision is also embodied in the sixth section of the act of July 23, 1866 (14 Stat., 218).

In the case of *Water and Mining Company v. Bugby* (96 U. S. 165), the court, citing the case of *Sherman v. Buick* (93 U. S., 209), say:

As against all the world, except the pre-emption settler, the title of the United States passed to the State upon the completion of the surveys; and if the settler failed to assert his claim, *or to make it good*, the rights of the State became absolute. The language of the court is (p. 214): "These things (settlement and improvement under the law) being found to exist when the survey ascertained their location on a school section, the claim of the State to that particular piece of land was at an end; and it being shown in the proper mode to the proper officer of the United States, the right of the State to the land was gone, and in lieu of it she had acquired the right to select other land, agreeably to the act of 1826.

Under the authority of this case there can be no question that, if the State had made no selection in lieu of that part of the thirty-sixth section settled upon by McEvoy, the title to the land embraced in his settlement would have vested in the State as of the date of the completion of the survey, in the event that McEvoy failed to make good his claim, but by the existence of a settlement on said tract at the date of survey, the State acquired the right to select other land in lieu of it, and having exercised this right by making selection of the land in controversy, her title to said tract was then completed, and by said act of selection she completely divested herself of all right thereafter to claim the part of section thirty-six used as the basis of said selection, whether McEvoy made good his claim or not. The failure of McEvoy to complete or perfect his claim subjected the land to disposal under the settlement laws, and not to any claim of the State.

This is the controlling principle in this case, and it is therefore unnecessary to pass upon the other questions raised by counsel for the State.

The application is denied.

FINAL PROOF—REPUBLICATION BY ASSIGNEE—EQUITABLE ADJUDICATION.

J. F. TAYLOR.

After new notice by the assignee, and in the absence of protest, the proof irregularly submitted by the entryman (now deceased), upon which certificate issued, may be accepted, and the entry sent to the Board of Equitable Adjudication, said proof showing due compliance with law on the part of said entryman.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 29, 1888.

I have considered the appeal of Jesse F. Taylor, successor in interest to John J. Dunlap, from your office decision of April 1, 1887, holding for cancellation the pre-emption cash entry made by Dunlap June 4, 1884, for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, the NW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and the E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 11, T. 23 N., R. 5 W., Helena land district, Montana.

John J. Dunlap filed declaratory statement for said tracts October 25, 1883, alleging settlement the same day, and advertised to make final proof May 31, 1884, before Isaac Hazlett, a notary public at Old Agency, Montana. The testimony of the two witnesses was given before Mr. Hazlett on the day named in the notice, but that of claimant was not given until June 4, 1884, and was taken by the register of the local land office at Helena. Notwithstanding this irregularity, the local officers approved the proof, accepted payment and issued cash certificate June 4, 1884.

It is stated in the proof that the claimant, a single man and a duly qualified pre-emptor, established actual residence upon the land in October, 1883, built a house and corral and fenced five acres. The improvements are valued at \$300. The claimant testifies that he has used the land as a home and farm and has broken five acres and cultivated the same to wheat, potatoes, peas, and corn. He testifies that his residence has been continuous; his witnesses say "very nearly" continuous.

October 19, 1886, you suspended the cash entry for the reason that the proof was not made in accordance with the published notice of the claimant's intention to make proof and for the further reason that the testimony of the witnesses as to the continuous residence of the claimant was not satisfactory, and required the claimant to publish a new notice of intention to make proof and to furnish an affidavit from the witnesses who had testified in the case, showing whether the claimant had complied with the requirements of the law as to continuous residence.

February 24, 1887, the register of the local office transmitted an affidavit of publication of notice made by J. F. Taylor, successor in interest of John J. Dunlap of his intention to make final proof January 23, 1886, together with a certificate of posting and a statement that no pro-

test or adverse claim was filed on that day or at any time during the period of publication. There was also transmitted at the same time, an affidavit of J. F. Taylor, reciting that he is the successor in interest to Dunlap who had died, and was therefore, unable to furnish the affidavit required by your letter of October 19, 1886. This affidavit is corroborated by Samuel C. Burd and Abel McKnight, the two witnesses to the proof, who swear:

That said Dunlap was a bona fide resident and settler on said land; that he lived thereon continuously and actually made it his home for at least six months prior to his making final proof on June 4, 1884, viz: the months of December, 1883, January, February, March, April and May, 1884; that he put in and cultivated a crop thereon and made substantial improvements; that the said Dunlap to obtain the means wherewith to improve his claim hired out to neighboring ranchmen at different times in the spring and summer of 1884 and was not on his place every day. For this reason in our former testimony in final proof in answer to the question whether his residence had been continuous, we said, "very nearly so."

April 1, 1887, you decided that the new publication made by the assignee, J. F. Taylor, can not be accepted, and held the cash entry for cancellation.

The testimony shows a substantial compliance with the requirements of the pre-emption law; and I direct that the entry be referred to the Board of Equitable Adjudication under Rule 10 of the Rules stating the character of the cases which may be submitted for the action of that tribunal.

Your decision is modified accordingly.

PRACTICE—NOTICE—SERVICE BY PUBLICATION.

DRISCOLL *v.* MORRISON.

Notice of a motion to set aside proof of service should be served on the opposite party.

An affidavit for publication of notice is sufficient which states that affiant lives in the vicinity of the land, and is well acquainted in that neighborhood, that he knows the defendant does not reside in that locality, and that after diligent search he is unable to find the said defendant.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 30, 1888.

I have considered the case of Michael Driscoll *v.* James L. Morrison on appeal by the latter from your office decision of February 11, 1887, holding for cancellation his pre-emption entry for the SE. $\frac{1}{4}$ of Sec. 15; T. 25 N., R. 63 W., Cheyenne, Wyoming land district.

Morrison filed pre-emption declaratory statement for said land February 3, 1885, alleging settlement the same day and on October 29, 1885, made final proof thereunder before the local officers, who approved the same and issued cash certificate thereon.

On March 12, 1886, Driscoll filed affidavit of contest against said entry alleging that "no settlement as described in D. S. No. 2360 has ever been made on said tract, that no one has resided on said SE. $\frac{1}{4}$, Sec. 15, for any time as required by the pre-emption law, that there is no house thereon; that the same has not been cultivated in any way; that said entry was not made for the exclusive use and benefit of said entryman and claimant."

A hearing was ordered by your office and a notice issued by the local officers dated May 4, 1886, citing the parties to appear at the office of A. B. Hart in Fort Laramie, on June 21, 1886, to submit testimony and stating that the final hearing would be had at the local office on July 7, 1886.

On May 7, Driscoll filed his affidavit setting up that "he has endeavored to serve the attached notice upon the contestee James L. Morrison, that after diligent search he is unable to find the said James L. Morrison; that he is well acquainted in the neighborhood and that he knows that no one by the name of James L. Morrison resides in that locality; that he is not acquainted with the present address of said James L. Morrison, that he has every reason to believe that said Morrison is no longer a resident of the Territory of Wyoming; that it will be impossible to serve the notice of contest upon said Morrison by personal service. Wherefore deponent prays that such service be made by publication." In accordance with this request notice was given by publication.

On the day set for taking the testimony the claimant made default, the contestant however, appeared with witnesses and submitted testimony. On July 7, the case was declared closed by the local officers and they took it under consideration.

On July 21st J. C. Baird, attorney for Morrison, entered a special appearance and filed a protest against the contest and any action "tending to affect the title to the land here involved" on the grounds that, the final proof having been approved by the local officers and final certificate issued, the general land office had no authority or control over the matter. At the same time said attorney also filed a motion "to set aside the service and proof of publication of service and to suppress the testimony taken alleging as grounds for said motion that "the said contestant in his affidavit for service by publication erroneously stated "that it will be impossible to serve the notice of contest upon said Morrison by personal service" the fact being that said Morrison is a bona fide resident of Wyoming Territory, and was engaged therein at his usual occupation at the time of the making of said affidavit;" that it was not shown how long the notice posted on the land remained so posted and that the affidavit as to the mailing of a copy of notice of contest herein fails to show what copy was actually mailed. This protest and motion were neither one sworn to, nor were the statements

made verified in any manner, nor was any notice thereof given the opposing party.

On August 12, the local officers rendered their decision.

In regard to the papers filed by the attorney for the defendant the local officers said "all which papers—appearance, protest and motion—are placed on file for the consideration of the Honorable Commissioner, the register and receiver being of opinion that no action can be taken by them upon the same after hearing closed, and holding that no action could in any event, be taken upon such protest and motion without proof of notice to the opposing party."

Upon consideration of the case in your office it was held by letter of December 23, 1886, that the proof of service of notice of contest was defective, in that the affidavit as to posting copy of notice on the land did not show "the length of time of such posting and the contents of the notice" and the contestant was required to furnish supplemental proof within thirty days remedying this defect. Such proof was duly furnished and your office thereupon affirmed the decision of the local officers and in said decision it was said :

In assuming jurisdiction, you practically overruled the motion which was made without notice to the opposite party and the alleged facts upon which it was based were not even stated under oath. You, therefore, properly omitted to consider the motion.

The appellant would have placed himself in much better light if he had supported his motion by an affidavit verifying the statements made in said motion, and if it had been stated there which it is not, that he did not receive the notice which was sent him, by registered letter, at Fort Laramie, Wyoming. Notice of the motion to set aside proof of service should have been served on the opposite party, but inasmuch as it pertains to the question of jurisdiction I have thought best to pass upon the merits of the case. I am of opinion that the affidavit upon which the order of publication was based was sufficient. See *Rollins v. Robbins* (5 L. D., 635).

The affidavit states therein that he lives and is well acquainted in the neighborhood of said land, that he knows that no one by the name of James L. Morrison lives in that locality; that after diligent search he is unable to find the said James L. Morrison.

The testimony submitted by the contestant is clear and conclusive and fully sustains the charges contained in the contest affidavit. The truth of these charges and of the testimony submitted thereunder, is not in any manner denied by the appellant here.

After carefully considering this case I find no good reason for arriving at a conclusion different from that arrived at by the local officers and in your office, and the decision appealed from is therefore affirmed.

OSAGE LAND—SETTLEMENT—FINAL PROOF.

CHITWOOD *v.* HICKOK.

The right of purchase under an Osage filing will not be accorded in the absence of a *bona fide* settlement.

Failure to submit final proof and make payment within six months after Osage filing, will not defeat the right of purchase in the absence of an intervening adverse claim.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 31, 1888.

I have considered the appeal of Elisha P. Hickok from your decision of August 7, 1886, in the contest case of James W. Chitwood *v.* Elisha Hickok, involving the NE. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, and N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ NW. $\frac{1}{4}$ Sec. 33, T. 32 S., R. 20 W., Larned land district, Kansas.

The record shows that Hickok filed Osage declaratory statement No. 6594, for said described tract November 28, 1884, alleging settlement on the 18th of the same month, and that on April 16, 1885, Chitwood filed Osage declaratory statement No. 8528, alleging settlement two days previous, which was entered on the record as for the corresponding tract in township thirty; but the certificate issued to him was for the tract in dispute.

On November 7, 1885, Hickok offered to make final proof before the register and receiver at Larned, Kansas. Chitwood appeared and filed a protest and cross examined the witnesses to Hickok's proof. After several continuances the testimony closed December 24, 1885, and on March 13, 1886, the local officers decided that "Hickok did not establish or maintain a continuous residence upon the tract in dispute for a period of six months prior to his making final proof. . . . That his wife and family resided in Winfield, Kansas, during the time he claimed continuous residence, . . . while he, was engaged in business at the town of Protection. . . . That Hickok made a verbal agreement in which he agreed to transfer his right and title to eighty acres of said tract to a town-site company of which he was a member, upon obtaining title thereto from the government; that two of the witnesses to his final proof were members of the same company and were not disinterested witnesses." That "the evidence clearly showed that Chitwood established a *bona fide* residence upon the said land on the 14th day of April, 1885, and that his residence was upon said tract continuously with his family, since that date; improving and cultivating the same."

They rejected Hickok's proof and held his filing for cancellation and awarded the land to the contestant Chitwood upon his making final proof.

On April 12, 1886, Hickok appealed from the action of the local land office.

On January 20, 1886, Chitwood filed an application to amend the record in the local office so as to cover the land in dispute. He alleged in said application that his declaratory statement shows that it covered the tract in dispute, but that one of the clerks in the office failed to read the figures in his declaratory statement as it was written, and thereby made a mistake and entered his filing on the corresponding tract of land in township 30, R. 20 W.

On August 7, 1886, your office considered the appeal and held that "while the testimony is not sufficiently strong to warrant the cancellation of his (Hickok's) declaratory statement, his proof must be rejected as not showing satisfactory compliance with the law in the matter of residence," and allowed him "upon notice by publication to furnish additional proof of continuous residence at any time during the life time of his filing." At the same time your office held that "all of the testimony goes to show that his (Chitwood's) settlement was actually made on the tract in dispute and at about the time indicated in his declaratory statement. There is no doubt that an error was made in describing the land intended to be covered by his filing, and that the same should be amended subject to the prior right of Hickok," and directed the local officers to make the proper annotations in the record.

On October 16, 1886, Hickok appealed from your said office decision and the case is now before me.

I find from an examination of the proofs and testimony in this case that both Hickok and Chitwood were duly qualified pre-emptors at the dates on which they made their respective filings for the land in dispute; and I also find that said described tract is Osage Indian trust and diminished reserve land, and therefore subject to disposal under the provisions of the act of Congress approved May 28, 1880 (21 Stat., 143).

Section five of said act, among other things, provides that:

The Secretary of the Interior shall make all rules and regulations necessary to carry into effect the provisions of this act.

By virtue of the provisions of said act the Department on June 23, 1881, formulated regulations by which, among other things, it was required that filings for Osage and diminished reserve lands should be made within three months from date of settlement, and proof and payment of not less than one fourth of the purchase money within six months from date of filing, with notice of publication as required in the pre-emption entries, and that a residence of not less than six months should be required to be shown, as evidence of good faith. Said requirements have been followed from that time up to this present date, and have been concurred in by circular of April 26, 1887, except that "six months continuous residence next preceding date of proof is not an essential requirement, but it is essential that the settlement be shown to be actual and bona fide." (5 L. D., 581.)

It is shown that Chitwood settled upon this particular tract of land

on the date alleged in his declaratory statement, and an inspection of that statement shows that it was made out for the land in controversy. It is evident that the mistake whereby it is made to cover lands in township *thirty* was made by whoever entered said filing on the records of the local office, and Chitwood's petition to have the record corrected should be allowed.

The weight of reliable evidence in the case establishes the following facts, viz: The claimant, Hickok, was a minister of the gospel, and for several years prior to making his filing for the tract in dispute he resided in the city of Winfield, Cowley county, Kansas; that he owned more than three hundred and twenty acres of land in said county, and a valuable residence in the city; that several years prior to 1884, he conveyed to his wife about one hundred and twenty-five acres of land, so that when he made his filing he did not own in his own name three hundred and twenty acres. The tract in dispute is situate in Comanche county, Kansas, and about one hundred miles distant from the city of Winfield. When Hickok made his filing for said tract he opened an office in the town of Protection, about two miles distant from the land, and there carried on the business of a notary public, taking final proofs, etc.; he slept and boarded in Protection most of the time up to about March or April, 1885; he never established an actual bona fide residence upon the pre-empted tract; he permitted his family to reside in the city of Winfield, and he never became a settler in good faith on said land within the meaning and intent of the law, but seems to have been endeavoring to obtain title thereto for speculative purposes by a pretended compliance with the law and regulations. This is indicated by the further fact (in addition to what has already been stated) of his having made a verbal agreement with the officers of a townsite company, of which he was a member, that upon obtaining title from the government, he would convey to said company eighty acres of said land. It also clearly appears that two of Hickok's final proof witnesses were members and directors of said townsite company, and were not therefore disinterested witnesses.

In view of these facts, Hickok's final proof is rejected and his filing canceled.

The evidence further shows that Chitwood, with his wife and four children, have resided continuously upon the tract ever since April, 1885; that he has placed upon the land several hundred dollars worth of substantial improvements, and has cultivated and cropped each year a reasonable portion of the land.

Although Chitwood failed to present his final proof within the time specified by the regulations, yet in view of his evident good faith and of the fact that the cancellation of Hickok's filing leaves no adverse claim to the land, he will be allowed ninety days from notice of this decision, within which to submit final proof in support of his claim.

Your said office decision is modified accordingly.

PRE-EMPTION—MARRIED WOMAN.

MARGARET FORGEOT.

A single woman who marries after filing declaratory statement and prior to final proof, defeats thereby her right of purchase under the pre-emption law.

First Assistant Secretary Muldrow to Commissioner Stockslager, August 31, 1888.

I have considered the appeal of Margaret Forgeot, formerly Margaret Shaffer, from your office decision of March 4, 1887, holding for cancellation her pre-emption cash entry for SW. $\frac{1}{4}$, Sec. 11, T. 28 N., R. 8 W., Niobrara land district, Nebraska.

On September 22, 1882, the claimant, then Margaret Shaffer, an unmarried woman, filed her pre-emption declaratory statement for the land in question, and on June 24, 1884, she made final proof.

In the interim, March 8, 1884, she had married, and your office, upon receipt of final proof, by letter "G" of October 21, 1886, held the said cash entry for cancellation, but allowing her sixty days to show cause why the same should not be done.

In response to this affidavits were filed by claimant and her husband, showing that she had settled upon the said land in good faith and had continuously resided thereon from date of filing; that prior to her said marriage, she had made inquiry of the local officers as to the effect of her marriage upon her rights in said land, and was assured by them it would make no difference whatever in her legal right as she could prove up equally well after marriage, and that but for such advice she would not have married before making final proof.

The testimony taken in final proof shows that claimant has forty-nine acres in cultivation, has erected two houses, stables, cribs and fences, aggregating \$500 to \$800 in value; that she was, prior to her marriage a widow, forty-eight years old and had five children.

Upon this testimony your office, by its said decision of March 4, 1887, held her said entry for cancellation and from this decision she appeals.

In your decision I must concur, although the case is one in which such decision is the cause of peculiar hardship, and is a case in which, if it was legally possible, the Department would like to make an exception.

The trouble is not in the Department but in the law.

Counsel for claimant, in her appeal, cites and relies upon the case of Maria Good, decided October 22, 1886 (5 L. D., 196).

In that case it was decided that when once legal qualification to make homestead entry is established, and the land applied for is subject to such entry, the only subsequent questions to be considered by the Department are those relating to residence, cultivation and alienation.

In Rosanna Kennedy (10 C. L. O., 152) it was held that the pre-emption right was not a vested right but simply a preference right and

*Overruled,
10 L. D. 629*

that vested right was not acquired until after entry and payment, and that by her marriage before making final proof and payment, which alone constitutes entry in pre-emptions, a woman waived her pre-emption right and can not make entry.

This decision has been uniformly followed and is based upon the proposition that the law allows a pre-emption only, to the person who at the time of the entry is either single or the head of a family, and by marriage a woman, although she might prior to that time be the head of a family, in law relinquishes that position to the husband and while that relation continues is disqualified from making pre-emption entry, being neither "the head of a family, a widow or a single person."

The filing of declaratory statement is in no sense an entry, but the mistaken idea that it is, is the source of many mistakes like the one made in the case at bar.

Your said decision is affirmed.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

JOHN R. CHOATE.

A homesteader may purchase under the act of June 15, 1880, even after the cancellation of his original entry, in the event that such purchase does not interfere with the subsequent right of another.

The fact that after the cancellation of the original entry, the land was entered by another, will not defeat the right of purchase, where such subsequent entry had been canceled on relinquishment prior to the application of the purchaser.

First-Assistant Secretary Muldrow to Commissioner Stockslager, August 31, 1888.

I have considered the appeal of John R. Choate from your decision of March 11, 1887, holding for cancellation his cash entry under act of June 15, 1880, for the NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 14, T. 25 N., R. 22 W., Springfield, Missouri.

The record shows that John R. Choate made homestead entry on above tract December 2, 1867, which was duly canceled for abandonment July 28, 1875.

On the 21st of January, 1876, Joseph R. Wade made homestead entry for the same tract, which was duly canceled for relinquishment November 28, 1883, and on the same day William C. Cox made homestead entry which was duly canceled for relinquishment June 4, 1885. On the same day, to wit: June 4, 1885, the local officers allowed John R. Choate to purchase said tract under act of June 15, 1880, and issued cash certificate and receipt therefor.

March 11, 1887, you directed that John R. Choate's entry to be held for cancellation, for the reason that by the homestead entries of Mr. Wade and Mr. Cox for the same tract, he lost all right to purchase the

land under said act. From this decision Choate duly appealed to this office.

Section 2, Act of June 15, 1880, provides,—

That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so entered for homesteads, may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefor. Provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

From the above language, it would appear that in considering an application under this act, the only question that presents itself is, was the land properly subject to the original entry, and will the proposed entry interfere with the rights or claims of others who have subsequently entered such lands.

There seems to be no doubt that these lands were properly subject to such entry and no adverse claim intervenes, as the subsequent entries of both Wade and Cox terminated and ceased to exist by their own voluntary acts, before Choate entered under the act of June 15, 1880.

The Department has repeatedly held that under the act of June 15, 1880, a homestead settler, even after the cancellation of his original entry, can purchase the same tract, provided it does not interfere with a subsequent right. *Samuel M. Mitchell*, (1 L. D., 96); *Hollants v. Sullivan*, (5 L. D., 115); *Northern Pacific R. R. Co., v. Elder et al.*, 6 L. D., 409.

The case of *Samuel M. Mitchell*, above cited, is almost similar to the case at bar. In both cases the lands have been covered by three separate homestead entries, which were duly canceled. In the case at bar the first entryman purchased the land under the act of June 15, 1880, and his rights are subservient only to any adverse claim that may have attached subsequent to the cancellation of his entry, including any equities that may exist in favor of the later entryman. The later entrymen, however, do not set up any rights, claims, or equities and there was, therefore, no bar to Choate's purchasing the land under the act of June 15, 1880. In the case of the *Northern Pac. R. R. Co. v. Burt*, reported in 3 L. D., 490, it was held that the homestead settler's widow, after the cancellation of the entry could purchase the same tract under the provisions of the act of June 15, 1880.

In the case of the *Northern Pacific Railroad Company against McLean*, reported in 5 L. D., 529, it was held that the widow of a homestead claimant could purchase under the act of June 15, 1880.

In your decision of March 11, 1887, you state that appellant sometimes signed his name "Choate" and at other times "Choat." In his affidavit of October 21, 1887, Choate explains the discrepancy in the signatures to the original and final papers. He testifies that he is nervous, can scarcely sign his name, sometimes has others sign it for him and at times signs it without the final "E" and at other times with the final "E." He testifies, however, that he is the identical person who

made homestead entry of said tract December 2, 1867, and who on June 5, 1887, purchased the same under the act of June 15, 1880.

In your said decision you also state that John R. Choate "on the 9th of June, 1885, made an additional entry for the Lots 8 and 9, Sec. 6, and NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, T. 18, R. 16, New Mexico, per homestead entry No. 1021."

This may be good cause for cancelling the subsequent entry, but it is no reason for cancelling his purchase under the act of June 15, 1880. The right to purchase lands legally entered conferred by the second section of the act of June 15, 1880, is not dependent upon compliance with the provisions of the homestead law, and is not subject to any other restrictions than are imposed in case of ordinary cash entry. George E. Sanford (5 L. D., 535).

In your said decision, you further state that the affidavit accounting for the loss of the duplicate receipt issued on Choate's original homestead entry, was not acknowledged in any manner. This was probably the fault of the officer before whom it was made. The jurat, or another affidavit, can probably be readily supplied, and when supplied Choate's entry should be approved.

In view of the fact that this act recognizes the power of a homestead entryman to transfer his right by a *bona fide* instrument in writing, and that this transfer is generally made on the back of the duplicate receipt, it is important that Choate should produce the duplicate receipt or account for its loss; showing satisfactorily that no such assignment has been made. In case of his failure to do so, his entry should be canceled.

You are directed to notify Mr. Choate that unless within sixty days he furnish such affidavit, his entry will be canceled. And if the proper affidavit be supplied, you will direct the case to be passed to patent.

MINERAL PATENT—CONFLICTING TOWNSITE.

W. A. SIMMONS ET AL.

There is no authority of law for the insertion in a mineral patent of a clause reserving the rights of a townsite.

The Department has the power, with the consent of the grantee, to recall a patent which did not issue in conformity with the judgment awarding the right of entry, and was not accepted by the grantee, and issue one in accordance with said judgment.

A townsite patent is inoperative as to all lands known at the time of the entry to be valuable for mineral, or discovered to be of such character prior to the occupation or improvement of land under the townsite laws.

Secretary Vilas to Commissioner Stockslager, August 31, 1888.

This is an application filed by William A. Simmons and his grantee, the Empire Mining and Milling Company, asking that a patent issued July 31, 1882, for Empire Mining claim entry No. 40, containing certain

reservations and exceptions in favor of the townsite of Tombstone, be recalled from the office of the register and receiver and canceled, and a new patent without such reservations be issued and delivered to claimants.

This claim was located July 19, 1878, and on January 21, 1880, William A. Simmons, who had acquired title by regular conveyances of said location, made entry of said premises under the mineral laws.

Subsequent thereto, to wit: March 3, 1882, the Mayor of Tombstone filed in the local office an application to enter certain lands under the townsite laws which embraced part of the surface ground included in the Empire Mining claim, claiming that said townsite right was initiated February 1, 1879.

On September 22, 1880, a patent was issued to the townsite for the entire premises claimed in their application containing, however, the following reservations:

Provided—That no title shall be hereby acquired to any mine of gold, silver, cinabar or copper or to any valid mining claim or possession held under existing laws; and provided further that the grant hereby made is held and declared to be subject to all the conditions limitations and restrictions contained in section 2336, Revised Statutes of the United States so far as the same is applicable thereto.

On July 21, 1882, the claim of Simmons for the premises in controversy was taken up for examination in your office upon his application for patent, alleging that said claim was duly located July 19, 1878, in compliance with law, and upon said application the entry of Simmons was approved for patent.

On July 31, 1882, patent was issued by your office on said entry made June 10, 1880, by said W. A. Simmons and was transmitted to the local office for delivery to the person surrendering the receiver's duplicate receipt therefor. Said patent contained the usual reservation inserted in all patents for mining claims according to the existing practice in the land office at that time, to wit:

Excepting and excluding, however, from these presents all town property rights upon the surface, and there are hereby expressly excepted and excluded from the same all houses, buildings, structures, lots, blocks, streets, alleys or other municipal improvements on the surface of the above described premises not belonging to the grantee herein, and all rights necessary or proper to the occupation, possession and enjoyment of the same.

The grantee refused to accept said patent because it contained said reservation and demanded a patent for all the land and premises included in the original location and application for patent and survey without such reservation.

This demand was refused by your office and upon appeal the Secretary of the Interior affirmed said decision December 13, 1883. Subsequently the supreme court in the case of *Deffeback v. Hawke* (115 U. S. 392) involving the question of the rights of claimants to mineral lands within townsite limits held that, the officers of the Land Depart-

ment have no authority to insert such reservation in a patent to mineral lands.

After this decision was rendered the claimant filed another application asking the Commissioner to recall the objectionable patent, which they still refused to accept, and to issue one conformably to law.

In your letter of March 6, 1888, declining to grant the request of applicants, you say

It is possible that had patent never issued for said Empire claim, and had never become a matter of record as such in this office a patent, prepared therefor, since the rendition of said decision in the case of *Deffeback v. Hawke*, might have been issued, with no clause of reservation inserted therein. The above statement is reservedly made because under the decision referred to, it is made incumbent upon this office to examine into the *respective rights* of townsite as well as of the mineral claimants, the dates of inception of rights etc., and therefore without such examination, which it is not the purpose of this office now to make, it will not be said without qualification that such patent might issue, even if the contingency mentioned existed.

But aside from possibilities, I cannot see that the patent already issued and of record in this office, is not by virtue of the aforesaid decision of the U. S. supreme court complete and satisfactory. As the supreme court has said that the land officers had no authority to insert such reservation in a mineral patent, then it must certainly follow that such reservation inserted in such patent is void and of no effect. This being so, no good reason can be advanced why the patent, issued July 31st, 1882, should not be accepted, or why a new patent conveying no more land or rights, should be prepared, recorded and forwarded for delivery to take its place.

The record in this case shows that the location of this claim was made July 19, 1878, and it is alleged by the applicants that the earliest date claimed as the initiation of the townsite right was February 1, 1879, as shown by the records of your office. But it is immaterial when the respective rights of the mineral claimant and the townsite applicants were initiated, as no title to lands containing known minerals can be acquired under the townsite laws. The townsite patent is inoperative as to all lands known at the time of entry to be valuable for the minerals, or discovered to be such before the occupation or improvement for residence or business under the townsite laws.

In the case of *Deffeback v. Hawke*, the location of the mineral claim was subsequent to the settlement and occupation for townsite purposes, and a patent issued for the mineral claim without the reservation although the townsite authorities had asserted prior occupation and settlement and insisted before the land office that the patent should be issued with the reservation excluding from its operation all town property, building lots, streets, etc., and all rights necessary and proper to the enjoyment and use of the same.

The mineral claimants rights to a patent rested upon the judgment of the land office approving his entry for patent upon the record showing that said claim was located July 19, 1879, and was in all respects regular and valid.

Upon this judgment he was entitled to a patent for said claim free from any reservation, or terms other than those of conveyance with re-

citals showing a compliance with the law and the conditions which it prescribed.

The decision of the Commissioner which was affirmed by the Department, refusing to recall the patent containing the reservations and to issue a new patent without reservation is not conclusive of the rights of the applicant to still demand that patent be issued in conformity with law and the judgment of the land department allowing said entry.

That was merely the decision of the Department that a ministerial power and duty had been properly executed. But the decision of the supreme court rendered subsequently, determined that it had not been properly executed and the right of the applicant to demand that patent issue in conformity to law still remains.

As to the power of the Department to recall a defective patent, there can be no question where a patent has been issued in conformity with the decision of the Department upon which the right to such patent rests, and has been placed in the hands of the local officers for delivery, it has then passed beyond the control of the grantor and is subject only to the will of the grantee. This was the character of the patent in the case of *United States v. Schurz* (102 U. S., 378), but where the patent has not issued in conformity with the judgment of the department awarding the right of entry as in this case, and its acceptance has been refused by the grantee the Department has the power to recall said patent with the consent of the grantee and issue one in conformity to said judgment.

Speaking of the power of the Department to recall a defective patent, the supreme court in the case of *Maguire v. Tyler* (8 Wal., 663), say:

Doubt as to the power of the Secretary to recall the patent cannot be entertained, as this point has been directly decided by this court. *Brazeaus'* representatives say this court in *Maguire v. Tyler*, (1 Black, 199) refused to accept the patent for the sixteen arpents and caused it to be recalled and his claim therefore stands before the court just as it existed in 1810, etc.

Again in the case of *Adams v. Norris* (103 U. S., 594), the court said:

It is not necessary to decide whether the refusal of the grantee to accept the patent in the present case and its return by him to the Commissioner of the Land Office, who ordered a new survey, removes the objections here made, though it is not easy to see why the refusal of the grantee to accept the grant and his consent to the return of it to the office, before intervening rights had accrued to any one, did not authorize a correction of any defect in that patent. * * * *

If the conveyance of 1866 passed the title to the claimant of a part of the land covered by this confirmed grant, there was no reason why an additional patent should not convey the remainder when the proper officer became satisfied that the first did not convey all that had been confirmed to the claimant. . . . In short it is but the common case of a grantor, who having failed to convey what he was bound to convey makes another deed to correct the wrong.

Being satisfied the the applicants are entitle to a patent conveying a clear title to the premises free from reservations, and that the department has the power to recall the defective patent issued July 31, 1882 and to issue a patent in conformity with law, I direct that the application be granted.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION.

J. B. HAGGIN.

The certification of the additional right conferred no privilege that could properly become the subject of bargain and sale, and a transferee, therefore, could have no other or different rights because of such certification, and in no case a greater right than the entryman.

The right to make a soldiers' additional homestead entry does not exist, where the period of military service is less than ninety days.

Secretary Vilas to Commissioner Stockslager, September 1, 1888.

I have considered the appeal of J. B. Haggin from your office decision of May 19, 1885, and of March 26, 1887, holding as illegal and for cancellation soldiers' additional homestead entry for the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 11 and E. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 12, T. 11 N., R. 27 W., S. B. M., San Francisco, California land district.

Said land was entered as a soldier's additional homestead, and attached to the papers in the cause is a certificate of your predecessor dated August 1, 1887, that the soldier who made the entry herein had made an original homestead entry of forty acres and was entitled to one additional homestead not exceeding one hundred and twenty acres, as provided by section 2306, Revised Statutes.

The entry was made April 5, 1882, the original entry of forty acres having been prior to that time patented to such soldier, and on the 20th of April, 1882, he sold and transferred said land to J. B. Haggin appellant herein.

Haggin testifies that in making said purchase he relied on said certificate of the Hon. Commissioner of the General Land Office which accompanied the entry and recited that said soldier was lawfully entitled to make additional homestead entry of one hundred and twenty acres of the public land as provided in Sec. 2306 of Rev. Stat.

Your said decision held said entry for cancellation upon the ground that the soldier who made the same had been during his term of service a member of the "Enrolled Missouri Militia" and was not in the army of the United States within the contemplation of said law.

The appeal is based upon the theory that the soldier's service came within the statute and that the certificate of the Hon. Commissioner is conclusive.

As to the last proposition, it has been uniformly held by this Department that purchasers from persons who hold final certificates, purchase the same with notice that the Land Department is but an administrator of the law and that it has no authority to issue patents to pre-emptors or entrymen who have not complied with the law, or who were not legally entitled to certificates.

The origin and effect of the said certificates of the Hon. Commissioner and the change of rule, are fully discussed in the case of *Hatfield et al.* (6 L. D., 557).

Such certificate was not one required by statute and conferred no such right as was the subject of traffic or bargain and sale, (*Hatfield, supra*), therefore a transferee would have no other or different rights because of it, and in no case could he have a greater right than the entryman.

Your said decision was based upon the conclusion that said soldier was not entitled to the benefit of Sec. 2306, R. S., because the "Enrolled Missouri Militia" was not a part of the army of the United States.

I have arrived at the conclusion that said act does not apply to said soldier and that he acquired no right by his said entry, but for a different reason.

Sec. 2306 gives the right to an additional homestead under certain circumstances to those *only* who are entitled under the provisions of Sec. 2304 to enter a homestead, etc., and said Sec. 2304 is applicable by its terms only to those who served in the Army of the United States, etc., for ninety days, (the original act of June 8, 1872 said ninety days or more) and a copy of the said soldier's discharge attached to the entry herein discloses the fact that he enlisted on the 10th day of September 1864 to serve sixty days, and was discharged on the 2d day of December 1864, having served but eighty-three days in all.

This seems to have been overlooked heretofore but as it is conclusive of the case it will be unnecessary to discuss the military status of the "Enrolled Missouri Militia."

Your said decision is therefore affirmed and said entry will be canceled.

FINAL PROOF-EQUITABLE ADJUDICATION.

A. D. WINANS.

In the absence of a protest or adverse claim, an entry may be referred to the Board of Equitable Adjudication, where the day fixed for the submission of final proof was a holiday, and said proof was made the day following.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 1, 1888.

In the case of Alphonzo D. Winans appealed by Frank E. Stevens from the decision of your office, dated June 10, and October 11, 1886, requiring new publication of notice and new final pre-emption proof, the record discloses the following facts:

The declaratory statement of Winans is not found among the papers accompanying your letter of transmittal, but your office finds that "he settled upon and established his actual residence on the SW. $\frac{1}{4}$, Sec. 21, T. 113 N., R. 60 W., Huron land district, Dakota, in the month of April, 1883." He advertised to make final pre-emption proof on February 22, 1884, at which time he and his witnesses appeared at the local land office for that purpose, but the 22nd being the anniversary of Washing-

ton's birth and a holiday, and the office not being open for the transaction of business, the register required him to come next day. On the next day, February 23, proof was made to the satisfaction of the register and receiver, the land paid for, and the usual final certificate obtained. On January 19, 1886, the entry was suspended by your office. In the intervening time Winans appears to have first mortgaged and then sold said land. Neither the mortgage or deed are found in the record, but the fact stated satisfactorily appears from the oaths of the parties in interest.

* * * * *

The register of the Huron land office on December 24, 1887, certified that, at the time of making proof in this case there were no objections filed to Winans' proof, and no protest or contest offered, so far as shown by the record.

On a full consideration of the facts disclosed by the record herein, it is believed that this case is one in which equitable relief should be afforded. There is no adverse claim here, no protest, and no evidence of fraud on the part of the entryman or of either of the parties in interest, and though the proof as to continuous residence is not so full and explicit as is generally desirable, yet it is sufficient in my opinion to dispense with further proof at this late date, and to show, with reasonable certainty, under the circumstances, the entryman's good faith. The day advertised for taking proof being a legal holiday, and consequently the proof not having been taken on that day, the case would seem fairly to fall within Rule 10, of the general equitable rules and regulations for the government of the Commissioner of the General Land Office, in submitting suspended entries to the Board of Equitable Adjudication.

You will therefore please refer the case to said tribunal for its action. The said decisions of your office are modified accordingly.

PRE-EMPTION—SECOND FILING.

EZRA D. CAFFEE.

The right to make a second filing will not be recognized where the pre-emptor failed to prosecute his rights under the first.

Secretary Vilas to Commissioner Stockslager, September 3, 1888.

I have considered the appeal of Ezra D. Caffee from your decision of April 30, 1887, denying his application to have his pre-emption right restored and to be allowed to file for the SW. $\frac{1}{4}$ of Sec. 10, T. 31, R. 49 W., Valentine, Nebraska.

His application sets out that he had filed a pre-emption declaratory statement for the N. W. $\frac{1}{4}$ of Sec. 13, T. 26 N., R. 5 W., Niobrara land

district, Nebraska; that being advised by the register that he was not qualified to make said filing at the date it was made, he abandoned said land; that the advice of the register as above was his sole reason for said abandonment; that the ground for said advice was that appellant moved from land of his own in the same State to settle upon the tract covered by his pre-emption filing, said land from which he moved being a homestead in the same land district upon which he had made final proof. He further states that, before making the filing, which he afterwards abandoned, as stated, he had deeded his said homestead to his wife, for the reason that he had used five hundred dollars of her money which she had received from her father's estate; that said deed to his wife was made for the above reason alone and not for the purpose of moving on the government land as a pre-emptor; that having so deeded he owned no land at the time of making his filing for the land which he afterwards abandoned; that neither he nor his wife now owns any land; that they now reside on the land for which he asks to be allowed to file; that his improvements thereon consist of a log house, fourteen by eighteen feet, a log stable, fourteen by sixteen feet, and other out-houses—also an acre broken. On his own showing, his application must be denied. If, as he states, he was not the owner of any land in the State of Nebraska, at the dates of his settlement upon and filing for the tract which he afterwards abandoned on the advice, as he says, of the register, then he was, so far as that point goes, a qualified pre-emptor and was bound to insist upon his rights under said settlement and filing, by appeal to your office and to this Department, if necessary, or lose his pre-emption right under said filing. He did not prosecute his right, but abandoned his claim, though now asserting that he was not disqualified under that paragraph of Sec. 2260 of the Revised Statutes, which provides that no person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory, shall, unless specially provided for by law, acquire any right under the pre-emption law.

Section 2261 of the Revised States provides that:

No person shall be entitled to more than one pre-emptive right by virtue of the provisions of section 2259; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file at any future time a second declaration for another tract.

On the statements made by appellant in the application under consideration (if for no other reason), he must be regarded as coming within the inhibition of the law above quoted.

By his own showing he has made one filing and neglected to prosecute his rights thereunder, though asserting that he was not disqualified at the date of said filing from settling and claiming as a pre-emptor. He has, therefore exhausted his pre-emptive right. His second filing can not, under existing law, be allowed, and your decision denying his application is affirmed.

PRACTICE—EXCEPTIONS—TESTIMONY—DEPOSITIONS.

MCCALLEN *v.* LEREW.

Objections as to the manner of taking testimony come too late when raised for the first time on appeal.

After proceeding to trial and submitting the evidence, it is too late to apply for the taking of further testimony by deposition.

Acting Secretary Muldrow to Commissioner Stockslager, September 4, 1888.

I have considered the case of Mary E. McCallen *v.* Stewart W. Lerew, involving the SW. $\frac{1}{4}$ of Sec. 15, T. 119, R. 68 W., Huron land district, Dakota, on appeal by the latter from the decision of your office by which a new hearing was ordered.

McCallen filed declaratory statement for the tract in contest August 28, 1883, alleging settlement June 15, 1883, and made homestead entry for the same tract January 15, 1886.

Lerew filed declaratory statement for the same tract March 28, 1884, alleging settlement March 26, 1884.

The township plat was filed in the local office (Huron) August 27, 1883.

Lerew gave the usual notice of his intention to make final proof on December 1, 1884, before the clerk of the district court of Faulk County, Dakota, which proof was duly made. To this proof McCallen filed a protest, alleging priority of claim. A hearing was therefore ordered. At the hearing thereafter held, both parties appeared and were represented by their respective attorneys. McCallen moved to dismiss the final proof of Lerew for insufficiency. The motion was sustained by the then receiver and overruled by the then register.

Without deciding the case upon its merits, on June 11, 1885, the papers were sent to your office for instructions.

On April 2, 1886, your office affirmed the action of the register and directed the local officers to consider the case upon all the testimony submitted and render a decision.

The local officers, successors to those before whom the original proceedings were instituted, on the 22nd of April, 1886, by their decision rejected Lerew's final proof on the merits, and held his filing for cancellation. From this decision Lerew filed an appeal, alleging the following errors: (1) The witnesses had not signed the evidence—(2) It does not appear that the testimony as written out was read by or to the witnesses—(3) It does not appear that the witnesses were sworn by the register and receiver—(4) The testimony was not taken in accordance with the instructions of the General Land Office—(5) That no action was taken on claimant's application for taking depositions on part of Lerew.

Your office held that there is sufficient error to sustain the appeal and accordingly directed that the case be remanded for a new hearing, basing

such action upon the non-compliance of the local officers with the instructions of your office to the Huron office of July 28, 1884 (3 L. D. 106), and September 22, 1884 (3 L. D., 121), and rule 42 of practice.

It appears from the record of the hearing, that the testimony of the witnesses was taken by a stenographer in short hand; that no signatures of the witnesses to their respective testimony as transcribed are thereto subscribed; that no certificate of the local officers regarding the correctness of such record nor any affidavit of the stenographer is thereto attached. The record fails to show where and before whom the testimony was taken; whether in the presence of the local officers or not.

However the parties were represented by their respective attorneys and no objection was raised to the testimony thus taken by either party until the local officers had decided the case upon it. Then Lerew in his appeal makes his objections. That cannot be permitted. He consented to the way and manner of the taking of the testimony, submitted the same to the consideration of the local officers and had his legal counsel to represent him. Being fully advised he waved all objections *then*, and should not be allowed to gainsay it *now*. He is estopped.

It appears further from the record regarding the 5th error claimed by Lerew, that after going to trial and after the testimony had been taken, and the evidence submitted, he filed with the local officers an affidavit for the taking of further testimony by deposition, together with written interrogatories. No action was taken on it. After proceeding to trial and submitting the evidence, it is too late to apply for the taking of further testimony by deposition.

For these reasons I must reverse your decision ordering a new hearing, and it is my opinion that the evidence taken at the hearing should be considered and the case decided upon its merits.

The case is therefore returned for disposition in accordance with the foregoing conclusion.

PRE-EMPTION—SALE BEFORE FINAL CERTIFICATE.

ORR *v.* BREACH.

The sale of the land after final proof, but prior to the issuance of final certificate, will not defeat the right to a patent, where the record shows due compliance with the pre-emption law in all respects.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 4, 1888.

I have considered the appeal of Henry Breach from your decision of January 29, 1887, holding for cancellation his pre-emption cash entry for the SW. $\frac{1}{4}$ of Sec. 5, T. 3 N., R. 70 W., Denver, Colorado.

It appears from the record that Henry Breach filed his pre-emption declaratory statement June 27, 1881, alleging settlement March 1, 1881.

September 19, 1881, Francis G. McLain made homestead entry for the same tract.

March 28, 1882, Breach gave notice of his intention to offer final proof and payment on May 12, 1882.

April 17, 1882, Frank B. Sheldon entered contest against McLain, for abandonment and against Breach for failure to comply with the law.

May 12, 1882, Breach made final proof and, as alleged by his counsel, tendered payment for the tract in question. Sheldon did not appear in support of his contest.

May 24, 1882, Breach conveyed to one Gilead P. Cheney all his interest in and to the land in question, which conveyance was duly accepted by the grantee and recorded two days after it was made.

June 12, 1882, the local officers rendered a decision in favor of Breach, from which Sheldon appealed to your office July 12, 1882.

January 12, 1883, you decided in favor of Breach, and directed the local officers to allow his entry as of the date of proof, viz: May 12, 1882.

January 20, 1883, the local officers accepted payment and issued final certificate and receipt as of that date, to wit: January 20, 1883.

January 8, 1885, your office suspended the pre-emption proof of said Breach on account of the adverse claim of said Francis G. McLain, and ordered the local officers to allow said McLain sixty days in which to show cause why patent should not issue on said pre-emption entry of said Breach.

October 15, 1885, your office, relieved the cash entry of said Breach from suspension, approved the same, and canceled the homestead entry of said McLain upon the ground that the said McLain did not appear and take action within the sixty days.

September 14, 1885, the local officers forwarded to your office the application of Addison F. Orr, for a hearing. Mr. Orr charged that the entry of Breach was fraudulent, in that he had conveyed the land to one Gilead P. Cheney, on May 24, 1882. A certified copy of the quit claim deed of Breach, conveying title for a consideration of \$500, was submitted.

November 13, 1885, this application was granted and a hearing ordered to be held when the said affidavit should be corroborated.

January 10, 1887, the local officers, in reply to your letter "G" of October 13, 1886, asking for a report on the status of this case, state that they sent for Orr's attorney and requested him to have the affidavit corroborated, but that this was never done. It does not appear, therefore, that a hearing was ever had under Orr's application.

July 3, 1886, Gilead P. Cheney addressed an application to the local officers, setting forth that on May 24, 1882, Breach conveyed the tract in question to himself and that in utter disregard of the instructions of letter "G" January 12, 1883, certificate was issued to Breach as of January 20, 1883, instead of May 12, 1882, the date of final proof and

alleged tender of payment. Cheney asked that certificate and receipt now issue as directed by office letter quoted.

July 29, 1886, the local officers rejected this application as they found "no necessity for the issuance of another receipt, as the date of entry is of record in the General Land Office and the record and files of this office show the same facts."

August 10, 1886, Orr's application was transmitted to your office and on January 29, 1887, you directed that Breach's cash entry be held for cancellation. From this decision an appeal was duly taken to this office.

In your said decision you allege that—

While it would appear from the facts recited that on May 12, 1882, Breach was entitled to enter, yet the entry was not actually authorized until January 12, 1883. Although, therefore, not made of record as directed and although this failure was error on the part of the local officers, the fact remains, that on May 24, 1882, when Breach attempted to convey the land, the title was not in him but in the United States.

By the decision of January 12, 1883, your office found that Breach had shown due compliance with the law, and that his final proof should have been accepted as of the date submitted and final certificate issued thereon. The conclusion thus reached is not now disputed, but it is said that the sale of the land prior to the issuance of final certificate, defeats the right to patent. In the case of the Magalia Gold Mining Company v. Ferguson (6 L. D., 218), the Department held that where the final proof shows compliance with law the patent may issue, although the land was sold prior to the issuance of final certificate. The ruling in that case is fully applicable to the facts presented by the record herein. Before Breach sold the land he had done everything that the law required and had made due proof of such compliance and was therefore entitled under the law to patent for the land. Although the legal title yet remained in the United States the equitable title was in him.

Your decision is therefore reversed, and patent will issue in due course to said Breach.

PRE-EMPTION—FINAL PROOF—GRAZING LAND.

COLUMBUS T. BLACKMAN.

If land is fit only for grazing, that fact should be shown in explanation of such use of the land in lieu of cultivation.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 5, 1888.

I have considered the appeal of Columbus T. Blackman from your office decision of May 19, 1887, rejecting the proof offered by him in support of his pre-emption cash entry for the E. $\frac{1}{2}$ SW. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 12, T. 1 N., R. 26 W., McCook, Nebraska, and allowing him to

submit supplemental proof, after due publication, showing that he has cultivated the land.

Blackman filed declaratory statement for said land June 6, alleging settlement April 15, 1884. Proof was made November 15, and cash entry November 19, 1884. It is stated in the proof that the entryman, a duly qualified pre emptor, made settlement on the land April 15, and established an actual residence thereon May 13, 1884; that he built a sod house eighteen by sixteen, in which he and his wife have continuously resided. The improvements consist of the house and one and one-half miles of wire fence and are valued at \$300. He has used the land for grazing. The proof does not show that the grazing, alleged, was of stock owned by the claimant. In response to the question, "How much of the land, if any, have you broken and cultivated since settlement, and what kind and quality of crops have you raised?" the claimant said "none."

The proof was submitted at nearly the earliest period possible and for that reason invites especial scrutiny. The improvement shown is not sufficient. While cultivation is not essential in all cases, if the land is adapted to agriculture it is an evidence of good faith that will generally be required. If this land is fit only for grazing, the fact should be made to appear in new proof as explaining the failure to cultivate. The proof before me is unsatisfactory; you will therefore direct the local officers to give immediately written notice to the claimant, that his proofs heretofore submitted are rejected, and that his entry will stand canceled unless within sixty days from the service of such notice, he shall furnish proof satisfactorily showing full compliance with the law in good faith, and that upon failure to furnish such proofs within the time limited, they will cancel the entry accordingly; and that upon receipt of such further proofs as shall be proffered within the time, they will promptly report the same to you with their opinion thereon.

Your decision is modified accordingly.

REPAYMENT—COMMUTED HOMESTEAD.

SARAH D. SMITH.

A homesteader, having voluntarily elected to commute, is not entitled to repayment on the ground that the period of residence shown on final proof was sufficient to warrant the issuance of final certificate without the payment of the purchase price required on commutation.

The right of repayment is limited to the cases specified by the statute.

Acting Secretary Muldrow to Commissioner Stockslager, September 6, 1888.

I have considered the appeal of Sarah D. Smith from your office decision of March 3, 1887, rejecting her application for the repayment of purchase money, claimed to have been erroneously required by register

and receiver for the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$, SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ and Lots 2, 3 and 4, Sec. 12, T. 43 N., R. 6 W., Lewiston land district, Idaho.

The records show, that Smith made pre-emption filing No. 716, May 23, 1878, for said tract, under the name of Sarah D. Young, alleging settlement March 18, 1878, which she relinquished September 1, 1879. On the day of her relinquishment she made a timber culture entry—No. 328—covering the same tract, also in the name of Sarah D. Young. On January 30, 1881, she relinquished said timber culture entry and on the same day made homestead entry No. 1416 for the same land which she commuted to cash entry No. 1549, February 13, 1886.

It is alleged, that some time in 1879, soon after the relinquishment of her pre-emption filing she was married to one Smith and lived with him till July 8, 1880, that then she separated from him on account of his abusive conduct and returned to her said timber culture claim, and with the exception of six weeks from March 20, to May 8, 1882, has resided there ever since.

It is also alleged that appellant has occupied and resided upon the land since 1875, excepting seven months in 1881, (it is supposed, she means the time during which she lived with her husband in 1879, and 1880).

She has fifty acres under cultivation with other substantial improvements on the place.

The marriage between appellant and Smith, her husband was dissolved December 1883, as appears from the duly certified copy of the decree of divorce on file.

At the time of the submission of the final proof February 13, 1886, the register was of the opinion, that appellant having shown more than five years residence on the land, was entitled to the same under the homestead law by and under a regular final homestead certificate; while the receiver held, that she, under the proof, could obtain title to the land only by making payment for the same in pursuance of the provision of section 2301 of the Revised Statutes.

Thereupon, appellant, on said day, February 13, 1886, commuted her said homestead entry to cash entry, rendering payment for the land and receiving a receipt for the money paid.

April 16, 1886, Smith made her said application to your office "for repayment of purchase money erroneously required by the register and receiver," claiming that "having shown continuous residence for five years and seven months, exclusive of the time she lived upon her pre-emption claim, together with valuable improvements evidencing perfect good faith she is entitled to make final entry without payment of purchase money."

The application of the appellant was properly refused. She voluntarily commuted her homestead entry; she was aware of all the facts in the case, and having chosen to purchase the land, it is now too late to reconsider her resolution. The divided opinion of the local officers

presents no sufficient ground for relieving her from the effects of her voluntary act.

But there is another reason, why the action of your office, should be sustained. The power of repayment by the Secretary of the Interior is limited and defined by statutes. The existing legislation on the subject is as follows :

Section 2362 of the Revised Statues, provides for repayment in cases where a tract of land "has been erroneously sold by the United States, so that from any cause the sale can not be confirmed." The act of June 16, 1880 (21 Stat., 287), provides, that repayment may be made of fees and commissions and excess payments upon the locations of claims under section 2306, where said claims were after such location found to be fraudulent and void, and the entries or locations made thereon canceled, or where entries are canceled for conflict, "or where from any cause the entry has been erroneously allowed, and can not be confirmed," or where double minimum price has been paid for lands afterwards found not to be within the limits of a railroad grant, the excess \$1.25 per acre may be returned.

Appellant's application is not authorized by any of the above provisions, and therefore must be refused.

Your decision is affirmed.

SECOND TIMBER CULTURE ENTRY—"DEVOID OF TIMBER."

DAVID E. SAYER.

A second timber culture entry may be allowed where the first through mistake was made for land not subject thereto, and good faith is apparent.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 6, 1888.

I have considered the appeal of David E. Sayer, from your office decision of April 31, 1887, denying his petition to change his timber culture entry No. 15, made December 11, 1885, for the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 35, T. 3 S., R. 4 W., to the NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$, Sec. 34 same township and range, Little Rock land district, Arkansas.

Sayer's petition is made under oath and dated the 16th day of January, 1886. He therein sets out, that at the time of the making of his entry, he was mistaken regarding the law controlling timber culture entries, that he supposed if the land covered by the same was devoid of timber, the requirements of the law were fully met as to the character of the land; that prior to the making of his said application he read pages 28 to 32 of office circular of March 1, 1884; that he read on page 29 the following sentence "The land embraced in this application must be exclusively prairie land, or other land devoid of timber;" that he did not before or at the time of making the application read forms No. 4-073,—No. 4-385 and No. 4-386 added to the said circular; that said

section 35 has a small tract of timber on the NE. $\frac{1}{4}$ thereof, but the land embraced in the application is prairie land; that he supposed, when he made the said application he "was going strictly according to law when being guided by the instructions on page 29 as above quoted," and that "this mistake was made from the conflicting instructions in the circular above quoted." For these reasons, he asks to be allowed to make the said change.

These statements are corroborated by the affidavit of a witness, who asserts that he was present when Sayer made his said application and believes the said statements to be true.

Attached to the petition is the affidavit of two other witnesses, from which it appears that they were acquainted with the land in said sections 34 and 35, that "there is timber on section 35 and that section 34 is prairie and devoid of timber."

I am inclined to believe that Sayer was honestly mistaken and supposed that the land applied for was properly subject to entry under the timber culture law. His good faith is further indicated by the fact that as soon as he discovered his mistake and within a little more than thirty days, he took steps to remedy it. I am of the opinion, therefore, that his petition should be granted.

Your decision is reversed accordingly.

PRE-EMPTION—FILING—AMENDMENT.

UPMAN *v.* NORTHERN PAC. R. R. CO.

The right to amendment does not exist where the filing was made for the land intended to be covered thereby, although said filing would have embraced other land had the pre-emptor known that such land was open to appropriation.

Acting Secretary Muldrow to Commissioner Stockslager, September, 8, 1888.

I have considered the case of Theodore Upman *v.* the Northern Pacific Railroad Company, involving the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$, Sec. 21, T. 11 N., R. 20 W., Helena, Montana, on appeal by Upman from your office decision adverse to him.

It appears that Upman, who had made pre-emption filing, No. 6144, for the SW. $\frac{1}{4}$ of Sec. 22, in the township and range above described, applied to change his filing so as to have it embrace the W. $\frac{1}{2}$ of SW. $\frac{1}{4}$ Sec. 22, and the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ Sec. 21, said township and range. That is, he asked to be allowed to float his claim westward by dropping therefrom the east eighty of the tract filed for in Sec. 22, and taking in lieu thereof the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 21, adjoining on the west.

Your office decision denied this application, on the ground that said Sec. 21, is within the limits of the grant to the Northern Pacific Railroad, the map of definite location of which, opposite the tract, was filed July 6, 1882, at which time there does not appear to have been any claim to the tract which would except the same from the grant.

Upman appeals from that decision, and claims that under your office decision in the case of Shelton M. McClain, involving land in Sec. 23 of the same township, the tract in question is subject to settlement and entry, and being so, his application should be allowed. In that case it appears your office recognized McClain's claim, and appellant argues that what was true of Sec. 23, in said township 11, as to its being subject to entry, is also true as to Sec. 21; that, if one was properly open to settlement, the other is.

The railroad company objects to the allowance of the application, and avers that there is quite a difference between this case and that cited and in the status of the land involved in the two cases; that the statement in your office decision in the McClain case was that the tract claimed by him was "part of the Bitter Root valley above the Lo Lo fork, which was held by the Secretary of the Interior to be excluded from the grant to the Northern Pacific Railroad Company, although lying within the limits of the same;" that the above statement would not be true as to the tract in question. Counsel refers to the fact that, on June 21, 1872, instructions were issued to the surveyor-general of Montana, pursuant to the provisions of the act of June 5, 1872 (17 Stat., 226), to survey the lands in the Bitter Root valley lying above the Lo Lo fork; that under said instructions the surveys were made the same year (1872) and the plats filed in the local office in October, 1872, and January, 1873, reference to said survey being made in the report of the General Land Office for 1873 (pp. 11 and 136), where, after reference to the act of 1872 (*supra*), it is stated that "the land has been surveyed, instructions furnished to the district land officers, and nothing which this office can do in the premises is wanting to carry the law into effect." Counsel also states that the plat of survey of this township, 11 north, 20 west, thus made in 1872, under the act of June 5, 1872, embraced only the eastern two tiers of sections, that being all the land in said township *in the valley*; that in 1879, a survey of the remainder of the township (11) was made so far as the mountains would permit, and embraced two additional tiers of sections; that the plat of survey and the field notes show the land thus surveyed in 1879, to be mountainous timber land.

The contention, therefore, is, that the only lands which can possibly be regarded as falling within the description in the 11th article of the treaty of July 16, 1855, ratified in 1859 (12 Stat., 975), of "the Bitter Root valley above the Lo Lo fork," or within the law of June 5, 1872, and the departmental decision of January 22, 1883, in the case of Phelps *v.* Northern Pacific Railroad (1 L. D., 368), are those surveyed in 1872, under the instructions of that year, issued under the act of 1872; that from the surveys as made it is evident that the lands embraced in the survey of 1879, are not a part of the valley lands, within the purview of the treaty or the act above cited; that, the tract involved in the McClain case, referred to, falling within the survey of 1872, while that here in question falls within the survey of 1879, the two cases are not alike, and

the law and rule which governed the McClain case are not applicable to this.

An inspection of the records of your office verifies the statements of counsel that the survey of 1872 embraced only the two eastern tiers of sections in township 11, and that the tract in the McClain case falls within that survey, while the tract here in question falls outside of said survey and within the survey of 1879, described as mountainous land.

The above recital is made, simply to bring out the facts relative to the two surveys of 1872 and 1879, and not with a view to determining at this time the right of the railroad company to the tract in Sec. 21, for I do not find the record and the data before me such as to warrant a satisfactory conclusion on that point, nor do I find it necessary, in order to arrive at a conclusion on the application of Upman, to now determine the rights of the company.

The applicant states that he filed for the SW. $\frac{1}{4}$ of Sec. 22, that "he did not take up any part of Sec. 21, because the land was claimed by the Northern Pacific Railroad Company, and it was the general impression of the people in Missoula county including the people of said township, that all the odd sections in said township were within the withdrawal for the railroad company; that he was credibly informed that the land office at Helena, M. T., would reject all filings on odd sections, and it would be useless to attempt to make any filings on odd sections in said township; that because of the matters stated aforesaid, he did not file on any part of said section 21," and he now asks to be allowed to so change his filing as to have it cover the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said section 21, in lieu of the E. $\frac{1}{2}$ of SW. $\frac{1}{4}$ of Sec. 22. His showing as above does not present such reasons as would justify favorable action on his application.

Amendments or changes of entries or filings once made are allowed with great caution, and, as a rule, only where by excusable mistake the applicant failed to get the land which he intended to take, or which he supposed he was getting. In this case applicant admits that his filing for the tract in Sec. 22 was his deliberate act. It will not avail him to say that he would have had his claim include land in Sec. 21, had he not supposed that section was railroad land. He could have had his original filing cover the tract now desired, and have tested the question of the right of the railroad company by securing a decision of the land department thereon.

Instead of doing this, he chose to accept mere rumor as to the rights of the company, and to take a tract of one hundred and sixty acres, about which there appeared to be no dispute, and now makes himself secure for one hundred and sixty acres, by holding that originally filed for pending his application to change, as herein indicated.

His application can not be allowed under such a proceeding. His act in filing for the tract in Sec. 22 was a deliberate one. He settled

upon and filed for the tract which he then intended to claim. By that act he exhausted his pre-emption right, and can not now on a change of intention be permitted to change his filing as proposed.

For the reasons above stated, your office decision, denying the application of Upman, is affirmed.

EDDY *v.* ENGLAND.

Motion for review of departmental decision rendered February 9, 1888 (6 L. D., 530), in the above entitled case, overruled September 8, 1888, by Acting Secretary Muldrow.

SOLDIERS' ADDITIONAL HOMESTEAD—ACT OF JUNE 15, 1880.

PUGET MILL COMPANY.

The second section of the act of June 15, 1880, should not be construed to permit an entryman, or his attempted transferee, to purchase under an entry which depends for its inception right upon false and fraudulent statements or forged documents. The allowance of a cash entry under said act by direction of the General Land Office, will not preclude a departmental adjudication as to the validity of such entry. The right of purchase under said act extends to a bona fide transferee claiming under an additional entry, although the original entry was canceled for failure to submit final proof within the statutory period.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 8, 1888.

By your office decision of April 15, 1887, the hereinafter mentioned cash entries, under act of June 15, 1880, previously covered by soldiers' additional homestead entries, were on that day held for cancellation, for the reason that the additional homestead entries were fraudulent or illegal. The cash entries are as follows:

8074 Puget Mill Co., SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, E. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 30, T. 26 N., R. 7 E.
 9159 " " " W. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 36, T. 26 N., R. 7 E.
 9160 " " " W. $\frac{1}{4}$ NE. $\frac{1}{4}$, Sec. 32, T. 27 N., R. 7 E.
 9161 " " " N. $\frac{1}{2}$ NW. $\frac{1}{4}$, NW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 20, T. 32 N., R. 5 E.
 9164 " " " W. $\frac{1}{4}$ NW. $\frac{1}{4}$, NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, Sec. 10, T. 31 N., R. 4 E.
 9165 " " " N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 18, T. 31 N., R. 5 E.
 9194 " " " E. $\frac{1}{4}$ NW. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 18, T. 31 N., R. 5 E.

all of Olympia land district, Washington Territory.

From the said decision the Puget Mill Company, grantee of the several entrymen, instituted an appeal to the Department, and the same is now before me for consideration.

Cash entry No. 8074 covered soldier's additional homestead entry No. 2388, made in the name of M. J. Miller, January 20, 1876, final certificate No. 560 issued February 9, 1876.

Your office on June 16, 1883, decided that the said additional homestead entry "is based upon papers of doubtful execution, and the party seems

never to have served in the United States army, as appears from the report of the War Department to this office, dated July 25, 1876, and sixty days from receipt of notice of this letter will be allowed the party in interest within which to show cause why the entry should not be canceled, or to file in your (the local officers') office a proper application (accompanied by the proofs specified on page 17 of the circular of this office, dated October 1, 1880) to purchase the land in said entry under the act of June 15, 1880."

Miller had executed a deed to the appellant of the lands covered by said entry June 15, 1876; the latter made cash entry for the lands January 7, 1881.

The record shows that Miller made his additional homestead entry, by virtue of his service in the army of the United States in Company L, Third Regiment, Arkansas Cavalry Volunteers. He filed a paper claimed to be a copy of his discharge, stating that he was enrolled in said company August 3, 1864, to serve three years, and was discharged May 15, 1865. Attached to the entry papers is a certificate from the Secretary of War, dated July 25, 1876, that "the name M. J. Miller is not borne on the rolls of Company L, Third Regiment, Arkansas Cavalry Volunteers, as shown by the records of this Department."

Cash entry No. 9159 covered soldier's additional homestead entry No. 2387 made in the name of Eli S. Forest, January 20, 1876; final certificate No. 560 issued February 9, 1876.

Your office by decision of December 16, 1876, held the said additional entry for cancellation, because based upon spurious and forged papers. August 30, 1884, your office, cancelling the said entry, decided "You (the local officers) will inform all parties in interest that sixty days will be allowed within which to file in your office an application (accompanied by the government's price of the lands and the proofs specified, on pages 16 and 17 of circular of this office, dated March 1, 1884,) to enter the land under the act of June 15, 1880."

Forest had executed a deed to the appellant of the lands covered by said entry, June 15, 1876; the latter made cash entry for the lands January 15, 1885.

The records show that Forest, when he applied to make his said additional homestead entry, by virtue of his service in the army of the United States, in Company B, Seventh Regiment, Missouri State Militia, Cavalry Volunteers, filed a paper, claimed to be a copy of his discharge, stating that he was enrolled in said company on July 28, 1863, to serve three years, and was discharged July 11, 1865. Attached to the entry papers is a certificate from the Secretary of War, dated July 25, 1876, that "the name Eli S. Forest is not borne on the rolls of Company B, Seventh Regiment, Missouri State Militia, Cavalry Volunteers, as shown by the records in this Department."

Cash entry No. 9160 covered soldier's additional homestead entry No. 2378, made in the name of William Sewell, January 20, 1876; final certificate No. 570 issued February 9, 1876.

Your office on September 29, 1884, decided that the said additional entry is based upon forged and spurious papers, and directed the local officers to inform all parties in interest, and "that sixty days from receipt of notice of this letter will be allowed within which to show cause why the entry should not be canceled, or to file in your office an application (accompanied by the government's price of the land and the proofs specified on pages 16, 17 of circular of March 1, 1884,) to purchase the land under the act of June 15, 1880."

The land embraced in the said entry was deeded to appellant June 15, 1876, and cash entry was made by the latter January 15, 1885.

The record shows that Sewell made his additional homestead entry by virtue of his service in the army of the United States in Company B, Seventeenth Regiment, Veteran Reserve Corps Volunteers. He filed a paper, claimed to be a copy of his discharge, stating that he was enrolled January 8, 1861, to serve three years and was discharged July 9, 1864. Attached to the entry papers is a certificate from the Secretary of War, dated July 25, 1876, that "the name of William Sewell is not borne on the rolls of Company 'B', Seventeenth Regiment, Veteran Reserve Corps Volunteers, as shown by the records of this Department."

Cash entry No. 9161 covered soldier's additional homestead entry, No. 2891, made in the name of R. P. Vaughan, March 18, 1878, final certificate No. 871 issued March 18, 1878.

Your office, on August 30, 1884, rendered a decision by which the said additional entry was held illegal, because the original homestead entry of Vaughan was canceled August 4, 1879.

The parties in interest were allowed, by your said office decision, to show cause within sixty days from notice, why the entry should not be canceled or to file with the local officers an application to purchase the land the same as in the entries hereinbefore noted.

Vaughan had deeded the land February 18, 1880, to appellant, Puget Mill Company.

Your office, by decision of December 12, 1884, allowed "the present claimant under mesne conveyances from the entryman, sixty days within which to purchase the land under the act of June 15, 1880. The appellant made cash entry for the said lands January 15, 1885.

It appears that the original homestead entry was canceled August 4, 1879, because the entryman did not make his final proof for the same within the statutory limitation.

Cash entry No. 9164 covered soldiers' additional homestead entry No. 2404, made in the name of James A. Sizemore, January 26, 1876; final certificate No. 580 issued February 10, 1876.

Your office, on September 29, 1884, rendered a decision, by which the said additional entry was held illegal, because "based upon spurious papers." The parties in interest were allowed, by your said decision, to show cause within sixty days from notice, why the entry should not be

canceled, or to file in the local office an application to purchase the land the same as in the entries hereinbefore noted.

Sizemore had deeded the lands, June 15, 1876, to appellant, Puget Mill Company, which made cash entry for the same January 19, 1885.

It appears that the records of the original homestead entry of James A. Sizemore bear his signature in good, legible handwriting, wherever his signature is attached thereto, inclusive of his final affidavit, bearing date August 5, 1873; and that the party making the additional entry signed by making the mark of a cross, at the dates of September 3, 1875, and January 26, 1876. No other discrepancy or irregularity is apparent on the face of the papers, or has been pointed out by your office.

Cash entry No. 9165 covered soldier's additional homestead entry No. 2412, made in the name of J. M. Prine, January 26, 1876; final certificate No. 575 issued February 10, 1876.

Your office, on November 4, 1884, decided the additional entry to be illegal, because "the signature of the party does not agree with the signature of the party of the same name to the original homestead papers, upon which the entry is based, and the military service claimed can not be verified by the records of the War Department." The parties in interest were allowed by your said decision to show cause, within sixty days from notice, why the entry should not be canceled, or to file in the local office an application to purchase the land under the act of June 15, 1880, as in the additional entries hereinbefore noted.

Prine conveyed the land by deed to the appellant June 15, 1876, and the latter made cash entry January 19, 1885.

The records show that Prine, when he applied to make his said additional homestead entry by virtue of his service in the army of the United States, in Company L Sixth Regiment, Missouri Cavalry Volunteers, filed a paper, claimed to be a copy of his discharge, stating that he was enrolled in said company July 21, 1864, to serve three years, and was discharged on September 12, 1865. Attached to the entry papers is a certificate from the Secretary of War, dated July 25, 1876, that "the name of James M. Prine is not borne on the rolls of Company L, Sixth Regiment, Missouri Cavalry Volunteers, as shown by the records in this Department."

Besides, it appears that the signature of the party making the additional entry fails to agree with the signature of James M. Prine, who made the original entry.

Cash entry No. 9194 covered soldier's additional homestead entry No. 2410, made in the name of Susan King, widow of Joseph S. King, January 26, 1876; final certificate No. 577 issued February 10, 1876.

Your office decided, January 16, 1885, that entry No. 2410, was held for cancellation as illegal and fraudulent, for the reason that "Susan King, who made the original homestead entry, upon which said additional homestead entry is based, informed your office in a letter, dated December 27, 1884, that her deceased husband was not named Joshua

S. King, but was named John Wesley King, and that he never served in the U. S. Army during the recent rebellion." By your said office decision, the parties were allowed to show cause within sixty days from notice why the entry should not be canceled, or to file in the local office an application to purchase the land under the act of June 15, 1880, the same as in the other additional entries hereinbefore mentioned and described.

A deed is attached to the papers of the said cash entry, by which it appears that a person, naming herself Susan King, conveyed the land covered by the said entry to the appellant June 15, 1876; and the latter made cash entry for the said land February 10, 1885.

The record shows that the person of the name of Susan King or assuming such name made the said additional homestead entry by virtue of the services of one Joseph S. King, of whom she is claimed to be the widow, in the army of the United States, in Company E, Third Regiment of Arkansas Cavalry Volunteers. The party made affidavit, bearing date September 13, 1875, in which it is set out, that she is the widow of Joseph S. King, that the latter served as a soldier in the said company, and was honorably discharged on or about June 30, 1865, after serving more than ninety days. Affiant further alleged that she was married to the said Joseph S. King on July 15, 1855, who died August 30, 1866. Attached to the entry papers is a certificate from the Assistant Adjutant General, that one Josiah King was enrolled on October 15, 1863, in Company E, Third Regiment of Arkansas Cavalry Volunteers, mustered into service November 19, 1863, to serve three years; that on the muster roll of said company for the months of November and December, 1863, he was reported as Joseph S. King, and was so borne on all subsequent rolls; that he was mustered out with said company at Lewisburg, Arkansas, June 30, 1865. Attached to the papers is also a letter, signed by Susan King, dated December 27, 1884, addressed to the General Land Office, reading as follows: "In reply to yours of the 2d instant, would say, that I homesteaded NW. of SE. Sec. 7, T. 9 N., R. 22 W., Johnson county, Arkansas, containing forty acres, as the deed from the land office at Washington City, as well as the county records, will show; my husband John Wesley King did not serve in the U. S. Army during the late war." The land described in the letter is the land covered by the original homestead entry, upon which the additional entry was based.

Cash entries numbered 8074, 9159, 9160, 9165 and 9194, founded on soldiers' additional homestead entries made in the names of Miller, Forest, Sewell, Prine and King, respectively, present similar facts: in the four entries first named the entryman was never a member of the company alleged by him; in support of such allegation, in each case, the entryman filed a copy of his pretended discharge, which is shown to be forged and spurious by the records of the War Department. In the case of entry No. 9194, based on additional entry made in the name

of King, it is shown by the records of the Department of War and the letter of the genuine Susan King, that the application for the additional homestead was founded on fraud and perjury. The signature "Susan King" appearing in the affidavit for the additional entry and the signature of Susan King in the letter appear not to be in the same handwriting.

The question of the validity of these five cash entries is controlled by the decision in the case of J. S. Cone (7 L. D. 94). It was there decided that the second section of the act of June 15, 1880 (21 Stat. 237) should not be construed to permit an entryman, or his attempted transferee, to purchase land covered by an entry which depended for its inceptive right upon false and fraudulent statements and forged documents. This opinion is still adhered to.

It is argued on the part of the appellant that, inasmuch as the cash entries were made in compliance with the instructions, and under the direct authority, of your office, and in harmony with the decisions of this Department, the entries should be sustained; that when the entries were made under the act of June 15, 1880, your office was in possession of all the facts, the entries were, therefore, *res judicata*, and any new and different construction of the statute should apply to cases arising thereafter only.

The attorney of the appellant has failed to refer in his argument to a decision of this Department sustaining a cash entry based upon facts similar to the facts presented in these entries.

As to the question, whether these entries having been made in conformity with your office decisions previously rendered, are *res adjudicata*, and could not therefore be disturbed, the position taken by appellant's attorney cannot be accepted. Conceding that the legality of these cash entries was *res adjudicata* so far as your office was concerned when the decision appealed from was rendered, the Secretary of the Interior is not precluded from considering the whole question whenever it comes before him; and if, after a careful investigation he concludes that any entry is illegal, that it should not have been made, he has a right, and it is his duty to say so, and direct its cancellation. For in so doing he is not exceeding his jurisdiction, but is "exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands." *Lee v. Johnson* (116 U. S., 48); *Charles W. Filkins* (5 L. D., 49); *Adolph Peterson* (6 L. D., 371). Cash entries numbered 8074, 9159, 9160, 9165 and 9194 should therefore be canceled.

The facts in the case of Sizemore's additional entry, upon which cash entry No. 9164 is founded present grounds of suspicion that the party making the additional entry was not James A. Sizemore who made the original entry, but a man falsely pretending to be the latter. I can not conclude that fraud is proven because Sizemore signed his name in legible handwriting in 1873, and the party making the additional entry

in 1875 signed by making his mark. From this fact alone fraud can not be inferred conclusively. Sizemore might have lost his hand or the use of it during the two years intervening between the original and the additional entry.

An opportunity, therefore should be given to Sizemore and the Puget Mill Company, his presumed grantee, to submit to your office affidavits in proof of the identity of the party making the additional entry as James A. Sizemore, who made the original entry.

The remaining cash entry, No. 9161, based upon the soldiers' additional entry of Vaughan, has been considered and the conclusion reached that it should be sustained. The additional entry became illegal by reason of the cancellation of the original entry August 4, 1879. The entryman having failed to make his final proof upon his said original entry within the statutory limit.

By your office decision of December 12, 1884, the parties in interest were allowed to purchase the lands covered by said entry under act of June 15, 1880. The Puget Mill Company put upon the record its deed from Vaughan, dated February 18, 1880, for the said lands. The company made the said cash entry No. 9161 January 15, 1885. Your office canceled the same by your said decision of April 15, 1887.

The said additional entry did not depend for its inceptive right upon false and fraudulent statements and forged documents. The said entry was made prior to June 15, 1880; the land entered was properly subject to entry; there was no adverse claimant, nor had a contest been initiated at the time of purchase. The cash entry therefore should be allowed to stand. Reference is made to the case of J. S. Cone, *supra*, where comment is made upon the various decisions of this Department relative to the right of purchase under said act. The act was intended to afford relief to those who had failed to comply with the law. Vaughan could have invoked it in reference to his original as well as additional entry, why can not the Puget Mill Company, his grantee, apparently *bona fide*, be permitted to take advantage of it?

The decision therefore embracing the said cash entries herein considered is, that entries, numbers 8074, 9159, 9160, 9165, and 9194, are canceled, and that entry No. 9161 be sustained and patent issued thereon, and that entry No. 9164 be allowed to stand, but Sizemore and the appellant or either of them is required to submit to your office, within ninety days from the notice hereof, proof by affidavits that the party making the soldier's additional entry, No. 2404, was in fact the identical James A. Sizemore, who made the original entry upon which the additional entry was founded; such proof to be taken either at some local office or before a clerk of a court of record, and be accompanied by a certificate of the officer before whom it is taken as to the credibility and standing of each witness. In case such evidence is not furnished within the said period, the said cash entry will be canceled.

Your decision is modified accordingly.

OSAGE LAND—FINAL PROOF.

DELAPP *v.* JACKSON.

As between two settlers on Osage land who were both in default in the matter of submitting final proof within the period required by the regulations, the right of entry must be accorded to the one who was first in settlement and making proof.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 13, 1888.

I have considered the case of James Delapp *v.* Wm. V. Jackson on appeal by the former, from your office decision of February 16, 1887, rejecting his final proof under his pre-emption filing for the NW. $\frac{1}{4}$, Sec. 15, T. 34 S., R. 17 W., Larned, Kansas land district, and allowing Jackson's pre-emption entry for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ said section to remain intact.

This land is a part of the Osage Indian trust and diminished reserve lands.

Jackson filed declaratory statement for the N. $\frac{1}{2}$ NW. $\frac{1}{4}$ the SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ of said section April 30th, alleging settlement March 16, 1885.

Delapp filed declaratory statement for the NW. $\frac{1}{4}$ of said section April 15, alleging settlement April 1, 1885.

The statement in said decision that these filings and final proof covered the same tracts is incorrect.

Both parties advertised to make final proof before S. P. Duncan, a notary public at Nešcatunga, Kansas, on December 24, 1885. Jackson made his proof on that day and executed the final affidavit before the clerk of the district court of Comanche county the same day. This proof was received by the local officers on December 28, who approved the same, received the payment required at the time of offering the final proof and issued receipt therefor the same day.

Delapp made his proof on the day set therefor and executed the final affidavit before the clerk of the probate court of Comanche county, on December 26th. This proof was received by the local officers on December 28th after they had approved that of Jackson. Delapp's proof was rejected because of the fact that Jackson's proof was first received. Delapp applied for a hearing, alleging a prior settlement by him and that Jackson had not complied with the law. A hearing was had, beginning June 21 and ending August 21, 1886. The local officers found from the testimony that Jackson made a settlement on the land claimed by him on March 16, but that he "never established or maintained a *bona fide* residence upon the tract in dispute," that Delapp went on the land the last of March but that he had not an actual residence there but made his home with his father who lived at a distance of one and a half miles from this land, and decided that both claims should be rejected.

Both parties appealed to your office where the final proof of Delapp was rejected and Jackson's entry was allowed to remain intact.

The following facts are established by a preponderance of the evidence in the case.

Jackson went on this land and made a settlement there March 16, 1885, as found by the local officers. He proceeded at once to build a house, part dug out and part sod, eleven by sixteen feet, in which he established a residence about the last of April. He caused ten acres of breaking to be done which he planted to corn that season. At date of final proof he had on the land the house above described, a well, ten acres of breaking, forty-eight fruit trees and two hundred forest trees. He seems to have brought himself within the requirements of the law.

Delapp went on the land about the first of April, built a sod and dug out house, dug a well, did about fourteen acres of breaking, of which seven or eight acres were cultivated that season and planted eighty-eight fruit trees and five hundred forest trees.

It will thus be seen that the improvements of the two claimants were very much the same in character and amount and that there were equally in default in not making proof within the period prescribed by the regulations, although each was equally in earnest in following up his claim as it is shown that both were there cultivating and improving the land at the date of the hearing, August 21, 1886. Jackson, however, made the prior settlement, completed his proof first and submitted the same, together with the purchase money required at that time before Delapp's proof reached the local officers. Under these circumstances the land should be awarded to Jackson and his entry will remain intact. Delapp's filing will be canceled as to the land in dispute with the privilege of completing his entry for the tract included in his filing which is not involved in this controversy, or relinquishing the same without thereby prejudicing his right to file for other land.

Your said office decision is accordingly modified.

HOMESTEAD ENTRY—PROOF REQUIRED OF HEIRS.

SKIDDIE V. COOK.

The heirs of a deceased homesteader are not required to maintain residence upon the land, but to continue cultivating and improving the same until the expiration of the statutory period.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 14, 1888.

I have considered the appeal of Skiddie V. Cook, widow of Charles M. Cook, from your office decision dated April 20, 1887, rejecting her final proof and holding for cancellation homestead entry No. 11,092, for the SW. $\frac{1}{4}$, Sec. 30, T. 16 S., R. 2 W., Montgomery land district, Alabama.

The record shows that Charles M. Cook, made homestead entry for said tract December 30, 1880, and established actual residence thereon with his family in the spring of 1881.

On September 1, 1883, special agent Mabson reported that claimant had not complied with the law in respect to residence. September 20, 1884 your office held the entry for cancellation and instructed the local office to "notify Cook that he would be allowed 60 days to show cause why the same should not be canceled."

On August 12, 1884, Cook's entry was finally canceled for failure to show cause.

In December 1884, Cook filed several affidavits praying for a re-instatement of his homestead entry.

In the beginning of May, 1885, your office was informed by a letter from J. P. Knabe, of Montgomery, Alabama, as attorney for the widow of claimant, that Mr. Cook, had died (since filing his application for re-instatement) "of chronic diarrhea with which he had been suffering several years, scarcely able to do anything. His widow and five small children have nothing in the world left them but this homestead. She remained continuously on the land with her husband and children until a few weeks before his death, when she moved him to New Castle where he could have the advantage of better medical attention. She is now again back on the land with the children and prays that the cancellation of the homestead be set aside, and that she be allowed to make final proof at the expiration of the five years."

On May 15, 1885, your office in reply to said letter wrote to the local officers as follows, viz :

It appears, from the records of this office, and from affidavits submitted, that Cook's application was filed December 30, 1880; that he resided upon the land until the middle of the year 1882. When he went to New Castle, some three miles distant to work at his trade in order to support his family; that he subsequently returned to the land when he was taken sick and at the time the notice that his entry was held for cancellation was received, he was utterly unable to do anything and was supported by charity. In view of the above, and the cancellation of the entry upon the ex parte report of the special agent and that the widow of the claimant is now residing upon the land, no adverse claim having attached, and Mrs. Cook, will be allowed to make proof when she can show five years continuous residence. You will so advise her.

On June 26, 1886, in accordance with published notice Skiddie V. Cook as widow of Charles M. Cook deceased, offered final proof before the clerk of the circuit court for Jefferson county, Alabama, which was transmitted to the local office, and on June 30, 1886, the register endorsed thereon the following: "Held up awaiting result of contest. Signed S. J. Harris, Reg."

On October 1, 1886, the register transmitted the final proof to your office with the following statement, viz :

Sir: Enclosed find final proof of S. V. Cook, widow of Charles M. Cook, who made Hd. 11,092. . . . which we wish to submit for your decision. This proof was filed in June, but held up to await the result of a contest then pending, instituted by

Wm. A. Brown, to have the Hd. canceled for abandonment and non-compliance with the Hd. law. At the hearing on July 28, 1836, we thought contestant had failed to bring forward sufficient proof and so gave decision in favor of the contestee. . . . I am satisfied that the law has never been complied with by Charles M. Cook, nor by his widow . . . as she testified. Therefore wish to submit the proofs to your decision.

Signed J. G. HARRIS, *Register*.

The final proof shows that at the time Charles M. Cook, made homestead entry he was a citizen of the United States and duly qualified to make said entry; that he died on March 8, 1885, leaving Skiddie V. Cook, his widow and two minor children surviving him. That since the date of her husband's death Mrs. Cook and her children occupied the tract continuously except when necessarily temporarily absent at New Castle, where she conducted a miners boarding house and thereby earned a means of subsistence for herself and her children. She improved, cultivated and cropped part of the tract each year since her husband's death. The improvements consisted of a log house, an orchard and garden and about two acres cleared and fenced—value \$100. It also appears that her late husband never made any other entry or filing for public land. On January 26, 1887, special agent Siebels of your office, visited the the tract and on February 10th same year reported among other things as follows, viz:

There are about five acres of the land cleared and about one acre has been fenced and cultivated by Mrs. Cook. No depredations have been committed. The entryman repaired a dwelling house built on the entry by the Coalburg Company. The improvements were worth \$35. Charles M. Cook, died in the spring of 1835. After his death his widow had two small pieces of land cleared, fenced and cultivated in corn; she is now having three and one-half acres more cleared, fenced and cultivated and is having lumber hauled to build a new dwelling. All the improvements will be worth \$200. Charles M. Cook, established his residence on his entry in the spring of 1831. He lived there with his wife and two children at intervals during the years 1881, 1882, and 1883. It was not continuous owing to very bad health; finally his health was so shattered he moved to New Castle to get medical aid and died there in the spring of 1885. She is keeping a boarding house in New Castle to get means to improve the entry. . . . Charles M. Cook, made this entry for his own and his family's exclusive use and benefit. . . . Since his death his widow has improved and cultivated the entry as above stated. There was no fraud.

To the 15th question, i. e., "Have any legal proceedings been instituted?" the special examiner answers, "None," and recommended that "Mrs. Cook should be allowed to keep the entry." On April 20, 1887, you rejected her final proof and held the entry for cancellation on the ground that Mrs. Cook failed to comply with the requirements of your letter of May 15, 1885, as to continuous residence upon the land.

* * * * *

The record shows that for good and sufficient reason your office reinstated the canceled entry of Charles M. Cook, and having done so, his heirs according to the decisions of this Department, were not required to reside upon the tract after his decease, they were only required to continue improving and cultivating the land, therefore, and

inasmuch as the final proof and the report of the special agent clearly shows a compliance with said requirement in good faith and in the absence of any adverse intervening claim I must reverse your decision and direct that the final proof already made be accepted and the entry pass to patent to the heirs of said Charles M. Cook.

DESERT LAND ENTRY—APPLICATION.

JAMES W. SEXTON.

An application to make desert land entry must show personal knowledge of the applicant as to the character of the land included therein.

Acting Secretary Muldrow to Commissioner Stockslager, September 17, 1888.

I have considered the case arising upon the appeal of James W. Sexton from your office decision of February 9, 1887, sustaining the action of the local officers in rejecting his application to enter under the desert land act the NW. $\frac{1}{4}$ SW. $\frac{1}{4}$, Sec. 29, T. 27 N., R. 7 W., Helena district, Montana.

The ground for said rejection by your office is, "that said act contemplates that persons entering land thereunder shall have a *personal knowledge* of the land they propose to enter, obtained from an examination of each and every legal sub-division thereof, which fact must be set forth in the declaration."

The action of the local officers and of your office is in accordance with the directions contained in the circular of instructions of June 27, 1887 (5 L. D. 708), approved by the Department, the fifth paragraph of which says (addressing local officers):

Your attention is called to the terms of this declaration as provided by existing regulations (form 4—274), which are such as require a personal knowledge by the entryman of lands intended to be entered. The required affidavit can not be made by an agent nor upon information and belief; and you will hereafter reject all applications in which it does not appear that the entryman made the averments contained in the sworn declaration upon his own knowledge derived from a personal examination of the lands.

After a careful examination of the argument of counsel for claimant I find no reason for abrogating the ruling above quoted, and therefore affirm your decision.

PRACTICE REHEARING.

DIXON *v.* SUTHERLAND.

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.

Acting Secretary Muldrow to Commissioner Stockslager, September 17, 1888.

This is a motion for review of the decision of the Department of May 22, 1888, affirming the action of your office holding for cancellation the timber-culture entry of defendant.

It appears from the record that contest was initiated against said entry by the contestant Dixon, alleging failure to break, plant and cultivate. Testimony was ordered to be taken before R. B. Pierce commissioner, May 20, 1885, at which time the plaintiff offered testimony, the defendant being in default.

When the case was taken up by the local office May 30, 1885, the defendant appeared by attorney and moved to dismiss the case upon the ground that she had not been properly served with notice, said notice having been served by the plaintiff in person. The local officers overruled said motion and held that plaintiff had sustained his charges as to the failure of defendant to plant and cultivate as required by law.

Upon the appeal of defendant you sustained said action, holding that service of notice by the plaintiff in person was in accordance with the rules, which decision was affirmed by the Department.

The only ground urged in support of said motion is that defendant employed an attorney to represent her in said case who advised her that service upon her by the plaintiff in person was not legal service and would not bind her to any proceedings had under it and said attorney advised her to stay away from the trial. That, relying upon and acting under such advice, she did stay away from the taking of the testimony for that reason alone. That defendant has a good defense to said contest and asks for a rehearing for the purpose of offering said defense.

The defendant has had full opportunity for presenting her defense and having acted upon the erroneous advice of her counsel upon a purely technical ground, she must abide by the decision of the Department.

The motion is refused and these papers are herewith transmitted to your office for file.

SWAMP LAND GRANT—FIELD NOTES OF SURVEY.

KORTSCH *v.* STATE OF MINNESOTA.

The adoption of the field notes of survey as the basis of adjusting the swamp grant will not estop the government from making inquiry into the character of a tract, although, from said field notes, it may appear to be of the character granted.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 18, 1888.

I have considered the appeal of the State of Minnesota from your office decision of February 21, 1887, holding for rejection the claim of said State for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ and the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, Sec. 31, T. 125 N., R. 39 W., Fergus Falls land district, Minnesota, under the swamp land grant act of March 12, 1860.

The case arose upon the application of Gustave A. Kortsch to enter said tracts under the timber culture law; and upon his allegation that the tracts were not swamp, a hearing was ordered. Testimony was pro-

duced showing that but a small portion of the land was swamp. The State offered no testimony. The local officers found that the lands were not swamp. On appeal you affirm the finding of the local officers.

It appears that the tracts in controversy are shown by the field notes of the survey to be swamp. In the case of *Lachance v. Minnesota* (4 L. D., 479), Secretary Lamar said:

As I understand the matter, the acceptance of the field notes as the basis of settlement simply makes them *prima facie* evidence of the condition of any given tract; it is not tantamount to an assertion that the field notes shall govern always and absolutely, irrespective of demonstrated fraud or falsity, but it places the burden of proof of such fraud or falsity on the party alleging it. The grant in question was a grant of swamp land; and if it can be proven affirmatively that any given tract was not swamp land at the date of the grant, then such tract did not pass by the grant.

The principal witness at the hearing was W. H. Sanders, a surveyor of twenty years experience in Minnesota, who made a survey of the land in controversy in the latter part of September, 1886. From such survey he made a map from which it appears that there are three tracts of swamp land of 10 acres 7.45 acres and 2.90 acres, respectively and each upon a separate legal subdivision. Said lands were never certified to the State as swamp lands.

The general government has reserved to itself the right to supervise the selecting of swamp lands and holds them subject to its control until they shall have been approved and patented to the State. (*Lachance case, supra*). The government, therefore, was not estopped from making inquiry into the character of the lands in controversy. The State was given due notice to appear and defend its selection, but it chose to offer no testimony contenting itself with a cross-examination of the witnesses for Kortsch. The testimony shows that the land is not of the character that passes under the swamp grant, and that it is five feet above the level of the stream and suitable for agriculture; and that there is no evidence or indication that there has been any change in the character of the land during the twenty-six years that have elapsed since the grant to the State was made. Upon such a showing—uncontradicted—I am of opinion that the field notes of the survey were false, if not fraudulent, and I affirm your decision rejecting the claim of the State to the tracts in controversy.

FINAL PROOF—PUBLICATION OF NOTICE.

DWIGHT W. ENSIGN.

New publication and proof will be required, where the publication was not made in the newspaper published nearest the land.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 18, 1888.

I have considered the appeal of Dwight W. Ensign from your office decision of April 4, 1887, rejecting his commutation homestead proof

for the W. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 22, and the NW. $\frac{1}{4}$ NW. $\frac{1}{4}$ of Sec. 27, T. 158 N., R. 66 W., Devils Lake district, Dakota, and suspending both the original entry and the cash certificate issued on said proof.

The action of your office was based on the fact that the notice of intention to make proof was published in the North Dakota Inter Ocean a paper published at Devils Lake, Dakota, twenty-eight miles distant from the land, whereas it should have been published in the Towner County Tribune, a newspaper published at Cando, about three miles distant from the land. The claimant is a clerk in the local office at Devils Lake, and he states in an affidavit that the publication was made in the "Inter Ocean" to save expense, the publisher making no charge therefor. This irregularity calls for new publication and new proof.

Your decision rejecting the proof and suspending the cash certificate and the original entry and allowing the claimant to submit new proof, properly made in accordance with law and official regulations, is affirmed.

JACOBS *v.* CANNON.

Motion for review of departmental decision rendered April 16, 1888 (6 L. D., 623), overruled by Acting Secretary Muldrow, September 18, 1888.

PRACTICE—FINAL PROOF PROCEEDINGS. RULE 35 OF PRACTICE.

MARTENSEN *v.* MCCAFFREY.

An adverse claimant, who appears in final proof proceedings before a clerk of court and objects to the submission of said proof, is not required to submit his testimony before said officer, in the absence of an order under rule 35 of practice authorizing such action.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 18, 1888.

I have considered the case of Peter C. Martensen *v.* Joseph McCaffrey on appeal of the latter, from your office decision of February 17, 1887, suspending the final proof of both parties for pre-emption entry for the SW. $\frac{1}{4}$, Sec. 9, T. 27 N., R. 13 W., Niobrara, Nebraska land district, and ordering a hearing on the contest initiated by Martensen's affidavit.

The record shows that said McCaffrey filed pre-emption declaratory statement for said land February 16, 1884, alleging settlement February 8, 1884, and Martensen filed declaratory statement April 30, 1886, alleging settlement April 24, 1886.

August 6, 1886, McCaffrey advertised his intention to make final proof October 19, following, before the clerk of the district court at O'Neil, Nebraska.

The contestant Martensen appeared at the said time and place and protested against McCaffrey's proof and filed an affidavit of contest, alleging that about two years previously said McCaffrey built a house on the tract which was unsuitable for cold or rainy weather, and that neither himself nor family had resided therein until after his, Martensen's, settlement thereon, but that said McCaffrey and family had, during said time, resided upon his timber claim a half mile distant therefrom, and that no part of said tract had, prior to his own settlement, been cultivated.

The said clerk before whom said testimony was being taken required the contestant to then and there, introduce testimony in support of his contest, no order for the taking of such testimony before him having been made by the local officers. This Martensen refused to do, and for that reason the local officers on October 23d, on McCaffrey's motion dismissed his protest, from which decision of the local officers Martensen appealed.

On November 8, 1886, Martensen presented his final proof which was rejected by the local officers on McCaffrey's motion on the ground that by his failure to furnish testimony October 19, as heretofore set forth, he waived his right as an adverse claimant.

Rule 35 governing practice in the government land offices provides, in the first sub-division thereof, as follows :

In the discretion of registers and receivers testimony may be taken near the land in controversy before a United States Commissioner, or other officer authorized to administer oaths, at a time and place to be fixed by them and stated in the notice of hearing.

It does not appear that the register and receiver in the case at bar had exercised their discretionary powers by directing the time and place of a hearing before the clerk and consequently contestant was not required to introduce his witnesses before him.

Your office held that Martensen was entitled to contest McCaffrey's claim, and suspending proof of both parties referred the case back to the local officers for hearing upon the contest.

In this I find no error. Your decision is therefore affirmed.

PRE-EMPTION SECOND FILING.

H. C. MILLER.

The right to make a second filing will not be accorded, where the first was illegal because the pre-emptor removed from land of his own in the same State to reside on the land embraced within said filing.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 18, 1888.

I have considered the appeal of H. C. Miller from your office decision of April 1, 1887, denying his application for a restoration of his pre-emption right.

It appears from the records of your office that Miller filed declaratory statement for the SE. $\frac{1}{4}$, Sec. 3, T. 2 S., R. 28 W., Oberlin, Kansas, May 12, alleging settlement May 8, 1884 and on May 28, 1885, submitted final proof thereon. The said proof was met by a protest filed by J. F. Fraker, who on March 21, 1885, had made homestead entry of said tract. A hearing was had and the local officers found that Miller's filing was illegal for the reason that he had moved from land of his own in the same State to settle upon the land he had filed for. On appeal you held the filing for cancellation and advised the local officers that "not only does the testimony tend strongly to show that defendant (H. C. Miller) removed from his homestead in violation of law, but it is evident that he has never in good faith complied with the requirements of the pre-emption law in the matter of residence on the land." From this decision no appeal was taken.

The homestead from which the local officer found that Miller had removed was in the same neighborhood and he had received receiver's final receipt March 3, 1884.

In his present application Miller swears that his first filing was made on the advice of a person who was presumed to know and by acting on said advice and by reason of said illegal entry the affiant has lost his pre-emption right. He asks that it be restored and that he be permitted to file for the NW. $\frac{1}{4}$ of section 29, T. 3, R. 35, Oberlin district, Kansas.

The decision appealed from denies said application and says:

Section 2261, restricts the settler to but one legal filing. The party filing a declaratory statement, does so of his own volition, and the question is one of *bona fide* intention equally as of fact whether the entry is capable of being perfected or not. Miller appears to have sought to appropriate the land embraced within his filing, without regard to legal requirements, and cannot now evade the result thereof. He must be held to have exhausted his pre-emptive right.

The rule is that under section 2261 Revised Statutes a pre-emptor may file but one declaratory statement for land free to settlement and entry and that the only exception is where the pre-emptor, through no fault of his, is unable to perfect his entry on account of some prior claim. *Allen v. Baird* (6 L. D., 298).

The land for which Miller filed was free to settlement and if he had been duly qualified and had made *bona fide* settlement thereon he would have secured it. Miller states in the application under consideration that the first filing was made on the advice of a person who was presumed to know the law. I have examined the testimony in the case of *Fraker v. Miller* and find that there was no error in the finding of the local officers that the latter had moved from land of his own to settle upon the land for which he had filed or the decision of your office holding that he had not resided thereon in good faith. It appears that Miller had sufficient knowledge of the law to make him attempt to evade the prohibition against moving from land of his own by making a pretended removal from his homestead, and a pretended residence at the house of his son-in-law. If he had knowledge of one prohibition of the

statute it is fair to assume that he knew of the other forbidding the filing of more than one declaratory statement; but whether or not he actually knew the prohibitions of the statute he must be charged with knowledge of the law and cannot be heard to plead ignorance of it. His attempt to acquire title to the tract filed for was illegal, but in that attempt he has exhausted his pre-emption right. To allow him now to file again would, in my opinion, be a violation of law and would allow him to take advantage of his own wrong. Clayton M. Reed (5 L. D., 413).

I, therefore, concur in your decision denying Miller's application and the same is affirmed.

MINING CLAIM SURVEY CIRCULAR OF DECEMBER 4, 1884.

RANGE VIEW LODE.

A new survey in conformity with the requirements of the circular approved December 4, 1884, will not be required, where a survey, in accordance with existing practice, had been approved by the surveyor general prior to the receipt of said circular.

Acting Secretary Muldrow to Commissioner Stockslager, September 19, 1888.

I have considered the appeal of George A. Chapman from the decision of your office dated April 12, 1887, in mineral entry No. 2879, Range View lode claim, survey No. 2074, Central City land district, Colorado.

The records show that Range View claim was located January 4, 1882, surveyed July 17, 1884, and the survey was approved August 2, 1884.

In accordance with duly published notice, an application for patent was filed in the local office March 20, 1885. On April 12, 1887, your office rejected the application on the ground that said survey does not conform to the principles announced in circular "N" approved December 4, 1884 (3 L. D., 540), and required claimant to have a new survey of said claim so as to conform to the principles of said circular.

On June 27, 1887, claimant appealed.

Upon review of the record and proof in this case, it appears that the survey of the claim in dispute was approved by the surveyor general of Colorado, August 2, 1884, and was made in accordance with the rules of your office then in force.

Section 4 of said circular "N" declares that, "If, however, a survey under the old practice has been approved by the surveyor general prior to the receipt by him of these instructions, application for patent thereon, if otherwise regular, will not be rejected."

In view of the foregoing, and as four months elapsed after the date of the approval of survey before the promulgation of said circular, I must reverse your said decision requiring a new survey.

MINING CLAIM—PATENT—TOWNSITE CLAUSE.

HARRY LIVINGSTON LODE.

The refusal of a mineral claimant to accept a patent containing a clause reserving the rights of a townsite, warrants the Land Department in recalling said patent, and instituting proceedings to determine the relative rights of the parties litigant.

Acting Secretary Muldrow to Commissioner Stockslager, September 19, 1888.

I have considered the appeal of Henreco L. Livingston from your office decision of April 14, 1887, in the matter of her application for the issuance of a patent for the Harry Livingston Lode claim, mineral entry No. 150, Deadwood land district, Dakota.

Location of this claim was made by the applicant April 16, 1880. Application for patent was filed in the local office and notice thereof was given by publication and posting from August 27 to October 28, 1882.

On October 25, 1882, a protest against the issuance of patent for said claim was filed in the local office by Henry C. Clark and B. F. Charlton, on behalf of themselves and also of certain others. These protestants alleged that the land embraced in said claim was within the limits of the townsite of Deadwood for which entry had been allowed; that they and other parties had erected valuable dwellings thereon and had occupied the same as residences since a date long prior to the location of this mineral claim; that they had title to their respective residences from the probate judge of Lawrence county, and "do protest against the issue of a patent to said Henreco Livingston for the aforesaid Harry Livingston Lode unless there be a reservation therein protecting the lot owners aforesaid."

The local officers refused Livingston's application to make entry for said claim. Upon appeal to your office that decision was reversed. In the letter of February 10, 1883, passing upon this case, after reciting the allegations of the protest, it was said :

The mining claim is shown by the field notes of survey to be within the townsite of Deadwood. The townsite entry was allowed July 29, 1878, long prior to the mining location but no patent has been issued thereon.

The Secretary of the Interior says in the case of the townsite of Rico (9 C. L. O., 90) that "whether the lot owner does take his lot subject to the rights of the mineral claimant as to the surface must depend upon priority of occupation It is not to be supposed that the recognized right of such lot-owner is to be destroyed by the subsequent discovery of a mineral vein that may have its course through such lot." He concludes that there should be inserted in township and mineral land patents mutual clauses of reservation. The mineral applicant is clearly entitled to make his entry and you erred in not allowing the same after he had submitted satisfactory proof and tendered the purchase money but I would state that when the patent is issued the usual townsite clause will be inserted in order to protect the lot owners who have prior right to the surface.

On July 2, 1883, the mineral claimant completed her entry by making payment and final certificate was issued thereon and on October 1, 1884, a patent was issued thereon containing the usual townsite clauses which patent was sent to the local office for delivery to the claimant.

By letter dated November 16, 1884, addressed to the Secretary of the Interior, the claimant refused to accept the patent so issued and asked that he recall it and cause a new patent to be issued "in accordance to and in conformity with the United States mining laws." This letter was referred to your office and answered by Commissioner McFarland by letter of December 5, 1884, in which, after reference to the decision of February 10, 1883, it was said :

From this decision an appeal might have been taken to the Honorable Secretary of the Interior but none was taken so far as appears. It is presumed you were duly notified in the premises and if so said decision has become final by your failure to appeal. This office has issued the only patent to said claim for which there is any authority of law. Your request must be denied.

This refusal to receive the patent issued and the request for its recall and the issuance of a new patent was repeated in letters of the claimant of February 25, 1885, to the local officers and of May 6, 1886, to the Secretary of the Interior, and was again denied by letter of your office of June 23, 1886.

On February 22, 1887, one B. G. Caulfield in behalf of himself and other owners of town lots embraced within the limits of said mineral claim, filed a protest against the issuance of a patent for said mineral claim and asked that the patent already issued should be recalled or if not "that if this Department shall consider her claim for the patent she demands that it will afford the surface occupants an opportunity to make proof of the non-mineral character of this pretended claim."

The local officers were directed by letter of March 5, 1887, to return the patent to your office which they did with letter of March 10, 1887.

On April 14, 1887, your office decided that "the refusal of the patentee to accept the patent allows this office to make an investigation that might properly have been made before the issue of the patent." And for the purpose of determining the conflicting rights of the townsite residents and mineral claimant, the patent theretofore issued was held for cancellation "without prejudice to the entry which will remain intact subject to further examination," from which decision the mineral claimant appealed.

At the time of the rendition of your office decision of February 10, 1883, holding that the patent for this claim when issued should contain the usual townsite reservation clause, the townsite residents were before your office by way of a protest, asking that their rights be protected. Under the existing and recognized practice, it was held not to be within the province of this Department to adjudicate such claims, but the parties were relegated to the courts to obtain an adjudication thereon, their respective rights pending such adjudication in the courts

being held to be sufficiently protected by the insertion in mineral patents of the townsite reservation clause and in townsite patents of the mineral reservation clause. See case of M. A. and Edward Hickey (3 L. D., 83), and authorities there cited.

In the case of *Deffeback v. Hawk* (115 U. S., 392) the land had been settled upon prior to the location of the mineral claim, but no steps had been taken prior to the application to make a mineral entry for said land to acquire title thereto under the townsite laws. The supreme court there said:

The title to the land being in the United States its occupation for trade or business did not and could not initiate any right to it, the same being mineral land, nor delay proceedings for the acquisition of the title under the laws providing for the sale of lands of that character; and those proceedings had gone so far as to vest in the plaintiff a right to the title before any steps were taken by the probate judge of the county to enter the townsite at the local land office.

The case under consideration differs from that cited in that the townsite entry was made July 29, 1878, long prior to the mining location made April 16, 1880, and also in that in the case at bar it is claimed that the land is not valuable for mining purposes while in the case cited, it was admitted that the land was at the date of the settlement thereon for trade and business known to be valuable for mining purposes.

Upon the facts presented by the record it would have been proper for your office upon the filing of the application for a mineral patent and protest against the allowance thereof, to have instituted proceedings to determine the rights of the respective parties. This course was, however, under the then existing practice, considered unnecessary, inasmuch as it was held that the rights of both parties were sufficiently protected by the form of patent then issued and the determination of the extent of those rights was properly subject to adjudication by the proper courts rather than by this Department. The townsite claimants were deprived of an opportunity to be heard at that time in support of their claims by the action of your office, which, as is claimed by the mineral claimant, was erroneous. If the proceedings then had were irregular the mineral claimant can not in justice ask more than to have the parties put in the exact positions they held at the time the first error was committed. This is what the decision appealed from sought to do.

For the reasons herein given your said office decision is affirmed and you will direct the institution of the proper proceedings for the determination of the rights of the respective claimants for this land.

Overruled
of R. L. [unclear]
9/20/11

OSAGE FILING—FINAL PROOF.

ELLIOTT v. RYAN.

Failure to make final proof within six months after Osage filing renders the land subject to intervening adverse claims; and rights under an intervening claim will not be lessened by the fact that the settlement therein was made prior to the expiration of the period accorded the first claimant to submit proof.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 19, 1888.

I have considered the case of J. W. Elliott v. Drew Ryan upon the appeal of the former from your office decision of January 6, 1887, rejecting his final proof and holding for cancellation his filing for the land in contest, to wit: E. $\frac{1}{2}$ NE. $\frac{1}{4}$ of Sec. 15, T. 32 S., R. 20 W., Osage Indian trust and diminished reserve lands, Larned land district, Kansas.

Ryan filed declaratory statement No. 8461, for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said section April 14, 1885, alleging settlement on the second of said month.

Elliott filed declaratory statement No. 10,288, for the E. $\frac{1}{2}$ SE. $\frac{1}{4}$, Sec. 10, and E. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 15, same town and range, October 16, 1885, alleging settlement March 26, 1885.

After due notice by publication Ryan made proof November 21, 1885, and on the 23d of said month cash receipt No. 8171, issued upon the first payment.

Elliott duly submitted his final proof April 6, 1886.

On December 9, 1885, an affidavit of Elliott, duly corroborated was filed, in which he alleges settlement and residence on the tract in contest prior to Ryan.

A hearing having been ordered for March 4, 1886, both parties appeared on that day; Ryan filed a motion for a continuance, setting out the names of five absent witnesses who if present would testify in effect, that he settled upon the land claimed by him April 2, 1885, by commencing to build a sod house and digging a well; that he completed a house upon the land April 9, 1885, and made the tract his continuous residence from said date to January 9, 1886; that Elliott did not settle upon the land until several days after Ryan, and that the affidavit of Elliott in so much as he therein alleges settlement on March 26, 1885, is false.

Elliott admitted that the witnesses named, if present at the trial, would testify in accordance with the statements alleged in the said affidavit.

Thereupon trial proceeded. The local officers decided in favor of Elliott, holding that he was the prior actual settler.

Upon appeal your office reversed the said decision; your office, as to the tract in contest, rejected the proof of Elliott and held his filing for cancellation, upon the ground that, "under plaintiff's agreement, the preponderance of the testimony shows Ryan to have been the first act-

ual settler, but aside from this, Elliott failed to place his claim upon record within the required time, and not until after Ryan was residing upon the land with his family."

Elliott appealed to this Department and the case is now before me for consideration.

Both parties were qualified pre-emptors, both actual settlers in good faith, and each, in absence of the other's claim would be entitled to the land covered by his filing.

The question of priority of settlement is involved in much doubt; taking into consideration the admission of Elliott that five witnesses would testify as alleged in Ryan's affidavit for continuance, your finding, that "the preponderance of the testimony shows Ryan to have been the first actual settler" seems to be justified by the testimony in the case, but it is not necessary to conclude upon the priority of the settlement of the parties, in order to determine their relative rights.

By the regulations of this Department of June 23, 1881, the actual settler on Osage lands is required to make proof and payment of not less than one-fourth of the purchase price within six months from date of filing.

Ryan filed his statement April 14, 1885, the six months expired October 13th of the same year; after that day he was in default and it was then perfectly proper for another settler, if duly qualified, to file on the land; such settler would thereby gain preference to Ryan. That is precisely what Elliot has done; he filed his statement October 16, 1885. Ryan did not make his proof until November 21, 1885. That Elliott had made settlement on the land prior to October 13th of the said year cannot put him in a position less advantageous than a settler, theretofore a stranger to the land, would be in. Elliott made his proof April 6, 1886, within six months from the date of his filing and the land in contest must therefore be awarded to him.

Accordingly Ryan's filing for the land in contest should be canceled, the proof of Elliot for the land covered by his filing be accepted, and his entry allowed, subject to his compliance with the further provisions of the law.

Your decision is reversed.

PRE-EMPTION—SECOND FILING.

JOSEPH L. DE BOCK.

A second filing may be properly allowed where, through no fault of the pre-emptor, the first fails by reason of conflict with a prior adverse claim.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 21, 1888.

On August 6, 1885, Joseph L. De Bock filed declaratory statement, alleging settlement July 3, 1885, upon E. $\frac{1}{2}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ Sec. 15, T. 32 N., R. 65 W., Valentine, Nebraska.

On December 28, 1886, De Bock filed his application to amend his said filing so that it would embrace, in lieu of the tract named, the S. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 14 and W. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 23, in the same town and range. This application was refused by your office decision of April 8, 1887, from which the claimant appeals.

The record shows that on April 9, 1885, one Joseph Benway had filed declaratory statement, alleging settlement April 1st preceding, upon the four forties adjoining those embraced in the appellant's filing, *i. e.*, W. $\frac{1}{2}$ NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said Sec. 15, and that on August 4, 1885, by affidavit acknowledged before the receiver, said Benway applied to so amend his said filing as to include therein three of the forties, *i. e.*, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$ and E. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said Sec. 15, which the appellant subsequently, *i. e.*, on August 6th following, included in his declaratory statement mentioned.

Benway's corroborated application set out, that from a survey, made "a short time ago," he learned that his said filing did not include the land he had selected, to wit: NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ Sec. 22, SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, E. $\frac{1}{2}$ SE. $\frac{1}{4}$ of said Sec. 15, the tracts named in his application, upon which he has broken four acres, fenced some and planted corn, potatoes and garden stuff, and hauled logs for a house and lived in a tent since the date of his filing.

On December 10, 1886, your office allowed Benway's said application to amend.

The appellant averred in his said application, that he has upon the land covered by his said filing a log house, stable and ten acres of breaking, and that he is living thereon with his wife and eight children. He states that, by reason of Benway's said amendment he has no right to this land.

It also appears from the appellant's application and from your said decision, that the pending application of Benway to amend as stated was not of record in the local office when the appellant filed his declaratory statement referred to.

Your office held in effect that the appellant had exhausted his pre-emption right by his filing of August 6, 1885. In this I can not concur.

The appellant does not apply to correct a mistake in his filing of August 6, 1885, nor does he allege that said filing fails to conform to his original intention. He asks to substitute a valid for an invalid filing, and this he has a right to do. See *A. J. Slootskey*, (6 L. D., 505).

The record, however, shows that when the appellant filed his declaratory statement, most of the land which he intended to claim being subject to Benway's pending application to amend, was consequently reserved. *Bracken v. Mecham*, (6 L. D., 264), and cases cited.

Benway's said application having been allowed by your office, the appellant is thereby prevented from making cash entry under his said filing.

This case is clearly within the ruling of *Allen v. Baird* (6 L. D., 298).

In the case cited the Department held that the only exception to the provision that a pre-emptor may file but one declaratory statement, is where through no fault of his own he is unable to perfect his entry on account of some prior claim.

You will direct that the appellant be permitted to file for the said S. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 14 & W. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 23 subject to any valid adverse claim attaching prior to the date of the present application.

Your decision is reversed.

HOMESTEAD—ACT OF JUNE 15, 1880.

NUTTLE *v.* LEACH.

An intervening pre-emption claim is sufficient to bar purchase under section two of the act of June 15, 1880.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 21, 1888.

I have considered the appeal of Archibald Leach, in the case of James M. Nuttle *v.* Archibald Leach from your office decision of September 15, 1886, holding for cancellation Leach's cash entry for NE. $\frac{1}{4}$ Sec. 35, T. 16 S., R. 25 W., Wa Keeney, Kansas, land district.

Leach made homestead entry of said land May 21, 1879, which entry was contested by Nuttle, and on January 18, 1886, said entry was formally canceled upon the books of the local office on evidence submitted by Nuttle.

On March 6, 1886, Nuttle filed a pre-emption declaratory statement thereon, alleging settlement February 20, 1886.

On March 23, 1886, Leach made cash entry under act of June 15, 1880.

Upon protest of Nuttle against patent being issued upon the certificate of Leach, both parties appeared and filed arguments in your office.

The second ground of error alleged by Leach in his appeal is in effect that, Nuttle having filed declaratory statement under the pre-emption law this case can not be held to come within the proviso of the act of June 15, 1880 (21 Stat., 237), which reads:

Provided, this shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

It was held in *George S. Bishop* (1 L. D., 69), that, after cancellation of a homestead entry, an adverse right may attach under a law other than the homestead law.

The proposition claimed in the case at bar, that an entry under the homestead law is the only entry contemplated in the proviso above set out, was thoroughly discussed in the *Bishop* case, *supra*, and it was held therein that the rule "*expressio unius est exclusio alterius*," does not apply to the interpretation of the term "homestead law," in the proviso of said act, but the same "is used in a generic sense, intending

thereby to illustrate its intent to protect all vested rights that might intervene prior to the application to purchase."

This ruling has been uniformly followed by the Department. Charles C. Martin (3 L. D., 373); Gilbert *v.* Spearing (4 L. D., 466); Patrick Roderick (4 L. D., 493); Kelly *v.* Maynard (5 L. D., 592).

As to the other questions suggested in the appeal, the proper time to consider those will be when considering Nuttle's final proof.

Your said decision is accordingly affirmed.

FINAL PROOF—EQUITABLE ADJUDICATION.

ANTON A. MOKLEBUST.

In the absence of protest or adverse claim, an entry may be referred to the Board of Equitable Adjudication where the final proof was submitted after the day fixed therefor, and good faith is manifest.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 21, 1888.

I have considered the appeal of Anton A. Moglebust from your decisions of February 16, and April 21, 1887, requiring new publication of notice with relation to his final proof on his pre-emption claim, embracing Lots 6 and 7, Sec. 6, and Lots 1 and 2, Sec. 7, T. 156 N., R. 64 W., Devils Lake district, Dakota.

It appears from the record that appellant gave due notice of his intention to make final proof and payment August 23, 1884, but that the same was not made until September 26, 1884, a period of thirty two days thereafter.

On that date appellant made an affidavit before the register of the district in which he stated that he was not able to offer his final proof on the day advertised "owing to his inability to secure the presence of his witnesses at the land office on account of their absence in another county where they were engaged harvesting." He then asked that his proof might be allowed on that day.

The local officers granted his request, his proof was made, the price of the land accepted, and final certificate duly issued thereon.

The record also shows that claimant resided upon the tract more than six months prior to the date advertised for making final proof and that he continued to reside upon it until June, 1886, when he made a homestead entry of another tract in the immediate neighborhood. He still continues to own and cultivate his pre-emption claim.

Your office letter G, of February 16, 1887, was the first notice claimant received that he must make new advertisement and new proof. This was after he resided in good faith for more than nine months upon his homestead claim, and a compliance with your decision would probably entail a loss of either tract.

It does not appear that any one intended to protest or has since made any objection or adverse claim, although four years have elapsed since proof was made and final certificate issued.

In the absence of any grounds for charging fraud on the part of the entryman and no adverse claimant having alleged that he was misled to his injury by the irregularity mentioned, the case seems to fall within the spirit of Rule 10 of the Rules of Equitable Adjudication. You will, therefore, please certify the case to the Board of Equitable Adjudication for the action of that tribunal.

Your decision is accordingly modified.

PURCHASE BEFORE PATENT--FINAL PROOF.

C. A. KIBLING.

Purchasers after entry and before patent take only an equity, and are charged with notice of all defects in their title.

When a witness is substituted for an advertised witness, new notice and proof covering the testimony of the substituted witness will be required.

When the proof is taken by an officer not named in the advertisement, it must be taken at the time and exact place designated in the printed notice; and the officer advertised to take such proof must officially certify that no protest was filed before him against the claimant's entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 21, 1888.

I have considered the appeal of C. A. Kibling, mortgagee of Francis Lekley, from your decision of December 13, 1886, rejecting the final proof of said Francis Lekley for the E.½ of the SE.¼, and Lot 4, Sec. 7, T. 113 N., R. 80 W., Huron, Dakota.

It appears from the record that Francis Lekley made homestead entry of the above tract October 15, 1884, and advertised to make commutation proof thereon "before judge of probate court in and for Sully county, at Okbajo, Dakota Territory, on Saturday, February 14, 1885."

The testimony of claimant and his two witnesses (only one of whom had been advertised) together with the rest of the proof was taken on the same date before the clerk of the district court of Clifton, same county, the claimant alleging as a reason therefor, that the probate judge was absent at the time.

The claimant, in his proof, alleged that his improvements were of the value of \$350. They consisted of a house, twelve by fourteen, stable eighteen by twenty, a well and eight acres of breaking, five of which were planted to tree seed. Claimant stated that he had not been absent at all from the tract, whilst his witnesses testified that he had "not been absent to exceed two days at a time."

Your office, by letter "C" of August 1, 1885, rejected the final proof and directed the local officers to notify claimant that he would be allowed sixty days in which to make new proof. The local officers, however, did

not properly notify the claimant of your decision, in that it was not served personally or by registered letter. The notice was mailed to claimant in care of one C. H. Walworth, an attorney, who refused to accept service, on the ground that his former appearance for claimant was "for the purpose of procuring repayment of the purchase money on a portion of his claim to which the government could not convey any title having previously sold the same."

It appears that shortly after making final proof, claimant went to Nebraska, and had not returned at the date of the appeal herein. His former attorney made repeated efforts to find him, but without any apparent success.

No appeal was taken from your said decision within the time allowed, but in March, 1886, C. H. Walworth *sua sponte*, submitted affidavits in support of his motion for reconsideration.

After considering these affidavits, your office, on December 13, 1886, directed that claimant's original entry be allowed to stand, subject to future proof. You at the same time advised the local officers to duly notify claimant of this decision.

It further appears that claimant, on March 1, 1885, mortgaged said tract to one C. A. Kibling, a resident of Strafford in the State of Vermont, to secure the payment of \$300 which he loaned him that day. This mortgage was recorded in the county in which the tract is situated on the 31st of that month and was made fifteen days after proof was submitted and final certificate issued.

January 28, 1887, Kibling, as such mortgagee, appealed from your said decision, alleging various grounds of error and asking that Lekley's final proof, as originally made, be accepted and that patent issue accordingly.

The rulings of this Department and the decisions of the courts, clearly establish the doctrine that as against the government the entryman has acquired no rights until he has performed the preliminary acts required by law. The rule of *caveat emptor* applies in this case and the purchaser or mortgagee can acquire nothing the original claimant did not possess.

Two weeks after the issuance of final certificate Kibling loaned his money to Lekley and if the latter's entry was either void or fraudulent the security upon which he relied for his investment, proved worthless. He assumed the risk and he must now abide the consequences. He does not seem to have acted without the necessary precaution as he employed counsel to transact this business for him.

All purchasers of lands after entry and prior to the issuance of patents are charged with notice that said entries must be confirmed by your office and that if said entries are void or fraudulent, the purchaser can acquire no better title than the vendor possessed. Purchasers after entry and before patent take only an equity and are charged with notice of all defects in their title. *United States v. Johnson et al.* (5 L. D., 442).

The claimant in making final proof has not complied with the instructions of circular letter of February 19, 1887 (5 L. D., 426), which prescribes that when witness not named in advertisement is substituted for advertised witness, new notice and proof covering the testimony of substituted witness is required. Also that when final proof is taken by officer not named in advertisement, it must be taken at the time and exact place designated in the printed notice and the officer advertised. to take such proof must officially certify that no protest was ever filed before him against claimant's entry. These requirements have not been complied with.

Your decision, therefore, that claimant's original entry be allowed to stand, subject to further proof, is accordingly affirmed.

HOMESTEAD CONTEST—ACT OF JUNE 15, 1880.

CRAIG *v.* HOWARD.

The right of purchase accorded by section two, act of June 15, 1880, extends only to entries made prior to the passage of said act.

The preference right of a successful contestant is superior to the right of purchase under said act.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 26, 1888.

I have considered the case of E. A. Craig *v.* W. J. Howard upon the appeal of the latter from your office decision of November 1, 1886, holding for cancellation his cash entry for the NE. $\frac{1}{4}$ of Sec. 11, T. 8 S., R. 24 W., Kirwin land district, Kansas.

The records show the following facts.

Howard made homestead entry for the said land May 6, 1881. In November, 1884, Craig instituted contest against him charging that Howard had wholly abandoned the said tract and changed his residence therefrom for more than six months since making entry and next prior to the date of such contest.

A hearing being ordered, and January 28, 1885, appointed for the time of trial, due notice was given therefor by publication.

At time of hearing contestant appeared, the claimant made default. Upon the evidence then adduced by the contestant, the local officers determined that the homestead entry of Howard should be canceled, and he not having appealed on November 10, 1885, your office canceled said entry for abandonment.

Craig on December 3, 1885, made homestead entry for the land.

In the meantime November 16, 1885, Howard made cash entry No. 4362—for the said land under the second section of the act of June 15, 1880.

Your office by the said decision of November 1, 1886, held said cash entry for cancellation for illegality of said homestead entry (meaning

the homestead entry of Howard) having been made after the adoption of the act referred to."

From this decision Howard appealed to this Department and the case is now before me for consideration.

The act of June 15, 1880 (21 Stat., 237), is applicable only to entries made anterior to its adoption. Another reason why Howard's cash entry should be canceled is, that Craig as the successful contestant, had the right to enter said land within thirty days from notice of cancellation of Howard's homestead entry. Craig made his entry twenty-three days after such cancellation.

Your decision is affirmed.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

FENNO *v.* BRADY.

The application to enter, filed by a successful contestant at the initiation of a timber-culture contest, when allowed, relates back and takes effect as of the date thereof to the exclusion of all intervening claims.

Commissioner Stockslager to register and receiver, Huron Dakota, January 14, 1886.

By letter of November 1, 1884, Frank E. Brady was allowed a preference right of entry to the NW. $\frac{1}{4}$ Sec. 33, T. 117, R. 60, upon his successful contest of timber culture entry No. 5796, thereon, and his timber culture application for entry was returned to be perfected. You reported that he was notified of the action November 13, 1884. He made timber culture entry No. 6098 same tract December 16, 1884, and you improperly allowed Miles D. Fenno to enter the same tract per homestead entry No. 9761, February 18, 1885, settlement alleged December 5, 1884, (See Wolfe *v.* Struble, Copp's L. O. 9, p. 148).

Fenno submitted affidavits upon the suspension of his entry, in which he states that he has made the tract his place of residence ever since date of settlement and has some improvements thereon, and acknowledges that Brady has had five acres broken upon the tract.

A settlement by Fenno prior to December 14, 1884, could not defeat Brady's right which did not expire until that date and I find upon an examination of Brady's timber culture papers an annotation by the register showing that the money was tendered and refused December 13, 1884, and the refusal appears to have been for the reason that it was unaccompanied by an affidavit alleging that he had not since date of the former affidavit, which accompanied the contest papers, made an entry under the timber culture law. It appears therefore that an effort was made to place his claim of record within the required time and was prevented only by a technical defect which I do not consider fatal to his rights, nor should Fenno, who was aware of Brady's contest and who

settled on the land subject thereto be permitted to acquire a claim to the exclusion of the contestant.

Therefore the homestead entry is held for cancellation and the timber culture entry will be allowed to stand. Advise the parties in interest allowing a right of appeal.

DEPARTMENTAL DECISION.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 27, 1888.

I have considered the appeal of Miles D. Fenno from your decision of January 14, 1886, holding for cancellation his homestead entry of the NW. $\frac{1}{4}$, Sec. 33, T. 117 N., R. 60 W., Huron, Dakota.

The facts are clearly stated in your said decision and I concur in the conclusion therein reached.

It should be mentioned in addition that at the time of the initiation of the contest, Brady filed an application to make timber-culture entry on said tract. On the successful determination of this contest, his right to enter the tract became absolute, if he was otherwise qualified to make such entry, and the requirement of the local office that he file a supplemental affidavit showing such qualification did not impair in any way the right which he had under the act of June 14, 1878. It temporarily suspended the recording of his entry, but when recorded it related back to and took effect as of the date of the application and cut off all intervening claims, and any person seeking to acquire an interest in the land during the interval between the determination of the contest, and the recording of his entry, could only obtain it subject to his superior rights. Besides the entry of Fenno, made after that of Brady and while the land was segregated by that *prima facie* valid entry, was illegal and should accordingly be canceled.

Your decision, therefore, holding for cancellation the homestead entry of Miles D. Fenno and allowing the timber culture entry of Frank E. Brady to stand is accordingly affirmed.

TIMBER CULTURE CONTEST—REPLANTING.

CONRAD *v.* EMICK.

Extreme drouth furnishes a sufficient excuse for a short delay in replanting, where the good faith of the entryman is apparent.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 27, 1888.

I have considered the appeal of John Emick from your decision of February 5, 1887, holding for cancellation his timber culture entry for the NE. $\frac{1}{4}$, Sec. 32, T. 103 N., R. 68 W., Mitchell, Dakota.

The record shows that John Emick made timber-culture entry of the above tract July 30, 1880, and on August 28, 1885, John Conrad initiated contest, alleging:

That said Emick has wholly abandoned said tract, for more than one year since making said entry, and next prior to the date of hearing; that said tract is not cultivated as required by law; that neither the first five nor the second five acres of trees are growing on said land, as required by law; that said first five acres and second five acres have been planted and have been plowed up and not replanted; and that for more than one year there have been no trees growing on said land as required by law.

October 12, 1885, was set for a hearing, and on that date the parties, their counsel and witnesses appeared before the local officers. Claimant's counsel appeared specially and moved to dismiss the proceedings on the ground that the affidavit of contest was insufficient and the allegations contained therein were general and not specific, and for the further reason "that the return of service of notice of contest is not properly certified to in that there is no proof of service whatever." This motion was properly overruled by the local officers as the allegations in the affidavit of contest were specific and the certificate of the sheriff, who served the notice of contest, was sufficient, he being a sworn officer and his return therefore under oath. The hearing was then proceeded with and a large amount of testimony taken, a considerable portion of which was entirely irrelevant to the issues involved in this contest.

A careful examination of the evidence shows that Emick broke nine acres of this tract in June, 1881, on which he raised a crop of corn in 1882. In 1882, he broke nine acres more and planted that season nine rows of tree seeds, almost all of which grew and at the time of the initiation of this contest amounted to about 18,000 trees, averaging in height from six inches to seven feet.

Claimant testified that this planting was made for the purpose of establishing a nursery from which he intended to transplant trees in case the seeds subsequently planted, as required by law, did not grow. In 1883, after carefully preparing the land, he planted six acres of tree seeds, four feet apart each way. The remaining twelve acres were planted to a crop of corn during this season. In the spring of 1884, five more acres were planted to tree seeds, the balance of the land was cultivated to crop and fifty-five additional acres were broken. Before planting the tree seeds, as aforesaid, claimant plowed and dragged the land, putting it in a proper condition for the reception of the seed. It is therefore evident that up to this time the entryman had fully complied with the requirements of law.

It appears that the tree seeds planted in 1883, did not properly mature and that those planted in 1884, almost entirely failed to grow. With a view of replanting the eleven acres planted to tree seeds in 1883, and 1884, he had the same plowed up in April, 1885. Owing to the continued dry weather and the consequent condition of the soil and

with the advice of his attorney, the replanting was deferred until the fall of that year. In the meantime this contest was initiated.

Claimant testified that at the time of plowing the eleven acres above referred to, he intended replanting the same or transplanting thereon trees from his nursery which he claims to have preserved and cultivated for such a contingency. In this he is corroborated by Dan. Kane, his hired man, who testified that claimant, before leaving for Iowa, directed him to plow this tract, saying that on his return it would be replanted in trees or tree seeds. This, however, was not done for the reasons already given, and a crop of flax seed was planted instead. Claimant, during the same year, sowed some sixty or seventy acres of this tract in oats and had in all one hundred acres under cultivation.

A preponderance of the testimony shows that during the spring of 1885, and for some six months previous, the weather was extremely dry, there being scarcely any rain, and consequently very little moisture in the ground. This, claimant alleges, was the reason his tree seeds failed to grow and also the reason he postponed replanting.

Upon the evidence submitted at the hearing, the register and receiver rendered different decisions; the former recommended that Emick's entry be canceled, and the latter that the contest be dismissed. From the receiver's decision Conrad appealed to your office, and on February 25, 1887, you rendered a decision sustaining the register and directing that Emick's entry be held for cancellation. From this action Emick appealed.

From the facts as already recited, it is clear that Emick fully complied with the law up to July, 1885, or at least, until May of that year, when he sowed flax seed in the plat in which he formerly planted tree seeds. The extreme drought of that spring and of the previous winter and fall deterred claimant from replanting and his postponement of the same was therefore in no way inconsistent with his good faith. On the contrary, the evidence satisfactorily shows that he acted in entire good faith and that his short delay in replanting was inspired by motives of caution and prudence. Claimant's other improvements strengthen the theory that he acted in good faith and that he meant to comply with the provisions of the timber-culture act.

The entryman's good faith should be taken into consideration in arriving at a proper conclusion in this contest. *Thompson v. Sankey* (3 L. D., 365); *Peck v. Taylor* (3 L. D., 372); *Rasmussen v. Rice* (6 L. D., 755).

When the requisite breaking and planting were done within the proper time, but the seeds so planted failed to grow, it was held that the entry should not be forfeited. *Hartman v. Lea* (3 L. D., 584).

I am, therefore, of the opinion that the entryman acted in good faith and has substantially complied with the law.

Your decision, therefore, holding for cancellation the timber-culture entry of John Emick is accordingly reversed.

RAILROAD GRANT—INDEMNITY LANDS.

NORTHERN PACIFIC R. R. Co.

The departmental order of August 15, 1887, with respect to filings and entries upon lands covered by unapproved selections, made applicable to lands within the second indemnity limits of the Northern Pacific.

Secretary Vilas to Commissioner Stockslager, September 28, 1888.

I am in receipt of your letter of May 14, 1888, enclosing communication, dated April 25, 1888, from George P. Flannery, of Minneapolis, Minnesota, in relation to the matter of suspending the final proofs of settlers within what was formerly held to be the second indemnity limits of the Northern Pacific Railroad.

I am also in receipt of your letter of August 2, 1888, forwarding letters from Messrs. Mendenhall and McNaught, counsel for the Northern Pacific Railroad Company, which request modification of instructions heretofore issued in relation to the lands within said limits.

It is suggested by the company, that, inasmuch as the question whether said railroad has a second indemnity belt is now pending before the Attorney General, awaiting his opinion, the further settlement and entry of lands of this class be suspended until the question be finally determined. This suggestion is not approved.

But inasmuch as the company claims the right of selection within these limits, I think it would be wise to instruct the proper local officers that as to any lands therein, covered by unapproved selections, the same action is to be taken, as was directed by departmental order of August 15, 1887 (6 L. D., 91), in relation to filings and entries upon other similarly selected lands in the first indemnity belt of said road.

 PRE-EMPTION—NAVAJO RESERVATION.

HUGH A. CARMON.

Land reserved for the use of the Navajo Indians by executive order of April 24, 1886, is not subject to pre-emption.

The provisions of the act of June 29, 1883, are applicable to settlement claims acquired within certain limits prior to May 1, 1883, and included within said executive order.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 29, 1888.

I have considered the case arising upon the appeal of Hugh A. Carmon from your office decision of March 26, 1887, holding for cancellation his pre-emption filing No. 1828, made December 5, 1885, for the SW. $\frac{1}{4}$ of Sec. 13, T. 29 N., R. 15 W. Santa Fe district, New Mexico, on the ground that the tract lies within the boundaries of the land reserved

by executive order of April 24, 1886, for the use of the Navajo Indians. I affirm your decision.

I would direct your attention, however, to the fact that the "Act making appropriations for the current and contingent expenses of the Indian Department," approved June 29, 1888, contains the following paragraph :

The sum of ten thousand dollars, or so much thereof as may be necessary, is hereby appropriated to enable the Secretary to pay the settlers, who, in good faith, made settlement in township 29 N., ranges 14, 15, and 16 W., New Mexico principal meridian, in the Territory of New Mexico prior to May 1, 1886, for their improvements, and for damages sustained by reason of the inclusion of said townships within the Navajo reservation by executive order of April 24, 1886; and such settlers may make other homestead, pre-emption, and timber-culture entries as if they had never made settlements within said townships.

Said Carmon having made settlement within the limits named prior to May 1, 1886, the statute above quoted applies to his case.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER—NOTICE OF CANCELLATION.

ENGLISH *v.* NOTEBOOM.

Under rule 17 of practice, notice of cancellation to the successful contestant is not sufficient, where given by unregistered letter.

An application to enter, filed with a timber culture contest, is equivalent to actual entry so far as the rights of the contestant are concerned, and withholds the land embraced therein from other disposition until final action thereon.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 29, 1888.

In the summer of 1885, Gerritt Noteboom contested the timber-culture entry, No. 8441, of David S. Correll, for the NW. $\frac{1}{4}$ of Sec. 13, T. 99, R. 66, Yankton land district, Dakota. Correll made default; and by your office letter of October 4, 1885, the entry was ordered to be canceled—the cancellation being noted on the books of the local office October 11th.

Noteboom had accompanied his application to contest with an application to enter the tract. After cancellation, the local office sent a notice of that fact to Messrs. Ellerman and Peemiller, Noteboom's attorneys of record. Noteboom not being heard from within thirty days, the local officers, on February 7, 1887, allowed Edmund F. English to make timber culture entry of the tract.

On March 12, 1887, Noteboom applied to perfect his entry, tendering the legal fee and commission—alleging continuous residence on the tract since October 1, 1886. The local officers refused to allow Noteboom's application because of English's entry.

Noteboom states under oath that he never received notice of the cancellation of Correll's prior entry. The local officers suggest that this

was because of his substituting one Poole, in place of Ellerman and Peemiller, as his counsel; and urge that notice to the latter should be considered as notice to Noteboom.

It appears, however, that the notice (if sent at all, of which there seems to be some doubt,) was by an ordinary, unregistered letter. This was not sufficient notice (see rule 17 of practice).

Noteboom's application to enter, filed with his contest, was equivalent to actual entry, so far as his rights were concerned, and withheld the land embraced therein from other disposition until such time as it should finally be acted upon, either by being merged into an entry, or rejected with right of appeal (*Pfaff v. Williams et al.*, 4 L. D., 455).

For the reasons herein given, your decision allowing Noteboom thirty days' preference right of entry from date of notice hereof is affirmed.

MINING CLAIM ADVERSE PROCEEDINGS.

MEYER ET AL. *v.* HYMAN.

(On Review)

A mineral entry prematurely allowed, pending the disposition of adverse litigation, may be permitted to stand on the withdrawal of the adverse claims.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 1, 1888.

In the matter of the motion for review by D. M. Hyman, of the decision of this Department of July 28, 1888 (7 L. D., 83) in the case of W. B. Meyer *et al.* and J. B. Wheeler *et al. v.* said D. M. Hyman, involving the latter's mineral entry, No. 14, for the "Durant Lode Mining Claim," Glenwood Springs series, Colorado, it appears from a communication bearing date of September 14, 1888, of C. C. Clements, attorney for the said Meyer *et al.* and Wheeler *et al.* protestants and adverse claimants, enclosed in your office letter ("N") of September 21, 1888, to this Department, that:

Since the appeal from your office decision of January 15, 1887, suspending said entry, all suits have been settled in favor of said Hyman and to the satisfaction of all parties concerned, so that there is now no conflict or controversy existing between said parties, and that it is now the desire of said protestants and adverse claimants that the said motion be granted to the end that said entry may be re-instated and patented without unnecessary delay.

In view of this state of facts, the question now is one solely between Hyman and the government, and his said entry, though prematurely allowed pending the suits between the said parties (R. S., 2326), appearing to be otherwise unobjectionable, and there being no useful purpose to be subserved by the cancellation thereof, it is "competent for this Department to sustain the same." (*Gunnison Crystal Mining Company*, 2 L. D. 722.)

The motion for review and recall of said decision of July 28, 1888, is therefore hereby granted, and said entry will be re-instated.

DESERT LAND ENTRY—FINAL PROOF PROCEEDINGS.

WILLIAM J. SPARKS.

The testimony of the entryman and his witnesses, in final proof proceedings under a desert land entry, may be legally required to be taken at the same time and place and before the same officer.

When the good faith of the entryman, and his purpose in making the entry are in doubt, he may be required to personally appear before the local office and submit to a cross-examination.

The Commissioner of the General Land Office is fully authorized under the law to require additional proof, where that submitted is not found satisfactory.

A desert land entry made for the use and benefit of another is illegal, and must be canceled.

A person is permitted to make but one entry under the desert land act; and it is clearly in violation of law for an individual or corporation to secure by indirection more than one entry.

Secretary Vilas to Commissioner Stockslager, October 1, 1888.

I have before me on appeal from the decision of your office, dated April 4, 1887, the case of William J. Sparks, involving the question of the sufficiency of his final proof on his desert land entry No. 2464, for the NW. $\frac{1}{4}$ of Sec. 15, T. 23 N., R. 67 W., Cheyenne land district, Wyoming Territory.

Said entry was made April 10, 1885, and final proof tendered December 3, 1886. The proof was rejected by the local officers on the ground that the reclamation of said tract was not shown by the testimony of claimant himself as required by the regulations, and by your office on substantially the same grounds; your predecessor in office holding that "the deposition of the entryman in desert land final proof must be made from a personal knowledge of the facts in the case; and that such deposition made upon information and belief can not be accepted."

Appellant, by his counsel, insists that said decision is erroneous, "because contrary to law and the regulations of the Department of the Interior in force at the time this proof was made."

In support of his position he quotes the requirements of the general circular of March 1, 1884, pages 36 and 37, as follows:

This proof must consist of the testimony of at least two disinterested and credible witnesses, who must appear in person before the register and receiver. They must declare that they have personal knowledge of the condition of the land applied for, and of the facts to which they testify, etc. (And he says) "For two years after the issuance of that circular, it was the almost invariable practice for claimants to make their depositions on information and belief as to this fact, and proofs so made were until the past year, unhesitatingly received by the officers of the government.

He also insists that as the reclamation of said land is shown by the testimony of two disinterested witnesses who appeared in person at the land office, and as this is all the law and the regulations required that to make "any further requirement is but the assumption of an arbitrary power, not authorized by law or the regulations but in defiance thereof."

I can not agree with the views here expressed.

The Commissioner of the General Land Office before permitting or sanctioning a final desert land entry, may lawfully and properly require satisfactory proof that the entryman has permanently reclaimed the land, and that this has been done for his exclusive use and benefit and not for, or in the interest of another.

The regulation quoted requires that at least two witnesses must appear before the local land officers on tender of final proof to testify in all cases of this kind. This does not necessarily imply that in some cases fuller proof may not be required. In cases where the final proof leaves the mind in serious doubt either as to the desert character of the land originally, or as to its permanent reclamation, or as to the good faith of the entryman in making the entry for his own use and not for the benefit of another, it is not only the right but the duty of the Commissioner to require further evidence. When the good faith of the entryman and his purpose in making the entry are in doubt, he may also well be required to personally appear before the local officers in order that he may be subjected to a cross examination and his conscience probed in their presence. The appearance of a witness on the stand and his manner of testifying are frequently important elements in weighing his evidence and determining its value. Independently then of the question as to whether in all desert land cases, where final proof was made before the circular of June 28, 1887, was issued (5 L. D., 708), you should require the affidavits of the applicant and his witnesses "in every instance, either of original application or final proof to be made at the same time and place and before the same officer," as is required in said circular (paragraph 7), I have no doubt but what you may in your discretion legally require the final proof to be so made. This requirement, in proper cases, could have been made under the general circular of March 1, 1884, and there are certain facts and circumstances surrounding this case which make it, in my opinion, a proper one in which to insist on the requirement, or at least to insist on further and more satisfactory proof.

The facts disclosed by the record herein and the records of your office indicate that this entry was made in the interest, and for the benefit of John Hunton, or the John Hunton Company; and not for the exclusive use and benefit of the entryman. If so made, the entry is illegal and should be canceled. *Joab Lawrence* (2 L. D. 22); *Stanton v. Durbin* (4 L. D., 445); Circular of June 28, 1887 (5 L. D., 708).

Some of the facts tending to show that the entry is illegal are as follows:

The entryman is now over seventy years of age, and resides in Madison county, Virginia. The land covered by his entry is in Laramie county, Wyoming Territory, and has never been seen by him. The irrigation of the land was done under the supervision of John Hunton. The John Hunton Company, on October 23, 1886, executed what pur-

ports to be a deed, conveying to the entryman a water right for the purpose of irrigating said land, the express consideration being \$800, equivalent to \$5 an acre for the land. Whether this was a real or only a colorable transaction is fairly questionable. The John Hunton Company is an incorporated company, organized in September, 1884, and doing business in Laramie County, Wyoming. The objects and purposes of said company, as appears from their certificate of incorporation, are :

To own, buy, sell and operate in real estate in the county of Laramie, and Territory of Wyoming; to improve the same; to construct, own, buy, sell and operate in irrigating ditches, and by means thereof reclaim lands and thereby render them fit for agriculture and pastoral purposes; and to own, buy, sell, breed and operate in neat cattle, horses, and mules.

John Hunton is a stockholder and director in said company and, as appears in the case of Theophilus Smoot, before me on appeal, was, on December 9, 1886, president and acting secretary thereof.

Said company appears to be the owners of one ditch five, and one-fourteen miles in length, supplied with water from Chugwater Creek. This creek runs through T. 23, R. 67, from near the southeast corner of the township, in a general northwesterly direction, and passes through said Sec. 15, in which appellant's claim is situated. Numerous entries appear to have been made along and on each side of this stream.

Appellant's corroborating witnesses on his application to enter were stock raisers, and his final proof witnesses were ranch laborers.

From the report of your predecessor in office for 1887 (page 466), it appears that proceedings had been instituted against John Hunton, of Laramie County, Wyoming, to compel the removal of fences unlawfully inclosing 13,470 acres of public land. Cattlemen sometimes attempt to hold land, which they have unlawfully inclosed, by having it entered in their interest and for their benefit, using the entrymen simply as instruments to enable them to do indirectly what they can not do directly, because forbidden by law. In the arid regions of the country the command of water courses affording an abundant supply of stock water is highly prized by cattle companies and stock men of large means. Exclusive possession of extended water fronts are prized not only on account of the water, an abundant supply of which is indispensable to large stock-raising enterprises, but on account of the extensive range of back country, which the possession and ownership of lands bordering on streams frequently secures the uninterrupted possession of for years.

It is well known to the land department that many fraudulent entries have been made in the interest of cattle companies and individual stockmen to secure these advantages by using as instruments their employes or their friends in distant States. One person is permitted to make but one entry under the desert land act, and securing more than one entry, by an individual or corporation, by indirection and circumvention, is clearly in violation of law.

The facts detailed and the circumstances surrounding this case strongly tend to show that Sparks' entry was not made for his exclusive use and benefit, but was made either for purely speculative purposes, or in the interest and for the benefit of another.

The validity of this entry and the good faith of the entryman, not being satisfactorily shown by the evidence submitted as final proof, said evidence is held to be insufficient, and it was properly rejected by your office.

Appellant will be allowed to make new proof before the local officers—after giving the usual notice—at any time within ninety days from the receipt of notice by him or his attorney of this decision; in default of which his said entry will be canceled.

Should appellant give notice of his intention to make new proof, the government should be represented at the hearing by a special agent of your office.

This case, it seems to me, challenges a thorough investigation, and it may be well to have other entries bordering on Chugwater creek, and lying along the line of the John Hunton Company's ditches, also investigated, so far as the facts in relation to such entries may tend to throw additional light on this case. It is desirable to know who are occupying and controlling the lands covered by these entries, and what use is made of the same by the entrymen or others.

The decision of your office is modified accordingly.

• PRE-EMPTION SETTLEMENT UNAUTHORIZED ENCLOSURE.

STODDARD *v.* NEIGEL.

A settlement made without violence, within the unlawful and unauthorized enclosure of another, is valid, and will not be defeated by said unlawful occupancy.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 2, 1888.

In the case of Margaret F. Stoddard *v.* Charles Neigel, involving the SE. $\frac{1}{4}$ of section 8, T. 12, R. 9 E., M. D. M., Sacramento land district, California, I have considered the appeal of the former from your office decision of March 14, 1887, adverse to her.

The record shows that the plat of survey of said tract was filed in the local office June 5, 1884. June 6, 1884, Margaret F. Stoddard made homestead entry for this land and on June 11, 1884, Charles Neigel filed his declaratory statement therefor, alleging settlement September 15, 1883. Neigel gave notice of his intention to make final proof June 9, 1886, and a hearing was had.

The facts brought out at the hearing are as follows: The land is situated in Eldorado county, California, and has been occupied by various persons since 1852, or 1853, when it was first inclosed. The first

settler was one Mayfield, who sold it to Mr. Swift who sold it to Von Amie who, in turn, sold it to C. Miles. From Miles, Hiram Stoddard—the husband of the homestead claimant—rented the track within the inclosure for a year or two and in 1864, he bought the same from Miles for \$450, and from that time until his death, in August, 1883, he occupied and used the land. The tract thus bought from Miles embraced not only the land in controversy, but about two hundred and forty acres additional. The fence inclosed the whole tract, or the most of it. None of this tract was surveyed until 1871, when a portion of it was surveyed. Upon a portion of the surveyed land Stoddard filed a declaratory statement and secured title to one hundred and sixty acres under the pre-emption law. He continued to live on his pre-emption claim until his death in August, 1883. In the spring of 1883, about eighteen acres on the tract in controversy were summer-fallowed by Stoddard and some brush cut down.

September 15, 1883, Charles Neigel drove a wagon through the bars of the fence surrounding this and the other land claimed by Stoddard. He lived in his wagon for a day or two when he put up a house into which he removed with his family. There was no one living on the land at the time. There was a small cabin which Neigel states was given to him by a wood-chopper, named Millett, who said he had built it seventeen years before.

The testimony shows that Neigel and his family have resided continuously upon the land from the date of settlement, and that he has made valuable and permanent improvements. Soon after he settled he made application at the local office to file his declaratory statement for the tract, but his application was rejected because the land described therein was unsurveyed.

November 9, 1883, Margaret F. Stoddard, the homestead claimant, began her residence upon the land. She also has made valuable and permanent improvements and had resided continuously thereon from that date until the hearing. After Neigel's settlement and in the fall of 1883, Mrs. Stoddard and her neighbor, Mr. Terry, deposited the amount necessary to procure a survey of this and other land. The survey was made and the plat filed in June, 1884.

Upon the testimony adduced at the hearing the local officers found in favor of Neigel and, on appeal, you affirmed the decision of the local officers on the ground that Neigel made the prior settlement and was residing on the tract when Stoddard made her entry.

From your said decision an appeal is taken, and the counsel for Stoddard invokes the doctrine laid down in the case of *Atherton v. Fowler* (96 U. S. 515) that "no right of pre-emption can be established by a settlement and improvement on a tract of public land where the claimant forcibly intruded upon the possession of one who had already settled upon, improved and inclosed that tract," as invalidating Neigel's settlement on September 15, 1883.

In the case under consideration there had been no settlement made by Stoddard prior to the date of Neigel's settlement, and the fence through which he passed was a general one inclosing the tract in controversy and other land. This fence was the joint property of Stoddard and Mr. Terry, a neighbor. Had he the right to pass through this fence? In the case of *Powers v. Forbes* (7 C. L. O., 149) it was held, that the illegal possession of a tract of public land cannot defeat the entry thereof by a qualified person who has complied with the law in every regard, except the intrusion upon the possession of another. Was the possession of Stoddard illegal? Upon April 5, 1883, a circular was issued relative to the unlawful inclosures of public lands (1 L. D., 683), in which the following language is used.

The public lands are open to settlement and occupation only under the public land laws of the United States and any unauthorized appropriation of the same is trespass. Such trespass is equally offensive to law and morals as if upon private property. The fencing of large bodies of public land beyond that allowed by law is illegal and against the right of others who desire to settle or graze their cattle on the inclosed tracts. . . . Graziers will not be allowed on any pretext whatever, to fence the public lands and thus practically withdraw them from the operation of the settlement laws. This Department will interpose no objections to the destruction of these fences by persons who desire to make bona fide settlement on the inclosed tracts, but are prevented by the fences, or by threats, or violence from doing so.

This circular had been promulgated several months before Neigel passed, without violence, through the enclosure and made settlement, and under its language, the inclosure was unlawfully made. Stoddard had never made settlement upon the tract and was not claiming possession under any law of the United States. Her occupation was unauthorized and did not defeat Neigel's settlement. I am of the opinion that the facts in this case, as set forth above, differ from those in the Atherton-Fowler case, and that the doctrine laid down therein does not apply. For this reason I affirm your decision awarding to Neigel the superior right to the tract.

PRACTICE—APPEAL—ACT OF JUNE 15, 1880.

ALONZO SWINK.

An application to purchase under the act of June 15, 1880, is an abandonment of a pending appeal.

The right of purchase under said act is not defeated by the pendency of proceedings against the original entry instituted by the government on a special agent's report.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 4, 1888.

I have considered the appeal of Alonzo Swink, from your office decision dated June 25, 1887, holding for cancellation his final certificate No.

1935, for the NW. $\frac{1}{4}$, Sec. 27, T. 23 S., R. 56 W., Pueblo land district, Colorado.

The record shows that Swink made homestead entry No. 1483, for said described tract February 24, 1880, and on March 9, 1885, in accordance with duly published notice he made final proof before the register and receiver at Pueblo, which was approved by them and final certificate issued thereon to him the same date.

On August 14, 1885, special agent R. G. Dill, of your office reported that he had made a personal examination of said tract, and found the character of the land to be agricultural, but would not produce crops without artificial irrigation; that the land was then in the possession of the entryman.

It is enclosed for farming, entire tract enclosed by claimant; no timber on the tract. . . . I found an adobe house, with dirt roof, worth \$100, and adobe stable worth \$50, these were erected in 1876, by George Powell, who had made a homestead entry on the claim. Two miles of fence have been erected by the claimant, worth \$400, about twenty acres have been sown in alfalfa, producing an annual crop worth about \$300, other portions of the claim have been cultivated to grain crops several years ago. The residence of claimant is on the land. He purchased the claim from George Powell, . . . claimant resided on and cultivated the land two years after making his entry, and then went to work on the cattle range since which time he has not resided continuously thereon. He was legally qualified, and is known in the neighborhood. There is no evidence that the entry was made in the interest of any other party. . . . I do not think any fraud was intended.

The special agent recommended,

That the claimant be required to complete the full term of five years residence on the land unless it is deemed . . . that he has sufficiently complied with the law.

March 31, 1886, your predecessor held the entry for cancellation on the report of said special agent and claimant received notice of the same April 6, 1886.

On May 20, 1886, Swink applied for a hearing in accordance with the requirements of your office circular of July 31, 1835 (4 L. D., 503), and on June 9, 1886, the local officers were directed to order a hearing in the premises; Whereupon they fixed the hearing for October 28-'86. On the day appointed Swink appeared with his attorney and witnesses; E. F. Ely, as special agent appeared for the government, but stated he was unable to procure the attendance of witnesses that day. It was thereupon agreed that claimant's witnesses be examined after which the hearing was to be postponed to December 1st so as to procure the attendance of witnesses for the government. The examination of claimant and his witnesses ended October 28-'86. The government failed to offer any proof on its part, and on March 11-'87, the register and receiver recommended that the entry be held for cancellation.

On March 24, 1887, claimant appealed. On June 25, 1887, your office decided, "That the facts developed on the hearing do not show a bona fide intention in claimant to make a home for himself upon the

land, and that the actual residence was wholly inadequate," and held the entry for cancellation.

On July 13, 1887, Swink appealed from said decision and on July 21st same year, he made due application at the local office to purchase said described tract under the provisions of the act of June 15, 1880; the local officers refused to accept or file his application, and made the following endorsement thereon, viz:

U. S. LAND OFFICE,
Pueblo, Colorado, July 27, 1887.

I hereby certify that the within application of Alonzo Swink to purchase under the act of June 15, 1880, was received at this office July 21, 1887, and purchase money for same duly tendered, and it is hereby rejected for the reason that the records of this office show that a contest, viz: United States *v.* Alonzo Swink, involving the H. E. No. 1483 of said Alonzo Swink is now pending before the Hon. Commissioner of the General Land Office, and awaiting the result of which contest no further action affecting the disposal of said tract will be taken by this office. Thirty days allowed for appeal.

(Signed)

WM. BAYARD, *Register.*

On August 27, 1887, claimant filed an appeal from the decision of the register rejecting his application to purchase and the whole case is necessarily before me.

As the entryman offered to purchase the land under the provisions of the act of June 15, 1880, subsequent to filing his appeal from your office decision of June 25, 1887, he thereby abandoned said appeal and the only question to be decided is as to his right to purchase under the provisions of said act of Congress. The second section of said act provides:

That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those have so entered for homesteads, may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the government price therefore Provided, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws. (21 Stat. 237).

The act of June 15, 1880, is a remedial statute and should be construed liberally. Its language is very plain and attaches no prerequisites to the purchase of lands duly entered under the homestead laws, except to show that the tract described is free from any adverse claim, nor does said act require proof of residence, improvement or cultivation of the land.

The instructions issued by your office from time to time relating to said act of June 15, 1880, and which have been approved by this Department (See circular of October 9, 1880, 2 C. L. L., 497); also general circular of March 1884, pp. 16 & 17), recognize the right of all persons who prior to June 15, 1880, entered under the homestead laws, lands properly subject to such entry, to obtain title by paying the government price, when such purchase did not interfere with any adverse claim of another; and as numerous decisions of this Department recognize such right to purchase, and as it clearly appears that no valid adverse claim

has intervened in the case at bar, and that the contest is between the government and the entryman, who is shown to have made a valid entry for the said tract prior to June 15, 1880, and the same had not been finally canceled, I must reverse your decision, and direct that Swink's application to purchase be allowed.

FINAL PROOF—NOTARY PUBLIC—RESIDENCE.

FRANCIS M. WOOD.

Final commutation proof made before a notary public may be accepted, where the claimant had given notice of his intention to submit said proof and the order for the publication thereof had been made before the circular of March 30, 1886, reached the local office.

Temporary absences, not inconsistent with the good faith of the entryman's residence, may be excused.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 4, 1888.

Francis M. Wood, on June 23, 1886, submitted commutation proof under his original entry of the NE. $\frac{1}{4}$, Sec. 32, T. 132 N., R. 60 W., Fargo, Dakota, and final certificate was duly issued June 26, 1886.

Your office on October 29, 1886, rejected the claimant's proof for the reason that it was made before a notary public in violation of the circular regulations of March 30, 1886, (4 L. D., 473). On application for review your office adhered to its former ruling and held also that the proof should be rejected for the reason that a sufficient showing of residence had not been made.

The case is now here on appeal.

With respect to the submission of claimant's proof, the receiver at Fargo reports under date of February 15, 1887, as follows:

In connection with this matter we would say that the order for publication of claimant's notice of intention to make proof was issued by this office April 2, 1886, at least two days prior to the receipt of your circular of March 30, 1886 (4 L. D., 473). (We have no records of the exact time said circular was received, but it could not have been received prior to April 4, 1886). The testimony in this case was taken in accordance with the order issued by this office (and would not have been received if it had not), and as the order was issued in accordance with the rules and regulations then existing, we cannot see that either the claimant or this office have erred.

The record shows that the published notice is dated April 2, 1886, that May 20, 1886, is the day fixed therein for the submission of proof, and that by subsequent orders of the local office the date for making said proof was postponed to June 23, 1886.

The third paragraph of the circular of March 30, 1886, provides:

Cases wherein notice of intention to make final proof shall have been given under the former practice, prior to the promulgation of this circular, shall be in no manner affected by the regulations herein contained.

This case clearly falls within the exception contained in said paragraph, and must be governed thereby. The claimant had given his notice of intention to submit proof, and the usual order for the publication of such notice had been made before the circular in question had reached the local office.

As to the claimant's compliance with law the final proof shows that he made his original entry, January 15, 1885, and established his residence on the land March 24, 1885, that "there have been periods of absence but not to exceed thirty days at any one time, except from October 1885, to March 1886, during which time we were temporarily located at Fargo, Dakota for the purpose of sending our children to school. During other times while I was absent my family resided upon and cultivated the land." His improvements were valued at \$600, and consisted of a frame house fourteen by sixteen, one and a half stories high, with a "lean to" of ten by twelve feet, one story high, frame stable thirteen by sixteen feet, with "lean to" seven by thirteen; a well fourteen feet deep, and curbed; fifty-four acres broken, with twenty-five acres in crop. In explanation of his absences the claimant states on cross-examination that he is Supt. of Missions for the Presbyterian church and that his short absences were occasioned by attention to duties under such appointment, but that during such absences his wife and children remained on the land; and that in the summer of 1885, he and his family were absent during the harvest season for the purpose of harvesting crops on another tract of land owned by the claimant, about seven miles distant from the homestead.

The improvements shown are ample, and the absences, under the explanation given, do not impeach the good faith of the claimant's residence.

Your decision is therefore reversed, and patent will issue in due course on the proof submitted.

PRACTICE—SECOND CONTEST—APPEAL.

WATERS ET AL. *v.* SHELDON.

The institution of a second contest is a waiver of any rights the contestant may have had under the first.

The date when the affidavit of contest is received and accepted by the local office determines whether the contest is premature.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 5, 1888.

I have considered the appeal of John E. Gilbert from your office decision of March 29, 1887, rejecting his contest against R. O. Sheldon on the latter's homestead entry for the SW. $\frac{1}{4}$, Sec. 21, T. 108 N., R. 66 W., Mitchell land district, Dakota.

Rudolph O. Sheldon made homestead entry for the said land October 30, 1885. On May 1, 1886, George H. Waters filed contest against said entry, alleging abandonment. The local officers dismissed the contest because prematurely brought, six months and one day, exclusive of the day of entry not having expired. (*Baxter v. Cross* 2 L. D., 69). Waters' appeal to your office was dismissed for the same reason.

On May 3, 1886, John E. Gilbert filed contest, affidavit executed May 1, same year, alleging that Sheldon had abandoned the said tract.

On May 4, 1886, said Waters executed a second contest affidavit, alleging abandonment which was received in the local office on the 6th of the said month and held subject to Gilbert's contest. Testimony showing abandonment was submitted June 28, 1886, in case *Gilbert v. Sheldon*, in accordance with due and proper notice.

The local officers on July 21, 1886, rendered a decision that Gilbert's contest was prematurely brought and that Waters second contest was "the first valid contest."

Gilbert appealed. Your office by said decision of March 29, 1887, affirmed the judgment of the local officers; thereupon Gilbert instituted his appeal to this Department.

The institution by Waters of his second contest was a waiver of his first. *Holdrige et al. v. Clark* (4 L. D., 382).

Gilbert's contest was not initiated until his affidavit of contest was received and accepted by the local office, May 3, 1886. *Bolster v. Barlow* (6 L. D., 825); *Seitz v. Wallace* (6 L. D., 299).

The local office entertained Gilbert's contest, received Waters second contest subject to it, issued proper notice for a hearing on the former for June 28, 1886. A hearing was had on that day, Gilbert submitted testimony showing abandonment and under the authority cited it was error to reject his contest. Your decision is accordingly reversed.

SCHOOL INDEMNITY--VOIDABLE SELECTION.

EARLY *v.* STATE OF CALIFORNIA.

A school indemnity selection, based upon a loss alleged prior to the survey of the township in which such basis is situated, is not void, but voidable, and becomes valid, in the absence of an intervening adverse claim, from the date when said township is surveyed and said loss definitely ascertained.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 8, 1888.

I have considered the case of Thomas G. Early *v.* the State of California, as presented by the appeal of the State from the decision of your office, dated August 13, 1886, holding for cancellation the indemnity school selections of the NE. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 10, the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 11, T. 3 N., R. 4 E., H.

M., made May 17, and 31, 1878, at the Humboldt land office in said State as per lists Nos. 34 and 35.

The record shows that said selections were filed by the State claiming said land in lieu of portions of Sec. 16, in T. 8 N., R. 5 E., H. M., conceded to be within the limits of the Hoopa Valley Indian reservation created by executive order, dated June 23, 1876, under the provisions of the act of Congress approved April 8, 1864 (13 Stat., 39).

On December 1, 1883, the plats of survey of townships 8 and 9, so far as the same fell outside of said reservation, were approved and the same were filed in the local land office on January 11, 1884.

On March 2, 1886, the local officers rejected the homestead application of said Early filed the same day, for the reason that the land applied for was covered by said indemnity selections. On appeal, your office held the selections for cancellation, for the reason that at the date when the same were filed there were no proper bases.

Your office concedes that if the subdivisinal surveys were extended over the entire township, the reservation would embrace the 16th section and that under the proper construction of the act of Congress approved July 23, 1866 (14 Stat., 218), "the State should be regarded as entitled to indemnity when that fact was determined by the surveys above mentioned." But your office decided, upon the authority of departmental decision in the case of Selby *et al. v. said State* (2 C. L. L., 634-5), that said selections were invalid, and hence, no bar to the appropriation of said lands under the settlement laws.

It is strenuously urged by the appellant, that if the bases upon which said selections were made, were defective at the date thereof, the selections became validated upon the filing of the township plats of survey, showing conclusively that the 16th section was wholly within said reservation and therefore a proper basis for said selection.

In support of said contention, counsel for the State urges that the Indian reservation was surveyed in 1875, under the directions of your office; that during the same year, townships 8 and 9 north, of range 3 east, were surveyed by United States Surveyor Foreman; that the east line of said townships intersects the north and west lines of the reservation; that said townships were properly connected with said reservation as appears from an inspection of the map of California made in your office in 1879; that the plats and field notes of the survey of said townships, and of said reservation were filed in the local office prior to November, 1879, and that upon the evidence thus furnished, indemnity selections were made, based upon the loss of the same sixteenth section; that said selections were allowed by this Department in March 1878, in the case of Eugene W. Kaster; and that after said selections had been allowed, and upon the same evidence, the State selecting agent treated said sixteenth section as lost to the State and filed said selections for the land in question in lieu thereof, which selections were certified by the register of the local land office to be correct.

The sixth section of said act of 1866, provides that the act of Congress approved March 3, 1853 (10 Stat., 244),

Shall be construed as giving the State of California the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as were settled upon prior to survey, reserved for public uses, covered by grants made under Spanish or Mexican authority, or by other private claims, or where such sections would be so covered if the lines of the public surveys were extended over such lands, which shall be determined whenever township lines have been extended over such land, and the case of Spanish or Mexican grants, when the field survey of such grants shall have been made. The surveyor general of California shall furnish the State authorities with lists of all such sections so covered, as a basis of selection, such selections to be made from surveyed lands, and within the same land district.

It has been uniformly held by this Department that said act of 1866, is remedial and should receive a liberal construction so as to accomplish its object as indicated by its title, namely: "To quiet land titles in California."

The case of Selby *et al. v.* said State (*supra*), arose upon the applications of certain pre-emptors to prove up and pay for lands claimed by said State under certain indemnity selections for lands alleged to be lost to the State, by reason of being included in Spanish or Mexican grants. The local officers rejected the applications for the reason that the lands applied for were covered by the prior state selections. On appeal, however, this Department, found, from an inspection of the records of your office that,

In nearly every instance the school sections alleged to be lost to the State, and in lieu of which these selections are made, are included in the limits of a grant not yet adjusted, and without final survey. . . . The State had not lost the land, and was not entitled to select indemnity therefor. Her pretended selections were therefore without authority of law and void. She can not be permitted to substitute other lands actually lost and thereby preserve her selections, so as to defeat the claim of said pre-emptor, for such substitution would be virtually a new selection taking effect from its date. (Citing State of California *v.* Haile and Watson, 1 C. L. L., 324).

Your office, in the Selby decision (*supra*) was directed to carefully examine the State selections alleged to be invalid, and if the allegation be true to reject the selections and examine the pre-emption claims upon their merits; and furthermore, that if persons apply to enter or file for lands covered by a State selection which is alleged to be invalid, they should be permitted to contest the selection after due notice to the State, and if, upon investigation, it be shown that the selection is invalid, it should be canceled, and the entries or filings should be received as of the date they were offered.

Taking the whole decision together in the Selby case (*supra*), it is quite evident that the selections were not void *ab initio*, only voidable. The lands selected were open to selection, settlement and entry in a proper manner. The selections had been allowed and posted upon the records, and by the express terms of the decision, if claimants under the homestead or pre-emption laws allege that the indemnity selections are invalid, contests should be allowed to determine the truth of the

allegation, and if the same be proven, the selections should be canceled and the applications should be received as of the day offered. This is in harmony with the rulings of the courts and the Department upon claims under the settlement and other laws of the United States.

In the case of *Durand v. Martin* (120 U. S., 367) Martin claimed certain lands by virtue of his patent from the State of California, which had selected the land as indemnity for land lost in Sec. 16, T. 22 S., R. 6 E., M. D. M., under the provisions of section seven of the act of March 3, 1853 (10 Stat., 244 to 247). It was contended that his title was bad, for the reason that said township had never been surveyed by the United States, and the east half of said section sixteen, which was the basis for the indemnity selection, was within the boundaries of a Mexican grant, the final survey of which was approved in 1859; that the land in question was within the exterior boundaries of said grant, upon which patent issued in 1872, excluding the land from the claim. The court said:

It is true that the certificate of the Commissioner to a list of lands which were not open to selection at the time they were selected, nor at the time they were certified, would not pass title out of the United States, because he had no authority in law to make such a certificate. But the case is quite different when the State presents for certification as an existing selection one that was bad when made but good when presented. Under such circumstances, if the rights of no third parties have intervened, there is nothing to prevent the Commissioner from treating the selection as if made on the day of presentation, and certifying accordingly. His certification is of selections claimed by the State at the time of its date, and if the State had a right to the title under the circumstances existing then, it was within his official authority to make the transfer. It is a matter of no moment that the selection was bad at the time it was made, if, at the time of its presentation for title it was good, and there were no intervening rights to be injured by reason of its acceptance and ratification by the United States.

Applying the principle thus announced to the case at bar, it is evident that said selection was good in 1883, which was prior to the application under the homestead laws.

In the case of the *Southern Pacific Railroad Company v. said State* (3 L. D., 88), this Department held that selections under the act of 1866, made prematurely because the question of the loss to the State had not been ascertained, were not void but voidable, and served to except the land selected from the grant to said company. See also *State of California* (3 L. D., 327).

In the case of *Niven v. the State of California* (6 L. D., 439), the Department held that an invalid school selection of record bars the allowance of an application to enter, but that the application to enter must be considered as an attack upon the selection.

In the case at bar the selection became validated long prior to the application to enter and hence, the attack upon it must fail.

The decision of your office must be and it is hereby reversed.

HOMESTEAD ENTRY—EQUITABLE ADJUDICATION

WILLIAM H. MARTIN.

Where the failure to establish residence within six months from date of original entry is caused by circumstances beyond the control of the entryman, and good faith is shown, the entry may be submitted to the Board of Equitable Adjudication.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 8, 1888.

William H. Martin, on September 8, 1881, made homestead entry of the NW $\frac{1}{4}$ of Sec. 2, T. 142, R. 55, Fargo district, Dakota. He began to build a house upon the tract, himself taking up his residence thereon May 8, 1882, having been delayed by sickness in his family and other causes beyond his own control, fully set forth in his final proof. His family arrived about a month later. His house is a one-story frame building, sixteen by twenty-six feet; granary fourteen feet; and other smaller buildings. Has one hundred and forty acres of the tract under cultivation. Final proof was offered October 27, 1886; but is rejected by your office on two grounds: (1) the entryman failed to take up his residence upon the tract within six months after entry. You suggest that, as there is no adverse claim, the case might be submitted to the Board of Equitable Adjudication for action, were it not (2) that you fail to find good faith in the matter of residence subsequently.

Claimant's family remained upon the tract from the first week in June, 1882, until about the 1st of November. Having seven young children, whom he desired to afford the facilities of education, the nearest school-house being at the village of Page, two and one half miles away, and the winters in that high northern latitude being so severe that it was dangerous to the lives of the children to attempt to walk that distance regularly, about the 1st of November each year he has removed his family to the village of Page—such removal, claimant alleges under oath,

Being but temporary, and for the sole and express purpose of permitting his said children to attend school, and for no other purpose whatever; and as for himself, during his said absence he kept up his daily labors at and upon said homestead, returning to said village of Page each evening.

Claimant's final proof witnesses corroborate the above statement, witness Berry adding:

I am in no way interested in said claim, and consider that no man could possibly act in better faith toward the government in this matter than Mr. Martin has.

Martin having established his residence upon the tract in good faith in May, 1882, I do not consider that the temporary absences under the circumstances above set forth, constitute an abandonment of residence, or militate against his good faith. I think the case one which can very properly be submitted to the Board of Equitable Adjudication, and so direct. Your decision is modified accordingly.

TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

JAMES A. BECKETT.

The refusal to entertain a timber culture contest necessarily carries with it the rejection of the application to enter accompanying the contest affidavit.

There is no law conferring a preference right of entry upon one who breaks five acres of a tract while it is covered by the uncanceled timber culture entry of another.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 8, 1888.

On January 12, 1885, one A. W. Mitchell initiated contest against the timber-culture entry of William Nicholas, for the SE. $\frac{1}{4}$ of Sec. 28, T. 23 S., R. 35 W., Garden City, Kansas. Trial was had April 8, 1885, when defendant defaulted, and the local officers recommended the cancellation of the entry. The record of the case was transmitted to your office. Pending action by your office upon the case—no appeal having been taken by Nicholas—Mitchell (on October 2, 1886,) filed a motion to dismiss the contest, and simultaneously one James A. Beckett filed application to contest Nicholas' entry on the same grounds. The local officers refused Beckett's application. Your office sustained the action of the local officers, held that Mitchell's motion to dismiss was practically a waiver of his preference right of entry, and canceled the entry of Nicholas, leaving the tract open for entry by the first legal applicant. It was entered under the timber-culture law by one Charles E. Merriam, February 8, 1887.

Notice of such action was given Beckett, who on February 19, 1887, presented an application to make timber-culture entry of the tract. This application was refused because of the prior entry of Merriam. From this action Beckett appealed to your office, and from your adverse decision he appeals to the Department—on the grounds (1) that his application was prior to that of Merriam, he having filed an application to enter at the same time he filed his application to contest; (2) that Merriam's application to enter ought not to have been accepted until he (Beckett) had been allowed the usual time for appeal to the Department; (3) that Beckett, having broken five acres of the tract prior to the cancellation of Nicholas' entry, had thereby acquired a preference right thereto.

In answer to which it will be sufficient to say:

(1) The rejection of Beckett's application to contest Nicholas entry necessarily carried with it the rejection of his accompanying application to enter the tract.

(2) Beckett did not appeal from said rejection (of his application offered October 2, 1886), and it was after the expiration of the time for making such appeal that Merriam's entry was accepted (on February 8, 1887). It was an act of courtesy or grace, and not demanded by law,

that Beckett was informed of Merriam's entry at the last named date, and he was then no longer in a position to appeal from the action of the land department in permitting anyone to make entry of the tract.

There is no law allowing preference right of entry to any person who will break five acres of a tract while it is covered by the yet uncanceled entry of some prior entryman.

Your office decision of June 15, 1887, is affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION.

ELISHA LEE.

The "pending cases" excepted from the regulations of February 13, 1883, were those then pending on application for certification.

Secretary Vilas to Commissioner Stockslager, October 9, 1888.

On January 13, 1886, there was filed in your office the application of Elisha Lee for certification of his right to make soldiers' additional homestead entry.

It appears that Lee made original entry of forty acres at Boonville, Missouri, on June 30, 1873; that his proof thereon October 4, 1875, failed to satisfy your office of his compliance with law in the matter of residence, and that your office by letter of January 12, 1876, directed the local officers to inform "Mr. Lee that before he can perfect his entry he will be required to reside upon and cultivate the land for such period as added to the above mentioned term of military service will make a total of five years from date of entry as required by law;" that the local officers subsequently reported that no action had been taken by claimant, and that on March 30, 1882 the entry was canceled.

Prior to said cancellation, and on November 15, 1875, Lee made an additional entry at Visalia, California, of one hundred and twenty acres, which was canceled on October 14, 1885, by reason of the failure of the original entry.

On October 28, 1885, claimant filed in your office an affidavit alleging that he had never received notice of the order cancelling his original entry, that in fact he had resided on the claim for four years after making proof, and asked the re-instatement of the entry. Corroborating affidavits were also filed to the effect that claimant had resided on the tract from July 1, 1873 to about May 1, 1881. Thereupon by letter of your office dated December 19, 1885, said original entry was reinstated, and has since been patented.

Meanwhile the tract in California formerly covered by his additional entry was otherwise appropriated.

Lee therefore applied for certification on January 13, 1886, as above stated.

His claim to certification is based on the ground that his case was a pending one on February 13, 1883, the date of the circular discontinuing the practice of certification, and was excepted from the general provision of said circular by the terms thereof.

From May 17, 1877, to February 13, 1883, it was the practice of your office to examine the papers accompanying each application for the right of soldiers' additional entry, and if the applicant were found entitled to the right, to issue a certificate to that effect. On the latter date said circular directed the discontinuance of that practice and provided certain rules to be followed in such cases. These rules required that such applicants should present themselves in person at the local office of the district in which the land desired was situated, sign certain papers, and make certain affidavits. The last clause of the circular provided, that:

These rules will not be deemed to apply to cases where the additional right has heretofore been certified by this office, nor to cases now pending, or which may be filed in this office prior to March 16, 1883. (1 L. D., 654).

It is true the additional entry in California was subsisting at the date of the circular. That fact it is claimed made this a "pending case" in the purview of said circular. The circular of 1883, was intended wholly to correct the evils attending the practice of certification, and its scope is limited to that intention. It directed that the practice of issuing these certificates should cease, but, in order to save harmless those who had secured their certificates under the former practice or taken steps so to secure them, it provided that pending cases would not be subject to the new rules. The "pending cases" excepted by the circular, therefore, were those pending on application for certification. This case does not come within that exception for the application for certification was not made until 1886.

The refusal of your office to issue said certificate is, for this reason, affirmed. Should Lee apply to make entry in person his case will be adjudicated anew.

RAILROAD GRANT--SETTLEMENT RIGHT.

NORTHERN PAC. R. R. CO. *v.* WILEY.

Land covered by a pre-emption settlement and filing at date of definite location is excepted from the operation thereof; and the validity of the pre-emption claim cannot be questioned by the company.

Secretary Vilas to Commissioner Stockslager, October 9, 1888.

I have considered the case of the Northern Pacific R. R. Co. *v.* Josiah Wiley, on appeal by the former from your office decision of November 1, 1886, holding that the SW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ of Sec. 1, T. 12 N., R. 17 E.,

North Yakima, Washington Territory land district, was excepted from the grant to said company of July 2, 1864 (13 Stat., 365).

This tract is within the limits of the withdrawal made on the filing, June 11, 1879, of the map of general route of the branch line of said company's road. It is also within the granted limits of said grant as determined by the map of definite location of said road west from Yakima city filed May 24, 1884.

On August 16, 1870, Josiah Wiley filed pre-emption declaratory statement for this tract, together with other land, alleging settlement thereon November 1, 1869.

On February 8, 1873, he made homestead entry for the land included in his pre-emption filing, which entry was canceled November 12, 1879, upon relinquishment.

On February 25, 1884, said Wiley filed a pre-emption declaratory statement for the tract in controversy, alleging settlement on the same day, and on October 8, 1885, made proof and payment therefor upon which the local officers issued final certificate.

Upon the examination of the papers in your office it was decided that Wiley's claim served to except the land from the operation of the grant to the railroad company. From that decision the company appealed.

In the appeal it is said,

The claim of Wiley existing under his homestead entry June 11, 1879, under the rulings of the Department excepted the land from the withdrawal on general route, but this entry was canceled November 12, 1879, and the tract then became public land and was subject to the company's right upon the definite location of the line May 24, 1884, unless some intermediate valid adverse right had attached to defeat that right.

It is further claimed that the settlement and filing made by Wiley February 25, 1884, could not operate to defeat the company's claim he having relinquished all right under his homestead entry and having exhausted his pre-emption right by a former filing. Wiley's statement that he first settled on this land November 1, 1869, is not contradicted. Admitting the truth of that statement it is seen that from the date of that settlement up to the date of the cancellation of his homestead entry November 12, 1879, Wiley was asserting such a claim to said land as served beyond question to except it from the operation of any withdrawal taking effect within that period. At the date the company claims its rights attached under the map of definite location, Wiley was on the land and had of record a claim thereto the validity of which the company can not question. *W. H. Malone v. Union Pac. Ry. Co.* (7 L. D., 13) *Millican v. Northern Pac. R. R. Co* (id., 85)

Your said office decision is affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATE—ATTORNEY.

L. D. CHANDLER.

The exercise, in person, of the right to make soldiers' additional entry, pending final disposition of an application for the certification of such right, precludes further action on said application.

The Department will not consider questions between attorney and client, arising on application for soldiers' additional certificate, where the claim for such certificate no longer exists.

Secretary Vilas to Commissioner Stockslager, October 9, 1838.

On June 6, 1832, Messrs Heylmun & Kane, as attorneys for L. D. Chandler filed in your office his application for certification of soldiers additional homestead right.

Pending action thereon, and on April 2, 1836, there was filed in your office by Messrs. Sickels & Hickox, as attorneys for Chandler, his power of attorney in favor of D. K. Sickels authorizing the latter to prosecute the claim, and a statement by said attorneys that Chandler "now desires to make an entry in person under the circular of February 13, 1833."

On examination of the papers in the case your office on May 19, 1836, found that Chandler was entitled to the right of soldiers' additional entry, and decided that he might "exercise his right to make a personal entry under the circular of February 13, 1833." (1 L. D. 654).

From this decision A. G. Heylmun "surviving partner of Heylmun & Kane," appealed, claiming generally, that the certificate should be issued and delivered to him.

Pending this appeal, it appears from the records of your office, Chandler went to the local office at Lamar, Colorado, and there on September 7, 1837, made his additional entry in person.

This action on his part makes it unnecessary to consider further his application for certificate.

As the certificate would be only the evidence of his right to make entry, it is plain that its issuance now would not serve him, as he has already exercised the right. No judgment on the question of his right to certification, therefore, will be rendered.

Appellant Heylmun complains of the substitution by Chandler of other attorneys, without notice to him. This however is a matter between client and attorney, and raises questions which it is not deemed appropriate for the Department to consider, the fact being that applicant, having exercised his right, has removed the basis of his claim for certification.

The appeal is therefore dismissed.

RAILROAD GRANT—CONFLICTING CLAIM.

NORTHERN PACIFIC R. R. CO. *v.* JOHNSON.

When land is excepted from the operation of the grant by reason of a subsisting filing or entry, and such adverse right subsequently ceases to exist, the land involved does not thereby become subject to the grant, but is public land, open to appropriation by the first legal applicant.

Secretary Vilas to Commissioner Stockslager, October 9, 1888.

I have considered the case of the Northern Pacific Railroad Company *v.* Erastus J. Johnson, on appeal by the former from the decision of your office of January 20, 1887, declaring valid the homestead entry, No. 5878, of the latter, on the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 5, T. 9 N., R. 2 W., Washington Territory.

The records show that the land was covered by homestead entry, No. 1651, made January 2, 1869, and canceled October 13, 1870, and was afterwards embraced in homestead entry, No. 1659, made November 23, 1870, and canceled October 29, 1873. Said land was also included within the limits of a withdrawal ordered upon said company's filing a map of general route, August 13, 1870. The company filed its map of definite location, September 13, 1873. It thus appears, that at the time of the filing of the map of general route and the withdrawal thereunder, the land was covered by said homestead entry, No. 1651, which was then subsisting; and, this entry having been subsequently canceled, said homestead entry, No. 1659, was made, which was a subsisting entry on the land at the date of the filing of the map of definite location.

The land was listed by the company (as per list No. 3), December 31, 1884, and thereafter, October 18, 1886, said Erastus J. Johnson made said homestead entry, No. 5878, now under consideration.

The act of July 2, 1864 (13 Stat., 365), under which the land is claimed by the company, only grants odd sections within certain prescribed limits, to which the United States "have a full title," and expressly excepts from the grant such odd sections as have been "reserved, sold, granted, or otherwise appropriated," and to which "pre-emption, or other claims or rights have attached," 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 right of the company to land under the grant vested "at the time the line of the road was definitely fixed" and the map of definite location filed. *Kansas Pacific Ry. Co. v. Dunmeyer* (113 U. S. p. 535). The grant is expressly limited to odd sections within the terms of the grant at that date; if not *then* subject to the grant, there is no provision for their becoming so subsequently. Accordingly, it is well settled by the decision of this Department, that when an entry or filing exists at the date when by the terms of the grant the rights of the grantee vest thereunder, and the entry or filing

subsequently ceases from any cause to exist, the land involved does not thereby become subject to the grant, but is public land, open to appropriation by the first legal applicant. (*Talbert v. Northern Pac. R. R. Co.*, 2 L. D., 536; *Northern Pac. R. R. Co. v. Burt*, 3 L. D., 490; *Holmes v. Northern Pac. R. R. Co.*, 5 L. D., 333; *Roeschlaub v. Union Pacific Ry. Co. et al.*, 6 L. D., 750). The fact that there was no entry subsisting at the date of the listing, December 31, 1884, is immaterial; the listing of the land by the company in no way affected the status of the land. *Roeschlaub v. Union Pacific Ry. Co. et al, supra.*

The decision of your office is accordingly affirmed.

PRACTICE—APPEAL—RULE 81.

NORTHERN PAC. R. R. CO. *v.* MARTIN.

Failure to appeal from the decision of the local office, defeats the right of appeal from the decision of the General Land Office affirming the action below.

Secretary Vilas to Commissioner Stockslager, October 9, 1888.

I have before me the record in the case of the Northern Pacific Railroad Company *v.* John Martin, appealed by said company from the decision of your office, dated December 16, 1886.

The subject matter of the controversy is the SE. $\frac{1}{4}$, Sec. 23, T. 6 N., R. 36 E., La Grande district, Oregon.

A hearing was had between the parties in February, 1886, which resulted in a decision by the local officers in favor of Martin, and in the rejection of said company's claim to the land in controversy. From this decision no appeal appears to have been taken, and it was affirmed by your said office decision and "declared final and the case closed."

Rule 81 of the Rules of Practice, as amended December 8, 1885 (4 L. D., 285) is as follows:

No appeal shall be had from the action of the Commissioner of the General Land Office affirming the decision of the local officers in any case where the party or parties adversely affected thereby shall fail, after due notice, to appeal from such decision of said local officers.

There is no claim by said company that it was not duly notified of the decision of the local officers, and no excuse whatever is offered for not appealing therefrom.

The facts disclosed by the record bring this case within the rule quoted and the appeal is therefore dismissed. (*Northern Pacific R. R. Co. v. McNeill* 6 L. D., 804).

MINING CLAIM PLACER—STATUTORY EXPENDITURE.

STORK AND HERON PLACER.

The cost of a survey, preliminary to the location of a ditch for the development of a claim, will not be credited on the required statutory expenditure where said ditch has not been dug.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 9, 1888.

On April 26, 1887, your office held for cancellation the cash entry of T. F. Van Wagener for the Stork and Heron placer mining claim embracing the SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 3, and the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 10, T. 11 S., R. 80 W. of 6th P. M., Leadville, Colorado land district.

The reason assigned for the said decision was that the claimant had failed to show that the requisite amount in labor and improvements, has been expended upon or for the development of the claim.

On July 29, 1887, counsel for claimant filed a motion for review of said decision, based upon the affidavit of one Samuel S. Harper filed with said motion.

The said affidavit was substantially to the effect that in the fall of 1879, the affiant a co-owner with claimant in certain mining claims, acting for himself and his associates, employed a surveyor and caused a preliminary line to be surveyed "to ascertain if it would be feasible to bring water through a ditch from the Arkansas River to work the ground claimed by deponent and his associates;" that "the actual cost of such survey was between \$500 and \$1000." That such ditch survey covered the ground now embraced in the Stork and Heron Placer claim; that the expenditure thus made had never been applied to any other ground for which patent has been sought, and that the field notes of such survey had been carefully preserved.

In your office letter of July 29, 1887, overruling said motion you say, "Such expenditure cannot be considered as showing compliance with the statutory requirement under which said entry was held for cancellation."

In your conclusion of law I find no error.

If a ditch had been actually dug and water brought therein for the development of the claim in question, the cost of a preliminary survey might be legitimately included in the cost of the ditch, and the claim in question might have credit for the cost thereof to the extent it was entitled *pro rata* with other claims benefited thereby, but it does not follow that the cost of a preliminary survey may be credited as the cost of a ditch which never has been and perhaps never will be constructed.

Even if claimants theory should be accepted, and the cost of said preliminary survey be applied *pro rata* to the credit of the claim, the evidence does not show the requisite amount of labor.

The evidence shows that said survey cost between \$500 and \$1000 and the deputy United States mineral surveyor certifies under oath that, "the interest of this claim in the projected ditch is one half." So that from the evidence even upon claimant's own theory, it does not appear that this claim should be credited with the sum of \$500.

As there is no contest or adverse claim in this case however, and as the requisite amount of expenditure may have been made upon the claim, or may yet be made thereon, the cash entry should only be suspended, and an opportunity afforded claimants to make proof, after proper notice, showing full compliance with the law.

Your said decision is accordingly modified to comply with the above.

HOMESTEAD ENTRY—RESIDENCE.

FRANKLIN FARRINGER.

Absences during the winter season, for the purpose of earning money to improve the land, are not inconsistent with the maintenance of residence in good faith.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 9, 1888.

I have considered the appeal of Franklin Farringer from your office decision of April 15, 1887, rejecting the final proof offered on his homestead entry of the SE. $\frac{1}{4}$ of Sec. 20, T. 135 N., R. 62 W., Fargo land district Dakota.

The entry was made May 21, 1881, and the claimant, who is entitled to credit for one hundred days service in the army, made final proof November 11, 1886. The proof was rejected by the local officers on the authority of the decision of your office in the case of Robert E. Pickert, wherein it was held that failure to reside on the land during the winter season is but a partial compliance with the homestead law and that settlers cannot obtain title to government land by "merely making summer excursions to tracts upon which they have made entries." There can be no objection to the application of this rule in any case where the facts justify such action.

April 15, 1887, you affirmed the action of the local officers in rejecting the proof.

It is stated in the proof that the claimant, a single man, duly qualified, settled upon his homestead November 9, 1881, and established his actual residence about the 20th of the same month. He built a comfortable frame house, dug a well and, at the date of the proof, had broken and cultivated 72 acres. The improvements are valued at \$480.

The claimant, in a corroborated affidavit states, that on or about November 20, 1881, he had completed his dwelling house and moved therein with his household goods and kitchen furniture, consisting of a bed, bedding, table, chairs, wearing apparel, and a stove, (set up) with a

pipe attached extending through the roof of the building. From November 20, to December 1, 1881, he remained on the land and then went away and did not return until April, 1882. After his return in April he pulverized the land he had broken in 1881, and sowed the same to wheat and oats and planted a vegetable garden.

During the season of 1882, he broke about fourteen acres of land dug a well, removed rock from the broken land, dug a draining ditch about twenty rods long, and harvested about ninety-seven bushels of wheat and seven hundred bushels of oats. He remained on the tract from April to December 22, 1882, when he went away and remained absent until April, 1883. He stayed on the land from April, 1883 to December 25, 1883. During the year he planted thirty-nine acres to wheat and oats. The greater portion of the crop was destroyed by hail in August and he harvested only one hundred and seventy-five bushels of wheat. He broke thirty-three additional acres of ground. He left the place in December, 1883, and returned in April, 1884. He planted seventy-two acres to wheat, oats and barley and harvested nine hundred bushels of wheat, two hundred and fifty bushels of oats and forty-seven bushels of barley. He left the place in November 1884 and returned in April, 1885, put in fifty-three acres to wheat and harvested six hundred and fifty bushels. He remained on the tract from April 1885, to November 11, 1885, when the proof was made.

The claimant further states that his absences have been caused by his poverty and that while absent he was working at various places as a carpenter and that "during each and every absence from said land he has left all of his household goods, kitchen furniture, farm tools etc. in the building upon said land and found them there upon returning; that he has expended all the proceeds from the crops grown on said land and all the money he has earned outside in improving the same and (for) his living expenses; that since establishing his residence upon said tract (in November, 1881) he has had no other home, nor claimed any other; that he has no intention of abandoning the land, that it is now and he intends to keep it as his home and to further improve it as he becomes able so to do."

The improvements on the tract are ample and the only question is the sufficiency of the residence. Entryman alleges that he established residence in November 1881, upon the tract and has since made it his home and that his absences were caused by poverty. In the case of Charles C. Boulton (6 L. D., 338) it was held, that actual residence having been established, and valuable improvements made, temporary absences thereafter, at a season of the year when but little work if any, could be done on the land, are not inconsistent with good faith in the matter of residence, and it has been held that the maintenance of residence is not inconsistent with absences due to poverty and the necessity of securing work away from the tract in order to earn money to secure a support and to improve the land, bad faith not appearing. Nellie O. Prescott (6 L. D., 245) Israel Martel (id., 566) Henry H. Harris (ibid., 154)

The fact that the claimant in this case has persistently clung to this tract and has each year added to its value by making improvements paid for by money earned by him in winter; that he left his household effects in the dwelling during his absences and returned to the place as soon as spring opened notwithstanding his statement that he could earn \$3.50 a day working at his trade as a carpenter, strongly indicates that he acted in good faith. William A. Thompson (6 L. D., 576).

His proof is satisfactory and should be accepted, and your decision rejecting it is reversed.

SOLDIERS' HOMESTEAD—CITIZENSHIP—RESIDENCE.

PAULUS KUNDERT.

Patent is not authorized under a soldiers' homestead entry unless it appears that the entryman is a citizen of the United States at the date of final proof.

The homestead settler, who has served in the army, is required to reside upon, cultivate, and improve the land claimed, for a period of at least one year after he shall have commenced his improvements, before patent shall issue.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 11, 1888.

On March 27, 1883, Paulus Kundert made soldier's homestead entry for the SE. $\frac{1}{4}$ of Sec. 8, T. 101 N., R. 68 W., Mitchell, Dakota.

On April 7, 1884, he made proof at the local office in support of said entry, and same day final certificate was issued therefor.

By decision of July 2, 1886, your office held both the claimant's original and final entries for cancellation, upon the ground that his proof lacked evidence of citizenship and that it was unsatisfactory as to residence and cultivation. From this the claimant appeals.

Section 2304 of the Revised Statutes entitles each honorably discharged soldier, who served in the army of the United States during the recent rebellion for ninety days, and who has remained loyal to the government, to enter upon and receive patents for a quantity of public land not exceeding one hundred and sixty acres, upon compliance with the provisions of the homestead act of May, 1862. This act requires the homestead applicant to be a citizen of the United States, or to have filed his declaration to become such.

The claimant filed such declaration in Green county, Wisconsin, on November, 1860.

Section 2291 R. S. provides that a patent shall issue to the homestead claimant, who is shown by his duly submitted final proof to have complied with the law, *if* on the date of such proof he be a citizen of the United States. The claimant states in the proof offered that he has not been naturalized. The said proof should therefore be rejected.

It further appears that the claimant served in the army of the United States for a total period of four years, three months and twenty-three days. Section 2305 of the Revised Statutes, however, requires the

homestead settler, who has served in the army, etc., to reside upon, cultivate and improve the land claimed, "for a period of at least one year, after he shall have commenced his improvements, before patent shall issue."

The claimant avers in final proof that his house was built on the land March 28, 1883, at which time he established his residence therein, and that his improvements consist of said house, seven by nine feet, and five acres broken and cultivated—total value \$100. He also states that about October 20, 1883, he went to Dubuque, Iowa, to get work, where, in consequence of an accident whereby he had two ribs broken and his right hand injured, he remained until March 25th following, and that his family (wife and two children) did not reside on the land.

The record, therefore, shows that in October following the claimant's settlement in March, 1883, the claimant left the land, to which he returned in the latter part of March, 1884, *i. e.*, a short time before submitting his final proof, and that during the period of about one year between his settlement and proof the claimant was in Dubuque (presumably with his family) almost half the time.

The foregoing, when considered in connection with his meagre improvements and the fact that his family never resided on the tract, might well raise a suspicion of bad faith. The claimant, however, seems to have frankly stated all the facts upon which he seeks to complete his entry, and although he fails to show that he has complied with the law, I am not prepared to find from the record before me that his entry should be canceled.

No adverse claim having intervened the claimant will be permitted, within the statutory period of two years following the expiration of five years from the date of his entry (Section 2291, Revised Statutes) to furnish proper evidence of citizenship, together with further proof showing compliance with the law.

Your decision is accordingly modified.

TIMBER CULTURE ENTRY—AMENDMENT.

CHARLES R. PHILLIPS.

The evidence in support of an application to amend an entry should satisfactorily show that the tract covered by the proposed amendment is the same land which, after a personal inspection, the entryman originally selected, that the first entry was erroneously made, through no fault of his, and that he exercised due care in making said entry.

On satisfactory explanation an amended entry for one hundred sixty acres may be allowed, where the first, through error, covered but eighty acres.

The case of Ezra A. Barton, cited and distinguished.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 11, 1888.

On June 24, 1886, Charles R. Phillips made timber-culture entry for the SE. $\frac{1}{4}$ SW. $\frac{1}{4}$ and SW. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 10, T. 18 S., R. 2 E., S. B. M., Los Angeles, California.

On August 9, 1886, he applied to amend said entry so as to include therein the NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, N. $\frac{1}{2}$ SE. $\frac{1}{4}$, SW. $\frac{1}{4}$ NE. $\frac{1}{4}$, of said Sec. 10.

The claimant's application to so amend (transmitted by the local office) was rejected by your office decision of December 18, 1886, from which the claimant appeals. The claimant avers in his application that the description of the land embraced in his entry (given to him by one E. R. Minor, a "neighboring settler") does not describe the land he intended to enter, to wit: the tracts named in his said application to amend; that the land entered by him is rocky, worthless and "incapable of cultivation;" and that "no one claims in any way" the land which he now seeks to enter.

Your office held that the claimant had "failed to show any satisfactory reason for amending his entry to embrace an additional area."

The Department has held that in cases of *bona fide* mistake made by parties exercising ordinary care and prudence, and in the absence of intervening adverse rights, the lands intended to be taken may be substituted for those mistakenly filed upon and entered. *Cowan v. Asher* (6 L. D., 785); *Henry E. Barnum* (5 L. D., 583).

This rule applies to timber culture entries. *Christian Zyssett* (6 L. D., 355).

By the pending application the claimant seeks to enter in lieu of the eighty acres embraced in the existing entry, one hundred and sixty acres in the same section.

Now, while the fact that the claimant's application is for more land than is covered by the entry which he seeks to amend may not be in itself sufficient to warrant the conclusion that the claimant has failed to exercise ordinary care in making such entry, it is in my opinion a circumstance that should be fully explained.

The claimant further avers that he "has been familiar with the land for years, and has heretofore set . . . the corner in the center of the section, and that he became confused and deceived when he sent up the description for the two forties."

Although it might be inferred from his application that the claimant visited the land before making the present entry, it does not clearly appear that he did so. The claimant's allegation that no one claimed the land which he seeks to enter is corroborated by two affiants. With this exception, the claimant's allegations are not corroborated.

The claimant's failure to submit satisfactory evidence in support of his application may, however, be the result of ignorance. No bad faith by the claimant is affirmatively shown, while the facts as stated by him may possibly be true.

The Department, in the case of *Christoph Nitschka* (7 L. D., 155), held that the provision in Sec. 2372 of the Revised Statutes, which requires in the case of an application for amendment the written opinion of the register and receiver as to the existence of the mistake and the credibility of the witnesses testifying thereto, may be properly applied to timber culture entries.

The case is, therefore, remanded to the local office for further evidence, to be passed upon by the register and receiver in the manner stated. This evidence should satisfactorily show that the tract which claimant now applies to enter is the same land which, after a personal inspection, he had originally selected; that the present entry was erroneously made through no fault of said claimant, and that he (claimant) exercised due care in making the same. Should the claimant produce such satisfactory evidence, I see no reason why the amendment asked for should not be allowed, subject to any valid adverse right attaching prior to the date of the present application. In the event of the claimant's failure to submit such satisfactory evidence within a reasonable time, the pending application will be rejected.

Your decision is modified accordingly.

I deem it proper to add that the ruling herein in no way conflicts with the decision in the case of Ezra A. Barton (7 L. D., 261). In that case, it was held that the exercise of the right of pre-emption for eighty acres precludes the allowance of an amended entry for an adjacent eighty acre tract, the latter being, at the inception of the original claim, regarded as not subject to appropriation.

This case differs from the one cited, in that the land which the claimant seeks to acquire by the application under consideration was vacant at the date of the existing entry, and is the identical tract which he (claimant) first intended to enter.

TIMBER CULTURE CONTEST BREAKING.

JACKSON *v.* GRABLE.

A deficiency of one quarter of an acre in the breaking will not justify cancellation, where the failure to break the full amount was the result of a mistake, and bad faith does not appear.

The mistake in such a case should be corrected prior to final proof.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 12, 1888.

I have considered the appeal of Francis C. Grable from your decision of June 6, 1887, holding for cancellation his timber-culture entry for Lots 1, 2, 3 and 4, Sec. 2, T. 16 N., R. 28 W., North Platte, Nebraska.

The record shows that Grable made timber-culture entry on above tract September 7, 1883, and that Jackson initiated contest against the same November 13, 1884.

The case was set for hearing January 7, 1885, when both parties appeared. On defendant's motion to dismiss the case for defective service, it was continued until February 19, 1885.

On the adjourned day the defendant moved to dismiss the contest on the grounds, 1st, That the allegations, of contestant, if true, did not

constitute a cause of action. 2nd, That the allegation that claimant made the entry for speculation is not stated as a fact, but as a matter of belief. 3d, That offering a relinquishment for sale does not constitute a cause of action.

The motion was overruled as to the first objection and sustained as to the second and third objections.

The trial was then proceeded with and a large amount of testimony was submitted by both parties.

The evidence shows that claimant employed one S. W. Parrotte to break five acres of said tract in June, 1884, and paid him for breaking that amount. Parrotte broke a plat which, according to his measurement, covered five acres, but which, in reality, amounted only to four and three fourths acres. Parrotte measured the land broken by stepping it off and calculated it at five acres. Claimant was not aware, until after contest was initiated, that the amount broken was less than five acres. The witnesses on both sides testify that the deficiency did not amount to more than one fourth of an acre.

There is nothing in the testimony to show that the entryman ever offered the claim for sale. On the contrary, it appears from letters submitted at the hearing, that contestant's attorney wrote to claimant with a view to compromising the contest. To this letter claimant replied:

I do not feel like making any proposition to your client, for I am sure his efforts will only result in annoyance and expense to him and the same to me, but I would prefer to spend the amount in defence of a principle.

After an examination of the testimony submitted at the hearing, the local officers recommended that claimant's entry be held for cancellation, notwithstanding "that he has substantially met the requirements of the law." June 6, 1887, you affirmed this decision and held Grable's entry for cancellation. From this action Grable appealed to the Department.

Claimant's good faith should be taken into consideration in arriving at a proper decision in this contest. *Thompson v. Sankey* (3 L. D., 365); *Peck v. Taylor* (3 L. D., 372).

In the case of *Rasmussen v. Rice*, reported in 6 L. D., 755, it was held that although the entryman had only broken seven acres instead of ten acres and although there were only fifteen hundred trees on the claim and the cultivation had been defective, still his entry should not be canceled as he had shown good faith.

In the case of *Vargason v. McClellan*, reported in 6 L. D., 829, it was held that failure to break the entire amount required the first year does not necessarily call for cancellation on contest, when it appears that the entryman has acted in good faith; nor does the right of the contestant in such a case preclude a determination therein upon principles of equity.

In the case of *Lucas v. Ellsworth*, reported in 4 L. D., 205, there were but four acres and sixty-seven rods planted, and yet the entry was not canceled on the ground that the entryman acted in good faith and the party who did the planting believed that he planted five acres.

The same ruling was followed in the case of *Thompson v. Sankey*, reported in 3 L. D., 365, and in *Peck v. Taylor*, reported in 3 L. D., 372. In the case of *Thompson v. Sankey*, but eight and one half acres instead of ten were planted, and in the case of *Peck v. Taylor* but eight and three-fourths acres instead of ten were broken, and yet in neither instance was the entry canceled.

As the amount of breaking done was by mistake, in the absence of bad faith, it is sufficient, provided the mistake be corrected before final proof.

Your decision, therefore, holding for cancellation the timber-culture entry of Francis C. Grable is accordingly reversed.

COMMUTATION PROOF—TRANSFEREE.

SIMON KARPES.

Where the entryman's only excuse for not making proof on the date advertised is the unexplained fact that he could not obtain money wherewith to make payment, the delay can not be properly said to occur through no fault of the claimant.

In such a case new proof will be required, and in the event that the entryman refuses or neglects to make such proof within the time fixed, due opportunity will be given his transferees to prove that he had, prior to transfer, fully complied with the law.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 13, 1888.

Simon Karpes, who on August 9, 1882, made homestead entry of the SE. $\frac{1}{4}$ of Sec. 22, T. 101, R. 63, Mitchell district, Dakota, advertised that he would make final proof January 24, 1885, but failed to do so until February 3, ensuing. He gives as his reason for this delay, his inability to obtain the purchase money. Your office, by letter of January 10, 1887, held this excuse to be insufficient, but allowed him "ninety days in which to make new proof, showing full compliance with the homestead law, in default of which his cash certificate would be canceled, leaving his original entry intact."

From your said decision the Vermont Investment and Guarantee Company, by its agent, M. H. Rowley, appeals, alleging (*inter alia*), that Karpes was informed by the local officers—

That as soon as he could get the money it would be received at the local office without prejudice, upon submitting an affidavit that he was still living upon the land, which was then the practice before the local office. The mortgagee furnished the claimant the sum of \$450, the claimant executing a mortgage for that amount against this land—the land office fees (\$201.50) being that part of the whole amount of the mortgage. The claimant has also conveyed by warranty deed this land to other parties, and now refuses to make new proof unless he can be assured of \$200 more money. Claimant has further conspired with his father to contest this cash entry for the purpose of defeating the payment of said mortgage, and has acted in a fraudulent and dishonorable manner.

Where the claimant's only excuse for not making proof on the date advertised is the naked, unexplained fact that he could not obtain the money wherewith to make payment, I hardly think the delay could properly be said to occur "through no fault of the claimant." (See *Mina Landerkin*, 6 L. D., 782).

I affirm your decision requiring new proofs to be made. You will direct that notice be served upon him, and also upon the transferees, that such new proof must be made within a reasonable time (to be fixed in the notice given); and in case the claimant shall refuse or neglect to make such proof within the period appointed, then the transferees shall be afforded opportunity to prove that claimant, previous to transfer, had fully complied with the requirements of the law.

COMMUTATION PROOF—CITIZENSHIP—ALIENATION.

FRITZ SCHENROCK.

An entryman who has filed declaration of intention to become a citizen of the United States, is qualified to submit final commutation proof. The right of alienation exists where there has been due compliance with law and the final certificate has issued.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 16, 1888.

May 26, 1883, Fritz Schenrock made homestead entry for the N. $\frac{1}{2}$ SE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ of Sec. 30, T. 116, R. 62, Dakota; alleging settlement May 17, 1883. He made final proof February 14, 1884, naming, among others, Ernest and William Schon as witnesses. The proof was approved and certificate and receipt issued February 29, 1884.

The claimant states in his proof that he is a single man, forty-eight years of age, and a naturalized citizen; that in May, 1883, he built a frame house, six by twenty-four feet, on said tract and established his actual residence May 23, 1883. He has also built a stable, fifteen by forty feet, has dug a well and broken seven acres of ground. The land broken has not been cultivated. He values his improvements at \$100. He states that his residence has been continuous, and that he has not been absent at all.

By letter "C" dated January 9, 1885, you called upon the claimant to furnish the correct orthography of his last name, which has been given both as Schonrock and Schenrock. January 20, 1886, the local officers transmitted an affidavit by William and Ernest Schon, in reply to your said letter, stating that the correct name of the claimant was Schonrock; that they now own the tract in question and have no knowledge of the whereabouts of Schonrock; that they have made inquiry and are unable to find him, and therefore they make affidavit.

By letter of February 16, 1886, you decide the case as follows:

By reason of apparent lack of good faith on the part of the entryman in that he failed to cultivate the land, and it not appearing that he was qualified to make said entry, and having disposed of the land before it was shown that he had complied with legal requirements, the final proof is rejected and the case and original entries are held for cancellation.

From your said decision an appeal is taken by S. M. West, attorney for the Western Loan and Trust Company of Pierre, Dakota, which has a mortgage on the property.

I find among the papers a certified copy of a declaration of intention to become a citizen of the United States made May 11, 1883, by said Fritz Schenrock before the clerk of the district court for the county of Spink, second judicial district of Dakota. This paper answers the objection made in your decision as to his qualifications.

It appears from a certificate furnished by the register of deeds of Spink county, Dakota, that there is on record in his office a warranty deed for the land in controversy given by Fritz Schonrock to Ernest Schon; said deed is dated March 12, 1884, and was recorded April 12, 1884.

The fact that Schonrock sold the tract thirteen days after he received his final certificate is not, of itself, conclusive evidence of bad faith.

A settler who has complied with all the requirements of the law in good faith and has received final certificate has the right to transfer it. *Myers v. Croft* (13 Wall., 729), *Falconer v. Hunt et al.* (6 L. D., 517).

The proof shows that the claimant settled in person upon the land and erected a dwelling house thereon, and that he has improved and inhabited the same. The proof was accepted by the local office, and as there is nothing in it inconsistent with good faith, I will not presume that the claimant has acted in bad faith.

Your decision is, therefore, reversed.

ABANDONED MILITARY RESERVATION—ACT OF JULY 5, 1884.

CONNELLY *v.* BOYD.

Actual occupation prior to the establishment of the reservation, or settlement thereon in good faith prior to January 1, 1884, with continuous occupation thereafter, must be shown to entitle the settler to the right of homestead entry under the act of July 5, 1884.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 18, 1888.

I have considered the case of T. F. A. Connelly *v.* W. M. Boyd on appeal by the latter from your office decision of April 2, 1887, holding for cancellation his homestead entry for Lot 1, in the NE. $\frac{1}{4}$ of Sec. 1, T. 13 S., R. 34 E., and the W. $\frac{1}{2}$ of Lot 1, in the NW. $\frac{1}{4}$ of Sec. 6, T. 13 S., R. 35 E., Bodie land district, California.

Boyd made homestead entry for this tract September 5, 1884, under the act of July 5, 1884 (23 Stat., 103) alleging settlement November 25, 1883. On September 16, 1884, Connelly made application to make homestead entry for the same land which application was refused by the local officers because of Boyd's prior entry. Upon appeal to your office, it was ordered that a hearing be had "to ascertain all the facts relative to the settlement and improvements of the respective parties." As a result of said hearing, the local officers decided that Boyd had made a real settlement and improvements, while Connelly had failed to do either in person. From that decision Connelly appealed to your office, where it was decided that neither of the parties had any right to make homestead entry for the land in dispute under the provisions of the act of July 5, 1884. Connelly's application to enter was denied and his contest dismissed and Boyd's entry was held for cancellation. From that decision Boyd alone appealed.

The land in controversy is a part of the military reservation known as the Camp Independence reservation. The use of the reservation for military purposes was, as shown by the testimony, abandoned in 1877. On November 20, 1883, the buildings thus abandoned were sold at public sale after due notice therefor, one of the conditions of said sale being that the buildings should be removed within ninety days thereafter. At this sale Boyd, the homestead entryman, purchased a house. He claims that he, on November 25th established his residence in this house and that his purpose in going on the land was to make it his home. The only work done by him on the land prior to January 1, 1884, was some grubbing to prepare the land for cultivation. Although Boyd was absent from this land a part of the time, yet he seems to have made his home in this house from about the time he purchased up to the date of the hearing.

The act of July 5, 1884, after providing for the appraisement and sale of abandoned and useless military reservations, provides further:

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 law, 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 sub-divisions. *Provided further*, That said lands were subject to entry under the public land laws at the time of their withdrawal.

By the failure of Connelly to appeal from your office decision that decision became final as to his rights, and the only question now to be determined is as to Boyd's right to make homestead entry for the tracts claimed by him under the provisions of the act above cited.

I am of the opinion that the facts presented in this case do not show that Boyd had brought himself within the provisions of the act above cited. At the time he bought the building in which he claims after-

wards to have established his residence, it was with the express stipulation as set forth in the notices of sale that it should be removed within ninety days from the date of the sale. All he claims to have done prior to January 1, 1884, on the land was "some grubbing" for the purpose of preparing the land for cultivation, but the amount of land so prepared is not shown. The only improvements he has on the land so far as the testimony shows, is the house purchased at the sale above spoken of, and ten acres of the land under fence. Just how much of the land claimed by Boyd was actually occupied by him on the first day of January, 1884, is not definitely shown, but it is evident that he had not all of it within his possession and control since it is shown that other parties were living on and cultivating parts thereof.

I am of the opinion that Boyd was not entitled to make homestead entry for said land, and your said office decision holding his entry for cancellation is affirmed.

FINAL PROOF—REPUBLICATION.

HENRY P. HARRIS.

Where the proof was made at the time and place designated in the notice, but before an officer not named therein, it may be accepted after republication of notice, in the absence of protest or objection.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 18, 1888.

On March 29, 1883, Henry P. Harris made homestead entry for the SE. $\frac{1}{4}$, Sec. 14, T. 133 N., R. 62 W., Fargo, Dakota land district.

On October 4, 1883, he commuted the same to cash entry, and on April 28, 1887, your office by letter "C" rejected claimant's final proof and said "the cash certificate and original entry will be allowed to stand, and he may submit new proof properly made in accordance with law and existing regulations, whenever he can show full compliance with law."

It appears from the evidence submitted on final proof that claimant established actual residence April 1, 1883, and made final proof October 1, 1883. His improvements consisted of a house ten by twelve feet, valued at \$100; barn eight by twelve feet, \$50; and forty-five acres of breaking, valued at \$240.

The irregularity in final proof upon which your office rejected the final proof was the fact that in the published notice it was stated that the testimony of the witnesses would be taken before W. Ed. Ruthruff, notary public, at Grand Rapids La Moure county, on October 1, 1883, and the proof as submitted showed that it was taken at the said time and place but before Homer F. Elliott, clerk of the district court of said county.

On August 26, 1887, claimant filed in the local office a motion, addressed to the Commissioner of the General Land Office, for a modification of your said office decision, asking that in lieu of making new proof, he be permitted to advertise his intention to make final proof, and that upon filing proof of such advertisement and a certificate of the officer before whom the same is advertised to be taken, showing that there is no protest against claimant making final entry for said land, claimant's proof now on file may be considered sufficient and the same go forward for patent.

This application or motion does not seem to have been considered by your office, or rather the same has been treated as an appeal from the decision of April 28, 1887, and being so before me it will be treated as such appeal.

Accompanying said motion is an affidavit of the entryman, Henry P. Harris, jr., in which he states that when he made homestead entry of said land it was his *bona fide* intention to make a permanent home thereof and use the said land in establishing a nursery and for other agricultural productions and live thereon five years before offering final proof, and that in pursuance of such purpose he established actual residence thereon April 1, 1883, and commenced the cultivation and improvement thereof, but becoming satisfied that it was impossible to successfully engage in the nursery business there, on account of the soil, climate and latitude not being adapted thereto he concluded to commute his said homestead to cash entry which he did in good faith; that since his said cash entry he has still continued to cultivate and improve said land of which he is still the owner, and has expended by way of new improvements thereon the sum of \$100. That he made said cash entry in good faith and for his own use and benefit, and not for the purpose of speculation nor for the use or benefit of any other person or persons whomsoever, but that since making said cash entry he has not continued to reside personally on said premises and consequently cannot now make the necessary affidavits for new final proof. That he has no recollection of the irregularity of making his final proof before an officer other than the one before whom the same was advertised to be made and if this occurred he can give no reason therefor, as he endeavored to follow the directions of his attorneys and the local officers.

The final proof shows more than the usual amount and value of improvements, and the improvements were described with more than usual particularity, and all the evidence was to the effect that claimant had not been absent at all from his claim after settlement, and I did not reach the same conclusion therefrom as the one given in your said letter, *i e.*, that his improvements were meagre and that his proof in the matter of residence and cultivation was of an unsatisfactory nature.

His proof in these matters is sufficient, and as to the irregularity of the proof in being taken before an officer other than the one named in the notice, this case in all essential particulars so far as this point is

concerned, is similar to that of Jacob Semer (6 L. D., 345), where it was held that the claimant should publish new notice of intention to submit final proof, and if upon the day advertised for final proof, no protest or objection should be filed, then the proof made before should be accepted. If protest or objection should be filed then new proof should be made but only to show compliance with the law up to date of final certificate.

This is practically what is asked for in the prayer of the petition for modification of your office decision.

Your decision is accordingly so modified as to require appellant to proceed in the manner above indicated.

PRACTICE—BURDEN OF PROOF—TIMBER-CULTURE ENTRY.

MOSS v. QUINCEY.

The burden of proof is upon the contestant, and the charge must be established by a due preponderance of the testimony to warrant cancellation.

That land has been broken does not exclude it from timber-culture entry, if it is naturally devoid of timber.

First Assistant Secretary Muldrow to Commissioner Stockslager, September 5, 1888.

I have before me the appeal of Charles B. Quincey, executor of one of the devisees of Frank S. Quincey, deceased, appearing herein for himself and on behalf of the other devisees, from your decision of February 15, 1887, holding for cancellation said Frank S. Quincey's timber-culture entry, No. 1875, for the NE. $\frac{1}{4}$ of Sec. 7, T. 9 S., R. 4 W., Concordia district, Kansas.

The said entry was made May 15, 1879, and contest was initiated by Miles B. Moss, on the 2d of August, 1883. Trial was had under said contest on the 3d day of December, 1883, and the local officers rendered their decision on December 26, 1883, in favor of contestant. January 17, 1884, your office, on appeal, reversed the said decision of the local officers. On April 30, 1885, the Department remanded the case for rehearing, on the application of the entryman, and on July 7, 1885, the rehearing so ordered was had. Thereafter the local officers rendered their decision (without date,) in which, after reciting the record history of the case, and stating that the issue was whether the entryman had ten acres of the tract cultivated to timber at the date of the contest, they concluded as follows:

We have carefully and critically examined, considered, and weighed the testimony of each witness in the case and the evidence as a whole, and our conclusions and findings therefrom are, that the plaintiff, Moss, has failed to support, by a preponderance of the testimony submitted, his allegations that the defendant entryman was in default at the date of the institution of this contest. We therefore recommend that this contest be dismissed, and that this entry be allowed to stand.

By your said letter of February 15, 1887, you reversed the decision of the local officers, upon the theory that,—

Between the date of entry and initiation of contest the land continued to be used by the defendant for general farming purposes, and such timber as he may have planted,

or caused to be planted, on the land was never properly cultivated or protected, else there would have been more trees than the inconsiderable number (something less than an acre) shown by the evidence to have been growing on the land when the contest was begun.

This finding, of an alleged failure to cultivate and protect the trees, would seem to be—as its form suggests—a purely inferential one, based wholly on the supposed fact—not itself affirmatively “shown by the evidence”—that only “something less than an acre” of trees were growing on the land at the date of the contest. Both the planting and the cultivating of more than ten acres, on more than one occasion, during the period between the making of entry and the initiation of the contest, were affirmatively testified to by the witnesses for defense, while every witness for the contestant expressly admitted that he could not positively contradict these allegations, there being portions of the tract amounting to more than ten acres, as to which he could not swear. At the date of the hearing (in 1885) there seems to have been between ten and thirteen acres of trees growing and in fair condition, and it by no means clearly appears that only an inconsiderable portion of these were trees planted before the date of contest. The burden of the proof was on the contestant, and I concur in the opinion of the local officers that he has failed to establish his case by a due preponderance of testimony—and this, too, although the defense was at the disadvantage of being unable, owing to the death of the entryman, to avail themselves of his knowledge of the facts, either on its own presentation of the facts, or in criticising that of the other side. I attach no importance to the point made, that the tract, having in great part been broken before entry, was no longer “prairie” land. If it was naturally devoid of timber, it could be entered as a timber claim under the act.

Everything considered, I think that the contest should be dismissed, and the heirs and devisees of the entryman allowed to proceed under the entry.

Your said decision is accordingly reversed, and the papers transmitted with your letter of July 16, 1887, are herewith returned.

EVIDENCE—BURDEN OF PROOF—DESERT LAND ENTRY.

PERRY BICKFORD.

In proceeding against an entry the burden of proof is upon the government, and a charge of fraud should be established by a clear preponderance of evidence to warrant cancellation.

The partial irrigation of a tract, while held under a previous pre-emption filing of the entryman, will not defeat his right under the desert land act, where the work of substantial reclamation remained to be done at the date of the original entry thereunder.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 11, 1888.

Perry Bickford on the 18th day of January, 1882, filed desert land declaration for the SE. $\frac{1}{4}$ of Sec. 10, T. 15 N., R. 78 W., Cheyenne land

district, Wyoming Territory. He made final proof June 19, upon which final certificate issued June 23, 1884. On September 25, 1885, special agent James A. George reported said entry to have been fraudulently made; your office ordered a hearing, which was had beginning August 10, 1886, the testimony taken before Richard Butler, clerk of the district court of the second judicial district of Wyoming Territory. Upon the testimony adduced the local officers decided adversely to the entryman; and upon Bickford's appeal your office sustained the action of the local office, and held the entry for cancellation. Bickford appeals to this Department.

At the hearing there were but two witnesses for the government, one of them was Special Agent George. His testimony relates mainly to the character of the tract as he found it at the date of his examination in September, 1885. He testifies:

I passed over the land of the Bickford claim some sixteen or seventeen times, riding back and forth east and west from fifty to a hundred yards apart, searching for irrigating ditches on the land, or marks that would show where ditches had been in previous years. . . . Only one ditch or sign of a ditch could be seen, and that was taken from a marshy place near Bickford's house and seemed to be a ditch cut for draining, and not for irrigation. The ground . . . was exceedingly wet; in many places the water from two to three inches deep, and in some places the ground was so soft that the horses sank in the ground over their fetlocks . . . Mr. Wilkins had men with sweeps, dragging the hay from the wet ground up to some high knolls, for the water to dry out before putting it in the stack. I went to Mr. Wilkins, and in talking with him suggested that the bottom land would be fine land to raise wheat and oats, and he replied, "This land is too wet for that." . . . I will swear that on careful investigation I found no ditches (except the one already mentioned), and that I am fully convinced that there is not one acre of land on the whole Bickford claim irrigated, in the summer of 1885 by artificial means, the result of the labor of Mr. Bickford or of any one hired by him.

The special agent's testimony as to the condition of the claim at the date mentioned was substantially corroborated by witness McCune. These two were the only witnesses for the government.

The conclusion intended to be drawn—and which the local officers and your office draws—from the above mentioned testimony is, that the land never was desert land, and hence never was reclaimed.

On the other hand, there was a large amount of testimony adduced tending to show that the tract in question was originally desert land.

To the usual question as to "whether any crop could have been raised upon that land without artificial irrigation that would reasonably reward a man for the time and labor of producing and caring for it," several witnesses answer directly, "No." Mr. Bickford, the defendant, testifies that there was a "small strip of not over ten acres, of that amount," upon which some grass would grow.

In 1875, he cut ten or eleven tons of hay, part from this tract, but mostly "from a claim afterwards belonging to Mr. Markle." Witness Daugherty testifies that in 1875, Bickford cut from the quarter-section in controversy "three or four loads, probably five little loads; . . .

they had on between three fourths of a ton and a ton to a load." Witness McDowell, who has known the tract since 1870, testifies that in 1870, he "went there to make hay, in that valley; . . . did not cut any hay on the Bickford claim from the fact that there was no grass grew there that would pay to mow." Witness Grant, a civil engineer and surveyor, testifies that "in '74 there was very little grass on this land." Witness Bailey, who lives only one hundred and sixty rods from the tract, testifies: "There was probably three or four acres that would raise a little hay, perhaps three or four hundred pounds to the acre; the balance was all what I should call desert land; it would raise nothing without cultivation." The same witnesses testify that the tract is now reclaimed. Bickford, the defendant, testifies that in 1883, he cut forty-five tons of hay from the tract. The other witnesses are not certain as to the amount cut in recent years, but know that it has greatly increased.

Upon the two questions at issue—viz., (1) whether this was originally desert land, and (2) whether it has been reclaimed—considerable light is thrown by witness McCune, called by the government on purpose to prove that the tract never was desert land, and that it never has been reclaimed. He testifies that in 1876, there were "five or six or ten tons of hay cut."

Q. Was it all cut on the Bickford place?—A. I can't exactly tell what ground it was cut on.

Q. Are you positive that they cut as many as four tons of hay on this particular claim that year?—A. Well, as I said before, I wouldn't be positive as to the amount of hay cut.

In 1879, the same witness testifies, about fifteen or twenty tons were cut from the tract; "In 1880 about the same amount; in 1881, it would run somewhere in the same neighborhood—judging from the size of the stack;" . . . "In 1885, probably fifty tons." This increase in the yield of hay he ascribes in part to the drainage ditch before spoken of by this witness, which "spreads its water over a part of the Bickford claim." In short, the testimony of the principal witnesses for the government corroborates that of all the witnesses for the defendant, so far as to show that the tract which in 1876, would not produce over four to five tons, had been in some manner so reclaimed as to produce forty-five or fifty tons.

As to whether the ditch referred to by the special agent was for drainage or for irrigation purposes, and whether there were any other ditches, the evidence of the witnesses for the defense is full and explicit. The defendant himself gives a detailed description of his ditches and whence the water in them was obtained. Witness McDowell describes—

One ditch taken from a spring creek on the Bickford claim running about or almost parallel with what is known as the "hogback" which I should judge to be about four hundred yards long, is but a small ditch. Another from the mouth of the same spring creek about two hundred yards long. Another small ditch about a hundred yards from the head of the first ditch, probably seventy-five yards long. The land on the northeast corner of the claim was very wet,

(This is probably the wet place spoken of by the special agent; the witness goes on to explain its origin:)

which was caused by water being conveyed from the North Fork (of the Laramie River) about three quarters of a mile northeast from what is known as the Markel claim, and runs down the Markel fence till it strikes the northeast corner of the Bickford claim. There are no ditches that convey the water any further, though the water spreads out there and covers quite a large piece of ground. There is another ditch that conveys water from a westerly direction, which irrigates about seven acres of land at the northeast corner of the Bickford claim.

The special agent attempted to convict this witness by reference to a map, of error as to the direction in which some of these ditches ran; but the essential fact of the existence of such ditches was not controverted. On the contrary, it was corroborated; as by the evidence of witness Daugherty who testified:

Below that he put on another ditch, probably a quarter of a mile long, from the same creek; then the neighbors joined together—Markel, the Welch boys, and Bickford—and took some water from the North Fork of the Laramie River and irrigated the east side of the claim.

Witness Bailey testifies that there were, "on the 23rd day of June, 1884," on Bickford's claim "three ditches and there may have been another one," which ditches he describes in substantial accordance with the preceding witnesses.

In view of the fact that in a proceeding for cancellation of an entry the burden of proof is upon the government, and that such entry should not be canceled except upon a clear preponderance of evidence showing fraud, I am of the opinion that the government has failed to make out a case against the defendant.

Your office decision referred to the fact that the entryman made some improvements upon the tract prior to the date of his making desert land entry of the same, at a time when he held it under a pre-emption filing; and adds:

The fact that a partial irrigation had been made prior to the time of the desert entry, though it was done by claimant, is adverse to his interests; for one can not enter under the desert act, land which he had reclaimed prior to entering.

The facts in regard to this branch of the case, as appears from the testimony adduced, are simply that the defendant, while holding the tract under his pre-emption filing, made two or three ditches from two hundred to five hundred feet long—"small ditches, that were made with a plow"—to carry water on a few acres of the lower portion of his claim; but not until he had made his desert land entry did he enter systematically upon the work of reclaiming the entire tract.

In view of the facts herein set forth, I reverse your office decision of May 5, 1887, holding Bickford's entry for cancellation.

DESERT LAND—SPECULATIVE ENTRY.

ANDREW WHITEHEAD.

A desert land entry not made in good faith for the exclusive use and benefit of the entryman will be canceled.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 19, 1888.

It appears from the record in this case that on May 2, 1883, Andrew Whitehead made desert land entry, No. 202, for the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and N. $\frac{1}{2}$ of Sec. 27, SW. $\frac{1}{4}$ SE. $\frac{1}{4}$ and E. $\frac{1}{2}$, SE. $\frac{1}{4}$, Sec. 22, W. $\frac{1}{2}$ SW. $\frac{1}{4}$ Sec. 23 and W. $\frac{1}{2}$ NW. $\frac{1}{4}$ Sec. 26, T. 4 N., R. 3 W., Boise City, Idaho.

On August 20, 1883, Whitehead relinquished the SW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 22 of said entry, and on September 18, 1883, the same was to that extent canceled by the local officers.

By letter "P" of your office, dated April 27, 1886, your predecessor held said entry for cancellation, upon the report of Special Agent A. S. Caldwell, of date October 5, 1885, on the stated ground that the same was made in the interest of the Idaho and Oregon Land Improvement Company; and allowed claimant the usual period of sixty days within which to apply for a hearing to show cause why his entry should be sustained.

An appeal was taken by claimant from this holding, but said appeal was treated by your office as an application for a hearing, and in pursuance thereof a hearing was ordered by office letter of July 12, 1886.

Trial was regularly had before the local officers—the same, after several continuances, having been closed on January 10, 1887.

Upon the testimony taken the local officers found in favor of the government and recommended that claimant's entry be canceled.

On appeal from this finding, your office, on June 17, 1887, affirmed the same, holding that claimant had not complied with the law as to reclamation and that his entry was made in the interest of said Idaho and Oregon Land Improvement Company.

Claimant's appeal from this latter decision brings the case here.

The testimony shows that a number of ditches were constructed on the claim in question, but as to their capacity and sufficiency for the purposes of irrigation and reclamation of the land, the evidence is conflicting and doubtful. The work of constructing these ditches was done under the superintendence of one Daniel B. Levan, who also made a survey and plat of the premises before the trial, for which purpose he was employed and paid by Robert E. Strahorn, who is general manager of said Idaho and Oregon Land Improvement Company. Claimant is a lawyer by profession, and in June, 1883, he entered the employ of said company as their attorney, and continued in such employment for the period of about one year. At the date of trial he was residing in the city of Denver, State of Colorado. He did not attend the trial, but on the affidavit of Homer Stutt, who acted as attorney for him at the hearing,

stating simply that he (Whitehead) "will not be able to appear" before the local officers at Boise City on the day of trial, his deposition was ordered to be taken, which was accordingly done and the same is on file in the record.

By a certain paper writing styled an indenture, made and entered into by and between said Idaho & Oregon Land Improvement Company, as party of the first part, and said Andrew Whitehead, as party of the second part, dated April 24, 1886, the original of which is on file among the papers in this case, it is provided:

That the said party of the first part, for and in consideration of the sum of four thousand dollars, lawful money of the United States of America, to it in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged does by these presents grant, bargain and sell, convey and confirm unto the said party of the second part, and to his heirs and assigns four hundred statutory inches of water, said water to be taken out of and from the Caldwell canal, which receives its supply from the Boise river at a point about eight miles east of the town of Caldwell in the county of Ada in the Territory of Idaho.

And it is further provided in said indenture that the water thereby conveyed is to be used only on the claim now in question, and that the same shall be held by the grantee therein and his heirs or assigns forever.

This indenture purports to be duly signed and acknowledged by the president and secretary of the said Idaho and Oregon Land Improvement Company, and on the back thereof the following endorsement appears:

Recorded at request of Robert E. Strahorn, May 1st, A. D. 1886, at 30 minutes past 1 P. M., in book 11 of Deeds, Page 590.

C. S. McCONNELL,
Recorder.

It appears from the deposition of claimant that in answer to the cross-interrogatory, "have you sold or assigned or agreed to sell or assign to any person or corporation the land embraced in your said desert entry, or any portion thereof?" he stated: "I have never at any time sold nor assigned my desert land claim, *i. e.*, the land embraced in said claim nor any portion thereof to any person or persons or corporation, and have made no contract with reference thereto, except the one dated April 24, 1886, a copy of which is hereto attached."

The paper thus referred to by claimant is a written agreement, bearing even date with the water right deed or indenture before mentioned, and made and entered into by and between said claimant, as party of the first part, and said Idaho & Oregon Land Improvement Company, as party of the second part.

Its provisions are chiefly, first: that the party of the first part, in consideration of one dollar, and the covenants and agreements of the second part thereafter following, "doth lease, demise and let unto the party of the second part, its successors and assigns," all the land covered by his said desert entry, except that part theretofore relinquished by him, as stated, and also the water right conveyed to him by said

company, as aforesaid, "To have and to hold the same until the conveyance hereinafter specified *have* been made unto the said party of the second part, its successors and assigns."

Second: that

Said party of the first part hereby covenants and agrees to and with the said party of the second part that he, his heirs and assigns, will at any time after making final proof or obtaining a patent, (as said party of the second part may elect) for the tracts of land hereinbefore described or any part thereof, to wit: said desert entry, number two hundred and two, from the government of the United States, on demand of the the said party of the second part its successor or assigns execute, sign, seal, acknowledge and deliver to the said party of the second part, its successors and assigns, a good and sufficient warranty deed, if after patent, or a quit claim, if after the final proof and before patent, free from all incumbrances placed thereon through or by the party of the first part, his heirs or assigns, of the following described tracts of land, being part and parcel of the premises hereinbefore described, to wit: The east one-half of the southeast one quarter of section twenty-two (22), the west one half of the southwest one quarter of section twenty-three (23), the northwest quarter of the northwest quarter of section twenty-six (26), the east one-half of the northeast one quarter and the north one-half of the northwest quarter, and the northwest quarter of the southeast quarter and the southeast quarter of the northwest quarter of section twenty-seven (27), all in township four (4) north, range three (3) west of Boise Meridian, and also three hundred inches of water flowing in said Caldwell canal and the right to the use of the same, being three-fourths of the water and the water right this day conveyed by the said party of the second part to the said party of the first part.

By the third clause of said agreement it is provided that if said entry should be rejected or disallowed by the government, or if claimant should for any reason fail to prove up and procure patent for the land embraced therein, then and in that event he would immediately reconvey to said company, the water right aforesaid.

The fourth clause provides that:

Said party of the first part covenants and agrees that he will exercise due diligence and use his best endeavors to make final proof and secure a patent from the government of the United States of and to the said tracts of land embraced in the said desert entry; but said first party shall not be held for a failure to procure patent as aforesaid, and all necessary expense connected therewith shall be borne by the party of the second part.

And it is further provided in said agreement, on the part of said company, that after patent shall have issued from the United States for the land in question and the deed of conveyance shall have been made to it by claimant as thereinbefore provided, the possession of the remainder of said claim will be surrendered by the company to claimant, together with one hundred inches of water from said Caldwell canal.

It is a significant fact, worthy of note in this connection, that this agreement was not admitted to record, as was the water right deed from said company to claimant made on the same day, either "at the request of Robert E. Strahorn" or any one else, but the existence of the same seems to have been a matter only within the knowledge of the parties thereto until brought to light through means of the hearing ordered in this case.

It is difficult to conceive how claimant could have expected, in the face of this agreement, to make final proof of his claim under the law and existing rules and regulations governing the administration thereof, and yet it appears from the testimony that he applied before trial to be allowed to make his proof.

By said agreement he not only attempts to convey to the Idaho & Oregon Land Improvement Company a present interest in said entry, but he agrees to convey to said company, absolutely, nearly three-fourths of the land covered thereby, after he shall have made proof and received patent therefor, with the proviso that the company shall be at all the expense attending the making of said proof and procuring a patent.

Now, while it may be contended that the existence of said agreement does not necessarily show that the entry in question was originally made in the interest of the Idaho & Oregon Land Improvement Company, yet it is very evident that the same has been, since the date of said agreement, and is at present, held by claimant in the interest of said company; and this fact, when considered in connection with all the other circumstances of a suspicious nature that surround this case, is strongly persuasive, in my judgment that said entry was not made in good faith for the exclusive use and benefit of the claimant, but that in fact the same was made in the interest of said Idaho & Oregon Land Improvement Company.

This is a case in which, in view of its peculiar circumstances, much weight, in my opinion, should be given to the finding of the local officers upon the testimony submitted in their presence, and after a careful examination of the whole record, I am not disposed to disturb the same. The decision of your office sustaining the finding below is therefore affirmed.

ACT OF JUNE 15, 1880—PREFERENCE RIGHT.

SMITH ET AL. v. MAYLAND.

The rule laid down in *Freise v. Hobson*, with respect to the right of purchase under the act of June 15, 1880, must govern in all cases not then finally adjudicated.

A premature purchase under said act, while the right of purchase was suspended in the interest of a contestant, may be recognized as valid if the contestant waives his preference right of entry.

A waiver of the preference right of entry by a successful contestant will not confer upon a third party any right as against the original entryman.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 20, 1888.

Heinrich Mayland, on March 29, 1879, made homestead entry for the SW. $\frac{1}{4}$ of Sec. 8, T. 30 S., R. 27 W., Garden City district, Kansas.

On May 25, 1885, Charles S. Smith initiated contest against Mayland for abandonment. Mayland made default at the hearing (August 19,

1885); and his entry was canceled by your letter "C." of July 2, 1886. He appealed neither from the decision of the local office nor of your office.

Prior to the said cancellation, however—to wit, on September 24, 1885—he purchased the tract, under section two of the act of June 15, 1880 (21 Stat., 237).

On July 27, 1880—within less than thirty days after notice of cancellation—one George C. Hays applied to file for the tract, alleging settlement on the 20th of same month; accompanying said application with affidavits setting forth that he had resided continuously on the land since October 1, 1885, and had improved it to the extent of \$150. His application was rejected (July 28, 1886,) because of the prior purchase by Mayland. Hays appealed, claiming that his filing should have been accepted, subject to the preference right of the contestant (Smith).

Your office decision of September 15, 1886, holds that:

Under the rulings in force at the time Mayland's purchase was made, his entry or purchase was properly allowed—it being then in order for a claimant to purchase under the second section of the act of June 15, 1880, at any time during the pendency of contest, thus acquiring title not only as against others, but the contestant as well. The recent ruling (case of Freise v. Hobson, 4 L. D., 580,) changing this practice, does not affect rights acquired prior thereto (Hollants v. Sullivan, 5 L. D., 115).

In this respect your office decision is in error. "The rule laid down in Freise v. Hobson must govern in similar cases not then finally adjudicated." (Roberts v. Mahl, 6 L. D., 446.) As the case at bar was not finally adjudicated at the date of the decision in the Freise v. Hobson case (June 21, 1886), the rule laid down therein must govern. In other words, "the initiation of the contest suspended the right to purchase under the act of June 15, 1880, until the final disposition of such contest (Clement v. Heney, 6 L. D., 641). But a right suspended is not a right destroyed. The suspension continues only until the expiration of thirty days from date of receipt by the contestant of the decision in his favor. Should contestant neglect or waive the exercise of such preference right, there would then exist no reason why the claimant may not exercise his right to purchase under the act of June 15, 1880; or why his prior and premature exercise thereof might not be recognized as valid.

It is quite possible that in the case at bar the appellant (Hays) filed for the tract with the consent of the contestant, the latter purposely refraining from taking advantage of the thirty days preference right allowed him by the law. While such refraining might properly be construed as a waiver by contestant of his preference right, it could not confer upon a third party any right as against Mayland which such third party did not previously possess. (See, as bearing incidentally upon this point, Bachman v. Smith, 5 L. D., 293.)

For the reasons herein given I affirm your said office decision of September 15, 1886, awarding the tract in controversy to Mayland, the purchaser under the act of June 15, 1880.

TIMBER CULTURE ENTRY—RELINQUISHMENT.

FERDINAND FAVRO.

The cancellation of a timber culture entry is warranted where the executor and sole devisee of the entryman files a relinquishment, and it appears that compliance with the law could not be shown within the life of the entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 22, 1888.

I have considered the appeal of Ferdinand Favro from your decision of February 23, 1887, rejecting the relinquishment of timber culture entry, made by Mariano Galdos, for the SE. $\frac{1}{4}$, Sec. 28, T. 12 S., R. 3 W., Los Angeles, California.

Said relinquishment is executed by Charles F. Francisco, the sole devisee and executor of said Galdos, deceased.

It appears from the record that said Mariano Galdos made timber culture entry April 28, 1881, and died about April 12, 1885, leaving a will which was duly admitted to probate and by which said Francisco was appointed executor and sole devisee of said Mariano Galdos, deceased.

Subsequent to the admission of said will to probate, the said Charles F. Francisco duly qualified as such executor, and thereafter sold to Ferdinand Favro, for the sum of one hundred and thirty dollars, the house and barn situated on said tract and formerly belonging to said Mariano Galdos, deceased.

On April 6, 1886, the said Charles F. Francisco, filed with the local officers, an affidavit in which he stated that he had relinquished all his claim to said tract as such executor and devisee, and in which he further said that he would not comply with the provisions of the timber-culture act as to the same. It does not appear that the local officers took any action upon this relinquishment, except to transmit it to your office.

On January 9, 1886, Favro made application to have said timber-culture entry canceled and to enter said tract as a homestead, and alleged continuous residence thereon since January 1, 1885. He has cultivated between ten and twelve acres of said tract and is willing to comply with the provisions of the homestead law, and there is no adverse claimant.

In your decision of February 23, 1887, you reject the relinquishment executed by said Charles F. Francisco on the ground "that this office does not recognize the right of an executor or devisee to relinquish the entry of a deceased timber culture claimant, so as to terminate the interest of the heirs."

It appears from the affidavits submitted in this case that said Galdos was a single man, a native of Peru, without known heirs at the time of his death; and that during the time he occupied said tract of land he never plowed five acres thereof or in any manner whatever complied with the requirements of the timber-culture of law.

The timber-culture law provides—

That no final certificate shall be given, or patent issue, for the land so entered until the expiration of eight years from the date of such entry; and if, at the expiration of such time, or at any time within five years thereafter, the person making such entry, or if he or she be dead, his or her heirs or legal representatives, shall prove by two credible witnesses that he or she or they, have planted, and for not less than *eight years* have cultivated and protected such quantity and character of trees as aforesaid; that not less than twenty-seven hundred trees were planted on each acre, and that 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, and shall receive a patent for such tract of land.

Under the facts stated above the presumption is that the dead entryman left no heirs in this country, but if he left heirs it would be impossible for them to make the proof required (within the time required) of *eight years* cultivation of trees, as it is now more than seven years since said entry.

The legal representative of his estate declines to comply with the law, and has formally relinquished all interest in the land. Under this state of facts it seems to me to be entirely proper to cancel said timber-culture entry and to permit Favro to make homestead entry for said land if there be no reason for rejecting his application other than appears in this record.

Without passing on the question of the right of an executor and devisee of a deceased timber-culture entryman to relinquish such entry, your decision for the reasons given is reversed.

HOMESTEAD ENTRY—EQUITABLE ADJUDICATION.

GORAN SANDBERG.

A homestead entry should be submitted to the Board of Equitable Adjudication where the final proof is not made within the life time of the original entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 22, 1888.

I have considered the case arising upon the appeal of Goran Sandberg from your office decision of May 17, 1887, rejecting his final proof upon his homestead entry for the SE. $\frac{1}{4}$ of Sec. 18, T. 104, R. 54, Mitchell district, Dakota.

Sandberg made said homestead entry July 5, 1880. He alleges that he took up his residence on the claim May 18, 1881—ten months and thirteen days having elapsed since entry. He left the land May 21, 1881—after having spent three days thereon, and remained away until September 12, same year. He again left September 26, and remained away till January 20, 1882. How long he was upon the place on this occasion he does not state. He was absent two or three times in the summer of 1882, and three times in 1883; the length of these absences are not set forth, except that one of them was four months.

I concur in your conclusion that the establishment of actual residence in May of 1881, is not shown, but as it appears that the claimant has actually resided upon the tract since the fall of 1885, and has made improvements thereon amounting to \$385, I affirm your decision allowing the original entry to stand, and affording the entryman opportunity to make new proof when he can show five years continuous residence. As such residence can not now be shown to have been maintained for five years, prior to the expiration of seven years from date of entry, such proof, when made, will necessarily have to be submitted to the Board of Equitable Adjudication.

HOMESTEAD—SOLDIERS' DECLARATORY STATEMENT.

ORLANDO STARKEY.

The homestead right is not exhausted by filing a soldier's declaratory statement, and abandoning the tract covered thereby, where such filing was rendered inoperative by reason of a prior valid adverse claim.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 23, 1888.

I have considered the appeal of Orlando Starkey from your office decision of March 17, 1887, refusing to permit him to transmute his pre-emption declaratory statement for the W. $\frac{1}{2}$ NE. $\frac{1}{4}$, NW. $\frac{1}{4}$, SE. $\frac{1}{4}$, and SE. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 33, T. 33 N., R. 47 W., Valentine, Nebraska land district, to a homestead entry.

It appears from the record that the said Starkey, by an attorney in fact, filed his soldiers' declaratory homestead statement for NE. $\frac{1}{4}$, Sec. 17, T. 33 N., R. 48 W., on May 6, 1884, and on July 1, 1884, he removed to said land to establish his residence thereon but found the same in possession of one Timothy Morrissey, who claimed to have resided thereon under a declaratory statement filed April 10, 1884, and being satisfied that said Morrissey had a valid prior right at the time applicant filed his said soldiers' declaratory statement Starkey settled upon the land first above described on July 2, 1884, and on July 22, 1884, he filed his pre-emption declaratory statement for the same, and has since resided thereon; that his improvements consist of a house, stable, milk house, fifty acres fenced, twelve acres broken, all of the value of \$200.

Applicant claims that his agent was only authorized by his power of attorney to file soldiers' declaratory statement for him upon said NE. $\frac{1}{4}$, Sec. 17, provided the same was vacant; that he was ignorant of the prior filing of said Morrissey therefor, and as he received no benefit in any way from his said soldier's declaratory statement and as the time for making final proof under the pre-emption law for the land he now holds will expire April 7, 1887, and he is poor and unable to pay the government for the land, he ought now to be allowed to transmute his said pre-emption declaratory statement therefor to a homestead entry.

In your said letter you say, "the party exhausted his homestead right when he made S. D. S. No. 147, I must therefore decline to grant the request."

In this conclusion I do not concur.

While it is true that but one homestead or pre-emptive right can be exercised by each individual, and while the law declares that a party having filed an intention to claim such right as to one tract of land, should not file a second declaration as to another, it means in a case wherein the first was for a tract open to such filing, and whereon the rights thereby claimed might ripen into an entry. Hannah M. Brown (4 L. D., 9).

It was also held by this Department in the Brown case *supra*, that, "when the law restricted persons otherwise properly qualified to one pre-emptive right it meant a right to be enjoyed in its full fruition, not that a fruitless effort to obtain it should be equivalent to its entire consummation. The same doctrine was cited and approved in *Goist v. Botum* (5 L. D., 643), and *Harlan Cole* (6 L. D., 290).

In the latter case and also in *Jasper N. Shepherd* (6 L. D., 362), it was held that the principle above stated as announced in the Brown case, applied with equal force in homestead entries when the circumstances were similar.

In the Cole case *supra*, subsequent to Cole's entry a filing for the same land alleging settlement at a date prior to Cole's entry, was put on record by another. This filing was contested by Cole and was decided to be valid, and it was held that Cole had thus been precluded from acquiring title, or any valid right or claim which could ripen into title to the land; that his entry as made never had any validity, and in law was as if it had never been made, and that his homestead right therefore was not exhausted by said first filing.

In the case at bar the soldier who had filed his homestead declaratory statement through an attorney in fact, when he found another in possession of the premises under a filing and settlement both prior in point of time to his declaratory statement did not initiate a contest nor await its delay but filed instead his pre-emption declaratory statement upon another piece of land, viz: the one which he now asks to transmute to homestead entry. He was not bound under the law to incur the expense or await the delay of a contest, and if the filing was *prima facie* a valid one he would not be chargeable with laches for failing to contest.

While he was not entirely free from fault in not making or causing to be made a more thorough investigation to discover the existence of prior rights before making his first filing, his failure in that regard, there being no adverse claim, may, as between him and the government, be excused under the rule in *Jasper N. Shepherd*, *supra*.

The transmutation asked for may be allowed.

Your said decision is accordingly reversed.

PRACTICE—APPEAL; ENTRY—AMENDMENT.

TRAINOR *v.* STITZEL.

When notice of the local officer's decision is sent through the mail, ten days additional are allowed within which to perfect appeal.

A homestead entry may be amended so as to embrace the land covered by the actual settlement and improvements of the entryman; and such right of amendment is superior to an intervening adverse claim, made with full knowledge of the facts.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 23, 1888.

I have considered the appeal of Eugene Trainor from your office decision of February 11, 1887, refusing to permit him to so amend his homestead entry as to exclude Lot 10 of Sec. 2, T. 24 N., R. 42 W. M., Spokane Falls, Washington Territory land district, and to include instead thereof Lot 7, of the same section.

It appears from the record that said Trainor filed a pre-emption declaratory statement March 10, 1880, for Lots 1, 2, 3, 4, 8, 9, and 10 of said Sec. 2, alleging settlement February 16, 1880, and on September 12, 1882, transmuted this filing to a homestead entry, the land described in said homestead entry being the same as in his original declaratory statement.

On May 12, 1884, the said Stitzel made homestead entry for Lots 5, 6, and 7 of said Sec. 2.

On December 18, 1884, Trainor applied at the local office to amend his homestead entry, to include said lot 7 and exclude said lot 10, alleging that he had resided on said lot 7 since 1880, and had made improvements thereon of the value of \$600, and that he had always supposed said lot 7 to be included in his said homestead entry instead of lot 10.

On January 9, 1885, your office by letter to the local officers directed them to notify Stitzel of Trainor's application to amend and that he was required to show cause why such amendment should not be allowed.

Subsequently the protest and affidavits of said Stitzel against allowing such amendment being filed in your office, your office by letter directed that Trainor be notified that he might commence a contest to determine his right, and on April 25, 1885, Trainor filed affidavit of contest alleging that said lot 7 was settled upon, improved and claimed by him before the entry of Stitzel and before the said Stitzel made any claim thereto; that by a clerical error Lot 10 was included in his said homestead entry instead of lot 7, but he had never made any improvements upon or laid any claim thereto but had settled upon and improved said lot 7, which was well known to said Stitzel at the time of his entry.

On the hearing of said contest the local officers decided in favor of said contestant, which decision was reversed by your said office letter of February 11, 1887, from which Trainor appeals.

The local officers notified the attorney of Stitzel of their decision upon

the contest by a letter through the mails but not registered. This was the only notice sent. Said notice was dated November 30, 1885, and was received by said attorney December 1, 1885, he filed appeal December 29, 1885, but did not serve notice of errors upon appellee until January 2, 1886, whereupon contestant filed motion to dismiss the appeal because the said notice was not served on appellee within the time provided by rule 46 of practice in cases before the district land offices.

The local officers overruled said motion and transmitted the appeal and from said ruling the contestant duly appealed to your office, but no reference thereto seems to have been made in your said office decision of February 11, 1887, and the refusal to sustain Trainor's appeal from the decision of the local office is assigned as error in the appeal before me.

Rule 46 of practice provides that,

Notice of appeal and copy of specification of errors shall be served on appellee within the time allowed for appeal, and appellee shall be allowed ten days for reply before transmittal of the record to the General Land Office.

Rule 44 of practice, provides that,

After hearing in a contested case has been had and closed the register and receiver will, in writing, notify the parties in interest of the conclusions to which they have arrived, and that thirty days are allowed for an appeal from this decision to the Commissioner, the notice to be served personally or by registered letter through the mail to their last known address.

Counsel for appellant in a written statement under oath of service of the notice of appeal and copy of the specifications of errors, states, that he received a notice of the decision of the register and receiver on said contest by non-registered letter through the ordinary mail on the first day of December, 1885, and that he served said notice etc. on counsel for appellee on January 2, 1886.

It is clear then that said notice was not served within the time allowed for appeal as provided in rule 46 of practice if the time began to run from the date appellant's counsel received notice of the decision, but appellant claims that under said rule he was entitled to have such notice served upon him personally or by registered letter, and this not having been done, the notice by ordinary mail could not be counted against him until such a time as he chose to recognize it, which was on the 29th of December, 1885, the day he filed his appeal, and that he was entitled to thirty days after that time to serve notice on appellee as required in rule 46. He also claims that rule 67 of practice is applicable to notices of decision of the local officers when the same are sent by mail, and that his said notice was therefore served upon appellee in due time.

Rule 67 is found in sub-division No. 16, of the Rules of Practice, which sub-division is entitled "Appeals from decisions rejecting applications to enter public lands", and is as follows :

The party aggrieved will be allowed thirty days from receipt of notice in which to file his appeal in the local land office.

Where the notice is sent by mail, five days additional will be allowed for the transmission of notice and five for the return of the appeal.

If this rule is applicable the time allowed for appeal did not expire until January 10, 1886, and consequently the notice served on appellee January 2, 1886, was within the rule.

In *Thyen v. Bryant et al.* (1 L. D., 117) your predecessor in a letter to the register and receiver in deciding upon a motion to dismiss the appeal because not filed in time, said,

This motion raises a question of practice which I think it proper to consider.

In communication to Hon. Montgomery Blair, of this city, dated Feb. 10, 1882 (8 L. O., 183) this office held that in cases where notice of its decisions was given through the mails by the district officers, ten days, in addition to the sixty days allowed for appeals, should be allowed for the transmission of the notice and the return of the appeal.

Rule 44 of the rules of practice is indefinite relative to the time from which the thirty days allowed for appeals from decisions of local officers should be computed. Evidently parties should be allowed thirty days from date of receipt of notice, and not be limited to thirty days from the day of mailing the letter containing the notice, and I do not think that such limitation was contemplated by the rules of practice. But it is apparent that a more definite rule is required to meet cases of appeals from the decisions of local officers than the uncertain and frequently impracticable one of ascertaining the date on which notice of the decision is actually received.

As uniformity in practice is desirable, and as I see no good reason why a distinction should be made in the matter of time allowed for transmission of notices and return of appeals between the decisions of this office and of local officers, when such notices are served by mail by the local officers, I shall hold that the rule heretofore referred to in respect to appeals from the decisions of this office is applicable to appeals from the decisions of local officers, and that ten days additional to the thirty days allowed for appeals from decisions of registers and receivers will be allowed for the transmission of the notice by mail and the return of the appeal to the local office.

On appeal of the same case to this Department, Secretary Teller concurred in the said decision of the Commissioner. (1 L. D., 118).

This being the law governing the question of practice in the case at bar, it follows that the notice of appeal and copy of specification of errors was filed in time and the motion to dismiss the appeal must be overruled.

Upon the merits the evidence is very conflicting. It is undisputed however, that Stitzel knew when he made his homestead entry, that Trainor had improved a part of Lot No. 7, and that he claimed it as part of his homestead entry, and the testimony of Trainor that he always intended to enter and thought he had entered Lot 7, instead of lot 10, is corroborated by the fact that he did considerable work upon said Lot 7, and by the fact that the shape of the tract of land if Lot 7 is included and Lot 10 excluded, would be more convenient for a farmer.

Taking the evidence as a whole, I am of the opinion that Trainor's contest should be sustained and as he has relinquished all claim to Lot 10, he should be allowed to amend his homestead entry so as to include said Lot 7.

Your said decision is accordingly reversed.

PLACER CLAIM REPORT OF DEPUTY SURVEYOR.

ROSINA T. GERHAUSER.

An examination of a placer claim and report thereon, by a deputy mineral surveyor, at the expense of the applicant for patent, should not be required, where the claim is upon surveyed land and in conformity with legal sub-divisions.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 25, 1888.

On February 13, 1883, Adam Gerhauser and Philo W. Rice claiming as locators and averring due compliance with local law, customs, and rules of miners, the mining laws of Congress and of Montana Territory, filed in due form application No. 1253, for patent to the certain placer mining claim described by legal sub-divisions of the public lands as the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, of Lot 3, Sec. 24 T. 10 N., R. 8 W., Helena, Montana.

On July 7, 1885, Rosina T. Gerhauser transferee of the parties named, filed her application to purchase the claim described. This application was rejected by the local office for failure to comply "with the requirements of circular "N" approved September 23, 1882." The claimant has appealed from your office decision of October 26, 1886, sustaining the action below.

Section 2331 Revised Statutes, provides that when placer claims are upon surveyed lands and conform to legal subdivisions no further plat or survey shall be required.

The circular approved September 23, 1882, has special reference to applications for placer claims. It sets forth that the first care must be exercised in determining the exact classification of the lands and that the clearest evidence of which the case is capable should be presented.

Section 2395 Revised Statutes, requires the United States deputy surveyor *inter alia* to note the true situation of all mines, etc., as well as "the quality of the lands," and provides that these descriptive notes should be "incorporated in the plat by the surveyor general."

The said circular, after stating that experience has shown the regular plats to be of little value owing to neglect of the foregoing, provides that:

It will be required in the future that deputy surveyors shall, at the expense of the parties, make full examination of all placer claims, and duly note the fact as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claims. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centers of trade or residence; also of well known systems of lode deposits or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and finally, what works or expenditures have

been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

This examination should be reported by the deputy under oath to the surveyor general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

The claimant on appeal, contends that your office erred in requiring such examination and report, for the reason that the claim was taken by legal subdivisions. It is also urged that the matters which the said circular requires to be shown are sufficiently proved by the proofs submitted with the claimant's application. This proof consists of formal affidavits showing the placer character of the claim, the improvements thereon, the supply of water, etc.

This appeal is, in my opinion, well taken. Section 2331 requires an applicant for a placer claim which can not be conformed to legal subdivisions to make a survey and plat of the same, but the same section expressly excepts from such requirement the applicant for a placer claim which does so conform. The record showing this claim to be in conformity with a legal subdivision it is evident that the government survey is the legal source of information concerning it.

To hold that the requirement of the said circular *i. e.*, that an "examination of all placer claims" should be made by a deputy surveyor "at the expense of the parties" applies to the case at bar would be to disregard the statutory provision referred to. The claimant's application should be allowed.

Your decision is accordingly reversed.

FINAL PROOF PROCEEDINGS—TRANSFEREE.

JAMES W. GRIFFIN.

Final proof irregularly submitted by an entryman, now deceased, may be accepted, in the absence of protest, after new publication of notice by the transferee.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 27, 1888.

Hiram Pettijohn, on June 7, 1882, filed pre-emption declaratory statement for the SE. $\frac{1}{4}$ of Sec. 31, T. 131, R. 53, Fargo land district, Dakota. He advertised that he would make final proof on December 30, 1882; but for reasons set forth failed to do so until January 2, 1883. Said final proof (in the absence of any protest or objection on the day appointed) was accepted by the local officers, and final certificate issued; but your office, by letter of August 16, 1886, demanded new advertisement and new proof. In reply it was alleged and shown that said Pettijohn had died about October 1, 1883, and that the tract had passed into other hands—being at the date of your said letter of August 16, 1886, in possession of one James W. Griffin. Thereupon your office, by

letter of March 30, 1887, in view of the fact that Pettijohn, being dead, could not make new publication, held the entry for cancellation.

In this your office was in error. The Department has decided in the case of Milo Adams (7 L. D., 197,) that where an entryman has left the country and his whereabouts is unknown, his transferee may make proof.

Certainly, then, the same may be done where the entryman is known to be dead. Inasmuch as Pettijohn's final proof shows his compliance with the law regarding residence and improvements, and his qualifications as a homesteader, you will direct that notice of final proof be given anew by the transferee; and if, at the time appointed in such notice, no protest or objection is filed, then the proof heretofore made may be accepted; should a protest or objection be filed, then a hearing must be had to ascertain whether Pettijohn had fully complied with the law during the period covered by his final proof.

MINING CLAIM—NOTICE—DESCRIPTION.

TENNESSEE LODGE.

In the notice of application for patent, the description of the claim should include the course and length of a line connecting said claim with the public survey or a mineral monument.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 30, 1888.

I have considered the appeal of Robert G. McDonald *et al.*, claiming to be owners of the "Tennessee Lode" claim in Santa Fe land district, New Mexico, from your office decision of May 26, 1887, requiring a new publication and posting of the notice of application for patent.

On March 31, 1884, Robert G. McDonald, Juan Delgado, Pedro Delgado, Quentien Morier and Edward L. Martin, made application to purchase the above-named claim under the mining laws of the United States.

Upon examination of said application in your office it was discovered that the proof of posting and publication of the required notice of such application was defective, the date of the first day of the posting being omitted and the affidavit of publication showing that said notice was published but fifty-six days prior to application.

By your office letter of June 26, 1886, additional proof of the proper posting and publication of said notice was required. To correct these defects, applicants reposted and republished notice, but without being ordered so to do by your office.

In both the first and second publications of such notice said claim was defined by metes and bounds, and reference was made to "Pine Tree" lode as being an adjoining claim, but the course and distance

from either corner of said Tennessee Lode claim to a corner of public surveys or to a U. S. mineral monument, was not shown, and as a similar deficiency of description existed in the published notice of the Pine Tree lode, the description of the location of the Tennessee lode was held by your office to be insufficient, and by your office letter of May 2, 1887, said claimants were required, within sixty days after notice "to publish a supplemental notice of their application for a patent for the statutory period, with the same rights as if it were an original publication, provided the tract shall not then be otherwise appropriated, and no valid adverse rights have attached thereto."

Posting on the claim and in the local office was also ordered to be again made.

By communication dated May 11, 1887 the said applicants, by their attorney, moved for a reconsideration of your said decision for the reasons that the description as required by your said decision is not required by the U. S. Revised Statutes nor by the previous rulings of the General Land Office, to be set forth in the published notice; and because the applicants had already twice published notices at great expense, and to again publish, would be a great hardship.

By your office letter of May 26, 1887, said motion was denied, and an order for new publication and posting in accordance with former decision was reiterated.

From this claimants appeal.

The law requiring notice of application for patent for mining claim is found in Sec. 2325, Rev. Stat., which provides among other things that with the application shall be filed a plat and field notes of the claim, showing accurately the boundaries of the claim which shall be distinctly marked by monuments on the ground, "and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat."

Said Sec. 2325 further provides that, upon the filing of such application, plat, field notes, and affidavits, the register shall publish a notice that such application has been made, for the period of sixty days in a newspaper, etc.

To carry into effect this law, the Department has adopted certain rules, those now in force applicable to this case, being embodied in a circular dated October 31, 1881.

Rule No. 14 of said circular directs the method of making location of such claims provides, that in the location notice reference should be made, giving the course and distance as nearly as practicably, from the discovery shaft to permanent and well known points, mentioning among others prominent buttes and hills.

Rule 29 thereof, in providing what the notice of application for a patent to be posted on the claim shall contain, provides that said notice

shall give the date of posting, the name of claimant, the name of the claim, mine or lode; the mining district or county; whether the location is of record, and if so

where the record may be found; the number of feet claimed along the vein and the presumed direction thereof; the number of feet claimed along the lode in each direction from the point of discovery or other well defined place on the claim; the name or names of adjoining claimants on the same or other lodes; or, if none adjoin, the names of the nearest claims etc.

Rule 34, provides for the publication and posting of such notices by register, and Rule 35 says:

The notices so published and posted must be as full and complete as possible, and embrace all the data given in the notices posted on the claim.

One of the objects designed to be accomplished by the establishment of U. S. mineral monuments was doubtless to provide for more accurate description of mining claims and their locations, than could be given by reference to natural objects merely, in localities to which the regular public surveys have not been extended, and there being such monument in the neighborhood as shown by reference thereto on the plat, it is proper that the course and length of a line connecting the claim therewith should be given in the notice.

Your said decision is accordingly affirmed.

See 4420161 PRACTICE—WITHDRAWAL OF CONTESTANT.

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OVERTON *v.* HOSKINS.

In cases of contest the government is a party in interest, and the Land Department is not precluded by a contestant's withdrawal from considering the evidence, and passing upon the rights of the entryman as between himself and the government.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 30, 1888.

I am in receipt of your office letter of October 4, 1887, accompanying which, the record of the contest case of North L. Overton *v.* George L. Hoskins, was transmitted to this Department.

The contest involved the latter's homestead entry No. 4068 for the SW. $\frac{1}{4}$ Section 27, T. 17, N., R. 21 W., North Platte land district, Nebraska.

Referring to the said record, it is stated in your said office letter

It shows that the register and receiver recommended for cancellation the said entry, from which decision the defendant appealed to this office, and that subsequently, the contestant filed a withdrawal of his contest, but this I hold does not prevent the consideration of the evidence by the government with a view of protecting its interest and the record is therefore transmitted for your inspection and such action as you deem proper.

It has been held by this Department that in cases of contest the government is a party in interest; it is not precluded by a contestant's withdrawal from considering the evidence in the case with the view of ascertaining and adjudicating upon the right of the entryman as be-

tween himself and the government. *Taylor v. Huffman*, (5 L. D. 40); *Hegranes v. Londen* (*idem* 385).

The evidence in the said contest is therefore legitimately before your office for consideration, and the papers accompanying your said letter are returned to you for appropriate action.

CONTEST—EVIDENCE; PRE-EMPTION—SECOND FILING.

BRIDGES v. CURRAN.

In the interest of the government the Department may take advantage of evidence brought out in a contest, although upon a point not charged in the affidavit of contest.

The pre-emption right is exhausted with one filing, though it may have been made prior to the adoption of the Revised Statutes.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 30, 1888.

I have considered the case of Henry J. Bridges *v.* Daniel Curran on appeal of the latter from your office decision of June 14th, 1887, holding for cancellation his pre-emption declaratory statement for Lots 9, 10, 15 and 16 (Fr. L. SE. $\frac{1}{4}$) Sec. 36, T. 2 N., R. 2 E., H. M., Humboldt California land district.

It appears from the record that said Curran filed declaratory statement for said land July 6, 1885, alleging settlement November 27, 1883, and on October 9, 1885, he submitted his final proof.

On October 8, 1885, H. J. Bridges filed in the local office a protest, and an affidavit of contest alleging that said land was the property of the State of California as school land and that he was an applicant to purchase the same under the laws of said state; that said land is rough, hilly, cut up by gulches, covered with a heavy growth of timber, and unfit for cultivation, and alleging also failure on the part of Curran to comply with the law in the matter of residence and improvements.

Hearing of said contest was had before the local officers November 16, 1885, the testimony was voluminous and conflicting and among other things developed the fact fully which was stated in claimant's affidavit in final proof, that the said Curran had previously filed a pre-emption declaratory statement upon another tract of land. In reply to the question—"Have you ever obtained the benefit of the pre-emption law before?" he replied,—“I have not obtained the benefit of it, no sir. I did file once previously in 1870, but I was so poor then I could not prove up.” He further stated that he could not borrow the money for that purpose without giving a mortgage, and upon the advice of the register of the local office he transmuted his pre-emption filing into a homestead entry for the same land.

Upon this evidence the local officers recommended that his proof be rejected and his filing canceled upon the ground that his former filing

had exhausted his pre-emption right and therefore the filing for the land in controversy was illegal and void in its inception.

Their decision was affirmed by your office in the decision appealed from and upon the same grounds.

As my view coincides with your own there is no need of considering the testimony offered upon the issues raised by the affidavit of contest.

It is contended by Curran's counsel on appeal, that your said decision is erroneous because based upon a question not in issue and not raised by the affidavit of contest.

An affidavit of contest is in the nature of a preliminary information. It confers jurisdiction upon the officers of the government to hear and determine the cause and they are not confined to the consideration of such testimony as may be relevant and material to the allegations of the contest affidavit, but may take cognizance of whatever the evidence may disclose.

In *Brandes v. Smith* (2 L. D. 95), the allegation of affidavit of contest was not proved, but as the testimony developed the fact that Brandes' entry was made for the benefit of another and was illegal in its inception, it was held that the entry should be canceled.

It has been uniformly held that the government being a party in interest in every contest, is not precluded from taking advantage of information on the merits of the case brought out on the trial. *Seitz v. Wallace*, (6 L. D. 300), citing *Litten v. Altimus* (4 L. D. 512); *Smith v. Brandes* (2 id. 95); *Condon v. Arnold* (id. 96); see also *Van Ostrum v. Young*, (6 L. D. 25).

Even had the contestant withdrawn from the case and dismissed his contest, such withdrawal would not prevent action by the Department upon the evidence submitted. *Taylor v. Huffman* (5 L. D. 40).

Counsel for appellant also claims that the first filing was made under the act of March 3, 1843, and that said act did not prohibit a second filing.

The whole theory of counsel upon this point is discussed in the case of *Jonathan House* (4 L. D. 189), in which case it is expressly held that Sec. 2261 of the Revised Statutes, which is as follows,

no person shall be entitled to more than one pre-emption right by virtue of the provisions of section 2259; nor where a party has filed his declaration of intention to claim the benefits of such provisions, for one tract of land, shall he file, at any future time, a second declaration for another tract,

creates no new provision of law; it simply continues in force as part of the revised statutes certain provisions which had long previously been in force as a part of the pre-emption law.

The case of the State of California *v. Pierce* (9 C. L. O., 118), upon which appellant relies to sustain his proposition that the law under which he made his first filing did not prohibit a second, and that no such inhibition existed when first filing had been on unoffered land, until the adoption of the Revised Statutes, has been repeatedly overruled: See J. B.

Raymond (2 L. D. 854), Jonathan House, (4 L. D. 189), Jose Maria So-laiza (6 L. D. 20).

The appellant having exhausted his pre-emption right by said first filing his declaratory statement filed for the land in controversy, was illegal in its inception and must be canceled.

Your said decision is accordingly affirmed.

STATE SELECTION—ACT OF JULY 23, 1866.

ELIAS ROWE.

The act of July 23, 1866, confirmed to the State of California irregular selections where the land covered thereby had been sold to purchasers in good faith under the State law.

The rejection of a State selection prior to the passage of said act will not remove said selection from the confirmatory operation thereof, where notice of such action was not given the State.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 31, 1888.

I have considered the appeal of Elias Rowe from your office decision of February 2, 1887, rejecting his application made November 19, 1886, to file declaratory statement for the N.E. $\frac{1}{4}$, NE. $\frac{1}{4}$, section 6, T. 2 N., R. 8 E M. D. M., Stockton, California, land district.

The reason assigned by the local officers for rejecting his application was because it appeared from the records of the office that said land was selected by the State of California, March 4, 1861.

The law under which the land above described was selected by the State of California, is section 8 of act of Congress approved September 4, 1841, (5 Stat. 455), (not March 4, 1861, as stated in your letters) and is as follows:

And be it further enacted, That there shall be granted to each State specified in the first section of this act five hundred thousand acres of land for the purposes of internal improvement: *Provided*, That to each of said States which has already received grants for said purposes, there is hereby granted no more than a quantity of land which shall, together with the amount such State has already received as aforesaid make five hundred thousand acres, the selection in all of the said States, to be made within their limits respectively in such manner as the legislatures thereof shall direct; and located in parcels conformably to sectional divisions, and subdivisions of not less than three hundred and twenty acres in any one location, on any public land except such as is or may be reserved from sale by any law of Congress or proclamation of the President of the United States, which said location may be made at any time after the lands of the United States in said State respectively, shall have been surveyed according to existing laws. And there shall be and hereby is granted to each new State, that shall be hereafter admitted into the Union, upon such admission, so much land as, including such quantity as may have been granted to such State before its admission, and while under a territorial government, for purposes of internal improvement as aforesaid, as shall make five hundred thousand acres of land, to be selected and located as aforesaid.

Under this law on March 4, 1861, the State agent of California selected and located in the name of the State of California, the land above described, and on April 19, 1861, the State of California, sold said NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ of Sec. 6, to one Robert K. Reed.

On July 3, 1862, your office by letter to the local officers, rejected such selection by the State of California, because under the grant of 1841, selections are required to be made in bodies of not less than three hundred and twenty acres.

It appears, however, from the reply of the register and receiver of the local office to a letter addressed to them that it does not appear that the State of California was ever notified of your said office decision of July 3, 1862, and by your office letter of February 2, 1887, the local officers were instructed to re-instate the selection as to said tract, upon the records of their office for the reason that said selection had been kept alive through the failure of the local officers to notify the State authorities in regard to the rejection (of the selection made by the State agent of said land) in 1862.

On July 23, 1866, an act of Congress was approved (14 Stat. 218) which, so far as the same may be applicable to the case at bar, is as follows:

Be it enacted, etc., That in all cases where the State of California has heretofore made selections of any part of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be and hereby are confirmed to said State: *Provided*, That no selection made by said State contrary to existing laws shall be confirmed by this act for lands to which any adverse pre-emption homestead or any other right has, at the date of the passage of this act, been acquired by any settler under the laws of the United States, or to any lands which have been reserved, etc.

It also appears from the record that one Benjamin E. Brown is the final assignee of said Reed and of the State title in said land.

Upon application of said Rowe for a review of your said decision of February 2, 1887, your office by letter of May 18, 1887, re-affirmed the former decision and from such action Rowe appeals to this Department.

It appears from the evidence that the transferee of the State of California, Benjamin E. Brown, settled upon the NE. $\frac{1}{4}$ of said Sec. 6, on July 1, 1853, and that on October 29, 1857, he filed declaratory statement for the same. That on August 20, 1858, the State of California selected for the benefit of one James E. Clements the S. $\frac{1}{2}$ and NW. $\frac{1}{4}$ of said NE. $\frac{1}{4}$ of said Sec. 6, and that said Brown subsequently purchased the right of said Clements thereto. That on September 28, 1867, he filed an abandonment of his claim as to said NE. $\frac{1}{4}$ NE. $\frac{1}{4}$ in order to secure title from the State therefor, through one R. K. Reed, purchaser from the State. Brown's immediate grantor being one W. H. Lyons, grantee of said Reed. The consideration paid by Brown for said forty acres was \$900.

It further appears that the said Brown has been in peaceable, undisturbed, and undisputed possession of said premises ever since his orig-

inal settlement in 1853, and has cultivated said land during the whole time, and that the said forty acres is now of the value of \$3,500.

This affidavit of Brown is corroborated by three persons.

You say in your said letter of May 18, 1887,

"Under all the circumstances I have concluded that the State had the right to notice, so that she might accept the land as in full satisfaction of three hundred and twenty acres or appeal. If the State had that right, and was not notified of the action taken in 1862, up to July 23, 1866, then the selection can not be treated as having been finally rejected on the latter date, and the confirmatory act of that date took effect upon it to confirm it as above set forth.

The State of California was entitled to notice of the rejection of its selection that it might have an opportunity to appeal or take such other course as might at the time seem to be to its interest, and as the record fails to show that any such notice was given the presumption that it was not is conclusive for the purposes of this case.

The act of July 23, 1866, is remedial in its character and should be construed liberally. It is entitled an act to quiet land titles in California, and was evidently intended by Congress to be curative of irregularities in selections made by the State under various grants, and to confirm titles in innocent purchasers from the State notwithstanding irregularities in selections.

It is contended by counsel for appellant that the attempted selection of the State agent made March 4, 1861, was illegal and void in its inception for the reason that no valid selections could be made under the law for a less quantity than three hundred and twenty acres.

This might be urged with some reason if the question was now between the State and an applicant to enter under the pre-emption law, but as the State prior to July 23, 1866, had under its laws disposed of said land to a purchaser in good faith the said act confirmed the title thereto in the State, for the benefit of its grantee, as fully and completely as could have been done by patent, and whatever irregularity there may have been in the manner of making the selection by the agent of the State, can not now be considered, the only questions being whether the State possessed the right to claim the land under the grant, and whether the land was subject to selection by its agents, *Geo. W. Frasher et al. v. O'Connor* (115 U. S. 102), and as to these matters no question is raised, nor indeed can there be any doubt, so far as the record before me shows, that these questions should both be answered affirmatively.

It necessarily follows then that said tract was at the time Rowe applied to file declaratory statement, *i. e.*, November 19, 1886, not a part of the public domain and not subject to settlement under the pre-emption laws, and his application was properly rejected.

Your said decision is accordingly affirmed.

PRACTICE—SECOND CONTEST—JUDGMENT.

CAMPBELL *v.* MIDDLETON ET AL.

A second contest should be received and held without action, pending the final disposition of the prior suit.

A second contestant cannot question, collaterally, the sufficiency of the evidence upon which a judgment of cancellation was rendered in a prior contest against the same entry.

First Assistant Secretary Muldrow to Commissioner Stockslager, October 31, 1888.

This controversy involves the NW. $\frac{1}{4}$ section 8, T. 12 N., R. 29 W., North Platte land district, Nebraska.

The record shows the following facts:

Clarence E. Middleton made homestead entry for the said land March 1, 1884. On January 8, 1885, Conrad Karsk, initiated contest against the said entry, charging, "that the said Clarence E. Middleton, has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making entry; that said tract is not settled upon and cultivated by said party as required by law, for the last six months previous to this day."

After due notice hearing was had February 21, 1885; Middleton made default. The testimony on behalf of the said contestant was submitted. It appeared therefrom that Middleton had not fenced, cultivated, built or resided upon, or in any way improved said tract, except that he plowed twenty-five acres; he had a house on the land but tore it down and sold the logs in September, 1884." He offered to sell, "the whole business" to the witness Peter Mylander for fifty dollars because he, Middleton, said "he would not live there under any circumstances."

Considering the evidence; the local officers February 26, 1885, rendered their decision, that the homestead entry of the said Middleton should be canceled.

Pending the contest of Karsk, George C. Campbell, on March 12, 1885, initiated a second contest against the said entry; in his contest affidavit Campbell charged that Middleton, "has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law, that said Middleton resided on said tract from the spring of 1884 until the 10th of September, 1884, when he sold his improvements and quitted his residence on said land and that at the date of hearing of the case of Conrad Karsk against said Middleton's said entry, said Middleton had not been absent from, nor abandoned said tract for a period of six months next prior thereto."

And the said Campbell therefore prayed for a hearing in the said case and "to be allowed to prove said allegations and that said Conrad

Karsk be cited to appear at said hearing and to show cause, if any exist, why his contest should not be dismissed and affiant be allowed to contest said homestead entry."

Together with his contest affidavit, Campbell filed his further affidavit of the same date. In it, he stated, "that he has commenced a contest on the homestead entry of Clarence Middleton for NW. 8-12-29 W.; that he is informed and believes that one Conrad Karsk has a contest pending against said entry; that at the time said Karsk commenced said contest said Middleton had not been absent from, nor had he abandoned said land for a period of six months; that said Karsk knew these facts, and knew when said Middleton left, viz: September 10, 1884; that said Karsk commenced contest against said entry September 16, 1884, which he dismissed, as affiant believes, because the land office would not entertain the same when the allegations did not show abandonment for six months prior to commencing the same."

On the contest of Campbell a hearing was ordered for May 21, 1885, by the local officers, of which Middleton and Karsk were duly notified. At the hearing Middleton failed to appear. Karsk appeared and moved the register and receiver of the said land office for a dismissal of the contest of the said Campbell, for the following reasons:

- 1st. Because of the pending contest of himself against the said entry.
- 2nd. Because contest affidavit of Campbell tends to corroborate allegations and proofs presented by himself in his contest.
- 3rd. Because facts set forth in affidavit of Campbell are not sufficient to authorize the granting of the relief asked.
- 4th. Because the allegations of contest of Campbell show the latter's contest "to be no more than a motion made by a stranger to the record to open up a judgment heretofore rendered by the register and receiver in the case of Karsk against said Middleton."
- 5th. Because Campbell is a stranger to the record in the case of *Karsk v. Middleton* "without exhibiting a shadow of interest either in the land under contest."

Campbell thereupon moved to strike said motion on behalf of Karsk from the files for the following reasons:

- 1st. Said motion does not state the facts as they exist, and does not allege sufficient reasons to entitle him to the relief sought.
- 2nd. Said motion is argumentative.
- 3rd. Said motion is not sustained by any affidavit or affidavits, showing that said contest of Karsk was legal.

Campbell further at the time of the said hearing filed his affidavit, bearing date May 21, 1885. He therein deposes that he is residing on the land embraced in the said homestead of said Middleton, and has built a frame house thereon sixteen by twenty feet, that he commenced his said contest against said entry on the first day he could legally do so, said Middleton not having abandoned said entry six months at any

time prior thereto; that he was waiting for the time to arrive when he could legally contest said claim, and did commence his claim the very day the six months had expired after said abandonment; that he is informed and verily believes that the person who was acting for said Karsk and took the notice of contest to the printer, told the printer that he knew the contest to be premature, but that they were doing so to bar out others who desired to contest the same. He further says that said Karsk commenced a prior contest against said entry before the expiration of the six months from the date of said Middleton's entry, and kept the same on the record until the one in question was commenced. He therefore says that each of said contests of said Karsk was fraudulent and void, and made in fraud of the rights of others who desired to contest said entry.

After due consideration the local officers rendered their decision, "that the acceptance of Campbell's affidavit of contest and the issuance of notice thereon was error and that his case ought to be dismissed."

From this decision Campbell appealed.

In your office letter of March 13, 1886, it is stated :

The trial (meaning the trial in the Karsk contest case) took place and judgment was rendered prior to the filing of Campbell's complaint which should only have been received and placed on file to await the final determination of the former suit. (2 L. D. 259-3 L. D. 512). Your action dismissing Campbell's contest is affirmed (2 L. D. 220). The testimony submitted by plaintiff Karsk appears to sustain his charges and as no appeal was taken from your decision in the case it is also affirmed, the entry cancelled, and the case closed.

Campbell thereupon appealed to this department from your said office decision and the case is before me for consideration.

For reasons stated in your said office letter your decision must be affirmed. The testimony submitted in the Karsk contest case fully supported the charges made therein, beside a second contestant can not question collaterally the sufficiency of the evidence upon which the judgment of cancellation in a prior contest against the same entry is founded.

Your decision is accordingly affirmed.

Subsequent to your said decision of March 10, 1886, on March 26, ensuing George C. Campbell made homestead entry for the said land. Conrad Karsk on May 6, 1886, made application to make a like entry for such land; attached to such application is the affidavit of Karsk from which it appears that he received no notice of your said decision but was informed the day previous, May 5, that Middleton's entry had been cancelled.

The entry papers of Campbell and Karsk's application are returned to your office, together with the other papers in the case for appropriate action.

ABANDONED MILITARY RESERVATION—RAILROAD GRANT.

FORT SANDERS.

The Fort Sanders military reservation having been abandoned, the following lands included therein are restored for disposition under the act of July 5, 1884: (1) The even numbered sections within the present reservation, and not within the reservation of 1867; (2) both the odd and even numbered sections included within the present reservation and also within that of 1867.

The odd numbered sections included within the reservation of 1867, but not within the present and not patented to the railroad company, will be restored to entry under the general laws.

Secretary Vilas to Commissioner Stockslager, July 9, 1888.

From your office letter dated February 13, 1888, it appears that by executive order of January 7, 1867, certain lands (six miles square) in the then Territory of Dakota, and in the present Territory of Wyoming, were reserved for a military post to be known as Fort John Buford; that the name of said reservation was subsequently changed to Fort Sanders, and that by executive order of June 28, 1869, its boundaries were changed and the reservation enlarged; that by act of June 9, 1874 (18 Stat., 65) it was reduced to the present reservation which is entirely within that of June 28, 1869, and includes a small portion of the reservation of January 7, 1867; that the existing reservation has been surveyed in accordance with departmental instructions of January 5, 1886, and the survey accepted by your office letter of March 26, 1887, to the surveyor-general of Wyoming, and that the lands covered by said reservation are within the limits of the grant to the Union Pacific Ry. Co., by the acts of July 1, 1862 (12 Stat., 489) and July 2, 1864 (13 Stat., 356) as shown by the map of definite location filed January 6, 1868.

By letter of January 20, 1887, the Department called the attention of your office to a number of abandoned military reservations (among them the one under consideration) and directed that they be surveyed and platted at once that the same might be appraised and disposed of under act of July 5, 1884 (23 Stat., 103) and also that a report be made to the Department in each case upon the completion of the work.

By proclamation of the President dated August 22, 1884, said reservation was turned over to this Department for disposition.

The right of the Union Pacific railroad company to the odd sections of land along its line within the former limits, and also within the present limits of the Fort Sanders (formerly Fort Buford) military reservation was considered by the Department on November 7, 1885, and by letter of that date (L. & R. 51, page 188) it was held that:

Upon the exclusion of a portion of the lands formerly within the boundaries of the Fort Buford reservation, the odd sections of land excluded reverted to the United States and did not become subject to claim by the railroad company.

Your said letter of February 13, 1888, recommends that the even numbered sections within the present reservation and not included within the reservation of 1867, be restored and disposed of under the act of July 5, 1884, and that both the odd and even numbered sections within the present reservation and *also* within the reservation of 1867, be likewise disposed of.

You further state that the odd sections within the boundaries of the reservation of 1867 and not included within the present reservation, have been treated as withdrawn for the benefit of the railroad company, and that part of the same have been inadvertently patented to said company, and recommend that such sections, not patented, be restored to entry under the general laws.

In these recommendations I concur and it is so ordered. The odd sections in the original reservation being reserved for military purposes at the date of the attachment of the company's rights were excepted from the grant. The act of July 5, 1884, directs the manner of disposition of the sections within the present reservation not granted to the company. The appointment of appraisers required by said act is a matter for subsequent disposition by the Department when it shall be deemed proper.

PRACTICE—INTERLOCUTORY ORDER—APPEAL.

JONES *v.* CAMPBELL ET AL.

An appeal will not lie from an interlocutory decision of the General Land Office.

First Assistant Secretary Muldrow to Commissioner Stockslager, November 1, 1888.

It appears from the record in this case that on October 11, 1886, at nine o'clock and seventeen minutes in the morning of that day, Charles F. Campbell, having paid to the receiver the land office fees, filed with the register his affidavit of contest against the timber culture entry of Thomas E. Martin, made October 9, 1885, for the SW. $\frac{1}{4}$ Sec. 34, T. 31 S., R. 39 W., Garden City, Kansas.

At a later hour of the same day, on motion by attorney of James W. Jones, who applied to initiate contest against said entry, and without notice to Campbell, the local officers dismissed the latter's contest, on account of a technical defect in his said affidavit, and allowed the subsequent contest to be filed.

From this action of the local office, dismissing his contest, Campbell appealed.

After said appeal was taken and during the pendency thereof before your office, said Jones filed a motion that the same be dismissed, on the ground that a copy thereof had never been served upon him, he "being the first contestant."

On February 1, 1887, your office overruled the motion of Jones, be-

cause of failure on his part to disclose, on oath, as required by the rules of practice, what interest, if any, and the nature thereof, he had in the matter involved in said appeal.

From this decision Jones appeals.

The matters involved in Campbell's contest and appeal are still under control of your office, and your action in overruling said motion was therefore purely interlocutory in its nature, and is in no sense a decision from which an appeal may be taken under rule 81 of rules of practice.

The said appeal of Jones is accordingly dismissed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

PAYNE *v.* ATLANTIC & PAC. R. R. CO.

A *prima facie* valid pre-emption filing existing at the date of indemnity withdrawal excepts the land covered thereby from the operation of said withdrawal.

Land covered by an uncanceled homestead entry is not subject to indemnity selection. *Acting Secretary Muldrow to Commissioner Stockslager, November 1, 1888.*

The land involved herein is the S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 1, T. 16 N., R. 4 W., Prescott, Arizona, and is within the limits of the indemnity withdrawal for the benefit of the grant to the Atlantic and Pacific Railroad, ordered May 17, 1872, received at the local office June 18, 1872.

On October 27, 1886, Edwin C. Payne applied to make homestead entry for the tract named. This application was, after protest by the said company, rejected, by reason of said withdrawal.

On January 8, 1887, the claimant, Payne, filed his certain affidavit, wherein he asked to be allowed to submit proof as to the status of the land, and also to make entry therefor.

The local officers, after a hearing duly had, at which the said company was represented, allowed the claimant's application. This action was sustained by your office decision of June 4, 1887, from which the company appeals.

It appears from your said decision, wherein the material facts are sufficiently stated, and to which reference is made, that the tract in question was, on June 18, 1872, *i. e.* the date of the stated withdrawal for the benefit of the appellant's grant, covered by the pre-emption declaratory statement of John A. Kimler, filed on the second of the same month. The said tract being, therefore, subject to a pre-emption filing, *prima facie* valid and existing at the date of the said withdrawal, it was, under the rule laid down in the case of *Malone v. Union Pacific R. R. Company* (7 L. D., 13), excepted from the operation of the appellant's grant.

I also concur in your conclusion that the land being covered by an uncanceled homestead entry, it was not subject to listing by the company on September 3, 1885.

The decision appealed from is accordingly affirmed.

RAILROAD GRANT—CONFLICTING SETTLEMENT CLAIM.

CENTRAL PACIFIC R. R. CO. *v.* FIELD.

The claim of a qualified pre-emptor, based on settlement occupancy and possession, existing when the right of the road attached, is sufficient to except the land covered thereby from the operation of the grant.

Under the original grant to the Central Pacific, and the amendatory act of 1864, the equitable claim of a settler is recognized and protected.

Acting Secretary Muldrow to Commissioner Stockslager, November 2, 1888.

I have considered the case of the Central Pacific Railroad Company, *v.* William J. Field, involving the SW. one-fourth of Sec. 33, T. 1 S. R. 2 W., M. D. M., San Francisco district, California, on appeal by said railroad company from the decision of your office of April 2, 1887.

Said land is within the twenty-mile limits of the grant to said railroad company of July 1, 1862 (12 Stat., 489) as enlarged by the act of July 2, 1864 (13 Stat., 356). The line of said company's road was definitely located opposite the tract in question, January 21, 1870. The township plat of survey was filed in the local office July 30, 1878, and, on October 7, 1878, the claimant, William J. Field, filed pre-emption declaratory statement, No. 14,588, for said land, alleging settlement thereon September 27, 1861.

A hearing was had December 24, 1883, and from the testimony adduced, it appears that Field and one Miller purchased in 1884, from prior occupants, their possessory interest in a tract of more than five hundred acres, embracing the quarter-section of land in question, and took possession of said tract under said purchase; that there was a house upon said quarter-section and Field cultivated said quarter-section by hired men who lived in the house thereon from 1864 to 1868, during which time Field resided off said land on the San Leandro road, engaged in hotel-keeping; that it was uncertain at that time, whether said land was public land of the United States or embraced within the limits of a private land claim, and it was understood between Field and Miller during their joint ownership of the possessory interest in the tract, that in the event the quarter-section in dispute was found to be public land, Field was to have the right to secure it under the pre-emption law; that in 1868, Field and Miller sold their possessory interest in the entire tract to Dennis Callaghan and William Watson, with the understanding that if said quarter-section should finally be ascertained not to be covered by a private land claim, then Field should have the right to resume possession of said quarter-section; and that pursuant to this understanding (in September, 1878) about two months after the survey, he notified Callaghan to move his improvements from said quarter-section and moved thereon himself with his family, where he has ever since resided and made improvements of the value of \$1200, consisting of a dwelling twenty-five by thirty-five feet, a barn forty by

fifty feet, a spring walled up with pipe running to the dwelling, men's quarters, chicken-house, two corrals, a half mile of fencing and one hundred and twenty acres under cultivation. On these facts the local officers rendered a decision adverse to Field, and on appeal, your office reversed said decision.

The act of July 2, 1864 (13 Stat., 356) under which the company claims the land in dispute, provides in section four thereof, "that any lands granted by this act, or the act to which this is an amendment shall not defeat or impair any pre-emption, homestead, swamp-land, or *lawful claim*."

There is a well recognized distinction between a pre-emption *claim* and the pre-emption *right*. "The act of 1841 did more than create a right of pre-emption, or of purchase before others; it legalized settlement on the public lands with a view to cash entry, which before had been trespass and made it the basis of a claim against the United States." This claim is "the equitable though inchoate right which is contemplated in the various acts granting lands to railroad companies. . . . A valid settlement creates a valid claim against the United States and under either the act of 1862 or the amending act of 1864, land covered by a valid settlement is excepted from the operation of the grant, whether or not there has been a valid declaratory filing for it." *Emmerson v. Central Pac. R. R. Co.* (3 L. D., 271).

The settlement existing on the quarter-section in dispute at the time the company's right vested under the grant, January 21, 1870, and which had existed and been maintained for many years before that time, was not unlawful or a trespass as contended by the counsel for the company. It was under and derived from Field and Miller and in subordination to the right reserved by Field to pre-empt the land if it should be found subject to pre-emption, and was but a continuation of the settlement or possession of Field and Miller from 1864 to 1868, which had been established and maintained by Field as to said quarter-section with a view to cash entry or pre-emption thereof in the contingency named.

Field was a qualified pre-emptor and, if the land had been surveyed, could and doubtless would have filed a declaratory statement and perfected his claim thereto under the pre-emption law long before the definite location of the road.

The claim by him of the right to pre-empt the particular quarter-section in dispute was maintained from 1864 to 1868, during the joint possession and ownership of himself and Miller, was provided for on the sale to Callaghan and Watson in 1868, and, as soon as the status of the land was settled by the survey in 1878, he asserted said claim and took the necessary steps to perfect and secure it by moving himself and family on to said quarter-section and filing his declaratory statement therefor. His good faith is further manifest from his subsequent continuous occupancy of the land as a home and the character and extent of his improvements. His claim, from its inception, was only for the particular quar-

ter-section in dispute, and was, in my opinion, under all the circumstances of this case, such a "pre-emption claim" as is contemplated by the act of 1864. As held in *Emmerson v. Central Pac. R. R. Co.*, *supra*, such acts contemplate an "equitable" as distinguished from a strictly legal claim.

The decision of your office is affirmed.

TIMBER CULTURE CONTEST—DEFAULT NOT CHARGED.

PLATT *v.* VACHON.

If the specific allegations of the contestant fail for the want of evidence, he cannot, under a general charge of non-compliance with law, take advantage of evidence showing a default not specifically charged.

In such a case the issue is between the entryman and the government, and in the absence of bad faith the entry will not be disturbed.

First Assistant Secretary Muldrow to Commissioner Stockslager, November 3, 1888.

In the timber-culture contest of Theron D. Platt *v.* Alexander Vachon, appealed by Vachon from your decision of March 4, 1887, the record discloses the following facts:

On May 21, 1880, Vachon made timber culture entry for the SW. $\frac{1}{4}$ of Sec. 22, T. 135 N., R. 56 W., Fargo land district, Dakota.

Platt instituted contest April 10, 1885, and a hearing in the case was duly had on June 30, and July 1st and 3d following.

The local officers found in favor of the entryman and dismissed the contest. On appeal you found that the entryman had not complied with the timber culture law, and held his entry for cancellation.

Where good faith in attempting to comply with the law satisfactorily appears, and the legal rights of a third party are not involved, it does not follow that a non-compliance, inside of the statutory time, with some of the requirements of the timber culture law by an entryman will warrant the forfeiture of his claim.

The contestant herein alleged in his affidavit of contest, that the entryman after breaking twenty acres, and the year following back-setting six acres of said land, failed to further cultivate to crop or otherwise any part thereof, either in 1882 or 1883; that he "wholly failed to plant trees or tree seed on ten acres of said tract or any part thereof during the fourth year of said entry, or at any other time;" that there were no trees growing on said tract, and that the ground plowed "is now all grown up to weeds."

The following facts were shown at the hearing, by a preponderance of the evidence:

Appellant resided sixty miles from the land in contest and the work done on it he hired to be done. The requisite quantity of land was

plowed in 1880, and six acres replowed in 1881, and a man engaged to crop it to oats, to whom the necessary seed oats was furnished. It was, however, not cropped or further cultivated that year. In 1882 ten acres were cropped to wheat. In the spring of 1883 the land was again plowed, and a little over eight and a half acres planted to trees. The summer of 1883 was quite dry, and from some cause nearly all of these trees died. In the fall of that year the ground was replowed and planted to trees in rows four feet apart each way. These trees received no cultivation during 1884, and from one-third to one-half of them failed to grow, or were killed by a prairie fire, which crossed that year a part of the land planted. The land planted grew up badly to weeds, and was not protected by a fire-break. Appellant, before the institution of this contest, had procured tree seed and engaged a party to have the land replanted where the trees were missing.

From this state of facts bad faith on the part of the entryman certainly can not be inferred. The material facts specifically alleged in the contest affidavit, too, are not only not sustained by the evidence adduced, but are disproved. The contestant having failed to support by proof the facts alleged, has acquired by his contest no legal right to have the entry canceled, even though it should be found from the evidence that the entryman had failed to protect and keep in a healthy growing condition the trees planted, because he failed to put that question in issue. It is true that the contest affidavit contains the general allegation "that the tree claim law has not been complied with during the second, third, or fourth years since making said entry."

A failure to properly plant, properly cultivate, or properly protect the trees planted, and to keep them in a healthy growing condition, can not be taken advantage of under such a general allegation by a contestant who makes specific charges of failure to comply with the law, and then fails to sustain his charges by proof.

The contestant having failed to sustain his charges, the question of canceling the entry and forfeiting the entryman's claim becomes one between him and the government alone, and generally in such cases, where bad faith can not reasonably be inferred, the entry will be permitted to remain intact.

The local officers found from the evidence in the case that—

The efforts the claimant has made to get the required work done; the number of persons he has employed at divers times to do the work, or to assist in its performance; the attention he has bestowed upon the matter; the readiness with which he has responded to every call from his numerous employes or agents engaged to perform the work, and the liberal amounts of money he has expended to ensure a compliance with the provisions of the timber culture law, establish conclusively his good faith in the matter.

In the finding of good faith in the entryman I concur, and as Platt has failed to sustain his allegations as to the facts fairly in issue, his contest is dismissed, and appellant's entry will remain intact.

The decision of your office is therefore reversed.

PRE-EMPTION—SETTLEMENT—RESIDENCE.

HENRY HOFFMEISTER.

Residence begins with the first act of settlement where such settlement is followed up by an actual inhabitancy of the land in good faith.

Acting Secretary Hawkins to Commissioner Stockslager, November 9, 1888.

I have considered the appeal of Henry Hoffmeister from your office decision of April 12, 1887, rejecting his proof and requiring him to make new publication and proof on his pre-emption cash entry for SW. $\frac{1}{4}$, Sec. 35, T. 102 N., R. 66 W., Mitchell Dakota land district.

The record shows that said Hoffmeister settled upon said land April 5, 1884, his first act of settlement being the erection of a house, and his family came thereon to live on the 15th day of April. He made final proof October 10, 1884.

In your letter you say :

He established residence thereon April 15, 1884. Claimant made proof October 10, 1884. He could not, therefore, have resided on the land six months immediately prior thereto, and his proof is rejected.

It has been frequently held by this Department that while the rule requiring six months' residence is wise and proper as a general rule, it is not to be indiscriminately applied, nor when good faith otherwise sufficiently appears.

It has also been held by this Department that a settler establishes a residence the instant he goes on the land for the purpose and with the *bona fide* intention of making his home there to the exclusion of one elsewhere. *Humble v. McMurtrie* (2 L. D. 161); *Grimshaw v. Taylor* (4 L. D. 330); *Houf v. Gilbert* (5 L. D. 238); *United States v. Skahen* (6 L. D. 120).

It appears from the evidence that claimant began the erection of his house on April 5, and that it was completed and his family had moved in on the 15th of said month, that his residence thereon was continuous and that his improvements consisted of a house ten by twelve feet, and thirty-three acres of breaking, eight acres of which had been in crop that season.

The occupancy of the house by the family within a few days after its completion sufficiently indicates that the intention of claimant was to make his home upon said land, and his residence would therefore, for the purpose of showing good faith—and this is the only purpose for which six months' residence is required—date from the commencement of his settlement, viz: April 5, 1884, and this allows a few days over six months to date of final proof.

Your said decision is accordingly reversed and the entry may be passed to patent.

JAMES D. RANKIN ET AL.

The final decision, under judicial proceedings, that the claimant is not entitled to any credit for work done on the claim, renders it necessary that the supplementary evidence should clearly show that the value of the improvements, or labor done upon or for the development of the claim, since the date of said proceedings, is not less than five hundred dollars.

The occupancy of land by townsite settlers is no bar to its entry under the mining laws, provided the land is mineral and belongs to the United States.

Where the entry was allowed on insufficient evidence as to the character of the land, and the requisite expenditure thereon, supplementary proof may be submitted in the absence of protest or adverse claims.

Acting Secretary Hawkins to Commissioner Stockslager, November 9, 1888.

I have considered the appeal of James D. Rankin *et al.*, applicants for the Bartlett and Shock placer claim, mineral entry No. 2367, made December 18, 1884, at the Leadville land office, Colorado, from the decision of your office, dated July 28, 1887, holding said entry for cancellation.

The record shows that on December 10, 1880, James D. Rankin and John D. Roby made application for patent, and that an adverse claim was filed by Relief Jackson, claimant of the Thomas Klak Placer Claim, under the provisions of Sec. 2326 of the Revised Statutes, and suit was instituted in the United States circuit court for the district of Colorado. A trial was duly had, and, upon the verdict of the jury, "that neither of the parties herein have proven title to the property in the complaint described," the court rendered judgment "that the said defendants go hence hereof without day." Both parties sued out writs of error to the supreme court of the United States, and the judgment of the circuit court was affirmed on December 3, 1883 (109 U. S., 440). The supreme court, after a full discussion of the question, held that, as there had been no work done by either claimant on the premises in controversy, the court properly instructed the jury to find against both.

On March 8, 1884, the appellants filed an additional report of the United States surveyor-general, and the local officers allowed said entry.

On March 2, 1885, your office examined said entry papers, and held that the evidence on file was not sufficient to show compliance with the requirements of the mining laws and the regulations of your office; that the applicants should furnish the surveyor-general's certificate, showing specifically the nature, value, date when made, and location of the several improvements, works and expenditures made upon or for the benefit of said claim by them or their grantors, and, if there are any facts necessary to show the possessory right of the claimant, they should be shown.

Your office, also, called attention to the fact that the final certificate of entry was in the name of James D. Rankin, while the name of John D. Roby appears as an applicant in all the papers prior thereto, and the claimants were required to furnish an additional abstract of title, showing all conveyances of title subsequent to the date of the application and prior to entry, or, if none are of record, then the proper certificate to that effect should be given.

On June 19, 1885, the local office forwarded to your office additional proof, in response to your office letter of March 2, 1885.

Your office, on July 28, 1887, "re-examined" the papers in said entry, and, referring to said action of the United States circuit and supreme court in said case, held that under the provisions of the act of Congress approved March 3, 1881 (21 Stat., 505), the proceedings in the case should have been stayed until the claimants had perfected their title; that the entry was improperly allowed by the local officers, for the reason that "no further or more satisfactory evidence of labor and improvements" was presented than was set out originally in the application and accompanying papers; that, although said entry was improperly allowed, your office gave the claimants an opportunity to perfect the same, by filing satisfactory evidence of labor or improvements, and of possession; that the sworn statement of the deputy surveyor, who made the original survey, the supplemental abstract of title, and the affidavits of Rankin and Carpenter were not sufficient to warrant the issuance of patent upon said entry; that nearly all of the labor and improvements mentioned in the statement of the deputy surveyor appear to have been placed on the claim prior to the trial of the cause, and for that reason and also because the claim appears to cover a large part of the town of Breckenridge, whose inhabitants might be injuriously affected by the issuance of patent, and the additional reason that the mineral character of all the land included in the exterior lines of said claim as surveyed is not sufficiently shown, the entry must be held for cancellation.

The appellants insist that your office erred in holding, that because the work was performed on the claim prior to the trial of the case in the United States court, it could not be counted as work under the decision of said court, and that consideration should have been given to the fact that the testimony at the trial was limited to the condition of affairs at the time when suit was brought, more than a year prior to the trial; that there was no evidence that the claim was entered for speculative purposes, on the contrary that the evidence showed that the rights of all parties having cabins on the land entered were protected by written contracts.

The act of March 3, 1881, *supra*, provides:

That if in any action brought pursuant to section 2326 of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

The decision of the court in said case (*supra*) was that, neither party had made any improvements upon the land in question within the meaning of the statute.

The suit was commenced on March 5, 1881, and final decision was rendered December 3, 1883. The field notes of survey filed with the application for patent show that the "improvements consist of sundry pits, shaft, flume, ditch, dam and dwelling house, the value of which is not less than \$500, and which I hereby certify were made by these applicants and their grantors," and then follows the particular location of said improvements on the claim, and the location and description of improvements, consisting of ditches and buildings not included in the estimate of value made by the deputy surveyor. The surveyor general certified that the value of the improvements was not less than \$500.

On June 3, 1884, the applicants filed in the local land office their joint affidavit, in which they swear that said placer claim is in the Blue River valley, being crossed by the Blue River, which furnishes an abundance of water for mining purposes; that said placer is covered with auriferous gravel of an unknown depth, which yields about two dollars per day, per man, when worked with a "rocker tom or ground sluice;" that bed rock has not been reached, but wherever bed rock has been reached on Blue River, it has been found to be covered with a rich auriferous gravel, yielding as high as \$2000 to the claim of one hundred feet; that the bed rock dipping down and laterally under water and into quicksand can not be worked without expensive and powerful machinery; that this rich gravel streak having been found above and below this claim, it is believed that it also underlies the land in question; that there is no timber upon and no well known or any system of lode claims or deposits upon or running into this claim; that the town of Breckenridge extends on to this placer claim, as shown by the official plat and field notes of said claim; that said applicants for patent do not claim any of the surface of said placer as now occupied by the residents thereon; that they have given said residents a written contract (copy of which is attached to the affidavit as an exhibit) to convey to each one the property owned by him situated on said placer claim; that said claim was not taken for speculative purposes; that said placer can be mined on the bed rock without injury to the surface that is occupied and the improvements thereon; that the improvements are adequately set forth in the field notes; that there are no salt or mineral springs on said land, and that the applicants have resided thereon for the past ten years.

The affidavit of the applicants, above set forth, is corroborated by the joint affidavit of four persons, who allege that they are property owners upon said placer, and that the applicants have promised to give each a deed to the ground claimed by him, and that said applicants have acted in good faith, and have not located said placer claim for speculative purposes.

The statements of the applicants relative to the character of the land are substantiated by the report of the United States deputy-surveyor, filed March 8, 1884.

The entry was allowed on December 18, 1884. On June 19, 1885, the applicants filed copy of a special report of said United States deputy surveyor, duly verified, which particularly describes the improvements alleged to have been made prior to the date of the application for patent, and states that since the application for patent, the applicants have sunk a new pit across the Blue River, from the old flume, sixteen feet wide and sixty feet long, and put in a bed rock flume from its mouth, forty-eight feet long, two and a half by three feet in size; that the value of the new pit is \$50, of the bed rock flume \$100; that they have also dug a new ditch from the Blue River, more than fifty feet in length to this pit, which is valued at \$10.00; that they have enlarged the old ditch and large pit and worked the same; that they have made improvements and performed work and labor upon said claim, during each and every year since 1880, and their value exceeds \$400, and that the applicants have been in possession of said claim ever since said application was made for patent.

With said report were filed an additional abstract of title and the affidavits of M. B. Carpenter, and James D. Rankin, one of the applicants. Carpenter, after referring to the decisions of the courts in said case, stated that the ground upon which the circuit court decided adversely to the applicants was, that two persons could not locate more than twenty acres of placer ground, and that the bill of exceptions did not make prominent the value of the improvements or the amount of work done on said claim. Carpenter also swears that he has known the claim for more than five and a half years, and knows that the value of the improvements was more than five hundred dollars at the date of said application for patent.

The affidavit of said Rankin alleges that said application for patent was made by said Roby and himself; that said Roby has not parted with his interest in said claim and is still an owner therein; that the duplicate receiver's receipt was issued to said Rankin and Roby, jointly, and, if the final certificate was made out to Rankin alone, it was a mistake on the part of the register of the Leadville land office, and that a patent should issue to said Roby and Rankin jointly; that the improvements certified to by the United States deputy surveyor were put upon said claim by said claimants and their grantors; that the applicants have made improvements each and every year since their purchase of said claim; that they made a relocation in 1881, after the trial of said case in the circuit court; that they did not abandon their former location; that said applicants are in possession of said claim and no one questions their title or right of possession.

From the foregoing, it is quite evident that the evidence as the record now stands, is insufficient to warrant the issuance of patent upon said entry.

The certificate of the United States surveyor general, required by the statute, was filed with the field notes of survey, but the supreme court found that the improvements claimed could not be considered as made for its development, and held that, "there having been no work done by either claimant, plaintiff or defendants on the premises in controversy, the court properly instructed the jury to find against both."

The supplementary evidence does not clearly show that the land is valuable for mineral or that the value of the improvement or labor done upon or for the development of said claim, since the date of the former suit, is not less than five hundred dollars.

The fact, as shown by the survey, that a part of said claim is occupied by residents of the town of Breckenridge is no bar to the entry of said land under the mining laws, provided the land is mineral and belongs to the United States. *Steel v. Smelting Company* (106 U. S., 447).

The error in the issuance of the final certificate can be easily remedied by a return of the entry papers to the local land office, and the issuance of another certificate to the proper parties.

While the evidence is not sufficient to warrant the issuance of patent upon said entry, I do not think the entry should be canceled. There is no protest, and no adverse claim, and I am of the opinion that the applicants should be allowed to furnish supplementary proof of the mineral character of said claim, and also of the required amount of improvements or labor placed thereon, since the date of said suit. Said proof should be furnished within sixty days from notice hereof, and, in case of failure of the claimants so to do, said entry will be canceled.

The decision of your office is modified accordingly.

MINING CLAIM—EFFECT OF ADVERSE PROCEEDINGS.

GEORGE H. SMITH ET AL.

The Department may properly, in the interest of the government, direct a hearing to ascertain whether the claimant has complied with the law, notwithstanding the fact that said claimant secured a favorable judgment in judicial proceedings instituted by an adverse claimant.

Acting Secretary Hawkins to Commissioner Stockslager, November 9, 1888.

I have considered the appeal of George H. Smith *et al.* from your decision of June 10, 1887, adverse to them, in the matter of their application, No. 37, for the Bull of the Woods lode and mill-site claim, lots 52 A, and 52 B, Bozeman, Montana.

You find the mill-site portion of the claim (52 B) to be in conflict, to the extent of 1.86 acres, with Cooke City townsite, entry No. 227, made August 23, 1884.

Upon a protest, filed by the mill-site claimants, said conflicting claims were considered by your office, which, under date of August 14,

1884, dismissed the protest. This action was affirmed by the Department October 31, 1885 (4 L. D., 212).

That decision called attention to the error committed by the register and receiver in allowing the townsite entry while the case was pending on the protest of the mill-site claimants.

While the case was pending, as above, before this Department, it appears that the local officers received and filed said mineral application No. 37. Your decision mentions this as error, and calls the attention of the local officers to the fact that they had been duly notified when the case was forwarded to the Department on appeal.

It further appears, that adverse claims were filed by the townsite and by Samuel B. Wyman, who claims as lot owner under the townsite entry, against said mineral application, or as to that portion claimed as lot 52 B, being the mill-site claim.

Suits on the adverse claims were duly commenced, and, so far as the knowledge of your office went, were pending at the date of the decision under consideration.

It appears from certified copies of the proceedings had in court, now in the record, that judgment in said suits was rendered adverse to the townsite and claimants thereunder. It further appears that, notwithstanding the adverse claims of the townsite and Wyman and the fact that notice of suit thereon had been filed, the mineral applicants, Smith *et al.*, applied May 15, 1885, to enter.

The local officers rejected said application, and on appeal your office by the decision now here sustained the rejection, citing Sec. 2326 of the Revised Statutes, which provides that, when an adverse claim is filed, "all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed," etc.

If this were the only ground of objection, the application to make mineral entry might now, since the adverse claims have been removed by judgment of the court, be re-instated and acted upon favorably as a matter solely between the mineral claimants and the government. Your decision, however, mentions other reasons why said applications should not be allowed, in so far as it relates to the mill-site (lot 52 B), which you deemed it proper to consider. You then refer to allegations by the adverse claimants that the mineral applicants have not complied with the law (Sec. 2337 R. S.), in the matter of the use or occupation of the mill-site tract.

It is charged that no part of the mill-site is now or ever has been used or occupied for mining or milling purposes, nor has any machinery or devices for mining or milling purposes, by applicants or any other persons ever been put upon or used upon said ground; that no labor has been done or commenced thereon for mining purposes, and that no improvements thereon of the applicants have been used for any mining purposes whatever.

As these allegations, if true, would defeat the claim for the mill-site, you regard them as sufficient to call for an investigation.

Your decision then proceeds to a consideration of the case on the showing made by the mineral applicants themselves, and concludes from the evidence found in the case that the "application for the mill-site was not made for the purposes contemplated by the statute, and the affirmative is not sufficiently established by applicants' own showing to entitle them to proceed."

Your decision accordingly holds for cancellation said mineral application, No. 37, in so far as it relates to the mill-site claim, lot 52 B.

It is strenuously urged by the mineral applicants on appeal, that they have in good faith complied with the law applicable to the mill-site, and that they should be allowed to enter the same, in connection with and as appurtenant to the lode, and they refer to the judgments of the court as conclusively showing such compliance. Those judgments were a finding as between these applicants and the adverse claimants only, and are not binding upon the government in matters pending between it and the applicants. These must be determined on evidence deemed satisfactory to the land department.

Court judgments of the character mentioned are entitled to consideration and may oftentimes be regarded as persuasive and aiding, in connection with other papers in a case to which they pertain, to a satisfactory conclusion; but they are in no case binding as against the United States.

In this case, the findings made and the judgments rendered by the court may, I think, be regarded as sufficiently persuasive, in view of all the facts, to warrant a hearing to fully test the questions of good faith and compliance with the law by these applicants in the matters of use and occupancy of the mill-site.

Your decision is modified accordingly, and you will direct that a hearing be ordered and had for the purpose indicated.

FINAL PROOF—UNAUTHORIZED CONTINUANCE.

MAGGIE A. GARRISON.

Where the proof was not made on the day fixed it may be accepted, in the absence of protest, on republication, and new affidavit covering the time up to the date of entry.

Acting Secretary Hawkins to Commissioner Stockslager, November 9, 1888.

I have considered the appeal of Maggie A. Garrison from your office decision of March 15, 1887, requiring her to make new publication of notice and new proof in her preemption cash entry for SW. $\frac{1}{4}$ Sec. 31, T. 1 N., R. 25 W., Bloomington Nebraska land district.

The reason for your said decision as stated therein is because proof was made on a day other than advertised in the published notice.

From supplemental affidavits explanatory of the irregularity, it appears that the claimant and her witnesses duly appeared at the time and place mentioned in said notice, before the officer therein named, who was clerk of the court of the county wherein said land was situated, and upon informing him that she had failed to procure the money with which to make her cash entry, was advised by him that she could not at that time introduce her testimony and he continued the hearing from August 18, the said day fixed in the notice to September 24, to enable her to procure the money necessary, that she returned with the witnesses on the said 24th of September, and made her final proof. That she had no idea there was any irregularity in the matter and did so upon the advice of the said officer. She further states that after making said final proof, she sold said land and can not now make new affidavit and new proof as required by your decision.

This affidavit is corroborated by several persons and also by an affidavit of the said clerk of the court, and he further states in his affidavit, that no objection to or protest against such final proof was made either on or before the day advertised or subsequently.

The irregularity in the case at bar not being different in principle from a case wherein proof was made on the proper day but before an officer other than the one named in the notice, as in *Richard Nolte*, (6 L. D. 622) and there being no adverse claim, new publication of intention may be made, new notice duly posted at the local office, and new affidavit covering the time up to date of entry, September 24, 1884, but if no one appears to protest against or contest said entry on the day named in said new notice, new proof need not be made.

Your decision is accordingly modified.

FINAL PROOF PROCEEDINGS—CONTINUANCE.

JOSEPH ZIMMERMAN.

Where the proceedings on final proof are continued to a day certain, by the order of the local office, after the claimant and one of his witnesses have testified, such proceedings are continuous, and the final certificate, issued at the close thereof will relate back to the beginning of said proceedings.

Acting Secretary Hawkins to Commissioner Stockslager, November 9, 1888.

I have considered the appeal of Joseph Zimmerman, Eben W. Martin, transferee, from your office decision of March 28, 1887, requiring the claimant to make new publication and new proof upon cash entry No. 542 of said Zimmerman for S. $\frac{1}{2}$ SW. $\frac{1}{4}$, Sec. 9 and SE. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 8, T. 8 N., R. 4 E., Black Hills Meridian, Deadwood, Dakota land district.

It appears from the evidence that said Zimmerman filed his declaratory statement for the land above described on the 11th day of October, 1882, alleging settlement October 10, 1882.

On December 11, 1883, the day fixed in the notice for final proof, Zimmerman and one of his witnesses appeared before the local officers, and made their affidavits, as shown by the date of jurats, and on the back of final proof blanks the following entry was made, viz :

On December 10, [11] Zimmerman and one witness appeared, testimony taken and proof suspended until December 13, to allow Zimmerman to produce another witness in his behalf, having shown good reason for such procedure.

In your said office letter you say, said entry—

Is hereby suspended for the reason, that the proof is not made in accordance with the published notice of claimant's intention to make proof; also for the reason that the testimony of claimant and one of the witnesses fails to show continuous uninterrupted residence upon the land entered for a period of six months immediately preceding the date of making final proof, and for the reason, that the pre-emption affidavit on file with the case does not cover the date of entry.

The first and last of the above reasons are based upon the fact set forth that one witness was examined on the 13th of December, and the cash certificate was dated the same day—while the notice was for the 11th,—but the entry of a regular continuance as noted on the back of the proof blanks seems to have escaped your notice.

It appearing that the taking of the testimony on final proof, on December 11, after the pre-emptor and one of his witnesses had testified, was continued to December 13, by the local officers upon good reason shown, makes the taking of the proof a single continuous proceeding to its conclusion and the issuance of a certificate in this case was part of the same transaction and related back to the beginning on December 11. *Falconer v. Hunt* (6 L. D. 512); *John McCarty* (Id., 806).

This disposes of the two reasons named, and leaves for consideration the remaining one concerning the discrepancy of statements in regard to residence.

Upon examination of the affidavits submitted on final proof it appears that in filling the blanks answering questions in regard to date of settlement and of establishing actual residence, by the witness Chas. E. Crippen, the former is stated to have been made November 10, 1882, and the latter November 10, 1883: while in the blank for answer to the question "What was his first act of settlement?" is written—"moving on the land."

In blank spaces in claimant's affidavit for the answer of similar questions November 11, 1882, is given for date of settlement, moving on the land for first act of settlement, and October 10, 1883, for the time of establishing actual residence. In the affidavit however, of the witness Julius O. Beam, the time of establishing actual residence is fixed as October, 1882. The writing throughout seems to have been by the register of the local office.

With his appeal the present owner transmits a number of affidavits tending to prove that both Zimmerman and the witness Crippen, in whose testimony the discrepancies appear, have left Dakota and can not now be found, also quite a number of affidavits tending to show

that the said discrepancies as to time of establishing actual residence are clerical errors.

Upon these affidavits or their sufficiency, I do not pass as they have never been before you for action, and they are herewith returned to you for proper consideration.

Your said decision upon the question of the alleged irregularity of taking the evidence of one witness on the 13th of December instead of the 11th, as advertised, is reversed because the said action was upon a continuance regularly granted.

FINAL PROOF PROCEEDINGS—STATUTORY REQUIREMENTS.

JOHN WOODS.

Republication and new proof will be required, where the proof was not taken on the day fixed, and a portion thereof was not taken before the officer designated.

Acting Secretary Hawkins to Commissioner Stockslager, November 9, 1888.

I have considered the appeal of John Woods from your office decision of April 21, 1887, in which you require him to make new publication of notice and submit new proof in his pre-emption cash entry for NW. $\frac{1}{4}$, Sec. 13, T. 20 N., R. 3 E, Helena Montana land district.

The claimant advertised that he would make final proof on the 16th of October, 1884, before W. F. Parker, notary public at Great Falls, Montana.

The proof was not made until October 18, 1884, and when taken, part was taken before the notary named and part before Chas. L. Spencer, deputy clerk of the district court for Choteau county, Montana.

No attempt was made by Woods to account for these irregularities, but his counsel in argument on appeal urges that the law does not require that proof should be made on the day specified, or that any specified day should be fixed in the notice, and that the requirement of the Department in this respect is going beyond the power granted in the statute to make needful rules and regulations for its enforcement; that such requirement increases the burden imposed on settlers, and is not a rule in aid of the proper execution of the law.

Claimant further contends that all the purposes of notice have been accomplished, and that no protest could now be entertained or contest heard because not presented on or before the day advertised for making proof, and that under the circumstances claimant is at least entitled to have his cash entry submitted to the Board of Equitable Adjudication under Rule 10.

In the case of Jacob Semer (6 L. D. 345) it was held that "when final proof is made before any person other than the local officers, the notice should describe that person definitely and explicitly," and it is of equal importance that the proof should be taken before the officer named in the notice.

The proof should also be taken on the day named in the notice.

It was held by this Department in *Albert L. Lent* (6 L. D. 110) that "when the act of Congress of March 3, 1879, (20 Stat. 472), directed that notice should be given by parties of their intention to make final proof, it was clearly intended that the time and place should be designated in said notice and, as a corollary to such requirement, that the proof must be made at said time and place; the object being to afford to all the world an opportunity then and there to appear and protest against said proof, if so inclined."

In the opinion in the said *Lent* case, it was further said that "the failure to make proof at the appointed time and place was not simply an irregularity," but that the requirement was most essential for the protection of the government against frauds, and private interests against the rapacity of designing men.

It is also, urged by appellant that the local officers are judges in the first instance, of the sufficiency and regularity of the proof, and that their acceptance of the proof in the case at bar is an official declaration that all legal requirements have been complied with, and no further inquiry can be made in regard thereto.

In the *Lent* case *supra* it is expressly held that "with the requirement of the law as to notice, the officers of the Land Department have no authority whatever to dispense; and the approval by the local officers of proof, against the making of which no proper opportunity of protest had been afforded, can add nothing to the strength thereof; but is calculated to inspire suspicion of an imposition upon these officers, or to bring down upon them the severe and just censure of their superiors."

In case of *J. F. Taylor* (7 L. D. 273), the proof was advertised to be made May 31, before a notary public named in the notice. The testimony of two of the witnesses was given before him on the day specified but that of claimant was not taken until June 4, and then by the register of the local office. The final certificate was canceled on account of such irregularity in proof, and on appeal, it appeared that the entryman was dead and his transferee filed new proof after publication of notice and it was held that as the testimony before the Department showed substantial compliance with the requirements of the pre-emption law, the entry should be referred to the Board of Equitable Adjudication, but this was after republication of notice and supplemental proof.

In the *J. F. Taylor* case too, there was no adverse claim and no allegation of fraud.

In the case at bar, I find among the papers an application to contest said entry made by one *John S. Jacobs*, filed in your office since your decision was promulgated. The affidavit in support of said application contains such allegations of fraud and failure to comply with the law as would render it highly improper to send the said entry of Woods

before the Board of Equitable Adjudication if there existed no other legal objection to such course.

Your decision is accordingly affirmed but, I make no decision upon the said application to contest, original jurisdiction in such matters being in your office, and said application is herewith returned for proper action.

COAL ENTRY—SECTION 2347 R. S.

NORTHERN PAC. COAL CO.

An entry made under section 2347 of the Revised Statutes for the use and benefit of another is illegal and must be canceled.

Acting Secretary Hawkins to Commissioner Stockslager, November 10, 1888.

I have considered the case of the Northern Pacific Coal Company, as transferee of John W. Dixon, *v. The United States*, on appeal by said company from the decision of your office of August 13, 1887, holding for cancellation the coal entry, No. 9, of said Dixon, made August 3, 1886, for the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and N. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 28, T. 20 N., R. 16 E., North Yakima district, Washington Territory.

Your office held said entry for cancellation, on the ground, that it was originally made by said Dixon, not for his own use, but for the immediate use and benefit of, and under a contract to convey to, the appellant, said Northern Pacific Coal Company, and that it was afterwards in pursuance of said contract so conveyed.

These facts appear from a report of Special Agent J. A. Munday, and the entryman (Dixon) in an affidavit on file in the case, states that he was paid by the agent of appellant \$25.00 to make said entry, and had no other interest whatever therein.

The appellant waived a hearing, admits the facts to be as above stated, and insists that this state of facts does not authorize the cancellation of the entry.

The entry was made under Sec. 2347 of the Revised Statutes, Dixon was a qualified entryman and the land was subject to entry under said statute.

This statute (Sec. 2347 Rev. Stat.) provides that "Every person" (of certain named qualifications) "or any association of persons severally" so qualified, "shall, upon application to the register of the proper land office, have the right to enter, by legal subdivisions, any quantity of vacant coal lands of the United States not exceeding one hundred and sixty acres to such individual person, or three hundred and twenty acres to such association, upon payment," etc. By Sec. 2350 of the Revised Statutes it is expressly enacted, that "The three preceding sections" (of which Sec. 2347 is one) "shall be held to authorize only one entry by the same person or association of persons"

In construing these statutes, this Department in a case like the present has said :

The Land Department can dispose of the government coal lands only in accordance with the law, and that as to the real point involved in this case is very specific. It provides that but one entry shall be made by one person or association of persons (Sec. 2350 R. S.), and that such entry, when made under Sec. 2347 R. S., shall be limited to one hundred and sixty acres by one individual person, or three hundred and twenty acres by an association of persons severally qualified. Adolph Peterson *et al.* (6 L. D., 371).

Under the admitted facts of this case, Dixon was but the nominal entryman, the conduit through which the title was to pass to the appellant, by whom the entry was in fact made. If this could be done for one entry it could be done for any number, and the recognition of such a practice, would be to allow that to be done indirectly which the law forbids to be done directly, and " would enable one person or corporation, operating through nominal entrymen, to acquire under sanction of the Land Department an unlimited quantity of coal lands, or a quantity limited only by the extent of the coal field, or by the means or desires of the person or company for whose benefit they are to be made." (Adolph Peterson *et al.*, *supra.*) It would be to sanction and encourage monopoly, which it is the manifest purpose of the law to prevent.

The truth of the foregoing views is illustrated by the fact, that the appellant is the transferee of two other coal land entries in said district (No. 3, Jas. B. Stevens and No. 8, A. E. Krohler), made by nominal entrymen and transferred to appellant under the same circumstances as those surrounding this case, and held for cancellation by your office on the same ground.

The decision of your office holding the entry in this case for cancellation is affirmed.

PRACTICE—SECOND CONTEST—APPEAL.

SMITH *v.* BROWN ET AL.

A second contest must be held subject to the disposition of the first. An appeal from the Commissioner's action, in rejecting an application to contest an entry, must be perfected in accordance with Rule 86 of Practice.

Acting Secretary Hawkins to Commissioner Stockslager, November 10, 1888.

I have considered the appeals of H. Chester Smith from the decisions of your office, dated March 12, 1887, and June 4, same year. In the first named decision, your office rightly held Smith's application, dated February 24, 1887, to contest Benjamin F. Brown's timber-culture entry, No. 931, of the NE. $\frac{1}{4}$ of Sec. 2, T. 1 N., R. 34, made July 30, 1884, at the McCook land office, Nebraska, should be subject to Howard Higginbotham's prior contest initiated October 19, 1886, and tried December 22, 1886.

The appellant insists that the first contest was illegal because the contestant, at date of filing his affidavit of contest, and prior to said trial, did not file his application to enter said land under the timber-culture or homestead laws.

The second decision required the appellant to perfect his appeal, as required by rule of practice No. 86 (4 L. D., 47).

The appellant insists that your office erred in making said requirement, for the reason that the appeal was from the action of your office rejecting an application to contest, and hence, did not require to be served as directed by said rule. Both of said decisions of your office were correct.

They are accordingly affirmed.

SWAMP GRANT—ADJUSTMENT BY FIELD NOTES OF SURVEY.

KNUDSON *v.* STATE OF MINNESOTA.

When the field notes of survey are the basis of adjustment, and the intersections of the lines of swamp land, with those of the public survey alone are given, said intersections may be connected by straight lines, and all legal sub-divisions, the greater part of which are shown by said lines to be within the swamp or overflow, will be classed as subject to the grant.

Assistant Secretary Hawkins to Commissioner Stockslager, November 15, 1888.

I have considered the case of John Knudson *v.* the State of Minnesota upon the appeal of the latter from your office decision of May 4th, 1887, holding for rejection the State's swamp land selection for the SW. $\frac{1}{4}$, SW. $\frac{1}{4}$, section 5, T. 130 N., range 43 W., Fergus Falls, Minnesota land district.

On November 13th, 1886, John Knudson made timber culture application to enter the land above described, but his application was rejected by the local officers, who endorsed on the back thereof as follows:

Application rejected subject to appeal in twenty days, for the reason that the tract is claimed by the State of Minnesota under the State swamp act contained in letter "K" of August 9, 1877.

Upon Knudson's appeal to your office, said decision was by letter "K" of May 4, 1887, revised. In said letter you say—

From a careful examination of the field notes of survey of the land, it does not appear that the greater part thereof is swamp or overflowed to such an extent as to render it unfit for cultivation, and in view of this the claim of the State therefor is this day held for rejection.

From this decision the State appeals and Hon. Moses E. Clapp, attorney-general of the State of Minnesota, files a printed argument in behalf of the State.

In his argument he invokes the application of the following rule, laid down in 1 Lester 543, viz:

When the field notes are the basis, and the intersections of the lines of swamp or overflow with those of the public surveys alone are given, those intersections may be connected by straight lines; and all legal subdivisions, the greater part of which are shown by those lines to be within the swamp or overflow, will be certified to the State; the balance will remain the property of the government.

In the field notes of survey of the whole of said Sec. 5, on file in the Department only the intersections of the boundary lines of said section with swamp or overflowed land are given, and they show intersections with a wet marsh on the north line at a point six chains E. from the NW. corner of said section and that said marsh is there ten chains wide, "surface nearly level, soil first rate, sandy loam with some gravel," and for random line of the south boundary line of the section said field notes show that at a point two chains and thirty links west of the SE. corner of said SW. $\frac{1}{4}$, SW. $\frac{1}{4}$, a wet marsh bearing NW. and SE. is entered, which is twenty-two chains and thirty links wide. On the west side of said section the said notes show a marsh commencing five chains and sixty-five links south of the NW. corner and eight chains wide, which makes the south intersection thirteen chains and sixty-five links south of said NW. corner.

Applying the rule invoked by appellant and connecting these intersections by a straight line from a point 13.65 chains south of NW. corner of said section, to a point 2.30 chains west of SE. corner of SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ and it will be readily seen that there are approximately, about ten acres of said SW. $\frac{1}{4}$, SW. $\frac{1}{4}$ which can be classed as swamp land.

The field notes then do not show that the greater part of said legal sub-division is unfit for cultivation by reason of the same being swamp or overflowed land.

Your decision is accordingly affirmed.

DESERT LAND—CLASS OF LAND SUBJECT TO ENTRY.

HOUCK v. BETTELYOUN.

Strong proof will be required to establish the desert character of land that is returned as "good" or "first-rate bottom land."

Land upon which there is a natural growth of timber is not subject to desert entry. Although it may appear that the productiveness of land is increased by irrigation such evidence is not sufficient to establish the desert character thereof.

Assistant Secretary Hawkins to Commissioner Stockslager, November 15, 1888.

I have considered the case of Geo. W. Houck v. Isaac Bettleyoun, on appeal of the latter from your office decision of January 31, 1887, holding for cancellation his desert entry No. 304 for SW. $\frac{1}{4}$, Sec. 12, N. $\frac{1}{2}$, NW. $\frac{1}{4}$, Sec. 13, E. $\frac{1}{2}$, NE. $\frac{1}{4}$ and SW. $\frac{1}{4}$, NE. $\frac{1}{4}$, Sec. 14, T. 25 N., R. 66 W., Cheyenne Wyoming land district.

It appears from the record that claimant made desert entry for the lands above described June 13, 1881, and made final proof thereon and received certificate June 15, 1884.

Complaint being made by one Geo. W. Houck that said land is not desert in character, that it is timber and meadow land, and that if desert land it has never been properly reclaimed; your office by letter of July 30, 1884, ordered a hearing to determine the true character of said land.

At such hearing both parties appeared in person and by counsel and many witnesses were examined in behalf of both parties.

Upon the evidence introduced the local officers decided against the entryman and on appeal to your office the same conclusion was reached.

After a careful examination of the mass of testimony in the record, much of which is irrelevant and immaterial and irreconcilably conflicting, I can see no reason for disturbing your said decision.

It appears from the evidence, that the body of land above described lies on both sides of the Laramie river and constitutes a river front on each side of about two miles in length. All of it except about five acres is low bottom land and ten acres are too wet to raise anything, while a pond or lake with an area of about forty acres is mostly upon this tract. This lake is never dry, it being filled in the spring by the annual overflow of the river and in the dry season kept up by "seeps" or springs; the result doubtless of percolation from the river through the sandy loam soil of which the bottom land is composed.

On the shore of this lake is a grove of trees, cottonwood and box-elder, from three to five acres in extent and many of the trees are more than twelve inches in diameter, and timber of a similar character lines both banks of the stream, almost without a break through its whole extent, and in some places, especially upon the north side of the river, this timber growth extends back many rods, and is found more or less on each forty acres of said tract.

Some of the witnesses think there are not less than five thousand trees upon the whole tract while several say two thousand or three thousand, and entryman himself admits three hundred and forty-three over twelve inches in diameter, about two hundred of these being on one forty acre tract. One witness says he counted fifty-three trees over two feet in diameter.

Most of this tract is quite level and but little higher than the Laramie river is at ordinary stage, the engineer who made the survey for an irrigating ditch testifying that a dam of boulders eighteen inches high would be sufficient to cause water to flow in at the head of the ditch even in the dry season, and entryman himself swears that no dam whatever is necessary during the irrigating season.

The evidence discloses the fact that until the first to the middle of July, Laramie river has a plentiful supply of water caused by the melting of snow in the mountains, and that it frequently overflows its banks during the spring months.

It is clearly shown that hay has been cut from the land in paying quantities, when the grass was not eaten down by cattle, nearly every season for twenty years without artificial irrigation, and that hay, potatoes, turnips and other vegetables have for many years been grown in paying quantities upon other and similar land in the Laramie bottoms both above and below the land in question, without artificial irrigation.

It is true that the evidence shows that by means of irrigation the yield of the land in dry years can be much increased, but this is by no means sufficient to prove such land to be desert in its character.

In a circular of this Department promulgated June 27, 1887 (5 L. D. 708), not announcing any new law but merely construing the old, it is said :

1st. Lands bordering on streams, lakes or other natural bodies of water, or through or upon which there is any river, stream, arroyo, lake, pond, body of water or living spring are not subject to entry under the desert law until the clearest proof of their desert character is furnished.

2nd. Land which produces native grass in sufficient quantity—if unfed by grazing animals to make an ordinary crop of hay in usual seasons, is not desert land.

3rd. Lands which will produce an agricultural crop of any kind in amount to make the cultivation reasonably remunerative, are not desert.

4th. Lands containing sufficient moisture to produce a natural growth of trees, are not to be classed as desert lands.

In the case at bar, many of the characteristics of lands which are not admissible to entry under the desert act, are shown by the evidence to exist, viz, the tract borders a stream on both sides for nearly two miles. There is a lake or pond thereon of nearly forty acres in extent, and this lake may be said to be fed with living springs, *i. e.*, the seeps from the river percolating through the soil. It produces an ordinary crop of hay when unfed by grazing animals, in usual seasons. It will produce potatoes, turnips, beets and some other vegetables, in an amount to make their cultivation reasonably remunerative, and it certainly has, for many years prior to the entry, contained sufficient moisture to produce a natural growth of trees.

The testimony shows that on said tract there are several acres of timber, and it can not therefore be entered under the desert law. *Riggan v. Riley* (5 L. D. 595).

In a letter of this Department directed to your office, dated May 11, 1888 (6 L. D. 662), it is said—

If the lands are not hilly and rocky and have but few ordinary timber trees upon them, they are not subject to entry under the desert land act, because the existence of such trees is evidence that the land is not desert. If the ordinary forest trees will grow upon land, there is sufficient moisture in the soil to render the land not desert in character.

This is no new law but a mere statement by the Department of what the law always has been.

There can be no question from entryman's own testimony that the tract in question is partly agricultural, and therefore not subject to entry as desert lands (4 L. D. 33).

The field notes of each subdivision of the land which is bounded by a section line in the case at bar, describe the land as good or first rate bottom land, and this would require strong proof to overcome. Alexander Toponce (4 L. D. 261).

The entryman claims in his argument on appeal that he was not notified that his acts of reclamation would be called in question, and that the evidence introduced upon that question should not be considered, and as the conclusion already arrived at is decisive of the case, upon the question of the character of the land itself, it is not necessary to decide that point.

Your said decision is accordingly affirmed.

TIMBER CULTURE CONTEST—AMENDMENT OF ENTRY.

CHURCHILL *v.* HANKANSON ET AL.

The right of a timber culture entryman to have his entry so amended of record as to include the land intended to be taken, cannot be recognized in the presence of an intervening homestead entry, made, and subsequently maintained, in good faith; nor can any right, as against such homesteader, be acquired through a contest directed against the timber culture claimant.

Secretary Vilas to Commissioner Stockslager, November 16, 1888.

I have considered the appeal of Harry D. Churchill from the decision of your office of March 15, 1887, dismissing his contest of the timber culture entry, No. 2294, of Hankan D. Hankanson, involving the NW. $\frac{1}{4}$ of Sec. 24, T. 112 N., R. 71 W., Huron district, Dakota.

Hankanson made said entry, May 4, 1883, and there is no doubt it was intended to be for NW. $\frac{1}{4}$ of said section 24, but his application by mistake described said quarter-section as being in section "34." In consequence of this error, said entry, when the papers reached your office, was posted in section 34, and a junior timber culture entry of one Hinds on the same quarter section in section 34 was canceled as being in conflict with that of Hankanson. Thereupon Hinds, September 22, 1884, acting upon the idea that Hankanson's entry was in section 34, contested it as of that section, and, of course, sustained his charge of failure to comply with the law as to that section, Hankanson not appearing, and the local officers, treating Hankanson's entry as being in section 34, rendered judgment in favor of Hinds. September 9, 1884, one Titus E. Price instituted contest against Hankanson's entry as being in section 24, alleging failure to comply with the law upon that tract, and the register reports, that the contest was dismissed September 24, 1884, on the ground that Hankanson's entry was located in Sec. 34.

October 4, 1884, ten days after the local officers had, on the contest of Price, held Hankanson's entry to be in section 34, one Andrew Marteeny filed pre-emption declaratory statement, No. 10,868, for said NW. $\frac{1}{4}$ of section 24, and, about a month thereafter, November 10, 1884, Hope

M. Peck, a single woman, finding after examination no other filing or entry of record as to said quarter section in section 24, and having no notice or knowledge of any other entry or filing thereon, and said tract being unimproved land, procured the relinquishment of said Marteeny, and made homestead entry, No. 9390, on said tract. She established residence on said tract at date of entry, November 10, 1884, and, with the exception of a visit to her parents in Illinois, lasting from December 4, 1884, to April 2, 1885, she lived upon said tract as a home till November 11, 1885, when she offered commutation proof. She built a good house (eight by twelve feet) on the land, cultivated six and a half acres, and her improvements were valued at \$100.

At the time Miss Peck made said homestead entry, the records both of your office and of the local office, showed Hankanson's entry to be in section 34 and, as above stated, the local officers, September 24, 1884, about a month and a half before her entry, had expressly decided, on the contest of Price, that Hankanson's entry was in section 34; and there was at the date of her entry no record of any entry or filing on said tract in section 24, except that of Marteeny, whose relinquishment she had procured.

By letter of September 19, 1885, however, (more than ten months after Miss Peck's entry and establishment of residence in section 24), your office re-instated Hind's entry in section 34, on the ground that Hankanson's entry properly belonged in section 24 and therefore did not conflict with that of Hinds, and required Miss Peck to show cause why her entry in section 24 should not be canceled for conflict with that of Hankanson. Five days thereafter (September 25, 1885), and while this question of conflict between the entries of Miss Peck and Hankanson was pending and undetermined, Churchill, the appellant, initiated a contest against Hankanson's entry, alleging failure to comply with the law as to said tract in section 24, and on the hearing, December 11, 1885 (it appearing that the charge was true), the local officers decided in favor of Churchill and held said entry for cancellation.

Miss Peck's commutation proof having been forwarded to your office by the local officers without recommendation, your office, having all the foregoing facts and the records pertaining to said cases before it, held, in the letter of March 15, 1887, that "In view of all the circumstances of the case, Peck's rights in the premises are superior to those of Churchill," and from this ruling Churchill now appeals.

I concur in the conclusion attained by your office. Miss Peck's rights are superior to those of Churchill on the facts of this case both in law and equity. She was in no wise responsible for, and therefore should not be prejudiced by, the mistake made by Hankanson, or by Hankanson and the local officers jointly, by which his entry was posted in section 34 instead of 24. Churchill's contest was initiated more than ten months after she had established her home on the tract in section 24, and while she was living on said tract, and after action had been taken

by your office looking to the adjudication of the conflicting claims of Hankanson and Miss Peck. While Churchill's affidavit of contest was properly received pending said adjudication, it should have been held in abeyance until the determination thereof. Churchill's contest of Hankanson's entry was necessarily dependent on the result of the inquiry as to the rights, respectively, of Miss Peck and Hankanson. If Hankanson's claim as against Miss Peck was not valid, then Churchill could acquire no rights as against Miss Peck by a successful contest of Hankanson's entry. Hankanson, however, had no rights as against Miss Peck, because, under the facts of this case and all the principles of law and equity applicable thereto, Hankanson's entry, in so far as that of Miss Peck is concerned, must be held to have been in section 34. The decision of your office is accordingly affirmed.

RAILROAD GRANT—MILITARY RESERVATION.

FORT SANDERS.

Lands included within a military reservation at the date of the definite location of a road are excepted from the operation of the grant; and no subsequent act of the Executive could render such lands subject thereto.

The act of June 9, 1874, provided for the reduction of the area included in the Fort Sanders military reservation, and legalized settlements that might have been made while the lands were in reservation, but did not operate either to confer a new grant upon the Union Pacific, or confirm to it lands theretofore excluded from its grant by reason of the existence of said military reservation.

Secretary Vilas to Commissioner Stockslager, November 16, 1888.

I am in receipt of your letter of the 14th inst. relative to certain papers filed by the Wyoming Central Land and Improvement Company and the attorneys for the Union Pacific Railway Company protesting against the restoration to the public domain of certain lands situated within the Fort Sanders (formerly Fort John Buford) military reservation, as provided for in the order of this Department of July 9, 1888.

By executive order of January 7, 1867, certain lands (six miles square) in the then Territory of Dakota and in the present Territory of Wyoming were reserved as a military post to be known as Fort John Buford; subsequently the name of said reservation was changed to Fort Sanders, and by executive order of June 28, 1869, its boundaries were changed and the reservation enlarged; by act of June 9, 1874 (18 Stat., 65) it was reduced to the present reservation which is entirely within that of June 28, 1869, and includes a small portion of the reservation of January 7, 1867.

The land lies within the limits of the grant for the Union Pacific Railway Company by acts of July 1, 1862 (12 Stat., 489) and July 2, 1864, (13 Stat., 356) the rights of which attached to the granted odd numbered sections within such limits January 6, 1868, the date of the

definite location of said company's road opposite the same. At that date the original Fort John Buford reservation was subsisting and the odd numbered sections therein were therefore excepted from the operation of the grant. It seems, however, that certain of said lands aggregating 2,903.67 acres were inadvertently patented to said company. The recommendation of your office that suit be instituted to set aside said patents is now pending before the Department.

By said letter of July 9, 1888 (7 L. D. 403), the recommendation of your office that the unpatented odd sections within the reservation of 1867, and not included within the present reservation be restored to entry under the general land laws was approved.

Pursuant thereto notice of such restoration to take effect "On the 16th day of November, 1888," was duly given. The amount of land involved is 7,584.25 acres.

It is against this restoration that the improvement company and the railroad company protest.

The Improvement Company claims to "hold under contracts for sale all the above and foregoing described lands except section 25, T. 16 N, R. 74 W., for which they hold a warranty deed" from said railroad company.

Inasmuch as the reservation was subsisting at the date of definite location there can be no doubt that the odd sections therein were excepted from the operation of the grant; nor does there seem to be necessity for further discussing this question in view of the repeated decisions of the supreme court. *Van Wyck v. Knevals* (106 U. S., 360); *Newhall v. Sanger* (92 U. S., 761); *Kansas Pacific Ry. Co. v. Dunmeyer* (113 U. S., 629). See also *Martin v. Northern Pacific R. R. Co.* (6 L. D. 657). Furthermore this conclusion has been uniformly adhered to by the Department as is shown in the decisions of November 7, 1885, and of July 9, 1888, *supra*. Nor could any subsequent act of the Executive operate to place such lands within the operation of the grant, they having been excepted therefrom by the terms of the statute. *Dunmeyer, supra*.

But it is urged that the said act of June 9, 1874, created a new grant to the company or confirmed these lands to it.

Said act is entitled:

An act to reduce the area of the military reservation of Fort Sanders and providing for the survey of said reservation as reduced.

The first section reduces the area of the reservation excluding from the new reserve the land in question. Section 2 provides for the survey.

Section 3 provides:

That the lands heretofore constituting the Fort Sanders military reservation outside of the limits of the new reservation, as defined in section one of this act, shall be held to be and have been subject and liable to the operation of the laws of the United

States in the same manner and to the same extent as if the same had never been included within the limits of said reservation: *Provided*, That in all cases where any of said last mentioned lands would be subject to entry under the pre-emption and homestead laws of the United States, the actual settlers on said lands shall have the right and privilege to make proof and payment for their respective claims, under the provisions of the pre-emption and homestead laws, by filing their declaratory statement as provided by existing laws, at any time within six months from the passage of this act.

The protests place particular stress on the words quoted, as follows, that the lands shall be held to be and “*to have been* subject and liable to the operation of the laws of the *United States in the same manner and to the same extent as if the same had been included within the limits of said reservation.*” It is said that these words “make it so ‘that the laws of the United States,’ which but for the said reservation would have conveyed these lands, shall be held to convey them through the operation and vigor of said act of June 9.”

But this extremely technical view gives all the force of the enactment to certain words and none to others.

If the statute declares the lands “*to have been*” subject to the laws of the United States, this condition of affairs must have continued up to the date of the act, June 9. Obviously then the grant could not have taken effect prior thereto. For if the lands passed at definite location they could not have been subject to these laws thereafter. But, again, the act declares the lands shall be held “to be” subject to the laws of the United States—in the present tense, that is at the date of the act. These laws are the public land laws. While it is true the granting act is a law, it would violate the well known canons of construction to say that the term “laws of the United States” refers only to the grant. This answer, however, merely meets the technical point raised: a more conclusive one is found in the case of the Leavenworth, Lawrence and Galveston R. R. Co. *v.* United States (92 U. S., 733), as pointed out by your office letter.

In that case Congress had by act approved March 3, 1863, granted lands to the State of Kansas to aid in the construction of a railroad which, when located passed through the Usage Indian Reservation. A treaty was afterwards made with the Indians by which they ceded a portion of their lands to the United States. Said treaty among other things, provided that

Said lands shall be surveyed and sold under the direction of the Secretary of the Interior, on the most advantageous terms, for cash, as public lands are surveyed and sold under existing laws, *including any act granting lands to the State of Kansas in aid of the construction of a railroad through said lands.*

It was urged on behalf of the railroad company that the effect of the concluding words of this provision of the treaty was to grant the lands in dispute to the State for the benefit of the road, or, at least, to recognize a grant already made.

The court held, however, that the treaty neither made a grant nor recognized one already made. The court say:

But whatever purpose it was meant to serve, it obviously does not *proprio vigore* make a grant. To do this other words must be introduced; but treaties, like statutes, must rest on the words used,—nothing adding thereto, nothing diminishing.

It is urged that the amendment, if it does not make a grant recognizes one already made. It does not say so; and we can not suppose that the Senate when it advised and consented to the treaty, with that, among other amendments, intended that the Indians, by assenting to them should recognize a grant that had no existence.

The act of 1874, can not have the effect claimed for it by the companies unless it is in the nature of a new grant to the company, and that cannot be conceded. If the question were in doubt the doubt must be resolved against the company.

Reading the whole act together it seems obvious that the purpose of Congress in this declaration was to legalize settlements that might have been made while the lands were in reservation. This construction is in harmony with the proviso to the third section which extends to such settlers the privilege of filing their declaratory statements at any time within six months from the date of the act. On this hypothesis the whole act is in harmony. The construction claimed by the companies is at variance with the rules of construction and renders the act inharmonious in itself.

I, therefore, find no reason for suspending the order already issued, or interfering with its operation.

PRACTICE—EVIDENCE—DEPOSITIONS—REHEARING.

MANUEL *v.* MILLER. *See page 447*

Depositions cannot be admitted in evidence where taken without due notice, or without furnishing the opposite party a copy of the interrogatories.

An erroneous ruling of the local office admitting illegal testimony will not deprive the General Land Office of the authority to order a further hearing between the same parties; and such hearing may be had after due notice, given by the local office, of the day fixed therefor.

Secretary Vilas to Commissioner Stockslager, November 16, 1888.

This is an application filed by J. L. Bradford, Esq., attorney for Jean Miller, asking that the supervisory power of the Department be exercised in the above stated case concluding with the following prayers:

That an order issue without delay to the Commissioner, requiring him to suspend proceedings under his letter to the R. & R. of September 18, 1888; and

That he be directed to decide the appeal in the case of Olibe Manuel *v.* Jean Miller, on the merits, and to notify the party against whom his decision is rendered of his right of appeal to the Department.

From said application and exhibits filed therewith, it appears that a contest was instituted by Manuel against the homestead entry of Miller for the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of Sec. 34, T. 6 S., R. 1 W., New Orleans,

Louisiana, alleging abandonment and failure to establish his residence on said land, upon which a hearing was ordered for September 28, 1886, which was subsequently, by agreement of parties, continued to October 19, 1886.

On August 27, 1886, a commission was issued upon application of contestant for the taking of depositions of Martin Miller and Edmund F. Richards, but no copy of the interrogatories was served on the claimant.

On October 11, 1886, a commission also issued upon the application of contestant for taking the deposition of Gerard Frugee and other witnesses, which was served on claimant October 8, 1886.

At the hearing of said case the claimant objected to said depositions being offered in evidence upon the ground that copies of the interrogatories had not been served upon claimant as required by the rules. The local officers overruled said objection, admitted said depositions and recommended the cancellation of claimant's entry. From said decision claimant appealed, alleging, among others, the following ground of error:

In admitting the depositions of the following witnesses for contestant—to wit: Martin Miller and Edmund F. Richard, taken before E. H. McGee, notary public, under the commission issued to him August 27, 1886; and the depositions of Gerard Frugee, George Richard, Ulysses Manuel, Rodolph Savoie, Joseph F. Richard, Etienne Brown, Sr., Homer Levergne, and Francois Johnson, taken before the same officer, under commission issued October 11, 1886.

Your office, by decision of September 18, 1888, held that the local officers erred in admitting said testimony, and rejected the testimony taken under the commission of September 27, 1886, upon the ground that a copy of the interrogatories was not served on the claimant prior to the issuance of the commission. You also rejected the testimony taken under the commission of October 11, 1886, upon the ground that the copy of the interrogatories was served on claimant only three days prior to the issuance of the commission.

The Rules of Practice require that interrogatories must be filed with the register and receiver, and a copy must be served on the opposing party or his attorney, who will be allowed ten days in which to file cross interrogatories, and that after the expiration of the ten days allowed for filing cross interrogatories a commission shall issue for the taking of said depositions. You therefore conclude that:

Inasmuch as the testimony contained in the depositions mentioned is all the evidence submitted by the contestant, I am unable to consider this case upon its merits; and, as the cause is to be re-tried on account of the error mentioned, I deem it unnecessary to encumber this letter with a consideration of the other errors complained of.

The proceedings had are therefore set aside and vacated, and the contest remanded for rehearing after due and proper notice.

The affidavit of contest is herewith returned as the basis of such rehearing.

Advise the contestant that he will be allowed thirty days in which to apply for alias notice, in default of which the contest will be dismissed.

The claimant contends that this is not in accordance with the rules of practice and the established mode of trying cases in the Department, but that as the contestant's testimony, taken by interrogatories was stricken from the record, it was the duty of your office to make a decision upon the merits on the record as made by the parties, so that the party against whom the adverse decision was made might bring the case before the Department on appeal. That the contestant should not have the benefit of a new trial, but his contest should be dismissed, and if the illegal testimony suggests fraud or a material non-compliance with the law, the government can protect itself by ordering a hearing under rule 72 of Rules of Practice.

I can see no error in the decision complained of or objection to the direction given to the case ordering a new hearing between these parties. An erroneous ruling of the local office admitting illegal testimony will not deprive your office of the authority to direct a rehearing between the same parties, and such a course is eminently proper where the illegality of such testimony is due to the irregular issuance of the commission under which such testimony was taken, especially if the testimony shows or suggests a non-compliance with the law on the part of the claimant.

In the case of *McMahon v. Gray* (5 L. D., 58) there was no objection to the admissibility of the testimony offered by the contestant, but the local officers dismissed the contest upon the ground that the contestant's allegations were not sustained. Upon appeal your office affirmed this finding, but held that the character of the testimony, coupled with the fact that the defendant introduced no testimony, constituted a proper cause for further investigation. *McMahon* protested against the expense of a further hearing and for the reason that he had offered all the testimony at his command and appealed to the Department, which appeal you declined to transmit upon the ground that the ordering of hearings is a matter resting in the discretion of the commissioner from which no appeal will lie.

The Department held that the contestant was entitled to have the ruling of the Department upon the case as made by the record, because he had no other testimony to offer and had rested his case on the evidence produced.

In the case cited it was suggested that the better procedure in such a case would be to institute an independent investigation at the instance of the government under rule 72 the contestant having failed to make out a case, and having announced that he had no further evidence to introduce.

In the case at bar the contestant's testimony was not considered by your office because it was improperly admitted by the local office owing to an irregularity in the issuance of the commission and the failure to have copies of the interrogatories served on the opposite party for a period of ten days preceding the execution thereof.

I see no reason why an independent investigation should be ordered in this case, or why another notice of contest should issue. As the case was tried by the local officers upon testimony improperly admitted, you will direct the local officers to fix a day for the rehearing of said case after notice to all parties, giving the contestant sufficient time to have the interrogatories executed after compliance with the Rules of Practice as to service of copy and issuance of commission.

The application of Jean Miller is rejected and you will notify Mr. J. L. Bradford of this action.

DESERT LAND—DOUBLE MINIMUM.

JOHN CAMERON.

The price of desert land within railroad limits may be properly fixed at double minimum.

Assistant Secretary Hawkins to Commissioner Stockslager, November 20, 1888.

September 2, 1887, John Cameron made desert land entry for the SW. $\frac{1}{4}$ of section 8, T. 13 N., R. 63 W., Cheyenne land district, Wyoming.

The local officers held that the tract being within railroad limits was double minimum land and they required the entryman to pay fifty cents per acre as the initial payment. He did so under protest, and made application for the return of \$40 or twenty-five cents per acre, which he claims, was illegally exacted of him.

September 28, 1887, you denied the application and the entryman appealed. He contends that there is no authority by law for classifying land subject to entry under the desert land act as double minimum and charging \$2.50 per acre therefor.

This contention was denied in the circular of June 27, 1887 (5 L. D. 703.) Your decision is in harmony with the views of the Department as expressed in said circular and it is, therefore, affirmed.

PRE-EMPTION—SECTION 2260, REVISED STATUTES.

DAVIDSON *v.* KOKOJAN.

A pre-emptor is not within the second inhibition of section 2260 of the Revised Statutes, who had in good faith, prior to his pre-emption settlement, disposed of the land then owned by him, although a formal deed for such land was not executed until after settlement.

Assistant Secretary Hawkins to Commissioner Stockslager, November 21, 1888.

I have before me the appeal of Frank Kokojan from your decision of March 21, 1887, holding for cancellation his pre-emption declaratory

statement, No. 8737, for the SW. $\frac{1}{4}$, Sec. 23, T. 29, R. 14 W., Niobrara district, Nebraska.

Kokojan filed his said declaratory statement April 22, 1886, alleging settlement February 17, 1886.

On May 14, 1886, Davidson made homestead entry, No. 12,678 for the same tract.

November 22, 1886, Kokojan offered proof, and, Davidson having protested, hearing was had.

The local officers, in a joint opinion, declare that they "do not feel justified in rendering an opinion (as to Kokojan's inhabitancy of the tract) based on the evidence furnished, for it is evident that some of the parties have perjured themselves." "In case his rights hinge upon the matter of residence (they) recommend that this case be placed in the hands of a special agent of the Interior Department and a new hearing ordered, which could be conducted near the land in controversy with but little expense to the parties." They themselves decide against Kokojan on the ground that he "moved from land of his own" on to the tract he is seeking to pre-empt.

In the decision appealed from your office disposes of the case in the same way: "Without going," you say, "into an exhaustive examination of the widely divergent and irreconcilably inconsistent statements of the opposite sides of the case, I am content to decide it upon the face of the record as presented, which conclusively shows that Kokojan was not at date of settlement a qualified pre-emptor."

The "land of his own" from which you hold that Kokojan moved on to his pre-emption, is the SW. $\frac{1}{4}$, Sec. 30, T. 28, R. 11 W., for which he made final proof and obtained homestead final certificate, No. 2560, on December 28, 1885.

On the 15th of January, 1886, he executed an instrument in writing in the Bohemian language, of which the following is put in as a correct translation:

Written on the 15th of January, 1886, O'Neill City, Holt Co., Nebraska. — I the grantor Frank Kokojan hereby sign my name to this contract between us, and that I received for my one quarter section, South west quarter in section 30, Township 28, Range 11 West, which I have sold to Waclav Kokojan \$550 Dollars, also will give him the said Waclav Kokojan a proper Deed as soon as he gets well. To all this I signed my name: (Signed) Frank Kokojan.

Witnesses: Signed Jakub Kokisek, Meri Kokojan, Jan Petr.

The "Waclav" (James) Kokojan here named is the claimant's father, and Jan Petr, one of the subscribing witnesses, swore at the hearing, as did also Frank Kokojan, that on the date named, at the time of the execution of this paper, Waclav Kokojan paid Frank, in cash, \$230, as part of the consideration stated, the balance being made up in cattle, of which Frank has since been the admitted owner.

Afterwards, under date of May 26, 1886, Frank executed a formal "warranty deed" to his father of said homestead tract.

The decision appealed from holds that "the agreement to convey in-

troduced in evidence, can not be held to divest his title of the homestead tract. The most that can be claimed under it is that the grantee may have a basis for an action for specific performance, but the title remained in Kokojan until by his deed of May 26, 1886, he passed it to his father."

Assuming that, because of its form, the papers of January 15, 1886, cannot be held to have been a "deed," such as would have been technically necessary to pass "the title," the fact remains that the transaction thereby witnessed may have been entirely effectual to divest Frank Kokojan of *such interest as he had* in the homestead tract, which interest did not then amount to "title," he himself not having received a technical conveyance of the land. On its face the instrument records the sale to Waclav as actually accomplished, and it is in proof that the consideration was then paid to the grantor. The promise to give a "proper deed" when the father got well may I think be fairly read as intended only as the "covenant for further assurance" which is frequently found even in conveyances of the most formal and final sort, and which was in this particular case made especially appropriate by the admitted informality of the paper which alone it was found convenient to execute at the time.

Unless, therefore, there is reason for holding that the alleged sale was only a fraudulent pretense, acted out for the purpose of evading the law, the claimant must be held to have transferred all his right and interest in the homestead tract as early as January 15, 1886, more than a month before his settlement on the pre-emption. To my mind, the informality of the paper first executed seems in no way a badge of fraud, since it appears probable that, had the parties consciously intended fraudulently to simulate a sale, they would have been especially careful as to the formalities of the transaction simulated.

The relationship between the grantor and grantee is a more suspicious circumstance, but not of itself sufficient to justify an affirmative finding of fraud, and in this case the surrounding circumstances do not seem to me to strengthen the suspicion. For all that appears, the alleged exchange of the homestead for money and cattle really took place on the 15th of January, as recited in the instrument of that date and sworn to at the hearing. Unless Kokojan has deliberately perjured himself, on a plain matter of fact, he has paid for the keep of the cattle since that date, and been deemed in all respects their owner, as between his father and himself. This is confirmed by the circumstance so much insisted on in the evidence for the protestant, that it was to Frank Kokojan's order that cheques were made out in payment for the milk yielded by the cows he claims.

I cannot, therefore, see my way to approving your conclusion that Kokojan was disqualified under Sec. 2260 of the Revised Statutes, and, as it clearly appears that he was prior to Davidson in point of time, I have to ask whether his (Kokojan's) proof satisfactorily shows compliance with the law upon his part.

As to this, neither the local office nor your office has as yet made a decision, but both point out that the testimony taken at the hearing already had really left the point in doubt, and the local officers recommend an investigation. This recommendation I approve, and I hereby direct that a new hearing be ordered.

Your said decision is modified accordingly.

PRE-EMPTION FINAL PROOF—CULTIVATION.

GEORGE W. JOHNSON.

Proof as to cultivation does not necessarily require a showing that a crop has been raised.

Assistant Secretary Hawkins to Commissioner Stockslager, November 22, 1888.

I have considered the appeal of Geo. W. Johnson from your office decision of May 23, 1887, rejecting his final proof offered upon his pre-emption declaratory statement for NE. $\frac{1}{4}$ section 26, T. 12 N., R. 20 W., Grand Island, Nebraska, land district.

Claimant filed declaratory statement March 29, 1884, and on November 24, 1884, presented his final proof, which being satisfactory to the local officers, he received final certificate.

On May 23, 1887, your office decided in regard to his proof as follows:

Cultivation of the land is one of the pre-requisites to entry under the pre-emption law. Geo. W. Johnson was allowed to make cash entry No. 2489 November 24, 1884, after living on the land since March 29, 1884, and not having cultivated one acre. His improvements consist of a house, stable, corral and two acres broken, and are valued at \$300.

His proof is therefore rejected. He may be allowed to show that he has lived upon and cultivated a portion of the land since entry, after publication.

The only evidence submitted is the testimony taken on final proof and that is not sufficient to sustain your said decision.

The witnesses both testify that claimant's residence was continuous from March 29, 1884; that he had a house, stable and corral worth \$300 and in answer to the question, "How much land has he broken and cultivated?" both say, "Two or three acres." Both say he has used said land for pasture and one says, "he is a stock grower." Claimant also says "two acres broken but no crops raised."

In John E. Tyrl (3 L. D. 49) it was held that a commutation cash entry should not be canceled, the evidence showing good faith, continuous residence, and that the entryman had cleared for the purpose of cultivation about half an acre, and gave as an excuse that he had settled too late.

While cultivation ultimately includes the planting and raising of crops, there may be cultivation without this; one definition of the word being "improvement for agricultural purposes."

It appears from the evidence in the case at bar, that the claimant was engaged in growing stock and that he had used his land principally for pasturage and this considered with the value and permanent character of his buildings and the fact that he had broken between two and three acres and thus by a definite act prepared it for the tillage of a crop, satisfies me that his cultivation may be considered sufficient.

Your said decision is accordingly reversed.

TIMBER CULTURE CONTEST—PLANTING.

PARK *v.* TERRELL.

A contest must fail where the default charged was cured prior to the initiation of the suit.

A slight failure in planting the requisite area may be properly excused, where the good faith of the claimant is manifest.

Acting Secretary Muldrow to Commissioner Stockslager, November 2, 1888.

I have considered the appeal of A. Park, in the case of said Park *v.* Mary E. Terrell, from the decision of your office of April 10, 1886, dismissing said Park's contest of the timber culture entry of Mary E. Terrell, on the NE. $\frac{1}{4}$ of Sec. 4, T. 9 S., R. 22 W., Kirwin district, Kansas.

Said entry was made, July 22, 1881, and the contest was initiated, July 22, 1884, being the fourth day of the fourth year after entry. The alleged ground of contest is substantially that the claimant failed to break, cultivate and plant as required by law during the second and third years after entry and prior to the date of contest.

The hearing was had November 25, 1884, and the testimony shows that, if there had been any default as to breaking and cultivation during the second and third years, the period covered by the allegations of the affidavit of contest, it had been cured by ample cultivation and preparation of at least ten acres in the early spring of 1884, before the initiation of the contest. As to planting during the third year (which terminated July 18, 1884), the first five acres, it appears, that the claimant, who was a young lady in very reduced circumstances and had to teach school to make a living for herself and mother, employed one, J. H. Mullany to have said planting done and furnished him ample means for that purpose; that he had six acres properly prepared for planting and the proper amount of tree seed were furnished for planting five acres and Mullany planted part thereof himself, but the man he hired to complete the planting "planted so thick," that the seed did not quite cover the five acres, and that as soon as he discovered this, he made every effort to procure more seed but failed. All this occurred in the spring of 1884, during the third year after entry and prior to the initiation of the contest.

I concur with the finding of your office and of the local officers, that this state of facts shows that the claimant endeavored in good faith

to comply with the law and that her failure to plant or cause to be planted the full amount of five acres the third year, was under the circumstances excusable.

The decision of your office is affirmed, and the said entry will be held intact, subject to future compliance with the law.

NOTICE—EVIDENCE—TIMBER CULTURE CONTEST.

BOYD *v.* BATDORFF.

Failure to cross the "t" in defendant's name, which was otherwise correctly written, will not defeat the notice where it described the land correctly, personal service was duly made, and the defendant was in no way misled, or liable to injury from the error specified.

Opinions should not be admitted in evidence of the acreage broken, the fact being capable of ascertainment with mathematical accuracy by actual measurement.

The claimants good faith being unquestioned, his entry should not be canceled, although it may appear that that he broke but four and half acres the first year.

Acting Secretary Muldrow to Commissioner Stockslager, November 2, 1888.

In the case of William M. Boyd *v.* Joshua Batdorff, involving the latter's timber culture entry, No. 4813, on the NE. $\frac{1}{4}$ of Sec. 33 T. 30 S., R. 38 W., Garden City district, Kansas, the said Batdorff appeals from your decision of August 12, 1887, adverse to him.

The entry was made September 9, 1885, and contest was initiated by Boyd October 19, 1886, the alleged ground of contest being "failure by Batdorff to do the breaking required to be done within one year from date of entry, and that at date of complaint (October 19, 1886), said default still existed, there being only four and a half or less than five acres broken."

On the hearing which was had April 28, 1887, the claimant introduced no evidence, having appeared specially and moved the dismissal of the contest, because of the omission to cross the "t" in his surname "Batdorff" in the copy of the notice served on him *personally*. The notice described the land correctly and was otherwise full and proper and was duly served, the name was properly written "Batdorff" in the affidavit of contest and other papers pertaining to the case, and the claimant was in no way misled or injured or liable to injury by the failure to cross the "t." Under these circumstances, the motion, as your office holds, was properly overruled by the local officers.

The contestant introduced two witnesses, one of whom had been acquainted with the land about a month and a half before the contest was initiated, and the other about six months before that time, and who testified that from the condition of the land when contest was initiated only four and a half acres thereof had been broken prior thereto. It does not appear, that said witnesses knew anything about the measurement of land or that they in any way actually measured the land in this

case, but we are left to infer, that they were simply of the opinion from the appearance of the land at the date of contest, that only four and a half acres had been broken.

This evidence is very unsatisfactory. The opinions of experts even should not be admitted in evidence, in a case like the present, where the margin is so small (a half acre), and where the fact is capable of ascertainment with mathematical accuracy by actual measurement. Conceding, however, that the evidence shifted the burden of proof from the contestant to the claimant, I am of the opinion, in the absence of anything tending to impeach the good faith of the latter, that the breaking of the four and a half acres the first year should be deemed a substantial compliance with the law. In the contest case of *Thompson v. Sankey* (3 L. D., 365), it was held by this Department, "In view of the timber culture claimant's good faith, the fact that he has but eight and one half acres, instead of ten, under cultivation and planted as required, should not cause the cancellation of his entry."

The decision of your office, canceling the claimant's entry, is reversed. He is advised, however, as was done in *Thompson v. Sankey*, *supra*, of the importance of a full compliance with the requirements of the law in the future.

HOMESTEAD CONTEST—RELINQUISHMENT.

McCLELLAN *v.* BIGGERSTAFF.

While it is true that a relinquishment filed pending a contest, is *prima facie*, the result of the contest, such presumption is not conclusive, and on proof it may appear that the relinquishment was in fact not the result of the contest, in which event the rights of the contestant must depend upon his ability to sustain the charge as laid by him.

Assistant Secretary Hawkins to Commissioner Stockslager, November 23, 1888.

I have considered the appeal of Ai McClellan, from your office decision of October 26, 1886, in the contest case of Commodore C. Biggerstaff *v.* the Heirs of Amos G. Lasiter deceased, involving said Lasiter's homestead entry No. 3,697 in North Platte land district, Nebraska.

The records show that on May 15, 1883, Amos G. Lasiter made said homestead entry for the NE. $\frac{1}{4}$, Sec. 25, T. 17 N., R. 21 W. in said land district. On April 16, 1885, Biggerstaff instituted a contest against said entry alleging that said Lasiter had died and that "his heirs have wholly abandoned said tract . . . that said tract is not settled upon and cultivated by said party as required by law".

On April 9, 1885, the register ordered a hearing before E. P. Campbell, a notary public at his office in Broken Bow, Nebraska, June 27, 1885, and to file the testimony so taken in the local office on or before July 6, 1885. On July 5, 1885, the notary public, filed in the local

office the testimony adduced before him and on the same date the heirs of Lasiter filed in the local office affidavits alleging that the testimony taken by the notary public as Commissioner was not taken at the time and place given in the notice, etc.

On July 11, 1885, the local officers decided that "We find from the testimony and affidavits presented, that the contestant failed to mail a copy of the notice of contest or post a copy of the same upon the tract involved, thirty days prior to day set for taking testimony and that there is a question as to whether the testimony was taken at the time and place named in the notice. We are, therefore, of the opinion that the case should be dismissed."

Biggerstaff filed an appeal from said decision August 1, 1885. On January 11, 1886, Ai McClellan filed an affidavit of contest against said entry of Amos G. Lasiter, alleging that "The said Amos G. Lasiter, deceased, or the heirs of said Amos G. Lasiter, have relinquished all right, title, and interest in said tract to the United States, and the tract is now held for speculation under the receipt given said Amos G. Lasiter and the same is held from settlement thereby."

The local officers ordered a hearing and set the same for March 26, 1886, before George W. Tufren, a notary public.

On March 26, 1886, said McClellan, filed in the local land office the relinquishment of the Lasiter heirs to the tract in dispute. There is nothing in the case to show that any testimony was ever taken or considered in McClellan's contest.

On October 16, 1886 your office decided that "under the circumstances presented, said case would be remanded for further trial after due and proper notice were it not for the fact that the entry in question having been relinquished March 26, 1886, such notice is now unnecessary," and held that the relinquishment inured to the benefit of contestant Biggerstaff and dismissed McClellan's contest.

In December, 1886, McClellan filed an appeal in which he alleges, viz :

1st. That your office erred in granting the preference right to said Biggerstaff, and in holding that the relinquishment of said tract by the heirs of Amos G. Lasiter, inured to his benefit.

2d. That your office erred in not granting the preference right to enter said tract to this plaintiff Ai McClellan.

3rd. In holding that it would have been the duty of your office to remand the contest of Biggerstaff for further hearing had not the relinquishment of said heirs been filed.

4th. That your office erred in not finding the said contest of Biggerstaff illegal and void.

5th. That your office erred in modifying the decision of the register and receiver dismissing said Biggerstaff's case; and praying the preference right granted to Biggerstaff be set aside and reversed and that he (McClellan) be adjudged to have the preference right to enter said tract.

While it is true that a relinquishment filed pending a contest, is *prima facie*, the result of the contest, such presumption is not conclusive, and on proof it may appear that the relinquishment was in fact not the result of the contest, in which event, the rights of the contestant would depend upon his ability to sustain the charge as laid by him.

Upon review of the record and proofs in this case I am convinced that a hearing should be ordered in the premises, for the purpose of ascertaining the following facts, viz :

1st. The status of Lasiter's entry at date of the initiation of Biggerstaff's contest, whether in fact it was then abandoned as charged by said contestant.

2nd. The circumstances attending the execution and filing of the said relinquishment.

3d. The good faith of all parties.

Your decision is modified accordingly.

HOMESTEAD ENTRY—APPROPRIATION.

ALLEN *v.* CURTIUS.

A homestead entry made by one who is at the same time maintaining a pre-emption claim for another tract, is illegal and must be canceled.

Land covered by a *prima facie* valid homestead entry is not subject to entry by another.

Assistant Secretary Hawkins to Commissioner Stockslager, November 23, 1888.

I have considered the appeal of Lilly J. Allen from your decision of October 5, 1887, rejecting her homestead application for the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 31, T. 23, S., R. 25 W., Garden City, Kansas.

The record shows that at the time of said application, the above tract was covered by the homestead entry of Mary Curtius, made December 24, 1883.

It appears that on August 10, 1883, said Mary Curtius filed her declaratory statement for Lot 1, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 2, T. 24 S., R. 26 W., same land district, and that she resided upon the same until June 7, 1884, when she made proof and received final certificate. A month later she established her residence upon her homestead tract and has since then resided upon same.

It is evident that Curtius made her said homestead entry, while residing upon another tract under the pre-emption law, and for which final proof had not been submitted. Her homestead entry was therefore illegal and should be canceled. *Murphy v. De Shane* (6 L. D., 831); *Krichbaum v. Perry* (5 id., 403); *Collar v. Collar* (4 id., 26); *Austin v. Norin* (4 id., 461).

At the date of Allen's application to enter, the land, being covered by a *prima facie* valid homestead entry, was segregated from the public domain and the local officers were, therefore, right in rejecting her said application.

By your letter of November 25, 1887, you transmitted "the application of Mary Curtius for a hearing to show cause why her homestead entry (upon the same tract) should be sustained." In her said application she admits the facts already recited as to her having made homestead entry upon the land in dispute, while residing upon another tract under the pre-emption law, and for which final proof had not been submitted. As the facts admitted by Curtius and appearing in the record show that her homestead entry was invalid, a hearing can be of no benefit to the applicant and the same is accordingly denied.

Since the homestead entry of Mary Curtius of the tract in question was illegal at its inception and should be canceled, and Lilly J. Allen was the first applicant to enter the same, I am of opinion that her said application should be allowed.

You are therefore directed to cancel the homestead entry of Mary Curtius and to allow the homestead application of Lilly J. Allen for the tract in question.

FINAL PROOF—TRANSFEE—EQUITABLE ADJUDICATION.

ALBERT ORTH.

In the absence of protest or adverse claim, an entry may be submitted to the Board of Equitable Adjudication, where the failure to submit proof on the day advertised is satisfactorily explained.

Evidence may be furnished by a transferee, showing that on the day fixed for the submission of proof, no protest or objection was made thereto.

Assistant Secretary Hawkins to Commissioner Stockslager, November 24, 1888.

I have considered the appeal of Albert Orth, claiming as transferee, from your office decision, dated April 1, 1887, holding for cancellation pre-emption cash entry, No. 8474, made by Daniel H. Altaffer for the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 15, T. 131 N., R. 56 W., Fargo, Dakota.

It appears that Altaffer on November 9, 1883, gave notice of his intention to make final proof before James H. Vail, clerk of the district court at Milnor, Sargent county, Dakota Territory, on December 21, 1883.

Said notice was duly posted in the local office and publication thereof was made in a newspaper designated by the register. For some reason the first appearance of said notice in the newspaper designated was not until November 21, 1883, twelve days after the entryman had given his notice to the local office.

By reason of the delay in commencement of publication, and in order that the notice might be published the requisite number of times, an order was made, upon the application of the entryman, continuing the case and extending the time for making final proof before the clerk of the court from December 21, to December 27, 1883. Instead of being taken on the day named (December 27, 1883,) the testimony of claimant and his witnesses was not taken until January 16th following.

Said proof having been transmitted to the local office, final certificate and final receipt were issued February 27, 1884.

Claimant filed an affidavit explaining his delay in making proof, and stating that he appeared as soon as possible after being informed of the continuance.

Your office, by letter of November 25, 1885, to the register and receiver, accepted the explanation above referred to as satisfactory and directed the local office to call upon claimant to furnish an affidavit from J. H. Vail, the clerk of court before whom the proof was taken, as to whether any adverse claimant appeared, or whether any protest was filed on December 27, 1883, the day set for taking the testimony.

In your office decision appealed from, reference is made to an affidavit executed July 17, 1886, by Albert Orth, setting forth that he, in May, 1884, purchased from the entryman, Altaffer, the tract in question, and that said Altaffer is now dead. Your said office decision thereupon concludes that the requirements of your office letter of November 25, 1885 (*supra*) can not be complied with, and directs the register and receiver to advise the present owner of the land that the cash entry under which he holds is held for cancellation, subject to appeal.

The case is here on Orth's appeal.

Upon an inspection of the record I find that the affidavit of J. H. Vail, called for by your said office letter of November 25, 1885, was furnished and was in the case when your office decision appealed from was rendered.

Said affidavit was dated July 17, 1886, and was filed with that of Orth, bearing same date, setting forth the facts of his purchase of the land and the death of the entryman. It could not be furnished by the entryman, he being dead, but it was furnished by his transferee. In it, said J. H. Vail, the clerk of court before whom the proof was made, swears "that on the said 27th day of December, 1883, at any time previous or subsequent thereto, there has not been filed with him any protest or objection in any manner, or adverse appearance made by any persons whomsoever to the taking of testimony in the final proof of Daniel H. Altaffer" for the land described.

This seems, in its substance, to fully meet the requirement of your said office letter of November 25, 1885, and the fact that it was procured and filed by the transferee, Orth, rather than by the entryman, Altaffer, (the latter being dead), does not vitiate or render less effective the sworn statement of the clerk of the court.

Your office has not objected to the substance of the proof and an examination of the same shows that the entryman fully complied with the pre-emption law in the matters of inhabitancy and improvement. The latter was in the final proof valued at \$1,000, which is above the average value of improvements shown by pre-emptors at date of final proof. The entryman continued to reside upon the tract after making final proof until his sale to Orth in May, 1884. His death, on October 4, 1885, is clearly proven. His good faith as a pre-emptor has not been questioned and I think is fully shown by the record.

I am convinced, after a careful examination of the case, that the transferee, who is here as appellant, is entitled to protection, it being shown that his vendor, the deceased entryman, acted in good faith and made substantial compliance with the law. No adverse claim appearing, the case is, in my judgment, a proper one for reference to the Board of Equitable Adjudication under the rules one and ten.

Your office decision is modified accordingly.

PRACTICE--DEPOSITIONS--HOMESTEAD ENTRY.

GEHMAN *v.* CULP.

Objection to a deposition, on the ground that it was taken without due notice, in order to receive consideration on appeal, should be made when said deposition is offered in evidence at the hearing.

A homestead entry made by one who is at the same time maintaining a pre-emption claim to another tract is illegal.

Such an entry, made under circumstances that establish the bad faith of the claimant, must be canceled, and held to have exhausted the right of the entryman under the homestead law.

Assistant Secretary Hawkins to Commissioner Stockslager, November 24, 1888.

I have considered the case of John R. Gehman *v.* Albert Culp, involving the NE. $\frac{1}{4}$ of Sec. 25, T. 111 N., R. 66 W., Huron, Dakota, as presented by the appeal of the latter from your office decision, dated June 22, 1887, adverse to him, in the matter of his homestead claim to said land.

It appears that appellant, under the name of James A. Culp, on April 1, 1882, made pre-emption filing, No. 16,892, for the NE. $\frac{1}{4}$ of Sec. 21, T. 104 N., R. 63 W., Huron, Dakota, and that he made final proof and received cash certificate for the same October 20, 1882.

On April 25, 1882, while his pre-emption claim was pending, he, under the name of Albert Culp, made homestead entry, No. 19,462, of the tract here in question.

November 20, 1883, Gehman filed affidavit of contest against Culp's homestead entry made as above, and at the same time applied to enter the land.

Said affidavit of contest charged that Culp's said homestead entry was illegal, and that at the time it was made he was holding and claiming another tract under the pre-emption law, upon which he subsequently made proof; that he used the name James A. Culp in the one case and Albert Culp in the other, in order to conceal the real facts.

December 27, 1883, Culp filed a petition, in which he attempted to explain how he came to have the two claims at the same time, by stating that he believed he had a right to hold the claims as he did. His petition is, that, it appearing that his homestead entry as made is illegal, said entry be canceled, and he be permitted to make a new and legal entry on the tract. He had, prior to the date of contest, filed a petition similar in purport to the above, but it failed to connect itself with any tract of land by description. It was accordingly returned by the local office, for amendment and completion.

On the same day on which Gehman's contest was filed, Culp filed another petition, accompanied by a second application to enter the tract in dispute, and asked that said application be received and filed *nunc pro tunc*.

Though this petition was filed on the same day on which the affidavit of contest was filed, it appears that the contest was filed first and that Culp had notice of said contest, for in the petition Culp refers to the fact "that one John Gehman filed contest against said homestead entry." In said petition Culp attempts explanation of the discrepancy in his signatures in his two claims, by saying that his correct name is James Albert Culp, and that he signed the homestead papers "Albert Culp," through a mistake of the attorney who drew the same; that they were by mistake drawn in the name of Albert Culp, and he signed them Albert Culp, in order to have the signatures correspond with the name as written in the body of the application.

The matter coming before your office for action, it was there held, by decision of May 22, 1884, that Culp's homestead entry was by his own admission illegal, and must be canceled.

From that decision Culp appealed to the Department, which on December 29, 1884, so far modified your office decision as to direct that a hearing be ordered to test the question of Culp's good faith, etc. Hearing was duly had, and the local officers transmitted the record to your office, with the recommendation that the petitioner, Culp, be allowed to make new homestead entry of the tract in question, and that he be allowed to date his settlement thereon back to August 20, 1883.

Your office, after a somewhat lengthy discussion of the case, concluded that Culp's homestead entry should be canceled, and that his homestead right should be held to have been exhausted.

From that decision he has appealed to this Department. In said appeal he assigns several grounds of error, which are substantially embraced in the following: 1st, Error in considering as evidence the testimony of one J. Bowser, taken by deposition; and, 2d, Error in finding

that he (appellant) had acted in bad faith in making his homestead entry.

Under the first assignment he charges that the deposition was extorted from Bowser, and that it was not taken in accordance with the rules of practice, in this, that there was no service upon appellant of a copy of said interrogatories.

Upon an examination of the record, I do not find these charges to be well founded. It is not shown that any extortion was practiced or any undue influence used in procuring said deposition, and appellant on the stand admitted the integrity of Bowser, and stated that he is a truthful and reliable man.

Furthermore, it is evident from the record that appellant's counsel was duly notified of the intention to take Bowser's deposition, and was furnished with a copy of the interrogatories.

Even, if this did not clearly appear from the record, the objection on that ground would not at this stage of the proceedings be entertained, no objection having been made to said deposition on the ground of want of notice, when it was filed in evidence at the hearing.

On the question of Culp's bad faith, I fail to find, after a careful examination of the whole record, any reason for disturbing the conclusions of your office.

It is admitted by appellant that his homestead entry as made was illegal, but he pleads ignorance of the law, and that he was misled by the impression current at the time that a pre-emptor could legally make a homestead entry, while his pre-emption claim was pending, provided he so arranged the dates of filing the respective claims that he could prove up his pre-emption claim and get on to his homestead claim before the expiration of the six months allowed for that purpose.

I am unable to conclude from all the facts that his mistake was an honest one. His initiating the two claims in different names is, of itself, a very suspicious circumstance and one his explanation of which, in view of the surrounding facts, is by no means satisfactory. When to this is added the testimony of Bowser, to the effect that appellant had said it was to enable him to hold two tracts of land at the same time, there can, I think, be little doubt of a purpose on the part of Culp to mislead and deceive the government, and to secure through said deception that to which he was not entitled under the law. This conviction is strengthened when we recall appellant's admission that Bowser is a truthful and reliable man, and when the further fact is noted that appellant, when asked on the witness stand if he had made such a statement as that to which Bowser had testified, failed to answer in denial in the same direct and categorical way in which Bowser had testified. His answer, "not to the best of my knowledge," contains in it, in view of his general positive manner as a witness, elements of uncertainty, if not evidence of a consciousness that having acted in bad faith, such a remark as that attributed to him by Bowser would have been in keeping

with his general purpose and effort to secure land through deception and in violation of law.

The question as to his compliance with the homestead law, in the matters of residence and cultivation, need not be considered, in view of what has been said as to the initiation of the homestead claim, but one fact brought out by the evidence on this point may be referred to, which, when considered in connection with facts and circumstances as to the manner in which the entry was made, may be regarded as confirmatory of the view that said entry was not made in good faith.

In October, 1882, immediately after making final proof on his pre-emption claim, Culp went upon his homestead claim, and, in connection with a claimant for an adjoining tract, erected on the line between the two claims a house, to be used by both claimants to hold their respective tracts. This was done just before the expiration of the six months allowed him within which to establish actual residence upon his homestead claim. The house was not completed so as to be habitable. After remaining there for two or three days, claimant left and went back to his former home in Illinois, and did not return to the tract until about the last of March, 1883, nearly a year after his homestead entry was made.

While this proceeding, as to the establishment of residence, was not necessarily inconsistent with good faith, and might, if it were the only questionable act, have been susceptible of satisfactory explanation, yet, when considered in connection with all the facts in evidence, it tends to confirm the correctness of the conclusion that appellant had acted in bad faith in making the entry, and that he was trying to obtain title to land under the homestead law in contravention of its requirements.

After a full consideration of the case in all its aspects, I concur in the conclusion reached by your office that Culp has not acted in good faith, and your office decision, to the effect that his entry should be canceled and his homestead right be declared to have been exhausted, is affirmed. See on this last point the case of Arthur P. Toombs, (7 L. D., 215).

RIGHT OF WAY—PUYALLUP INDIAN RESERVATION.

NORTHERN PAC. R. R. Co.

In the absence of statutory authority granting right of way privileges through the Puyallup Indian reservation, an application for such privileges should be addressed to Congress.

Secretary Vilas to the Commissioner of Indian Affairs, November 21, 1888.

I am in receipt of your letter of 24th August, presenting maps filed by the Northern Pacific Railway, showing line of road through the Puyallup Indian reservation, Washington Territory, built under an agreement between said Railway Company and the Puyallup Indians,

which was approved by the Department April 13, 1877, and also a line of a proposed spur of said road, 1225 feet in length for which application is now made for authority to build.

The map shows that the said spur line, for which the right of way is now asked, is located wholly on the school farm of the Puyallup reservation, and this matter is presented by you in view of Department decision of April 20, 1888, in the case of the Milwaukee, Lake Shore and Western Railroad for instructions as to whether the authority required should not be obtained by the Railroad Company from Congress.

In response to this inquiry you are informed that in the absence of any authority of law for the construction of the proposed spur or branch of railroad on the reservation, no permission can be granted by the Department for that purpose, and application should be made to Congress therefor by the company desiring to construct it.

In response to your further inquiry whether Congressional action should be had as to the main line constructed under Department authority of April 13, 1877, it is sufficient to say that when legislation shall be under consideration for the construction of the spur or branch line above referred to, the status of the existing line of the road, now in operation upon the reservation should be brought to the attention of Congress for such legislation as may be deemed necessary, in any report that may be made to that body or any Committee thereof, on the subject. Congress can then determine what, if any, legislation is necessary regarding the matter.

The maps accompanying your letter are herewith returned.

PRE-EMPTION PROOF—CULTIVATION.

JENNIE BURTON.

In the matter of cultivation, the time of year in which residence was established may be properly considered, where no crop was raised, but due preparation was made therefor, and good faith is clearly manifest.

First Assistant Secretary Muldrow to Commissioner Stockslager, November 27, 1888.

I have considered the case of Jennie Burton, on her appeal from your office decision of April 20, 1887, suspending her pre-emption cash entry for NW. $\frac{1}{4}$, Sec. 32, T. 153 N., R. 59 W., Grand Forks, Dakota land district.

It appears from the record that the claimant made settlement upon the land July 15, and established actual residence November 28, 1882. Final proof was made June 1, 1883. The improvements on the tract at time of final proof consisted of a house, well, and five acres broken; value of improvements \$200.

In your said decision you suspend her proof "for the reason that the improvements made by claimant are not deemed sufficient to show

good faith," and you order that she make new publication and proof, "which new proof must show full compliance to the law as to improvements and cultivation."

It appears from supplemental affidavit of claimant on appeal that she was married shortly after making final proof.

In your said letter the objection to claimant's proof seems to be principally owing to the fact that there was no crop raised by her upon the land.

It is not disputed that she resided continuously upon the land from November 28, to date of final proof, June 1, a period of over six months, and it is equally clear that her improvements are of the value of \$200, (her witnesses each say \$250), and that she had five acres broken.

The fact that her settlement was made November 28, after the cropping season was over, and that her proof was submitted June 1, before the next crop could be raised may be considered as sufficiently accounting for her failure to raise a crop.

In deciding what constitutes cultivation under the law the time of year in which residence was established may well be taken into consideration, and if actual residence was established too late in a season for the raising of a crop, and final proof is submitted too early in the next for a crop to be raised, and the claimant has broken a reasonable quantity of land and thus by a definite act prepared it for the planting of a crop, such a condition of affairs being shown on appeal more than five years after final proof, the definite preparation of land for a crop, may be considered sufficient compliance with the law requiring cultivation to pass the entry to patent, there being no adverse claim and no evidence of bad faith. John E. Tyrl (3 L. D., 49).

In the case at bar, the evidence of claimant's good faith being unimpeached, and the improvements valuable, the entry may be passed to patent.

Your said decision is accordingly reversed.

TIMBER CULTURE CONTEST—PRACTICE—AMENDMENT.

REYNOLDS *v.* PETTIT.

An allegation of non-compliance with law will not lie, when made prior to the expiration of the year in which it is alleged to have occurred.

An affidavit of contest directed against a timber culture entry should set forth specifically in what years, and in what respect, the entryman has failed to comply with the law.

An affidavit of contest, held insufficient for want of particularity, may be amended.

First Assistant Secretary Muldrow to Commissioner Stockslager, November 27, 1888.

I have considered the appeal of J. E. Pettit from your office decision of October 1, 1885, holding for cancellation his timber culture entry

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made October 7, 1876—for the NE. $\frac{1}{4}$ of Section 22, T. 132 N., R. 46 W., Fergus Falls, Minnesota.

The case arose upon an affidavit of contest filed September 22, 1884, by George Reynolds, charging "that the said J. E. Pettit has failed during the eighth year after his said entry to keep upon said tract in good condition ten acres of timber as required by law and further that during said year and prior years he has failed to cultivate in such manner as to promote its growth the timber actually planted thereon."

Notice of the complaint was served upon the entryman and he was summoned to appear at the local office November 11, 1884, to respond and furnish testimony concerning said alleged failure. Upon the day fixed for the hearing Soren Listoe made special appearance as attorney for the entryman and moved to dismiss the case on the following ground:

1. The charges in the complaint are too vague and do not constitute sufficient ground for a contest.

2. The complaint fails to specify in which year or years default is made as required by the rules of the Department;

3. The charge in complaint that claimant has failed to cultivate trees during the eighth year after the entry, cannot be considered as the eighth year did not expire till October 7, 1884, and affidavit of contest is dated September 26, 1884, eleven days prior to the expiration of the eighth year in which time default if any existed—might have been remedied.

4. Complaint fails to allege (failure) to comply with the law up to the present time, and for this reason alone the case should be dismissed.

The motion to dismiss the contest was sustained by the receiver and overruled by the register.

Testimony was taken in support of the contest, the claimant introducing no witnesses and taking no part in the proceedings. The register found "that the testimony is *ex parte* but shows conclusively that claimant has made no attempt to comply with the law" and recommended the cancellation of the entry.

No opinion was given by the receiver. December 3, 1884, the attorney for the entryman appealed from the action of the register in not dismissing the case upon the motion made by special appearance. December 12, 1884, the local officers transmitted the papers in the case and on October 1, 1885, you decided that the affidavit of contest was sufficient to put the defendant on guard to defend his claim. Because he failed to do so and because, in your opinion, the testimony justified such action you sustained the finding of the register and held the entry of Pettit for cancellation.

From your said decision the entryman appealed.

Upon the motion to dismiss the affidavit of contest on the ground that it was defective the local officers were divided. Your predecessor decided that it was sufficient. This is the first issue raised by the appeal.

As to the allegation that the entryman had failed to cultivate trees during the eighth year after the entry, the objection to the contest af-

fidavit is sustained as the record shows that when it was made the eighth year had not expired. *Chilton v. Cornell* (1 L. D. 153). In the case of *Bennett v. Gates*—on review—(3 L. D. 378) it was held :

The requirement of a specific charge including failure on the part of the entryman until the date of the initiation of contest, has been and very properly should be insisted upon for the purpose of avoiding the expense, delay and vexation of a hearing upon frivolous or insufficient grounds.

I am of the opinion that the contest affidavit in this case is defective in that it fails specifically to allege in what years and in what respect the entryman failed to comply with the requirements of the timber culture law. An affidavit of contest should make specific allegations so that the entryman can know what charge he will be called upon to meet at the hearing. For this reason I will not consider the case upon the *ex parte* testimony presented but permit the contestant to amend his affidavit of contest in such a manner as to put in issue the question whether the entryman had complied with the law. The latter will then have the opportunity sought for in his application for a re-hearing—to produce testimony in support of his entry.

Your decision is modified accordingly.

PRACTICE—APPEAL—INTERVENOR.

JOHN RALLS.

The appeal of a stranger to the record should be disposed of under rule 82 of practice, where such appellant has failed to show his right to be heard as an intervenor.

First Assistant Secretary Muldrow to Commissioner Stockslager, November 28, 1888.

On June 2, 1887, the pre-emption entry of John Ralls for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of section 7, T. 14 S., R. 5 W., Las Cruces, New Mexico land district, was held for cancellation by your office.

On July 26, 1887, there was filed in your office by parties not of record in the case, an appeal from said decision. Said appeal begins as follows :

Now come Grayson and Borland grantees of said Ralls by their attorney and file this their appeal from the decision of the Hon. Commissioner rendered in said case upon June 2, 1887.

This appeal is signed by the attorney and is not verified in any manner nor is there any thing in the record of this case except the bare statement above quoted to show that Grayson and Borland have any interest whatever in the case.

Certain rules are prescribed by the department providing for the manner in which parties not of record may intervene in any case in which they have an interest. These rules have not been followed in this case and the appeal is therefore defective and should have been disposed of under Rule of Practice No. 82.

The case is returned to your office for disposition in accordance with said rule.

HOMESTEAD ENTRY—PRE-EMPTION CLAIM.

JOSEPH W. MITCHELL.

One who has, after due compliance with the pre-emption law, submitted final proof may legally make a homestead entry for another tract, although the final certificate may not have issued on his pre-emption proof.

First Assistant Secretary Muldrow to Commissioner Stockslager, November 30, 1888.

I have considered the appeal of Joseph W. Mitchell from your office decision of July 8, 1887, holding for cancellation his homestead entry for the SW. $\frac{1}{4}$ of section 12, T. 26 N., R. 29 E., North Yakima land district, Washington Territory.

Mitchell made homestead entry for the said lands June 6, 1884. Your office held his entry for cancellation because he had made pre-emption proof for other lands April 28, 1884, on which cash certificate did not issue until June 16, 1884.

It appears that Mitchell's pre-emption claim covered the SW. $\frac{1}{4}$, section 29, T. 27 N., R. 30 N., land district aforesaid and that he made his final proof thereon April 28, 1884, before the deputy clerk of the district court for the counties of Spokane, Lincoln, Douglas and Adams, Washington Territory; the cash certificate bears date June 16, 1884; patent issued August 15, 1888.

The record of claimant's pre-emption claim shows that he had, at the date of his final proof, complied with the requirements of the pre-emption laws; though the legal title after that remained in the United States, the equitable title was in him; he could have then before the issuance of the cash certificate, disposed of the land by sale, if he had so chosen. See *Orr v. Breach* (7 L. D. 292); *Magalia Gold Mining Company v. Ferguson* (6 L. D., 218); no reason is therefore apparent why he had not the right after the date of his proof to make a homestead entry.

Your decision is accordingly reversed.

PRE-EMPTION FINAL PROOF—CULTIVATION.

MICHAEL MCKILLIP.

Where land is better adapted for grazing than for raising crops, the erection of the necessary buildings and preparation for stock raising, together with the actual use of the land for such purpose, may be accepted as satisfactory proof of cultivation, if good faith is also shown in complying with other requirements of the law.

In such a case however the final proof should clearly show in what manner, and to what extent, the land was used for grazing purposes.

First Assistant Secretary Muldrow to Commissioner Stockslager, November 30, 1888.

I have considered the case of Michael McKillip, on his appeal from your office decision of June 6, 1887, rejecting his proof in support of

his pre-emption cash entry No. 883 for NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, Sec. 1, and SE. $\frac{1}{4}$, SE. $\frac{1}{4}$, Sec. 2 and N. $\frac{1}{2}$, NE. $\frac{1}{4}$, Sec. 11, T. 5 N., R. 31 West, McCook Nebraska land district.

The testimony submitted in final proof is to the effect that claimant established actual residence upon said land December 25, 1883, and when he presented his final proof November 28, 1884, he had as improvements thereon a log house twelve by twenty-eight feet, with three windows and two doors, two wells, about four hundred rods of wire fence, a corral, stable and bridge, all of the value of \$225. He also stated that "the land is more valuable for grazing than for farming or raising crops," and that none of it had been broken.

You rejected his proof for want of breaking and cultivation, and you further say, "If he has resided on the land subsequent to entry, he may show after duly published notice, any cultivation he may have done upon the land."

With his appeal he submits certificates of the persons who were local officers at the time of his filing and entry, that the instructions sent them from your office at the time said entry was made were in effect that, in grazing districts, stock raising and dairy production are so nearly akin to agricultural pursuits as to justify the allowance of entry upon proof of permanent settlement and the use of the land for such purposes. He also cites a decision of Commissioner McFarland, in the case of Benj. Bird, to the same effect, as quoted in letter "G" of August 29, 1883, by Commissioner McFarland to the register and receiver of McCook Nebraska. Appellant also submits with appeal his own affidavit that his residence had been continuous for more than six months and he had used the land for grazing purposes; that said land was more valuable for grazing than for farming; that of the one hundred and sixty acres not more than fifty could be plowed and successfully farmed and that such farming land lies in two or three patches separated by ravines. That before offering final proof he told the local officers that he had done no breaking and was informed by them that it would not be necessary under their rules. He further states in said affidavit that "most of the level or smooth land was right around his house, and was a good place to picket his horses and that a portion of it was fenced and used for horse pasture and he did not want to break it up."

Where the tract as a whole is better adapted for grazing purposes than for the raising of crops, the erection of necessary buildings and preparation for stock raising, coupled with the use of the land by the claimant for that purpose, and actual and continuous residence with such valuable improvements as indicate good faith, may be held such cultivation as is required by law in regard to that class of lands, but all the facts necessary to be determined should fully appear in the evidence.

In the case at bar it does not appear whether the wire fence was used

to enclose claimant's land alone or other tracts in connection therewith, nor does it appear how many cattle claimant pastured thereon or whether they were his own or the property of other parties. The facts should more fully appear.

The entryman after duly published notice may show acts of cultivation made by him since the entry if any there has been; and if no ground has been broken, he may show the lines on which the wire fence was built at the time of offering final proof, whether the same enclosed his said claim alone, and if any other land was enclosed in common with his he may describe all of such land and give the name or names of the owners. He may state the number of cattle pastured upon his said claim prior to his offer of final proof and the name or names of the owners. He may give the number and kind of stock owned by him at the same time, and he may also state in what employment he was engaged between his filing and final proof and give the name or names of his employers, and upon his failure so to do within ninety days from notice of this decision, his said cash entry will be canceled.

Your decision is modified in accordance with the above.

FINAL PROOF—OSAGE LAND.

BAKER *v.* HURST.

Failure to submit final proof within six months after Osage filing renders the land covered thereby subject to intervening adverse rights.

First Assistant Secretary Muldrow to Commissioner Stockslager, November 30, 1888.

I have considered the case of Andrew H. Baker *v.* Dennis P. Hurst, on appeal of the former from your office decision of April 19, 1887, involving the title to Lots 1 and 2, and S. $\frac{1}{2}$, NE. $\frac{1}{4}$, Sec. 6, T. 34 S., R. 20 W., Larned, Kansas land district.

The tract in question is Osage trust and diminished reserve lands.

On September 24, 1884, the said Dennis P. Hurst filed Osage declaratory statement for the land above described alleging settlement August 25, of the same year.

He made settlement by pitching a tent on the land and having some breaking done and made arrangements to have a house put up, and then returned to Cowley county, Kansas, where he remained during the winter. His wife, however, remained near the land visited it one or more times but established no residence thereon. The house being completed in February, 1885, Hurst began to occupy it about the middle of March, 1885, but before or about April 1, he started to Winfield, Kansas, to attend court being himself a party in a cause pending, and did not return until about May 14, at which time he brought his wife

*Overruled,
J. L. B. 110
(See 9 L. B. 360)*

with him, she having been for some weeks in attendance upon a sick son; and this was the first of her residence upon the land.

During this absence of Hurst and on April 28, 1885, Andrew H. Baker, and family established a residence upon the land.

The actual presence of both families upon the land from April 28, and May 14, respectively, has been continuous.

Baker filed his declaratory statement for said land October 1, 1885, but claims that he made application to file within three months after settlement and could not make filing for the reason that the local office was closed to public business from May 27, to October 1, 1885, on account of the records thereof having been burned. Baker made final proof and offer of payment on December 9, 1885, a little more than seven months after settlement and a few days over two months after filing.

Hurst, however, did not make final proof and offer of payment until November 23, 1885, about fourteen months after filing and nearly fifteen months after settlement.

Upon his appeal from the decision of the register and receiver, Baker specifically assigns as error the failure of defendant to make final proof within the time required by law, and this specification of error you failed to notice it seems, for in your said decision it is stated that "both parties made the usual proof after due notice," and you say further,

I find from the testimony that Hurst was a qualified pre-emptor—that he made the prior settlement and established his residence on the land prior to the intervention of Baker's adverse claim, and that he has complied with all the requirements of the law.

It may be conceded that the proof shows that both parties were qualified pre-emptors, that the residence, improvement and cultivation made by each have been fully up to the requirements of the law, and that Hurst established his actual residence upon the land before Baker did, but in your finding that Hurst "has complied with all the requirements of law," I do not concur.

On June 23, 1881, instructions to the local officers in regard to the sale of Osage lands it was said :

Filing must be made within three months from date of settlement and proof and payment of not less than one-fourth of the purchase price within six months from the date of filing.

This rule is still in force, see *Rogers v. Lukens* (6 L. D., 111).

In said case *Lukens* had filed January 26, 1885, alleging settlement January 1, before, but did not make his final proof until September 12, 1885. *Rogers* filed May 4, 1885, alleging settlement February 13, 1885, and submitted her proof August 13, 1885.

This Department in deciding said case said :

I concur in the finding of your office that *Lukens* was the prior settler, but your conclusion that his failure to make final proof within the required period did not render his claim subject to the intervening right of *Mrs. Rogers*, I cannot accept.

It is further said in said decision that—

While it is true that the prior settlement and improvement of Lukens put all subsequent settlers on notice as to his claim yet he could only maintain such priority by due compliance with law. Now it is conceded that his final proof was not made in time. By this failure his priority was lost, and his rights became subject to any valid intervening claim.

The same construction was also given to the law in the case of *Reed v. Buffington* (7 L. D., 154).

Hurst filed his declaratory statement September 24, 1884, the six months allowed him for making proof and payment expired March 24, 1885; after that day he was in default and it was perfectly proper for another settler, if duly qualified, to file on the land; such settler would thereby gain preference to Hurst. *Elliott v. Ryan* (7 L. D., 322).

Upon the law as announced in these authorities, your said decision is hereby reversed. Hurst's entry will be canceled and the final proof of Andrew H. Baker, accepted.

MINING CLAIM—SCHOOL LANDS—STATE OF COLORADO.

VIRGINIA LODGE.

The State is entitled to sections sixteen and thirty-six under the school grant, if said sections were not known to contain mineral when the survey was approved; and the discovery of mineral on said lands after the survey was approved would not defeat the title of the State.

Title to school lands would not, however, pass to the State by a survey grossly irregular, apparently inaccurate and subsequently set aside; nor would such a survey preclude the location of a mining claim on land returned therein as section thirty six.

Secretary Vilas to Commissioner Stockslager, December 1, 1888.

In the matter of the appeal of W. H. Harvey from the decision of your office of July 28, 1887, it appears, that March 26, 1885, said Harvey made mineral entry, No. 382, for the "Virginia" lode claim, which had been located, August 24, 1883, and lies partly in the SW. $\frac{1}{4}$ of Sec. "36," T. 43 N., R. 8 W., N. M. M., Durango district, Colorado, embracing an area of 2.485 acres in said section 36, exclusive of the conflict of the "Virginia" claim, with two other mineral surveys in said section 36.

As stated in your office decision, "The survey of said T. 43 N., R. 8 W." (in which said section 36 is located) "was approved December 30, 1882, but notwithstanding the deputy-surveyor reported the entire township very mountainous, the same was not returned as mineral in character," and "there is no allegation contained in the record, that said Virginia Lode claim was discovered prior to the approval of said survey, December 30, 1882, nor is it alleged, that said section 36 was known to be mineral at that date." Your office held that under these circumstances, said section 36 "must be held to have passed to the State of Colorado" as school land, "under the provisions of the enabling act of

Congress," approved March 3, 1875, and held said entry for cancellation as to said 2,485 acres in said section 36. From this decision, the present appeal is taken.

By section seven of said enabling act, it is provided that sections 16 and 36 in every township are granted to said State for the support of common schools, and by section fifteen of said act, "That all mineral lands shall be excepted from the operation and grants of this act." (18 Stat., 474.)

The State of Colorado was admitted as a State, pursuant to the provisions of said enabling act, August 1, 1876 (19 Stat., 665), before the survey in this case was approved, and it is held by this Department, that in such cases the State is entitled under said act to sections 16 and 36 for the support of common schools, if said sections were not known to contain minerals at date of the approval of the survey, and that the discovery of minerals on said lands *subsequent* to such approval does not defeat the title of the State. (*Townsite of Silver Cliff v. The State of Colorado* (6 C. L. O., 152); *J. Dartt* (5 C. L. O., 178); *State of Colorado*, 6 L. D., 412). This ruling is based upon the established doctrine, that the grant as to said sections surveyed subsequent to the admission of the State took effect and the State's title vested thereunder upon the approval of the survey.

Until the survey of the township and the designation of the specific section, the right of the State rests in compact—binding, it is true, the public faith, and dependent for execution upon the political authorities. Courts of justice have no authority to mark out and define the land which shall be subject to the grant. But when the political authorities have performed this duty, the compact has an object, upon which it can attach, and, if there is no legal impediment, the title of the State becomes a legal title.

(*Cooper v. Roberts* (18 How., 173); the State of Colorado, *supra*.)

The State's title to the lands having vested on the approval of the survey, the lands not being then known to contain minerals, can not be divested by the subsequent discovery of mineral thereon. To hold the contrary would tend greatly to disparage and unsettle the titles to such lands, and thus lessen their value to the State, and might be productive of great hardship and injustice to purchasers from the State. After issuance of patent, the same rule is laid down as to statutory exceptions of mineral lands from railroad grants. (*Samuel W. Spong*, and cases therein cited, 5 L. D., 193.)

But it further appears in this case, that, while the said township was surveyed and such survey approved, December 30, 1882, as above stated, the same was within three months thereafter (March 31, 1883) withdrawn and suspended from entry by order of your office for irregularities in said survey, and still stands so suspended. The "Virginia" Lode claim was located, August 24, 1883, nearly five months after said withdrawal and suspension, and it is contended by the claimant that, in consequence of such withdrawal and suspension, the lands included within the boundaries of said survey remain "unoccupied mineral lands of

the United States, subject to exploration and occupation, as if such survey had never been made."

The order of withdrawal and suspension of said township as surveyed from entry does not specify wherein said survey is irregular, but only states, as ground therefor, that there are "apparent irregularities" in said survey. On examination, however, of the plat of said survey, I find that it is so irregular in shape—such a gross departure from that rectangular equilateral form, to which township surveys in ordinary cases should at least approximate—that said order of withdrawal and suspension was justified on that account, and the "apparent irregularities" mentioned in the order were, doubtless, irregularities "apparent" on the face of the plat.

It appears, moreover, that the surveys of surrounding townships are irregular in many respects and unreliable.

As shown above, the reason of the rule, that the State's title vests on the approval of the survey is that the survey "marks out and defines the lands subject to the State's grant." A survey so grossly irregular on its face as the survey in this case, and surrounded by other unreliable surveys, by which its own accuracy is necessarily affected, more or less, and which your office promptly set aside, can not be held to have subserved that end. The reason of the rule ceasing, the rule itself ceases. The State's title, therefore, did not vest by reason of said survey, and, there being no other legal impediment, the land in question in this case was subject to the claimant's mineral entry.

The decision of your office, holding for cancellation said entry as to said 2.485 acres, is reversed.

ALABAMA COAL LANDS ACT OF MARCH 3, 1883.

ALICE JORDAN.

Land returned as valuable for coal prior to the passage of the act of March 3, 1883, is not subject to homestead entry until after public offering.

Secretary Vilas to Commissioner Stockslager, December 1, 1888.

On August 20, 1887, Alice Jordan filed her application to make homestead entry for the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 2, T. 18 S., R. 2 W., Montgomery, Alabama. The application was rejected by the local officers for the stated reason that the land is "valuable for coal and not subject to entry."

On appeal by applicant from this finding, the same was affirmed by your office, on October 26, 1887, on the ground that "the tract is shown on the mineral list here as valuable coal."

The applicant again appeals. In the appeal, her attorney alleges that the land in question "lies outside the coal fields proper, and is not valuable for coal or mining purposes, and is valuable only for agricultural purposes, and is properly subject to homestead entry."

In her homestead affidavit the applicant swears that she settled on the land in the year 1872; that she has improvements on the same worth \$100, and that she is now residing thereon.

The tract in question is included in the list of lands in the State of Alabama, reported in 1879, as "valuable for coal," which list is now on file among the records of your office.

By the act of March 3, 1883, (22 Stat., 487) entitled "An act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands," it is provided 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."

The tract involved herein, has not been offered at public sale, as provided by said act, since it was reported as aforesaid, as containing coal, and the same is therefore not subject to entry thereunder.

The allegations that the land is not valuable for coal, and that the same is suitable only for agricultural purposes, are presented through the mere naked statements of appellant's attorney, are wholly unsupported by anything that appears in the record, and can not therefore be considered as proper grounds upon which to base an inquiry, as to the true character of the land.

In view of the foregoing, your decision is affirmed.

FINAL PROOF—TRANSFEREE—EQUITABLE ADJUDICATION.

DAVID W. HICKS.

Where a part of the land was misdescribed in the notice and testimony, the proofs submitted may be accepted, after republication by the transferee, and the entry referred to the Board of Equitable Adjudication, in the absence of protest.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 3, 1888.

I have considered the appeal of David W. Hicks transferee, from the decision of your office, dated May 26, 1886, requiring new publication and new proof upon commutation cash entry No. 476, of the N.W. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of Sec. 12, T. 5 S., R. 72 W., 6th P. M., made by Thomas Woolcock on March 25, 1884, at the Central City land office in the State of Colorado.

The record shows that said Woolcock made homestead entry No. 327 of said land on November 15, 1882, and on February 8, 1884, filed in said office, notice of his intention to make final proof in support of his claim before the local officers on March 25th same year. The published notice, dated February 8, 1884, gave the number of the entry and described the land as the N.W. $\frac{1}{4}$ of the SE. $\frac{1}{4}$, the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, and

the "S. $\frac{1}{2}$ " of the SW. $\frac{1}{4}$, instead of the "W. $\frac{1}{2}$ " of the SW. $\frac{1}{4}$ of said section. The testimony of the witnesses contains the same error in the description of the land, and shows that the entryman was duly qualified to make said entry; that he first settled on his homestead in May, 1882; that he bought the house of a former settler in 1882, and commenced to reside therein with his family in November, 1882; that he was not absent from his homestead until April, 1883, when he took his wife to England on account of her ill health, where she died, and on July 1, 1883, claimant returned to his homestead; that during his absence in England he had a hired man upon his homestead; that his improvements consisting of a hewed log house, sheds, fencing, and twenty acres in cultivation, are valued by one witness at \$1000, by the other at from five to seven hundred dollars, and by the claimant at \$700.

The non-mineral and final affidavits properly describe the land, and the local officers on March 25, 1884, accepted the proof and issued final certificate No. 476, describing the land correctly. On May 26, 1886, your office suspended said entry and called the attention of the local office to the misdescription in said notice, directed them to "call upon the claimant to make proper publication of notice and after expiration of said notice, if no objection is filed to the entry, the proof formerly submitted may be accepted."

On May 2, 1887, the transferee filed in the local office his affidavit corroborated, in which he alleges that said Woolcock made said entry as aforesaid; that after said entry was made, said Hicks purchased the land covered by said entry, from said Woolcock who, shortly afterwards, left the country, and, as the affiant is informed, went to England; that said Woolcock settled upon the identical tract entered by him and that the S. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of said Sec. 12, except so much thereof as is included in said W. $\frac{1}{2}$ of said SW. $\frac{1}{4}$ section, is still vacant and unoccupied land; and that the error in the publication of said notice misled and injured no one; that said Hicks has since sold said land to one Daniel Halderman, who occupied said tract at the date of said affidavit, namely, August 30, 1887. Your office considered said affidavit and denied the request of said Hicks, to wit: that patent issue on said entry, for the reason that the testimony of the witnesses described the land erroneously and that the final proof must be rejected. The effect of said decision is to cancel said entry, for it appears that the entryman can not now make new proof.

There can be no serious question that the entryman complied with the requirements of the homestead law in good faith, and the only defect is in the description of the land in the published notice, and the testimony taken before the local officers. There was no protest and no adverse claim, and the corroborated affidavit of the transferee shows that the tract improperly included in said notice was still vacant and unoccupied.

Upon the facts, as presented by the record, I am of the opinion that

the transferee should be allowed to give new notice properly describing the land, and if no protest or objection is filed thereto, the proof already offered may be accepted and the entry referred to the Board of Equitable Adjudication for its consideration. J. F. Taylor (7 L. D., 273).

The decision of your office is modified accordingly.

HOMESTEAD ENTRY—PROCEEDINGS ON SPECIAL AGENT'S REPORT.

CHARLES F. BURNHAM.

The fact that the entryman did not establish a residence on the land until after his entry had been held for cancellation on the report of a special agent, is not sufficient in itself to warrant a conclusion of bad faith, or call for cancellation of the entry, in the absence of any adverse claim.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 3, 1888.

Charles F. Burnham appeals from the decision of your office of June 25, 1887, holding for cancellation his homestead entry, No. 8132, for the SE. $\frac{1}{4}$ of Sec. 6, T. 129 N., R. 45 W., Fergus Falls district, Minnesota.

Said entry was made, January 16, 1884, and held for cancellation, October 17, 1885, upon the report of Special Agent N. B. Wharton.

A hearing was subsequently (July 13, 1886,) ordered under the circular of July 31, 1885 (4 L. D., 503), as amended by the circular of May 24, 1886 (ib., 545), for the claimant to show cause why the entry should be sustained. From the evidence taken at said hearing, which was had, December 23, 1886, it appears, that the claimant had filed a pre-emption declaratory statement for the land, July 11, 1881, having prior to that time built a shanty and broken five acres thereon, and lived there during the summer of 1881; that on January 16, 1884, he made his said homestead entry, and thereafter rented another place for three years and cultivated said other place during the seasons of 1884 and 1885, and during this time he visited the homestead tract about once a month. He testifies that he rented said other tract for the purpose of raising the means to pay for a team he had bought and to improve the homestead tract, and that from the time he filed said pre-emption declaratory statement, in July, 1881, he has considered said tract his home and had had no other home. His house was a board house, twelve by fourteen feet, with a ten foot addition, a shingle roof, two windows and three doors, and comfortable and moderately well furnished for the claimant (who was a single man) and cost \$50, exclusive of the value of the claimant's labor thereon, and there were seven acres of the land broken, and a part of it sown to barley in 1884, and part to wheat in 1885, but the crops were not harvested, because, as claimant testifies, they were not worth harvesting. This was the state of facts, as shown by the proof, prior to the holding of the entry for

cancellation on the special agent's report, October 17, 1885. After that, in the fall of 1885, the proof shows that the claimant returned to the land, and has since continuously lived thereon as his home, and at the date of the hearing was cultivating a crop of wheat thereon.

The local officers held the entry for cancellation, on the ground, that the claimant "has shown bad faith as to residence and improvements," and your office affirmed this ruling.

It is true the claimant did not commence living upon the land continuously until after the entry had been held for cancellation on the report of the special agent, but I do not think that this circumstance, considered in connection with all the facts in the case, shows conclusively that claimant has acted in bad faith, and, as there does not appear to be any adverse claim and the question is between the claimant and the government, you are instructed to allow the entry to remain intact, subject to the claimant's full compliance with the law within the lifetime of said entry.

The decision of your office holding said entry for cancellation is reversed.

FINAL PROOF—EQUITABLE ADJUDICATION.

CYRUS H. THOMPSON.

The final proof submitted may be accepted and in the absence of protest or adverse claim, the entry sent to the Board of Equitable Adjudication, where the proof was not made on the day advertised, but new publication was thereafter duly made.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 3, 1888.

I have considered the appeal of Cyrus H. Thompson from the decision of your office, dated July 8, 1887, requiring new publication and proof in support of his pre-emption claim for the E. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 10, T. 138 N., R. 86 W., 5th P. M., Bismarck land district, in the Territory of Dakota.

The record shows that on August 19, 1884, the register gave due notice of the intention of said Thompson to make final proof in support of his pre-emption claim for said land, before said local land officers at Bismarck, Dakota Territory, on October 2, 1884.

The final proof appears to have been submitted on October 8, same year. It shows that claimant was duly qualified to make said entry; that he has complied with the requirements of the pre-emption laws and the regulations thereunder relative to inhabitancy and improvements, which consist of a good house sixteen by twenty-four feet with a kitchen addition ten by twelve feet, out-houses, a well, and five acres of breaking, all worth \$400.

The local officers accepted the proof, received payment, at \$2.50 per acre for the land, and issued cash certificate No. 662 for the same.

On April 25, 1887, more than two and one half years after the issuance of said certificate, your office suspended said entry and required the claimant "to make new publication and posting of notice of his intention to make proof and to furnish the same taken at the time and place and before the officer named therein." On May 9, 1887, the register gave notice of claimant's intention to make final proof before the local officers at Bismarck in said Territory on June 20, same year. On the last named date, the local officers transmitted proof of such publication and posting of notice, and they also certify that on said 20th of June, no adverse claimant appeared during the day and no protest of any character had been filed involving the good faith of the claimant or his right to the land.

On July 8, 1887, your office directed the local office to require new proof as directed by your office letter dated April 25, 1887. The local officers, on July 12, 1887, referring to the decision of your office dated July 8, 1887, state that the claimant was not required to make new proof on account of the ruling of the Department in the Crossthwaite decision (4 L. D., 406) and also the decision of your office, dated May 11, 1886, in the case of Charles H. Sanger, whose proof was defective in the same particular as the claimant's.

With his appeal, is filed the affidavit of claimant, alleging that he was informed by the register that he would not be required to make new proof, only new publication and posting of notice; that, at the time of republishing his said notice, he could have easily procured witnesses and could have made new proof, but now his witnesses are scattered, and it would cause him great trouble and expense to make new proof; that claimant has acted in good faith and in accordance with the information that he received from the officers of the land office, and he asks that he may not be put to more trouble and expense in perfecting his said entry.

From the foregoing, it is clear that the failure to furnish new proof was owing to the advice of the local officers, and it would be an unnecessary hardship to cause the claimant to make another publication and new proof. He has already given two notices by publication and no protest or objection has been filed. His final proof if submitted on the day advertised, would have been ample, his good faith is unquestioned, and the irregularity in this case as shown by the record, is one that, in my opinion, may very properly be cured by the action of the Board of Equitable Adjudication.

The decision of your office is modified accordingly and said entry will be referred to the Board of Equitable Adjudication for its consideration.

FINAL PROOF—NOTICE—RESIDENCE.

ULRICH FUCHSER.

A proper description of the land in the published notice is absolutely essential. The plea of poverty will not be accepted as an excuse for absences from the land, where good faith is not apparent.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 3, 1888.

I have considered the appeal of Ulrich Fuchser from the decision of your office dated May 10, 1887, requiring him to make new proof, after due publication, upon his pre-emption claim for the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of Sec. 24, T. 29 R. 22 W., 6th P. M., Valentine land district, in the State of Nebraska.

The published notice of intention to make final proof erroneously described the land as the N. $\frac{1}{2}$ of the SW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the SE. $\frac{1}{4}$ of the NE. $\frac{1}{4}$ of said Sec. 24.

The final proof made for the land which he claims, on the day and before the clerk of the court as advertised, shows that the claimant was duly qualified to make pre-emption entry; that he settled upon said land in March, 1884, built a house twelve by twelve feet, and established his residence therein April, 1884; that his residence has been continuous but the claimant has been at work as a section hand, being upon his claim from Saturday evening until Monday morning; that his improvements consist of said house, a well and six acres of breaking—all worth \$50.

The local officers accepted the proof and issued final certificate No. 529, thereon, dated November 9, 1884.

Your office, on May 10, 1887, suspended said entry and rejected the proof because the notice was erroneous and because the final proof as to residence and improvement was insufficient to show the good faith of the claimant. The claimant was required to give new publication and make new proof as required by law and the regulations of this Department thereunder.

With his appeal, the claimant has filed his affidavit, corroborated with several other affidavits, in which he alleges that he was a very poor man, and obliged to work out to make a living; that he borrowed part of the money necessary to make his improvements and pay the purchase money on said land; that his employment on the railroad ceased and he was obliged to go away, as he could not make a living on said land; that he proved up his claim so that he might be away and earn a living; that afterwards, he made homestead entry of another tract of land, and, hence, can not comply with the requirements of your office as to further residence on his pre-emption claim.

From the claimant's own showing, it does not appear that the decision of your office is erroneous. A proper description of the land in

the published notice is absolutely essential. See act of March 3, 1879 (20 Stat., 472); *F. M. Crossthwaite* (4 L. D., 406); *United States v. Bayne* (6 L. D., 4); *Alfred Sherlock* (*ibid.*, 155); *Nancy E. Adams* (*ibidem* 705).

Again, the explanation of claimant is not deemed satisfactory. He does not state where the land is situated that he subsequently entered under the homestead law. If, as he claims, he could not make a living on his pre-emption claim upon which his improvements are valued at \$50, it is quite remarkable that he should seek to enter another tract of land under the homestead law, upon which he had to pay a fee and is required to make valuable improvements.

A careful examination of the whole record leads me to the conclusion that the decision of your office is correct, and it is accordingly affirmed.

TIMBER CULTURE CONTEST—SECOND CONTEST; PLANTING.

D'ACRES *v.* TUTHILL.

In determining whether a charge of non-compliance with law is supported by the evidence the good faith of the claimant is entitled to due consideration.

The claimant is justified in adopting a method of planting found to result successfully in that vicinity.

An unsuccessful contestant may file a new contest against the same entry, charging failure to comply with the law since the date of the hearing under the first, and include therein a charge against the good faith of an intervening contest.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 3, 1888.

I am asked to review the decision of the Department of July 24th last, in the above stated case, upon the following ground:

The Hon. Acting Secretary's decision ignores the specific points of exception to the Commissioner's decision alleged in the appeal, and simply concurs in the conclusion reached by the Commissioner, without showing wherein a single point raised in contestant's appeal is erroneous, without force, or contrary to the fact.

The decision complained of is a simple affirmance of your decision of June 3, 1886, affirming the action of the local officers in holding that, although claimant failed to secure such a growth of trees as the law contemplated, and that the method of cultivation was not such as the climate and soil of Dakota requires for successful timber culture, the evidence fails to show such a want of good faith as to work a forfeiture of claimant's possessory right to the land.

It is claimed by the applicant in this motion that the failure on the part of the entryman to show a strict compliance with the requirements of the timber culture law, subjects his entry to forfeiture in favor of the contestant, upon proof of the same, and that the question of intention of good faith can not operate to waive a positive mandatory requirement of the law.

The evidence in this case shows that during the first two years after entry (May 3, 1878,) he broke and cultivated twenty acres. In the spring of 1880 he planted three acres to walnut and other tree seeds, and in the fall of the same year planted four acres more to ash seeds. The planting was done by dropping the seeds in furrows plowed eight feet apart through the stubble of the barley raised that year, and covering them with a harrow drawn across the furrows. In May, 1881, he planted four acres more in the same manner. During that season, the seven acres planted in 1880, were cultivated with a corn-plow, and the seeds planted in 1881 were cultivated by dragging a harrow between the furrows, and in the spring of 1882, the eleven acres then planted were cultivated in the same way. In the spring of 1883, a man, hired to plow up a certain portion of the tract, upon which trees failed to grow satisfactorily, and with a view to replanting them, plowed up two acres of claimant's best trees. This space was replanted with ash seeds. In the spring of 1884, ten acres were planted to two year old cottonwood trees, in furrows eight feet apart, by placing the trees in the furrows and pressing the earth to them. In July, 1884, the first ten acres were re-plowed, with a view to re-planting trees in the spring of 1885.

Some of the witnesses testified that there were scarcely any trees on the tract, while others testified that there were over six thousand.

Although the method of planting adopted by claimant was not successful in growing trees, he was justified in pursuing that method from the fact that others in the same vicinity, who pursued the same method, were successful, and it was evidently in view of this fact that the local officers and your office found that the failure was due to no fault of claimant, but that he exercised such judgment and care as any prudent man under the circumstances would do.

In such cases the good faith of the entryman being clearly shown, and it appearing that he can perfect his entry within the time allowed by law, I can see no error in holding that such failure does not work a forfeiture of the claim. I think the good faith of the claimant is an element that may properly be considered.

It is further alleged by the applicant that a new contest against said timber culture entry was filed in the local office while this case was pending before the Department and before the decision of the Department of July 24th last, reiterating all the allegations contained in D'Acres's application for contest, which the applicant has grounds for believing was a collusive or friendly contest filed in the interest of Tuthill's heirs, for the purpose of frustrating a new contest by D'Acres, and preventing him from showing by said new contest that Tuthill had utterly failed since the former hearing to make any attempt to comply with the timber culture act, thereby depriving D'Acres of the position he had occupied as a prior legal applicant to enter the land at any time within thirty days after cancellation of Tuthill's entry.

This question can not be considered in this motion, inasmuch as the contestant has a right to file a new contest against said entry, alleging failure to comply with the law since the date of said hearing, and to allege the collusive and friendly character of the contest above referred to, and to have all his rights in the premises fully passed upon and considered on the trial of said contest.

The motion is denied, and the papers are herewith returned.

HOMESTEAD ENTRY—MARRIED WOMAN.

ALICE M. GARDNER.

The right acquired by the homestead entry of a single woman is not affected by her subsequent marriage.

Such an entry, canceled on relinquishment filed as the result of a different ruling by the General Land Office, may be properly re-instated.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 4, 1888.

This record presents the appeal of Alice M. Gardner, *nee* Alice M. Church, from your office decision of October 19, 1887, refusing to re-instate her homestead entry for SE. $\frac{1}{4}$ Sec. 30, T. 9 S., R. 2 E., Oregon City, Oregon.

Alice M. Church made homestead entry for said tract April 4, 1884, and on November 3, 1885, married Frank M. Gardner.

On July 14, 1885, your office held in the case of Maria Good, (13 C. L.O., 102), "that a woman who makes a homestead entry and subsequently marries before completing the same, forfeits her right thereby to acquire title to the land."

Claimant learned of said decision and thereupon wrote to the local officers, "for the purpose of learning whether in any way she could save her homestead for her own individual use and benefit." In response thereto the register by letter, informed her that under the ruling of your office she had "forfeited her homestead right when she became married." Thereupon, on October 18, 1886, she relinquished said entry and on the following day her husband made entry for the tract.

On October 22, 1886, the Department reversed the ruling of your office in said case of Good, and held that the right acquired by the homestead entry of a single woman is not affected by her subsequent marriage. (5 L. D., 190).

Upon learning of this action, claimant herein applied for a re-instatement of her said entry. Her petition shows that she has complied with the law from date of entry and had on the claim when she made said relinquishment, a dwelling house and barn, thirty acres under fence, about fifteen acres under cultivation with one and a half acres of an orchard valued in all at \$1,000.00.

It further appears that the relinquishment was made as a result of your office decision in the Good case. Fearing that she would lose her improvements under said ruling she relinquished, and procured the entry by her husband. No reason appears for doubting her good faith throughout. With the record is an agreement signed by claimant's husband, that he will relinquish his claim to said land on condition that he be allowed a new homestead entry for other land.

Under all the circumstances the petition of claimant should be granted. She was led into executing the relinquishment by the advice of the local officers, acting in accord with the ruling of your office. While it is true the relinquishment was not necessary to protect her interests, she was led to believe otherwise by the erroneous ruling of your office.

Her entry will, therefore, be re-instated upon the presentation to the local officers of a properly executed relinquishment of the tract by her husband. His right to make a new homestead entry "for other land" will not now be considered.

Said decision is accordingly reversed.

PRE-EMPTION ENTRY—CITIZENSHIP.

PAUL O. BREWSTER.

Failure of the pre-emptor to file declaration of intention to become a citizen, will not defeat his right to a patent, if such defect is cured prior to the intervention of any adverse right.

An incorrect statement in the final proof as to the claimant's citizenship may be excused, where it was made under a misapprehension of the law, and not with the intent to swear falsely.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 4, 1888.

I have considered the appeal of Paul O. Brewster, from your decision of August 1, 1887, holding for cancellation his pre-emption cash entry for NE. $\frac{1}{4}$, NE. $\frac{1}{4}$, section 7, NW. $\frac{1}{4}$, NW. $\frac{1}{4}$, section 8, SE. $\frac{1}{4}$, SE. $\frac{1}{4}$, section 6, and SW. $\frac{1}{4}$, SW. $\frac{1}{4}$, section 5, T. 32, R. 55 W., Valentine, Nebraska, land district.

It appears from the record that said Brewster made final proof on the above described land November 1, 1886, and received final certificate, and on December 4, 1886, he made a homestead entry of other land. In his final proof it is stated that he is "native born of the United States," while in his homestead entry, made about a month later, it appears that he was of foreign birth, and he filed therewith a copy of his declaration of his intention to become a citizen.

Upon appearance of this discrepancy your office held the said cash entry for cancellation, as above stated.

With his appeal claimant filed affidavit alleging that his final proof blanks were filled in by the clerk of the district court, before whom said proof was taken; that affiant did not state to said officer that he was native born, but said in reply to the proper question, that he was a minor at the time his father became naturalized, and was informed by said clerk that under the circumstances stated he would be a citizen the same as native born, and the said clerk so filled out the answers in final proof affidavits, which affiant permitted him to do in the belief that said clerk's statement was correct, and that affiant had no intention of testifying falsely. This is corroborated by the affidavit of C. H. Andrews.

In *Mann v. Huk* (3 L. D., 452) the defendant was not a naturalized citizen and had not filed his declaration to become such at the time of filing his declaratory statement, but declared his intention to become a citizen before plaintiff made his homestead entry, and Secretary Lamar in deciding the case on appeal said,

It is the settled ruling of this Department that when a defect of this sort exists it may be cured by fulfilling the requirements of law at any time prior to the intervention of an adverse claim, and otherwise showing good faith.

See also *Ole O. Krogstad* (4 L. D., 564), and *Jacob H. Edens* (7 L. D., 229).

The claimant having declared his intention to become a citizen of the United States and the incorrect statement as to his citizenship made in his final proof being inserted under a misapprehension of the law and not with the intent to swear falsely, his cash entry may be passed to patent.

Your said decision is accordingly reversed.

PRE-EMPTION—SECTION 2260, REVISED STATUTES.

OLE K. BERGAN.

The prohibition in the second clause of section 2260, R. S., 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.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 4, 1888.

Ole K. Bergan filed declaratory statement for lot 6, section 35, T. 115 N., R. 38 W., Redwood Falls, Minnesota, October 2, alleging settlement October 1, 1886.

The land filed for is an island containing 22.05 acres.

May 23, 1887, pursuant to notice, proof was made showing continuous residence since October, 1886, and improvements consisting of a house and fencing, valued at one hundred dollars.

Bergan testified that he removed from land of his own to make settlement as a pre-emptor. No crops had been raised the land having been used for grazing purposes.

May 26, 1887, this proof was rejected by the local officers because it was based upon a filing made in violation of Section 2260, Revised Statutes, which provides that no person who quits or abandons his residence on his own land to reside on the public land in the same State or Territory, shall acquire any right of pre-emption.

June 16, 1887, an appeal was filed on the ground that Bergan had acted in good faith.

September 15, 1887, you affirmed the decision of the local officers as being in accordance with law, rejected the proof, and held the filing for cancellation, because it was illegal.

From your said decision the claimant appeals.

In an affidavit dated October 13, 1887, he deposes that he had a contract to buy lot 2, section 35, T. 115 N., R. 38 W., and that if certain payments were made at a certain time, he should get a warranty deed therefor; that at the time of his filing and settlement on the land involved herein, he had only partly paid for said lot 2, and had received no warranty deed therefor. It was from this lot that the claimant removed when he made settlement on the pre-emption claim.

The fact that the claimant had not made all the payments on the land from which he removed when he made settlement on the pre-emption claim, and had not received a deed therefor, will not serve to exempt him from the inhibition of the statute. See case of *Ware v. Bishop* (2 L. D., 616), where it is held that when a party has paid for the land though no deed has passed, he is an owner of such land and cannot remove therefrom and become a pre-emptor of public land. And in the case of *Frank H. Sellmeyer* (6 L. D., 792), it is held the prohibition in the pre-emption law against persons who quit or abandon their residence on their own land is not restricted to those who hold legal title to said abandoned land but extends as well to those who hold under equitable title.

While it does not appear that the claimant in this case had made all the payments he had agreed to make before receiving the deed of the land from which he removed, it is not alleged that he has abandoned his right to make the payments as they fall due, or that the contract does not exist in full force and that when the necessary payments shall have been made he will not receive title. Under such circumstances, I think he had such ownership in the land as brings him within the prohibition of Section 2260 of the Revised Statutes.

Your decision is therefore affirmed.

PRE-EMPTION ENTRY—REPAYMENT.

SAMUEL K. PAUL.

Repayment may be allowed where an entry is canceled for insufficient residence, but no fraud appears.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 4, 1888.

I have considered the case of Samuel K. Paul, on his appeal from your office decision of June 23, 1887, refusing repayment of the purchase money paid by him in his pre-emption cash entry for NE. $\frac{1}{4}$, section 25, T. 116 N., R. 78 W., Huron, Dakota, land district.

It appears from the record that on the 31st day of May, 1884, Samuel K. Paul, filed declaratory statement for the land above described alleging settlement on the 10th day of the same month.

On July 12, 1884, one Banker filed declaratory statement for the same land alleging settlement on May 13th previous.

On November 15, 1884, Banker made final proof before an officer named in his notice, and on December 4, 1884, Paul made his final proof before the local officers, paid them the money and received final certificate.

Banker subsequently protested against the entry of Paul and upon a hearing ordered for the purpose, the local officers decided in favor of Banker upon the ground that Paul's residence and cultivation had been insufficient. Upon appeal your office affirmed the decision of the local office and Paul without appeal to this office relinquished his entry and petitioned for repayment of purchase money.

In your said decision you say

Paul's right to the land was superior to Banker's, if he had complied with the law under which he made his entry, the government could and would have confirmed the sale, but it was proven that he never established a residence upon the land in question.

From the circumstances of the case I am of the opinion that the law does not provide for repayment in a case of this character.

In your office letter "G" of December 15, 1886, written to the register and receiver of the local office wherein you held Paul's entry for cancellation, you say,

One feature of the case would indicate great carelessness on the part of the local officers. On August 7, 1884, the usual published notice was given in behalf of Banker by Geo. B. Armstrong, register. On September 4, 1884, a similar notice was published in behalf of Paul without regard to that of Banker. On November 15, 1884, the day named in the notice, Banker appeared and made his proof before the officer designated and deposited the purchase money with him. On December 4, 1884, Paul made his proof before the receiver, and entry papers issued thereon, notwithstanding the published notice of Banker.

It is provided in Sec. 2, of the Act of June 16, 1880, that:

In all cases where homestead or timber-culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be con-

firmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled, etc.

In John Carland (1 L. D., 532) it was said :

There was no conflict, the entry was not erroneously allowed and might have been confirmed. As there has been no fault or error on the part of the government, the Department is without authority in the matter.

In Duthan B. Snody (1 L. D., 532) it was held that the act of June 16, 1880, was remedial and should be liberally construed, and that where entry for any cause, had been erroneously allowed, no fraud appearing, repayment should be made.

In Howard W. Laug (3 L. D., 518) it is said—"There is nothing in the record to show that the entryman has been guilty of any fraud or intentional wrong, and to refuse to refund the purchase money in this case, would be a kind of confiscation unwarranted by law and manifestly unjust."

In the case at bar the claimant failed in the contest because of insufficiency of residence, and in Minerva A. Widger (6 L. D., 694) the claimant admitted facts showing insufficiency of residence, and it was held that as there was no fraud shown, repayment should be allowed.

There being no fraud shown and the entry having been wrongfully allowed by the error of the local officers, as stated in your letter above referred to, I am of the opinion that repayment should be made.

Your decision is accordingly reversed.

MILL SITE—AMENDED SURVEY.

SENATOR MILL SITE.

An amended survey will be required where no connection is shown with a mineral monument, or a corner of the public surveys.

In requiring such amendment the applicant should be informed that his entry will be canceled if such requirement is not complied with in a specified period.

Secretary Vilas to Commissioner Stockslager, December 4, 1888.

I have considered the appeal of the Lester Mining Company from the decision of your office, dated July 11, 1887, holding for cancellation mineral entry, No. 136, of the Senator mill-site claim, made January 7, 1885, at the Prescott land office, in the Territory of Arizona.

The record shows that your office, on December 4, 1886, examined the papers in said entry, and advised the United States surveyor-general for Arizona, that the survey of said mill-site could not be accepted, because it did not show any connection with a United States mineral monument, nor with a corner of the public surveys, and that an amended survey must be made, in accordance with the regulations of your office. The surveyor-general was also required to furnish an additional certificate, showing the necessary expenditure upon said mill-site.

On June 18, 1887, the surveyor-general advised your office that the claimants, after having been duly notified of the requirements of your said office letter of December 4, 1886, had failed to take any action relative thereto. Thereupon, your office, on July 11, 1887, held said entry for cancellation.

The requirements of your office decision of December 4, 1886, were proper and in accordance with the regulations of the Department. But no date was fixed within which the claimant would be required to comply, nor was the company advised that the entry would be canceled for non-compliance.

I am, therefore, of the opinion, that the company should have sixty days from notice hereof within which to furnish the amended survey and the proof as to the required expenditures upon said mill-site, and in the event that they fail so to do, said entry will be canceled.

The decision of your office is modified accordingly.

— — —

HOMESTEAD ENTRY—COMMUTATION.

PETER WEBER.

Where the residence shown on final proof is found insufficient, but bad faith is not apparent, the entryman may be permitted to submit commutation proof, although the statutory life of the original entry has expired.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 4, 1888.

I have considered the case of Peter Weber, involving the SE. $\frac{1}{4}$ of section 1, T. 101 N., R. 55 W., Mitchell, Dakota, on appeal from your decision holding for cancellation both his original homestead entry and his final certificate for said land.

The entry was made June 10, 1879, and final proof March 19, 1886. The final certificate was issued March 23, 1886.

It is stated in the final proof that the entryman, a single man aged twenty-eight years, established his actual residence on the land April 30, 1880. His first house was a sod house twelve by fourteen, with door and window, and shingle roof. He subsequently built a frame house with shingle roof, door and four windows. He dug a well and broke fifty-five acres of ground. He has raised crops for six seasons. He values his improvements at \$355. Asked for what period he had been absent, he said: "I have not been absent from said tract to exceed four and one-half months at any one time—when I was residing with my father's family and at work on his homestead one-half mile from my homestead. My father and I have our stock together."

Upon cross-examination he said: "I have been absent from said claim during the winters of 1880—1881—1882—1883—and 1884 at my father's place for the purpose of work and taking care of the stock, the longest period of any one absence being from November 15, 1880, till

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9 L. D.*

April 1, 1881. I was absent from December 31, 1885, till March 18, 1886, at work as aforesaid. I am unable to give a more definite statement as to the exact dates each year."

He testified that he had in the house bed and bedding, table, stove, chair and dishes of the value of \$15.00.

By letter of February 15, 1887, you held the original entry and the final certificate for cancellation on the ground that the entryman did not maintain a continuous residence upon the land. You say—

I am of the opinion that when a settler regularly leaves his homestead year after year, upon the approach of cold weather, he forfeits all of his right to acquire title to the land.

In an affidavit duly corroborated, dated April 14, 1887, the entryman states that he has not alienated any part of said land, but has used it for a farm and home for himself and family (having married since making proof) and has made valuable improvements, viz:—a frame barn thirty by thirty-two, value three hundred dollars, six acres of breaking valued at eighteen dollars, twenty dollars of fencing and a well sixteen feet deep, valued at twenty dollars.

The proof does not show to my satisfaction that the residence of the entryman during the whole period claimed, was on the tract involved to the exclusion of one elsewhere. There is, however, no adverse claim and no testimony controverting his statements. His residence after proof was made, as stated in his affidavit, and the valuable improvements made by him may be taken into consideration as showing that the entry was not made in bad faith but with the intention of securing the tract for a home. The statements of the entryman, however, are not corroborated. Under these circumstances while the entry can not be passed to patent upon the proof submitted and while new proof can not be made within the statutory period, I will so modify your decision as to give the entryman the opportunity within ninety days after the receipt of notice hereof to commute his entry in accordance with the provisions of section 2301, Revised Statutes.

MINING CLAIM—NOTICE—EQUITABLE ADJUDICATION.

ROWENA LODE.

In the absence of any protest or adverse claim, a mineral entry may be referred to the Board of Equitable Adjudication, where the notice and plat of survey were not posted on the claim, owing to its inaccessibility, but were posted in a conspicuous place on an adjoining claim, and it appears that the law has been fully complied with in all other particulars.

Secretary Vilas to Commissioner Stockslager, December 5, 1888.

I have considered the appeal of Elizabeth Gwynn from your decision of February 23, 1887, holding for cancellation mineral entry, No. 2500,

made April 20, 1885, by her upon the "Rowena" lode claim, survey No. 3911, Leadville, Colorado.

Said survey was made January 8, 1885, and the above named claimant, on February 2, 1885, filed her application for patent. Notice of her intention was given by publication and by posting.

April 20, 1885, no adverse claim having been filed and no objection having been made, entry was allowed, the money paid for the land, and final certificate issued.

When the case came up for action in your office, it was found upon an inspection of the record "that during the statutory period of publication, a plat of said claim and a notice of the application for patent therefor were not posted on the claim, but, on the contrary, were posted on the Wheeler claim (survey No. 3910), which is adjacent thereto; at a point about 1000 feet southeasterly from the southeast end of said 'Rowena' claim."

Your decision holds, in effect, that in view of the requirements of section 2325 of the Revised Statutes you are in such case without authority of law for issuing patent as requested, and that therefore the reasons assigned for failure to post on the claim can not be accepted, nor considered.

Section 2325 of the Revised Statutes provides, among other things, that a person, association or corporation, seeking a patent for mineral land shall post a copy of the plat of survey, together with a notice of the application for patent, "in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice" in the proper land office. To render the notice complete, the register shall publish it "for the period of sixty days in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period."

After speaking of the evidence required as to improvements, the statute goes on to say, that :

At the expiration of the sixty days of publication, the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists.

In this case, the publication and posting in the local land office appear to have been in strict accordance with the law above quoted, but there was no posting on the claim. Instead, there was posting of notice of this claim on an adjoining claim, in which it appears this applicant is also interested. The reason assigned for such posting is, because of its "not being possible to post on claim."

In further explanation of this statement is the affidavit of two persons, who swear that the notice was posted on the Wheeler lode, adjoining this claim, on the northwest side of a building, at the mouth of discovery tunnel; that it was not posted on the "Rowena" claim, because of deep snow, and danger from snow-slides, which are very frequent in the locality, and it was impossible without risk of life to so post; that there is on the claim no tree, cabin, or other suitable object upon which said notice could have been posted, had the claim been accessible; that had it been possible to post on a stake, the notice would soon have been swept away by snow-slides; that owing to the practical inaccessibility of the "Rowena" lode, the notice was much more conspicuous as posted; that the house upon which the plat and notice were posted is the only inhabited building in the locality, and that access to the "Rowena" lode can only be gained by a trail, which passes the house on which said notice was posted within plain and easy view of the notice as posted.

It is contended on appeal that the facts as above stated show such a compliance with the law as to entitle the applicant to a patent.

The object and purpose of the law relating to publication and posting of plat and notice of intention, preliminary to the allowance of an application for patent, is to afford an opportunity to adverse claimants or others to object and to present the grounds of their objections. In this case that object or purpose seems to have been met by the notice as made.

On the facts as presented, it may truly be said that as a fact the purpose of the law was as well, if not better, accomplished by the posting as made, than it would have been by posting on the claim.

The notice was posted in a conspicuous place on the only building in the locality. This building was at the mouth of the tunnel, which was being operated for the benefit of the claim in question, in common with others, and was on the only trail by which the claim could be reached. So placed, it was certainly more effectual as a notice than it would have been had it been placed on a practically inaccessible tract.

There is no adverse claim, and no protest has been filed against the allowance of patent. Good faith on the part of the claimant seems manifest, and while the direction of the statute has not been literally followed, there has in my judgment been such substantial compliance with the law as, in view of the facts and circumstances, will warrant the reference of the case to the Board of Equitable Adjudication for its action, under sections 2450 to 2457 of the Revised Statutes.

You will accordingly make such reference by a special letter, setting out the facts and referring to this decision.

Your decision is modified accordingly.

PRACTICE—APPEAL—INTERLOCUTORY ORDER—INTERVENOR.

MARY L. TIFFANY.

An appeal will not lie from the action of the General Land Office in requiring a claimant to file additional evidence in support of his entry, but only from final action in the case, on the refusal or failure of the entryman to comply with such requirement.

The unsworn statement of a stranger to the record is not sufficient to entitle him to the right of appeal.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 5, 1888.

I have considered the appeal of Mary L. Tiffany, as transferee, in the case of Mary E. Barnett's pre-emption cash entry No. 11952, for the NE. $\frac{1}{4}$, SW. $\frac{1}{4}$, W. $\frac{1}{2}$, SW. $\frac{1}{4}$, Sec. 3, and NW. $\frac{1}{4}$, NW. $\frac{1}{4}$, Sec. 10, T. 110 N., R. 77 W., Huron land district, Dakota Territory.

The record shows that Mary E. Barnett filed declaratory statement No. 10058, for said described tract June 3, 1884, alleging settlement thereon May 29, same year.

On December 1, 1884, in accordance with published notice, she made final proof, and payment, before the clerk of the district court, at Pierre, Dakota Territory, which was approved by the local officers and cash certificate No. 11952, issued thereon December 17th, same year.

On July 8, 1887, your office by letter "G," notified the register and receiver that—

Claimant, who is a single woman, settled and established her residence on said tract June 1, 1884, and made proof on December 1, 1884. Her improvements consist of a house and five acres broken, value of same \$100.00. She has raised no crops. I am of the opinion that claimant has not made sufficiently valuable improvements to warrant the allowance of her entry, and you will require her to furnish an affidavit, showing whether she is still the owner of said land, and the character and value of the improvements she has made thereon since date of making final proof.

On or about July 23, 1887, one Mary L. Tiffany filed in your office an unsworn statement, in which she alleged, that she was the present owner of said described tract; that she purchased the same of Mary E. Barnett, and paid taxes thereon for two years, and had in her possession the receiver's receipt for said one hundred and sixty acres; she also asked to be informed as to her rights in the premises.

On August 13, 1887, said Tiffany by her attorney filed an appeal, in which it is alleged:

1st. It was error to suspend such proof, it being in evidence that claimant had resided on the tract continuously for six months preceding the date of entry.

2d. It was error to hold that claimant's improvements were not sufficient.

3d. It was error to require an affidavit to show that claimant was still the owner of said land.

4th. It was error to call for evidence to show the character and value of improvements made by claimant, since date of entry.

5th. It was error not to have approved said entry for patenting, upon the said proof presented, the same being sufficient under the pre-emption law.

Upon review of the record in this case, I am convinced upon two grounds, that the appeal herein is not well taken, viz: 1st: Your office letter of July, 1887, only required the entryman "to furnish an affidavit showing whether she is still the owner of said land, and the character and value of the improvements she had made thereon since date of final proof."

In the case of Jennie M. Tarr (7 L. D., 67), this Department held that "An appeal will not lie from the action of the Commissioner of the General Land Office, requiring a claimant to furnish an additional affidavit in support of his entry, but only from his final action in the case upon the refusal or failure of the entryman to comply with said request."

There is nothing in the record of the case at bar, to show that the said cash entry has been held for cancellation.

2d. The unsworn statement filed by Mary L. Tiffany, who is not a party of record in the case, is not sufficient under Rule 102 of Practice, to entitle her to the right of appeal.

For the reason, herein stated, the appeal is dismissed.

RAILROAD GRANT—ACT OF JUNE 22, 1874.

FLORIDA RY. & NAVIGATION Co. v. DICKS.

A relinquishment under the act of June 22, 1874, when accepted by the proper officer of the government, is at once operative; and the land covered thereby is released from all claim of the company, and becomes subject to disposal under the general land laws.

Secretary Vilas to Commissioner Stockslager, December 6, 1888.

I have before me the appeal of the Florida Railway & Navigation Company from your decision of March 29, 1887, holding for confirmation Abraham Dick's cash entry 10,002, made March 18, 1885, under the second section of the act of June 15, 1880, for the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, T. 15 S., R. 22 E., Gainesville district, Florida.

The tract in question is within the six mile (primary) limits of the grant now claimed by the above named company (as successor to the Atlantic, Gulf & West India Transit company), between Waldo and Tampa, under the act of May 17, 1856 (11 Stat., 15).

A withdrawal for the benefit of said grant was ordered September 6, 1856, and the lands were again ordered withdrawn by letter of March 16, 1881, which was received at the local office March 26, following.

On April 1, 1876, the board of directors of the Atlantic Gulf & West India Transit Company, adopted a resolution waiving its claim to lands between Waldo and Tampa occupied by settlers who should be found by this Department to be entitled to equitable relief, up to December 13, 1875; and on June 25, 1881, the company extended said relinquishment in favor of "all actual bona fide settlers who made im-

provements prior to the 16th day of March, 1881." In making the said relinquishments the company reserved the right to make "lieu" selections under the act of June 22, 1874, and the records show that on March 29, 1882, per list 2, the company selected the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 18, T. 14 S., R. 23 E., in lieu of the tract in question.

The said tract now in question—the NE. $\frac{1}{4}$ SE. $\frac{1}{4}$, Sec. 23, T. 15 S., R. 22 E., was entered as a homestead by said Dicks on November 21, 1879, and by him purchased under the act of June 15, 1880, on the 18th of March, 1885.

Upon these facts your office, in the decision appealed from, "held that by reason of said lieu selection the railway company abandoned all claim and right to the land covered by Dicks' entry and as the records show no other claim adverse thereto, said entry should be held for confirmation.

On appeal the company insists "that, as declared in the case of said company against Miller, (3 L. D., 324) a final entry cannot be legally made under the act of June 15, 1880, without proof of good faith and facts which would bring the case under the waiver of the company."

But this contention cannot be sustained. As was held in the case of the Hastings & Dakota Railway Co. (6 L. D., 716),

A relinquishment under the act of June 22, 1874, is made to the United States and when accepted by the proper official of the government becomes at once operative, and the company is entitled to select lands in lieu of those relinquished, provided said lands were in such condition as to warrant a relinquishment, without regard to the ability or intention of the settler to perfect his claim. The land by reason of such relinquishment is released from all claim of the company and is subject to disposal under the general land laws.

This being so, and Dicks having thus been left at liberty to perfect his homestead entry, the company has no interest entitling it to insist on his proving up in the ordinary way, as distinguished from his purchasing under the act of 1880.

Your said decision is accordingly affirmed.

FINAL PROOF—EQUITABLE ADJUDICATION.

JAMES A. CAIN.

In the absence of protest or adverse claim, an entry may be referred to the Board of Equitable Adjudication, where the testimony of the final proof witnesses was not taken on the day named, or before the officer designated, but the claimant's own evidence was submitted in accordance with the notice.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 7, 1888.

I have considered the appeal of James A. Cain from the decision of your office, dated June 23, 1887, suspending his pre-emption cash entry, No. 10,538, of the E. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NE. $\frac{1}{4}$, and the NW.

$\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 28, T. 22 S., R. 12 E., M. D. M., made December 9, 1884, at the San Francisco land office in the State of California.

The record shows that said Cain filed his pre-emption declaratory statement No. 17,513, for said land on August 20, 1883, alleging settlement August 2nd, same year. On October 10, 1884, the register gave notice by publication of claimant's intention to make final proof in support of his claim, before the register and receiver at said land office on December 9, 1884. The testimony of his witnesses was taken before the clerk of the county court of Monterey county in said State on December 4 1883, and his own testimony and final affidavit were taken by the receiver of said land office.

The final proof shows that the claimant, a married man, was duly qualified to make said entry; that he first settled upon said land and built a house thereon August 2, 1883; that he has resided continuously on his claim with his family, since August, 1883; that his improvements, consisting of a house, well, and one half mile of fencing, are worth \$300.

The local officers accepted the proof and issued final certificate as aforesaid.

The final proof shows that the claimant complied with the requirements of the pre-emption law and the departmental regulations thereunder, relative to inhabitancy and improvement. His own testimony was taken on the day and before the officer as advertised. The final proof was deemed satisfactory to the register and receiver and in the absence of any protest or objection to said proof on the day the same was offered at the local office, I see no good reason why the technical defect may not very properly be cured by the Board of Equitable Adjudication. You will please refer said entry to said Board for its consideration under the appropriate rule.

The decision of your office is modified accordingly.

PRACTICE—JURISDICTION—FINAL PROOF.

HULTS *v.* LEPPIN.

On protest filed against the acceptance of final proof, the local office has authority to order a hearing to ascertain the facts in the case.

The local office acquires jurisdiction by due notice to the settler.

A pre-emptor who, in the presence of an adverse claim, elects to make final proof must abide the result thereof, and submit to an order of cancellation in the event that his proof fails to show compliance with the law.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 7, 1888.

July 10, 1884, Christian Leppin filed declaratory statement, No. 7,078 for the SE. $\frac{1}{4}$ of Sec. 24, T. 14 N., R. 14 W., Grand Island, Nebraska, and Daniel C. Hults made homestead entry upon same tract October 20, 1884.

Leppin made proof, in accordance with published notice May 1, 1886, and upon protest filed by Hults, alleging that Leppin had no valid claim to the tract prior to October 20, 1884, the date of Hults' entry, hearing was set for August 16, 1886.

Leppin's final proof was made before Aaron Wall, a notary public at Loup City, Nebraska, and Hults makes affidavit that on the day advertised for making said proof as aforesaid, he "went to the office of said Wall at eight o'clock in the forenoon of said day and visited said office frequently during said day and was unable to find at what hour said proof was taken, and that said proof was taken surreptitiously and without affording plaintiff the opportunity to cross examine defendant's witnesses; that plaintiff had three witnesses present on said day and that said Wall refused to take their testimony and refused to allow any cross examination of defendant's witnesses or to furnish a copy of said testimony on payment of the fees therefor."

On the day set for the hearing, both parties appeared, and Leppin objected to the local officers assuming jurisdiction in the matter upon the ground that the testimony should have been offered at the time final proof was made. The objection was overruled and the hearing proceeded.

The action of the local officers in overruling the motion made by Leppin's counsel was proper, as the only pre-requisite required by law to give the local officers jurisdiction is due notice to the settler. See cases of *Edward Wiswell* (6 L. D., 265); *Doty v. Moffatt* (3 L. D., 278); *Houston v. Coyle* (2 L. D., 58).

The testimony shows that about July 12, 1884, Leppin broke six acres upon the tract and dug a hole, which he terms a dug-out, in which he put hay and over which he placed brush. Leppin testified that on the 12th of July, 1884, he erected a small shanty, six feet long and five feet wide, built of boards and brush, and in which he slept ten nights in July, ten in September, and fifteen in October, 1884. In this, however, he is not corroborated by any of his witnesses. On the contrary, all the other witnesses testified that there was no shanty or other structure of any kind upon this tract prior to October 26, 1884, a date subsequent to Hults' homestead entry.

October 26, 1884, Leppin built a house, which he afterwards enlarged. He also built a stable, and dug a well, his improvements in all being valued at about \$200. He resided in the house until after the hearing.

Hults began his house about April 15, 1885, moving into it after its completion and remaining there continuously except four months, during which he and his wife worked for a Mr. Brown, his furniture in the meantime remaining on his homestead. He also built a stable, dug a well and broke seven acres, his improvements amounting to about \$200.

Both the pre-emptor and the homesteader are poor and this is the reason assigned by each for not complying more fully with the law.

December 2, 1886, the local officers recommended that Leppin's final proof be rejected and that the Hults' entry be held intact.

May 6, 1887, your office reversed this decision and awarded the land to Leppin "subject to his completion of entry in due form upon the proof presented and held the homestead entry of Hults subject thereto." From this decision Hults appealed to the Department.

Leppin could not have established a residence in the hole he dug upon the tract which was utterly unfit for human habitation and which was the only place of residence he had on the land at the time Hults made homestead entry.

Leppin in assertion of his claim to enter and purchase the land, under the pre-emption law, elected to make final proof in the face of the recorded notice of Hults that he too intended to claim the tract under the homestead law. Because of the presence of this adverse claim, Leppin must stand or fall by the record made by his final proof. That record shows that he failed to comply with the law in the matter of residence and improvement.

A pre-emptor who, in the presence of an adverse claim, elects to make final proof must abide the result thereof and submit to an order cancelling his filing, in the event that his proof fails to show compliance with the law. *Wade v. Meier* (6 L. D., 308).

Your decision is hereby reversed.

FINAL PROOF -EQUITABLE ADJUDICATION.

JUDITH M. CLARKE.

In the absence of protest or adverse claim an entry may be referred to the Board of Equitable Adjudication, where the testimony of the claimant and his final affidavit were not submitted before the officer designated, but the evidence of his witnesses was taken in accordance with the notice.

A misdescription of the land in the published notice requires republication to cure the defect, when the proof already submitted may be accepted in the absence of protest.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 7, 1888.

I have considered the appeal of Judith M. Clarke from the decision of your office, dated August 13, 1887, suspending her pre-emption cash entry No. 1844 of the S. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 5, T. 20 N., R. 4 W., [E.] made January 2, 1884, at the Helena land office in the Territory of Montana, and requiring her to make new publication and new proof.

The record shows that the register, on November 15, 1884, published notice of the claimant's intention to make final proof in support of her claim before Willis F. Parker a notary public at Great Falls in said Territory, on December 27, 1884. The testimony of her witnesses was

taken on the day named, and before the officer, as advertised, but the testimony of the claimant and her final affidavit were taken before one Charles L. Spencer, probate judge and ex officio clerk of Choteau county in said Territory.

The final proof shows that the claimant was duly qualified to make said entry; that she complied with the requirements of the pre-emption law and departmental regulations thereunder relative to inhabitancy and improvement, and if the land had been properly described in the notice of publication, the entry could very properly be referred to the Board of Equitable Adjudication for its consideration. But a careful examination of the published notice shows that the land is described as being in Sec. 5, T. 20 N., R. "8" E., instead of "4" E. This error will require a new publication of notice containing the correct description of the land. If such republication is made within ninety days from notice hereof and there is no protest and no objection to the allowance of said entry, the final proof already received may be accepted and the entry submitted to the Board of Equitable Adjudication for its consideration. If, however, republication is not made as required herein, then the entry must be canceled.

The decision of your office is modified accordingly.

TIMBER CULTURE ENTRY—PROCEEDINGS ON SPECIAL AGENT'S REPORT.

MARY H. BURNHAM.

In the case of a hearing ordered on a special agent's report, it is competent for the entryman to show acts in compliance with the law, performed after notice of the proceedings instituted on said report.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 7, 1888.

I have considered the appeal of Mary H. Burnham from the decision of your office of June 25, 1887, holding for cancellation her timber culture entry, No. 1525, for the NW. $\frac{1}{4}$ of Sec. 26, T. 129 N., R. 46 W., Fergus Falls district, Minnesota.

Said entry was made July 31, 1884, and was held for cancellation by your office November 17, 1885, upon the report of a special agent, that only two acres of the land had been broken the first year after entry "and there was no good reason why the law had not been complied with." July 13, 1886, a hearing was ordered for the claimant to show cause why the entry should be sustained, and was had December 20, 1886.

The evidence adduced at said hearing shows that the claimant employed and paid her son, George W. Burnham, to break five acres the first year after entry, and he broke from two and a half to three acres

during said year, and testified that the cause of his not breaking five acres was the excessive dryness of the land and that one of his horses died while he was plowing the land. The government witness, O. R. Lippitt, corroborates the testimony of George W. Burnham as to the dryness of the land, and says "the opportunities for breaking in that season were not good." It further appears that the claimant employed and paid said George W. Burnham to break an additional five acres for the second year, and, during the second year and before the hearing, he had broken the whole ten acres, and it was "under a good state of cultivation."

Your office held the entry for cancellation on the ground that the claimant "can not claim the benefit of anything done after the date November 20, 1885, when notice of the proceedings taken on the agent's report had been served on her."

This position is untenable. The rule invoked by your office applies to cases of contest, in which the rights acquired by the contestant can not be defeated by a claimant's doing the requisite amount of breaking, cultivation or planting after service of notice of the contest. It has no application to a case like the present one, where there is no contest or adverse claim and the question is one solely between the claimant and the government, and no bad faith is shown.

You are instructed to allow the entry to remain intact, subject to the claimant's compliance with the law in good faith during the life time thereof. The decision of your office is reversed.

RAILROAD GRANT—INDEMNITY WITHDRAWAL.

NEW ORLEANS & PAC. R. R. CO. *v.* LEGER.

Under the language of section twelve, act of March 3, 1871, it was not competent for the Department to withdraw from the operation of the homestead and pre-emption laws, the indemnity belt of the grant to the New Orleans Pacific Company. The existence of such withdrawal is no bar to the allowance of a homestead entry.

Secretary Vilas to Commissioner Stockslager December 8, 1888.

I have considered the appeal of the New Orleans Pacific Railroad Company from your predecessor's decision of April 22, 1886, allowing Simon Leger to make homestead entry of the SE. $\frac{1}{4}$, Sec. 9, T. 8 S., R. 3 E., L. M., New Orleans, La.

The tract was selected as indemnity on the 28th of December, 1883. Leger made his application to enter January 25, 1886, alleging settlement in the summer of 1878.

Without resting the decision of the point upon the authority of the Herring case (110 U. S., 27), which may be distinguishable in that the settlement rights there in question accrued before the withdrawal; but in accordance with the principle of the decision in the case of Guilford

Miller (7 L. D., 100), I concur in your view that under the language of section 12 of the act of March 3, 1871 (16 Stat., 573), it was not competent for the Department to withdraw from the operation of the homestead and pre-emption laws the indemnity belt of the grant to the New Orleans Pacific Company.

Your allowance of Leger's entry, notwithstanding the order of withdrawal, is accordingly affirmed.

COMMUTATION—EQUITABLE ADJUDICATION.

FRANK W. HEWIT.

A commuted homestead entry, wherein residence was not established within six months from date of the original entry, should be referred to the Board of Equitable Adjudication for its action.

In final proof proceedings publication of notice, and due proof thereof, should appear.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 3, 1888.

I have considered the appeal of Frank W. Hewit from the decision of your office, dated June 16, 1887, affirming the action of the local officers at Valentine, Nebraska, refusing to accept the commutation proof offered by said Hewit in support of his homestead entry, No. 1922, dated July 17, 1884, of the SW. $\frac{1}{4}$ Sec. 12, T. 33 N., R. 41 W., for the reason that said proof was unsatisfactory, not showing improvements "sufficient to establish the good faith of claimant."

The final proof, taken before the clerk of the district court, shows that said Hewit was a native-born citizen of the United States, a single man, over twenty-one years of age; that he first settled upon said land on July 17, 1884; that he built a house, and established a residence on said land on April 25, 1885; that his improvements consist of a frame house, ten by twelve feet, with one door, a window, a well, and thirty acres of breaking—all valued at \$150; that his residence had been "very nearly" continuous since the establishment thereof.

The claimant, in answer to question five, testified:

I have been absent several times, as shown by affidavit herewith, but have made the claim my home and have had no other, and have only been absent when my circumstances made it necessary, and have improved and cultivated my land to the best of my ability.

He also testifies that he cultivated thirty acres of said land and raised thereon crops for two seasons. In the special affidavit, above referred to, which is duly corroborated, the claimant swears that he made entry of said land on July 17, 1884, and commenced the erection of a house; that he was then absent until October 8, 1884, when he returned to his claim and found his improvements removed; that he remained a short time and was then absent until April 11, 1885, when

he returned and erected a dwelling house, commencing permanent residence on April 25, 1885, and remained until May 8, 1885; that he then went away and returned on October, 1885, and lived on his claim until November 15, 1885; that he then went away and came back on April 6, 1886, since which time he has lived on his claim up to the date of said proof, namely: October 8, 1886, except for about two weeks, and for the time accounted for in the accompanying affidavit, when he was unavoidably absent. With said special affidavit was filed the certificate of H. W. Hewit, M. D., sworn on September 28, 1886, in which he certifies "that Frank Warren Hewit has been watching and taking care of his brother, Dr. J. W. Hewit, of Bellwood, Nebraska, who has been sick with typhoid fever since August 29, 1886, and is now convalescing, but will not be able to be up before October 3, or 4, 1886. This certificate is corroborated by the affidavit of Dr. S. L. Brown, and also by the affidavit of Dr. J. H. Calkins.

Your office affirmed the action of the local office, for the reason that "upon examination of the proof, which is dated October 8, 1886, it does not seem to be accompanied by the cross-examination required by circular of December 15, 1885, and September 23, 1886."

The applicant insists that the action of your office was erroneous, for the reason that his proof shows compliance with the requirements of law, and that, in fact, a cross-examination was made, as appears from the affidavit of the officer taking said proof, filed with his appeal. Said affidavit of the clerk of the court alleges that "to the best of his recollection and belief," a cross-examination was had and forwarded with the final proof, which showed that said Hewit made said entry on July 17, 1884, and in the fall of 1884 he commenced the erection of a house thereon, in which he remained a short time; that he was then absent until the spring of 1885, when he returned and built a house on the claim and did some breaking, remaining about one month; that he was then absent until the fall of the same year, when he returned to his claim, and remained about two weeks; that he was then absent until the spring of 1886, when he returned and resided upon the land until the date of his final proof, October 8, 1886, except that he was absent during the day or part of the time, and occasionally at night, being at work in the village of Gordon, about five miles distant; that such absences were necessary; that he was also absent during the summer about two weeks on a visit to the Black Hills in Dakota, and was absent four or five weeks immediately preceding the date of his proof, and until a few days thereof, in attendance upon a sick brother, whose condition and circumstances required claimant's attention.

The claimant has also filed his affidavit, dated August 9, 1887, in which he alleges that said final proof was accompanied by a cross-examination as to residence, cultivation, etc.; that since said October 8, 1886, the date when said final proof was made claimant has resided upon said land and now has matured thereon thirty acres of growing

crops; that his buildings and improvements on said land represent all the money he has been able to make since making his said entry, and that he has been unable to make other or greater improvements for the want of necessary funds.

The proof shows due compliance with the requirements of the law as to improvement and cultivation. The claimant's absence appears to be satisfactorily accounted for after the establishment of his residence. It appears, however, that claimant did not establish his residence on said land until after the expiration of more than six months from the date of entry, and the record, as presented, fails to show the proof of publication as required. If the publication was duly made, the claimant ought not to be subjected to the expense of making new proof and giving new notice, unless he has failed to comply with the requirements of the law as to residence, cultivation, and improvement.

It would seem to be proper, therefore, since there is no adverse claimant and no protest, that the final proof submitted should be returned to the local office, with directions, if the claimant has made due proof of notice of publication, and the proof was made in accordance with such notice, then the final proof should be approved and the entry submitted to the Board of Equitable Adjudication for its consideration. If the notice of intention was not duly given and the final proof made in accordance therewith, then new notice should be given and new proof should be made within sixty days from notice hereof.

The decision of your office is modified accordingly.

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SCHOOL GRANT—COAL LANDS.

STATE OF COLORADO.

Applications to file coal declaratory statements may be properly received for sections sixteen and thirty-six, with due opportunity accorded the State to show cause why the same should not be allowed.

Secretary Vilas to A. Sagendorf, Denver Colorado, December 10, 1888.

I am in receipt of your communication of November 16th instant, referring to the circular of the General Land Office of June 11, 1888, to registers and receivers, as follows:

You will receive applications for coal declaratory statements on sections sixteen and thirty-six, upon proper allegations made, and when applications to purchase are made you will, under paragraph thirty of the coal regulations, notify the proper State authorities and allow thirty days within which to show cause, if any exist, why the application should not be received.

You state that the Board of Land Commissioners of the State of Colorado ask a consideration of said order by this Department, and request that all coal declaratory statements heretofore received under the above order be canceled, and that instructions be issued to the local officers,

directing that no filings be hereafter accepted without a regular hearing. Said request is based upon the following grounds: First, that the title of the State to agricultural lands, designated as sections sixteen and thirty-six, attached upon the filing of the township plats in the surveyor general's office; Second, that the State is informed and believes that no coal developments were made upon said tract, or any indications of their mineral character were known prior to survey; Third, that as the title to the land vested in the State upon its admission, and no adverse claim having been filed for a term of years, thereafter, no cloud should rest upon the title of the State on the equivocal statements or allegations of applicants; Fourth, that these lands do not belong to the public domain, and are not open to settlement as agricultural lands, or subject to development as mineral lands.

I see no objection to the circular complained of. The grant of school lands to the State of Colorado expressly excepts therefrom all mineral lands, and in lieu of such lands, the State is entitled to select other lands as indemnity therefor. The survey of the public lands causes the grant to attach to the 16th and 36th sections of such lands only as were contemplated by the grant, and may pass by the grant, but it does not fix the title of the State to any mineral lands, because such lands are expressly excepted from the operation of the grant, and if the mineral character of the land is known prior to certification, other land in lieu of said 16th or 36th sections should be certified to the State.

I can, therefore, see no objection to allowing the mineral character of the land to be asserted and proved by persons claiming the same under the mineral or the coal land laws, inasmuch as the State has a right to appear and protest; but in all such cases the State should be notified whenever application is made to enter a 16th or 36th section, under the coal lands law, and this seems to be contemplated by the circular complained of.

PRACTICE—DEATH OF CONTESTANT.

HURD *v.* SMITH.

As the right of the contestant is personal, his death, occurring during the pendency of a contest, leaves the question at issue as between the entryman and the government.

Secretary Vilas to Commissioner Stockslager, December 10, 1888.

This record presents a motion for review of departmental decision dated February 29, 1888, in the case of Perley P. Hurd *v.* Harvey E. Smith, involving the NE. $\frac{1}{4}$ Sec. 19, T. 112, R. 66, Huron, Dakota.

Smith made homestead entry of the tract August 31, 1882, and contest charging abandonment was initiated by Hurd July 3, 1885. A hearing was had and the local officers recommended the dismissal of

the contest. Your office, by letter of June 1, 1885, reversed that action and held the entry for cancellation. That decision was affirmed by the department as above stated.

In the motion for review the death of contestant is suggested, and on that ground it is asked that the former action be reconsidered and Smith allowed to perfect his entry.

Affidavits are filed to the effect that contestant Hurd died on March 21, 1887, among them that of the physician who attended him in his last illness; that the contestee Smith has since August 1, 1883, continuously resided on said tract with his family; that he has a dwelling house twelve by fourteen feet with addition ten by eighteen feet, valued at \$200, a barn twelve by thirteen feet, worth \$100, a granary, well, one hundred and three acres in cultivation, and that the improvements are worth \$600.

Notice of said motion was served on the attorneys of record for contestant by registered letter dated March 9, 1888, and no response from them has been received.

In the case of *Hotaling v. Currier* (5 L. D., 368) where the death of contestant was suggested after decision in his favor by your office, it was said :

If that be true I see no reason why said Currier should not be permitted in due time to show full compliance with the requirements of the timber culture law.

In the case of *Morgan v. Doyle* (3 L. D., 5)—a homestead contest—where a charge of abandonment had been sustained, it was said :

It appears, however, from the affidavit of the attending physician that Morgan died May 5, 1884, and by *ex parte* evidence filed by Doyle, it is shown that since April, 1883, he has resided continuously upon his land and that he has placed improvements thereon to the value of \$200.

Now whatever right the contestant acquires in cases of this nature is by virtue of the act of May 14, 1880 (21 Stat., 140), and the right thereby conferred is personal (*Boyson v. Born*, 9 C. L. O., 61); hence the case as it now stands, is entirely between the entryman and the government.

In view of the fact that Doyle has since April, 1883, complied in all respects with the law and shown his good faith by extensive improvements, I am of opinion that his entry should not be disturbed.

See also *Fitzsimmons v. Meder* (6 L. D., 93), and *Rasmussen v. Rice* (*ibid*, 755), to the same effect.

Under all the circumstances of this case the motion is sustained, the decision complained of is revoked and Smith will be allowed to proceed under his homestead entry.

TIMBER CULTURE CONTEST—SPECULATIVE ENTRY.

SAYLOR *v.* WILSON.

The fact that the entryman executed a power of attorney, containing, among other things, authority to sell, is not sufficient to warrant the conclusion that the entry was made for a speculative purpose.

Secretary Vilas to Commissioner Stockslager, December 10, 1888.

I have considered the case of S. A. Saylor *v.* William A. Wilson, involving the validity of the latter's timber culture entry on the N. $\frac{1}{2}$ of the NW. $\frac{1}{4}$, the SE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the NE. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, of Sec. 12, T. 2 N., R. 31 E., in the La Grande, Oregon land district, which comes here on appeal by Wilson from the decision of your office of March 4, 1886, holding his entry for cancellation.

The contestant alleges abandonment, and that the entry was made for speculative purposes.

The first allegation is unsupported, and the only real issue is made on the last. Your decision is referred to for the facts bearing on the question to be determined.

The only question presented by the case is as to the sufficiency of the evidence to warrant the finding that appellant's entry was made for speculative purposes, for, if so made, it was fraudulent and should be canceled. The only evidence tending to show a speculative intent is a power of attorney, executed by said Wilson three months and a half after his entry was made, authorizing one Sargent "to improve, attend to, cultivate, sell or dispose of my certain timber culture"—describing the land embraced in said entry. Your office holds this evidence sufficient to show that the entry was made for speculative purposes. With this opinion I can not agree.

Some of the facts found in this case are well calculated to excite the suspicion that Wilson's entry was made in the interest of Sargent, but suspicion, however violent, does not constitute proof, and Sargent swears that he has no interest in the land, except as Wilson's agent. It must also be borne in mind that when Wilson entered the land he swore that it was for his own exclusive use and benefit, and "not for the purpose of speculation or directly or indirectly for the use or benefit of any other person." The proof shows that Sargent had, as Wilson's agent, the charge of other property belonging to Wilson besides this claim, to wit: town lots, notes and accounts, and it fails to show that Wilson or Sargent ever offered to sell said claim. The authority to sell contained in said power of attorney does not of itself show bad faith and is not inconsistent with good faith. In certain possible contingencies such a power might become necessary to prevent the entryman from suffering great inconvenience or pecuniary loss. Where an act of a party is consistent with good faith, and such act furnishes the only suspicion of bad faith, the inference of fraudulent intent can not be fairly drawn.

The proof failing to show abandonment or that the entry was made for speculative purposes, the contest must be dismissed, and appellant's entry will remain intact. The decision of your office is therefore reversed.

PRACTICE—APPEAL—CERTIORARI.

PETTIT *v.* BUFFALO GOLD & SILVER MG. CO.

When it is made to appear that the supervisory authority of the Secretary should be exercised in the disposition of a case, an application for certiorari should be granted, whether the information is formally laid before the Department or otherwise.

Secretary Vilas to Commissioner Stockslager, December 10, 1888.

This is an application for certiorari filed by Caroline S. Pettit, alleging as follows, to wit:

That your petitioner as claimant of the Brick Pomeroy Lode, having filed her protest, under oath and duly corroborated, charging that the Silver Tide Lode claim as surveyed, applied for, and entered, embraces ground occupied by the Brick Pomeroy claimant as a dumping ground, and does not fall within the limits of the Silver Tide claim as located, nor follow the course of the vein.

That a hearing was ordered upon said protest, which was decided adversely to petitioner by the local office who also refused a rehearing, applied for by claimant, on the ground of newly discovered evidence; that from said decisions protestant appealed to the Commissioner of the General Land Office, and that said decision of the local officers was affirmed by your office, and said appeals were dismissed. That within the time allowed for appeal from said decision by the rules of practice, petitioner filed an appeal to the Department, which your office refused to submit, upon the ground that protestant, who stands solely in the relation of *amicus curie* has no right of appeal.

Reserving for consideration the question whether the applicant here has a right of appeal or not, her allegations, that "the Silver Tide Lode claim as surveyed, applied for and entered does not fall within the limits of the Silver Tide claim as located, nor follow the course of the vein," are of so serious a character, asserting a failure to comply with essential pre-requisites to the obtaining of a patent, that a proper case is presented thereby, if true, for the exercise of that just supervision which the law vests in the Secretary of the Interior over all proceedings instituted to acquire portions of the public lands: a supervision which should be exercised whether the information which puts it in motion is laid before the Secretary formally or otherwise.

You will therefore, on receipt hereof, certify up to this Department the papers in the matter referred to for investigation and such action as may be deemed appropriate.

PRIVATE CASH ENTRY—ACT OF JULY 2, 1864.

CHARLES P. BEDELL.

A private entry for land increased in price by the grant to the Northern Pacific, made when the record in the local office showed the land subject thereto, may be referred to the Board of Equitable Adjudication on the additional payment of one dollar and twenty five cents per acre.

Secretary Vilas to Commissioner Stockslager, December 10, 1888.

I have considered the appeal of Charles P. Bedell from the decision of your office, dated June 9, 1887, holding for cancellation his private cash entry, No. 1417, of lots 2 and 3 of Sec. 2, T. 1 N., R. 4 E., made September 6, 1870, at the Vancouver land office, in the Territory of Washington.

The record shows that your office, on July 11, 1876, suspended said entry, for the reason that the tracts were not subject to private sale at the date of said entry, because they were within the limits of the withdrawal of August 13, 1870, for the benefit of the Northern Pacific Railroad Company under its grant by act of Congress approved July 2, 1864 (13 Stat., 365), which act increased the even sections within said limits to two dollars and fifty cents per acre, and reserved them to homestead and pre-emption settlers.

Your office further advised the local officers that there was a bill then pending in Congress for the relief of such cases, and that no action would be taken by your office upon said entries, unless the claimants should desire to have their entries canceled and receive back the purchase money.

It appears that the entry covers only 49.92 acres, and that at the date thereof the local office had received no notice of any withdrawal. The land had been once offered, and, so far as the record in the local office showed, the land was subject to private entry. Moreover, the entryman, as appears from his corroborated affidavit has built a substantial frame house upon said land and made valuable improvements thereon worth more than one thousand dollars.

It is true that the sixth section of said act provides, that "the reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre, when offered for sale." But, in view of all of the circumstances of the case, as above set forth, I am of the opinion that the entryman should be permitted to pay the full amount required, and, in case he shall pay the additional amount, namely one dollar and twenty-five cents per acre, within thirty days from due notice hereof, the same should be accepted, and the entry referred to the Board of Equitable Adjudication for its consideration. If the claimant shall fail or refuse to make such payment, within the time designated, said entry will be canceled.

The decision of your office is modified accordingly.

TIMBER LAND ENTRY—EQUITABLE ADJUDICATION.

ORLANDO BLACKMAN.

A timber land entry may be referred to the Board of Equitable Adjudication where the proof was not submitted within ninety days from the date of the published notice, but due compliance with the law and regulations was shown in other respects.

Secretary Vilas to Commissioner Stockslager, December 10, 1888.

I have considered the appeal of Orlando Blackman from your decision of September 10, 1887, rejecting his application to purchase, under the act of June 3, 1878, the SE. $\frac{1}{4}$ of the NE. $\frac{1}{2}$, and Lot 1, Sec. 4, T. 25 N., R. 7 E., Olympia, Washington Territory.

The record shows that Blackman filed his application to purchase March 18, 1887, and that notice was posted and published according to law. June 16, the ninetieth day from the date of filing said application, the local officers canceled the same. June 18, 1887, proof and payment were tendered and rejected on the ground that they were not made within ninety days from the date of the published notice.

From this action Blackman appealed to your office and on September 10, 1887, the same was affirmed. From this decision Blackman appealed to the Department.

No adverse claim has been filed against Blackman's application. He was duly qualified to make the entry and purchase and his application was made in accordance with the rules and regulations. Notice of said application was posted and published in the manner and during the time required by the statute.

The proof submitted shows that the land was unfit for cultivation, was heavily timbered and would, if cleared, be unfit for cultivation by reason of its being high, rocky, and dry, and further that it was unoccupied, without improvements and that there are on it no indications of gold, silver, cinnabar, copper or coal.

The only objection made by your office, as a ground for rejecting the proof is that Blackman was two days late in making proof and payment. He submitted an affidavit in which he stated that he believed he was entitled to three months instead of ninety days in which to offer proof and payment.

The purpose and object of the law seems to have been fully met and by proof of a character which was in accordance with the regulations and practice of the land department. There is nothing tending to show any fraud or attempted fraud on the part of the claimant. I think there has been such a substantial compliance with the law on the part of the entryman as to warrant the reference of this case to the Board of Equitable Adjudication for action under sections 2450 to 2457 of the Revised Statutes.

You will therefore please certify the case to the Board of Equitable Adjudication for the action of that tribunal.

PRACTICE—REVIEW—EVIDENCE—CONTINUANCE.

SMITH *v.* SMART.*See Page 291*

Objection to the manner in which testimony was taken comes too late, when raised for the first on motion for review.

A continuance, on the ground of absence of counsel, or witnesses, should be denied where a showing of due diligence is not made.

Refusal of the officer before whom the testimony was taken to allow a continuance, is not a good ground for review, where exception to such action was not taken below.

The rights of a party should not be affected by testimony offered in another case, to which he was not a party and had not opportunity to reply.

Objection to the affidavit of contest will not be considered, when raised for the first time on motion for review.

Secretary Vilas to Commissioner Stockslager, December 10, 1888.

W. F. Smart, defendant in the above stated case, by his attorneys, S. S. Henkle and John A. Sibbald, files a motion for review of the decision of the Department, of July 24, 1888 (7 L. D., 63), reversing the decision of your office dismissing the contest in the above case, upon the following grounds:

Because the testimony in this case was taken without authority from the register and receiver.

Because of other irregularities and errors apparent in the proceedings and record of the case.

Because the affidavit of contest is fatally defective.

Because this contest, with ten or twelve others, originated in a combination of certain persons against the defendant Smart and his brothers.

In support of the first ground of error, it is alleged that said testimony was taken before J. F. Ford, a notary public, and that no commission was issued and signed by the register and receiver authorizing said Ford to take said testimony; that, if any commission was issued, it was not returned with the testimony, and that if the order endorsed upon the back of the contest affidavit is the commission to take the testimony in this case, it was not signed by the register and receiver. No objection to this irregularity was made at the time of the hearing, or before the register and receiver, or before your office, and it is now too late to raise the objection on motion for review of the departmental decision, it appearing that at the hearing A. B. Smart appeared as the agent and representative of claimant, and it not being shown that he did not have notice of said irregularity, prior to the filing of this motion.

The "defects and irregularities apparent in the proceedings and record of the case," complained of in the second ground of error, are substantially as follows: That the contest affidavit is endorsed, "Hearing at office, October 21, 1888" (evidently intended for 1885), whereas the published notice directs the return of the papers to his office, "when and where they will be examined and decision rendered therein October

25, 1885;" that the record does not show "when, where and at what hour said testimony was taken;" nor that the witnesses were first sworn to testify; nor that it was sealed up, and the title of the case endorsed on the envelope; nor when the package was opened at the local office; nor that Ford promptly transmitted the testimony by mail or express.

It does not appear how the claimant's rights were affected by these alleged irregularities, and if he could have taken advantage of them at any time, it is now too late to complain of them, having failed to take advantage of them before the local office, or in his appeal to your office from these decisions.

The defendant further complains that the notary made no record of his refusal to grant the defendant a continuance, but that he was treated with contempt and refused recognition, and that the only evidence of the refusal is the fact that he did not adjourn the hearing.

It is true that on said hearing Smart moved for a continuance of the case, upon the ground that he had engaged Washburn & Curry to defend said suit, from whom he received a letter, stating that they could not attend the trial on that day, but he did not show that he had employed counsel in time, nor was any reason shown why they could not attend. He also moved to continue, upon the ground of the absence of material witnesses, but it was shown on the trial that at least one of the witnesses had the consent of Smart not to appear on that day, and it was not shown that he had exercised due diligence in procuring the attendance of the other witnesses. It was upon this ground that the continuance was refused, and the Department held that such continuance was properly refused. I see no error in this ruling.

Besides, no objection to such alleged refusal was made by the claimant before the register and receiver, or before your office, on appeal from their decision, and the alleged error therein can not be considered on the motion for review.

It is further alleged in this motion that the agent of claimant was not permitted to appear in his behalf and cross examine the witnesses; but the record shows that while objection was made to his appearing for claimant without showing written authority therefor—certain objections were made upon the direct examination of the witnesses, which are noted in the record, and said witnesses were cross examined. It is reasonable to presume that the objections were made and that the cross examination of the witnesses was conducted by the agent of the claimant. The record does not show that claimant's agent was refused permission to offer proof, and if it did he should have taken exception to the action of the notary before the local officers.

A third ground of objection is that the affidavit is fatally defective, but no objection was made to said affidavit before the local officers or before the Commissioner, nor was it made before this Department, when the case was here on appeal from the decision of your office, and these questions can not be raised for the first time upon a motion for

review, after a hearing has been had upon said affidavit and decision rendered thereon.

The remaining ground of objection is, that this contest, with ten or twelve others, originated in a combination of certain persons against the defendant Smart and his brothers.

I do not see from anything set up in the motion for review that this alleged combination against the defendant and others can in any way affect this case. The applicant does not show that the alleged combination against the several entrymen contributed in any manner to prevent this claimant from complying with the law.

He alleges that the evidence in the case of *Hackett v. W. E. Smart*, which was dismissed by the Commissioner, April 25, 1888, shows clearly the facts indicating a conspiracy and the persons engaged in it; that said Hackett also aided and assisted E. L. Smith, the contestant in the present case, and that in the case of *Farnsworth v. A. B. Smart*, now before the Department on appeal, the local officers recommended the dismissal of the contest, saying:

This contest, from the evidence and statements of counsel and witnesses, seems to be a sort of community feud.

He therefore asks that the record in these cases be considered in determining this case, for the purpose of showing a conspiracy, and that said contest was not initiated in good faith, presumably for the purpose of showing that the contest should be dismissed; and that although the entrymen may not have complied with the law at the date of contest, yet as the question would then be solely between the government and the entryman, he might still be allowed to perfect his entry within the thirteen years allowed by law.

It does not appear that the claimant did not have knowledge of this alleged conspiracy at the time of the contest, and this defence should have been made at the hearing of the case, or before your office.

The rights of the contestant in this case should not be affected by the testimony offered in another case to which he was not a party and had no opportunity to reply.

The evidence in this case fully sustains the finding of the local office, that claimant had failed to comply with the law, as to planting and cultivation during the third and fourth years after entry. The witness who did the planting testified that the seeds were so wormy as to be materially damaged, and that upon calling the attention of Smart, the agent, to this fact and that he did not believe they would grow, he was told by Smart to mind his own business. He further testified that these seeds failed to grow.

It was also shown by the testimony that in April of the fourth year, which ended May 25, 1885, the ten acres were replowed and cultivated in asli seeds; that the planting was done with a clipper press wheat drill, and the tree seeds and wheat were sown together in drills, one inch apart and four feet wide; that the harvesting of the wheat was

done with a twine binding harvester, and not in such a manner as to protect small trees, if any had been growing on the land.

It was further shown by the evidence that this was not the usual way of planting tree seeds; that there was no cultivation of the land after the tree seeds were planted, and that there were no trees growing on the land at the date of the contest, August 12, 1885.

It was held by the Department, that the information communicated by the agent of the defective quality of the tree seeds planted in the third year was sufficient to bind the principal, and that the claimant is responsible for the negligence of his agent in planting such seeds. It was therefore held that the allegation of failure to comply with the law in the third year was sustained, and that this failure was not cured by what was done upon the ten acres during the fourth year.

It being shown that the planting during the fourth year was improperly done, and that the harvesting of the wheat from the land was done in such a manner as not to protect the small trees, the claimant is therefore responsible for the failure to grow, and no evidence has been produced showing that said planting was successful.

I see no reason for disturbing the decision of the Department of July 24, 1888, and the motion is therefore denied.

HOMESTEAD CONTEST PRACTICE ACT OF JUNE 15, 1880.

ARNOLD *v.* HILDRETH.

The death of the appellee, after due notice of appeal, will not deprive the Department of jurisdiction to render a decision on the questions raised by said appeal.

The preference right of a contestant cannot be defeated by an application of the entryman to purchase under the act of June 15, 1880, made during the pendency of the contest.

The rule laid down in *Friese v. Hobson* governs in all cases not finally adjudicated prior thereto.

Secretary Vilas to Commissioner Stockslager, December 11, 1888.

This is a motion filed by Weeks and Wells, transferees of Orville Hildreth, for review of the decision of the Department of August 27, 1887, directing the cancellation of the entry of Orville Hildreth, made under the act of June 15, 1880.

By decision of the Department of June 9, 1888 (6 L. D., 779), you were directed to return this application to Messrs. Weeks and Wells to have service perfected on contestant Arnold.

Said motion having been served, and objections to a reconsideration of said case having been filed, it is now before me for consideration.

The question involved in the decision of the Department of August 29, 1887, was, whether Hildreth was entitled to purchase the tract embraced in his homestead entry, under the act of June 15, 1880, in the

face of Arnold's contest. The local officers allowed Hildreth to purchase, which action was affirmed by your office, but the Department by said decision of August 29, 1887, held that the contest of Arnold could not be defeated by the application of the entryman to purchase under the act of June 15, 1880; nor by the allowance of such entry by the local officers.

In this application it is alleged that Hildreth died in the fall of 1885, shortly after making his cash entry, and that applicants became the purchasers of said land July 29, 1887, and have had no notice of any contest until recently, that they are not advised that any action was taken on behalf of Hildreth, or his heirs, in resistance of the contest after his death, and that no disposition of the contest has been made by the local officers, and that it remains undecided at this date.

The allegation that the local officers have made no disposition of said contest was based upon the fact that the receiver failed to file an opinion in this case after the evidence had been submitted, but the record was transmitted to your office, with the appeal of Arnold from the action of the local office, allowing the cash entry of Hildreth.

Passing upon this question, the Department in its decision of June 9, 1888, said:

The irregularities of the local officers did not deprive the Commissioner of jurisdiction to pass upon that question, because Arnold's appeal brought up the entire record, and his rights depended upon a determination of that issue. Upon the record of evidence before him taken on the hearing, the Commissioner, by virtue of his supervisory power over the disposition of the public lands, had full jurisdiction in the case to render decision thereon as the tribunal of original jurisdiction.

The appeal of Arnold from the action of the local officers was taken prior to the death of Hildreth, and the Commissioner thereby acquired jurisdiction to pass upon the questions presented by said appeal, and to render judgment thereon, but it is alleged by the applicants that, at the time the appeal was filed by Arnold from the decision of the Commissioner Hildreth was dead and his estate was unrepresented. The death of Hildreth had not been suggested when the decision of the Department of August 29, 1887, was rendered, but it appeared from the record that service of the appeal was made upon Alvin Hildreth, the attorney for the entryman. If it be true, as alleged by the applicants, that Hildreth was dead when said appeal was taken, the Department could not acquire jurisdiction of said appeal, unless said estate was at that time represented, and service of said appeal was made upon the representative of said estate, or the attorney of said representative.

Therefore the only question to be considered in this case is on the service of the appeal from the decision of your office of September 22, 1885, affirming the action of the local office allowing the cash entry of Hildreth, made under the act of June 15, 1880. If Hildreth was in life at the date the appeal was taken from the action of your office of September 22, 1885, the Department acquired jurisdiction of the case upon said appeal, and could thereafter proceed to adjudicate and dispose of said appeal, although Hildreth may not have been in life at the date of the departmental decision.

It is alleged by Messrs. Weeks and Wells, in their affidavits made in support of their motion for review, that "Orville Hildreth, the above

named entryman, is now dead, and as deponent is informed and believes his death occurred in the fall of 1885."

In response to this sworn statement, made upon information and belief, the contestant, Arnold, files his own affidavit, in which he swears that:

Orville Hildreth died during the month of March, 1887, instead of in the year 1885, and that his means of knowing such to be the fact is that deponent assisted in laying out and attended the funeral of said Orville Hildreth.

This affidavit is corroborated by the affidavit of Dr. D. M. Slemmons, the attending physician in his last illness, who swears that Orville Hildreth died about March 8, 1887; that he visited Hildreth the day before he died, and his memorandum shows that his last visit was made March 8, 1887. This testimony is also corroborated by the affidavits of H. W. Arnold and Wilson H. Arnold.

The Department, in its decision of June 9, 1888, having directed that service of this motion be made upon Arnold, with a view to giving him the opportunity to deny the allegation as to the death of Hildreth, and said affidavits having been served on Messrs. Weeks and Wells, who do not controvert the facts alleged therein as to the death of said Hildreth, it is evident that the Department had jurisdiction to pass upon said case when it rendered the decision of August 27, 1887, it appearing that service of said appeal was made upon claimant in accordance with the rules of practice.

Attached to the appeal of claimant from the action of your office of September 22, 1885, is the affidavit of W. H. Mott, who swears that he served a copy of said appeal on Alvin Hildreth in person November 3, 1885.

There is also attached to said appeal the affidavit of M. A. Butterfield, who swears that Alvin Hildreth represented the claimant on the trial of said case, and that he mailed a copy of the appeal to Orville Hildreth, the claimant, at Montrose, Dakota, November 12, 1885.

There is no reason shown by the applicants why a rehearing should be had in this case.

The contest of Arnold proceeded to a hearing, and after evidence had been taken and an opinion had been filed by the register adverse to said entry, he attempted to purchase under the act of June 15, 1880, which was allowed by the local officers, and affirmed by your office. But the Department reversed said decision, holding that the rights of Arnold, the contestant, could not be defeated by the application to purchase, or by the allowance of said entry by the local officers.

It is contended by the applicants that the rule in *Friese v. Hobson* was not in force at the date of said cash entry, and should not control this case. But the Department held, in the case of *Roberts v. Mahl* (6 L. D., 446), that the rule in *Friese v. Hobson* governs in all cases that have not been finally adjudicated.

As this case was not finally adjudicated until the decision of the De-

partment of August 29, 1887, it must be controlled by the decision of *Friese v. Hobson*, and I therefore see no reason for granting the rehearing asked for.

The motion is refused, and you will notify Arnold of his preference right of entry within the time allowed by law.

PRE-EMPTION—SECOND FILING.

VESTA F. BONEBRAKE.

A declaratory statement filed without the authority or consent of the claimant, who neither ratified nor accepted the same, is not a legal filing, nor a bar to the exercise of the pre-emption right.

Secretary Vilas to Commissioner Stockslager, December 11, 1888.

On April 23, 1886, Vesta F. Bonebrake filed declaratory statement, alleging settlement on the 8th of the same month, upon Lots 1 and 2, and S. $\frac{1}{2}$ NE. $\frac{1}{4}$, Sec. 5, T. 31 S., R. 36 W., Garden City, Kansas. He submitted proof at the local office in support of his claim on November 19, 1886. This proof was rejected by the local officers. The claimant appeals from your decision of March 14, 1887, sustaining the action below and holding his declaratory statement for cancellation.

The action of the local officers was based upon the fact that the records of their office show a declaratory statement to have been filed by the claimant on April 12, alleging settlement April 8, 1886, upon a tract in Sec. 7 of the township named.

The claimant avers in his corroborated affidavit, made December 8, 1886, that his declaratory statement last mentioned had been made out for him by an agent; that some five or six days afterwards, he learned that the land embraced therein was covered by a homestead entry; that he thereupon saw said agent, who told him that as his "declaratory statement papers" had not been filed, he could file for another tract, and that before December 8, 1886, he did not know that such declaratory statement had been filed. The homestead entry mentioned appears by the records of your office to have been made April 9, 1886.

The said agent, by affidavit, made December 18, 1886, corroborates the above, and sets forth, that about five or six days after making out the claimant's declaratory statement for the tract in Sec. 7, he learned that it was covered by a homestead entry; that about the same time he told the claimant that said declaratory statement had not been sent to the local office (seventy miles distant), and that he (claimant) could make another filing.

The affiant states that he told claimant that he would not send said declaratory statement to the local office, and that it "became of record through mistake," but does not explain the manner in which the said mistake occurred.

The affiant also swears that at the time of the conversation referred to, "he had sent no declaratory statement filing for the land."

The said declaratory statement for the tract in Sec. 7 was therefore apparently filed after the said conversation, and consequently after the claimant had revoked any authority which he may have given the agent to file it for him.

It appearing from the foregoing that this declaratory statement was filed without the knowledge or consent of the claimant, who has neither ratified nor acquiesced in the same, I can not concur in the conclusion reached by your office, that this was a legal filing, and that his right of pre-emption was exhausted thereby.

The claimant in his declaratory statement, filed for the land which he now seeks to enter, alleged settlement there on April 8, 1886, i. e., on the same day upon which he appears from your said decision to have claimed settlement upon the tract named in the declaratory statement, erroneously filed in the manner stated.

The claimant's proof, however, shows that he established actual residence upon the land involved on April 14, 1886, and that the same was continuous; that he built a sod house, twelve by fourteen feet, broke eighteen and cultivated four acres to corn.

The record showing that the claimant has complied with the law, his entry should, in the absence of an adverse claim, be allowed upon the proof submitted.

Your decision is reversed.

LOCAL OFFICE—ORDER OF BUSINESS.

HOLMAN *v.* BARRICK.

Local officers, with the approval of the Commissioner, may adopt such regulations as to the order of business in their offices as will tend to expedite the transaction of such business.

Under a regulation thus made, designating certain hours of each day wherein filings would be received, the register may properly refuse to receive an application to contest, presented outside of the hours so designated.

Secretary Vilas to Commissioner Stockslager, December 11, 1888.

I have considered the appeal of Henry M. Holman from your office decision of April 22, 1887, rejecting his application to contest George L. Barrick's homestead entry for the NE. $\frac{1}{4}$ of Sec. 14, T. 31 S., R. 39 W., Garden City land district, Kansas.

Barrick made homestead entry for said tract October 8, 1885, and on October 11, 1886, at 3.45 p. m., Holman by his attorney presented to the register at the local office an affidavit of contest against said entry. The register refused to receive or file these papers because of a rule of that office to receive filings only from nine o'clock a. m., until twelve o'clock noon of each day. These contest papers were again presented the next morning and refused because of the filing of another contest that same

morning, but prior to the presentation of Holman's papers. Holman thereupon appealed to your office, setting up that he by his attorney presented his contest papers at 3.45 p. m., October 11, 1886; that the register refused to accept the papers or to formally reject the same by endorsement on the back thereof; that at the time of first presenting these papers said attorney informed the register that another and different party than Holman was desirous of contesting said entry and he was informed that another and different affidavit to contest said entry would be presented on the following day; that said attorney thereupon employed one Nelson Davenport to take a position at said land office door so as to present said papers upon the opening of the office the next morning; that Davenport remained there all night and until nine o'clock next morning and entered the office second in line and presented the contest papers of Holman to the register, who endorsed the following thereon:

Presented and rejected this 12th day of October, 1886, for the reason that a contest on same tract had been previously filed, which prior contest is still undetermined and pending. The register offered to file this subject to said prior contest but said course was declined by attorney for present contestant.

It is also alleged in said appeal that, the prior contest mentioned was first presented on October 12, 1886, and by the person just before Davenport in line, and that said person had remained at the door of the land office all night.

Your office, after the receipt of said appeal, called upon the local officers for a full report of the facts in this case. They made such report in letter dated March 23, 1887, in which it is said that owing to the amount of business transacted at that office and the insufficiency of the clerical force to handle that business, they had been authorized by the Commissioner "to only keep the office open one hour per day if we could not give more time to the public;" that the rule that filings could not be received at that office in the afternoon was well known and recognized by the public; and that this case was not appealed "as a matter of right or justice, but in a spirit of malignity and with a purpose solely to harass the local officers, override rules and authority and injure the public service." The action of the local officers was approved by your office, and in the decision it is said:

The rule established by you is in accordance with instructions from this office and seems to be fully warranted. The rule is for the benefit of the public to allow time for proper disposition of matters coming before your office.

In general circular of March 1, 1884, approved by Secretary Teller, it is directed, among other things, that the local officers "will be in attendance regularly at their office, keeping the same open for the transaction of business from nine o'clock a. m., till 4 o'clock p. m., and giving all proper information and facilities to persons applying therefor."

While under this regulation the local offices must be kept open between the hours designated there is nothing therein prohibiting the

local officers with the approval of your office from adopting such regulations as to the order of business as will tend to expedite the transaction of that business.

From the records in this case it seems that in order to transact the large amount of business of that office it was necessary to designate certain hours within which certain branches of business would be considered. Any other course would have led to inextricable confusion in the affairs of the office and thus to great inconvenience and injury to those transacting business there. The statement of the register that the rule was well known to the public is not contradicted nor does the case present any element of hardship. It is evident that the contestant here or his representative, knowing that a contest against this entry was to be presented at the first practicable moment under the rules of the office sought to acquire a prior right to contest said entry in direct contravention to a well established and reasonable rule.

Your said office decision is affirmed.

MINING CLAIM—ANNUAL EXPENDITURE—RELOCATION.

LITTLE PAULINE *v.* LEADVILLE LODGE.

In a claim located after May 10, 1872, failure to make the annual expenditure required by the statute, renders the claim subject to relocation in the same manner as if no location of the same had ever been made, provided that work has not been resumed thereon after such failure, and before relocation.

The forfeiture declared by the statute in such case is absolute, and the original locator will not be heard to question the validity of a relocation, in a proceeding instituted to determine whether said locator had complied with the law in the matter of the annual statutory expenditure.

If the relocation is not legal, the illegality must be shown in the regular manner, in a proceeding instituted for that purpose.

Secretary Vilas to Commissioner Stockslager, December 11, 1888.

Louis R. Sharp appeals from your office decision, dated February 28, 1887, holding for cancellation mineral entry, No. 1985, made by himself and others, for the Leadville Lode claim, Leadville, Colorado.

The record shows that on June 25, 1880, said Sharp and others filed their application for patent for said Leadville Lode claim, and that on December 27, 1883, receiver's receipt and final certificate of entry thereof were issued to claimants by the local officers.

It further appears that on October 2, 1883, protest against the allowance of said application was filed by John Quinn *et al.*, charging, substantially, the abandonment of the Leadville Lode claim by said Sharp *et al.* and failure on their part to perform or cause to be performed annual assessment work upon, or for the benefit of, said claim, after December 31, 1881, and up to September 25, 1883, and alleging that protestants had relocated said claim, on said last mentioned date, under the

name of the Little Pauline Lode. This protest was duly sworn to and was supported by the affidavit of John A. Keely, one of the original locators of said Leadville Lode.

On February 11, 1886, your office, upon consideration of the entry papers of the Leadville Lode, and of the foregoing protest, directed that a hearing be had, in order to determine the truthfulness of the allegations of said protest.

A hearing was accordingly had before the local officers, at which a large amount of testimony was taken, the same having been commenced on May 26, 1886, and completed, after several adjournments, on June 11, 1886.

Separate opinions were thereupon rendered in the case by the local officers, disagreeing as to some of the findings therein, and agreeing as to others.

The receiver found :

That there was an entire neglect on the part of the claimants to perform the annual labor for the year 1882 upon the Leadville claim; also that the protestants failed to make such a valid and legal relocation through the Little Pauline claim, as to deprive the claimants of their right to a patent to the Leadville Lode.

The register found :

That the claimants of the Leadville Lode have failed to do or cause to be done any annual or other labor, or to make any improvements whatever upon the Leadville Lode since the 31st day of December, 1881, and that the same was "open to relocation in the same manner as if no location of the same had ever been made," when located by protestants as the Little Pauline Lode; and further that the relocation of the Leadville Lode as the Little Pauline Lode, was in every respect in conformity with the statute in such cases made and provided.

Thereupon he recommended that the entry of the Leadville Lode be canceled.

Appeals were taken by the parties, respectively, from both of these findings, and upon consideration thereof your office held that :

It satisfactorily appears from the testimony, which is voluminous, that no work was done upon or for the benefit of said Leadville claim during the year 1882, and that work thereon was not resumed up to the date of entry, December 27, 1883, and it does not appear that work was ever resumed upon said claim. The evidence conclusively shows that work had not been resumed upon said claim up to September 25, 1883, when it appears that the Little Pauline location was made;

and thereupon that portion of each separate opinion of the register and receiver in harmony with the above was affirmed, and the entry of Sharp *et al.* was held for cancellation. It is from this decision that Sharp now appeals.

The evidence in the case is very voluminous, and upon the question as to the character of the relocation of the claim in controversy, under the name of the Little Pauline Lode, there is considerable conflict.

It is conclusively shown, however, by the testimony submitted by protestants, that no work was done upon, or for the benefit of the claim under the Leadville location, during the years 1882 and 1883, and this fact is not controverted by Sharp, but is expressly admitted by him on

cross-examination. He seeks to avert the consequences of this failure on the part of himself and his associates, on the stated ground that the relocation of the claim by protestants, under the name of the Little Pauline Lode, was not a valid and legal relocation, such as is required before a forfeiture of their claim under the Leadville location can be declared.

This contention is based upon the alleged failure on the part of protestants to discover, by means of a new discovery shaft or tunnel, separate and distinct from that of the original locators, "the vein or lode within the limits of the claim located," prior to date of relocation, as required by Sec. 2320 of the Revised Statutes, and presents the only question for determination in this case.

It appears from the testimony that a new discovery shaft or tunnel was constructed by protestants on said claim, by means of which as is shown by a clear and decided preponderance of the evidence submitted at the trial, the vein or lode within the limits of the claim was discovered by protestants, prior to the date of their said location thereof; and if it be admitted that such new discovery was a necessary pre-requisite to a valid relocation of said claim, under the circumstances of this case, and that the question of the validity of such relocation is properly in issue herein, I am satisfied from the evidence submitted, that such issue must be decided in favor of the protestants.

But I do not think that any question touching the validity of the location made by protestants can be properly considered or determined upon the record here presented.

Section 2324 of the Revised Statutes, which is taken from the mining act of May 10, 1872, provides, among other things, that:

On each claim located after the tenth day of May, 1872, and until a patent has been issued therefor, not less than one hundred dollars worth of labor shall be performed or improvements made during each year.

And further, that:

Upon failure to comply with these conditions the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same has ever been made, provided that the original locators, their heirs, assigns or legal representatives, have not resumed work upon the claim after failure and before such location.

The Leadville Lode claim was originally located by Sharp and his associates, on February 12, 1879, and therefore comes within the provisions of the statute above quoted; and there can be no question from the testimony that there was no labor performed, or improvements made thereon, during the years 1882 and 1883. By reason of this failure and of the further fact that work had not been resumed upon said claim, or mine, prior to September 25, 1883, the date of the relocation thereof by protestants as the Little Pauline Lode, such claim or mine was on said last mentioned date, "open to relocation in the same manner as if no location of the same had ever been made."

It is clear, therefore, that there was an absolute forfeiture on the part of Sharp and his associates, by reason of the foregoing, of all rights they had acquired under their location of said claim, and I can not see that it properly lies with them to raise, in the manner stated, any question as to the validity of the Little Pauline location.

This latter location was made upon precisely the same land covered by the Leadville location, and at a time when the same was in every respect legally subject thereto, as shown, and if in any way illegal, such illegality must be shown in the regular manner, in a proceeding instituted for that purpose.

For the reasons stated, your said office decision holding the entry of said claim under the name of Leadville Lode, for cancellation is affirmed.

REPAYMENT—PRE-EMPTION ENTRY.

GEORGE J. RUSKRUDGE.

If an entry was innocently procured and allowed, under the mistaken belief, entertained by the entryman and the officer allowing the same, that the facts in the case showed a sufficient compliance with the law as to residence, when in truth such compliance is not shown, then the entry was "erroneously allowed" and the entryman is entitled to repayment on the cancellation of his entry.

Secretary Vilas to Commissioner Stockslager, December 11, 1888.

In the matter of the application of George J. Ruskrudge for repayment of the purchase money paid by him—on pre-emption cash entry—for lots 1 and 2, and the E. $\frac{1}{2}$ of NW. $\frac{1}{4}$, Sec. 7, T. 16 S., R. 14 E., in the Tucson, Arizona, land district, appealed from the decision of your office of May 17, 1886, denying said application, the following are the material facts bearing on the question to be determined:

On October 24, 1881, appellant filed his declaratory statement for the above described land, alleging settlement on the 20th of the same month.

On June 9, 1882, he submitted evidence on final proof, which a month later was rejected by the local officers, and on August 7, following, he appealed to the Commissioner of the General Land Office. On March 21, 1883, the Commissioner, in his decision of the case, addressed to the local officers, said:

I concur with you in your opinion that his acts do not constitute a compliance with the requirements of the pre-emption law, or indicate good faith in his settlement on the land. Inasmuch as there is no adverse claim upon the land, Ruskrudge will be allowed to show compliance with law at any time before the expiration of his declaratory statement.

From this decision Ruskrudge appealed to the Secretary of the Interior. This officer, in his decision of the case, rendered January 2, 1884, said:

He (Ruskrudge) shows that he has erected a house, cleared and fenced about five acres of the tract, of which about one acre is in cultivation, and jointly with the oc-

occupant of adjoining land has dug a well on the dividing line. His improvements are valued at over \$200. He has resided on the land and made it his home from the date of his settlement to the date of his proof (about seven and one half months), except that he was absent at various times, aggregating from three to four months, while engaged as a deputy United States surveyor in surveying government lands.

Your decision rejects his application to enter, but allows him to show compliance with the law at any time before expiration of his declaratory statement. There is no adverse claimant, and his present proof sufficiently shows, in my opinion, his good faith and compliance with the law. I therefore modify your decision and allow the entry.

In accordance with this decision, appellant, on January 20, 1884, made pre-emption cash entry. On the same day Anna M. Livingston—who, it appears, filed a declaratory statement for said land July 16, 1883—took steps to obtain a hearing in the Ruskrudge case, aforesaid, and on July 21, 1884, the Secretary of the Interior suspended said cash entry, and directed a hearing. This hearing, it appears, “was directed to ascertain simply the facts as to settlement, residence, cultivation and improvement of the land by Ruskrudge.” The evidence taken on said hearing is not found in the record in this case, but it appears that the local officers sustained the validity of the entry, and that your office reversed their decision, and held said entry for cancellation, and that the Livingston filing should be allowed to stand. This decision rendered January 12, 1886, was not appealed from, and on April 14, 1886, Ruskrudge filed his application for repayment of the purchase money.

Want of good faith and failure to comply with the pre-emption law as to residence and cultivation are the grounds on which the application is denied, and in denying the same you say:

The law governing the return of purchase money does not provide for repayment in cases where parties fail to comply with the law under which they have made their entry.

Section two of the act of June 16, 1880 (21 Stat., 287,) provides that the Secretary of the Interior shall cause the purchase money paid on an entry of public lands to be repaid in all cases where the entry has been “canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed.”

In the case at bar the entry was allowed, and it appears can not be confirmed. If the entryman is not shown to have been guilty of some fraud in connection with his entry, it seems clear to me that the entry was also *erroneously* allowed. If the allowance of the entry was procured by false and fraudulent representations, or by any fraudulent act on the part of the entryman, it can not be properly said to have been erroneously allowed, and in such case he would not be entitled to a return of the purchase money. On the other hand, if the entry was innocently procured and allowed under the mistaken belief, entertained by the entryman and the officer allowing the same, that the facts in the case show a sufficient compliance with law as to residence, when in reality they do not show such compliance, then the entry was erroneously al-

lowed, and the party making the same is entitled to a return of the purchase money.

Vague and erroneous notions as to just what is required to constitute residence under our settlement laws are quite common among those who are unlearned in the law. Indeed, it is frequently a very perplexing question not only to the unlearned, but to their legal advisers, and to the tribunals called upon to finally determine such questions. To punish a mere error of judgment on this question by forfeiting to the government an entryman's purchase money, would be a harsh rule and one not sanctioned by the law.

The evidence before me does not show bad faith on the part of appellant. In fact, the testimony produced on making final proof is unusually frank and straightforward. In answer to the question, "Has claimant resided on the land continuously ever since?" (since settlement), one of his witnesses says: "I have seen him there time and again He is deputy United States surveyor, and has been off several times on surveys: I should say he was on the land a quarter of the time." His other witness, in answer to the same question, says: "He has not." Appellant says, in answer to this question, "I have resided upon the land and made it my home, with the exception when I have been absent employed on government work—have been absent in the employ of the government at various times, in all between three and four months surveying government land." In this testimony there does not seem to be any disposition whatever on the part of appellant or his witnesses to conceal the real state of facts, and he evidently supposed them sufficient. The then Secretary of the Interior also thought them sufficient in the absence of an adverse claim to the land, and consequently allowed the entry.

In your decision of the case of *Anna M. Livingston v. George J. Ruskrudge*, July 12, 1886, you come to the conclusion that Ruskrudge "never established a *bona fide* residence on the land." The facts from which this conclusion was reached, as set out in said decision, do not differ very materially from the state of facts shown by appellant's final proof, as set out in the Secretary's decision quoted above. They are as follows:

The testimony shows that Ruskrudge is a qualified pre-emptor, that he made his settlement at the time alleged; that he put up a common shanty, dug a well, did some little clearing and fencing. He had none of the usual implements of agriculture to found on a claim, no teams, etc. Just before he made his final proof he broke up about an acre of land with a spade and planted it in corn, which it appears never matured He admits that he was absent from the tract from the time he made his settlement and final proof, a period of a little over seven months, from three to four months. He also admits that after the rejection of his final proof by this office, that he left the land and has never pretended to live there since; also that his house was removed from the tract.

These facts, in my opinion, do not show *mala fides*.

As far as I can discover from the record in this case, the pre-emption cash entry made by appellant was—in the sense the phrase is used

in the act quoted—"erroneously made," and that he is therefore entitled to a return of the purchase money.

For the reasons given, the decision of your office is reversed.

ALABAMA LANDS—ACT OF MARCH 3, 1883.

NATHANIEL BANKS.

After the passage of the act of March 3, 1883, land theretofore reported as valuable for coal, could not be entered under the second section of the act of June 15, 1880, until it had been first offered at public sale.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 12, 1888.

November 16, 1869, Nathaniel Banks made homestead entry for the W. $\frac{1}{2}$ of the SW. $\frac{1}{4}$ of section 7, T. 18 S., R. 9 W., Montgomery, Alabama. Said entry was canceled March 5, 1879, because final proof had not been made.

March 28, 1887, Nathaniel Banks made cash entry No. 21006, of said land under the second section of the act of June 15, 1880.

July 18, 1887, the local officers transmitted the petition of Columbus E. Rice and Thomas F. Rice, to have canceled the said cash entry of Nathaniel Banks and praying that they be allowed to enter said tract, under the provisions of the act of June 15, 1880, as assignees of Lewis Phillips who purchased the land of said Banks in 1871, under his prior homestead entry made in 1869. Petitioners enclosed the deed of Banks conveying the land to Lewis Phillips, in 1871 and the deed of Phillips conveying the tract to themselves in 1874.

September 12, 1887, you held for cancellation the cash entry of Banks. You say:

The act of March 3, 1883, to exclude the public lands in Alabama from the operations of the laws relating to mineral lands provides that the lands shall first be offered if they have been heretofore reported to this office as containing coal or iron before they can be entered.

The tract in question has been reported to this office as valuable for coal. The question suggested is—Does the act of March 3, 1883, prevent the purchase? I am of opinion that it does because it provides that all public lands which have been reported to this office as containing coal or iron shall first be offered at public sale. On the cancellation of that homestead entry the land merged and became public and being in the mineral list as aforesaid, came under and is subject to the provisions of the act of 1883.

You further hold that only those persons who have entered lands properly subject to entry may purchase lands under the second section of the act of June 15, 1880, and that this tract being valuable for coal and consequently classed as mineral, was not properly subject to the entry made by Banks in 1869 and, therefore, no right to purchase resulted therefrom.

When the application to purchase the land under the act of June 15, 1880, was made the act of March 3 1883 (22 Stat., 487), had been passed, and it provides "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," before becoming subject to disposal. The tract involved herein was reported in 1879, as valuable for coal. Therefore, under said act it could not be entered until it had been first offered at public sale.

Your decision is accordingly affirmed.

PRE-EMPTION ENTRY—SECTION 2260 R. S.

ANDERSON *v.* BAILEY.

A pretended sale of the land from which the pre-emptor removed will not relieve him from the statutory inhibition.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 13, 1888.

I have considered the case of John Anderson *v.* Frank W. Bailey, on appeal of the latter from your office decision of March 26, 1887, rejecting his proof and holding for cancellation his pre-emption declaratory statement for SW. $\frac{1}{4}$ section 26, T. 103 N., R. 62 W., Mitchell, Dakota land district.

It appears from the record that Bailey filed declaratory statement for said land November 24, 1883, alleging settlement same date, and on November 28, 1885, Anderson made homestead entry for the same tract.

Bailey offered his proof on May 27, 1886, at which time Anderson filed a protest alleging that Bailey was not a qualified pre-emptor for the reason that he had moved from land of his own, to reside upon the tract in dispute.

The record shows that on February 6, 1883, Bailey received his final certificate for the land entered as a homestead and that on November 23, 1883, the day before filing his declaratory statement for the land in controversy, he conveyed the said homestead tract to his wife, by warranty deed, and on August 21, 1884, she conveyed the same to one Emmons, Bailey joining in the deed.

Bailey made settlement upon the tract in dispute on November 24, 1883, by building a house into which he removed with his family on December 20, remaining in the interim with his wife in the house upon the homestead conveyed to her.

Bailey admits that he transferred the tract from which he removed to his wife, in order to qualify himself to take a pre-emption claim.

The local officers found that the transfer of Bailey to his wife "was only a shallow subterfuge" and for that reason rejected his proof and recommended his entry for cancellation.

Bailey testified that the deed to his wife was made in consideration of her assuming the payment of a mortgage of four hundred and fifty dollars on the land, and love and affection. He says she subsequently paid this mortgage although by mistake the release was made out in his name, and he made another conveyance to his wife of the homestead to correct an incorrect spelling of her name in the former deed.

Bailey further says that when the homestead tract was sold to Emmons, the mortgage for the unpaid portion of the purchase price was made to him on the request of his wife, her health being at the time poor. Bailey also testifies that the contract between himself and wife was made that he might be able to make a pre-emption filing and was so talked over between himself and wife.

At the time he made settlement upon the tract in controversy he remained there three days and two nights and then returned to the land conveyed to his wife which was little more than half a mile distant.

Bailey testifies that when he was married his wife had about three thousand, five hundred dollars which she let him have and he had all along intended to convey the said homestead to her on that account.

The fact that when the land was sold to Emmons the mortgage back was made to Bailey and not to his wife, taken in connection with the other circumstances in the case, satisfies me, that the alleged sale was a subterfuge and that he was the real owner of the land from which he removed to the land in controversy, at the time of such removal. It follows that he comes within the inhibition of section 2260, of the Revised Statutes.

Your said decision is accordingly affirmed.

SWAMP GRANT—PLAN OF ADJUSTMENT—EFFECT OF CERTIFICATION.

STATE OF MICHIGAN.

In view of the fact that prior to the swamp grant many of the surveys in the State were found erroneous and re-surveys made, some at the suggestion of the State, and others under special appropriations by Congress for the correction of such erroneous surveys, "the notes of the surveys on file," which was the basis of adjustment accepted by the State, must be interpreted as meaning the notes of the surveys finally adopted and approved by the government. The contemporaneous and long continued construction in accordance with such interpretation of the agreement is fairly conclusive as to the actual intention of the parties thereto.

The ascertainment of the specific tracts granted, is a question of fact to be settled by the Secretary of the Interior; and the terms of the grant cannot be enlarged by the adoption of a plan for its adjustment, nor the government bound thereby to pursue the same, if it be found to be incorrect in operation.

The State is not entitled to lands that were not of the character granted, though said lands were erroneously embraced in certifications based on the original surveys that were incorrect; and the Secretary of the Interior in the exercise of a rightful jurisdiction was authorized to correct such certification in accordance with the facts.

The instructions issued to the surveyors-general to make out lists based on the field notes of survey, do not amount to a contract, but are only to be held as the declaration of a rule of evidence which the Department would follow, if the State was willing to accept it, and no more obligatory than other instructions of the Department to officers under its jurisdiction. The assent of the State, which was the condition of the instructions becoming operative, did not give them the character of law, or render them a binding obligation.

As the erroneous certifications, based on the original surveys, had been corrected, on the evidence furnished by the re-surveys, prior to the passage of the confirmatory act of March 3, 1857, it must be presumed that said act had reference to the amended lists as then existing. It follows that said act did not confirm the original selections based on the erroneous surveys.

Secretary Vilas to Commissioner Stockslager, December 17, 1888.

By your letter of the 13th of July, 1886, addressed to the land officers at Reed City, Michigan, you rejected the claim of the State under the swamp land grant of 1850 to the following tracts of land in that district, to wit: N. $\frac{1}{2}$ SE. $\frac{1}{4}$, section 26, township 23 N., range 3 W.; NE. $\frac{1}{4}$ NW. $\frac{1}{4}$, section 14, township 27 N., range 3 W.; Lot No. 2, section 5, township 37 N., range 3 W.; SE. $\frac{1}{4}$ NE. $\frac{1}{4}$, section 26, township 21 N., range 4 W.; SW. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 34, township 21 N., range 4 W.; SE. $\frac{1}{4}$ NW. $\frac{1}{2}$, section 30, township 23 N., range 4 W.; N. frl. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 30, township 23 N., range 4 W.; SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 30, township 23 N., range 4 W.; SE. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 22, township 23 N., range 5 W.; W. $\frac{1}{2}$ NE. $\frac{1}{4}$, section 28, township 23 N., range 5 W.; S. $\frac{1}{2}$ NE. $\frac{1}{4}$, section 32, township 23 N., range 5 W.; SE. $\frac{1}{4}$ NW. $\frac{1}{4}$, section 32, township 23 N., range 5 W.; NE. $\frac{1}{4}$ SW. $\frac{1}{4}$, section 32, township 23 N., range 5 W.; NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, section 32, township 23 N., range 5 W.; NW. $\frac{1}{4}$ SE. $\frac{1}{4}$, section 34, township 23 N., range 5 W.; W. frl. $\frac{1}{2}$ SW. frl. $\frac{1}{4}$, section 30, township 24 N., range 5 W.; S. $\frac{1}{2}$ NE. $\frac{1}{4}$, section 35, township 21 N., range 6 W.; N. $\frac{1}{2}$ SE. $\frac{1}{4}$, section 35, township 21 N., range 6 W.; stating that under date of March 29th, 1852, the United States surveyor-general of Michigan reported to your office the said tracts as swamp and overflowed land, and under date of October 27th, 1853, a list embracing all of these tracts except the west fractional half of the southwest fractional quarter of section 30, in township 24 north, range 5 west, was approved by the Secretary of the Interior, but that none of said tracts have been patented; that it was subsequently discovered that the surveys from which such selection and proof were made, were erroneous, and under the date of October 29th, 1853, August 28th, 1854, and July 15th, 1856, supplementary lists of lands in townships re-surveyed under the direction of your office, abrogating and superseding all lists of land prior thereto, were made and reported, which embraced all the townships above named, but did not embrace the foregoing described tracts; and that said tracts are not shown by the field-notes to be swamp land within the meaning of the grant.

And by your letter of the same date to the land officers at Marquette, Michigan, you rejected the following described tracts of land, to wit:

SW. $\frac{1}{4}$ NE. $\frac{1}{4}$ section 30, township 45 N., range 18 W.; W. $\frac{1}{2}$ SE. $\frac{1}{4}$ section 14, township 46 N., range 18 W.; SE. $\frac{1}{4}$ SE. $\frac{1}{4}$ section 32, township 46 N., range 20 W.; Lots 2 and 3, section 5, township 46 N., range 20 W.; Lots 1 and 2, section 32, township 47 N., range 20 W.; stating them to have been first reported by the surveyor-general, under date of February 12, 1853, as swamp and overflowed, that under date of January 9th, 1854, a list embracing them was approved by the Secretary of the Interior, but that the lands were not patented; that on re-surveys, a like supplementary list was reported by the surveyor-general, under date of November 18th, 1856, abrogating and superseding all lists prior thereto, covering the above described townships, but not embracing the above described tracts, which are also not shown by the field-notes to be swamp land.

The appeal of the State of Michigan brings up your decision for review. Shortly stated, the case is, that it was arranged with the State that the designation of the swamp lands under the grant should be made from the field-notes of survey, and lists were prepared from the original survey; but, re-survey having been made of many townships, in consequence of serious errors in the original, lists of selections corrected according to the re-surveys were subsequently made, as the basis of a new certification and patent. The State now claims the first certification to have been conclusive of its right, so that it is entitled to the lands described therein, notwithstanding the amended and substituted list subsequently certified and patented. It also claims that the act of 1857 absolutely confirmed its title to all the lands described in such certifications under the original surveys, as well as in the certifications made in correction and substitution thereof. The amount of land involved in the case at bar is about thirteen hundred acres; but the questions for determination possess a greater importance because a very large amount of land is claimed by the State upon a similar foundation, amounting, so counsel said in discussion, to some seventeen hundred thousand acres.

Having thus briefly stated the general aspect of the case, it is necessary to go into an examination of the facts in greater detail, with a view to a correct elucidation of the rights of the State, the government, and purchasers from the government.

After the swamp land act was passed on the 28th of September, 1850, it being thereby declared the duty of the Secretary of the Interior, as soon as might be practicable after its passage, to make out an accurate list and plats of the lands therein described as granted, and transmit the same to the Governors of the several States, the Commissioner of the General Land Office sent instructions, under date of November 21st, 1850, to the several surveyors-general, in which, after defining the character of the lands granted, he said:

You will please make out a list of all the lands thus granted to the State, designating those which have been sold or otherwise disposed of, since the passage of the law, and the price paid for them when purchased.

The only reliable data in your possession from which these lists can be made out, are the field-notes of the surveys on file in your office; and if the authorities of the State are willing to adopt these as the basis of those lists, you will so regard them: If not, and those authorities furnish you satisfactory evidence that any lands are of the character embraced by the grant, you will so report them.

On the 6th of December, 1850, the surveyor-general for the State of Michigan addressed the Governor by letter, enclosing a copy of these instructions, and desiring information to enable him to carry out the views of the government

Whether the State authorities are willing to adopt the field-notes of the survey on file in this office as a basis of the lists of all lands thus granted to the State,

or whether they conclude to have a survey made to determine the boundaries of the swamp and overflowed lands. To this the Governor replied, under date of the 20th of December, that he preferred to delay action until the meeting of the Legislature; and on the 3d of January following, the surveyor-general again wrote the Governor, expressing his opinion that the State would be the gainer by accepting the field-notes as the test of determination, by which the quantity of swamp lands appeared to be greater than an actual re-survey of the whole would probably disclose.

The Legislature, to whom the Governor submitted the matter, passed an act, approved June 28, 1857, in the following words:

The people of the State of Michigan enact that they adopt the notes of the surveys on file in the surveyor-general's office, as the basis upon which they will receive the swamp lands granted to the State by an act of Congress, of September 28, 1850.

Thenceforward the surveyor-general, in executing the Commissioner's instructions to make out lists of all the lands so granted to the State, resorted entirely to the field-notes of surveys, entering as swamp and overflowed each government sub-division of which, according to the language of the grant, "the greater part" appeared from the field-notes to be "wet and unfit for cultivation."

But it happened that the original surveys of the State, beginning with those made in 1839 and 1840, were, in many instances, seriously erroneous, and from the year 1842 and continuously until 1857, a large number of the townships were re-surveyed, under direction of the General Land Office. These re-surveys were originally instigated by a joint resolution of the Legislature of Michigan, passed in 1842, requesting the President to cause the sub-division of eighty-one townships, therein described and represented to have been either not surveyed or so imperfectly surveyed as that the work was valueless, to be surveyed "at as early a day as may be consistent;" upon which the President ordered an inquiry with a view to a re-survey if necessary; and, before the end of 1848, seventy-eight of the described townships were re-surveyed; three of them never have been. After this work was begun, Congress, from time to time, moved by the reports of the surveyor-general for the district embracing Michigan, made appropriations to continue similar

re-surveying in the State. These appropriations were made in 1845, 1846, 1849, 1850, 1851, 1854, 1855 and 1856.

In making out the list of swamp lands, from time to time transmitted by the surveyor-general of Michigan to the General Land Office, the practice appears to have been to follow the notes of the re-surveys in the first instance, whenever re-surveys had been made, entirely disregarding the original; and if there were no re-survey, to proceed on the notes of the original surveys; and subsequently, as re-surveys were made of townships in which lists had already once been transmitted, a corrected list was sent forward based upon the re-survey, designed to supersede and take the place of the former list as a true and accurate exhibit of all the swamp lands within the township. Thus, all the lists made of swamp lands in the seventy-eight townships which had been re-surveyed at request of the Legislature, prior to the grant, and in all such others as had been re-surveyed in pursuance of appropriations by Congress prior to the first certification, were based on the re-surveys, entirely disregarding the original as no longer of any validity or value; and this operated to give from the beginning interpretation to the phrase "the notes of the surveys on file" found in the act of the State of Michigan, and to the understanding of the government and the State, as having reference to the surveys finally adopted and approved by the general government; of course the only legal abiding surveys. It seems never during the period of certification to have been supposed either by the officers of the government, or by the officers of the State, that the terms of the act or the nature of the understanding, related to the notes of the original and first survey, wherever a re-survey had occurred. This idea required and governed the preparation and transmission of amended and corrected lists, when re-surveys furnished the means of making a more accurate designation of the swamp lands in a township. In short, during all this time, it appears to have been accepted as the duty of the government and the right of the State alike, to designate as granted by the act only such tracts as the best evidence, provided by the surveys to which resort had been agreed upon, disclosed to be truly within its terms. Accordingly, notwithstanding certifications had been made to the State of lands indicated by the original survey to be swamp and overflowed, when subsequent lists, corrected by the re-surveys, were certified, no difficulty was made by the State in receiving patents from the government in accordance with the corrected lists, and no claim appears to have been asserted of a right to patents upon the lists so superseded. Inasmuch, however, as the business of determining, certifying and patenting the swamp lands proceeded from year to year during the course of years as the clerical force in the Land Office was able to dispatch it, it resulted that patents were issued for a considerable amount of lands which had been listed by the surveyor-general and subsequently certified by the Secretary, upon the basis of the original surveys, and that, afterwards, re-surveys were made which dis-

closed errors in the certifications patented like those discovered in certifications which had not gone to patent before the re-survey was made, or reported to the Land Office.

The general result of the re-survey was to diminish the aggregate amount of lands shown by the field-notes to be swamp and overflowed, as contrasted with the original survey, but, in some townships, including some of those now under consideration in this case, a greater amount of swamp land was returned upon the basis of the re-survey than by the original. The State accepted the patents in either case, whether more or less, without question.

The theory and practice of the General Land Office are clearly shown by the following letter addressed by the Commissioner to the Commissioner of the State Land Office, in which the view above expressed is set forth, as well as the further idea that whatever excess had been patented, the State would make compensation for when indemnities were selected.

GENERAL LAND OFFICE,
Dec. 22, 1858.

S. P. TREADWELL, ESQ.,
Commr. State Land Office.

SIR: The subject of the swamp grant of Sept. 28, 1850, so far as the same relates to the State of Michigan, in view of the basis adopted by the State in designating the lands granted and the numerous re-surveys made since the passage of the law, presents peculiarities which require an action on the part of the authorities of the State to enable us to adjust the business with proper regard to the evidences in the case. To present the matter is the purpose of this communication.

The surveyors-general of the district have from time to time reported selections in lists from the evidences of the surveys as originally made. Such selections were examined with the records of this office, and, so far as they were found vacant and not interfered with by settlements, were submitted to and approved by the Secretary of the Interior.

The authorities of the State were immediately thereafter furnished with certified copies of the lists containing the lands thus approved. Since such approvals were made and certified, the surveyors-general, upon the evidences of the re-survey of many townships, have forwarded lists to supersede and abrogate the reports made in townships described therein. These subsequent selections differ materially from the former ones.

The patents for probably one-half of the townships in this condition as originally selected and reported were prepared and transmitted prior to the receipt of the subsequent reports based upon the evidence of the re-surveys.

The balance of the selections originally made, and which are superseded by reports under re-surveys, have been approved and certified, but are not carried into patent, nor can they be as thus approved, for the reason that the reports made after the re-surveys are the only proper evidence upon which our action must be made in determining the grant.

So far as the patents have been issued, it is not intended to make any alteration in the lists, but when the indemnity provisions of the act of 2d March, 1855, come to be executed, a comparison between the reports based upon the original surveys and reports made after re-surveys will be made, and when the lands in the original reports do not appear in the subsequent reports, a deduction to that extent will be made from the indemnity certificate. This, it is believed, will do equal justice to all interested.

The paper herewith enclosed will show in what townships the lands have been patented as first selected, and those townships in which the lands are approved but not patented; and it is forwarded with the request that the proper authorities of the State may elect to receive the grant with reference to those townships in which the lands have not been patented, as the selections are made upon the evidences of the re-surveys.

It is our purpose to submit to the Secretary of the Interior, for a revocation or approval, so much of the lists in the several land districts as embrace the tracts in the condition specified; forwarding at the same time a list of the tracts as subsequently reported for his approval. You will be pleased to present the matters herein contained to the proper State authorities.

The patents for the swamp lands in Clinton, Ottawa, and Newaygo counties, so far as the difficulties above described do not exist, are now in the course of preparation, and will be forwarded as soon as they are completed.

Very respectfully, your obdt. servant,

THOS. A. HENDRICKS,
Comm'r.

This communication (as well as a prior one in 1855 to the Governor) clearly stated the view of the Department that the notes of the re-surveys governed in the designation of swamp lands. In a communication dated April 5th, 1859, transmitting a copy of the Commissioner's letter, the State Land Commissioner invites the Governor's attention to the exact point, and intimates his opinion against compliance with the request of the Commissioner.

It does not appear, however, from any of the voluminous papers and reports from which many extracts have been printed for use upon the hearing of this matter, that the State of Michigan, through any of its authorities, ever either formally assented to or dissented from the view of the Land Office. I should not undertake to discuss in detail the various correspondence, reports of the State Land Office and action of the State and the Governor, but simply give my impression of what they establish. Reviewing all this action, the sum of the testimony of these documents to my mind is that the government, through the Land Office, steadily maintained the position which had been taken from the beginning; that the State did not protest against this view, although no formal assent appears, but submitted to the action of the Land Office, and asserted no dispute of its practice, and no claim to the lands under the first certifications, prior to about 1880, when, in consequence of the claim having been raised in a former report of the State Land Commissioner, movement began looking to its prosecution. It seems to have been understood that the act of 1860 put a limitation of two years on the assertion of claims under the swamp land grant, and the land officers of Michigan appear to have diligently prosecuted the claims of the State during the succeeding three or four years, but not to have asserted this claim. Indeed, the reports of the State Land Commissioner, from 1862 to 1870, speak of the grant as being nearly satisfied by patents already issued; and entirely ignore the existence of any such right on the part of the State as this claim presents.

Meantime, the general government had placed in the market the lands so withheld from the first certification and they have been disposed of under the general land laws to settlers and purchasers, or they have been granted, in some part, to the State to aid in the construction of railroads. Thus it happens that, at the present time, the lands claimed by the State, upon this basis, are generally in the hands of private owners by direct conveyance from the government, or through grants to aid in internal improvements; and the intervention of the Department in favor of the State, would, in most cases, operate only as the expression of the opinion of the Department that the State possesses a better title than has been conveyed to the grantees of the government, and attempt to invest the State with a title by patent after other patents have been already issued. The contestants of the right of the State to the particular tracts now under discussion, are persons who have since 1880, made entry of them from the government; although arguments have been heard on behalf of a much greater number indirectly interested in the subject.

It may be added that no evidence is furnished to show that the lands claimed now are, or at the date of the grant were, in fact, swamp or overflowed; and the presumption must be allowed, therefore, that they were not, since such is the testimony of the reliable survey.

The points of law involved may now be considered without further detail of the facts, except, perhaps, as connected with some special features.

I.

So far as any obligation to follow the original surveys is asserted to spring from the alleged agreement between the Land Office and the State to adopt the field-notes as the basis for designating swamp lands, three reasons appear to be each sufficient to answer the claim.

In the first place, no power existed in the Commissioner, or in the Secretary himself, to so bind the government. The act of Congress made the grant and defined the subject granted. The Department could not add to its terms or impose an obligation to patent lands not swamp and overflowed and unfit for cultivation. One Secretary might adopt for himself a practice or rule to govern his performance of the duty to designate and certify lands granted, which the act devolved upon him; but he could not impose that rule or practice upon another, nor even oblige himself, if he found it to be incorrect in operation. The supreme court has determined that the ascertainment of the specific tracts granted by the act of Congress, is a question of fact, to be settled by the Secretary upon evidence, or, upon failure of a determination by him, by a jury. *Railroad Co. v. Fremont County* (9 Wall., 89); *Railroad Co. v. Smith* (9 Wall., 95); *Buena Vista County v. Railroad Co.* (112 U. S., 165). What, therefore, will be accepted as sufficient to establish the fact is a question only of evidence, which every Secretary must decide for himself. The act of the Legislature of Michigan amounts

only to the authoritative declaration on the part of the State, of its acceptance of the field-notes as a rule of designation if the Secretary pursues it. The Department cannot be held bound by that act, or by any understanding to pursue that rule, until, at least, after certification and patent.

Secondly, no agreement of the kind can be asserted upon the basis of the facts narrated. The instructions to the surveyors-general do not amount to a contract with the State. They are properly to be regarded only as the declaration of a rule of evidence which the Department was willing to pursue on condition that the State was willing to accept it; but no more obligatory, nor less open to change, than other instructions of the Department to officers under its jurisdiction. The assent of the State, which was the condition of the instructions being operative, did not give them the character of inflexible law or binding obligation. And, although the Department has usually pursued the course so outlined, it has repeatedly expressed the reservation of the right and purpose to proceed upon more satisfactory evidence when the surveys are shown to be so incorrect as to be unreliable. *La Chance v. Minnesota* (4 L. D., 479).

Finally, so far as this case is concerned, the obligation of the supposed understanding turns upon the application to be given to the terms employed, "the notes of the surveys". For, if this phrase means the notes of the corrected and permanent surveys, which was its interpretation from beginning to end of the certifications made to Michigan as already shown by the facts narrated, the force of the claim is turned against the State. The value of contemporary construction is universally acknowledged; and, in this case, irrespective of any question of estoppel, the action of the Department and its acceptance by the State during so many years, can leave little doubt that the field-notes referred to were intended to be those which furnished the best evidence of the fact. The force of this contemporaneous construction is augmented by the fact that at the time when the phrase was first employed in the adjustment of the grant with the State of Michigan, many re-surveys had already been made, some of them at the request of the State itself, and that others were in progress under specific appropriations therefor by Congress; appropriations which were, in terms, "for correction of erroneous and defective surveys," "for re-surveying and correcting erroneous surveys" and the like. It cannot be presumed that when corrected surveys already existed, or were in progress, reference by this phrase was intended to those which were, or should prove to be, erroneous and defective, instead of those which were correct and reliable. If, therefore, the meaning of the phrase, as applied to surveys already made or in progress, attached to the notes of corrected surveys, instead of the original defective ones, it cannot be doubted that it equally applied to the notes of such surveys as should be subsequently, by authority of Congress, likewise corrected. And since this

obvious conclusion was, in fact, recognized and acted on by both parties when the re-surveys were afterwards made, the meaning of the phrase in the supposed agreement must be accepted accordingly; and so far as obligation attends it, the consequence is unfavorable to the present claim of the State.

II.

The effect to be awarded to the certifications first made upon the basis of the original surveys presents the most serious question upon this appeal. The swamp land act was a grant *in presenti*, passing title to the lands of the described character from its date. *Wright v. Roseberry* (121 U. S., 488). But identification of these lands was essential to this title to any specific tract, and the act left it to the judgment of the Secretary of the Interior to conclusively make that identification. It is only where he has failed to act, that resort to another tribunal is admissible. *Wright v. Roseberry, supra*.

Upon the same authority, it must also be admitted, perhaps, that when the Secretary has made this identification by a certification not open to valid question, the duty to patent upon the request of the Governor so essentially follows, that the title may be deemed perfect to the specific tracts thus determined to be granted even before the act of patenting.

When, however, the certification made by the Secretary is, before patenting, challenged for fraud or mistake, I think the right and duty remain with him to correct the identification according to the facts, so that the patent shall issue only for lands which were, in truth, granted by the act of Congress. To put the case strongly, is it to be presumed that any court would, by mandamus, compel the Secretary to issue the patent, when by false and fraudulent evidence he has been deceived into affixing his signature to a certification which embraced, among the tracts described, a large body of land beyond all dispute high and dry, in no part wet, swamp or overflowed, or unfit for cultivation? Or would a writ go to compel the patenting of such lands which, through accident or gross mistake, had been so included in a certified list? To suppose such a judgment possible, would impute to a court the violation not only of the act of Congress, but of plain and acknowledged principles of justice. It necessarily follows that when such a case occurs, the Secretary retains the power, until a patent issues, to correct his error in the attempt to identify the granted lands, by conforming his certification to the truth as discovered after it was made. It equally follows, that when the Secretary has, before patent, made discovery of fraud, accident or mistake, in consequence of which he has included in his certification lands not granted by the act of Congress, and has corrected the certification so as truly and rightly to identify the lands actually granted, the only right to a patent existing in the State, or which any court would enforce, attaches to the land actually

granted, and correctly identified by the amended certification. Otherwise, the singular consequence would attach to the performance of this act which is no where else suffered by the law, that fraud, mistake or accident becomes, openly and undeniably, the basis of title, and the government is defrauded of its lands by means which would be a sufficient foundation to relieve another grantor from a conveyance actually made. This reasoning seems, to my mind, indisputably to demonstrate that a right of correction in a proper case, remains in the Secretary, even after a certification has been made, if the issuance of patent has not dispossessed him of jurisdiction.

Applied to the facts of this case, this line of reasoning also demonstrates that the State is not entitled to the lands now claimed. Because it has been shown that these lands were erroneously embraced in the certifications made upon the basis of the original surveys, that the evidence which led to their inclusion in the lists was false, that the lands are, in fact not swamp or overflowed and were not granted by the act of Congress, and that the mistake of the Secretary was corrected by another list, in accordance with the facts. The correction was made in the exercise of a rightful jurisdiction remaining in the Department, as I think I have shown; and, had the State resorted immediately thereafter to a court for the writ of mandamus, it can not be supposed that its judgment would have obliged the government to part by patent with its rightful title to lands which had not been granted, simply because of a mistake of its officers induced by false evidence and corrected before judicial aid was invoked, while patent was, at the time, proffered to every tract to which the State was entitled by the grant.

But the case of the State now stands much more unfavorably to its demand. All the lands which were, in fact, granted to it—at least within the township now in question—were long ago identified and patented; the correction of the lists of identification, and all the circumstances upon which the correction proceeded, were fully made known to its officers; in the course of the correction, lands not embraced in the first list, were added to those certified, while none were excluded except such as were not subject to the grant; the patents were accepted by the State and no claim asserted for the residue until after the lapse of many years. Meantime, the lands omitted from the original certifications in order to conform them to the lands actually granted, have been sold or otherwise disposed of by the government, and are held by persons entitled to be regarded as innocent purchasers in good faith. Under such circumstances the inequity of the claim to lands which are not in fact such as were described in the grant, the title which did not pass *in presenti* by the act itself, which never has passed by patent, and to which no other right exists than can be drawn from a mistake in supposing them within the grant, a mistake arising from false evidence, a mistake corrected without objection by the officers of the State, becomes, to my mind, so clear and unmistakable that the

duty of this Department is to lend no aid to the demand. If, upon such a foundation, there be any principle of law which will award to the State these lands not granted, it must be discovered and enforced by others.

III.

It is further claimed on behalf of the State, that the act of March 3d, 1857, confirmed these certifications, and directed the approval and patenting of the lands therein described to the State, irrespective of the correctness of the identification. That act declared:

That the selection of swamp and overflowed lands granted to the several States . . . heretofore made and reported to the Commissioner of the General Land Office so far as the same shall remain vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, be and the same are hereby confirmed, and shall be approved and patented to the said several States, as soon as may be practicable after the passage of this law.

This theory of the act necessarily compels counsel for the State to assert that all the lists reported by the surveyor-general and certified by the Secretary, both the original and the corrected lists, were thereby confirmed. But it must be presumed, I think, that Congress knew the facts, and its language must be applied to the facts as they were understood and interpreted by the government at the time. All the corrections in the certification had been previously made. Each list of identification in respect to which any claim is now asserted had been amended by striking out the lands which, upon the better evidence of the re-surveys, were shown not to be swamp or overflowed, and by the addition of those which were of that character but not embraced in the original list. In point of fact, the lands erroneously included in the first certifications, had been actually erased from those certifications by lines of ink drawn over them and annotations showing them to be expunged from the lists. In each case of an erroneous certification another amended list had been prepared as a substitute, made in accordance with the facts. In legal contemplation, this amended list stood in the stead of the other, and the case must be regarded to be the same in law as if the correction had been made actually upon the original list, by erasure of the lands improperly included in it and addition there of such as ought to be included but had not been. In other words, there was but one selection remaining, the amended and corrected list which stood in place of the preceding. I have shown this to have been done in the exercise of a rightful jurisdiction in the Department. It must be presumed that this was the list which Congress had in mind when passing the confirmatory act of 1857.

This view is re-enforced by the contemporaneous construction of the Department and officers of the State, already sufficiently stated; and by the equitable considerations to some extent presented, sufficient to operate an estoppel against a different interpretation now.

Over 5,800,000 acres have been patented to the State of Michigan as lands embraced within the grant of the act of 1850. In designating these lands, a generous rule of evidence has prevailed in the Department. Every intendment appears to have been taken against the grantor and most favorably to the grantee, in enlargement of the quantity of lands conveyed. This has been brought about, notwithstanding the disallowance of the lands erroneously certified in the first list; and there appears to remain no reason to suppose that the State has not received all the lands actually within the description of the grant, as swamp and overflowed and unfit for cultivation (unless, possibly, some fugitive tracts not within the present claim) and hundreds of thousands, if not millions, of acres beside. The State Land Commissioner, in his report for 1868, affirmed of the lands received under this donation that "They are not all what the term strictly implies, 'swamp' in fact, but that large portions of the same are fine agricultural lands, whilst others are covered with heavy forests of pine and other valuable timbers." The Governor informed the Legislature in 1867 that portions of these swamp lands "are among the most valuable lands in the State." In 1869, the annual message said that "though known as swamp lands, a large portion of them are excellent agricultural lands, and many of them are covered with forests of pine and other valuable timber." This testimony shows how liberally the rule of identification operated, and how extensively the limiting characteristic that, although swamp and overflowed, the lands must be also "unfit for cultivation" was disregarded; and these facts would authorize the characterization of this demand for so large a body of lands not asserted to be swamp and overflowed by even other terms than unjust. I can not think that such action ought to be taken by the officers of the government, in professed execution now of this donation of forty years ago already so generously carried out, as would not only so enlarge the subject of the grant beyond its true description, but would operate to inflict uncertainty of title and expensive litigation upon so many residents and holders who have rested for years upon the faith of grants by the United States to them or their predecessors in title.

IV.

It was shown upon the argument that a portion of the lands embraced within the present claim, those in townships twenty-three and twenty-seven north, of range three west, township twenty-four north, of range five west, and township twenty-five north, of range six west, were not in fact certified to the State of Michigan; but that the corrections were made by expunging these lands from the lists, as first signed by the Secretary, before the duplicated list was transmitted to the State; so that they do not appear in the certification held by the State. If the prior certifications were to prevail over the considerations I have regarded

as binding, a question would arise whether the certification could be deemed complete until delivered to the State. The view which I have taken renders any discussion of this immaterial.

This cause has been discussed orally and in the printed briefs, both on behalf of the State and in opposition to its claims, with great ability and an amplitude of reasoning and research of facts, which I have not attempted fully to comment on, although every point has been considered. The view I have taken renders it unnecessary to go further.

Your decision is affirmed.

REMOVAL OF LOCAL OFFICE—INSTRUCTIONS.

[Telegram:]

DEPARTMENT OF THE INTERIOR, GENERAL LAND OFFICE,

Washington, Dec. 29, 1888.

REGISTER AND RECEIVER,

Deadwood, Dakota Ty.

In view of the contemplated removal of the district office to Rapid City, you will in cases in which hearing is now set before you, continue such cases to a day certain, when further time is necessary for sufficient notice, and in all such cases where the parties do not desire such hearing at Rapid City, provide for taking the proofs before some duly qualified officer designated by you, as conveniently located to the parties in interest as possible, and have all published notices properly amended to show the material facts. When parties so stipulate you may hear cases now set for Deadwood at Rapid City. In cases where personal service of notice has been given, notice of the changes must be given in like manner. Where notice has already been given to take proof at Rapid City, before judge or clerk of court, it may be taken as advertised.

S. M. STOCKSLAGER,

Commissioner.

Approved,

WM. F. VILAS,

Secretary.

PUBLIC SURVEY—MEANDER LINE.

GOOSE LAKE.

Where the meander line of a survey bordering upon a lake was established at a time of extreme high water, and the subsequent recession thereof, which occurred shortly after the survey, left a large body of land between said meander line and the permanent shore line, it is held that such reliction is the property of the government and should be included within its system of public surveys.

Secretary Vilas to Commissioner Stockslager, December 17, 1888.

I have before me your letter of May 10, 1888, transmitting for departmental consideration the application, and accompanying papers,

of certain citizens of Lake County, Oregon, for the survey of lands situate at the northern extremity of Goose Lake, in township 39 south range 20 east, and townships 40 and 41 south, range 19 east, in said State of Oregon.

It appears that said application was by your office first transmitted to the Department for its action July 8, 1887.

Objection to the proposed survey having been filed, setting out that if made it would interfere with the riparian rights of the owners of the lands around Goose Lake, the Department, under date of November 17, 1887, returned the papers to your office with direction that "a hearing be had between the alleged settlers and those claiming title to the land as riparian owners to determine whether the lines of survey were properly run, or whether the land in dispute has been formed by accretion since survey." Pursuant to said direction, your office instructed the local officers at Lakeview, Oregon, to order a hearing to determine the issue raised as above mentioned.

A hearing was had, and, on April 19, 1888, your office received the record in the case, including a large amount of testimony taken at said hearing.

Upon an examination of said testimony, your office recommends that the application for survey be granted.

To be more explicit as to the issue made and to better understand the questions involved, it should be stated that the lands in dispute lie between the meander line of the shore of Goose Lake and the present line of water in said lake.

Said Goose Lake lies partly in Oregon and partly in California. The copy of the official plat before me shows that the lands around that part of the lake in Oregon were surveyed as follows :

Township 39 south of range 20 east, which embraces the land around the north end of the lake was surveyed in August 1868, while the lands on the west side of the lake, consisting of townships 40 and 41 south, range 19 east, as well as those on the east side of the lake, which compose townships 40 and 41 south, range 20 east, were surveyed in August, 1872.

Your letter states that :

Although the hearing was intended to relate to lands located in township 39 south, range 20 east, and townships 40 and 41 south, range 19 east, the testimony presented refers mainly to the lands situate in township 39 south, range 20 east only, at the northern extremity of Goose Lake.

An examination of the record verifies this statement, as to the scope of the testimony.

Presumably the inquiry at the hearing was confined to the lands around the north end of the lake, because the petitioners for survey were settlers on said lands only, and did not care to press the inquiry beyond the lands in which they claimed an interest. It should, however, have been extended by the local officers under your office instruc-

tions and in the interest of the government, so as to include the lands on the east and west side of the lake as well as north of it.

Now, as to the lands covered by the investigation, viz: those at the north end of the lake, in township 39, it is, in effect, alleged by the petitioners that the survey made in 1868 was fraudulent, in that it did not correctly locate the meander line of the lake in said township; that about three thousand acres were by said survey returned as lake, whereas it is dry land; that all of said three thousand acres produces abundant crops of natural hay and is valuable for agricultural purposes and desirable for homes.

The statements made by these petitioners as to the fraudulent character of the original survey are denied by one protestant, who as owner of certain land having the meander line for its southern boundary claims to the water, and avers that the allowance of survey as asked would interfere with her riparian rights. Wherefore she asked a hearing.

The voluminous testimony taken at the hearing had is in some respects conflicting, but the following conclusions may, I think, safely be drawn therefrom.

1. The meander line, as located by the survey of 1868, and the present water line at the north end of the lake are apart from one-half mile at their nearest points to two and a half miles at their most widely separated points.

2. Between said lines there are about three thousand acres of land, which on the official plat appears as water and as a part of the lake, whereas if the survey were extended to the water's edge, where it is now found, it would appear as a part of township 39 north of range 20 east.

3. The meander line as fixed by the survey of 1868 followed substantially the water line as it then existed, and no fraud appears to have been committed in making said survey.

4. The waters of the lake have since receded, leaving bare the land covered by the application for survey and leaving the meander line of the original survey in places over two miles from the present water line.

The conclusions of fact above mentioned suggest several other questions, the answers to which, if they can be found in or gotten from the record, will materially aid in the direction of a correct and satisfactory conclusion in the whole case as presented. For example, if it can be found that the land in question may properly be regarded as having been at the date of survey part of the bed of the lake, and that the recession of the water has since been gradual, then the owners of the lands having the meander line for a boundary might, perhaps, be held entitled to the reliction.

On the other hand, should it clearly appear that the lake at the date of survey was much above its ordinary level because of temporary or unusual causes; that the lands in question were not a part of the

bed of the lake, but temporarily inundated ; that in the following season the waters receded, or that the recession and reliction occurred within the course of a year or two, whereby this very large acreage was uncovered under such circumstances as that no principle of law would justly award it to the owner of the land bordered by the meandered line ; then I think this land could not be properly regarded as having been gained by reliction to the riparian owner's property. A question might arise whether the land would not then go to the State. But, it being shown that the meander line was so grossly an inaccurate representation of the actual margin of the lake, it would seem to be more just to hold that the property remained public land of the United States, only temporarily inundated and by mistake surveyed as a lake.

Now, what are the facts on these points ?

Without attempting to recapitulate the voluminous testimony in the record, it is sufficient to say that, after a careful examination of the same, it seems reasonably certain that when the survey was made in 1868 the meander line as then located followed substantially the water line as it then existed ; that said water line was not that of the lake at its ordinary level, but was temporary, said lake being at that time, by reason of melting snows in the surrounding mountains, and the floods resulting therefrom, several feet higher than its ordinary level, and higher than it has been since. The land rises very gradually from the lake and a rise of five or six feet would inundate the land between the present water line of the lake and the meander line as fixed by the survey.

Said land, or much of it, was bare in 1869, the next year after the survey, and has for many years grown natural grasses, which have been cut and used as hay. Among the growth thereon is considerable of sage brush, which, according to the evidence, has been growing on portions of said land for years.

There is nothing in the formation of the ground to indicate that the permanent shore line of the lake was ever on or near the meander line as laid down in the official plat, and the evidence taken at the hearing quite clearly shows that it never was on or near said meander line, except temporarily, by reason of unusual floods, and this happened to be at the time when the survey was made.

While it does not appear that there was any actual fraud committed in making said survey, I am of the opinion that it would be a fraud upon the law and upon the United States to hold that the meander line as erroneously located should stand as representing the true water-line of the lake, and to award to those whose lands are bounded by it the two or three miles of land intervening between it and the real water-line of the lake at its ordinary level.

Formal objection to survey as asked has been filed by but one person claiming as owner of land on the meander line. She states that she is the owner of lots, aggregating 69.55 acres, and to allow her to take by

reason of such ownership to the present shore line of the lake would be to give her over six hundred acres in addition to the 69.55 acres above mentioned.

On the facts as they appear in the record, this, in my judgment, would be to award her a large body of land to which she is not entitled under any rule of law.

On the evidence submitted, you find that the original meander lines of Goose Lake, in Township 39, "were improperly located, at a time of extreme high water, but that the surveyor had no knowledge that such was the fact," and you recommend that the application of the settlers for survey of the lands herein referred to be granted.

It may be that the determination of the rights of property in this land can only be finally made satisfactorily by a judicial tribunal. But to initiate a case upon which such a determination can be invoked, it is better that the lands should be surveyed and properly defined and described as a part of the public domain. I think it must be regarded as public land; and, so believing, the only proper course to give effect to the public right is to survey it and proceed in accordance with the law and regulations.

Upon a full consideration of the record, I concur in your finding of fact and in your recommendation, which is accordingly approved.

FINAL PROOF—EQUITABLE ADJUDICATION.

JAMES H. WARNER.

An entry may be submitted to the Board of Equitable Adjudication, in the absence of protest, where through mistake Sunday was designated as the day on which final proof would be submitted, and said proof was made the day previous.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 18, 1888.

I have considered the appeal of James H. Warner from the decision of your office, dated September 21, 1887, refusing a reconsideration of your office decision dated June 20, 1887, suspending his pre-emption cash entry of the SW. $\frac{1}{4}$ of Sec. 14, T. 108 N., R. 68 W., dated December 13, 1884, Mitchell, Dakota Territory, and requiring new publication and new proof, because the proof was taken on Saturday, the 8th day of November, 1884, instead of November 9th, the day advertised.

The final proof shows that claimant was duly qualified to make said entry, and that he had complied, in good faith, with the requirements of the pre-emption law as to inhabitancy, improvement, and cultivation.

The local officers accepted said proof, received payment for the land, and issued cash certificate therefor.

The claimant has filed with his appeal, his own affidavit, the affidavit of one Hallenbeck, and the affidavit of Judge Rice, before whom the

final proof was taken. These affidavits allege that the day designated in the published notice for taking said proof, was Sunday; that the error was the mistake of the register or printer; that it was not discovered until just before the time for taking said proof; that claimant consulted with several attorneys, and with the officer before whom the final proof was advertised to be taken, and was advised to make the proof on Saturday immediately preceding the day advertised; that he acted upon said advice and made said proof which was accepted by the local officers; that there has never been any protest filed or any objection made by third parties to said entry, and the claimant alleges that he is a poor man, and it would be a great hardship to require him to make new proof, as his witnesses have gone away from the vicinity of said land.

After a careful consideration of the whole record, I am of the opinion that there has been a substantial compliance with the requirements of the law, and the defect may very properly be cured by the action of the Board of Equitable Adjudication. You will please refer said entry to said Board for its consideration under the appropriate rule.

The decision of your office is modified accordingly.

LAND RETURNED AS MINERAL—BURDEN OF PROOF; RESIDENCE.

KANE ET AL. v. DEVINE.

The burden of proof is upon an agricultural claimant for land returned as mineral; but after a hearing before the local office as to the character of the land, decided in favor of the agricultural claimant and not appealed from, the burden rests with a mineral claimant who alleges a subsequent discovery of mineral.

A charge that the settler has changed his residence is not sustained by evidence which shows that the alleged absence was the result of judicial compulsion.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 18, 1888.

The land involved herein is the NE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, Sec. 28, T. 20 N., R. 12 E., M. D. M., Sacramento, California.

The whole of said township was returned as mineral, and the plat thereof filed in the local office on February 23, 1878.

On May 23, 1878, Thomas Devine made homestead entry for said tract, together with the N. $\frac{1}{2}$ of SW. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of Sec. 27, in the same town and range.

On March 4, 1879, a hearing was held in the contested case of Thomas Devine v. Alfred Smith, whose pre-emption claim conflicted with Devine's said homestead entry and the grant to the Central Pacific Railroad Company.

Upon the testimony submitted the local officers awarded the land in section 27 to the railroad company, and allowed Devine to perfect his entry upon the tract involved. From this action Smith appealed. No

action with reference to this appeal was taken by your office. You state that:

Instead of disposing of said appeal, this office, by letter "N" of October 11, 1882, finding that the character of the land above described was called in question by numerous affidavits, ordered a thorough investigation to determine the relative value and character of the land.

The affidavits referred to were made in September, 1882, by S. B. Davidson (claiming as owner of two certain mineral claims located upon the said tracts) and several others.

A hearing was had in pursuance of your said office letter of October 11, 1882. This hearing was had before a notary public on January 22, and continued upon different days until February 10, 1883.

The local officers found from the testimony transmitted the land in section 27 to be mineral, and that in section 28, *i. e.*, the forty acres in dispute, to be agricultural in character.

No appeal was taken from this decision.

On May 12, 1884, the local office transmitted an application, purporting to be an application of the trustees and inhabitants of Sierra City townsite, to contest the homestead entry of Devine. This application is based upon the allegation that Devine had changed his residence and been absent from the land from October 1, 1880, to May 15, 1881, and from June 6, 1881, to June 7, 1882, and that he had agreed to sell and convey after final entry certain portions of the tract. This application was sworn to by one J. W. Kane (who was an affiant in support of the said affidavit of Davidson), on May 5, 1884, and signed by him (Kane), as attorney. On May 19, 1884, the local officers transmitted the affidavit of said Kane, also made May 5, 1884. In this affidavit Kane avers that he has located both a lode and placer claim upon the land; that he has recently discovered valuable quartz lodes and placer mines thereon, and that since the date of said homestead entry, Devine has by "acts of violence, deadly threats and murderous attempts" completely prevented and excluded all persons from prospecting on the land. Three affidavits, in support of the foregoing, were transmitted therewith.

On May 10, 1886, your office considered the record of the said hearing had in January, 1883, and also the application and affidavits last mentioned. From office letter of said date, it appears that you were "unable to reach a satisfactory conclusion as to the real character of this tract." Thereupon, by the same letter, your office ordered a hearing to determine the matters contained in the application and affidavits transmitted as stated, upon May 12 and 19, 1884.

In pursuance of this instruction, testimony was only submitted before the deputy county clerk for Sierra county, at Downieville. This hearing was commenced on September 6, 1886, and proceeded with at different times until October 27th following, when it was concluded.

The local office found that the land is not mineral in character, and sustained the homestead entry. This action was reversed by your office

decision of September 6, 1887, from which the homestead claimant Devine appeals.

The local officers, in passing upon the testimony submitted at the said hearing, in January, 1883, concerning the character of the one hundred and sixty acres included in Devine's homestead entry, say:

That gold in small quantities is to be found on every part of it, but the same evidence showed clearly that gold in paying quantities had never been found on any portion of this land;

that the presence of valuable mineral on the land is "only conjecture." They find, however, that the land in section 27 is of no value for agricultural purposes, and that Devine has cultivated a portion and made valuable improvements upon the forty acres in section 28, *i. e.*, the tract in question. Their said decision (not appealed from) was rendered "under this state of facts."

In the record of the hearing, upon which the decision appealed from is based, I can not find any evidence that shows the land to have been occupied or used as a townsite. Your office affirms the local office in finding, "that the townsite claimants have not established their claim to any part of said land." No appeal was taken from this finding. Your finding is accordingly, in this regard, affirmed.

The mineral claimant avers, in the townsite application, that the claimant Devine had failed to maintain a continuous residence upon the tract, in that he was absent from October 1, 1880, until May 15, 1881, "on account of the murder of Alfred Smith, a claimant and inhabitant of said tract, who was found murdered thereon and his body burned," and that "Devine again changed his residence from said tract to the State prison on June 6, 1881, until the 17th day of July, 1883, on account of his attempted murder of Mrs. B. Zellner and Mrs. W. Busch, both inhabitants of said tract."

To what extent the claimant was absent from the tract does not clearly appear from the evidence. It, however, appears that he had been twice tried for the murder referred to, and that he had been in the State's prison. The claimant's absence from the land appears from the record to have been (as found by the local offices) "because of circumstances over which he had no control," and not for the purpose of changing his residence.

Moreover, it clearly appears that his (claimant's) wife and children continued to reside upon and occupy the tract and to which he seems to have returned after his release from jail. The mineral claimant's allegation in this regard is without force.

The allegation that the claimant agreed to convey a portion of the land upon the completion of his entry is based upon the testimony of the mineral claimant (Kane) and John F. Leary, who lived upon the tract and whose relations with the claimant appear to have been unfriendly.

He (Kane) states that in 1880 the claimant and his attorney made an

arrangement at Sacramento with one Busch, who had appeared there to contest his (claimant's) entry, whereby about one-third of the tract was to be conveyed to Busch, if the latter would allow claimant to "get a homestead patent." and that said Busch went into possession by his brother and two others, who built three houses on the land. The mineral claimant, also, swears that the claimant agreed to convey after final entry a lot upon this tract to the said Leary.

Leary swears that, while the claimant was in the State's prison, which appears to have been in 1881, his (claimant's) wife agreed to sell to him (Leary) a lot for \$100 and to convey the same after final entry; that the claimant ratified this agreement, and that he (Leary) in accordance therewith went into possession of said lot and built a house thereon. The record does not, in my opinion, sustain this charge.

The testimony shows that considerable trouble had existed between the claimant and some of the said residents upon the tract, and tends in my opinion to show that said parties went on the tract regardless of the claimant's claim. The claimant's wife testifies that one of the parties, who, as the contestant states, took possession under Busch, was notified not to build upon the land. The witness Leary admits on cross-examination that the claimant did not fulfill his promises, and ordered him to move his building from the tract, while the claimant swears positively that he never "offered" the said lot to Leary or anybody else.

The greater part of the very voluminous testimony was submitted for the purpose of determining the character of the land. The mineral claimant (Kane) and another, on April 29, 1884, located the entire forty acres as the Kentucky placer claim, and on May 3, following, he (Kane), located the Golden Monarch lode claim upon the tract. In support of the allegation that the land was mineral in character, a number of witnesses were examined. The testimony of these witnesses was to the effect that the land was mineral in character; that it lies in a great gold belt; and that it is surrounded by valuable mines. A number of said witnesses stated that they had recently examined the land and found three well defined ledges of gold bearing quartz; that the principal lode, the said Golden Monarch, extending across the tract from southeast to northwest, is about two feet wide; that the other two ledges are each about one hundred feet from the Golden Monarch and parallel thereto. Considerable testimony was produced showing the value of this quartz, and a number of pieces of the same were made exhibits for the mineral claimant in the case. One witness states that this quartz would pay \$100 per ton. It was also shown on behalf of the mineral claimant that the gravel taken from what was called a shaft upon the tract showed the presence of gold in paying quantities. It was estimated that this gravel would pay "about six dollars a car."

The witnesses for the claimant all assert that the land is not mineral. Several of them swear that they examined the land with reference to both its quartz and placer value, and state, in effect, that but a faint

trace of gold could be found after a careful prospect in either the gravel taken from the said shaft, or quartz taken from the alleged lodes. Pieces of this quartz are also submitted by the claimant as exhibits in the case.

In the decision appealed from your office found that the greater part of the evidence is "taken up with attempts to impeach the defendant's testimony, and that the character of the land had been "a matter of secondary consideration." It was held in your said decision, however, that under ruling of the Department in *Dughi v. Harkins* (2 L. D., 721), that, the land having been returned as mineral by the surveyor general, the burden of proof was upon the homestead claimant to show that the land was not mineral.

I do not consider the case at bar to be governed by the case cited. In this case it can not be held that the homestead claimant is (as found by your office) the party assailing the return of the surveyor general. The land involved was the subject of a hearing had (January, 1883), by the direction of your office, for the express purpose of determining its character.

The local office found the land to be agricultural, and no appeal was taken from their decision. Their finding, then, became final, and it is now for the mineral claimant to sustain his allegation of recently discovered mineral.

The Department has repeatedly held that it must appear "not that neighboring or adjoining lands are mineral in character, or that that in dispute may hereafter by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, but that as a present fact it is mineral in character." *Magalia Gold Mining Company v. Ferguson* (6 L. D., 218), and cases cited.

The witnesses for both parties examined and prospected upon the land, and their evidence is in direct conflict as to its character. It is, however, clear that no mining operation has ever been conducted upon the land, nor has mineral in any quantity been taken therefrom, although more than two years have elapsed since the mineral claimant located his claim. The mineral claimant claims to have spent all the money he could spare upon a ditch located beyond the northern boundary of the tract. He says that this ditch is intended to convey water to his Kentucky placer claim; that it is not completed; and that such ditch will cost \$3,000. The only work which the mineral claimant claims to have had done upon the land appears to be the "shaft" referred to. This shaft, some fifty feet in depth, was dug by Leary and is situated within ten or twelve feet of his (Leary's) house. At the date of hearing it was used by him as a well, and from the testimony in behalf of the claimant it appears to have been sunk solely for that purpose.

Testimony was also introduced by the claimant tending to show that the tract had been "salted" in the interest of the mineral claimant.

The claimant and family have resided upon the tract since 1876. He enclosed and cultivated about five acres. He raised a variety of veg-

etables and had one hundred and eighteen fruit trees. He had a house, with eight rooms, a hay barn, stable, chicken house, etc. One of the mineral claimant's witnesses estimates his improvements as worth \$2,000.

It appearing from the record that the tract had been fully examined by the mineral claimant and witnesses, I agree with the conclusion reached by the local office that the mineral claimant's charge, that the claimant, by deadly threats, etc., "prevented all persons from prospecting" on the land, is not "entitled to any weight." I deem it proper to add, however, that the evidence in my opinion fails entirely to sustain this allegation.

After a careful consideration of the evidence, in the light of surrounding circumstances, I am satisfied that the value of the mineral claims located upon this tract is speculative, and the land is not shown to be mineral in character "as a present fact," within the meaning of the authorities cited. I can not, therefore, find in this record sufficient warrant for disturbing the claimant's entry for the tract involved.

Your decision is reversed.

HOMESTEAD ENTRY—SETTLEMENT—ACT OF MAY 14, 1880.

CHRISTENSEN *v.* MATHORN.

By section 3, act of May 14, 1880, 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.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

The record in this case shows that on November 20, 1883, Herman Christensen made homestead entry, No. 12,821, for the NW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ and the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 4, T. 112 N., R. 54 W., Watertown district, Dakota, and that on January 18, 1884, Wilhelm Mathorn made homestead entry, No. 13,099, for the entire NW. $\frac{1}{4}$ of said section, alleging settlement October 20, 1883. That by letter "C" of your office, under date of August 1, 1884, the said entry of Christensen was suspended, for conflict with said entry of Mathorn for the same land, and Christensen was allowed sixty days within which to show cause why his said entry should not be canceled, by reason of such conflict. That on February 5, 1885, the local officers transmitted to your office the corroborated affidavit of Christensen, resisting the right of Mathorn to the land in controversy, stating that he had made his said entry in good faith, and claiming the land embraced therein by right superior to that of Mathorn. That upon consideration of said affidavit, your office, by letter "C" under date of February 17, 1885, directed the local officers "to order a hearing, at which each may have an opportunity to present such evidence as he may have, in support of his claim to the tract in controversy." That a hearing was accordingly ordered

for May 14, 1885, at which time both parties appeared and submitted testimony.

It is shown by the testimony thus submitted that Mathorn made settlement upon the tract embraced in his said entry, in the month of June, 1883, in a small sod house, built by his son Edward Mathorn, and that he and his family continued to reside therein until October 20, 1883, when he commenced to build a larger house, but owing to the cold weather he, with his family, removed therefrom, between the 20th and last day of October, 1883, to a more comfortable house, situated on a pre-emption claim, upon which he had made final proof some time previously thereto; that he continued to reside on his pre-emption until January 18, 1884, when he made his said homestead entry, whereupon he returned to his said homestead claim, and continued to reside thereon to the date of the hearing; that, at the time Christensen made his said entry, he had full knowledge of Mathorn's settlement on the land and of his improvements thereon, which at that time consisted of some five or six acres of breaking, besides the house built by his son, and the larger house commenced by him, as above stated, but the land was then unoccupied by any one, and Christensen relies upon the fact that Mathorn did not make his entry within three months from the date of his settlement, as required by law. In the matters of residence, cultivation and improvement, both parties seem to have complied with the law, up to the date of the hearing, the said Christensen having followed his entry by settlement and improvement in April, 1884.

Upon this state of facts the local officers decided in favor of Mathorn, and recommended that Christensen's entry be canceled. From this decision Christensen appealed and in passing upon said appeal, your office, by letter "C", of date July 16, 1886, held:

It seems clear that Mathorn established an actual residence on the land in the summer of 1883, and his absence during the winter of 1883 and 1884, was only temporary, and if he did not make his homestead entry within three months from the date of his settlement, he *did* make such entry within three months from the date when Christensen's adverse right attached, *i. e.*, November 20, 1883, when the latter made homestead entry, and I think sufficient diligence was used to defeat Christensen, who did not settle upon the land till April 1884, and is not shown to have ever resided thereon for any length of time.

Christensen's appeal is dismissed and his homestead entry, No. 12,821, is hereby held for cancellation.

Christensen's appeal from this latter decision brings the case here.

By section three of the act of May 14, 1880 (21 Stat., 140), it is provided:

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.

In the case of *Watts v. Forsyth*, reported in 5 L. D., 624, and 6 L. D., 306, it was held by this Department, that the settlement of a homesteader is only protected by the act of Congress, above quoted, 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—citing Sec. 2265 of the Revised Statutes.

In the case at bar, it is conceded that Mathorn did not make his entry within three months from the date of his actual settlement on the land embraced therein, and his right by virtue of such settlement thereby became subject to any valid intervening right. Christensen acquired by his said entry and subsequent settlement, such right, and the said entry of Mathorn was, for that reason illegal. The decision of your office is therefore reversed, the entry of Christensen will be allowed to stand, and as the law allows but one existing homestead entry for the same tract of land, the entry of Mathorn must be canceled, to the extent that it conflicts with that of Christensen.

FINAL PROOF PROCEEDINGS—CONTINUANCE—MISDESCRIPTION.

KATE D. WOLF.

The continuance of final proof proceedings should be to a day certain.

Where through no fault of claimant the land was misdescribed in the published notice, the proof may be accepted as made, after republication, in the absence of protest or objection.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have considered the appeal of Kate D. Wolf from the decision of your office of March 28, 1887, suspending her original homestead entry, No. 77, and commutation cash entry, No. 1004, for the SE. $\frac{1}{4}$ of Sec. 18, T. 156 N., R. 64 W., Devil's Lake district, Dakota, and rejecting her final proof thereon.

The claimant made said original homestead entry December 10, 1883, and commuted the same to cash entry and made final proof thereon February 28, 1885.

Your office suspended said entries and rejected the proof 1st, because in the published notice of the claimant's intention to make said proof, the land was misdescribed as being in Sec. "28" instead of Sec. 18, and 2d, because the proof was made February 28, 1885, and not on December 22, 1884, the day designated in said published notice.

The proof as made related to the land embraced in said entries and was sufficient in itself, and it appears that the notice of intention to make said proof filed by the claimant with the register, and that furnished by the register to the publisher, correctly described said land, and the mistake in the description was made by the publisher and with:

out fault on the part of the claimant. The publisher in such cases "acts under the direction of the register" (20 Stat., 472), and the mistake was, therefore, chargeable to the officer of the government, rather than the claimant, and she should not be prejudiced thereby. (*United States v. Clark et al.* (6 L. D., 770); *Lytle v. Arkansas* (9 How., 333); *Yosemite Valley Case* (15 Wall., 20).

As to the second ground for the action of your office, it appears that the claimant sprained her ankle a few days before the day (December 22, 1884) appointed for making the proof, which prevented her appearing at that time, but her attorney was present and presented her excuse, and thereupon the local officers granted a continuance *until the claimant was able to be present*, and she subsequently, February 28, 1885, appeared with her witnesses and made said proof. The proof was approved by the local officers, and, as stated above, was in itself sufficient.

The local officers erred in the indefinite postponement of the making of the proof; they should have continued it to a day certain when it could have been again so continued if the claimant had not recovered. Even if there had been no error in the published notice, this indefinite postponement would have necessitated new publication, as it would have amounted to a discontinuance of the original notice.

This error, however, is not material in the present case, as, the original notice being fatally defective, a continuance to a day certain based upon such defective notice, would have been equally as invalid as an indefinite postponement. Nor does this case fall within that class of cases, where the final proof is not submitted on the day fixed in the notice, but no adverse claim exists, and no one appears to protest against the proof on the day advertised for its submission, in which cases it is held that the entry may be submitted to the Board of Equitable Adjudication for confirmation. (*William H. Adams*, 6 L. D., 745). Those are cases of valid notice. In contemplation of law, however, there was, in the present case, no original notice and no day designated for making proof, and it falls within the reason of those cases of notice defective because of misdescription of the land and where the claimant is without fault in which it is held, that this Department may, in the exercise of its duty of supervision, direct that new publication of notice be made, and, in the absence of protest or objection to the entry within the time prescribed in said new notice, that the proof already made be accepted as final proof. (*Forest M. Crossthwaite*, 4 L. D., 406); *United States v. Clark et al.*, *supra*).

You are, therefore, instructed to direct the register to make new publication of notice according to law, and if no protest or objection is filed to said entry within the time prescribed in said notice, the proof already submitted by the claimant will be accepted as final proof. The decision of your office is modified accordingly.

RIGHT OF WAY ACT TIMBER CUTTING.

OREGON & WASHINGTON TY. R. R. CO.

Under the act of March 3, 1875, the right of a railroad company to take timber for construction purposes is limited to public lands *adjacent* to the line of the road. Lands one hundred and fifty miles distant from the road are not adjacent thereto

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have considered the appeal of the Oregon and Washington Territory Railroad Company from the decision of your office, dated August 12, 1887, refusing its application to cut timber for construction purposes from the unsurveyed public lands in and about Cleelum, Kittitas county, Washington Territory, some twenty miles west of Ellenburg.

Said application is made under the provision of the act of March 3, 1875 (18 Stat., 482) granting the right of way to railroads through the public lands of the United States and allowing them, under certain conditions, "the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad."

Your office rejected said application for the reason that the lands from which the applicant proposed to take the timber were situated from one hundred and fifty to two hundred miles distant, from the line of the railroad and hence they were not adjacent to it.

It is quite clear that the application must be refused. If a railroad company can go one hundred and fifty to two hundred miles from the line of its road and not adjacent thereto, to procure timber for its construction, it would seem that it could take timber anywhere upon the public domain for the purpose of building its road. I do not think the statute warrants such a broad construction. In the Denver and Rio Grande Railway Company (6 L. D., 449) this Department cited with approval the decision of the United States district court for Colorado, rendered August 27, 1887, holding that:

Under the act of March 3, 1875, railroad companies have only the right to take timber from public lands for the construction of that portion of their lines of road adjacent to the lands cut from, the word "adjacent" meaning extending laterally some distance from the line of the road, and probably within ordinary transportation by wagons; and that timber so taken can not be lawfully transported to parts of the road remote from the place of cutting and there used, nor can it be used for purposes of repair.

The decision of your office refusing said application must be, and it is hereby affirmed.

TIMBER CULTURE CONTEST—PREFERENCE RIGHT.

DAYTON *v.* HAUSE ET AL.

A contestant will not be heard to assert a preference right of entry, when it appears from the record that he has disqualified himself to make entry prior to the final disposition of the contest.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have considered the appeal of Lyman C. Dayton from the decision of your office, dated September 6, 1887, dismissing his appeal from the action of the local land officers at Aberdeen, Dakota, adverse to him.

The record shows that Lyman C. Dayton filed in the local office at Watertown, Dakota Territory, his affidavit of contest against timber-culture entry No. 5070 of the NE. $\frac{1}{4}$ of Sec. 23, T. 123 N., R. 64 W., alleging as ground of contest, that the entryman, Joseph F. Hause, had relinquished said tract. Notice issued and August 25, 1881, was set for hearing, which was continued to November 1, 1881. On the last named date, James R. Dayton filed his affidavit in the local office, alleging that L. C. Dayton's contest was not made in good faith and moved the dismissal thereof; also that the entry of said Hause be canceled, and that he be allowed to enter said land. James R. Dayton also filed the affidavit of said Hause, with his relinquishment and the local officers canceled said entry of Hause on January 21, 1882, and permitted James R. Dayton to make timber-culture entry No. 5070 for said land. On March 24, 1882, L. C. Dayton filed an application for a rehearing and review of the action of the local officers, which was denied by your office on October 10, 1883, and an application for reconsideration was also refused on October 15, 1884.

On appeal a hearing was ordered by this Department (4 L. D., 263) in said case "with a view of ascertaining whether Lyman C. Dayton filed any application to enter said tract, and if so, when; at what time the register and receiver dismissed his contest against said entry, and whether either or both of said parties have acted in good faith; whether they are qualified to enter said tract under the homestead or timber culture laws; and whether said tract has been platted and sold as alleged."

The hearing was duly had, and the local officers, upon the evidence offered, found (1) That Lyman C. Dayton never made a proper application to enter the NE. $\frac{1}{4}$ of Sec. 23, T. 123 N., R. 64 W., the land in question, under the timber-culture law, and the departmental rules and regulations thereunder; (2) That Lyman C. Dayton's contest against said tract was dismissed on November 1, 1881; (3) That he had notice of said dismissal; (4) That he has never complied with the timber-culture law as to improvements and cultivation; (5) That said L. C. Dayton has exercised his homestead right by entering the SE. $\frac{1}{4}$ of Sec. 14, T. 123 N., R. 64 W., (6) That he has virtually abandoned the land

in question because he made timber-culture entry of the SE. $\frac{1}{4}$ of Sec. 2, T. 122 N., R. 64 W., on March 10, 1882; (7) That James R. Dayton was a qualified entryman, that he has acted in good faith as to the cultivation and improvement of said tract under the timber-culture law, and (8) That said tract has never been platted and sold as alleged.

On appeal, your office affirmed the action of the local office, dismissed the appeal of Lyman C. Dayton, and allowed the timber-culture entry of James R. Dayton to remain intact subject to future compliance with the law.

The appellant insists, among other things, that, even conceding that he did not file a proper application to enter said tract, yet he is entitled to the preference right of entry by reason of the initiation of his contest. Admitting, the truth of appellant's contention, yet the record shows that he subsequently entered another tract of land under the timber-culture law, and also one under the homestead law. He could, therefore, take nothing by his application to enter the tract in question, even if he had filed as he alleges. In the departmental decision ordering a hearing (*supra*) my predecessor, Secretary Lamar, stated:

It will be observed that no witnesses have testified in this case before the register and receiver. *Ex parte* affidavits have been filed by both Lyman C. Dayton and James R. Dayton directly in conflict, and they can not be accounted for, except upon the hypothesis that one or the other has sworn falsely.

The testimony taken at the hearing is, in many respects, very conflicting and wholly irreconcilable, but a careful examination of the whole record, shows no good reason for disturbing the findings of the local officers and the conclusion of your office. Said decision is accordingly affirmed.

INTERNAL IMPROVEMENT GRANT—STATE OF CALIFORNIA.

JOHN McNAUGHTON ET AL.

A location made under a warrant issued by the State in part satisfaction of the internal improvement grant of 1841, is within the confirmatory provisions of section one, act of July 23, 1866, and patent should issue therefor in accordance with said act.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have considered the appeal of John McNaughton, Thomas McNaughton, Elizabeth Lawrence and James O. Ellison, from your office decision of June 9, 1887, rejecting their several applications to make homestead entries for various portions of the NE. $\frac{1}{4}$, of section 7, and NW. $\frac{1}{4}$ section 8, T. 8 N., R. 1 W., H. M., Humboldt, California land district.

It appears from the record that the State of California, on September 11, 1852, issued to C. Gilchrist, land warrant No. 72 for 320 acres to be located in part satisfaction of the 300,000 acre grant for purposes of internal improvements, given the State by the act of September 4, 1841.

Gilchrist sold said warrant to one Hiram Wagar who made application to select thereon the lands above described on March 18, 1857.

Plat of the survey of the township was filed in the local office January 19, 1856.

After making such selection Wagar sold the land and it has since been sold and transferred a number of times, part of it being subdivided and having thereon a church, cemetery, blacksmith-shop, hotel, and a number of dwellings, constituting a small town, all claimed by, through, and under the selection of said Wagar.

This land has never been certified to the State and with the papers I find the request of the surveyor-general of California, that the said certification be now made, in order that the State may issue patent to the owner.

You say in your said decision that the selection under Wagar's land warrant made in 1857, "was never duly reported to your office, but evidence that it was made is on file." And further, that "In reporting the offerings made February 14, 1859, under proclamation of June 30, 1858, the land above described was excepted from the offering because of selections that had been made under the act of September 4, 1841."

You further say that said State land warrant No. 72 was at one time in your office and that said number is still found in a list of selections in Humboldt land district made under the said act of 1841.

On February 24, 1887, Elizabeth Lawrence applied to make homestead entry for the NE. $\frac{1}{4}$ of section 7, and on the next day James O. Ellison made a like application for the NW. $\frac{1}{4}$ of section 8, and on March 1st, following, John and Thomas McNaughton, presented similar applications. These applications were all rejected by the local officers for the reason that the record of their office showed said lands to be covered by State application No. 58 by State land warrant No. 72.

On July 23, 1866, Congress enacted a law entitled "An Act to quiet land titles in California," and in section one thereof it was provided as follows, (14 Stat., 218):

That in all cases where the State of California has heretofore made selections of any portion of the public domain in part satisfaction of any grant made to said State by any act of Congress, and has disposed of the same to purchasers in good faith under her laws, the lands so selected shall be and hereby are, confirmed to said State etc.

Then follow certain provisos which do not apply to the case at bar.

The State of California did sell to an innocent purchaser warrant No 72, authorizing him to locate the same on that much of the land granted to the State by the act of September 4, 1841, and the government permitted the assignee of the purchaser, as agent of the State to make selection of the tracts in controversy, upon said warrant, and accepted said warrant from the owner thereof, and placed the same on file in your office, as stated in your said letter.

The owner of the warrant was not required to do anything more to

perfect his right to the land under section one of the act of July 23, 1866. Subsequent proceedings were to be inaugurated by your office as required in section three of said act, which is as follows:

That it shall be the duty of the commissioner of the general land office to instruct the officers of the local land offices and the surveyor-general, immediately after the passage of this act, to forward lists of all selections made by the State referred to in section one of this act, and lists and maps of all swamp and overflowed lands claimed by said State, or surveyed as provided in this act, for final disposition and determination, *which final disposition shall be made by the commissioner of the general land office without delay.*

I can see no reason why certificate should not now issue for the tract in controversy, as provided in said section three.

It follows that the several applications to make homestead entry were properly rejected.

Your said decision is accordingly affirmed.

OREGON DONATION CLAIM—MARRIED MAN.

ANDREW J. ALLEN.

Though a donation claimant may be entitled, at date of settlement, to claim three hundred and twenty acres of land as a married man, if his wife dies prior to the completion of the period of occupancy certificate can issue for but one hundred and sixty acres.

In such a case the donee may be allowed to relinquish such portion of the land as may be necessary to make his claim approximate one hundred and sixty acres, which shall include contiguous tracts and his principal improvements.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have considered the appeal of Andrew J. Allen from the decision of your office, dated August 14, 1886, holding for cancellation donation certificate, No. 1984, for lots 5, 6, 7, and 8, of Sec. 9, lot 1, the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, the W. $\frac{1}{2}$ of the NE. $\frac{1}{4}$, and the NW. $\frac{1}{4}$ of the SE. $\frac{1}{4}$ of Sec. 16, T. 25 S., R. 4 W., issued August 23, 1876, by the Roseburg land officers, in the State of Oregon.

Said certificate is for 252.16 acres, and is in the name of Andrew J. Allen and wife, assigning the east-half to him and the west-half to his wife.

The final proof shows that Allen claimed three hundred and twenty acres, as a married man, under the act of Congress approved September 27, 1850 (9 Stat., 496), and amendments thereto; that he was married on August 15, 1847, and arrived, with his wife, in said State, then a Territory, on September 17, 1852; that, on September 4, 1854, he settled upon unsurveyed land in what proved to be T. 25 S., R. 4 W.; that he resided continuously upon and cultivated said land until the fourth day of September, 1858; that his wife died upon said claim on July 12, 1855; that he was, at date of settlement, a native born citizen, over twenty-one years of age.

Your office held that said Allen was entitled to claim, at the date of his settlement, three hundred and twenty acres, but, at the date of his final proof, his wife having died in the meantime, certificate could issue for only one hundred and sixty acres of land, citing as authority the case of *Hall v. Russell* (101 U. S., 503). Your office further found that the township plat of survey of said land was approved on February 20, 1856; that Allen filed two notices, claiming parts of sections 9 and 16, by metes and bounds; that in 1876, when said certificate issued, he changed his claim and took it by legal subdivisions; that there is no adverse claim, except the Oregon and California Railway Company, which asked, by telegraph, for a hearing to determine the status of said lot 8, in Sec. 9; that the claim of the company should be rejected for failure to furnish affidavits within the time required, showing the status of said lot 8; that the selection of said lot 8 ought not to be disturbed, as said notices include nearly one-half of said lot; that the field notes of the survey of said township locate Allen's house in lot 7 of Sec. 9, and, as the fourth section of said act requires that the donation shall include the improvements of the donee, your office held for cancellation said certificate as to lots 5 and 6 of Sec. 9, and the NE. $\frac{1}{4}$ of the NW. $\frac{1}{4}$ of Sec. 16, containing ninety-eight acres.

The appellant insists that your office erred in holding that the extent of the donation grant depends upon whether the settler is married, or single, at the date when the occupancy of the land is completed. This contention can not be sustained.

The fifth section of said act provides that to certain persons, who are qualified and have complied with the provisions of said act,

There shall be and hereby is granted the quantity of one quarter section, or one hundred and sixty acres of land if a single man; or, if married, or if he shall become married within one year from the time of arriving in said Territory, or within one year after becoming twenty-one years of age, as aforesaid, then the quantity of one-half section, or three hundred and twenty acres, one half to the husband and one half to the wife in her own right.

The donation act was very fully considered by the United States supreme court in the case of *Hall v. Russell* (*supra*), in which it was held that the grant by said act was not to a settler only, but to a settler who had completed the four years of residence and cultivation, and had otherwise conformed to the provisions of said act; that whenever a settler qualified himself to become a grantee, he took the grant and his right to a transfer of the legal title from the United States became vested, but until he was qualified to take, there was no actual grant of the soil; that the provision in the fourth section, "that in all cases where such married persons have complied with the provisions of this act, so as to entitle them to the grant, as above provided and either shall have died before patent issues, the survivor and children or heirs of the deceased shall be entitled to share an interest of the deceased in equal proportions, except where the deceased shall otherwise dispose of it by testament duly and properly executed according to the

laws of Oregon," related to such married persons as had completed their four years residence and cultivation, and had otherwise complied with the law; that the language of the fifth section of said act clearly indicates that there was to be no grant, except to persons, who, by complying with the provisions of the act, had become qualified to take. Again, in the case of *Vance v. Burbank* (101 U. S., 521), the supreme court reaffirmed the doctrine announced in *Hall v. Russell* (*supra*), and added "The statutory grant was to the settler, but if he was married, the donation, when perfected, inured to the benefit of himself and wife in equal parts. The wife could not be a settler. She got nothing except through her husband." The same principle was subsequently adhered to in the case of *Maynard v. Hill* (125 U. S., 190).

While concurring in the conclusion of your office, that the claimant can acquire title to not more than one hundred and sixty acres of said land, I am of the opinion that he should be permitted to relinquish so much of the land covered by said certificate as may be necessary to approximate the claim to one hundred and sixty acres, which shall leave the land contiguous and include his principal improvements. In case the claimant shall file such relinquishment within thirty days from notice hereof, the certificates may be canceled as to that part relinquished, and patent may issue on the certificate as amended. In case the claimant shall fail to file such relinquishment within the time designated, after due notice hereof, the decision of your office will be affirmed.

Said decision is modified accordingly.

SOLDIERS' ADDITIONAL HOMESTEAD—MINOR.

W. S. PINE.

The right to make soldiers' additional entry accorded to the minor child under section 2307 R. S., must be exercised prior to the expiration of his minority.

The fact that the certificate of the soldier's additional right was issued during such minority would not operate to extend the time within which entry could be made thereunder.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have considered the appeal of W. S. Pine, guardian of Fred H. Kilmer, minor orphan of H. Kilmer, deceased, from the decision of your office, dated July 21, 1887, holding for cancellation soldier's additional homestead entry No. 1420 (final certificate No. 291), of Lot 2 of Sec. 31, T. 21 N., R. 67 W., made August 17, 1886, at the Cheyenne land office, in the Territory of Wyoming.

Your office held said entry for cancellation, for the reason that at the time the same was made in the name of W. S. Pine, guardian of Fred Kilmer, minor heir of Fred H. Kilmer, deceased, the said heir was more than twenty-one years of age, and, hence, the entry was illegal.

The counsel for appellant, in his appeal claims:

That said entry should not have been held for cancellation, because the S. A. scrip, with which this location was made, was duly certified by your predecessor, and assigned for a valuable consideration, which went to the benefit of said minor orphan child prior to his becoming of age; and the fact that said orphan child, having become of age, subsequent to the transfer of said scrip, should not in any manner affect the interests of a bona-fide owner of the same, or the subsequent location thereof.

Section 2307 of the Revised Statutes provides that:

In case of the death of any person who would be entitled to a homestead under the provisions of Sec. 2304, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter.

This Department held in the case of Lars Winqvist (4 L. D., 323), that:

The right of additional homestead given to the soldier can only be exercised by the soldier during his life, and after his death by his widow during her life or widowhood; and after her death or marriage, by his children during their minority.

If the entry of the minor child must be made during his minority, as the statute requires, then the fact that the certificate was issued during such minority could not extend the time when such entry must be made. The right to make such entry is personal and not assignable, and such has been the repeated ruling of this Department. See Lars Winqvist (*supra*) Chauncey Carpenter (7 L. D., 233); J. B. Haggin (7 L. D., 287).

It follows, therefore, that the decision of your office was correct, and it is hereby affirmed.

SCHOOL LANDS—FORT SANDERS MILITARY RESERVATION.

GEORGE TIMMERMAN.

Sections sixteen and thirty-six, embraced within the lands excluded from the Fort Sanders military reservation by act of June 9, 1874, are reserved for school purposes in accordance with section 1946 of the Revised Statutes, and hence not subject to entry.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have before me the case of George Timmerman appealed from the decision of your office, dated March 22, 1887, rejecting his application to enter Sec. 36, T. 16 N., R. 74 W., Cheyenne land district, Wyoming, under the desert land act.

It appears that said section is within the original limits of the Fort Sanders, formerly Fort John Buford, military reservation, created by executive order, dated January 7, 1867. By act of June 9, 1874 (18 Stat., 65) said reservation was materially reduced leaving said section outside of the new reservation. Section third of said act provides:

That the lands heretofore constituting the Fort Sanders military reservation outside of the limits of the new reservation, as defined in section one of this act, shall be held to

be and have been subject and liable to the operation of the laws of the United States, in the same manner and to the same extent as if the same had never been included within the limits of said reservation.

Section 1946 of the Revised Statutes is as follows :

Sections numbered sixteen and thirty-six in each township of the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana and Wyoming, shall be reserved for the purpose of being applied to schools in the several Territories herein named, and in the States and Territories hereafter to be erected out of the same.

This was a law of the United States at the time the act of June 9, 1874, was passed, and is now, and it must be held to operate on sections sixteen and thirty-six the same as if such sections had never been within said military reservation. Said section is, then, reserved for school purposes, and is not subject to desert land entry.

The decision of your office rejecting appellant's application to enter is therefore affirmed.

MINERAL LANDS—SALT DEPOSITS—ACT OF JANUARY 12, 1877.

SALT BLUFF PLACER.

Land chiefly valuable for its salt deposits is not subject to entry as a placer mine. No authority exists for the disposal of saline lands, or salt springs, belonging to the United States except under the provisions of the act of January 12, 1877. The provisions of said act are not applicable to the Territory of Utah, hence there is no authority for the disposal of such lands in said Territory.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

On November 25, 1879, Axel Eiuersen and Christian A. Madsen filed application, in conformity with the provisions of the act of May 10, 1872 (17 Stat., 91), for a patent from the United States, for the E. $\frac{1}{2}$ of the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, Sec. 33, T. 20 S., R. 1 E., Salt Lake City, Utah, known as the "Salt Bluff" placer mine.

The record shows that the tract involved is chiefly valuable for its salt deposits.

On May 15, 1883, receiver's receipt and final certificate of entry were issued to claimants by the local officers, and thereupon the papers in the case were transmitted to your office for appropriate action thereon.

In response to the requirements of three several letters of your office, dated respectively, on February 14, 1884, October 6, 1884, and April 2, 1885, certain amendments were made, and supplemental proofs furnished by claimants, in reference to said entry, for the purpose of satisfying your office of their full compliance with the requirements of said act of May 10, 1872, and the circular instructions issued thereunder.

On July 31, 1886, your immediate predecessor held said entry for cancellation, on the ground that "no authority exists for making such entries, or for disposing of salt lands in the Territory of Utah, in any man-

ner." The case is now before me on appeal by claimant from this decision.

The first question presented for determination by the appeal is, as to whether lands bearing salines or salt, and chiefly valuable for their salt deposits, are subject to entry and patent under the mineral act of May 10, 1872, *supra*.

The first section of said act provides :

That all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, under regulations prescribed by law.

Section two of said act provides for the location of mining claims upon veins or lodes of quartz or other rock in place, and section ten provides that the act of July 9, 1870 (16 Stat., 217), shall, with certain exceptions as to proceedings to obtain a patent, be and remain in full force and effect.

It is provided by said act of July 9, 1870, among other things, "that 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 this act, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims," with certain exceptions therein specified, as to the survey of such lands, the number of acres that could be entered and the price, per acre, that should be paid therefor.

It is proper to note in this connection, that after the appeal herein was taken, John Mullan, Esq. who represents as attorney the interests of Elias Crane, E. W. Crane and F. Oliver, filed in the record, a written argument for the stated purpose of showing that salt is a mineral, and that lands chiefly valuable for salt deposits, are subject to entry and patent under said act of May 10, 1872.

Said written argument is accompanied by the application of the parties named, to intervene for the purpose stated, and is supported by a sworn statement, to the effect that said applicants have for the past ten years and more, held by actual possession and constant use certain salt mines in Sevier County, Utah; that they have used the crude product in the manufacture of salt for family use and for cattle, and have expended for improvements in buildings, machinery, roads, etc., upwards of \$5,000, and a like sum for labor, with a view to obtaining patents for their claims, under the act of May 10, 1872.

This argument has been duly considered, but it may be well to note, in passing, that in determining the first point raised by the record, it is not deemed necessary to inquire whether salt is or is not a mineral.

As before stated, the real question presented in this case is as to whether lands belonging to the United States, which are saline in character, are subject to entry and patent under the act of May 10, 1872; and as bearing directly upon this question, we are led first to inquire

whether there has been any settled policy on the part of the government in dealing with such lands, as distinguished from other lands, made subject to entry and patent under the general land laws. If there has been, and still exists, a separate and distinct policy in reference to such lands, it follows that they are not subject to entry and patent under the provisions of said act of May 10, 1872, and the question, as to whether salt is a mineral within the meaning of said act, is therefore immaterial.

In the case of *Hall v. Litchfield et al.*; decided by your office on March 2, 1876, and affirmed by my predecessor, Secretary Chandler, February 13, 1877 (Copp's U. S. Mineral Lands, 321), it was held, following the authority of the case of *Morton v. Nebraska* (21 Wall., 660), that it has been the policy of the government to reserve salt springs and lands from sale, and that there is no authority for their disposal, either as agricultural or mineral lands; and in that case certain filings and applications for lands in the State of Colorado, returned by the surveyor-general as saline lands, and the contrary not being shown, were rejected.

In the case of *Morton v. Nebraska, supra*, the status of saline lands and salt springs was fully considered by the supreme court. The action was ejectment, the plaintiff's title being based upon locations of certain warrants. The State insisted that these locations were without authority of law, because the lands on which the warrants were laid were saline lands, and therefore not subject to entry under the land laws of the United States. The court rejected the claim of the plaintiff to the lands therein in question—the same being palpably saline in character—holding that the policy of the government since the inauguration of the public land system by the act of May 18, 1796, to reserve saline lands from disposition under the laws regulating the sale and disposal of the public lands, has been uniform. In discussing the question as to whether this policy was continued or abandoned by the act of July 22, 1854, "to establish the offices of surveyor-general of New Mexico, Kansas and Nebraska," (10 Stat., 308,) the court said:

There was certainly no reason why a long established policy, which had permeated the land system of the country, should be abandoned. On the contrary, there was every inducement to continue, for the benefit of the States thereafter to be organized, the policy which had prevailed since the first settlement of the Northwestern Territory. In the admission of Ohio and other States, Congress had made liberal grants of land, including salt springs. This it was enabled to do by reserving these springs from sale. Without this reservation it is plain to be seen there would have been no springs to give away, for every valuable saline deposit would have been purchased as soon as it was offered for sale. An intention to abandon a policy which had secured to the States admitted before 1854, donations of great value, cannot be imputed to Congress, unless the law on the subject admits of no other construction.

And the court further said that the act of 1854, "instead of manifesting an intention to abandon this policy, shows a purpose to continue it." See also on this subject, Weeks' on Mineral Lands, 48; Copp's U. S.

Mining Decisions, 214; Copp's U. S. Mineral Lands, 324-5; *Cole v. Markley* (2 L. D., 847).

The decision of the supreme court in *Morton v. Nebraska* was rendered in October, 1874, and following closely thereafter an act was passed by Congress, approved January 12, 1877 (19 Stat., 221), which provides:

That whenever it shall be made appear to the register and receiver of any land-office of the United States that any lands within their district are saline in character, it shall be the duty of said register and said receiver, under the regulation of the General Land Office, to take testimony in reference to such lands to ascertain their true character, and to report the same to the General Land Office; and if, upon such testimony, the Commissioner of the General Land Office shall find that such lands are saline and incapable of being purchased under any of the laws of the United States relative to the public domain, then, and in such case, such lands shall be offered for sale by public auction at the local land-office of the district in which the same shall be situated, under such regulations as shall be prescribed by the Commissioner of the General Land Office, and sold to the highest bidder for cash at a price not less than one dollar and twenty-five cents per acre: and in case said lands fail to sell when so offered, then the same shall be subject to private sale, at such land-office, for cash, at a price not less than one dollar and twenty-five cents per acre, in the same manner as other lands of the United States are sold: *Provided*, That the foregoing enactments shall not apply to any State or Territory which has not had a grant of salines by act of Congress, nor to any State which may have had such a grant, until either the grant has been fully satisfied, or the right of selection thereunder has expired by efflux of time. But nothing in this act shall authorize the sale or conveyance of any title other than such as the United States has, and the patents issued shall be in the form of a release and quit-claim of all title of the United States in such lands.

It would seem from the language of the statute above quoted, that at the time of its enactment, Congress did not consider saline lands as subject to sale and entry, or capable "of being purchased under any of the (then existing) laws of the United States relative to the public domain;" and while the passage of said act is not expressly, it is virtually, a recognition on the part of Congress of the policy of the government theretofore existing, as shown, touching the reservation of saline lands, and manifestly shows a purpose to continue the same.

The Territory of Utah has had no grant of saline lands by act of Congress, and is therefore within the proviso of said act.

On April 10, 1877, circular instructions were issued by your office under said act, to the local land officers of the United States (4 C. L. O., 21), in which it is stated that "this act provides a mode of proceeding by which public lands indicated by the field notes of survey, or otherwise, to be saline in character may be rendered subject to disposal."

The only decision of your office I have found, in which it is expressly held that saline lands or salt springs are subject to entry under the mining act of May 10, 1872, is contained in a letter addressed by Acting Commissioner Curtis, on April 27, 1874, to one J. A. Rollins, at Salt Lake City, Utah (1 L. O., 19, and Copp's U. S. Mineral Lands, 321), but this ruling was, in effect, reversed by the decision in the case of *Hall v. Litchfield et al.*, above cited, and the doctrine therein announced does

not appear to have been followed by your office after the rendition of said latter decision.

In view of the foregoing, and after a careful consideration of the whole subject, I am satisfied that no authority exists for the disposal of saline lands or salt springs belonging to the United States, except under the provisions of said act of January 12, 1877, and that the policy of the government is, and has been from the earliest date, to *reserve* all salines, and to dispose of them only by specific acts of Congress. The act of January 12, 1877, not applying to the Territory of Utah, it follows that there is no authority for the disposal of the lands in question in any manner, and the entry thereof made by claimants, as stated, must therefore be canceled.

For the reasons stated, your office decision is affirmed.

PRACTICE—CONTEST—PREFERENCE RIGHT.

GRINSTEAD *v.* MURPHY.

The contestant is entitled to thirty days after the receipt of notice of cancellation, within which to exercise his preference right of entry.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

On March 25, 1885, Andrew P. Murphy initiated contest against Charles W. Bowman's timber-culture entry for the NW. $\frac{1}{4}$ of Sec. 20, T. 18 S., R. 27 W., Wa Keeney land district, Kansas. Hearing was had May 7, 1885; the claim was adjudged forfeited, no appeal was filed, the case was closed, and the entry was canceled December 8, 1885. On the same day the contestant was notified of his preference right of entry. On January 9, 1886, Virgil H. Grinstead made timber-culture entry of the same tract. The contestant, as appears by the papers in the case, did not receive notice of the result of the contest until January 1, 1886. On January 5, he forwarded an application to enter the tract, which application did not reach the local office at Wa Keeney until after the entry of Grinstead had been allowed; and it was rejected because of said prior entry. From this action of the local officers Murphy appealed. Your office, by letter of February 10, 1887, sustained the appeal, and directed that his application be allowed and the entry of Grinstead canceled.

The question at issue seems to be whether the contestant must exercise his preference right within thirty days after the cancellation of the entry which he has contested, or within thirty days after he *receives notice* of such cancellation. The act of May 14, 1880 (21 Stat., 140), allows him "*thirty days from date of notice.*" I therefore affirm your decision awarding to Murphy the right to make entry of the tract.

MINING CLAIM—PROCEEDINGS TO OBTAIN PATENT—POSTING.

PRATT v. AVERY ET AL.

The copy of the plat and notice of application must be posted in a conspicuous place on the land embraced in the plat.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have considered the case of Charles H. Pratt against T. M. Avery and Samuel Allerton, upon the appeal of the latter from your decision of October 27, 1887, holding for cancellation mineral entry, No. 150, Sylvanite No. 2 lode claim, Gunnison, Colorado.

The record shows that T. M. Avery and Samuel Allerton filed their application for patent to the Sylvanite No. 2 mining claim, April 13, 1885, and made entry for the same July 11, 1885.

September 10, 1885, Charles H. Pratt filed a protest against said entry, alleging, substantially, as follows:

1st: That said entry was allowed through the mistake of the local officers before the period of publication had expired.

2d: That mineral has never been discovered.

3d: That there never was any plat or notice posted in a conspicuous place upon said claim as required by law.

By your decision of April 16, 1887, you overruled the first objection, dismissed the second, and ordered a hearing to determine "whether a plat and notice were posted in a conspicuous place on the land embraced in said claim, prior to the filing of the application for patent," as alleged in the third objection. No appeal was taken from your action in reference to the two first objections.

Hearing was commenced before the local officers June 27, 1887, and continued a number of days.

The testimony shows that the place of posting was the breast of a drift, about fifteen feet long, run from a tunnel at a point about eighty-eight and a half feet distant from its mouth or entrance, and in the neighborhood of fifty feet below the surface of the claim. Artificial light was necessary to read the notice. A sign of "No admittance" was placed over the entrance of said tunnel, and the foreman was instructed to allow no person except employes to enter said tunnel.

Whilst the evidence shows that it was unsafe, if not impossible, to post the plat and notice on the surface of the claim at the season of the year in which it was posted, such posting could, however, have been safely made at the mouth of said tunnel, or on the walls of one of the four houses erected at the tunnel's entrance, where it could have been easily seen by persons passing over the claim.

It also appears that during a part of the time said notice was posted at the end of Sylvanite No. 2 tunnel, which started from the old Sylvanite tunnel. This posting was fifteen feet from the main tunnel, and during part of the winter this fifteen feet of space was filled with ore

from other portions of the mine, thus rendering it impossible even for the men working in the mine to read said notice and plat.

July 23, 1887, the local officers recommended "that the Sylvanite No. 2 lode claimants be required to make new publication, posting and proof of same."

October 27, 1887, you decided that "the appeal of claimants from said decision is accordingly dismissed, and said entry is hereby held for cancellation without prejudice to the claimants proceeding *de novo* in a regular manner."

From said decision claimants duly appealed.

Section 2325 of the Revised Statutes prescribes that in order to obtain a patent for mineral lands, the applicant "shall post a copy of such plat, together with a notice of such application for a patent in a *conspicuous* place on the land embraced in such plat previous to the filing of the application for a patent." The evidence shows that claimant has not complied with this requirement of the statute.

I therefore affirm your decision.

TIMBER LAND—SETTLEMENT—ACT OF JUNE 3, 1878.

WRIGHT *v.* LARSON.

While lands chiefly valuable for timber and stone, and unfit for ordinary agricultural purposes, are not excluded from settlement by the act of June 3, 1878, yet settlement on such lands should be carefully scrutinized as the exception in said act is in favor of the "*bona fide* settler."

A settlement for the purpose of securing the timber on the land, or for any other purpose than establishing a home, is not a *bona fide* settlement within the meaning of said act.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

I have considered the case of William Wright *v.* Hans Larson, on the appeal of the former from the decision of your office of March 15, 1887.

July 10, 1885, the appellee, Hans Larson, filed pre-emption declaratory statement, No. 10,184, for Lot 5, the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ and the SE. $\frac{1}{4}$ of SE. $\frac{1}{4}$, of Sec. 32, T. 24 N., R. 1 W., Olympia district, Washington Territory, alleging settlement, June 18, 1885.

December 30, 1885, the appellant, William Wright, filed an application to purchase said Lot 5, and the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$, and the E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said Sec. 32, under the timber land act of June 3, 1878, and, on April 5, 1886, tendered proof and payment therefor, and, April 29, 1886, made supplemental proof.

February 23, 1886, Hans Larson filed a protest against the allowance of timber land entry of said land by Wright, and hearing was had in July, 1886, both parties being present in person and by counsel, and a large amount of testimony being taken. The local officers decided in

favor of the pre-emptor, Larson, and disallowed the application of Wright, and your office in said decision of March 15, 1887, affirmed the decision of the local officers, and Wright now appeals to this Department.

On the hearing, the appellant offered to prove, that the land in dispute was "chiefly valuable for timber" and "unfit for cultivation." The local officers refused to allow this proof to be made, and this is one of the errors assigned on this appeal. This assignment of error must be sustained. In the case of *Porter v. Throop* (6 L. D., 691), I held, that "while the act of June 3, 1878, in exempting from its operation lands claimed by a 'bona fide settler,' *ex vi termini*, recognizes that there may be a *bona fide* settlement on lands of the character described therein—that is, lands chiefly valuable for timber and 'unfit for ordinary agricultural purposes'—yet, for obvious reasons, such settlements should be closely scrutinized, and the fact, that the land is of such a character, might be a circumstance, taken in connection with the other facts of the case, shedding light upon the question of the *bona fides* of the settler." The exception in the act of June 3, 1878, is in favor of the "*bona fide* settler," and the issue involved in this case is the *bona fides* of the settlement of Larson. The evidence offered as to the *character* of the land being relevant to this issue, under the circumstances of this case hereinafter stated, should have been admitted.

It is true, as stated in your office decision, that "The question of Larson's compliance with the requirements of the pre-emption law will be enquired into when he offers to make proof," and it was not necessary, as between him and the timber land applicant, that compliance with those requirements should have been shown on the hearing in this case. The *bona fides* of his settlement and not his conformity to the requirements of the law, was the subject of inquiry, and on this issue the burden was upon the timber land applicant. A settlement to be *bona fide* must be made for the purpose of making the tract a home. (*Porter v. Throop, supra.*) This is the test, and a settlement for the purpose of securing the timber on the land or for any other purpose than establishing a home, is not a *bona fide* settlement within the meaning of the act of June 3, 1878.

It appears from the evidence, that the tract in dispute was six or seven miles from any other settlement in a dense forest of fir timber, and accessible only by a foot path, that it had been returned by the surveyor-general as timber land, and had on it (according to the estimate of the witness) 4,000,000 feet of merchantable timber; and, while the local officers decided, as above stated, that evidence that the land was unfit for cultivation was not admissible, it appeared from the testimony incidentally, that the soil was poor, broken and gravelly, and that it would require the expenditure of an amount wholly disproportionate to any possible returns which could be expected from such land to clear and prepare it for cultivation. There seems to have been no induce-

ment for a reasonable man of family to establish a home on such land, surrounded as it was by a forest, located so far from any other settlement and comparatively inaccessible.

Larson testifies, that he went on the land in May, 1885, and built a house thereon about the last of July of that year, and was there about three weeks the first time and from one to two weeks in each of the months of July, August, September, October and November, 1885, and from November, 1885, to May, 1886, he was not on the land at all; that he owned a comfortable well-furnished house in Seattle, in which he and his family (a wife and son) resided during the whole of said time up to April 16, 1886, when he and his family went to California, where he remained about three weeks and then returned to the land, leaving his family in California, and that, on account of sickness of his wife and son, he went to California again in June, 1886, and had just returned to the land a few days before the hearing. The house built by Larson on the land was a log house, twelve by fourteen feet, with walls six feet high, chinks unstopped, a bark roof and gable ends which would not protect from rain, a dirt floor, a door and window, but no chimney. He had dug up a few stumps, slashed the trees on from a third to a half acre of land, and had spaded a piece of ground, twenty by thirty feet, and planted oats and onions thereon. He had also laid down two or three logs, as he states, for the foundation of a better house. His total improvements were valued by his witness at \$50, and by the witnesses of the timber land applicant at not more than \$20.

The character of Larson's improvements and of the land, its location and surroundings, and the large quantity of merchantable timber thereon (for utilizing which, together with that on other lands in the vicinity, a railroad had been projected and commenced about the time of Larson's filing), his maintenance of a home elsewhere after his alleged settlement on the land, and all the facts and circumstances of the case, convince me, that his was not a *bona fide* settlement for the purpose of establishing a home on the land, but that it was a pretended, or, at most, colorable, settlement, made with a view to securing the benefit of the timber thereon.

The decision of your office is accordingly reversed. The filing of Larson will be canceled, and the application of Wright must be acted upon as though said filing of Larson had not been made.

MINING CLAIM--MILL SITE--TIMBER.

TWO SISTERS LODGE AND MILL SITE.

Land not used or occupied for mining or milling purposes can not be appropriated under section 2337 R. S., for the purpose of securing the timber growing thereon.

Secretary Vilas to Commissioner Stockslager, December 19, 1888.

On October 29, 1885, John Brennan *et al.* made mineral entry, No. 2924, at Central City, Colorado, for the Two Sisters' Lodge and Mill-Site

claim, situated in the Montana mining district, Clear Creek county, State of Colorado, as per survey No. 2190 A and B.

One June 15, 1887, the claimants were required by letter of your office, to furnish evidence that the mill-site—survey No. 2190 B—was used or occupied, at or prior to the application for patent, for mining or milling purposes.

The evidence submitted in response to this requirement, consists of the corroborated affidavit of entryman, Brennan, from which it appears that said mill site was located for the purpose of securing the timber growing thereon for use in working said lode; that the claimants have been using such timber for the purposes stated, and construing such, use as equivalent to use and occupancy of the land for mining or milling purposes, they seek to obtain patent for the tract under Section 2337 of the Revised Statutes.

Upon consideration of the record as thus presented, your office, on September 8, 1887, held the entry of claimants for cancellation, to the extent of the area embraced in said mill site, survey No. 2190 B, on the stated ground that “the use of the timber growing on the mill site is not . . . such use or occupation of the *land* as the law contemplates.”

The appeal by claimants from this decision brings the case here.

It appears from the record in the case that there is upon the land applied for a considerable quantity of timber, such as can be used for “timbering the mine,” but not suitable for saw lumber; there is no timber within the boundary lines of said lode claim suitable for use in working the mine, and that said mine or lode can not be successfully worked without getting the necessary timber from some other place. That the situation of the tract is a suitable one for the erection of a concentrating mill, and the claimants allege that it is their intention and expectation to erect on the tract such a mill, for the purpose of concentrating the ores taken from said Two Sisters’ Lode.

But it is at present only insisted by the claimants that it is necessary for them to have the use of the timber growing on said land for the purposes aforesaid, and for that reason alone they ask that a patent be issued to them for the land as a mill-site. No improvement of the tract is shown, or alleged, nor has the *land* been used or occupied by claimants, in any sense, except for the purpose of taking the timber therefrom.

By said Sec. 2337 of the Revised Statutes, it is provided that:

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

In the case of Charles Lennig (5 L. D., 190), the Department held that the foregoing section contemplated the actual use or occupation by improvements or otherwise, for mining or milling purposes, of the land sought to be obtained thereunder; that the second clause of the section makes the right to a patent of a mill-site dependent upon the existence on the land of a quartz mill or reduction works; but that under the first clause of said section, the *use* or *occupation* of the *land* for mining or milling purposes, is the only prerequisite to a patent. That by the "use" of the *land* for mining or milling purposes, is meant the operation of a quartz mill or reduction works upon it, or in any other manner, employing it in connection with mining or milling operations; and that "occupation" of the *land* for mining or milling purposes, so far as it may be distinguished from the "use" thereof, is something more than mere naked possession, and that such occupation must be evidenced by outward and visible signs of the applicants' good faith. It was further held in said case that "when an applicant is not actually using the land, he must show such an occupation, by improvements or otherwise, as evidences an intended use of the tract in good faith for mining and milling purposes," and that the use of water obtained from the tract is not a use of land, as contemplated by said section.

This ruling was followed in the case of the Cyprus Mill-Site (6 L. D., 706), in which it was held that land not improved or occupied for mining or milling purposes, can not be appropriated under said section 2337, for the purpose of securing the water thereon.

Viewed in the light of these authorities, it is clear that the land here in question, has neither been "used" or "occupied" by the applicants, for mining or milling purposes, within the meaning of either clause of said section. The use of the timber thereon is not the use of the *land*; neither is the mere naked possession of the tract, for the purpose of taking the timber therefrom, such an occupancy of the *land* as is contemplated by the act.

Your said office decision is therefore affirmed.

FINAL PROOF PROCEEDINGS—REPUBLICATION—HEARING.

MAGGIE A. GARRISON.

The necessity for republication, where the proof was not made on the day designated, is obviated by a hearing subsequently ordered on affidavit of contest.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 21, 1888.

On November 30, 1888, this department recalled its decision dated November 9, 1888 (7 L. D., 417), in the case of Maggie A. Garrison involving her title to SW. $\frac{1}{4}$, Sec. 31, T. 1. N., R. 25 W., Bloomington,

Nebraska land district, said decision being a modification of your decision in the same case dated March 15, 1887.

The attention of the Department has been called to the fact that prior to the signing of the said decision of November 9, 1888, an affidavit of contest filed by one Nicholas Deitz, July 14, 1888, had been transmitted to this Department but said affidavit not being with the record in said case at the time the same was examined by me, received no consideration.

As a hearing upon said affidavit of contest will doubtless be ordered by your office, and as all the facts necessary for a proper and just decision will no doubt be brought out upon said hearing, a republication of notice as directed in my said letter of November 9, becomes unnecessary, and I herewith return said affidavit of contest and the other papers in the case for such further action in your office, as the case may require under the law and rules of the Department.

ALABAMA LANDS—ACT OF MARCH 3, 1883.

DAVID J. DAVIS.

While *bona fide* homestead entries, made prior to the passage of the act of March 3, 1883, were protected under said act, such protection would not extend to one claiming under the relinquishment of such an entry.

A homestead entry, allowed in contravention of the terms of said act, and under which valuable improvements have been made, may be suspended, pending public offering of the land, and treated as an application to enter in the event that the land is not sold on such offering.

First Assistant Secretary Muldrow to Commissioner Stockslager, December 21, 1888.

I have considered the case of David J. Davis, on his appeal from your office decision of December 2, 1887, holding for cancellation his homestead entry made December 20, 1886, for SW. $\frac{1}{4}$, NW. $\frac{1}{4}$, E. $\frac{1}{2}$, SW. $\frac{1}{4}$ and NW. $\frac{1}{4}$, SW. $\frac{1}{4}$, Section 24, T. 15 S., R. 4 W., Montgomery, Alabama land district.

You say in said decision that the entry "is held for cancellation for illegality the land embraced therein being described in the mineral list on file in this office as 'valuable for coal.'"

A corroborated affidavit of appellant filed with his appeal, shows that claimant who was duly qualified to make homestead entry of public lands, purchased the improvements of one Elias M. Myrick on the land above described, together with the said Myrick's relinquishment of his homestead entry for said land made September 5, 1882. Claimant filed said relinquishment in the local office and immediately made entry of said tract under the homestead law. After entry he took possession of the land, built a house sixteen and one-half by eighteen and one-half

feet with side room and shed room and with his family established a residence, and has since built a crib and stable and cleared and put in cultivation three acres of the land. That in addition to the sum of fifty dollars paid for improvements of Myrick, claimant's improvements are worth over two hundred dollars, and his residence since a short time after his entry has been continuous.

Your said decision is based upon the act of March 3, 1883 (22 Stat., 487) which provides :

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 10, 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.

In case of *Wiley v. Raymond* (6 L. D., 246) it was held that the purchaser of a relinquishment can acquire no rights to the land by virtue of his purchase. The only things he can buy are the improvements of a prior settler.

The moment Myrick's relinquishment was filed the land covered by his entry was abandoned and reverted to the government (*Whitford v. Kenton* (10 C. L. O., 374) cited and approved in *Thorpe et al. v. Williams* (3 L. D., 341).

While Myrick's homestead entry made in 1882, prior to the act of March 3, 1883, was protected by the proviso of said act, from the operation of the law, no such protection was extended to a purchaser of his relinquishment, and as soon as the relinquishment was filed the land became public land and all the laws applicable at once attached thereto, and among these, the said act of March 3, 1883, providing that said land must first be offered at public sale before it became open to entry.

It follows then that claimant's entry cannot legally be completed, but as said land may not find a purchaser upon being offered and as claimant seems to have acted in good faith and has placed valuable improvements thereon, his entry may be suspended pending the offering of said land at public sale, and if the same shall not be sold upon such offer, then appellant's entry may be considered as an application to enter of its original date and he may be permitted to make entry thereunder.

With this modification your said decision is affirmed.

SWAMP LAND—FIELD NOTES OF SURVEY.

SUTTON *v.* STATE OF MINNESOTA.

The field notes of survey are presumptively correct, and must be taken as true until disproved by a clear preponderance of the testimony.

The arrangement entered into between the Secretary of the Interior and certain States as to the credit to be given to the field notes of survey, was adopted for convenience in the adjustment of the swamp grant, but was not in any proper sense a contract between the government and the State that such field notes should be taken in all cases as conclusive evidence.

The falsity of the field notes of survey may be shown by a party in interest, without requiring such party to also establish the fact that such survey was fraudulently made.

Secretary Vilas to Commissioner Stockslager, December 22, 1888.

I have before me the case of James E. Sutton *v.* the State of Minnesota appealed by the latter from your decision of March 9, 1887, rejecting its selection, under the swamp land grant, for the N. $\frac{1}{2}$ of the SE. $\frac{1}{4}$ of Sec. 12, T. 63 N., R. 18 W., Duluth land district, Minnesota.

Your finding of facts which is fully sustained by the record herein, is as follows :

It appears that Sutton settled on the land in June, 1884, some months prior to the survey thereof, and about one year prior to the date of the selection of it as swamp land (July 18, 1885). His improvements are valued at \$200. The witnesses state that the land is all high and rolling, and that there is no portion of the eighty acres in question that can be termed, in any sense, swamp or overflowed, or could have been of that character at the date of the swamp grant to Minnesota (March 12, 1860). They (the witnesses) were shown the official plat of survey of the land, wherein it is designated as swamp land, and which they pronounce to be false.

The single question presented herein requiring serious consideration, is whether the pre-emption claimant, Sutton, can be permitted to show by parole testimony that the field notes of survey designating said tract of land as swamp are false, and that said tract was in fact at the date of the grant, dry agricultural land; and thereby establish a settlement claim, good as against the claim of the State, without going further and showing that such field notes were also fraudulently made.

Appellant, by her attorney-general and his assistant, in argument insists that you have given too liberal a construction to the case of *Lachance v. Minnesota* (4 L. D., 479) in that such construction practically nullifies "the adjustment of the swamp land grant as agreed upon by the State and the United States." And that the State, on the two propositions submitted to it by this Department, having elected to adopt the field notes of survey as the basis for the adjustment of the swamp grant, such proposition and election constitutes a binding agreement between the parties that the field notes of survey, in the absence of act-

ual fraud at least are to be taken as *conclusive* evidence of the character of the land.

In support of the State's position, the case of *Crowley v. State of Oregon* (2 C. L. L., 1098) and 1 Lester, Nos. 574, 579, 582, 590 and 603 are cited. The question under consideration was not passed on in the case of *Crowley v. the State of Oregon*. The only citation bearing directly on the question of the right of a party to file on or enter land indicated by the field notes of survey as swamp by showing that the land in fact was not swamp is the *Winaus* case, 1 Lester No. 582. The decision in that case was made in October, 1855. But few facts are stated in the decision. The lands seem to have been selected by the State as swamp land prior to *Winan's* application to enter. The application, which was probably to make cash entry, was denied on the ground "that the field notes of survey were to be regarded as conclusive of the subject;" that is, of the question of the character of the land. The other citations do not bear on the conclusive character of the evidence afforded by the field notes of survey where their correctness is attacked even by a party proposing simply to enter the land, much less by a settler in good faith who has placed valuable improvements on the land prior to survey. Nos. 574, 579 and 590 are general instructions to the proper officers in regard to the evidence required in the adjustment of swamp grants. No. 603 embodies certain observations by Secretary Thompson in reply to a letter of Governor Randall of Wisconsin, of May 2, 1859, in which Governor Randall suggested "an examination and resurvey with a view of ascertaining what lands have been erroneously omitted from the lists of swamp lands, that they may be hereafter certified to the State." The Secretary in reply declined to accede to this suggestion and gave reasons why the mode of adjustment adopted by his and the governor's predecessors in office should not be disturbed.

It is evident from Governor Randall's request, and the Secretary's reply thereto, that neither of them regarded said proposition and election by their predecessors as a binding agreement to take the field notes of survey as conclusive evidence in all cases of the character of the land. The Secretary spoke of the supposed binding agreement as a "method of adjustment" and a "plan of selection" which had worked well, but gave no hint that he believed it to be an agreement binding on the government. *Winan's* case and the general instructions cited (*supra*) undoubtedly countenance the doctrine contended for by appellant, that where the field notes of survey indicate the swampy character of the land, they must be taken as conclusive of the fact (unless attacked for actual fraud), and that consequently all lands so indicated to be swamp passed to the State under the grant, and that no adverse claim initiated subsequent to the date of the grant could in any manner or under any circumstances attach to said lands. Notwithstanding the countenance this doctrine may have received from the Department in the past, a full con-

sideration of it has led me to the conclusion that it is not based on sound reason, nor so established by authority as to require that it should be sustained in the case under consideration.

The field notes of survey being entries in writing made by a public officer in the regular discharge of his duty are presumptively correct, and are *prima facie* evidence of the fact stated of a very high character. They must be taken as true, till disproved by a clear preponderance of the evidence, and while imposing a heavy burden on a party who attempts to disprove their correctness and to show their absolute falsity they do not, in my opinion, preclude this being done in a proper case.

The arrangement early entered into between the Secretary of the Interior and the proper authorities of certain States, as to the credit to be given to the field notes of survey, was a speedy and inexpensive plan adopted for convenience in the adjustment of swamp land grants, and one doubtless which would generally prove correct; but it was not in any proper sense a contract between the general government and the State, that such field notes should be taken in all cases as conclusive evidence of the facts stated therein.

The construction given by you to the case of *Lachance v. State of Minnesota*, decided by my immediate predecessor, Secretary Lamar, is not in my opinion too liberal. Said decision, as I understand it, holds that the falsity of the field notes may be shown by a party in interest, without such party being also required to prove that the survey had been fraudulently made, as was held by the Commissioner in that case, and whose decision was thereby reversed.

The following language of said decision, if standing alone, might perhaps give some countenance to the position taken by the State herein :

As Minnesota elected to accept the returns of the survey on file in the surveyor general's office as the basis of the adjustment of its grant, there can be no question of the propriety and correctness of your decision, in so far as it insists on abiding by the field notes of survey, until such survey shall have been proven to be fraudulent.

But when this language is considered in connection with the entire decision it does not seem to militate in the least against the construction which you have placed on said decision.

The language of said decision bearing most strongly on the immediate question under consideration is as follows :

As I understand the matter, the acceptance of the field notes as the basis of settlements simply makes them *prima facie* evidence of the condition of any given tract ; it is not tantamount to an assertion that the field notes shall govern always and absolutely, irrespective of demonstrated fraud or falsity, but it places the burden of proof of such fraud or falsity on the party alleging it. The grant in question was a grant of swamp land ; and if it can be proven affirmatively that any given tract was not swamp land at the date of the grant, then such tract did not pass by the grant.

Your decision herein is based, in my opinion, on sound reason and the most recent authority in the Department, and it is therefore affirmed.

SOLDIERS' ADDITIONAL HOMESTEAD—CERTIFICATION.

JOHN M. WALKER ET AL.

The right to make soldiers' additional homestead entry is not assignable.

A certificate of the additional right will not be issued where it appears that the soldier has parted with his interest therein, and that such certificate if issued would inure to the benefit of the assignee. Such cases are not protected by the circular of February 13, 1883.

Secretary Vilas to Commissioner Stockslager, December 24, 1888.

By letter of October 7, 1887, your office, pursuant to an order from the Department dated March 17, 1887, (5 L. D., 504) transmitted the papers in the case of John M. Walker *et al.*, involving the question of the certification of soldiers' additional homestead right. The names of the claimants are set out in your said office letter.

It appears that on April 20, 1882, there was filed in your office the application of John M. Walker for certification of additional homestead right; that on August 12, 1886, your office considered the application and held that his military service was duly established, and that he was entitled to an additional entry of eighty acres, but declined to issue a certificate to that effect.

Afterwards, on August 20, 1886 the Acting Commissioner took up and considered the remaining applications involved in this case and decided that as said claims "are similar to the Walker case they cannot be certified to for the reasons therein mentioned," and stated further that, "the parties, if qualified, may make their personal entries under instructions contained in official circular on the subject dated February 13, 1883."

From these two decisions a joint appeal was filed, and the question is now here for adjudication.

The law granting additional homestead rights to soldiers is found in section 2306 of the Revised Statutes, as follows:

Every person entitled, under the provisions of section 2304, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Section 2304 grants the right of homestead entry, with certain conditions to soldiers.

There is no provision in this statute or any other, requiring your office to issue a certificate of the additional homestead right to any individual, nor is it claimed by the appellees that the law directs the issuance of such certificate.

The claims here are based on the provisions of certain circulars heretofore issued by the Land Department.

By circular of August 5, 1874, applicants for soldiers additional home-

stead entry were relieved from the requirement of going in person to the local office to make the affidavit required in such cases, and it was provided that such affidavit might be made before the clerk of any court of record for the county in which the applicant resided, and transmitted with the application and fees by mail or through an attorney to the proper land office.

This regulation, however, led to so many abuses, that Secretary Chandler on May 17, 1876, directed the abandonment of the practice and required all such applicants to appear in person before the proper local officers. His letter to your office is as follows:

I have considered your report of the 9th instant, upon the subject of frauds in soldiers' additional homestead entries, by which it appears that large numbers of entries have been made upon forged applications, and genuine applications by parties not entitled, and that the right to make such entries is the subject of sale and transfer, effected by means of two powers of attorney—one to make the entry, and the other to sell the land when entered.

Your instructions of August 5, 1874, approved by the Department, provided that the requisite affidavit in this class of cases might be made before the clerk of any court of record for the county in which the applicant resided, and transmitted with the application and fees by mail, or through an attorney to the land office of the district in which the land applied for should be situated.

The purpose of this regulation was to relieve the applicant of the alleged hardship imposed by the requirement of personal attendance at the land office of the district in which the entry is to be made.

While it is doubtless true that the requirement of personal attendance in many cases must cause inconvenience and expense to the applicant, experience has demonstrated that to dispense with it will open the door to frauds of serious magnitude, and that under existing laws the requirement is essential to the protection of the interests of the government.

I have, therefore, to direct that the instructions embodied in your circular of August 5, 1874, be revoked, and that in future all persons entitled to enter additional homesteads, be required to make their applications in person, with due proof of identity, at the land office of the district in which the desired land is situated, and that the affidavit required by the regulations of this Department upon such applications be made before the register and receiver of such office, and further that no entry of such homestead be permitted by attorney.

The foregoing requirements are believed by me, after a careful examination of the subject, to be necessary for the protection of the government against fraudulent entries, and I am also satisfied that they are fully sustained by the statute regulating homesteads The right to make entry is not assignable, and in all cases the applicant should be required to make oath that he has not made or agreed to make any sale, transfer, pledge, or other disposition of his right to make the entry, or the land which he applies to enter. (2 C. L. L., 486).

These regulations were made applicable to applications and entries then pending.

Instructions thereunder were issued May 22, 1876 (Ibid. 488).

Afterwards on July 10, 1876, Secretary Chandler modified his instructions so as to except from their operation entries pending at the date of such instructions, as follows:

Referring to my communication of the 17th of May, 1877, upon the subject of soldiers' additional homestead entries, it now appears that owing to the death or change

of residence of the soldier it is often difficult, and in many cases impossible, to procure his attendance at the local land office for the purpose of making the required affidavit, and in other cases where the entry has been made at a land office remote from the residence of the soldier and the land subsequently sold, the soldier has no longer any inducement to comply with the order of May 17th, above referred to. I have therefore determined to modify my order of the date above mentioned so far as the same relates to applications for entry which were pending at its date, and to allow all such entries as appear to have been made by a duly qualified person in accordance with the regulations of the Department then in force. . . . All entries made subsequent to May 17, 1876, will be governed by the regulations now in force. (Ibid., 480).

By letter of March 10, 1877, the Secretary further modified his order of May 17, 1876, as follows:

I have considered your report of the 17th ultimo, in relation to soldiers' additional homestead entries, and in view of the facts therein stated, I have determined to modify my decision of May 17, 1876, so as to permit entries to be made in the following cases, viz:

1st. Those presented prior to order of March 20, 1876, suspending all entries of this kind, and rejected for reasons insufficient in law to bar their reception, but kept alive by appeal which by such rejection were postponed beyond the date of the order, and so lost.

2d. Those actually in the hands of agents or attorneys at the date of the promulgation of your instructions of May 22d last, in execution of my decision of the 17th of the same month, which, under said instructions, have not been recognized and which still remain in the hands of such agents or attorneys; and

3d. To allow entries to be made by the agents or attorneys of the party originally entitled to the entry, but only after the claim has been presented to you and certified as valid, and that the party is entitled to the amount of land claimed, under such instructions and regulations as you may prescribe. (Ibid., 478).

Thereupon the circular of May 17, 1877, embodying said instructions, was issued. After describing the papers necessary to be presented with the application for additional entry the circular concluded:

When these papers are filed and examined, they will, if found satisfactory, be returned with a certificate attached, recognizing the right to make additional entry under the law; and when presented with a proper application at any district land office, either by the party entitled, or his agent or attorney, they will be accepted by the register and receiver, and forwarded with the entry papers to this office, in the usual manner. (Ibid.).

Thus the practice of certifying to the right to make additional homestead entry originated.

This practice continued until 1883, when it was discontinued by the circular of February 13. Smith Hatfield, *et al.* (6 L. D., 557).

Said circular of February 13, is as follows:

Section 2306 of the Revised Statutes of the United States provides that any person entitled to make a homestead entry under section 2304 (providing for the benefit of soldiers and sailors of the late war), who had, prior to June 22, 1874, made a homestead entry of less than one hundred and sixty acres, may enter an additional quantity of land sufficient to make, with the previous entry, one hundred and sixty acres.

The right granted by this section, and extended by section 2305 to the widow, if unmarried, or otherwise to the minor orphan children by proper guardian, is a personal one and is not transferable, nor subject to assignment or lien, nor can it be ex-

exercised by another. It can lawfully be exercised only by the soldier or sailor, or by the widow or guardian, as the case may be, in his or her own proper person.

The practice which has hitherto prevailed of certifying the additional right as information from the records of this office and permitting the entry to be made by an agent or attorney is hereby discontinued.

The following regulations will hereafter be strictly observed:

1st. The party desiring to make an additional entry, and being entitled thereto must present himself at the land office of the district in which the land he wishes to enter is situated, and make his application in the same manner as in case of an original entry. (Form No. 4-008).

2. In addition to the usual homestead affidavit the claimant must make a special affidavit showing—

First. His identity as the soldier he represents himself to be, reciting his military service, and stating his present residence and post-office address.

Second. The facts, in detail, respecting his right to make the additional entry, and that he has fully complied with the provisions of the homestead laws in the matter of residence upon, and cultivation and improvement of his original entry, and whether or not he has proved up his claim and received a patent for the land.

Third. That he has not in any manner previously exercised his additional right either by entry or application, or by sale, transfer, or power of attorney, but that the same remains in him unimpaired.

3. The foregoing affidavits must be sworn to and subscribed in the presence of the register or receiver. This rule must be strictly adhered to in order to avoid false personation; and applications and affidavits presented to the register and receiver with signatures attached *will not be received*. Department circulars of May 17, 1877, and September 1, 1879, are modified accordingly.

4. These rules will not be deemed to apply to cases where the additional right has heretofore been certified by this office, nor to cases now pending, or which may be filed in this office prior to March 16, 1883. (1. L. D., 654).

It is under the last clause of this circular that the applicants here urge their claim for certification. They say they were excepted from the general provisions of the circular inasmuch as their applications were pending at the date of the circular, or were filed prior to March 16, 1883.

The question thus presented is much simplified by certain statements and admissions made in a brief filed in the case and sworn to by M. J. Wine, as attorney for the claimants.

Mr. Wine says, that he personally visited each of the applicants for the purpose of securing a transfer to himself of the rights here in question; that he stated (to each), "that no bargain for the sale or transfer of these rights could be made until after he had made application for entry under the regulations then in force. Applications, duly prepared and executed were then delivered to me to file as his attorney for certification and location, and by my directions were filed in the General Land Office. Subsequently I bargained with each of these applicants for his right to make these locations. I paid them a certain amount in cash at the time, and agreed to pay them a larger sum when their rights to make such entries should have been ascertained to be valid. . . . I ask permission to state some of my reasons for believing that such claims were legal and proper; that I had a perfect right to buy them upon the conditions and at the time I did."

Here is an express declaration on oath that the soldiers originally interested in these additional rights have parted with their respective interests therein, and have received part of the consideration agreed on; that the applications were filed by the assignee with the understanding that he should be the beneficiary upon issuance of the certificates.

Such cases are not protected by the last clause of the circular of February 13, 1883.

That clause merely provided that the rules laid down in the circular should not apply to cases then on file or to those filed prior to March 16, 1883. The rules referred to are numbered 1, 2, and 3 in the circular, and provide that the applicant must present himself at the proper local office, make his application as in other cases, and make certain affidavits. But exemption from compliance with these rules in no way authorized the assignment of the additional homestead right, for the second clause of the same circular declares that the additional homestead right "is a *personal one*, and is not transferable nor subject to assignment or lien, nor can it be exercised by another."

Nor was this latter declaration a new one in 1883. Under circular instructions of September 1, 1879 (6 C. L. O., 160) the applicant was required to swear, "that I have not sold my additional homestead claim, and that I have not made any prior application for an additional homestead certificate." So in the instructions of Secretary Chandler, of May 17, 1876, *supra* it is said:

The right to make the entry is not assignable, and in all cases the applicant should be required to make oath that he has not made or agreed to make any sale, transfer, pledge, or other disposition of his right to make the entry, or the land which he applies to enter.

See also instructions of May 17, 1877 (2 C. L. L., 478).

It thus appears that the Department has constantly adhered to the opinion that these rights are not assignable.

The case here presented is one of speculation in these rights, an abuse which the circular instructions of this Department have throughout been intended to prevent. The practice of certification itself was but a device adopted by the Department in its efforts to secure to the soldier the benefits of the law. The practice proved a failure, and after full trial was abandoned in the circular of 1883.

The assignee herein asks that certificates be issued for his benefit on claims which he purchased in violation of the repeated instructions of this Department.

His petition is denied, and for the reasons herein stated the decision appealed from is affirmed.

This decision will in no manner interfere with the right of additional entry in any soldier who is entitled under the law to make such entry.

HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

JAMES K. JACKS ET AL.

An agreement to sell made prior to an entry under section 2, act of June 15, 1880, does not render such entry fraudulent.

The right of the entryman under said act is not affected by the discovery of coal on the land after the completion of final entry.

Secretary Vilas to Commissioner Stockslager, December 27, 1888.

I have considered the appeal of James J. Jacks and J. T. Milner, transferee, from the decision of your office, dated December 27, 1886, holding for cancellation cash entry, No. 16,551, of the S. $\frac{1}{2}$ of the NW. $\frac{1}{4}$ of Sec. 22, T. 16 S., R. 3 W., H. M., made by said Jacks at the Montgomery, Alabama, land office, on November 26, 1880.

The record shows that said Jacks made homestead entry, No. 4230, of said tract on September 14, 1871, and the same was canceled for abandonment in September, 1879, on account of the claimant's failure to make final proof within the seven years required by law. Subsequently, Jacks made cash entry of said land under the provisions of the second section of the act of June 15, 1880, (21 Stat., 237). Upon the report of a special agent of your office, a hearing was ordered to determine the validity of said cash entry.

From the testimony taken at said hearing, the register found that the entryman had forfeited his right to make cash entry under said act, because he had sold his improvements and interest in the land prior to making said entry, and also that, as the act expressly excepts mineral lands, the land in question, being shown to be mineral, could not legally be entered by said claimant, and that his entry should be canceled. The receiver dissented and held that, as it was shown that said homestead entry was properly made, the land not being classed as mineral in the official survey, the fact that Jacks sold his improvements to Mrs. McDaniel, ought not to invalidate his cash entry of said land, and that the same ought to be passed to patent.

Your office, on appeal, sustained the action of the register and held said entry for cancellation, for the reason that the same was fraudulent, because it was made "for speculative purposes."

The ground upon which your office bases its conclusion that said entry was fraudulent is, that it was made at the suggestion of the transferee, who was intending to build a railroad near said land, and was engaged in purchasing coal lands along the route, and who loaned the entryman the money to pay for said land, without taking any security therefor; that, although there was no express agreement between the entryman and transferee, there was "a tacit understanding that Milner was to get the land;" that it is clearly shown that Jacks could not have perfected his homestead entry, because he had failed to comply with the requirements of the law, and hence he is not protected by the act of March 3, 1883 (22 Stat., 487).

A careful examination of the whole record shows that said land was at the date of said homestead entry properly subject thereto; that Jacks made said entry, and resided upon and improved his claim for some four years, when, by reason of failure of crops, he was unable to make a living thereon, and he, therefore, sold his improvements and claim to Mrs. McDaniel for the sum of two hundred dollars. Mrs. McDaniel paid a part of the purchase money, namely, \$160, and went into possession of the place. The entry of Jacks was canceled as aforesaid, but Mrs. McDaniel did not pay the balance of the purchase money, nor did she make any filing or entry of said land.

The land was returned by the United States surveyor as agricultural land, and the evidence fails to show that at the date of the homestead entry, or at the date of the cash entry of Jacks, the land was mineral land. Jacks made cash entry of the land on November 26, 1880, and soon after sold the land to said Milner. It also appears that Milner purchased all the interest that Mrs. McDaniel had in said land, and there is no adverse claim to the tract.

Although Jacks gave no written instrument of conveyance to Mrs. McDaniel, yet, if she was claiming said land in any way, a different question would be presented for consideration. That Jacks had a right to make said cash entry under said act seems evident. Even conceding that he had agreed to sell the land to Milner after entry, that fact alone would not make the entry fraudulent.

Acting Secretary Muldrow, in the case of George E. Sandford (5 L. D., 535), construing said act, held:

There is nothing in the law authorizing the entryman to make a purchase under said section and act, or in the regulations of the Land Department, which prohibits him from making such contract of future sale, as is here shown to have been made. The party, having made the entry, could "entitle" himself absolutely to the tract covered by it, by paying the price therefor. And the fact that he made a previous agreement to sell can in no way, so far as I can see, in the absence of a prohibition to that effect, impair this right of purchase. No law was violated and no fraud practiced, but a clear legal right was exercised both as to purchase and sale.

The evidence fails to show that at the date of said homestead and cash entries any coal had been discovered upon said land, and the subsequent discovery of coal, on a small portion of the land, after the final entry, can not affect the right of the purchaser, who had completed his entry. Samuel W. Spong (5 L. D., 193); Deffebach v. Hawke (115 U. S., 393); Mullan v. United States (118 U. S., 271); Colorado Coal Company v. United States (123 U. S., 307).

I conclude, therefore, since said land was properly subject to said entry, and there is no adverse claim and no fraud shown, and a long course of decisions so requires, that said entry was properly made and should be passed to patent in due course of business.

The decision of your office, holding said entry for cancellation, must be, and it is hereby, reversed.

SWAMP GRANT—EFFECT OF CERTIFICATION.

STATE OF OREGON.

In the adjustment of the swamp grant the government is not bound by a certification procured through the false and fraudulent report of its agent; and the Secretary of the Interior is vested with due authority in such case to revoke and cancel a certification thus procured.

Secretary Vilas to Commissioner Stockslager, December 27, 1888.

On the 16th of September, 1882, my predecessor in this office (Mr. Teller) approved a list of swamp and overflowed lands selected as inuring to the State of Oregon under the provisions of the act of Congress approved September 23, 1850, as extended to said State by act of March 12, 1860, known as list number five in the district of lands subject to sale at Linkville, now Lake View, Oregon, amounting to a total quantity of 97,641.24 acres; of which, however, 6,803.87 acres had been either previously approved or were in conflict leaving 90,837.37 acres. Subsequently, it was reported to the Department that the examination and report made by R. V. Ankeny, an agent of the government, in connection with Charles Whittaker, agent for the State, upon which the list had been prepared and approved, were false and fraudulent, and that, in consequence, the list embraced a large amount of lands in no sense such as were described in the grant. No patents having issued upon the list, my predecessor (Mr. Lamar) on the 20th of January, 1887 (5 L. D., 374) notified the State to show cause on or before April 18th, 1887, why the certification of this list should not be set aside, and a re-examination of the land ordered. The time fixed for the hearing of this order to show cause has been adjourned by different orders, some of them at the request of the State or parties claiming under the State, so that the matter now comes up for final disposition. Meantime, a complete re-examination of the lands has been made by Charles Shackelford, an agent of the United States, and his report is before me upon this hearing.

The State has by certificate or otherwise parted with its right to the greater portion of the lands embraced in this list to various parties, in large bodies; the purchase from the State having, as it appears, been made before even the examination and report by Ankeny and Whittaker; and most, if not all, of these parties have been represented in the hearing in opposition to a revocation of the former certification.

It is represented by the special agent's report, as well as by petitions and communications on file in the office, that many of the lands included by this list are in no sense swamp or overflowed, but high, dry, arable land, and now in occupation and cultivation by settlers, who urge upon the Department a disposition of the controversy in accordance with the law and the facts for their relief from the claims asserted against them by claimants under the State; and in your communication

of August last you earnestly recommend an early decision. The hearing has been somewhat delayed at the request and for the convenience of counsel, but the matter has recently been abundantly and ably argued orally and upon printed briefs. The papers, reports, affidavits and petitions are exceedingly voluminous, and the discussion has taken a range which it will be unnecessary for me to follow in order to present the facts and the views upon which I base my conclusion, which I shall endeavor to state as briefly as possible.

The order to show cause was based upon a report of Agent Shackelford, accompanied by various affidavits and documentary proofs. From these it appears that, prior to the time of the examination by Ankeny and Whittaker, certificates of sale had been issued by the State of Oregon to H. C. Owen for over 480,000 acres of land in the State, title to which it was expected would be derived through certification under the swamp land grant. On the 26th of December, 1881, Ankeny and Whittaker made affidavit to their report of the examination of lands now embraced in the list under question. Whittaker, although nominally the agent of the State, was really to some degree the agent also of Owen, being so large a claimant of lands of this character. It is shown that Owen made and executed with James H. Fisk, whose affidavit is on file, a bond and agreement, dated the 23rd of December, 1881, by which bond he promised to convey to Fisk for the price of \$140,000 at the option of Fisk to be exercised at any time prior to May 1st, 1882, a large body of these lands alleged to be swamp, aggregating about 115,000 acres, for which he (Owen) then held certificates of sale from said State; and also a body of lands alleged to be of like character aggregating about 1,400,000 acres, for which no certificates of sale had been issued by said State, but upon which Owen had placed certain filings in the State land office, and thereby claimed a priority of right of purchasing—at the rate of fifty cents per acre for each and every acre so accepted by said Fisk, and it was further agreed that said Fisk upon such sale, should retain from said \$140,000 the sum of \$20,000 and from the sum received from the sale of lands so covered by filings, one-half thereof as compensation and commissions.

It is also shown that another agreement was made between Owen of the first part, and Fisk and Ankeny of the second part, bearing date the 23rd day of December, 1881, in which it is recited that, whereas, Owen, on the 23rd day of December, 1881, did sell and agree to assign, transfer and convey to the parties of the second part at their option at any time up to and inclusive of the 1st day of May, 1882, certain swamp lands for which Owen had the certificates of the State of Oregon, and certain filings upon other lands of like character, of the description and for the consideration particularly set forth in the option bond, above mentioned, "which bond and its covenants are in fact to and for the equal benefit of both J. H. Fisk and said Rollin V. Ankeny, although made in terms to said Fisk alone", "and whereas, it is the interest of

the parties hereto and it is understood and agreed that out of the sum of \$140,000 stipulated in the said bond as the price to be paid for those lands included within the certificates held as aforesaid" by Owen, said second parties are to be paid \$42,000 and out of the sum received for filings or on account of interests represented by filings, as stipulated in the bond, the second parties are to be paid one-half thereof and a further sum equal to five per cent upon the half for which the interest represented by the filings should be sold, it was further stipulated and agreed that if Fisk or Ankeny should within the time limited sell the property for the consideration named, they should receive and retain as compensation, costs, expenses and commission therefrom, first out of the \$140,000 the sum of \$42,000, second, in addition, the second parties should receive and retain one-half of the proceeds of sales of filings or of interests represented by filings, and five per cent of the other half, etc.

It is argued that this transaction was simply the employment by Owen of Fisk and Ankeny as his agents to sell his land, and involves no turpitude and no just accusation of official misconduct. It is very obvious, however, that, inasmuch as the title of Owen to the lands from which Fisk and Ankeny hoped to derive so large gains if they effected a sale, was essential to that result and depended upon the report of Ankeny and Whittaker and subsequent certification by the Secretary of the Interior, the interest of Ankeny in this was entirely antagonistic to his duty as an officer of the government. The concealment of his name in the contract and bond with Fisk, and in the statement of Owen himself, show that it was well understood that such contract was incompatible with his official relations. The contract was not acknowledged until the 28th of December, although dated on the 23d. Acknowledgment was not necessary to its validity, and the date as well as the affidavits of the parties, show that the transaction was in fact negotiated before Ankeny made his affidavits to his report as an agent of the Department. Many other things in the record tend to impute corruption to Ankeny; but there is also denial of most of it, and some of the affiants to affidavits accompanying the first report of Shackelford have successfully impeached their own credibility by later affidavits disputing the statements in the former. All the circumstances of Owen's dealing with Ankeny appear by no means to be disclosed; but the facts as stated in respect to this contract, and mildly stated, are beyond dispute. Fisk, who has disclosed the contract referred to and papers accompanying it, also by his affidavits states that Owen informed him "that he had all along given said Ankeny money and paid his (Ankeny's) bills and expenses while he was engaged on the part of the United States in examining the lands covered by his (Owen's) filings, and which were selected as swamp land by the State, and that Ankeny had cost him a good deal of money." Owen denies this statement in a general way by his affidavit; and yet leaves room for suspicion that Ankeny received money through Whittaker which came from Owen, or payments.

for his benefit, while engaged in the examination. The evidence, on both sides, is in the form of *ex parte* affidavits, and furnishes but an unsatisfactory basis from which to draw a conclusion of fact in respect to the nature and extent of the dealings and relations between Owen and Ankeny, directly or indirectly. The contract alone is undeniable and clearly brought to light.

In such a condition of the evidence, the truth of the report made by Ankeny and Whittaker, as the result of their examination of the lands in their lists submitted to them, becomes of the utmost importance in determining the probability of fraud in the action of Ankeny. If the lands reported by Ankeny to be swamp had proven to be so in fact, the suspicion of evil influence from his transactions might not be indulged. But it now appears from the report of agent Shackelford, in large measure supported by affidavits of a trustworthy character and, indeed, in large measure not disputed, that he examined in the field 90,978.37 acres of the lands in this list and of them he reports only 57,012.11 acres to be swamp and overflowed within the meaning of the law, allowing, as he stated on the hearing, the benefit of the doubt to the State, and against the United States, wherever a doubt arose; and that 33,966.46 acres are in no wise properly to be classed as swamp or overflowed land. Among the latter is an aggregate area of 20,178.92 acres of the lands in lists number five which are situated on hills or steep mountains or sage-brush deserts, in many instances embracing lava-rock hills ranging from four to eight hundred feet in height above overflow, and that of each legal subdivision in this body of land no part can by any question be regarded as wet or other than entirely dry land. Of the lands reported by him as not swamp or overflowed, P. M. Curry, the surveyor of Lake county, Oregon, makes affidavit that during the summer of 1886, and parts of the months of May and July, 1887, he accompanied Shackelford upon the examination in the field of the greater portion, giving the number of each tract examined, that he located the corners of the tracts and that none of them are swamp or overflowed, the great majority dry and arid, and in some instances the tracts are mountainous. In corroboration of these statements there are among the papers in the case some thirty affidavits mostly of residents on portions of the lands certified in said list, who state that the lands claimed by them are not swamp within the meaning of the granting act, but are dry and good agricultural lands; also the petitions of two hundred and ten settlers in Grant county, and of sixty-six settlers in Lake county setting forth that most of the lands so certified to the State in these localities is in fact not swamp in character and asking opportunity to establish their allegations by evidence.

On the other hand, the answers of the various respondents are confined to showing that certain of the tracts so certified are in fact swamp within the meaning of the act, but no denial is made of the allegation in said report corroborated as it is, that upwards of 20,000 acres certi-

fied in said list are high and dry, located on hills and steep mountain sides, embracing arid deserts and rock ridges of great height.

It thus appears that over one third of the lands embraced in list number five were improperly classified as swamp or overflowed; that no opportunity exists as to more than twenty thousand for controversy in respect to their condition at any former time, because they lie upon hills or desert ridges of which no change in natural condition can be affirmed since 1860.

Had these facts been known to Secretary Teller, his certification of list number five would never have been made. It was the product of a false report by an agent of the government whom he was obliged to trust. The magnitude of the falsehood of that report is sufficient to show that it was fraudulent. It is impossible that an officer could have returned in the discharge of his duty as swamp and overflowed more than one-third of the lands so reported which were in fact dry, and so great a proportion of which were upon mountains or arid deserts. He was guilty of fraud if he made this return recklessly, without knowledge of the facts; but in view of his relations to the largest claimant of the lands, as to some extent disclosed by the contract shown, his action can not but be regarded more unfavorably. The government ought not to be, and can not be, bound by the act of certification brought about by such means. It must be revoked and canceled, as would very promptly have been done by the Secretary who signed it if the facts had been disclosed to him while in office.

Some question has been raised of my jurisdiction to make this order. This question has been repeatedly considered by my predecessors in office, and but one conclusion was ever reached. In the case of the State of Michigan, recently decided, I have expressed to some extent the reasons which seem to me to support the jurisdiction of the Department to correct such an error. To that decision I need add nothing for the purposes of this case. Suffice it to say, that unless the certification may be revoked, it would appear necessary to follow it by patent and thus invest the State with the possession of a grant which ought immediately to be set aside by a court of equity. If such be the law, the State and her grantees are not without remedy, and my assumption of jurisdiction can be reviewed and corrected by the courts. It ought to require nothing less than a mandate from the court of last resort to compel the head of this Department, charged with the duty of caring for the interests of the government and truly identifying the lands it has granted, to become an instrument for so great an outrage upon its grant as the facts here disclosed show a patent would be.

The certification of the list number five of the Lake View district is accordingly revoked and canceled and that list entirely set aside. You will prepare another list, in which you will include such lands only as by satisfactory evidence, drawn from all reports and information at hand, are unquestionably shown to be swamp or overflowed and unfit

for cultivation. Such other lands included in list number five as are doubtful in character, according to the evidence now at hand, you will make a separate list of, and will detail two trustworthy agents to carefully and thoroughly examine, with a view to determining their true condition at the date of the granting act in 1860, and require reports exhibiting by an accurate plat and description the present condition of each subdivision and such evidence as may be taken in respect to any difference in condition at the date of the act. In making this examination, opportunity should be afforded to the State and her grantees to be represented, in accordance with the usage on that subject. Such lands in the list number five as are satisfactorily disclosed to be not swamp or overflowed nor unfit for cultivation, you will restore to the public domain subject to any rights which have attached to them under the laws.

COAL ENTRY—CONTIGUOUS TRACTS.

C. P. MASTERSON (ON REVIEW).

A coal land entry embracing non-contiguous tracts, made in good faith, and in accordance with the practice then existing, may be passed to patent as made, or so amended as to include contiguous tracts.

Secretary Vilas to Commissioner Stockslager, December 28, 1888.

I am asked to review the departmental decision of August 10th last in the *ex parte* case of Charles P. Masterson (7 L. D., 172), involving coal entry No. 99, for the E. $\frac{1}{2}$ of the SE. $\frac{1}{4}$, the SW. $\frac{1}{4}$ of the NW. $\frac{1}{4}$, and the SW. $\frac{1}{4}$ of the SW. $\frac{1}{4}$, of Sec. 34, T. 16 N., R. 6 E., Olympia land district, Washington Territory.

Counsel for applicant alleges in said motion that the Department erred in its decision aforesaid, in holding that the law requires coal land entries to be contiguous or compact in form; and they ask that, if the Department should not see proper to change its ruling in this respect, said decision be so modified as to declare that the rule prescribed in said decision shall not be applicable to cases arising prior thereto, under another and different ruling in force at the date when Masterson's said entry was made; or, in view of the perfect good faith of the entryman which is in no way questioned, and of the fact that no rights have intervened, that he be allowed to relinquish the two forty-acre tracts held for cancellation and to amend his entry by taking two forties contiguous to his remaining two forties.

The question as to the rule requiring coal entries to be made of contiguous tracts and compact in form was fully considered in the decision now sought to be reviewed, and I deem it unnecessary to enter into a further discussion thereof.

I am unable to find that the land department has in any case directly announced the principle that coal land entries may be made of non-con-

tiguous subdivisions; but it seems to be a fact that such was the practice of your office, and that in many instances entries consisting of non-contiguous subdivisions have been allowed to pass to patent. It is evident that such action was not an inadvertence but an erroneous construction of the law. The entry in the present case was allowed under a practice then prevailing in your office.

It has been held by the Department that where a decision operates to change a practice or rule well established especially if it be upon a point of interpretation not without difficulty, the action already taken by private parties in good faith under the prevailing practice, may be sustained in proper cases; and although such construction may have been erroneous, it does not follow that any acts which have been performed in pursuance of or in accordance with such construction or interpretation are necessarily illegal. See *Minor v. Mariott et al.* (2 L. D., 709); *Allen v. Cooley* 5 (L. D., 261); *Cudney v. Flannery* (1 L. D., 165).

While this motion has been pending, Robert Breese, Michael J. Reilly, and Gottlieb Jaeger have joined with Masterson in an application, representing that they have entered other lands in sections twenty-two and thirty-four, and asking to respectively relinquish and amend so that their several entries shall be of contiguous land.

In view of the fact that these entries were allowed and final receipts issued during the ruling of your office then in force, I think, and so direct, that the decision of August 10, 1888, be modified so that the entries previously made may either be passed to patent, or that the entries may be amended in the manner asked for, so that each shall be of contiguous land—whichever shall appear to you most agreeable to equity; the latter course being preferable, in that it most nearly conforms to law.

DOUBLE MINIMUM LANDS—ACT OF JULY 2, 1864.

HENRY MCCREA.

After the map of general route was filed in accordance with the grant of July 2, 1864, the reserved even sections within the limits thereof were not subject to sale for a less price than two dollars and fifty cents per acre.

Secretary Vilas to Commissioner Stockslager, December 28, 1888.

Henry McCrea filed declaratory statement No. 4271, June 27, 1871, alleging settlement January 16, 1871, upon the NE. $\frac{1}{4}$ of Sec. 6, T. 137 N., R. 35 W., St. Cloud, Minnesota. August 2, 1871, he paid for the land with Alabama agricultural college scrip No. 5 (register and receiver, St. Cloud, No. 3190) at one dollar and twenty-five cents per acre.

Your office letter "G" dated March 18, 1875, required McCrea to make "additional payment of \$1.25 per acre for the reason that the lands involved are double minimum in value."

May 27, 1886, your predecessor directed the land officers that "as there is no report on file with the papers as to action in the premises, you will at once notify the party in interest that such additional payment is required. That he will have sixty days within which to appeal or ninety days within which to make payment, and that if no action is taken said entry will be canceled."

June 21, 1887, McCrea was notified of the above decision and on July 18, 1887, he appealed from the same.

The records of your office show that the land in question is within the limits of the grant by act of July 2, 1864 (13 Stat., 365) to the Northern Pacific Railroad, and that the map of general route of the said road opposite this tract was duly filed August 13, 1870.

Section six of the granting act, which reserves the odd sections within said grant for the railroad company, provides that the "reserved alternate sections shall not be sold by the government at a price less than two dollars and fifty cents per acre when offered for sale."

Counsel for the claimant insist that the rights of the said company did not attach to this land until the 21st day of November, 1871, when the plat was filed in the office of the Commissioner of the General Land Office.

In the case of the Northern Pacific Railroad Company *v.* Vaughn (6 L. D., 11), decided in accordance with the ruling in the case of Buttz against the Northern Pacific Railroad (119 U. S., 55) it was held "that when the general route of the Northern Pacific, provided for in section six of the act of July 2, 1864, was fixed, and information thereof was given to the Land Department by filing a map thereof with the Secretary of the Interior, the statute withdrew from sale or pre-emption the odd sections to the extent of forty miles on each side thereof."

The land within the limits of the said grant therefore, on and after August 13, 1870, the date of filing the map of general route, became subject to the operation of the act of July 2, 1864, and in accordance with the said provisions the reserved even sections could not be sold for a less price than two dollars and fifty cents per acre.

In the case of Lawrence W. Peterson (11 C. L. O., 186), the same doctrine is held.

McCrea does not claim to have made settlement until January 16, 1871. The entry at one dollar and twenty-five cents per acre was therefore erroneously allowed by the local office.

While it is true that the claimant's entry could be legally canceled it is still a fact that in refusing to pay the additional price of one dollar and twenty-five cents per acre, he acted in good faith, and also that no other rights have intervened.

I fully concur in your conclusion that before the claimant's entry is passed to patent, he should make the additional payment, but in view of the foregoing, he should be permitted to do so within a reasonable time after notice hereof, or to relinquish either one-half or the whole of his said entry.

You will therefore allow the claimant, within ninety days after notice hereof, to either make such payment, or to relinquish one-half of his entry; or else at his option to relinquish the whole of said entry, and upon proper application have returned to him the scrip heretofore located. In default of action in accordance herewith, you will cancel the said entry.

Your decision is accordingly modified.

SCHOOL INDEMNITY—FRACTIONAL TOWNSHIP.

JAMES LYNCH.

The improper description of the basis as a portion of section thirty-six will not defeat a selection made in fact upon a deficiency basis caused by the non-existence of sections sixteen and thirty-six.

Under the rulings of the Land Department, as formulated in the circular of July 23, 1885, a selection is not invalid though slightly in excess of the basis upon which it is made.

Secretary Vilas to Commissioner Stockslager, December 29, 1888.

By decision of your office of May 15, 1888, indemnity school selection, R. & R. 2519, San Francisco, California, of the NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 3, T. 25 S., R. 9 E., M. D. M., made in lieu of the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 36, T. 28 S., R. 8 E., M. D. M. was held for cancellation, upon the ground that, "There being neither section sixteen, nor thirty-six, in the township, the above selection upon the basis of a portion of the latter section, which is shown to be miles out in the ocean, is invalid. For the same reason it is apparent that the selection does not come within the confirmatory provisions of the act of March 1, 1877."

Said township is a fractional township, embracing a quantity of land equal to three sections, all of which is embraced in the limits of the Rancho Santa Rosa, patented March 18, 1865.

It is not questioned that the State is entitled to three hundred and twenty acres of land as indemnity for said fractional township 28, under the act of February 26, 1859 (11 Stat., 385), if she has not exhausted her right of selection as to said township. But you held said selection invalid, for the reason that said selection was made upon the basis of a portion of section thirty-six, which did not exist, instead of being made upon a deficiency basis caused by the non-existence of both sections sixteen and thirty-six.

This is a mere technical objection or irregularity, and does not defeat the right of the State's selection, if it is shown that she is entitled to that quantity of land, under the act of May 26, 1859, to compensate deficiencies where sections sixteen and thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. Her right to lieu lands in said township did not rest upon any prior appropriation or disposition of either section sixteen or thirty-six, but upon the ground that no

such sections existed. Therefore, if it be shown that she has not exhausted her selections as to said township, and the selection is in all other respects proper and legal, it is a valid selection and should not be canceled, because the basis is improperly described as a portion of section thirty-six of said township.

It is contended by the counsel for Lynch that the State of California has made six selections, which were duly listed to the State, and which exhausts her right of selection to the three hundred and twenty acres of land as indemnity for fractional township 28 south, range 8 east, M. D. M.

From the records of your office it appears that selections were made to compensate deficiencies in said fractional township 28 S., R. 8 E., M. D. M., as follows:

- N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 35, T. 8 S., R. 4 W., in lieu of the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ and W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of Sec. 36, T. 28 S., R. 8 E., M. D. M., selected October 19, 1868, and approved January 20, 1870—120 acres.
- Lot 3, 4, 7 and 8, Sec. 35, T. 28 S., R. 10 E., in lieu of part of E. $\frac{1}{2}$ of SE. $\frac{1}{4}$ of said section 36, selected April 24, 1869, and approved September 8, 1870—62.14 acres.
- NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 25, T. 7 N., R. 10 W., in lieu of NW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said Sec. 36, selected December 12, 1869, and approved November 12, 1873—40 acres.
- NW. $\frac{1}{4}$ of SE. $\frac{1}{4}$ Sec. 3, T. 25 S., R. 9 E., in lieu of SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ of said Sec. 36, selected May 11, 1870, and approved November 15, 1871—40 acres.
- NE. $\frac{1}{4}$ of NW. $\frac{1}{4}$ Sec. 7, T. 14 N., R. 14 W., in lieu of NE. $\frac{1}{4}$ of SW. $\frac{1}{4}$ of said Sec. 36, selected January 30, 1873, approved November 12, 1873—40 acres.
- SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 7, T. 14 S., R. 14 W., in lieu of SW. $\frac{1}{4}$ of NW. $\frac{1}{4}$ of said Sec. 36, selected January 3, 1873, approved November 12, 1873—40 acres.

The aggregate amount of said selections is 342.14 acres, being 22.14 acres in excess of the amount to which the State was entitled as compensation for deficiencies in said fractional township.

It is also contended by counsel for Lynch that the selection first above set forth, to wit, the N. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 35, T. 8 S., R. 4 W., was embraced in three separate lists of selections, the last of which was duly listed to the State, per list 11, January 20, 1870, in lieu of the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and the SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 36, "T. 7 S., R. 8 W.," M. D. M.

He also contends that in 1881 the Commissioner, upon the request of James W. Shanklin, the State agent, changed said bases to "T. 28 S., R. 8 E., M. D. M."

The records of your office show that, by letter of July 28, 1881, the Commissioner addressed the register and receiver at San Francisco, California, as follows:

Upon an examination and comparison of the records of your office with transcripts of the record of the State surveyor general's offices (as presented by J. W. Shanklin, State surveyor general), in the matter of approved indemnity school selections, certain discrepancies have been discovered, as hereinafter shown, viz: . . . On page 3 of approved list No. 11, the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 36, "T. 7 S., R. 8 W., S. B. M.," appears as the basis for the W. $\frac{1}{2}$ of NE. $\frac{1}{4}$ and SE. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 35, T. 8 S., R. 4 W., M. D. M. This is an error, the correct basis therefore being the W. $\frac{1}{2}$ of SE. $\frac{1}{4}$ and SW. $\frac{1}{4}$ of NE. $\frac{1}{4}$ Sec. 36, T. 28 S., R. 8 E., M. D. M.

It is admitted by the counsel in his brief that said selection was made upon the last named basis, November 4, 1869, which was approved January 20, 1870.

The action of the Commissioner above referred to did not change the selection from one basis to another, as insisted upon by counsel, but was simply a direction to correct the records so as to show the true bases upon which said selection was made and approved.

The only question remaining in this case is, whether the approval of the entire selections, covering 342.14 acres, made to compensate a deficiency of three hundred and twenty acres, is valid.

It will be seen that before the two last selections of forty acres each were approved to the State, she was entitled to 57.86 acres as a balance due to compensate said deficiency.

At the date of said selections, it seems that a practice prevailed in the General Land Office to approve of selections where the quantity selected was greater than the basis, provided the excess was less than the smallest legal subdivision. In such cases the excess was charged against the State in other selections thereafter to be made, or upon the final adjustment of the grant.

This rule was formulated in the circular of July 23, 1885, which provides that:

Where it occurs that a fraction in quantity of less than forty acres remains as the basis for a selection in a fractional township, or a section or part of a section lost to the State, a specific subdivision, containing a quantity equal to the basis or a little more or less, may be selected and the State will be credited in the final adjustment of the grant with the balance in her favor, if any such balance should then be found to exist.

The rule was subsequently changed by the circular of July 29, 1887, which provided that the area of the selected tract must be equal to the bases, and that if the area of the deficiency was of such quantity that it could not be compensated by legal subdivisions, selections may be made by legal subdivisions as near to said deficiencies as can be made, and the deficit will remain to be used in another selection.

In the case now under consideration, the excess of 22.14 acres being less than the smallest legal subdivision, and having been made in accordance with the practice prevailing at the date of said selection, I see no reason for holding as invalid any part of the selections made to compensate the deficiency due to the State in said fractional township, inasmuch as said excess of 22.14 acres can be charged to the State on the final adjustment of the grant.

Said selection of 342.14 acres was approved and listed to the State, because it was entitled to three hundred and twenty acres to compensate deficiencies existing in said township. Its right to said selection rested upon no other basis, and, although the basis may have been improperly described, as in lieu of parts of a section thirty-six, which did not exist, instead of being described as in lieu of deficiencies caused by

the non-existence of sections sixteen and thirty-six, it can not affect the validity of said selection.

It, therefore, follows that the State's right to indemnity for the deficiency in said fractional township has been satisfied, and the purchaser from the State is not required or allowed to purchase under the act of March 1, 1877.

Your decision is reversed.

Circular prescribing regulations for making school indemnity selections in the Territory of Wyoming under the sixth section of the act of Congress approved August 9, 1888.

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
Washington, D. C., November 16, 1888.

TO REGISTERS AND RECEIVERS IN WYOMING:

GENTLEMEN: The sixth section of the act of August 9, 1888, entitled "An act to authorize the leasing of the school and university lands in the Territory of Wyoming, and for other purposes," is in the following language:

That where lands in the sixteenth and thirty-sixth sections in the Territory of Wyoming are found upon survey to be in the occupancy and covered by the improvements of an actual pre-emption or homestead settler, or where either of them are fractional in quantity, in whole or in part, or wanting because the townships are fractional, or have been, or shall hereafter be reserved for public purposes, or found to be mineral in character, other lands may be selected by an agent appointed by the governor of the Territory in lieu thereof, from the surveyed public lands within the Territory not otherwise legally claimed or appropriated at the time of selection, in accordance with the principles of adjustment prescribed by section twenty two hundred and seventy-six of the Revised Statutes of the United States, and upon a determination by the Interior Department that a portion of the smallest legal subdivision in a section numbered sixteen or thirty-six in Wyoming is mineral land, such smallest legal subdivision shall be excepted from the reservation for schools, and indemnity allowed for it in its entirety, and such subdivisions, or the portions of them remaining after segregation of the mineral lands or claims, shall be treated as other public lands of the United States.

To carry out these provisions of law you will be guided by the following instructions:

1. Selections must be restricted to lands non-mineral in character, not otherwise legally claimed or appropriated. The character of selected tracts will be determined under the rules existing as to agricultural land entries. In all cases the selected tracts must be covered by non-mineral affidavits made by the selecting agent appointed by the governor of the Territory, or an agent duly appointed by the selecting agent for the purpose, and in case of such appointment by the latter, evidence thereof should accompany the affidavits. You will also require the affidavits of such agent or sub-agent that the lands at date of application are not in the occupancy of any actual pre-emption or homestead settler; and in order that the settlers may have due notice of the proposed selections you will require publication thereof, describing the lands by subdivision, section, township, and range, for a period of six weeks. Should protests be filed the agent may eliminate the tracts involved from the lists, or hearings may be had to determine the facts by legal testimony should the agent in such instances dispute the allegations of prior settlement by the protestants. This rule is made in view of the restriction contained in said sixth section of selections to lands "not otherwise legally claimed or appropriated at the time of selection."

2. The selected tracts must be connected with specific bases of exactly the same quantity. Respecting the method of so balancing the selections you are referred to the circular letter of this office of July 29, 1887, page 124 of the annual report of this office for 1887, which was sanctioned by the Department in the case of *Melvin et al. vs. California* (6 L. D., page 702), and now is applicable to your districts.

3. In presenting selections of indemnity lands based on sections 16 and 36, or portions thereof, found upon survey to be in the occupancy and covered by the improvements of an actual pre-emption or homestead settler, the Territory may proceed in one of two ways to have its rights defined:

(a.) By proceeding to prove such occupation at date of survey and up to the time of selection by the testimony of at least two respectable disinterested witnesses. In such instances the qualifications of the alleged pre-emptor or homesteader must be shown, and also the occupancy and improvement as to each subdivision used as the basis of selection. Publication must be resorted to by the selecting agent for a period of six weeks of notice of intention to prove such occupancy, in order to select indemnity, and the time and place of hearing must be stated therein. Hearings may be held before you or the judge or clerk of any court in the Territory having common law or probate jurisdiction and using a seal, and where the testimony is taken before such officers of courts the papers must be made up with the seal of the court affixed under the rules governing the affixing of jurats to the proofs of settlers made before such officers. It is not regarded as mandatory upon the Territory to select indemnity on bases of this kind, as the act is worded. It is a right which may be exercised, but it is a privilege which might be abused, and consequently the above regulations as to proofs are necessary for the ascertainment of the facts.

(b.) By relying on the proofs of pre-emption and homestead settlers claiming by virtue of settlement prior to survey after entry by them. The validity of such bases of selection would depend upon the establishment of the fact of such settlement before this Department.

4. In making selections founded on the deficiencies in the school sections, or tracts in such sections in reservations for public purposes, the bases should be carefully described in the lists of selections by section, township, and range, or by fractional townships where the school sections are entirely wanting.

The manner of using the bases so that they shall be satisfied in quantities exactly equal to those of the selected tracts is explained in the circular of July 29, 1887, referred to in paragraph 2 hereof.

5. The language of the law is plain and explicit as to the quantities of indemnity lands that may be selected in lieu of mineral lands upon a determination of their mineral character, and respecting such determination the following regulations are issued:

(a.) A determination by the Secretary of the Interior, or a decision by this office or the local officers, which becomes final under the Rules of Practice, that a portion of the smallest legal subdivision in a section numbered 16 or 36 in Wyoming is mineral land, will place the entire subdivision in the class of bases that may be used in selections of land as indemnity.

(b.) All the lands in said sections 16 and 36 returned as non-mineral must be presumed to be school lands for the purposes of this act until the presumption is overcome in the manner hereinafter indicated. The bare return of lands as mineral by the surveyor-general will not be regarded as conclusively classifying them as mineral, the returns of dep-

uty surveyors as to the character of the land surveyed having been found in many cases to be indefinite or erroneous.

(c.) In the absence of a decision by this Department that land in a school section is either mineral or non-mineral in character, the Territory may proceed as follows:

First. By applying to the Secretary of the Interior, through the proper district office, where the land has been returned as non-mineral, for his certificate that the land was rightly so classed. Such certificate will determine whether the reservation for schools took effect upon the lands *in place* beyond attack by mineral claimants. Notice of such proceeding must be given by publication and posting in the manner prescribed by the Rules of Practice.

Second. By proceeding to prove land which has been returned as mineral to be in fact non-mineral in the manner prescribed in circulars "N" of September 23, 1880, and October 31, 1881.

Third. By relying upon the record for indemnity where lands have been entered as mineral; where the Territorial authorities have information that the mineral character of tracts in sections 16 and 36 is shown by evidence in this office, a list of them may be sent here through the proper district office, to determine whether they may be used as bases for selection. If the decision should be in the negative, the character of such tracts may be determined under the procedure indicated in the first and second subdivisions of this paragraph.

6. The act of July 1, 1864 (seventh subdivision of section 2238, U. S. R. S.), requiring fees to be paid in selections of lands by States and corporations, is not construed by this office as requiring fees of Wyoming Territory on making selections under said sixth section.

S. M. STOCKSLAGER,
Commissioner.

Approved:

WM. F. VILAS,
Secretary.

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