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DECISIONS

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OF

# THE DEPARTMENT OF THE INTERIOR

AND

## GENERAL LAND OFFICE

IN

### CASES RELATING TO THE PUBLIC LANDS

FROM JULY 1, 1891, TO DECEMBER 31, 1891.

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# DECISIONS

RELATING TO

## THE PUBLIC LANDS.

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PROCEEDINGS BY THE GOVERNMENT—ACT OF MARCH 3, 1891, SECTION 7.

### INSTRUCTIONS.

In all cases where proceedings by the government have been, or shall be, begun against an entry within two years from the date of the final certificate, said entry will be held to have been taken out of the confirmatory operation of section 7, act of March 3, 1891.

The word "proceedings" as used herein, and in the circular of May 8, 1891, will be construed to include any action, order, or judgment, had or made in the General Land Office, canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, without which the entry would necessarily be canceled.

The case of Stella G. Robinson, 12 L. D., 443, overruled.

*Secretary Noble to the Commissioner of the General Land Office, July 1, 1891.*

I am in receipt of your letter of the 7th inst., transmitting "proposed decisions in two cases" (not signed) and requesting instructions "how to proceed."

In one of the cases, that of Benjamin Crawford, involving land in the Huron district, South Dakota, it appears that claimant, on April 6, 1885, commuted his homestead, made December 11, 1883, to cash entry; that on July 9, 1886, your office held the certificate for cancellation on the ground that claimant had failed to show compliance with law; that appeal was taken, and on August 7, 1888, the Department modified said decision and allowed claimant to submit new proof within the life time of the entry; that notice thereof was sent to claimant, who has failed, in any manner, to respond. You propose to pass the entry to patent under section seven of the act of March 3, 1891 (26 Stat., 1095).

In the other case, that of Cora B. Vineyard, involving land in the Huron district, North Dakota, it appears that claimant commuted her homestead to cash entry on February 21, 1885; that on November 7, 1885, your office held the same for cancellation, for the reason that the proof did not show good faith in the matter of residence and cultiva-

tion; that by letter of June 8, 1887, your office "adhered to the former decision, except that the cash certificate and original entry were suspended instead of being held for cancellation;" that appeal was taken, and on October 16, 1888, the Department affirmed the latter decision and required new proof, and on June 7, 1890, denied a motion for review, and that claimant has failed to comply with the requirements of your office. You propose to pass this entry also to patent under said act.

You desire to know, in view of the decisions requiring further proof and of the passage of said act of March 3, whether such cases shall be passed to patent thereunder, without further showing by the claimants as to their compliance with law.

I do not deem it advisable to indicate what action should be taken in the cases submitted, but will embody in this paper my views of the general question, leaving to you the application of the law in particular cases.

The proviso to said section provides:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or preemption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

In considering the instructions to the chiefs of division of your office, under said section 7, I had occasion to consider the scope of the proviso thereto, and the conclusions I then reached are expressed in the instructions as finally issued, in the following words:

Under the proviso to said section 7, after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the laws mentioned, when there are no proceedings initiated within that time by the government or individuals, the entryman shall be entitled to patent; but all "contests" and "protests" against any entries of the classes mentioned which were pending at the date of the passage of said act are excepted from this rule and will be considered and disposed of as if said section had not been passed. . . . Nothing herein contained shall be construed as to prevent the government from completing proceedings initiated by it within two years after the issuance of the receiver's receipt.

The question presented is, what action on the part of the government will amount to the initiation of such proceedings?

Owing to the great number of cases awaiting adjudication, a case on appeal from your office cannot be reached in regular order by the Department, for decision, within two years from the date of certificate. This state of affairs has existed for many years, and appears plainly from the published reports of the Department. If then, all such final certificates that have stood for two years before they are reached for decision by the Department, are confirmed by said proviso, notwithstanding adverse action by your office, it follows that your office is ousted of its ordinary jurisdiction to determine whether claimants have com-

plied with the law. For if entries on appeal are confirmed because of necessary delay, the action of your office will go for naught, notwithstanding you have found fraud on the part of claimants, or a failure to comply with the law. It will only be necessary to take an appeal and await the lapse of time. And this evil will be a continuing one, and in the present state of the working force, insurmountable.

From 1812 the Commissioner of the General Land Office has been specially charged with the administration of the land laws, (2 Stat., 716; 4 Stat., 107). Section 453 of the Revised Statutes provides that:

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government.

In my judgment it was not the intention of the act, to oust the Commissioner of all practical jurisdiction of those matters which, from the beginning, he was specially authorized by statute to superintend, and to confirm all entries after two years from final receipt, without regard to their status: nor to confirm entries made without authority of law and which could not have been allowed under the law as it existed at the passage of the act of 1891; and certainly not to confirm former entries standing under judgment of cancellation, unappealed from. (James Ross, 12 L. D., 446.) It simply declares that after the lapse of two years the government can not begin proceedings to set aside the action of the register and receiver in allowing an entry.

You will, therefore approve for patent all entries against which no proceedings were begun within the period of two years from the date of the final certificate, but where proceedings have been, or shall be, begun within the specified period, the entry will be held to have been taken out of the operation of this statute, and such cases will proceed to final judgment as heretofore.

The word "proceedings," as used herein and in the circular of May 8, 1891 (12 L. D., 450), will be construed as including any action, order or judgment had or made in your office canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled.

Every suspended entry, where the entryman has not been duly notified thereof, and required to furnish proof necessary to complete the entry within two years from the date of the final receipt, will be released from suspension and adjudicated under the foregoing rules.

The case of Stella G. Robinson (12 L. D., 443), and all other cases in conflict with the views herein expressed, are hereby overruled.

## TOWNSITE ENTRY—PRACTICE—APPEAL.

TOWN OF JENNINGS *v.* MCFARLAIN.

An entry of a townsite by an incorporated town must be made by the corporate authorities thereof, through the mayor, or other principal officer, duly authorized to take such action, and the official character and authority of the officer making such entry must be duly shown.

The Department will not consider an appeal in the absence of notice to the opposite party, and due proof thereof.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 1, 1891.*

I have considered the case of the town of Jennings *v.* Andrew D. McFarlain, on appeal of the said town from the decision of your office of February 6, 1890, rejecting the application made through its mayor, John H. Roberts, to enter the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 34, T. 9 S., R. 3 W., New Orleans land district, Louisiana, under section 2387 of the Revised Statutes, in trust for the use and benefit of the occupants thereof, according to their respective interests; and to contest the location of the same land made by Andrew D. McFarlain, January 3, 1885, with Louisiana school indemnity warrant No. 3957. The application of the town to enter this land was made July 17, 1889, and its affidavit to contest the location of McFarlain was filed in August of the same year.

This affidavit alleged that McFarlain was not entitled to take said land, because it had been and is within the corporate limits of the town of Jennings, and is divided into town lots occupied by people living thereon. But its application was rejected by the local officers because it failed to show the official character of Roberts, who claimed to be the Mayor of the town, and also, failed to show that Roberts was authorized by "the corporate authorities of said town to act in this matter," and further because the affidavit of contest failed to allege or show that the land in contest at the date of McFarlain's location of the same was within the corporate limits of the town or was then occupied for municipal purposes, or that the town had any priority of right to the land over McFarlain. From this ruling of the local officers the town, through its attorney, appealed.

Your office, before rendering its decision, directed the register and receiver at New Orleans to notify Mr. Elms, the attorney of the town, of the omissions in the affidavit of contest and application to enter the land, but, if such omission should be supplied, and the affidavit of contest amended, so as to allege or show that Mr. Roberts was the official Mayor of the town, duly authorized by its corporate authorities to represent the said town in its application to enter this land, and should further allege or show that the town had a prior right to this land at the time of McFarlain's location of the same, that a hearing should be ordered to determine the facts of the case.

This notice, in substance, was served on Mr. Elms, the attorney for the town, September 21, 1889. But he neglected or refused to give it attention.

On the 8th of October, 1889, Andrew D. McFarlain made and filed an affidavit in which he alleged that at the date of his location of this land the said land was wholly unoccupied, and therefore urged that the matter of his location be adjusted.

On receiving this communication from McFarlain, your office again directed the local officers at New Orleans to notify Mr. Elms, the attorney for the town, that the amendments before called for must be filed, if at all, within sixty days from the receipt of the original notice above mentioned. On the 25th of October, 1889, the certified copy of a commission, showing that John H. Roberts had been duly elected Mayor of the town of Jennings and was then acting in his official capacity, was duly filed, but it failed to show that he, the said Roberts, was authorized by the corporate authorities of the town to make application to enter this land or contest the right of McFarlain to the same. No amendment or change was made in the affidavit of contest, and, thereupon, your office, February 6, 1890, considered the appeal and affirmed the action of the local officers.

The said town, through its attorney, has appealed to this Department, and in its appeal expresses the belief that it would be able to show that the land, or a portion of it, had been already laid out into town lots and was actually inhabited by people holding under McFarlain, prior to the date of his, McFarlain's, location under the school warrant.

This statement, if conceded as alleged, would not establish a priority of right to the land in the town; but a copy of this appeal, with its specifications of error and arguments, has not been properly served, according to the Rules of Practice, on the opposing party. The attorney for said town was advised of this omission, and on the 28th of April, 1890, filed an affidavit in which he averred that on that day he mailed to A. D. McFarlain, by registered letter, a copy of the said appeal, specifications of error and arguments. This notice is not in accordance with the 96th rule of practice, which provides "that the proof of service by registered letter shall be the affidavit of the person mailing the letter, attached to a copy of the post-office receipt." The latter part of the rule was not observed, and there is no evidence that a copy of the appeal papers reached the opposing party.

The circular of the Department, approved November 5, 1886 (5 L. D., 265), relative to the manner of acquiring townsites on public lands, provides that "if the town is incorporated, the entry must be made by the corporate authorities thereof, through the mayor or other principal officer duly authorized so to do," and the official character and authority of the officer making the entry must be shown.

As these provisions have not been observed, and, as the appeal is defective, it is hereby dismissed, and the decision of your office affirmed.

## HOMESTEAD ENTRY—ACT OF MARCH 3, 1891, SECTION 7.

ALBERT A. BOSLEY.

A homestead entry allowed under a defective notice of intention to submit final proof is within the confirmatory operation of section 7, act of March 3, 1891, where no proceedings against the same are initiated by the government within two years from the issuance of the final receipt, and there is no adverse claim, pending contest, or protest against said entry.

The expiration of the statutory life of an entry does not exclude the same from the confirmatory effect of the section aforesaid.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 1, 1891.*

On November 11, 1882, Albert A. Bosley made homestead entry of the NE.  $\frac{1}{4}$ , Sec. 35, T. 113 N., R. 67 W., Huron, Dakota.

He made commutation proof thereon October 23, 1883, and on November 6, 1883, final certificate and receipt for the money in payment for the land issued.

On November 11, 1885, you rejected his proof because of defective notice in that it stated that the proof "will be made before judge or clerk of court of record in and for Hand county, Dakota Territory," but did not designate the court or name the place where the court is located or when the proof would be made. The proof was made before the clerk of the district court for Hand county.

He appealed, and on July 30, 1888, the Department affirmed your action and required claimant to furnish new proof within the life time of the entry, after new and proper publication.

On June 7, 1889, he again appeared before the clerk of the district court of Hand county, D. T., and submitted testimony in accordance with new published notice. This proof was filed in the local office June 8, 1889, and was accompanied by a petition from claimant asking that he be allowed an extension of time from June 7, 1889, to December 7, 1889, in which to show compliance with law. It appears that after he made his first proof, and received his final certificate, he moved from the land, but continued to cultivate and improve it; he has sixty-five acres of breaking which were cropped every year and has erected a new house twelve by fourteen feet, and a barn fourteen by eighteen feet. It is seen that the entry expired by limitation November 11, 1889.

In consideration of the facts above given, you, on October 30, 1889, suspended the entry under the authority of departmental decision of July 30, 1888, (above referred to) and claimant brings this appeal from your action.

It does not appear that the land has been sold or encumbered. There are no adverse claims and no pending contest or protest against the validity of the entry; nor were any proceedings initiated against

it by the government within two years after issuance of receiver's receipt. The entryman is therefore entitled to patent for the land, under the proviso to section seven of the act of March 3, 1891 (26 Stat., 1095). By reason of that statute, passed and approved since your judgment was rendered, the decision appealed from must be and it is hereby reversed, and patent will issue in due course of business.

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HOMESTEAD CONTEST—RESIDENCE.

KEOGLE *v.* GRIFFITH.

A homesteader who by mistake erects his house outside the boundaries of his claim, and resides therein, but subsequently removes to his claim, on discovery of the mistake, and establishes residence thereon, does not necessarily manifest a want of good faith by continuing to make use of the buildings erected on the adjacent tract.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 1, 1891.*

The record in the case of John D. Keogle *v.* Merrit R. Griffith is before me on appeal of the latter from your decision of June 6, 1889, holding for cancellation his homestead entry, made January 21, 1884, upon the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 24, T. 90 N., R. 48 W., Des Moines, Iowa.

He gave notice of his intention to submit commutation proof on June 15, 1887, as to the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of said section, and to relinquish as to the remaining part of the entry. The proof was duly submitted, and Keogle, on the same day, filed his affidavit of contest against the entry, alleging "that said tract is not settled upon by said party as required by law, and that he has never resided thereon, but has since said entry, and now, resides upon other land."

Hearing was had, and, on August 31, 1887, the receiver recommended the cancellation of the entry. The register would take no part in the decision, because he had just come into office (July 27, 1887), and the case had been tried by his predecessor.

Claimant duly appealed, and you, by your said decision, affirmed that judgment.

A motion for a rehearing was then filed, which you overruled on February 18, 1890, and claimant brings this appeal to reverse your action.

The facts as disclosed by the record are as follows: In the spring of 1883, claimant purchased a relinquishment to the land, and settled upon it, as he supposed, and broke about five acres. In the fall of that year, he built a frame house (one story and a half), and finished it in good style; he also built a good barn, pig pens, etc. He lived with his family in this house during the rest of that year, improving the land and caring for his stock. In March, 1884, he had his land surveyed; he then

learned, for the first time, that his improvements were on the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 23, about forty rods from the land he had entered. He thereupon built a frame house eight by ten, one story, worth about \$50, upon the land he had entered. This house stood about fifty rods from the one first built. He moved a bed, some chairs, a stove, and other articles into the second house, and thereafter claimed it as his residence, and swore he continuously occupied it as such; but he admits that he also used the first house, especially when keeping boarders—also that he kept his stock in the barn on section 23.

It is furthermore shown that it was impracticable to move the buildings from section 23 to section 24, when the mistake was first discovered. The intervening land was rough and broken; the buildings would have to be taken down piece by piece and thus much damaged. The land on which he first built appears to have belonged to one Coleman, and when he discovered that fact, he bought it, in order to save his improvements.

It is insisted that claimant's alleged residence in the house on section 24 was a mere pretext, and that his real home was all the time on section 23, in the house first built, and that contestant's allegation in this respect is sustained by the evidence. This is the view held by your office; also by the local office.

As seen above, claimant denies this, swearing his home was continuously on section 24, after the mistake was discovered and the second house built.

The principal reason assigned for the belief that he made his real home in section 23, and not in Sec. 24, is that the house first built was more commodious and comfortable, and that claimant would not voluntarily abandon the better residence for the inferior one; also that he was seen about his first residence very often; that the same was furnished and occupied by boarders, and his family often seen there.

Against this theory is the positive evidence of claimant himself (introduced as a witness for contestant), and when it is considered that he must have known that he had to make his residence on the land he had entered, in order to obtain title thereto, it is not unreasonable to accept his sworn statement as to that fact.

There is no law or regulation which prohibits a settler seeking title to the public lands from using a house situated on an adjoining tract for business purposes, such as merchandizing, keeping boarders, etc., provided the settler maintains a bona fide residence on his own claim; and if, by mistake, he places his barns on the wrong land, he is not prohibited from using them, even after he discovers such mistake, provided he in good faith changes his residence to the land covered by his entry in a reasonable time, after the mistake is discovered.

In the case at bar, claimant built as soon as he discovered his first improvements were on the wrong land. His second house was small, and by no means as well built or as comfortable as the first one, for

the reason that he had expended nearly all his means in making the first improvements, and was necessarily compelled to live in smaller quarters.

Residence in good faith in a house supposed to be on the land claimed is constructive residence upon said land; and the discovery of the entryman that the house is in fact not on said land will not defeat the entry. *Lewis C. Huling* (10 L. D., 83).

When an entryman's house was by mistake built thirty yards outside of the lines of his claim, but was occupied by him in good faith, it was held to be constructive residence on the land. *Talkington's Heirs v. Hempfling* (2 L. D., 46). Under these rulings, he might have commuted his homestead to cash entry when the mistake was first discovered; but in place of doing this, he went to the expense of rebuilding, broke and cultivated fifty-five acres of his land, and when he offered to commute, he had lived on the two places more than four years. The land was wild and wholly unoccupied when he first went to it. He has made extensive improvements thereon, and I fail to discover any evidence of bad faith on his part.

In consideration of the views above expressed, your decision is reversed, and the contest is dismissed.

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#### OKLAHOMA TOWNSITE PROCEEDINGS—APPEAL.

##### INSTRUCTIONS.

Under a proper construction of the act of May 14, 1890, the Secretary of the Interior is authorized to allow appeals from the decisions of the townsite trustees to the Commissioner of the General Land Office, even though said act does not expressly provide for an appeal in such cases.

*Secretary Noble to the Commissioner of the General Land Office, July 3, 1891.*

In your communication dated June 30, 1891, is set forth a copy of a telegram from the townsite trustees of Guthrie, Oklahoma Territory, stating that in the townsite contest case between various parties, involving the right to certain lots in said town, the defeated party appealed from the decision of the townsite trustees to your office, pending which the successful parties applied to the district court of said territory for a writ of mandamus to compel said trustees to execute and deliver to them a deed for the lots in question; that the United States attorney appeared in behalf of said trustees, but the court directed the writ to issue, and entered judgment against the trustees for the costs of suit, on the ground that the law provides for no appeal from the action of the trustees to the Commissioner of the General Land Office; that similar applications have been made in nine other cases which will probably be followed by many more, and the trustees ask if they

shall resist the application with a certain prospect of judgment against them for costs, or shall they make and deliver deeds in all similar cases in accordance with said judgment of the court.

It is further stated that the action of the court was contrary to the instructions of the Department dated June 18, 1890 (10 L. D., 666); that upon request, the court granted a stay of proceedings for twenty days, which was about to expire; that, by said circular, an appeal was expressly given to parties aggrieved by the action of the trustees to the Commissioner of the General Land Office; that such appeals were directed to be made special but a failure to appeal should not be construed as a waiver of, nor held to prejudice, the rights of either party, nor to preclude suits in the courts in case the party entitled to appeal desired to proceed in that manner, for the purpose of settling the title to the lot or lots in controversy; that said construction as to the right of appeal was based, upon the express language of the act which requires the Secretary of the Interior to provide "regulations for the proper execution of the trust."

And the request is made by you that the action of said court be considered by the Department "in connection with the law and regulations," at the earliest practicable date, and that you be notified what action should be taken by you in cases similar to that adjudicated by said court.

This Department has been heretofore advised of the judicial proceedings against said townsite trustees, and on March 2nd requested that said United States attorney be directed to appear and defend said action. Afterwards, Acting Attorney-General Maury advised this Department that said court had rendered a judgment adverse to the trustees in said case; that said United States attorney desired to appeal the case to the supreme court of the Territory, and if this Department was willing to have the case contested in the supreme court of the Territory and let that decision determine the action of this Department, he would direct said attorney to prosecute an appeal in the case with "the utmost vigor."

In response thereto, the Attorney-General was advised by Acting Secretary Chandler, on June 22, last, (L. & R., Misc. 221, p. 151) that he was unable to see any objection to an appeal being taken in said case to the supreme court of the Territory, and, if necessary, to the highest appellate authority, but he would "be unwilling to promise to abide by the decision of the supreme court of the Territory in case its judgment should be adverse to the views of the Department," that he was "of the opinion that said case should be appealed, to the end that the erroneous ruling of the district court shall be speedily corrected." Presumably, the appeal has already been taken and the decision of the appellate court will doubtless soon be rendered.

By section 13 of the act of Congress approved March 2, 1889 (25 Stat., 1004), it is provided that the lands acquired by the United States,

known as Oklahoma, "shall be a part of the public domain," to be disposed of as therein directed after the proclamation of the President; and the Secretary of the Interior is authorized to allow townsite entries, each to contain not more than three hundred and twenty acres, under sections 2387, and 2388 of the Revised Statutes of the United States. Section 22 of the act of Congress approved May 2, 1890 (26 Stat., 81-91), extends the provisions of Title 32 Chapter 8 of the Revised Statutes of the United States relating to the reservation and sale of townsites on the public lands "to the lands open or to be opened to settlement in the Territory of Oklahoma," with certain restrictions as to reservations for parks, etc.

By the act of Congress approved May 14, 1890 (*id.*, 109), special provision was made for townsite entries of lands in Oklahoma.

Section 1 limits the amount that may be embraced in each entry to 1280 acres, and prescribes that the entry shall be made—

for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees, including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such townsite, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees.

Section 2 prescribes what shall be taken as evidence of occupancy by lot-claimants.

Section 3 relates to conveyances of church lots and section 4 directs—

That all lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings or for the purpose of parks, if, in the judgment of the Secretary, such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section.

Section 5 makes the provisions of the Kansas townsite laws applicable to the trustees under said act.

Section 6 prescribes the manner of adjudicating the entries and directs that "when final entry is made, the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided."

By section 7 power is given to said trustees to administer oaths, to hear and determine all controversies arising in the execution of said act, and they are required to—

keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same.

Said section also allows the trustees—

such compensation as the Secretary of the Interior may prescribe . . . and such traveling and other necessary expenses as the Secretary may authorize, and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise.

After a very careful consideration of the provisions of said act, said circular of June 18, 1890, was issued by me, prescribing the duties of said trustees and the rights of applicants for town lots thereunder. The first ten paragraphs thereof prescribe the manner of disposing "to persons entitled to the same according to their respective interests, the lots, blocks, or grounds to which each occupant thereof shall be entitled under said act." The eleventh paragraph prescribes that the survey of the townsite, when completed, shall be certified by the trustees in quadruplicate; that one of the plats shall be filed in the district land office, one in the office of the register of deeds in the county where the town is situated, one in the General Land Office, and the remaining plat shall be kept by the trustees for their own use.

Paragraph 12 directs the manner of procedure on the part of the trustees when two or more persons claim the same lot, applying thereto "as far as practicable the rules prescribed for contest before registers and receivers of the local offices," and requiring the trustees to administer oaths to witnesses, to observe the rules of evidence as near as may be in making their investigations, and at the close of the case, or as soon thereafter as their duties will permit, to render their decision in writing.

By paragraph 13 of said circular it is provided that—

Any person feeling aggrieved by your judgment may, within ten days after notice thereof, appeal to the Commissioner of the General Land Office under the rules, (except as to time) as provided for appeals from the opinions of registers and receivers, and if either party is dissatisfied with the conclusions of said Commissioner in the case, he may still further prosecute an appeal within ten days from notice thereof to the Secretary of the Interior upon like terms and conditions and under the same rules that appeals are now regulated by and taken in adversary proceedings from the Commissioner to the Secretary except as modified by the time within which the appeal is to be taken. Such cases will be made special by the Commissioner and the Secretary and determined as speedily as the public business of the Department will permit, but no contest for particular lots, blocks, or grounds shall delay the allotment of those not in controversy.

Paragraph 25 requires the trustees to file with the Commissioner of the General Land Office their expense accounts together with a record of their proceedings as prescribed by section seven of said act of May 14, 1890, and paragraph 27 directs that all correspondence by the trustees with the Secretary of the Interior be through the Commissioner of the General Land Office, in order "that a complete record thereby may be kept in the Land Office."

Said paragraph 13 was amended on May 8, 1891, by adding thereto the following words:

and a failure to appeal as herein provided shall not be construed as a waiver of, or to prejudice the rights of either party, nor held to preclude suits in the courts in case the party entitled to appeal desires to proceed in that manner for the purpose of settling the title to the lot or lots in controversy. (12 L. D., p. 612.)

The precise question for determination is: Does said act, properly construed, authorize the Secretary of the Interior to allow appeals from the decisions of the townsite trustees by the defeated applicants?

It must be remembered that the land subject to entry as townsites is a part of the public domain, and the act of May 14, 1890, must be construed *in pari materia* with other legislation relative to the disposition of the public domain, in order to ascertain the intention of Congress as expressed in the language of said act. *Pennington v. Coxe*, 2 Cranch 33-52; *United States v. Freeman*, 3 How., 556-565; *Cope v. Cope*, 137 U. S., 683-688.

The "power to dispose of and make all needful rules and regulations respecting the Territory or other property belonging to the United States" is vested by the Constitution exclusively in "the Congress." (Constitution of the United States, Art. 4, Sec. 3, Clause 2; *United States v. Gratiot et al.*, 14 Pet., 526.)

By section 1 of the act of March 3, 1849 (9 Stat., 395; now Sec. 437 R. S.), the Department of the Interior was created. The Secretary of the Interior is charged with the supervision (*inter alia*) of "the public lands, including mines." (Sec. 441, second clause, Revised Statutes of the United States.)

The General Land Office was originally established by the act of April 25, 1812 (2 Stat., 715), as a bureau in the Department of the Treasury, was reorganized under the act of July 4, 1836 (5 Stats., 107), and became a part of the Department of the Interior under said act of 1849 (*supra*; see Sec. 446 R. S.).

By section 453 of the Revised Statutes it is provided that—

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands, and, also, such as relate to private claims of land, and the issuing of patents for all (*agents*) (grants) of land under the authority of the government.

In the case of *Lytle v. Arkansas* (9 How., 314-333), the supreme court, construing the act of May 29, 1830 (4 Stat., 420), continued in force by the act of July 14, 1832 (*id.*, 603), granting rights to settlers on the public lands, said:

The register and receiver were constituted by the act a tribunal to determine the rights of those who claimed pre-emption under it. From their decision no appeal was given. If therefore they acted within their powers, *as sanctioned by the Commissioner* and within the law, and the decision cannot be impeached on the ground of fraud or unfairness, it must be considered final.

In the subsequent case of *Barnard's Heirs v. Ashley's Heirs* (18 How., 43-44), the supreme court, commenting upon the contention that the register and receiver having, on due proof of examination, rejected

Barnard's claims to a preference of entry of the four quarter sections, he is thereby concluded from setting them up in a court of equity, because the register and receiver acted in a judicial capacity, and their judgment, being subject to no appeal, is conclusive of the claim, said :

In cases arising under the pre-emption laws of the 29th of May, 1830, and of the 19th of June, 1834, the power of ascertaining and deciding on the facts which entitled a party to the right of pre-emption was vested in the register and receiver of the land district in which the land was situated, from whose decision there was no direct appeal to higher authority. But, even under these laws, the proof on which the claim was to rest was to be made "agreeably to the rules to be prescribed by the commissioner of the general land office;" and, if not so made, the entry would be suspended, when the proceeding was brought before the commissioner by an opposing claimant. In cases, however, like the one before us, where an entry has been allowed on *ex parte* affidavits, which were impeached and the land claimed by another, founded on an opposing entry, the course pursued at the general land office was to return the proofs and allegations, in opposition to the entry, to the district office, with instructions to call all the parties before the register and receiver, with a view of instituting an inquiry into the matters charged; allowing each party, on due notice, an opportunity of cross-examining the witnesses of the other, each being allowed to introduce proofs; and, on the close of the investigation, the register and receiver were instructed to report the proceeding to the general land office, with their opinion as to the effect of the proof and the case made by the additional testimony. And, on this return, the commissioner does in fact exercise a supervision over the acts of the register and receiver. This power of revision is exercised by virtue of the act of July 4, 1836, sec. 1, which provides "that from and after the passage of this act, the executive duties now prescribed, or which may hereafter be prescribed by law, appertaining to the surveying and sale of the public lands of the United States, or in anywise respecting such public lands; and also such as relate to private claims of land, and the issuing of patents for all grants of land under the authority of the government of the United States, shall be subject to the supervision and control of the commissioner of the general land office, under the direction of the president of the United States." The necessity of "supervision and control," vested in the commissioner, acting under the direction of the president, is too manifest to require comment, further than to say that the facts found in this record show that nothing is more easily done than apparently to establish, by *ex parte* affidavits, cultivation and possession of particular quarter sections of land, when the fact is untrue. That the act of 1836 modifies the powers of registers and receivers to the extent of the commissioner's action in the instances before us, we hold to be true. But if the construction of the act of 1836, to this effect, were doubtful, the practice under it for nearly twenty years could not be disturbed without manifest impropriety.

In the case of *Magwire v. Tyler et al.*, involving a question of survey under a confirmed Spanish grant, the supreme court held that—

The Secretary of the Interior has the power of supervision and appeal in all matters relating to the General Land Office and that power is co-extensive with the authority of the Commissioner to adjudge, and that he may, in the exercise of his supervisory powers, lawfully set aside a survey made under a confirmed Spanish grant, order another to be made and issue patent upon it. (1 Black 195, syllabus.)

In the case of *Witherspoon v. Duncan* (4 Wall., 210), considering the power of the State to tax lands within its limits after entry at the local land office, the court said: "It is true the entry might be set aside at Washington; but this condition attaches to all entries of the public lands."

In the case of *Lee v. Johnson* (116 U. S., 48), which was a suit in equity to have the holder of a patent from the United States declared a trustee of the property and compelled to convey the land included in said patent to the complainant, the court said :

The patent having been issued by the officers of the Land Department, to whose supervision and control are entrusted the various proceedings required for the alienation of the public lands, all reasonable presumptions are indulged in support of their action. It cannot be attacked collaterally, but only by a direct proceeding instituted by the government or by parties acting in its name and by its authority. If, however, those officers mistake the law applicable to the facts or misconstrue the statutes and issue a patent to one not entitled to it, the party wronged can resort to a court of equity to correct the mistake and compel the transfer of the legal title to him as the true owner. The court in such a case merely direct that to be done which those officers would have done if no error of law had been committed.

The supreme court of Michigan held in that case that the decision of the Secretary of the Interior was not conclusive because it was not upon a question at issue between the contestants, which was the only question that could be considered by the Secretary of the Interior on appeal, as original jurisdiction had not been conferred upon him. But the court said (Op. p. 52):

Under these circumstances, so far from having exceeded his jurisdiction in directing a cancellation of the entry, he was exercising only that just supervision which the law vests in him over all proceedings instituted to acquire portions of the public lands.

It has been repeatedly held that the decision of the officers of the Land Department made within the scope of their authority on questions involving conflicting claims for the public land is generally conclusive everywhere, except when reconsidered by way of *appeal within the same Department*. *Johnson v. Towsley* (13 Wall., 72); *Shepley v. Cowan* (91 U. S., 330); *Quinby v. Conlan* (104 U. S., 420).

In the case of *Butterworth v. Hoe* (112 U. S. 50), the supreme court held that the Secretary of the Interior has no power by law to revise the action of the Commissioner of Patents in awarding to an applicant priority of invention and adjudging him entitled to a patent, and there are some expressions in the opinion of the court that would seem upon a casual reading to deny the right of appeal from the decision of the local officers, unless expressly conferred by statutory provision. But a more careful examination will show a material difference in the two cases. Indeed, the court says: (Op. p. 56) "Each case must be governed by its own text, upon a full view of all the statutory provisions intended to express the meaning of the legislature." And the court found that by the express provision of law, an appeal was allowed from the adverse action of the Commissioner of Patents to "tribunals distinct from and independent of the Patent Office, the integrity and force of whose judgments would be annulled if not regarded as conclusive upon the Commissioner, notwithstanding any power of direction and superintendence on the part of the Secretary, which is therefore neces-

sarily excluded." Such is not the case with the decision of the local officers; the courts act after the Department has finally determined the rights of applicants for public lands, or possibly they may issue a mandamus to compel action upon appeals filed, where their consideration is refused by the proper officer. *Craig v. Leitensdorfer*, 123 U. S., 189-214.

An examination of the pre-emption laws shows that under section 2263 of the Revised Statutes, which was a substantial re-enactment of section 12 of the act of September 4, 1841 (5 Stat., 456), pre-emption entries were authorized upon making proof of settlement and improvement, "agreeably to such rules as shall be prescribed by the Secretary of the Interior," but no appeal is specially provided for by statute, except in cases where two or more persons settle upon the same tract of land. Section 2273 of the Revised Statutes requires that

all questions as to the right of pre-emption arising between different settlers shall be determined by the register and receiver of the district within which the land is situated; and appeals from the decision of the district officers, in case of contest for the right of pre-emption, shall be made to the Commissioner of the General Land Office, whose decision shall be final, unless appeal therefrom be taken to the Secretary of the Interior."

So also in the homestead law, there is no special statutory provision allowing appeals from the decisions of the local officers, although section 2297 of the Revised Statutes provides:

If at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the government.

This section was amended by the act of March 3, 1881 (21 Stat., 511), so as to allow the settler twelve months from the date of filing in which to commence his residence when climatic reasons are shown "under such rules and regulations as he may prescribe." While it is true that in many cases no express appeal has been allowed by the statute from the findings of the local officers, yet the uniform practice of the Department has been to allow appeals from such action in all cases by applicants for public land feeling aggrieved by the action of the local officers.

It may be conceded that the first section of said act of May 14, 1890, does not specifically prescribe that an appeal may be taken from the action of the townsite trustees, yet the first section of the act does require the Secretary of the Interior to appoint the trustees to make the entry; that the entry shall "be made under the provisions of section 2387 of the Revised Statutes, as near as may be," and that "the Secretary of the Interior shall provide regulations for the proper execution of the trust." This last provision materially changed the method of procedure under said section 2387, for that required the execution of

the trust as to the disposal of lots in such town and the proceeds of the sale thereof "to be conducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated." Moreover, by the seventh section of said act, said trustees are required to file a record of their proceedings in the general land office, which becomes a part of its records, evidently showing that it was the intention of Congress that the acts of the trustees should be subject to revision by this Department.

It is manifest that the duty of directing the proper execution of the trust by the trustees whom he had appointed, is expressly devolved by law upon the Secretary of the Interior. Nor is it absolutely necessary that the statute should expressly direct that an appeal be allowed from the decisions of said trustees to the Commissioner of the General Land Office.

It was said by the supreme court in the case of *United States v. MacDaniel*, 7 Peters, 1-14:

A practical knowledge of the action of any one of the great departments of the government, must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he must show a statutory provision for everything he does. No government could be administered on such principles. To attempt to regulate by law the minute movements of every part of the complicated machinery of government would evince a most unpardonable ignorance on the subject. Whilst the great outlines of its movements may be marked out, and limitations imposed on the exercise of its powers, there are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government. Hence, of necessity, usages have been established in every department of the government, which have become a kind of common law, and regulate the rights and duties of those who act within their respective limits.

It is a maxim of law that "*Contemporanea expositio est optima et fortissima in lege*" and that such contemporaneous construction by the officers upon whom was imposed the duty of executing the statute is entitled to great weight and will not be overturned unless clearly erroneous, has been the ruling of the supreme court almost from the beginning. *Edwards v. Darby*, 12 Wheaton, 206-210; *United States v. Moore*, 95 U. S., 760-763; *United States v. Philbrick*, 120 U. S., 52-59; *Hastings and Dakota Ry. Co. v. Whitney*, 132 U. S., 357-366.

The opinion of the district court which decided that no appeal would lie from the decisions of the townsite trustees to the Commissioner of the General Land Office is not before me, and hence I am unable to know the grounds upon which the judgment was based. But, after a careful consideration of the whole question, I am still of opinion that, both upon principle and authority, said circular of June 18, 1890, was issued by competent authority, and rightfully directed the allowance of appeals from the decisions of the townsite trustees. The provisions of said circular as amended should be carried out promptly, and you are advised that if actions are brought in "similar cases to that passed

upon by said court," the Attorney-General should be requested to direct the proper United States attorney to defend such actions, and, in case judgments are rendered against the townsite trustees, to take appeals to the supreme court of the territory. It is to be presumed that upon suggestion of the United States attorney other cases similar to the one pending on appeal will be stayed to await the final decision of the appellate tribunal.

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RIGHT OF WAY—STATION GROUNDS.

CONTINENTAL RY. AND TELEGRAPH CO.

A map of definite location submitted under the right of way act of March 3, 1875, will not be approved, if the termini of the section of road delineated thereon are not definitely stated in the affidavit and certificate accompanying the same. Plats of station grounds filed under said act must show the line of the company's right of way.

*Acting Secretary Chandler to the Commissioner of the General Land Office, July 1, 1891.*

With your letter of the 15th instant you submitted, and recommended the approval of, a map showing the definite location of a section of 11½ miles of the line of road in Colorado of the Continental Railway and Telegraph Company and two plats showing grounds selected by the company for station purposes, all filed for the purpose of securing the benefits of the right of way act of March 3, 1875.

The termini of the section of road delineated on the map are not definitely stated in the affidavit and certificate and for that reason the map is returned herewith without approval. The plats are not satisfactory and are also returned herewith without approval because the line of the company's right of way is not delineated thereon. The first section of the right of way act grants the use of "ground adjacent to such right of way for station buildings" etc., and in executing this provision of the act it is the duty of the Secretary of the Interior to know that selections are adjacent to the right of way before he can attach his signature of approval to plats submitted for his action. In the present instance he cannot know this by reason of the omissions referred to above.

## PRE-EMPTION ENTRY—SETTLEMENT BEFORE SURVEY.

HARRINGTON *v.* WILSON

In a case of conflicting settlement rights acquired prior to survey, either party may enter the whole tract on condition that he tenders to the other a written agreement to convey to him that portion of the land covered by his occupation.

The agreement in such a case is sufficiently explicit if it clearly follows the departmental award as to the relative rights of the parties litigant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 6, 1891.*

I am in receipt of the appeal of James A. Wilson from your letter of November 20, 1889, suspending his pre-emption cash entry for the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , Sec. 29, T. 3 N., R. 10, Rapid City, Dakota.

It appears that on January 22, 1889, this Department rendered the following decision, in relation to the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section, viz :

The Commissioner of the General Land Office, -

Sir: I have before me the appeals of both the above named parties, from your decision of January 8, 1887, allowing them to make joint entry of the three forties as to which their respective pre-emption filings conflict, and providing that "in the event that either party fails or refuses to consent to this award within (the time allowed), the other party will be allowed to make entry of the tract in dispute—to wit, the W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , and NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 29, T. 3 N., R. 10 E., Deadwood district, Dakota.

In view of the fact that Harrington prevented Wilson, by threats backed up by the exhibition of fire-arms, from mowing on the disputed tract, or improving or otherwise using the same, and that Wilson's settlement was made in view of Harrington's admissions and representations, at the time, that his claim did not go further east than a line which is now east of his improvements, the case may properly be treated as one in which the parties respectively occupied, before survey, distinct and sufficiently ascertained portions of the disputed subdivisions, though Harrington seems to have attempted, after Wilson's initiation of his claim, to drive the latter farther eastward, by successive alteration of his boundaries. This being so, and Harrington's substantial improvements being saved to him by the apportionment pointed out by the originally established occupancy, the case falls within the principle of the decision in *Coleman v. Winfield* (6 L. D., 826). In accordance with that precedent, I direct that Wilson be permitted to make entry of the disputed forties, upon the condition that he tender to Harrington an agreement in writing to convey to Harrington that part of said forties occupied by Harrington (bounded by the line which was shown to be east of his improvements: to wit, the line marked by the elm tree formerly marked "Ham's East Line," some 31 rods east of the west line of the forty) and if he (Wilson) declines to enter into such agreement, then Harrington may make entry of the entire tract, upon his tendering to Wilson a written agreement to convey to him all but that portion of said tract hereinbefore awarded to him (Harrington). If both parties fail or refuse to make entry upon the terms and conditions herein prescribed, then the parties will be allowed to make joint entry, in accordance with the provisions of Section 2274 of the Revised Statutes.

In pursuance of said decision, Wilson, on February 21, 1889, made pre-emption cash entry, as above described, and tendered to Harrington-

ton an agreement to convey, what he claims to be, that portion of the disputed forties, as described in said departmental decision.

April 15, of the same year, Harrington filed a protest against the issue of a patent to Wilson for the land in dispute, alleging that the entry was unlawful and contrary to the decision of the Secretary, because—

1st. The said Wilson ought not to have been allowed to make entry of said land for the reason that he had not first complied with the requirements of the Secretary of the Interior in his decision of the 22nd of January, 1889, and had not tendered to Harrington an agreement in writing to convey to Harrington that part of the disputed forties occupied by Harrington.

2nd. That the only paper tendered or shown by said James A. Wilson in any manner attempting to comply with the decision of the said Secretary, was an offer on his part to convey a strip of about thirty-one rods in width 'in the west side of the land,' herein described, which would deprive said Harrington of a large part of his substantial improvements clearly awarded him by the decision of the Hon. Secretary, and further, said offer of said Wilson contained a condition not suggested or implied in the decision of the Hon. Secretary, to wit: That said Harrington should first pay him for the land and a proportionate share of the expenses of his entry.

3rd. That said entry ought not to have been allowed for the further reason that there is no authority in law for permitting an entry by one man of any government subdivision of land in part for himself, and, as to the remainder in trust for another, but the only provision by which a subdivision can be entered in the interest of more than one party, is section 2274 of the Revised Statutes of the United States, authorizing a joint entry in the case therein described, or for either of the disputing claimants to such subdivision to enter into a voluntary contract with the other to convey his portion after patent.

In your said letter you suspend said entry and allow Wilson sixty days in which to comply with the requirements of said decision of the Secretary, in default of which his entry will be canceled, and both parties will be allowed to make joint entry, in accordance with the provisions of section 2274 of the Revised Statutes.

I find on examination of the record that Wilson has substantially complied with the requirements of the decision of Secretary Vilas, above quoted.

The agreement to convey to Harrington his portion of the land in controversy, as determined by said decision, is filed with the record, and is as follows:

To Con. Harrington, contestant above named.

You will please take notice: That on the 22nd day of January, 1889, the Secretary of the Interior, on appeal in the above matter, rendered a decision, modifying the decision of the Commissioner of the Gen. Land Office, of the 8th day of January, 1887, in the above matter.

Now, therefore, in accordance with the decisions aforesaid, you will further take notice, that I propose to complete my entry, and do hereby offer and agree, to and with you, your heirs, administrators, executors and assigns, to deed to you all of that portion of the land above described lying west of the elm tree, or line marked by the elm tree, and formerly marked Hamm's east line, the same being a strip, about 31 rods wide, in the west side of the land above described; that I will make such deed, to wit: a good and sufficient deed of warranty, for said strip of land, and deliver the same to you, on demand, after I complete said entry. For the making and delivery of such deed as aforesaid I bind myself, my heirs, administrators, executors and assigns.

Provided always that you pay or cause to be paid to me the sum of one and 25-100 dollars per acre for the land included in such strip, and the further sum of two dollars, being one-fourth of the expense incurred and paid by me in making such entry, the payment of said sums of money to be made to me, at the time of the delivery of said deed.

This agreement, I think, describes the land with such certainty, that there need be no quibbling over it.

The third objection raised by counsel for Harrington namely, "That said entry ought not to have been allowed for the further reason that there is no authority in law" therefor, can not be considered herein, because it questions the legality of the decision aforesaid, and that question could properly be considered only on a motion for review.

Wilson having substantially complied with the requirements of this Department, his entry will be sustained.

The decision of your office is therefore reversed.

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#### DESERT LAND ENTRY--APPLICATION.

##### FREDERICK P. WOLCOTT.

An application to enter desert land must show that the applicant's knowledge as to the character of the land is derived from a personal examination of the same. The affidavits of the applicant and his witnesses must be made at the same time and before the same officer.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 7, 1891.*

The appeal of Frederick P. Wolcott from the decision of your office under date of May 13, 1890, rejecting his desert land application to enter NW.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , and lots 1, 2, 3 and 4, of Sec. 24, T. 3 N., R. 76 W., Cheyenne, Wyoming, has been considered.

It appears that on the 2nd day of April, 1890, Wolcott executed before the clerk of the court of common pleas, Hamilton county, Ohio, his declaration or desert land application for the above described land; that on the 10th day of the same month, Frank P. Ryan and Stanley Harrington, as witnesses, executed affidavits, as to the character of the land in question, before the deputy clerk of court, 1st judicial district of Wyoming, and that this application accompanied by the above affidavits of witnesses was presented to the local officers April 12, 1890, and rejected by them on the ground that the appellant did not testify in his declaration that he had personally inspected the land and knew from personal examination the desert land character of the same, and furthermore, that the declaration was sworn to outside of the State of Wyoming.

From this decision the party appealed, and your office under date of May 13, 1890, sustained the action of the local officers, from which the party again appeals.

By a general circular issued by Commissioner Stockslager January 1, 1889, approved by Wm. F. Vilas, then Secretary of the Interior, it was provided that applicants for desert lands must have a personal knowledge of lands they intend to enter; that the averments in the declaration can not be made upon "information and belief," and that the register and receiver must reject all applications where the averments contained in the declaration are not from knowledge "derived from a personal examination of the lands;" furthermore, that "the affidavits of applicant and witnesses must in every instance either of original application or final proof be made at the same time and place and before the same officer."

In the case at bar the applicant did not comply with the requirements laid down in said circular, he had never seen or personally examined the land nor did he with his witnesses execute the necessary papers before the same officer and at the same time and place.

The rule requiring a personal knowledge of the land by the applicant, was first established by general circular issued by Commissioner Sparks, under date of June 27, 1887, and went into effect August 1, 1887. See circular approved December 3, 1889 (9 L. D., 672) and Jacob P. Oswald (11 L. D., 155); also cases decided in accordance with said rule, James W. Sexton (7 L. D., 312), and Violette Hall (8 L. D., 96).

After a careful examination of the papers and argument in this case, I can find no just reason for abrogating the present ruling in such cases, therefore the decision of your office is affirmed.

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RAILROAD GRANT—EXPIRED PRE-EMPTION FILING.

KRICKLAN *v.* ST. PAUL AND SIOUX CITY R. R. CO.

A pre-emption filing on unoffered land, under which proof and payment are not made prior to the public offering, raises no presumption of occupancy as against the subsequent operation of a railroad grant.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
July 7, 1891.

I have considered the appeal of Johann Kricklan from the decision of your office of July 11, 1889, rejecting his application to enter under the homestead law the SE $\frac{1}{4}$  of the SE $\frac{1}{4}$  of Sec. 11, T. 114 N., R. 28 W., Marshall, Minnesota.

The record shows that on August 8, 1857, Richard Holden filed a pre-emption declaratory statement for the tract in question, alleging settlement on May 14, 1857. This filing was on unoffered land and has never been canceled.

On the passage of the act of May 12, 1864 (13 Stat., 74), the tract fell within the indemnity limits of the St. Paul and Sioux City Railroad Company's grant, and was withdrawn July 15, 1864.

This tract also came within the ten-miles limits of the grant for the benefit of the Hastings and Dakota Railroad Company, under the act of July 4, 1866 (14 Stat., 87).

The road was definitely located on June 26, 1887. The withdrawal for the benefit thereof became effective July 21, 1866. Both the railroads were built opposite the land, but the land has not been selected or listed on account of either grant.

On March 28, 1887, Johann Kricklan applied to enter said tract as a homestead; his application was rejected by the local land officers, and, upon appeal, your office affirmed their action, subject to his "right either to appeal to the Secretary of the Interior or to apply for a hearing for the purpose of affording him an opportunity to show that pre-emption or homestead settlement rights had attached to said land and were subsisting at the several dates of withdrawal and definite location hereinbefore mentioned."

He has appealed to this Department from your ruling rejecting his application. It is shown that Holden's filing on the land was made on August 8, 1857, and the tract was offered at public sale on October 15, 1860, under proclamation No. 664. Accompanying the proclamation was a notice to each pre-emption claimant for any of the lands offered to appear and submit proof on his claim before the register and receiver before the day appointed for the commencement of said sale, "otherwise such claim will be forfeited." Holden offered no proof before the day of the offer to sell, and never has submitted any proof thereon. The tract was in this condition at the dates of the withdrawal for the benefit of the St. Paul and Sioux City Railroad Company, and the definite location of the Hastings and Dakota Railroad Company.

It is a well-settled rule of the Department that the existence of a *prima facie* valid pre-emption filing of record at the date when the grant became effective, raises a presumption of settlement as alleged and of the actual existence of the claim, which is conclusive as against the grant in the absence of an allegation that said filing was void *ab initio*. *Union Pacific Railway Co. v. Haines*, 11 L. D., 224; *Northern Pacific Railroad Company v. Stovenour*, 10 L. D., 645.

It will be noticed that the existence of a filing must be *prima facie* valid in order to create the presumption held to be conclusive against the railroad company. I am of the opinion that this presumption of occupancy raised by the existence of the filing was destroyed by Holden's failure to make proof and payment before the date the tract was offered by executive proclamation in 1860. It should be treated and held to be an expired filing and all rights forfeited under it several years before the rights of the railroads attached. The tract was therefore, *prima facie*, subject to said grant.

Your office decision is accordingly affirmed.

## CONTEST—PRACTICE—INTERVENTION—RELINQUISHMENT.

WEIR *v.* MANNING ET AL.

In the corroboration of allegations set up in an affidavit of contest the testimony of one witness is sufficient.

A contestant should not be allowed, on filing the relinquishment of the entryman, to exercise the right of entry during the pendency of a plea of intervention setting up fraud and collusion as against the contest.

A contest in which an intervenor has been recognized should not be disposed of prior to the day fixed for hearing, and without notice to said intervenor.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 8, 1891.*

I have considered the case of Gavin Weir *v.* John Manning *et al.*, on appeal by the former from your decision of October 12, 1889, affirming your decision of December 22, 1887, in which you held that the affidavit of contest presented by Weir on February 25, 1887, against the homestead entry of Manning for the E.  $\frac{1}{2}$ , NE.  $\frac{1}{4}$  and S W.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$ , Sec. 20, T. 5 N., R. 2 W., Salt Lake City land district, was properly rejected.

The record in this case through the action and non-action of the former register of the Salt Lake City land office has become very much confused, but the following is in substance what it shows:

On November 15, 1885, John Manning made homestead entry for the said land, and on February 25, 1887, Gavin Weir presented his affidavit of contest against the same, alleging abandonment. This was not filed by the local officers for the reason, as claimed by the register, that it was not corroborated.

On March 10, following, Alfred E. Manning presented his affidavit of contest against the said entry, also alleging abandonment. There is nothing to show that this was docketed. It was marked filed, but no notice appears to have been issued, nor any action taken thereon. On the 12th of same month, Gavin Weir's attorney, G. R. Maxwell, appeared at the local office with James Weir, and placed on the affidavit of Gavin Weir the corroborating affidavit of said James Weir, and it appears from the evidence in the case that there was one corroborating witness to the affidavit when it was first presented. Upon this, the attorney for Weir asked that the case be filed, docketed, set for hearing, and that notice issue thereon, but the local officers, after filing the paper, declined to issue notice, or set the case for hearing, but held it to await the result of the A. E. Manning contest. Immediately thereafter, the attorney of Weir filed an affidavit or plea of intervention and asked to be allowed to intervene in the Manning contest. This was allowed, the plea was filed and the case set for hearing July 20th following, of which Manning was duly notified.

On June 13, 1887, A. E. Manning filed his answer to the plea of intervention. The original plea is lost or destroyed, but from the state-

ments of Maxwell in his affidavit and brief on file, and from the answer of Manning, I learn that at the time the plea was filed, the affidavit of contest of Weir had been lost or destroyed, and Maxwell alleged in his plea of intervention that it was corroborated by one witness when presented on February 25, 1887, and for a second ground of objection to Manning's contest against his brother's entry, he charged that it was collusive and fraudulent. The answer of Manning is inartistically drawn, but it substantially shows that the original affidavit was "supported by the oaths of Gavin Weir and Alexander Weir, and as to the second charge, he does not deny it, but says "The pretense of collusion made in said affidavit and motion for intervention are refuted by the accompanying affidavit."

On June 20, 1887, A. E. Manning filed in the local office a relinquishment by John Manning of his homestead entry. It was *sworn to* by the entryman at Auckland in the colony of New Zealand, on May 10, 1887. The entry was thereupon canceled, and A. E. Manning was allowed to file a pre-emption declaratory statement for the land, alleging settlement June 7, 1887, and on July 14, following, he made desert land entry for the tract.

On July 20, the day set for hearing the matters contained in the intervention pleadings, Weir appeared at the local office with his attorney and witnesses, and learned that the case had been disposed of, the entry canceled, and that Manning had made an entry for the land. His attorney asked to have the case restored to the docket and that the local officers hear testimony to show the truth of the allegations of said plea. This was refused. Thereupon, the attorney prepared a copy of the original affidavit of contest as offered on February 25, and as supplemented by the affidavit of James Weir on March 12, 1887, and prepared the affidavits of himself and Gavin Weir and the corroborating witnesses. These were sworn to before the register (Webb) and marked filed July 20, 1887, and the register was asked upon this showing to re-instate the case and make a record of the filing of these affidavits, and it was insisted that as Manning was in default on the issues made by the pleadings, that Weir should have a judgment upon his plea as intervenor. The local officers refused to re-instate the case, or to take any action, or to make any record of the transaction from which refusal, and from their action in the case Weir appealed, and made substantially the following assignments of error:

1st. "The register and receiver erred in permitting any entry or filing upon this land pending this intervention."

2. The answer of Manning establishes the main facts and shows a priority in Weir, which it was error to overlook.

3. There was an issue, on the intervention, and it was error to dismiss it without notice or trial, and before return day (July 20). The answer raised an issue which should have been tried.

4. Error in not having proof that John Manning authorized the relinquishment.

5. Upon return day, the witnesses for Weir should have been heard, and said case should have been on the docket, and Manning being in default, judgment should have been rendered in the case upon the affidavits filed as upon default.

6. Error in allowing Manning to make entry when it was set forth in the pleadings that his contest was fraudulent, and that he was perpetrating a fraud upon the government.

Notice of this appeal was duly served on Manning. On August 4, 1887, the register transmitted to your office, the appeal and answer to the appeal, but did not send up the affidavit of contest, or the affidavits and plea of intervention or answer thereto, or the copy of affidavit of contest, or the affidavits made on July 20, or any record of the business transacted at his office on the 20th of July, nor does he allude to any of the papers, in his letter of transmittal, but ignores the entire proceeding.

While the case was pending before your office, counsel for Weir, learning of the conduct of the register, suggested a diminution of the record, and asked that the entire record be sent up, and he filed an affidavit setting forth the various matters that were deemed a part of the record and necessary to an understanding of the case. This suggestion and affidavit, your office took no action upon, but passed upon the case sent up and dismissed the contest of Weir, and allowed the desert land entry to remain intact. From this action, Weir appealed, and on May 10, 1889 (L and R, Vol. 95, p. 381), this Department found

that Weir, on or about March 14, 1887, while the contest of Alfred E. Manning was pending, filed his motion to intervene or plea of intervention, in the said contest, claiming priority of right and perhaps, as Manning's answer would indicate, collusion between the two Mannings, regarding the contest of Alfred E. Manning. To properly determine the case, the missing documents should be supplied,

and held that if Weir's plea made him a party he should have been notified of the action to be taken in the case. The same was returned to you with directions to have the missing papers transmitted to your office, if the originals were missing or lost, that the parties furnish copies, etc., and you were directed when you should receive these documents, to consider the case *de novo*.

Observing the mandate, the local officers were called upon for the missing documents, and the parties were notified of the action of the Department.

Henry W. Manning appeared and exhibited his letters of appointment as administrator of the estate of Alfred E. Manning, deceased, also an affidavit setting forth the names of his heirs, and that they were minors. He was made party to the case and filed an affidavit setting forth what had been done toward reclaiming the land. The register then in the office was unable to find either the affidavit of contest or application to intervene, or any affidavit in support of the same, but a copy of the original affidavit of contest by Weir and the affidavits of Maxwell, Gavin Weir

and the corroborating witnesses were found and transmitted to your office on September 11, 1889. It appearing that Maxwell had died in the meantime, Bird and Lowe were substituted as attorneys for Weir, who send their appointment as attorneys, and a statement that they have no personal knowledge of the past history of the case, and the affidavit or plea of intervention having been also lost or destroyed, no copy is furnished. Thereupon on October 12, 1889, your office again passed upon the case and found that as Weir did not appeal from the action of the local officers in rejecting the affidavit of contest, of February 25, 1887, "it was very strong evidence of the correctness of the report . . . . that Weir's contest affidavit when first presented was entirely uncorroborated and was therefore properly rejected," and you award A. E. Manning the preference right of entry, and adhere to your former decision dismissing Weir's contest, from all which he appeals to this Department.

These four affidavits transmitted to your office included the affidavit of George R. Maxwell, late attorney of Weir, and who was formerly register of the land office at Salt Lake City, who states in detail the entire transaction, also the affidavit of Gavin Weir and Alexander Weir. While the three differ a little in their recollection of the exact words used by the register, yet they agree substantially that he said to Maxwell, on February 25, 1887, when he presented the affidavit, "You must have another witness." Maxwell replied that the law did not require it, but if the rules required two, he would get the other one, and asked if the corroborating affidavit could not be made before some officer other than the register, and spoke of the distance they had to bring a witness. The register said that would not do. Then Maxwell said "I'll send up another as soon as I can." The register said "All right bring or send him up and I'll issue the notices." The register then put the papers away and the three men left the office.

James Weir made affidavit in substance that he went to the land office with Maxwell on March 12, 1887. Maxwell called for the Weir complaint against Manning. It was produced by the register. Witness says "I took it and carefully read both affidavits," the one signed on the face by Gavin Weir, and the one on the back, signed by Alexander Weir. He recognized both signatures. Maxwell then drew up a corroborating affidavit for witness to sign, which he did and was sworn by the register, and left the office. He returned in a short time and found Maxwell and the register discussing whether Manning or Weir had a priority. Then he learned that Alfred E. Manning had a contest affidavit on file. The register said Weir's contest would do him no good, and asked Maxwell if he wanted the papers. Maxwell replied "No I don't want the paper now, it belongs here, and I will investigate and see what I'll do next." They then left the office together, leaving the papers with the register, since which time they have not been seen by witness.

The affidavit sent up, which purports to be a copy of the original, is upon a printed form, and it is nearly all printed matter, except names and dates. The charge was briefly stated, and there is little chance for error in the substance of it. There is further, in evidence, the affidavit of contest of A. E. Manning against John Manning's entry and the relinquishment of John Manning who was in New Zealand. It is very apparent that the affidavit of contest and the relinquishment on the back of John's receipt, except the date and place, are in the same handwriting, and it is almost as certain that they were written with the same pen and ink.

It is, from all the evidence in the case, clearly shown that the affidavit of February 25, 1887, by Gavin Weir was corroborated by Alexander Weir. We must arrive at this conclusion or impute deliberate perjury to Maxwell and the three other witnesses. It is quite apparent that John's receipt was in the control of his brother, A. E. Manning, for some purpose. The fact that A. E. Manning filed the affidavit immediately after Weir's had been offered, and that no hearing was ordered thereon, or notice issued, or affidavit filed for service by publication, but that the case was held until John could send the relinquishment, tends strongly to show collusion and fraud in A. E. Manning's contest, and that it was filed to defeat Weir's preference right. It is singularly suggestive that the original affidavit was lost or destroyed, and that following it the plea of intervention and the affidavits supporting it were lost or destroyed, while the answer of Manning, and all the papers on his behalf are preserved.

There is nothing tending to show that Maxwell or Weir were at fault in this matter. It is noticeable too that the register, in transmitting the appeal on August 4, 1887, did not send the papers on which it was based, nor mention the filing of the affidavits on June 20, or the fact that he had disposed of the intervention of Weir, and when called upon by your office, on November 5, 1887, for a full report of the proceedings and for the papers, he replies on November 12 following, that his letter of August 4 gives a full report of all the proceedings in the case, and that he is unable to make further report, yet he never reported the intervention proceedings. It is unfortunate that Maxwell died pending the case, as it rendered it impossible to produce a copy of the plea of intervention.

It is quite clear that injustice has been done in this case. Weir did not appeal from the action of the local officers in refusing to issue notice on his affidavit corroborated by one witness, for the obvious reason that it was easier to procure another witness.

I have, upon full consideration of the case, arrived at the conclusion (1) that it was error to allow Manning's entry while the plea of intervention in his contest case was pending. John Manning's relinquishment could not affect the charge of fraud and collusion made against A. E. Manning's contest, but the relinquishment rather tended to prove the truth of the charge.

Again it was error to dispose of the case before the day of hearing, in the absence of the intervenor and without notice to him. And having stricken the case from the docket, it should, upon the showing made by the intervenor, have been re-instated, and the testimony taken and made a matter of record, that he might have had the benefit of it before your office. To dismiss the case and refuse to take any action or make any record of any proceedings was inexcusable as well as erroneous.

When a charge of collusion and fraud was lodged against a contest, and the papers presented and the circumstances surrounding the case tended strongly to prove the truth of the charge, it was error to allow such contestant a preference right of entry for the land on a relinquishment being filed.

Although Weir did not appeal from the action of the local officers in refusing to issue notice on his affidavit of contest which is conclusively shown to have been corroborated by one witness, yet this was such an error of law that under rule forty-eight of Rules of Practice, your office could have reversed the local officers, and ordered it placed on file.

In view of the entire record, I regard this as a case wherein the Secretary of the Interior may well exercise the directory and supervisory powers conferred upon him by law, and reserved to him by rule 114, Rules of Practice, that the case may be placed in its proper status. In order, therefore, that justice may be done and the rights of the parties determined, your decision affirming the local officers' action and dismissing the contest of Weir is reversed, and the case remanded to the local office, with directions to place the affidavit of contest of Gavin Weir on file as of February 25, 1887 (and as the original is lost, supply the record), and a hearing will be ordered. *Houston v. Coyle* (2 L. D., 58-61). Notice will be given the parties thereof, and Weir will be afforded an opportunity to present evidence in support of his affidavit of contest and to sustain the charge of collusion set forth in his plea of intervention. See *Eddy v. England* (6 L. D., 530). The representative of A. E. Manning, deceased, will be allowed to defend the entry of John Manning and offer evidence in support thereof, also to controvert the allegation of collusion in A. E. Manning's contest.

Upon receipt of the report of the local officers upon the testimony taken at such hearing, your office will re-adjudicate the case.

## DESERT LAND ENTRY—WATER SUPPLY—FINAL PROOF.

ORIN P. McDONALD.

A water supply derived from wells located on the land may be accepted as sufficient under the desert land law, if it be shown that said supply is controlled by the entryman, is permanent in character, and effectively used for the purposes of reclamation.

New final proof may be submitted with a view to equitable action on the entry, where the proof on file shows a failure to effect reclamation within the statutory period, and that such failure is due to difficulties encountered in procuring a sufficient water supply.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 8, 1891.*

The appeal of Orin P. McDonald from the decision of your office dated January 28, 1890, rejecting his desert land proof for section 10, T. 12 N., R. 61 W., Cheyenne, Wyoming, has been considered.

It appears that May 8, 1886, he declared his intention and made desert land entry for the above described land; that on June 21, 1889, the local officers notified him that the period of three years within which proof of reclamation should be made had expired; that in response to said notice, on September 19, 1889, he appeared at the local office and filed notice of intention to make proof on his entry November 5, 1889, and on the day specified, he appeared at the local office with his witnesses and submitted final proof which was rejected by the register as insufficient and thirty days allowed for appeal.

On December 5, 1889, the local officers transmitted his appeal and your office under date of January 28, 1890, sustained the action below, from which this appeal is taken.

The proof submitted in this case shows that the land is rolling soil sandy loam with no natural stream of water on it; that the nearest running water is Muddy Creek, about four or five miles distant, from which it would be impossible to irrigate the tract in question on account of its elevation above the creek, therefore, as the only method by which irrigation could be accomplished, he dug four wells and erected four large wind-mills with a pumping capacity of over 2,000 gallons per hour; that one of the four wells is located on each quarter section and that the water from said wells has been conducted and distributed by means of thirteen ditches upon every forty acre tract in the section. The proof further shows that the wells are about seventy-five or eighty feet deep and have an abundance of water and that the ditches aggregate between seven and eight hundred feet to each well and that the water was gradually spreading over all the tract except two or three high points, one of about thirty acres in the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and about thirty acres in the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of said section, which are not susceptible of irrigation.

It is further shown that the improvements placed upon the entry for irrigation purposes, cost over \$1000, and that the entryman was unable to get a supply of water upon the land sufficient for irrigation purposes sooner, on account of the difficulty he experienced in getting the proper pipe and machinery for the wells.

The first section of the desert land act of March 3, 1877 (19 Stats., 377), provides for the reclamation of such lands by "conducting water upon the same" and on making "satisfactory proof" of such reclamation, patent for the same shall issue to the entryman.

There is nothing in the act that regulates the character of the final proof, but it apparently rests upon the presumption that the desert character of the land is caused by the absence of moisture and that if water is brought upon the land reclamation will follow, therefore in examining cases of this kind it would seem necessary that the following points should be considered; 1st, Has water been brought upon the land? 2d, Is it of sufficient quantity to irrigate and reclaim the land, rendering it capable of producing agricultural products? 3d, Is the supply permanent and controlled by the entryman and the means of distribution sufficient?

In the case at bar the proof shows that water has been brought upon the land at the rate of 2,000 gallons per hour continuously and it would seem at that rate that it would be sufficient to irrigate all that portion of the entry susceptible of irrigation; furthermore the supply is controlled by the entryman and it would appear that such supply would be permanent and the distribution sufficient.

The only question then that remains to be disposed of in this case is, was the land sufficiently reclaimed at date of making proof, to entitle the entryman to a patent? Again referring to the testimony, we find that only about thirty or forty acres of the land was actually irrigated, but that this is owing to the fact that the wells have not been running long enough to irrigate the whole tract, although there is no lack of water; thus it is shown that the entryman has at considerable expense introduced water upon every forty acre tract in his entry sufficient in quantity to irrigate the land, that the supply is permanent and under his own control, in fact it would seem he has done all in his power to accomplish the reclamation both as to the letter and spirit of the law, and it is simply a matter of time when the water supply furnished by the entryman will fully and satisfactorily reclaim all the land except the high points heretofore referred to.

Secretary Teller in letter to Commissioner McFarland, under date of February 9, 1885, (3 L. D., 385) says: "I do not think it necessary to distribute the water over the land as is done in the course of irrigation, that would be to require a useless thing of the claimant," then again he says: "I do not wish to be understood as holding that the water must cover all the land; but it must be carried to a part whence it can be distributed over the land, except when high points and uneven surface

make it practically impossible that it should be done." Now in the case at bar the party has not only carried a large and permanent supply of water on the tract but he has distributed it upon each and every forty acre tract in his entry.

In the case of Alexander Toponce (4 L. D., 261), where good faith had been shown and persistent efforts had been made against difficulties to reclaim the land and there being no adverse claim, although eight years had elapsed since date of entry, the claimant was allowed another opportunity to make final proof.

In the case under consideration the *bona fides* of the entryman is unquestioned and it is shown that notwithstanding serious difficulties and obstacles he succeeded in introducing a large amount of water on the land, while in the Toponce case no water had reached the land when the case was submitted.

Although the proof is satisfactory in this case, as to introducing and sustaining water on the land, yet it is not satisfactory as to a full reclamation of the same, as the whole tract for which proof is offered, except possibly some high points not susceptible of irrigation "should be actually irrigated in a manner indicative of the good faith of the claimant." George Ramsey (5 L. D., 120).

Where difficulties prevent the submission of final proof of reclamation within the statutory period and no adverse claim appears and good faith is manifest, further opportunity to submit such proof should be allowed, Morris Asher (6 L. D., 801).

In the case of Wm. G. Rudd (7 L. D., 167), where proof did not show reclamation on account of trouble in getting water and supplemental affidavits had been subsequently filed showing further reclamation, the original proof was rejected and the party allowed to make new proof after publication, and when received to be submitted to the board of equitable adjudication.

December 5, 1889, after proof of McDonald had been rejected by the local officers and appeal taken, a supplemental affidavit was filed in the case containing further evidence in relation to the reclamation, hence it would seem that this case should follow the rule laid down in the case last cited, therefore the decision of your office is modified to the extent of allowing the entryman sixty days after due notice within which to make new final proof, after due publication, which if found satisfactory and in accordance with the rulings of this Department will be submitted to the board of adjudication.

## TRANSFEREE—SECTION 7, ACT OF MARCH 3, 1891—PRACTICE.

NIELS C. E. JORGENSEN.

A transferee can not invoke the confirmatory powers conferred by section 7, act of March 3, 1891, if the entry in question has been canceled by a decision that became final prior to the passage of said act.

A motion for the review of a departmental decision filed in the General Land office must be submitted to the Department for its action thereon.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
June 11, 1891.*

I have considered the application of A. B. Barnes, transferee, for a review and reconsideration of departmental decision, dated June 16, 1890, affirming the decision of your office in holding for cancellation pre-emption cash entry made by Niels C. E. Jorgenson for NE.  $\frac{1}{4}$ , Sec. 3, T. 106 N., R. 67 W., Mitchell, South Dakota.

It appears that Jorgenson made said pre-emption entry April 29, 1884; that on November 1, 1888, your office held the same for cancellation for failure of the party to comply with the requirements of the pre-emption law and that on appeal this Department under date above given sustained your office decision.

A motion for a review of this decision was denied November 25, 1890, and now the transferee makes this second motion for reconsideration for the reason that he believes he is entitled to relief on the grounds of strong equity and for the additional reason that the act approved March 3, 1891, will protect him if said entry is re-instated as prayed.

In the case under consideration the entry was canceled by your office for failure of the party to comply with the requirements of the pre-emption law, and in the present motion for review there is no new question presented by the motion not previously considered or involved in the case, except the protection claimed under the act of March 3, 1891.

The transferee can not plead greater equities in his behalf than existed in the entryman, as his rights are in no sense other or different therefrom. Jorgenson, by his entry, acquired only an equitable title to the land, the legal title still remaining in the United States, and Barnes, as transferee of Jorgenson, took an equitable title only; or in other words, he stepped into the shoes of the pre-emptor and has no greater or different rights or equities.

This principle is so well known and established that it is unnecessary to cite authorities in support of the proposition.

The final judgment of the Department on the entry in question was rendered June 16, 1890, and your office, under date of June 24, 1890, in accordance with said judgment canceled the entry, therefore at the date of the passage of the act of March 3, 1891, said entry was canceled and the final judgment in full force and effect.

The final judgment and cancellation of the entry concluded all the rights and equities the entryman possessed at that time, in the land

embraced by his entry, and therefore the transferee, as against the United States, was in a like manner concluded.

The only question then that presents itself in this case, is whether the entry of Jorgenson, under such circumstances, is confirmed by the seventh section of the act of March 3, 1891.

This case, as presented, is similar in this respect with that of James Ross (12 L. D., 446), in which this Department held that section seven of the act referred to, "does not in terms or by implication, confirm an entry so canceled prior to its passage," therefore, the transferee in the case at bar cannot invoke the confirmatory powers of the act in question in his behalf, as the rule and construction laid down in the Ross case must prevail in this.

In transmitting the case to this Department, your office calls attention to the Ross case, stating that the case —

presents the question of jurisdiction, viz., whether with knowledge of the decision cited, it should be transmitted to the Department, or whether this (your) office should refuse to transmit the same, in view of the ruling already announced in a similar matter.

I am unable to see wherein the question of jurisdiction in this case or in similar cases, can arise.

It is a general rule that a motion for review or for a new trial is an application to the discretion of the court wherein the decision to be affected by such review or trial, was made. The authority to act on such motion lies only with the court having jurisdiction of the case; therefore, a motion for review of a departmental decision must necessarily be submitted to this Department.

Your attention is called to Rules 77 and 114, Rules of Practice.

The application for re-instatement of entry is denied.

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TIMBER CULTURE CONTEST—DEATH OF CONTESTANT—INTERVENING ENTRY.

O'CONNOR *v.* HALL ET AL.

The right to complete an entry, initiated by one who contests a timber culture entry, and applies to enter the land covered thereby, but dies prior to the favorable termination of said proceedings, descends to the heirs of the contestant.

A relinquishment filed during the pendency of a contest will not be permitted to defeat the right of a contestant, if the evidence submitted warrants cancellation of the entry on the charge as laid by him.

An entry allowed on a relinquishment during the pendency of contest proceedings, should not be canceled in the interest of the contestant, on the subsequent successful termination of the contest, without affording such intervening entryman an opportunity to show cause why the contestant is not entitled to enter the land.

In a hearing ordered between such intervening entryman and the successful contestant, the issue is limited to the qualifications of the contestant and his right to make entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, June 11, 1891.*

I have considered the case of James O'Conner *v.* Wm. H. Hall on appeal by Volney D. Throop, intervenor, from your decision allowing the heirs of James O'Conner to complete timber culture entry of James O'Conner, deceased, for SE.  $\frac{1}{4}$ , Sec. 34, T. 111 N., R. 52 W., Watertown, South Dakota, land district.

The record shows that on April 23, 1879, Wm. H. Hall made timber culture entry for this land. On May 19, 1886, James O'Conner filed an affidavit of contest against the same, and made an application in due form to make timber culture entry thereof. Upon proceedings regularly had the register and receiver recommended the cancellation of the entry, from which action Hall appealed to your office. On April 10, 1887, O'Conner died, leaving a widow, Harriet O'Conner, and some children.

On July 23, 1888, Volney D. Throop presented a relinquishment of Hall's entry, dated on the 18th of the same month, and accompanied it by his own affidavit of the death of O'Conner, upon which showing he was allowed to make timber culture entry for the land.

On October 17, 1888, the relinquishment having been forwarded to your office, your office letter "H" closed the case, awarding to the contestant preference right of entry. This, it appears, was done without your office having knowledge of the death of O'Conner or of the entry of Throop.

Upon notice being received by O'Conner's attorney of the cancellation of the entry and of the award of the preference right of entry, Mrs. O'Conner, widow, on August 21, 1888, applied to make homestead entry for the tract in ignorance, so far as appears, of the fact that her late husband had an application on file to make timber culture entry therefor. This application was rejected because of Throop's timber culture entry. On September 18th following, she again applied to make entry, claiming residence thereon from August 17, 1888. This was rejected because of Throop's entry, and because the preference right being personal only, did not descend to the heirs. From this rejection, she appealed, and on July 27, 1889, your office held that Throop's entry was improperly allowed, pending the application of O'Conner to make timber culture entry for the land. That the preference right did not descend to the heirs, but that the right to complete and perfect the entry initiated by O'Conner during his life time did descend, and that the heirs of James O'Conner were entitled to complete this entry by furnishing satisfactory proof that O'Conner up to the time of his death had not exhausted his rights under the timber culture law; and you add that if such entry shall be perfected, Throop's

entry will be canceled. Application was immediately made by the heirs to complete the timber culture entry of decedent, and thereupon Throop appealed from your decision.

He submits the following assignment of errors :

First: Error in holding that the heirs and legal representatives have a preference right of entry.

Second: In holding that contestant's heirs and legal representatives have any preference right whatever for any cause.

Third: "In holding that contestant's heirs and legal representatives be allowed to enter said tract without first giving claimant (Throop) an opportunity to show cause why his entry should not be canceled."

Fourth: Substantially the same as the third.

The first and second assignments of error are without merit, for the reason that your decision did not give the heirs a *preference right of entry*, and so stated, but it did give the heirs the right to complete an entry initiated by the ancestor.

This ruling was clearly right and in accordance with the ruling in case of *Rosenberg v. Hale's Heirs* (9 L. D., 161) in which it is said:

It is obvious therefore that upon the cancellation of Edgar's entry R. F. Hale's application to enter the land under the timber culture act, became of full force and he, or in case of his death, his heirs could perfect the entry by him initiated.

It appears that Edgar had made timber culture entry for a tract of land, and Hale had contested the entry. The entry was canceled on the contest of Hale, but he died before the final decision, while in the case at bar, the entry was canceled upon the filing of Hale's relinquishment but a relinquishment cannot defeat the right to complete an entry initiated by the contestant. In *Webb v. Loughrey et al.* (9 L. D., 440), this question was fully considered, and a number of cases cited, and it was said,

Loughrey's relinquishment filed pending the contest, . . . will not necessarily defeat the contest rights of Webb. His rights will depend on his ability to sustain the charge laid by him. He has maintained the charge and therefore should prevail.

This principle renders it necessary to consider the contest case of *O'Conner v. Hall*, and having carefully reviewed the record and testimony in that case, I find that "the charge laid" by O'Conner was clearly maintained, and had there been no relinquishment, the case pending on appeal by Hall would have resulted in sustaining the action of the local officers and the cancellation of the entry. This would have entitled O'Conner, had he been living, to complete the entry initiated by him. His application to enter would have become of full force. He being dead, his heirs, as we have seen, are entitled to "perfect the entry by him initiated."

The third assignment of error has more merit. It is the uniform practice of the Department to give every one a hearing who has a claim of record for the land in controversy.

Throop will, therefore, be allowed to show, if he can, that O'Conner was not qualified to make a timber culture entry at the time he made his application to enter this land, or at the date of his death, or that the persons offering to complete the entry are not the heirs at law of O'Conner. If O'Conner was not a qualified entryman and he could not have completed his entry, upon the cancellation of Hall's entry, his heirs cannot complete it. This question Throop has a right to be heard upon. He made his timber culture entry, however, pending a contest and an application to enter, and should have known what the record was. He bought a relinquishment after a decision against the entry, so he went upon the land at his peril, and will not be allowed to show what he has done in pursuance of his entry, but may offer testimony bearing upon the right of O'Conner to make entry, or whether the persons applying are his heirs at law.

You will, therefore, remand the case to the local office, with directions to notify the parties hereof, and if Throop shall, within sixty days from such notice, file in the local office an affidavit alleging any fact, which if true, would render O'Conner disqualified to make timber culture entry, or that the applicants are not the heirs of O'Conner, the local officers will order a hearing thereon, and give notice thereof to the parties in interest, and they will afford the parties an opportunity to present evidence upon the issue indicated. Upon receipt of the report of the local officers upon the testimony taken at such hearing, your office will re-adjudicate the case. If Throop shall neglect or decline to file such affidavit, his entry will be canceled, and the case, as to him, will be closed. Your decision is modified accordingly.

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

PATRICK H. McDONALD.

A relinquishment will not be accepted where the entryman has previously thereto disposed of his interest in the land.

An irregularity in an entry does not require equitable action, if such entry falls within the confirmatory operation of section 7, act of March 3, 1891.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 10, 1891.*

The appeal of Patrick H. McDonald from the decision of your office dated January 20, 1890, declining to accept his relinquishment for the N.W.  $\frac{1}{4}$ , Sec. 25, T. 102 S., R. 57 W., Mitchell, South Dakota, and allow him to make a pre-emption entry for the same tract, has been considered.

It appears that on May 28, 1879, he made a homestead entry of the above described tract; that on April 3, 1886, he made final proof that was in all respects satisfactory and final certificate was issued; subsequently, however, it was discovered that the final affidavit was missing.

On March 31, 1888, your office directed the local officers to call upon the party to furnish a new affidavit, which it appears for reasons hereinafter referred to, he declined to do; that one Oliver Young, ex probate judge of Hanson county, South Dakota, before whom said proof was taken, testifies under oath that when it was made, he prepared and filled out the proper final affidavit which was properly executed and transmitted with the papers to the local office.

It appears further that a short time after making said proof he executed a mortgage on said land to Burnham, Tulley and Co., the mortgage running to one of the firm, as trustee, for \$150; that shortly after executing this mortgage he conveyed the said land to his wife Mary L. McDonald by warranty deed.

In the spring of 1880, Mrs. McDonald was compelled to obtain a divorce from her husband on account of wilful neglect of duty and habitual drunkenness, leaving her with the care and support of seven small children; that she is in possession of the land under her warranty deed, and has paid the taxes and interest on the mortgage and kept up the improvements; furthermore, it is shown that she resided on the land with her husband from date of entry until sometime after final proof was made and that she joined with him in the mortgage given on the property for \$150.

Since Mrs. McDonald procured her divorce McDonald has endeavored, evidently through spite, to defeat the issue of patent on the homestead entry, by tendering a relinquishment of the land as the entryman and thereby depriving his wife and seven children of their home as well as defeating the rights of the mortgagee. Your office, under date of January 20, 1890, rejected the relinquishment presented, and also the application of McDonald to enter the land under the pre-emption law, thereby affirming the action of the local officers from which he again appeals.

In the case at bar the appellant executed a mortgage upon his property for \$150, and also deeded all his right, title and interest in the land in question to his wife, Mary Ellen McDonald, hence under these circumstances he would have no further interest therein and therefore could not relinquish, in other words, he is by his own acts effectually barred or estopped from such action. Blackstone says:

A man shall always be estopped by his own deed or act, or not permitted to aver or prove anything in contradiction to what he has once solemnly avowed.

The act of March 3, 1891 (26 Stat., 1095), provides: that where a homestead entry in which final proof has been made and certificate issued, to which there is no adverse claim, originating prior to final entry, and which has been sold or encumbered prior to March 1, 1888, and after final entry, to *bona fide* purchasers or incumbrancers shall, unless fraud shall be found on the part of the purchaser, be confirmed and patented. In my judgment, the case under consideration comes clearly under this statute.

McDonald not only mortgaged this land but conveyed the same before March 1, 1888, and after final certificate issued, as shown by the certified abstract of title filed with the case, moreover, by affidavits submitted it is satisfactorily shown that said mortgage is still unpaid and that the interest thereon has been and is being paid by Mary Ellen McDonald.

There is no evidence nor is there any thing even alleged impeaching the good faith of the mortgagee and transferee.

As the entry is confirmed by the above mentioned act, it will not be necessary to submit the same to the board of adjudication, therefore your office decision is affirmed with the above modification.

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CAPELLI *v.* WALSH.

Motion for review of departmental decision, rendered April 9, 1891, 12 L. D., 334, in the case above entitled, denied by Acting Secretary Chandler, July 10, 1891.

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PRE-EMPTION ENTRY—SECTION 7, ACT OF MARCH 3, 1891.

ALTON A. BARTLETT.

The suspension of an entry, by an order of the General Land Office made after the lapse of two years from the issuance of final certificate, does not operate to except such entry from the confirmatory operation of the proviso to section 7, act of March 3, 1891.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 10, 1891.*

This is an appeal by Alton A. Bartlett, from your office decision of June 5, 1888, holding for cancellation his pre-emption cash entry for the N.  $\frac{1}{2}$ , SW.  $\frac{1}{4}$ , Sec. 12, T. 105 N., R. 57 W., Mitchell, South Dakota.

It appears that he filed pre-emption declaratory statement September 9, alleging settlement March 30, 1884, upon said tract; that he made proof therefor December 27, 1884, upon which final certificate was issued January 17, 1885; that July 29, 1887, your office finding said proof insufficient, suspended the entry and required an affidavit showing whether he is still the owner of said land, and the character and value of the improvements made thereon since date of making final proof. Affidavits were furnished in attempted compliance with such requirements, but being unsatisfactory to your office, the entry was held for cancellation by the decision appealed from.

By letter dated March 25, 1889, you canceled said entry for failure to appeal from said decision. Thereupon, Bartlett, alleging that he was without notice, both of your decision of June 5, 1888, and your letter of March 25, 1888, filed an application for reconsideration.

By letter dated February 13, 1890, you denied said application, but allowed Bartlett to appeal.

In letters of instruction dated May 8, 1891, (12 L. D., 450) and July 1, 1891 (13 L. D., 1), the Department construed the proviso to section seven of the act of March 3, 1891, to mean that a proceeding by the government, (as distinguished from one by an individual) against an entry of the kind specified, instituted after a lapse of two years from the date of final certificate, is not sufficient to except such entry from confirmation by said proviso.

Bartlett's final certificate is dated January 17, 1885. No action appears to have been taken with reference to his entry until July 29, 1887, when as stated it was suspended by your office. The period between these dates is greater than two years.

The pending entry will accordingly be passed to patent. The decision appealed from is reversed.

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PRACTICE—MOTION TO DISMISS CONTEST.

LEIN *v.* BOTTON.

A motion to dismiss a contest, for the want of sufficient evidence to sustain the charge, is in the nature of a motion for a non-suit, and does not deprive the defendant of his right to thereafter submit testimony in support of the entry, in the event that said motion is denied.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 13, 1891.*

I have considered the case of Kund F. Lein *v.* Ellick N. Botton, upon the appeal of the latter from your decision holding for cancellation his homestead entry for the NE.  $\frac{1}{4}$  of Sec. 32, T. 146 N., R. 53 W., Fargo land district, Dakota.

His entry was made on the 10th of December, 1884, and Lein filed affidavit of contest on the 10th of March, 1887, alleging failure to establish *bona fide* residence on the land, failure to cultivate, and abandonment, on the part of the entryman.

A hearing followed, which was concluded on the 13th of July, 1887. After the evidence on the part of the contestant had been produced, the claimant's counsel moved to dismiss the contest, on the grounds:

1st. Because contestant has failed to prove the allegations contained in the notice of contest.

2nd. Because the evidence submitted by contestant does not show that claimant has any home other than this homestead, and instead of abandoning said homestead he has cultivated a considerable part of the land from year to year in good faith.

This motion was not decided by the register and receiver upon the trial, but on the 13th of October, following, they rendered a decision denying the motion, and holding the entry for cancellation. An appeal

was taken from that judgment, and on the 10th of December, 1889, it was affirmed by you.

The case is before me upon appeal from the judgment of your office, the claimant alleging in his notice of appeal that it was error on the part of the local officers to render a decision on the merits of the contest, after denying claimant's motion to dismiss the same, without giving him an opportunity to submit evidence in his own behalf; and that you erred in sustaining the decision of the local officers, not only in denying the motion to dismiss the contest, but in adjudging the homestead entry in controversy forfeit upon the *ex parte* testimony of the contestant, without even permitting the claimant to be heard in his own defense.

Upon the trial, the contestant made no attempt to prove that the claimant had abandoned or failed to cultivate the land. In fact his evidence showed that for two or more years the claimant had cultivated and raised crops upon more than one hundred acres of the tract. Upon the question of residence his evidence was sufficient to put the claimant upon his defense, and I think, therefore, that the local officers did not err in denying his motion to dismiss the contest, neither would your office have erred in affirming their judgment to that extent. The important question, however, for me to determine upon this appeal, is :

Did Botton lose his right to defend the contest upon the merits, by making his motion to dismiss, at the conclusion of the contestant's evidence?

In my opinion he did not. His motion was in the nature of a motion for a non-suit, and should have been decided upon the trial. If it was granted, that ended the contest, and obviated the necessity for him to submit proof; but if denied, then he had a right to offer evidence to rebut that submitted by the contestant, and he should have been given an opportunity to do so. The decision holding his entry for cancellation denied him this right, and therefore does not meet with my approval.

The principle laid down in the case of James Copeland (4 L. D., 275), is applicable to this case, and a similar doctrine was held in *McMahon v. Gray*, (5 L. D., 58) and in *Kelley v. Butler* (6 L. D., 682).

You will direct the register and receiver to continue the hearing in the case, after giving all parties due notice of the time set for such hearing, and if at that time the claimant fails to offer evidence in his behalf his entry will be canceled. The decision appealed from is modified accordingly.

## HOMESTEAD ENTRY—RESIDENCE—COMMUTATION.

RICHARD L. WILLIAMS.

Temporary absences occasioned by the poverty of the claimant do not interrupt the continuity of his residence.

If the final proof as submitted by the homesteader under section 2291, R. S., shows that he has not complied with the law in the matter of residence, and hence is not entitled to perfect his entry under said section, he is also, by such failure to comply with the law, debarred from exercising the right of commutation.

The case of Gottlieb Bosch, 8 L. D., 45, overruled.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 14, 1891.*

I have considered the appeal of Richard L. Williams from your decision of February 20, 1889, rejecting his final proof upon homestead entry No. 3569, made April 25, 1883, upon the NW.  $\frac{1}{4}$  of Sec 12, T. 109 N., R. 68 W., Huron, Dakota.

The record discloses the following facts:

Claimant made his final proof June 25, 1888. He appears to have been in limited means. He built his first house—doing the work himself—in May, 1883; he built a second house in the summer of 1884—again doing the work himself. This house, together with part of his crops, was burned in November, 1886, and in December thereafter he built his third house, which is a frame ten by twelve feet, one story, shingle roof, papered inside, one room, one window, one door, board floor, habitable at all seasons of the year, and worth \$45; it was furnished with one bed, table, one stand, one stove, cooking utensils, dishes, two chairs, trunks, guitar, and books. The furniture in second house was burned. In 1883, he cropped forty-three acres to wheat, raising three hundred and seventy-eight bushels; in 1885, he cropped twenty acres to flax, raising fifty bushels, and forty-three acres to wheat, raising two hundred and fifty-eight bushels; in 1886, he had forty-five acres in wheat and raised four hundred and fifty bushels, and eighteen acres of flax, which was burned out; in 1887, he cropped thirty-three acres of millet and raised two hundred and thirty bushels, also thirty acres of flax and raised one hundred and sixty bushels. When he made proof in June, 1888, he had thirty-two acres in crop, and was ready to sow thirty-one acres in rye. His farming implements consist of one-half interest in a harvester; a plow, harrow, pulverizer, and one-half interest in a wagon. These he owned from date of entry.

As to his residence, he says: "It has been actual, continuous residence. I mean by that, it has been my only home."

The proof shows that during the various crop seasons he was on the place all the time, but, in order to earn money and improve his claim, he was in the habit of hiring out to others between crop seasons; and from November 9, 1884, to March 1, 1885, he was working in Wisconsin;

from January 1, 1885, to January 1, 1888, he was employed (except during crop seasons) to work in the office of the probate judge of Hand county, but during such employment it was his custom to go to his home about three times a month, and at such times he remained there from one day to one week; from February 1, 1888, to April 10, 1888, he was in Toledo, Iowa, working "to earn money to buy seeds and provisions for myself and home."

He is a single man. His testimony is given in a frank, straightforward manner, without any evasion; it is clear and precise as to both facts and dates.

The sole question is, whether his residence was continuous. He was certainly not on the land during the whole time, but residence on the land and presence thereon are not synonymous. When away from the land, he swears he was at work to earn means to further improve it. This is permissible. He further swears that he had no other home, and that he always returned to the land, when he quit working for others.

The raising of crops for five consecutive years; the large acreage in cultivation; the building of the third house, after the second was destroyed by fire; the thorough preparation for housekeeping; claimant's continuous presence on the land during every crop season; his voting in that precinct, and his own oath, uncontradicted, that his only home was there during the more than five years; his constant practice of returning to the land after each temporary absence therefrom, and the further fact that he was still living on the land when he made his final proof—all these considerations impel me to believe that he acted in good faith, and that he maintained a *bona fide* residence upon the land.

While you find in your said decision that claimant's residence is not such as is required by the homestead law, yet you decided that his proof showing "apparent good faith, and his continuous residence in the latter year is ample to authorize the purchase of the tract by him under section 2301 of the Revised Statutes, if he so elects," and you cite as authority the case of Gottlieb Bosch (8 L. D., 45).

I am unable to find where the Bosch case has ever been followed by the Department. On the contrary, it is clearly at variance with the cases of Samuel H. Vandivoort (7 L. D., 86), and Frank W. Hewit (8 L. D., 566); also the case of Peter Weber—on review—(9 L. D., 151), where it is said:

If, therefore, the claimant in this case was not entitled to patent because of his failure to comply with the homestead law, he was, it would seem, by such failure also debarred from the exercise of the right of commutation. See also Greenwood Peters, 4 L. D., 236; Susie Corey, 11 L. D., 235.

The Bosch case (*supra*) being thus at variance with the above cited cases and many others, and being contrary to the principle upon which the right of purchase is based, is hereby overruled.

The decision appealed from is reversed, and patent will issue in due course of business upon the proof submitted.

## PRACTICE—APPEAL—STIPULATION.

HAFFIE *v.* STATES.

A stipulation of the parties extending the time allowed for appeal from a decision of the General Land Office, is ineffective in the absence of departmental consent thereto.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
July 14, 1891.*

Thomas K. States has applied for a writ of certiorari in the case of William Haffie (in some of the papers of record written "Haffey," and in some "Haffry") against said States, involving the NE.  $\frac{1}{4}$  of Sec. 2, T. 150, R. 53, Grand Forks land district, North Dakota.

The application is made because of your refusal (by letter of March 28, 1891,) to recognize the applicant's appeal from your decision of February 14, 1887, on the ground of its not having been filed in time—it appearing that he received notice of said decision on February 23, 1887, but failed to file appeal therefrom until May 7, ensuing.

He explains his failure to appeal within the time prescribed by the Rules of Practice (Nos. 86 to 90) as follows :

Prior to the rendering of the opinion by the register and receiver, and the decision of the Honorable Commissioner, this affiant was called to Bismarck, the seat of government of this Territory of Dakota, to discharge the duties of clerk of the House of Representatives; that while acting as such he received notice of the opinion, and immediately stipulated with W. A. Selby, attorney for William Haffie, to extend the time for filing an appeal until such time as affiant's official duties would permit him to return to Grand Forks; that affiant did not return until on or about May 1st, and immediately prepared and forwarded the appeal, a copy of the appeal being served upon W. A. Selby, and a written stipulation as to the agreement to extend the time of filing the appeal, duly signed and entered—which stipulation, together with all the records in the possession of affiant were duly filed with the case; that affiant reserved for his own use a full copy of the evidence taken, of the grounds of appeal, and of the stipulation so entered into; but that said evidence, stipulation, and records were destroyed by fire in the month of November, 1888, when the block in which his office was located was destroyed by fire; that affiant relied upon the good faith of W. A. Selby in waiving the time for filing the appeal, and knows that he fully and freely assented thereto; that said Selby died subsequently to the trial of the case, and affiant has been unable to obtain access to his papers, and is informed and believes that they are now in the State of Pennsylvania.

While attorneys for opposing parties can enter into stipulations that shall be binding upon themselves and each other, such a stipulation, unless entered into by the Department also, is in no way binding upon it. In other words, whether or not to waive the rule requiring an appeal to be filed within sixty days, in view of a stipulation to the contrary between the attorneys interested, is a matter within the discretion of the Department. It is very possible that because of delay in appealing, resulting from such a stipulation, your office, supposing that there was no intention to appeal, might close out a case, cancel an

entry, and permit some other party to enter the tract and build upon or otherwise improve it. In such a case it would be a great injustice to the later entryman to divest him of his rights in order to carry into effect such a stipulation. On the other hand, it is conceivable that cases might arise where justice and equity would be subserved by the Department waiving the rule and allowing the appeal in accordance with the stipulation.

In the case at bar, in view of the facts set forth in the affidavit of the counsel for applicant, you are directed to transmit the record to the Department.

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DESERT LAND ENTRY—ARID LAND ACT—WITHDRAWAL.

MARY E. BISBING.

A desert entry made after the passage of the act of October 2, 1888, of lands subsequently designated for reservoir purposes, is invalid under the terms of said act, but may be suspended, under the provisions of section 17, act of March 3, 1891, with a view to its ultimate allowance in the event that the land covered thereby is not required for the purposes designated.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 14, 1891.*

I have considered the appeal of Mary E. Bisbing, from your office decision of December 17, 1889, holding for cancellation her desert land entry No. 2726 for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and lot 5, of section 33, T. 14 N., R. 5 E., Salt Lake, Utah.

The record shows that on the 6th day of April, 1889, she made desert land entry for said tract. It also appears that on the 5th day of August, 1889, the director of the Geological Survey reported to the Department, that on July 19, 1889, the township in which said lands are situated was selected for reservoir purposes under the act of Congress of October 2, 1888 (25 Stat., 527). Upon these facts your office on December 17, 1889, decided that the land in question was not subject to entry under the desert land act and held said entry for cancellation.

From this judgment she appeals, and assigns the following errors:

1st. The Hon. Commissioner erred in holding said entry for cancellation on the grounds stated.

2d. He erred in holding that appellant could acquire no right to the land by virtue of settlement and improvement *prior* to the specific withdrawal of the same for reservoir purposes.

The first assignment of error is too indefinite and vague to present any question for consideration. See Rule of Practice 88; *Devereux et al. v. Hunter et al.* (11 L. D., 214).

The second ground of error is based upon the theory that she had a vested right in the land by virtue of an entry, improvements, and reclamation prior to the time notice reached the local office that the land was withdrawn.

The language of the act of October 2, 1888, *supra*, is that,

All the land which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law.

The Hon. Attorney-General construing the intent of Congress upon this subject in an opinion dated May 27, 1890, among other things says:

The object of the act is manifest. It was to prevent the entry upon and the settlement and sale of all that part of the arid region of the public lands of the United States, which could be improved by general system of irrigation, and all lands which might be designated or selected by the United States surveys as sites for the reservoirs, ditches, or canals in such system. \* \* \* It was, therefore, the purpose of Congress by this act to suspend all rights of entry upon any lands which would come within the improving operation of the plans of irrigation to be reported by the Director of the Geological Survey under this act. \* \* \* There can be no question that if any entry was made upon land which was thereafter designated in a United States survey as a site for a reservoir, or which was by such reservoir made susceptible of irrigation, the entry would be invalid, and the land so entered upon would remain the property of the United States, the reservation thereof dating back to the passage of this act.

Following this rule, the entry having been allowed after said act was passed, the entryman acquired no right thereunder, and it was properly held for cancellation as the law stood at the date of your decision.

But Congress, by act of August 30, 1890, (26 Stat., 391), repealed so much of the act of 1888, as provides for the withdrawal of the public lands from entry, occupation and settlement, and

all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

It will be perceived that these provisions can not benefit the entryman in this case for the reason that the township, in which the lands lie, was selected prior to the passage of this law and by its terms the land so selected must remain segregated and reserved from entry or settlement as provided by the act of 1888; and this is so notwithstanding the circulars to which your office decision refers have been rescinded (11 L. D., 296).

By section 17 of the act of March 3, 1891 (26 Stat., 1095) it is provided:

That reservoir sites located or selected and to be located and selected under the provisions of an "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June thirtieth, eighteen hundred and eighty nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

In view of these restrictive features, and the fact that the whole township in which Bisbing's entry is located was selected for reservoir purposes, and the further fact that the reservoirs when constructed may be located upon such portion of the township as not to cover the entry of Bisbing, in that case the entry might be protected if the law under which it was made had been complied with, therefore you are directed to suspend said entry to await the action of the proper authorities in the matter of the actual location and the construction of the reservoirs; then if it shall appear that the tract in question is not necessary for the construction and maintenance of such reservoirs, the entry may be completed, but if it shall turn out that said lands are necessary for the construction and maintenance of such reservoirs then the entry must be canceled.

Your office decision is accordingly modified.

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RIGHT OF WAY ACT—MAP OF DEFINITE LOCATION.

PRESCOTT AND ARIZONA CENTRAL RY. CO.

A map of definite location may be accepted as filed within time under the right of way act of March 3, 1875, where the survey of the line and the construction of the road are carried on at the same time, and the map of such survey is filed within twelve months after the location of said road.

The fact that an amended map of definite location is not filed within the period fixed by the statute, will not prevent its being accepted as within time, if the original map was presented within the statutory period.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
July 15, 1891.*

The attorney for the Prescott and Arizona Central Railway Company has filed a motion for review of departmental decision of August 11, 1890, refusing to approve the map filed by said company for the purpose of securing the right of way over the public domain under the provisions of the act of March 3, 1875 (18 Stat., 482). This company, in 1885, filed in this Department copy of its articles of incorporation and proofs of organization which were held to be satisfactory. Afterwards, on August 25, 1887, the company filed a map of its road and four plats showing tracts selected for station purposes, for the purpose, it was stated, of complying with the requirements of the law in that regard. This map and these plats were found defective, and were returned by your office September 9, 1887, for correction.

On March 21, 1890, the company presented another map. After examination thereof in your office, it was recommended that said map be not approved, as follows:

Said map has been examined in connection with the lines of the public survey and found defective, Tp. 20 N., R. 5. W., not being subdivided, although it is so represented on the map. It also passes directly through Fort Whipple military reservation.

In consideration of the fact that said map is not strictly executed and authenticated in the manner prescribed by the rules and regulations; that said company failed to file maps of definite location within the time prescribed by the act under which it was organized, but went forward and constructed its line of road over the public lands with full knowledge that the provisions of the act of March 3, 1875, had not been complied with, I would recommend that said map be not approved.

This letter of your office was returned August 11, 1890, with the following indorsement thereon constituting the departmental action now sought to be revoked:

Respectfully returned to the Com. of the Genl. Land Office with the map which is not approved as it was not filed within the time prescribed by law.

If it be found that the original map filed August 25, 1887, was presented within the statutory period, the fact that the amended or perfected map was not filed until after the expiration of that period will not prevent it being treated as filed in time. Longmont, Middle Park and Pacific Ry. Co. (11 L. D., 552).

The map presented on March 21, 1890, was prepared by a party employed for that purpose and upon a survey in the field of the line of said road made in 1889, after the construction thereof. The president of the company stated in his certificate as follows:

That the survey of the line of route of the company's road, as accurately represented on the accompanying map was made under the authority of the company, first in the year 1885 and 1886 by a chief engineer of said company and subsequently after completion, between the 1st day of March 1889 and the 1st day of September 1889, and said profile route as accurately represented by the accompanying map was adopted by the company by resolution of its board of directors on the 2nd day of August 1887 as the definite location of said road.

He further certified that said road was commenced to be constructed on or about March 1, 1886, and completed January 1, 1887.

In support of the motion for review, affidavits of the president, the road-master of the company, and of various civil engineers employed at various times about the construction of said road, were filed. From these affidavits, it appears that there was but one practicable route for the line of this road, and that owing to the topography of the country, the survey of the line, and the construction of the road were carried on at one and the same time. There was no preliminary survey in the field for the purpose of selecting a route and locating the line of the road. Some work on construction of the road was done in March, 1886, but owing to the difficulties and delays met in obtaining money and materials for prosecuting the work, the first section of twenty miles was not completed until about the last of September of that year. The survey which located this section of the road was made but a few days before, the two branches of work being carried on, practically at one and the same time. The work of construction was then prosecuted with diligence, and the road completed by January 1, 1887. It is stated, and the map filed so indicates, that but a small portion of the first section of twenty miles of said road passed over surveyed lands, and that

the first section of the road running across surveyed land was not definitely located and constructed until about November 1, 1886.

If the statements made in these affidavits are to be accepted as true, and I perceive no good reason for refusing to so treat them, they establish the fact that the first map was filed within twelve months after the location of the road. The course pursued in this instance was an unusual one not likely to be feasible in many instances. In adopting such a course, the company assumed the risk of failure to obtain the right of way from the government or from any individual acquiring rights, in any tract of land across which the road should run, prior to the filing of the map.

After carefully considering this matter in the light of the facts presented and the explanations made in the affidavits and exhibits filed in support of the motion for review, I have concluded, and so hold, that the map in question was filed within the time prescribed by law, and the departmental decision of August 11, 1890, holding the contrary is hereby revoked and set aside.

The map now presented being re-filed May 7, 1891, is properly authenticated, and upon its face seems properly executed, but in view of the allegations made as to the difficulties met in executing the surveys on which it is based, and as to the withdrawal and suspension of the plats of some of the townships, I have thought it best that said map should be again examined in connection with the records of your office. You will please cause this examination to be made, the facts alleged in the affidavits filed in support of the motion for review being taken into consideration, as early as possible and resubmit the map with your recommendation in the premises. The plats showing tracts selected for station purposes, mentioned in your letter of August 6, 1890 are not among the papers now before me, and have not therefore been considered or passed upon.

126 Pacific 1058

DESERT LAND ENTRY—DEATH OF ENTRYMAN—PATENT.

INSTRUCTIONS.

see 482026

If the record discloses the death of a desert entryman patent should issue in the name of the heirs generally.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
July 16, 1891.*

I am in receipt of your letter of June 15, 1891, requesting information as to whom patents should issue in desert land cases in case of entryman's death.

You state that you are uncertain whether the doctrine announced in the case of Clara Huls (9 L. D., 401) is applicable to desert land entries made under the act of March 3, 1877 (19 Stats., 377), owing to the fact that

in that law no provision is made whereby the fee shall inure in case of the death of an entryman, as is provided in the pre-emption, homestead, and timber culture laws.

The Clara Huls case came under the homestead law, but it is not perceived that any different principle will govern the issue of a patent in a desert land entry. While it is true that the desert land act of March 3, 1877, does not specifically state to whom the fee shall inure in case of an entryman's death, still the law of descent provides generally that any estate belonging to a man at the time of his death shall inure to his legal heirs, and it is not doubted that this Department will protect the heirs of a deceased desert-land entryman who has complied with the law up to the time of his death; and, by complying with the law after his death, they may reap the reward which he might have procured had he lived. If a desert-land entryman has a valid entry at the time of his death, it goes without saying that his heirs may receive the benefit thereof by complying with law and take unto themselves the patent.

It follows that if the entryman would have been entitled to a patent at this time, had he lived, his heirs are now entitled to it.

The desert land law is a part of the general system of the laws of the United States enacted for the purpose of disposing of the public lands, and should be construed in connection with all of said laws. Section 2448 of the Revised Statutes of the United States provides:

Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

It will be noticed that the nature of the claim upon which patents are to be issued, whether homestead or desert land, is not designated. The section was evidently intended to protect the heirs, devisees, or assignees of any deceased patentee, where, through inadvertence, mistake, or ignorance, the patent was or may be issued after the death of the entryman. It certainly was not intended to afford authority for issuing patents to dead entrymen where the fact of such death has been brought to the knowledge of your office.

In the case of Clara Huls, *supra*, it was doubtless thought to be unnecessary by the Department to refer to said section 2448, since that section was only intended to afford relief where the death of the entryman was unknown to your office or where a mistake had been committed.

It may be asserted as a sound rule governing the issuance of patents in desert land cases that where it is shown that the entryman is dead, no patent ought to be issued in his name. In all such cases, patent should be issued in the name of the heirs of the entryman, generally, without specifically naming them. For example: if the entry-

man's name is John Smith, a patent should be issued "to the heirs of John Smith, deceased," leaving to the courts of the respective localities the duty of ascertaining who the particular heirs are and what their particular interests are under the law of the State or Territory in which the land is situated.

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WAGON ROAD GRANT—DONATION CLAIM.

WILLAMETTE VALLEY WAGON ROAD CO. *v.* HOLMES.

The grant of July 5, 1866, is one of quantity to be selected within specified limits, and in the absence of selection the right of the company does not attach to any specific tract.

The act of March 2, 1889, does not divest the Department of jurisdiction over lands within said wagon road grant, or operate as a bar to patent for lands excepted therefrom.

The act of August 6, 1888, confirms donation claims that were "set off to orphans" of claimants, regardless of the qualifications of the original claimants, if at the date of said act there is no adverse claim, and there has been due occupation and improvement of the land.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
July 16, 1891.

This case involves the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , Sec. 1, T. 12 S., R. 1 W., Oregon City, Oregon. Said tract is within the limits of the withdrawal for the grant by the act of July 5, 1866 (14 Stat., 89) for the Willamette Valley and Cascade Mountain Wagon Road Company, which, as stated by your office took effect July 3, 1871, and also within the primary limits of the grant to the Oregon and California Railroad Company, whose rights attached by definite location March 26, 1870.

It has not been selected or listed by either company.

On March 3, 1874, the register and receiver issued to William C. Holmes, Eliza J. Bridgefarrow, formerly Eliza J. Holmes and Mary E. Bridgefarrow, formerly Mary E. Holmes, donation certificate under act of July 17, 1854 (10 Stat., 305), for this and other tracts aggregating 155.32 acres. This certificate was based upon a notification filed November 30, 1855, by W. A. Paul, guardian for said parties, the orphan children of John J. and Jane Holmes.

On September 30, 1887, your office held said certificate for cancellation "but withdrew the decision October 27, 1888, the claim having been confirmed by the act of August 6, 1888" (25 Stat., 359).

On June 21, 1889, your office held that the tract involved, being at the time of the withdrawal for the Wagon Road Company, and the definite location of the railroad company's line, covered by said donation claim was excepted from both grants and rejected the claims of both companies therefor.

The Wagon Road Company and Alexander Weill, its assignee, appeal.

The appellants' main allegation of error is that the act "providing in certain cases for the forfeiture of wagon road grants in the State of Oregon" approved March 2, 1889 (25 Stat., 850), operated to suspend all jurisdiction of the Land Department over lands embraced in said appellants' grant until after the final decision of the courts as provided in said act.

The precise question thus presented was fully considered in the case of said Wagon Road Company *v.* Morton (10 L. D., 456), wherein it was held that the act referred to does not divest the Department of jurisdiction over lands within the said grant or operate as a bar to patent for land excepted therefrom.

The act of August, 1888, *supra*, confirmed claims that were "set off to orphans" of claimants under the Oregon donation acts by the surveyor general of the Territory or the register and receiver of the proper local office, for which certificates were issued and the claimants, their heirs or assigns have since occupied and improved such claims and there are no adverse claims thereto.

The finding by your office to the effect that the land was so occupied is sustained by affidavits furnished, it appears, in pursuance of your office instructions and the same is not questioned. If, therefore, there was at the date of the said act of August, 1888, no claim adverse to that of the defendants, the same was thereby confirmed regardless of the qualifications of the original claimants John J. and Jane Holmes, who it seems died in 1850, en route to, but before arriving in the Territory of Oregon.

It is urged, however, that the land had passed by the grant for said wagon road and that it could not pass by the act of August, 1888, *supra*. Said grant was of "alternate sections of public lands designated by odd numbers three sections per mile to be selected within six miles of said road."

In the Morton case, *supra*, and in that of Binehart *v.* said Road Company (5 L. D., 650), it was held after a full discussion that said grant is one of quantity to be selected within specified limits and that without selection the right of the company does not attach to any specific tract.

The company having failed to exercise its right to select the land, as part of the grant, its claim thereto can, I think, be eliminated from the case. The defendant's claim can, therefore, be considered as confirmed by the act of August, 1883, *supra*.

The judgment appealed from is accordingly affirmed. The Oregon and California Railroad Company is not now in the case.

## TIMBER CULTURE ENTRY—ACREAGE.

JOHN W. SNODE.

One quarter, approximately, of the number of acres in any one section may be appropriated under the timber culture act of June 14, 1878.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 16, 1891.*

On February 17, 1890, John W. Snode applied at the local office in Garden City, Kansas, to make timber-culture entry for lot 5, Sec. 12, T. 24 S., R. 34 W., in said Garden City district.

The section in which this lot is situated contains four hundred and eighty-six and thirty-five one-hundredths (486.35) acres. The lot applied for contains thirty-two (32) acres.

At the date of this application Charles P. Safford had entered and was then holding a timber culture entry in the same section, containing one hundred and thirty-eight and forty one-hundredths (138.40) acres, which added to lot 5 would aggregate one hundred and seventy and forty one-hundredths (170.40) acres, which is 10.40 acres in excess of a full quarter-section and 48.82 acres in excess of a quarter of this particular section.

The local officers demanded, in addition to the prescribed fee (\$9.00), twenty-six dollars (\$26.00), or payment for the 10.40 acres in excess of one hundred and sixty acres, an ordinary quarter section, two dollars and fifty cents (\$2.50) per acre, it being within the limits of a railroad grant.

The applicant tendered the fees, \$9.00, but refused to pay the \$26.00 for the excess in acreage.

The register and receiver thereupon rejected his application, and he appealed to the Commissioner, and by your office letter of March 28, 1890, the action of the local officers was affirmed, and he now further prosecutes his appeal to this Department.

By the timber-culture act of June 14, 1878 (20 Stat, 113), it is provided "That not more than one quarter of any section shall be thus granted" (see proviso in Sec. 1). I do not find that the decisions of this Department have ever construed this proviso to mean one hundred and sixty acres (approximately), or a quarter of an ordinary section, as seems to have been contemplated by the local officers and by your office in affirming their action.

In the case of Bernard McCabe (4 L. D., 69) entries were allowed in the same section, aggregating two hundred and eighty acres, because the section contained more than four times that amount of land.

In the case of Charles W. Miller (6 L. D., 339), the section contained six hundred and ninety acres, and two entries were allowed, aggregating one hundred and eighty-one acres, which was nine acres in excess of one quarter of the section. The excess of nine acres was held to be insignificant, and both entries were allowed because they approximated *not* one hundred and sixty acres (a quarter of an ordinary section), but

because they approximated one hundred and seventy-two acres, or one quarter of that particular section.

I think it is plain from the language of the act that it was the intention of Congress to allow one quarter (approximately) of the number of acres in any one section to be appropriated under the act. The section in which the land in controversy is situated contains but 486.35 acres—one-fourth of this would be less than one hundred and twenty-two acres. One hundred and thirty-eight acres have already been entered under the claim of Safford, which is sixteen acres in excess of one quarter thereof.

It follows that all the land subject to timber-culture entry in this particular section had been appropriated prior to the date of Snode's application. His application must therefore be rejected *in toto*.

The decision of your office is accordingly modified.

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FOREST RESERVATION—ACT OF MARCH 3, 1891.

PIKE'S PEAK PARK.

Directions given for the temporary reservation of lands embraced within the proposed reservation, and for proceedings in accordance with the general instructions of May 15, 1891.

*Acting Secretary Chandler to the Commissioner of the General Land Office, July 20, 1891.*

Under date of June 30, 1891, you reported upon a petition for the setting apart of certain lands in the State of Colorado for the purposes of a public park to be known as "The Pike's Peak Park," which had been referred to you for that purpose.

By letter dated June 29, 1891, Mr. Geo. H. Parsons of Colorado Springs transmitted an additional petition by which it is sought to have reserved certain other lands adjacent to those described in the first mentioned petition to be made a part of the Pike's Peak Park, or to be known separately as "The Monument Forest Reservation."

These petitions are, as expressly stated, presented under, and the reservation is requested to be made by virtue of the provisions of section 24 of the act of Congress of March 3, 1891, entitled "An act to repeal timber-culture laws, and for other purposes" (26 Stat., 1095), which section reads as follows :

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

Under date of May 15, 1891, instructions as to the proper mode of procedure for "securing the necessary data upon which to base recommendations for such forest reservations" were issued (12 L. D., 499).

These instructions were prepared in contemplation of those cases wherein the initiative steps should be taken on the part of the government, but are, in my opinion, equally applicable to cases like the present where the President is petitioned to exercise the authority vested in him by said section. It is peculiarly appropriate that public notice of this proposed reservation should be given as prescribed in said regulations. All parties interested, whether in favor of or against such reservations, should be afforded an opportunity to submit their views. You will direct a special agent of your office to make an examination of the lands described in said petitions and to proceed in the matter in accordance with the provisions of said regulations.

It is stated in your report upon the first petition that the records of your office show the existence of claims of various kinds to many of the tracts included in said petition. The same is probably also true as to the lands described in the petition last filed. In order for intelligent action in the premises by this Department and for the information of the President, lists should be prepared showing the tracts to which any claim is asserted, the character of such claim and its condition. The information to be given by these lists should be as full as possible, and to this end it may be well to call upon the local officers for reports.

It is important that no new claims be allowed to be initiated to any of the tracts embraced in these petitions, and I, therefore, approve your action directing the local officers to allow no further disposal of any lands embraced in the original petition. In order, however, that no further complications may arise, you will issue at once an order temporarily withdrawing all lands in both petitions from settlement, sale or other disposition.

When the special agent shall have submitted his report, you will please forward the same with accompanying papers and a list of the lands embraced in the proposed park or parks, giving all the information in your possession as to claims to any of said tracts, with your recommendation in the premises.

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ACT OF MARCH 3, 1891—SECTION 7.

SAMUEL M. MITCHELL ET AL.

An entry that is susceptible of confirmation, in the interest of a transferee, under section 7, act of March 3, 1891, and is also within the confirmatory provisions of the proviso to said section, should be adjudicated under said proviso.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
July 20, 1891.*

On the 7th instant I rendered a decision in the case of the United States *v.* Samuel M. Mitchell, involving his soldier's additional homestead entry for the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 13, and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 12, T. 24 S., R. 55 W., Pueblo land district, Colorado.

Final proof was made and final certificate issued on November 15, 1884. No action adverse to the claim was taken by your office until December 10, 1890—more than six years after entry; and so far as the record shows, no contest has at any time been filed against it.

Said departmental decision of the 7th instant, in view of section 7 of the act of March 3, 1891, "To repeal the timber-culture laws, and for other purposes," directed that the transferee—the Pueblo & Arkansas Valley Railroad Company—be called upon to furnish proof, as required by the letter of instructions to chiefs of divisions, dated May 8, 1891 (12 L. D., 450).

From the showing above set forth, however, it becomes apparent that the case comes within the terms of the proviso of said section 7—without reference to the interest of transferees.

For this reason the departmental decision of the 7th instant, above referred to, is hereby vacated and set aside; and you will proceed to adjudicate the case under the proviso of said section 7, in connection with the instructions to chiefs of divisions, dated May 8, 1891.

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#### APPLICATION TO ENTER—RAILROAD LANDS.

##### MOTHERWAY *v.* PARKS.

A legal application to enter, while pending, withdraws from any other disposition the land embraced therein.

The legal operation of a pending application to enter is not affected by a second application of the same party.

The departmental order of October 10, 1887, restoring to entry the lands formerly withdrawn for indemnity purposes under the grant to the Marquette, Houghton and Ontonagon R. R. Co., made due provision for receiving applications to enter that embraced lands covered by pending unapproved selections, subject to the claim of the company.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 20, 1891.*

I have considered the appeal of Samuel Parks in the case of William Motherway *v.* Albert S. Parks from the decision of your office dated January 8, 1890, awarding the preference right to Motherway to enter as a homestead the SW.  $\frac{1}{4}$ , Sec. 9, T. 48 N., R. 41 W., Marquette, Michigan.

It appears that the land in question was within the indemnity limits of the Marquette, Houghton and Ontonagon Railroad grant under the act of June 3, 1856 (11 Stat., 21), as extended by the act of March 3, 1865 (13 Stat., 520); that under date of September 21, 1888, your office rejected the application of the railway company to select the land in question for the benefit of said road with the usual right of appeal; that on October 29, 1888, no appeal having been taken, the decision rejecting the application of said road was declared final.

August 23, 1887, William Motherway made application to enter said land as a homestead which was rejected by the local officers, on account of being within the indemnity limits of said road; he appealed from this action, and your office under date of October 5, 1888, returned the application to the local officers with instructions to allow the entry subject to the rights of the railroad company, as the question of such right was then pending.

It appears that on October 20, 1887, prior to your instructions and while Motherway's appeal was still pending in your office, that he filed another application to enter the land as a homestead and that also on the same day and at the same time the appellant A. S. Parks, made application to enter the same tract; furthermore, that as both parties claimed the land in question, Motherway by prior application and Parks by alleged settlement on the land, the local officers appointed a day of hearing, but on the day designated no testimony was submitted, therefore the local officers decided that as the applications were simultaneous that the land should be awarded to the highest bidder: from this action Motherway again appealed and your office, under date of January 8, 1890, sustained the appeal and awarded the right of entry to the first applicant, Motherway. Parks appeals.

It is evident that Motherway was the first applicant and that at the date Parks made application the appeal of Motherway was still pending and therefore Parks' claim could not attach until the prior claim had been disposed of.

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) and *Maria C. Arter*, (7 L. D., 136).

The fact that the defendant made a second application for the land while his first application was still pending does not affect the case, and therefore all the proceedings by the local officers during the pendency of his application were erroneous.

Counsel for appellant, however, contends that the tract in question was not subject to entry of any kind until it was restored by the order of the Hon. Secretary of the Interior under date of October 10, 1887, and therefore that Motherway was not entitled to any preference right by reason of such application.

In the order above referred to Secretary Lamar directed:

That all lands under withdrawals heretofore made and held for indemnity purposes under the grant to the Marquette, Houghton and Ontonagon Railroad Company, be restored to the public domain and opened to settlement under the general land laws, except such lands as may be covered by approved selections; provided the restoration shall not affect rights acquired within the primary or granted limits of any other congressional grant. As to lands covered by unapproved selections, applications to make filings and entries thereon may be received, noted, and held subject to the claim of the company.

Furthermore Secretary Lamar says:

If the decision of your office should be adverse to the company, and no appeal be taken, the selection will be canceled, and the filing or entry allowed, subject to compliance with the law.

In the case under consideration the land in question was embraced in a list of unapproved railroad selections which were rejected by your office for the reason that they were within the indemnity limits along the unfinished portion of the road; therefore under date of October 5, 1888, your office directed the local officers in accordance with said Secretary's order, to allow Motherway's application subject to the right of appeal by the railroad company, and subsequently when the rejection of the selections became final, your office very properly recognized Motherway as the first legal applicant for the land.

With this view of the case and as the claim of the railroad company has been concluded, the application of Motherway to enter the land should be allowed and therefore your office decision is affirmed.

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OSAGE ENTRY—ACT OF MARCH 3, 1891—SECTION 7.

UNITED STATES *v.* HARP ET AL.

For the purposes contemplated in section 7, act of March 3, 1891, an entry of Osage land under the act of May 28, 1880, may be properly regarded as a pre-emption entry, and included within the confirmatory provisions of said section.

Entries that may be confirmed for the benefit of a transferee, under said section, and that are also within the terms of the proviso thereto, should be adjudicated under said proviso.

*Acting Secretary* *Chandler to the Commissioner of the General Land Office, July 21, 1891.*

I have considered the motion of the heirs of James F. Black, deceased, transferee in the case of the United States *v.* Columbus Harp *et al.*, to have said case considered under the seventh section of the act of March 3, 1891. (26 Stat., 1095).

The record shows that on August 7, 1882, Harp made Osage cash entry for the SW.  $\frac{1}{4}$  Sec. 20, T. 34 S., R. 7 W., Larned, Kansas, the tract in question, and received final receipt therefor on August 15, following.

On March 13, 1883, James F. Black, claims to have purchased the land in good faith for a valuable consideration.

On October 5, 1885, a special agent of your office reported that the entry was fraudulently made, and on November 25, following, it was held for cancellation. Subsequently a hearing was had, and the local land officers found against the entry and recommended its cancellation. An appeal was taken from their ruling to your office, where, on September 22, 1890, the finding of the register and receiver was affirmed and the entry held for cancellation.

An appeal was taken from your decision and was pending here at the date of the passage of the act of March 3, 1891, *supra*.

The heirs of James Black, deceased, claiming to be the present owners of the land have filed this motion.

It appears from the statement of facts above given that the entry in question was made on August 15, 1832, and that the tract was purchased by Black after final entry and before March 1, 1838. No fraud has been found on the part of the purchaser, and no adverse claim originating prior to final entry exists.

Section seven of the act above cited provides for the confirmation and the issuance of patents on existing entries made "under the pre-emption, homestead, desert-land or timber culture laws," on certain conditions.

It follows that the entry in question should be governed by the provisions of said section, if found to belong to either of the classes of entries enumerated in said act. Under the act approved May 23, 1830, entitled "An act for the relief of settlers upon the Osage trust and diminished reserve land in Kansas, and for other purposes," (21 Stat., 143), the general circular of January 1, 1839, page 12, provides:

The Osage Indian trust and diminished reserve lands are subject to sale to parties having the qualifications of pre-emptors on the public lands.

Claimants are required to file a declaratory statement within three months from date of settlement, and to make proof and payment within six months from date of filing.

This proof must be made after notice by publication, before the officers authorized to take proof in pre-emption cases, and must show that the claimant is a qualified pre-emptor and an actual settler on the land at the date of application to enter. 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*.

Payment for these lands must be made in cash at the rate of \$1.25 per acre, and may be made by installments, one-fourth the purchase price when proof is made, the remainder in three equal annual installments with interest on the deferred payments at the rate of 5 per cent. per annum. \* \* \*

By filing Osage declaratory statements in accordance with the act of May 23, 1830, the right of pre-emption to such or any other lands is exhausted if the filings are valid and capable of being perfected into complete title.

It is seen that the manner of disposing of these lands is very similar to that of disposing of lands under the pre-emption law, and it is provided that the filing of an Osage declaratory statement under the act above cited, exhausts the right of pre-emption, etc.

In the case of *Fraser v. Ringgold* (3 L. D., 69), it was held that,

The word pre-emption is one of broad signification, and was in use under State laws and in other statutes before its incorporation into the United States land system. It is held in general, that claims under the townsite laws are pre-emptions; so of the settlement statutes respecting certain Indian lands; and, broadly, that where a special preference is given to a claimant, dependent or contingent upon the performance of conditions which any one of a qualified class may reasonably fulfill, by which he may hold to the exclusion of others, such preference is a pre-emption, and inures to the individual upon the inception of his claim. Measured by these rules, a desert-land entry is much more clearly within the definition than many others, which are so recognized.

Inasmuch as it has been the practice of the Department and your office to require settlers upon Osage lands to comply with the requirements of the pre-emption law as to settlement, cultivation and improvement, I conclude that an Osage cash entry is, for all purposes contemplated in section seven of the act of March 3, 1891, *supra*, a pre-emption entry.

Having arrived at this conclusion, it becomes apparent that the case now under consideration comes within the terms of the proviso of said section 7—without reference to the interest of transferees. You will therefore proceed to adjudicate the case under said proviso, in connection with the instructions to chiefs of divisions, dated May 8, 1891.

CONTEST—PRACTICE—APPEAL—DEATH OF PARTY.

COX *v.* WHEELER.

The Department acquires no jurisdiction through an appeal taken on behalf of a deceased timber culture entryman, if such action is not authorized by the heirs or legal representatives of the decedent.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 21, 1891.*

Ezra F. Wheeler made timber culture entry January 9, 1884, of the SE.  $\frac{1}{4}$  of Sec. 4, T. 14 N., R. 20 W., Grand Island, Nebraska, and on February 15, 1887, Alfred Cox filed a contest against said entry, upon which a hearing was ordered. The local officers found in favor of the contestant, and recommended the cancellation of the entry, which decision was affirmed by your office, December 9, 1889.

From the decision of your office an appeal was taken by Blair and Campbell, who appeared as attorneys of record for Wheeler, while the case was pending before your office.

On February 7, 1891, you transmitted a motion filed by the attorneys of Cox to dismiss said appeal, upon the following grounds :

1. That the appeal taken in said action was not taken until March 20th, 1890, and not until after the expiration of more than sixty days after the rendition of the decision of the Hon. Commissioner of the General Land Office.
2. That long prior to that time, to wit: November 13th, 1889, the said claimant, Ezra L. Wheeler, died.
3. That said appeal was taken without authority of law.
4. That the said Ezra L. Wheeler being dead, no appeal could be taken for him, and the pretended appeal is therefore null and void.

With this appeal is filed the affidavit of S. O. Holcomb, who swears that said Wheeler died on or about November 13, 1889, and not later than November 20.

Service of a copy of this motion and affidavit was acknowledged by Blair and Campbell, the attorneys who filed the appeal in the name of

Wheeler, and the facts therein stated are not controverted. The death of Wheeler, occurring prior to the time of the filing of said appeal, the Department could not acquire jurisdiction thereby, unless his estate was at that time represented, and the attorneys had no authority to file said appeal, except as the attorneys of the legal representatives of the estate. (*Arnold v. Hildreth*, 6 L. D., 779; same, on review, 7 L. D., 500); *Allphin v. Wade* (11 L. D., 306).

It not appearing that the said Wheeler left heirs surviving him, or that there was a legal representative at the time of filing said appeal, it must therefore be dismissed. But I direct that Messrs. Blair and Campbell be notified that they will be allowed sixty days in which to show that Wheeler left heirs surviving him and that they appeared as attorneys for said heirs in taking and prosecuting the appeal, or to take proper steps to have a legal representative appointed and after the proper representative has been appointed to file an appeal in his behalf.

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*Overruled*

WAGON ROAD GRANT—SELECTION—WITHDRAWAL.

CHAPMAN *v.* WILLAMETTE VALLEY WAGON ROAD Co. *20 L. D. 259*

By the act of July 5, 1866, Congress granted to the State only the right to select three alternate sections per mile within the six mile limits of the road, and the title to any particular tract does not accrue to the State or the company prior to the selection thereof.

The failure of the company to respond to a settler's notice of intention to submit final proof for land included within a previous executive withdrawal, made for the benefit of said company, precludes its subsequent objection to the allowance of the settler's entry.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
July 21, 1891.

I have considered the case of Henry Chapman *v.* The Willamette Valley and Cascade Mountain Wagon-road Company, as presented by the appeal of the latter from the decision of your office dated February 23, 1886, rejecting its claim of the right to select the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 15, T. 24 S., R. 31 E., and sustaining the pre-emption cash entry of said tract, *inter alia*, made by said Chapman on January 13, 1881, at the Lake View land office, in the State of Oregon.

The tract in question is in an odd-numbered section within the limits of the withdrawal for the benefit of said road made by order of the land department July 10, 1874, which was received at the local office on August 6, same year, under the provisions of the act of Congress approved July 5, 1866 (14 Stat., 89). The township plat of survey was filed in the local office on June 1, 1876. On March 13, 1879, said Chapman filed his pre-emption declaratory statement for said tract and others in Sec. 22, alleging settlement thereon March 1, 1879, and on January 1, 1881, made proof in support of his claim, after due notice

thereof, and no protest having been filed, the proof and payment were accepted by the local officers and cash certificate number 168 was issued thereon.

On February 23, 1886, your office examined said cash entry and held that:

the tract was subject to the claim of Chapman at the time of his filing and entry, and, as his proof shows full compliance with the law, his entry is hereby held for approval, subject to appeal within sixty days by the Wagon-road Company.

The company alleges in its appeal that said tract is in one of the sections granted by said act, and that the title to the said section vested in the State of Oregon, *in presenti*, by the operation of the said act, and attached immediately upon the completion of the surveys, to each odd section within said grant, and thereby said grant withdrew the said lands from the public domain and from all right of purchase either by pre-emption, homestead or otherwise, and thereby prohibited the exercise of all jurisdiction of the Land Office and the Executive Department to make or allow sales of any of said lands. It is further insisted by the company that, since the State of Oregon granted the lands embraced in said act of Congress to said company, and the governor having, on January 24, 1871, certified that said road had been duly completed,

the right of said wagon-road company to select three sections to the mile from the alternate odd-numbered sections within six miles of the said road, as so completed, thereupon attached to each of the said six sections, whenever such sections should be designated by proper survey; and the said right of the said company attached by relation, from the date of the said grant.

The contention of the company is, in effect, that said act created a legislative withdrawal of all of the odd sections of public land within said six-mile limits that became effective either from the date of the acceptance of the grant by the legislature of Oregon or from the date of the filing of the map of definite location opposite the land in question. In the brief of counsel filed in support of said appeal, reference is made to the case of *Rinehart v. said company*, and it is stated that

all the legal questions which we have discussed in this brief, and which are involved in the present case, arise also in the *Rinehart* case.

Said case was decided by the Department on May 23, 1887 (5 L. D., 650), and it was held that the construction of the road and the filing of a map of definite location thereof did not cause the grant to attach to any particular tract of land; that the grant by its own operation did not withdraw from entry the lands within the limits fixed thereby, and that the executive order of withdrawal did not become effective until notice thereof was received at the local office. This doctrine was reaffirmed in the case of said company *v. Morton* (10 L. D., 456), wherein Morton's homestead final proof was approved, no objection having been made to the acceptance thereof by the local officers after due notice of claimant's intention to make the same. The *Rinehart* and the *Morton* cases (*supra*) differ from the case at bar in this: that in the former case

no notice of the executive withdrawal had been received at the local office prior to the settlement of Rinehart; while in Morton's case, his settlement antedated the executive withdrawal.

From a careful examination of said grant, there can be no question, in my judgment, that Congress intended just what the language of the granting act purports, namely: to grant to said State for the purpose of constructing a military wagon-road in said State,

alternate sections of public lands designated by odd numbers, three sections per mile, to be selected within six miles of said road.

This act is peculiar in that it fails to provide for any definite location of the road. The lands, if free, could be selected on either side of the road, and the only limitation as to the disposal of the lands is found in sections 2 and 4 of said act, the former requiring that the lands shall be disposed of by the State only for the purpose indicated in the grant; and the latter section providing that when ten miles of said road are completed not more than thirty sections opposite said completed portion of the road shall be sold, and upon the certification to the Secretary of the Interior by the governor of said State that any ten continuous miles of said road are completed, another thirty sections may be sold, and so from time to time until the whole road is completed. If the road was not completed within five years, no further sales were to be made, and the land unsold should revert to the United States. It is very evident that Congress granted to said State only the right to select three alternate sections per mile within the six-mile limits of the road. The particular sections granted were by the express terms of the act "to be selected" presumably by the State or the company building the road. Until selection was made, it could not be ascertained what tracts passed under the grant. The distinction between lands granted, which acquire precision by some act of the company, such as the definite location of the road, and lands "selected" is clear and is well recognized by the rulings of the Department and the decisions of the Supreme Court of the United States.

In the case of *Barney and others v. Winona and St. Peter R. R. Co.*, (117 U. S., op. p. 232) the court said:

In the construction of land grant acts, in aid of railroads, there is a well-established distinction observed between 'granted lands' and 'indemnity lands.' The former are those falling within the limits specially designated, and the title to which attaches when the lands are located by an approved and accepted survey of the line of the road filed in the Land Department, as of the date of the act of Congress. The latter are those lands selected in lieu of parcels lost by previous disposition or reservation for other purposes and the title to which accrues only from the time of their selection.

See also *Sioux City R. R. v. Chicago Ry* (id. 407), and *Wisconsin R. R. Co. v. Price Co.* (133 U. S., 496).

While the grant in question did not specifically designate the sections granted, and give the right to select indemnity as such, for lands granted which were lost, yet it did give the State the right to select the

land to the amount granted, but the title to any particular tract did not accrue to the State or the company prior to its selection thereof.

If, therefore, prior to such selection, the land was sold or entered and the company failed to protest against the allowance of final proof, even though the land was within the limits of an executive withdrawal made for the benefit of the State or the company, it could not be heard afterwards to complain if the land was awarded to the settler. It is not asserted and it does not appear that the company cannot select enough land to amount to the quantity granted. It has no title to any particular section, but having failed to protest when final proof was made, its objection cannot now prevail. This is the ruling of the Department with reference to selections of indemnity lands, and no good reason appears why the same rule should not apply to the case at bar.

The company having failed to appear and protest against the allowance of said entry, its objection to the same must be overruled.

For the foregoing reasons, the decision of your office must be, and it is hereby affirmed.

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APPLICATION FOR SURVEY—MEANDER LINE.

JOHN W. MOORE.

In the survey of lands that border upon permanent bodies of water the meander line determines the quantity of land subject to sale, but the water line forms the true boundary of the tract.

Where a tract thus surveyed has been sold by the government, and title thereto has passed to subsequent purchasers, a survey will not be authorized of land that may lie between the meander and water lines.

The returns of the Surveyor General, and the record of a survey made under his direction, are evidence of the highest character, that no private survey can be allowed to overcome.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 21, 1891.*

The appeal of John W. Moore, from the action of your office, dated June 24, 1890, in rejecting his application to have surveyed certain lands on Fidalgo bay in front of the government meander line of lots 3 and 5, fractional, Sec. 18, T. 35 N., R. 2 E., W. M., Washington, has been considered.

It appears that Moore lays claim to 23.55 acres of land lying outside of the meander line in front of said lots, and has built a house thereon; that he claims said land was omitted from the original survey and is dry land; that it is also public land and therefore he asks that the surveyor-general be directed to survey the same, with a view of obtaining title thereto. It further appears that all of said fractional section 18, comprising lots 1, 2, 3, 4 and 5, was entered under the pre-emption law by William R. Griffin, and patented to him April 15, 1875; that

said lots have passed by deed of purchase through a number of transfers and they are now owned by Annie C. Bowman, who claims all the land to the water and does not recognize the Moore claim or consent to have a survey of the same made.

Under date of June 6, 1890, the surveyor-general submitted the question of survey in this case to Commissioner Groff and on the 24th of the same month, he was instructed that no application for the survey of said land would be approved by your office; also, on September 8, 1890, Hon. Henry C. Lodge, House of Representatives, transmitted a letter, diagrams and other papers from said Moore illustrating the position and describing the tract claimed by him, and asking that a deputy surveyor be appointed to survey the land. Under date of September 11, 1890, your office in reply enclosed a copy of the letter to the surveyor-general above referred to and declined the request. Moore appeals.

The statutes of the United States directing the manner of surveying public lands, provides: that such survey shall be made by the rectangular system, except in certain cases where the straight lines are interrupted by some natural object as a body of water or water course, then the margin of the water is recognized as the boundary of the land. In the case under consideration, the west line of section 18, was established by the surveyor in accordance with the statute, leaving the north, east and south boundaries to be defined by the waters of Fidalgo Bay. Meander lines are not boundaries. There is no law which authorizes a surveyor to establish a meander line as the boundary of any tract, the true boundary is the water line, and although the plat would seem to indicate that the meander and water lines were the same, yet it is generally the case that the water line shown on the plat is not the true water line or shore line, but only the meander line.

Meander lines are run in surveying fractional portions of the public lands bordering upon navigable rivers (and as well upon inland lakes of water) not as boundaries of the tract but for the purpose of defining the sinuosities of the banks of the stream and as the means of ascertaining the quantity of the land in the fraction subject to sale and which is to be paid for by the purchaser. *Railroad Co. v. Schurmeir* (7 Wall., 286).

In the case under consideration it may be that the U. S. deputy surveyor failed from some cause, to accurately trace the water line and thus embrace the true area of the lots; this in effect, if true, would be to deprive the government of the price of the land omitted from the computation, nevertheless, it cannot be held

“that the purchaser from the United States according to the plat—much less those who have taken title through mesne conveyances—shall be deprived of the area which the boundaries of the lots as shown by the plat entitled them to have.” *James Hemphill* (6 L. D., 555).

The bay in this case was the great natural object governing the boundaries on the north, east and south of the section in question represented on the plat by the meander line, but the “metes and bounds

of that line must upon well settled principles yield to the natural boundary." Reuben Richardson (11 C. L. O., 284), and citations therein. The appellant bases his claim principally upon the showing of a private survey, alleging that the meander line if *now surveyed* will project a portion of the land into another section and therefore, if for no other reason, the survey should be made. Even if it were admitted that your office has the authority to direct a resurvey under such circumstances, there is nothing submitted in this case to show that the land alleged to lie outside of the meander line, was in existence at the date of the survey in 1872, furthermore, the returns of the surveyor-general and the record of the survey made under his direction are evidence of the highest character, that no private survey can be allowed to overcome.

The patent issued to William R. Griffin for the land in question holds the same by description to the water line, and at this date the land appears to be within the corporate limits and is covered by the town of Anacortes.

The decisions of the supreme court and of this Department are clear and well established in cases of this character and therefore under them the request of Moore for a survey of the alleged tract was properly denied by your office.

All the material points of exception taken by appellant from the decision of your office have been considered.

Your office decision is affirmed.

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#### OKLAHOMA LANDS—SETTLEMENT RIGHTS.

##### BLANCHARD *v.* WHITE ET AL.

One who enters the Territory of Oklahoma prior to noon of April 22, 1889, in violation of the act of March 2, 1889, and the proclamation of the President thereunder, with the intent to secure an entry in advance of others, is disqualified to make entry under said act.

The disqualification imposed by said statute extends to an applicant who remains outside of said Territory until noon of April 22, 1889, but seeks to evade the prohibitory operation of the statute through the assistance of another whom he has theretofore employed to enter said Territory for such purpose.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 21, 1891.*

I have considered the case of Carley J. Blanchard *v.* Ewers White and Vestal S. Cook (intervenor), on appeal by each of them from your decision of March 7, 1890, involving the SW.  $\frac{1}{4}$  of Sec. 27, T. 12 N., R. 3 W., Guthrie land district, Oklahoma Territory.

The record shows that White made homestead entry for this land on April 23, 1889, alleging settlement on April 22d; that Blanchard on the 23d of same month applied to make homestead entry for the tract,

also alleging settlement on the 22d, and his application was rejected, for the reason that White had made entry for it. On the 27th of same month, Blanchard filed an affidavit of contest against the entry of White, alleging that he entered upon and occupied the land prior to twelve o'clock noon of April 22, 1889, in violation of the provisions of section 13 of an act of Congress, approved March 2, 1889, and the President's proclamation thereunder.

It further alleges that White was a deputy U. S. marshal; that he used his official position to defraud the contestant in making entry, etc.

Hearing was ordered upon this affidavit, and set for July 16, 1889.

On May 1, 1889, Vestal S. Cook made application to make homestead entry for the tract, alleging settlement in the afternoon of April 22, 1889, which was also rejected on account of White's entry. On June 15th following, he filed an affidavit against the entry of White, and also charged in it that Blanchard, as well as White, had entered upon and occupied the land prior to twelve o'clock noon of April 22, 1889, and with this affidavit he filed a petition of intervention, setting forth in detail the facts, and also the facts concerning his own settlement, and he asked to be allowed to intervene, to prove the truth of his allegations, which privilege was granted him.

On the day set for the hearing all the parties appeared, a large amount of testimony was taken, and the local officers, upon considering the entire case, found that White was there as deputy marshal; that he had taken advantage of his position to make an entry in violation of the spirit of the law, and recommend the cancellation of his entry. They further found that Blanchard was in the Territory, and near the land before noon of the 22d of April, and they rejected his application to make entry. They also found that Cook had violated the law and disregarded the President's proclamation, by placing horses, for "relays," within the Territory, before noon on said April 22d, and rejected his application, from which findings and decision each of the parties appealed and your office, on March 7, 1890, affirmed said decision, from which each of the parties again appealed.

On November 28, 1890, White relinquished his entry, and the same was canceled. Cook having been properly allowed to intervene, the relinquishment leaves the case before me, simply between Cook and Blanchard.

There have been, however, since the case has been pending in the Department, several applications to contest the entry of White, some of which also ask to intervene in this case; there are also several applications to make entry for the land, all of which have been forwarded through your office to the Department and filed with the papers in the case at bar, but, as none of these have been passed upon by you, and are not regularly before the Department, I have not considered them, but return them, with the record, for your consideration and disposition.

The relinquishment of White eliminates some of the questions of law, and simplifies to some extent the evidence in the case. The only remaining questions of fact being as to the conduct of Blanchard and Cook, respectively, there being no question of priority between them.

The questions of law are presented in the respective assignments of error in the appeals. Counsel for Blanchard, in his appeal, assigns substantially the following errors: (1) That your decision is against the weight of the evidence; (2) that it is against the law of the case, and under the latter they have made a number of assignments, which may be resolved into this: (a) that your office misconstrued and misapplied the act of Congress of March 2, 1889, and also the President's proclamation; or (b) that the proclamation of the President was based upon a strained and unwarranted construction of the law; that if it was the purpose of the President by said proclamation to warn all persons to stay entirely without the boundaries of the Territory until twelve o'clock noon of April 22, 1889, it was "in violation of the rights guaranteed to this contestor by the Constitution and the laws of the United States," and that it was error to follow such a construction of the law.

In the appeal of Cook there are several assignments of error, the principal one being, that your office erred in holding that, inasmuch as Cook's agents entered the Territory before the hour designated, for the purpose of holding horses for him, that he was constructively in the Territory contrary to law, and in disregard of the proclamation. The ninth assignment is as follows:

Said decision erred in assuming that a man can be constructively anywhere through an agent.

Briefly stated, the counsel of Cook claimed that his rights are not affected by the action of his agent, who went into the Territory in violation of law; that the result of the agent's conduct must rest upon him alone.

The testimony in the case is quite voluminous, but taking first that which relates to the conduct of Blanchard and we have substantially the following:

He was in the Territory several times during March and April, 1889. He had no business to attend to there. On the 15th of April, he claims to have been employed by the "boss carpenter" of the Santa Fe Railroad Company, and says he went to work for it on the 19th, and worked till noon on the 22d. He was not a carpenter nor railroad "hand," but was a farmer who lived in Cowley county, Kansas. He says in his testimony that he first concluded to take a homestead a half a minute before twelve o'clock noon, on April 22d. His wife had been at the depot at Oklahoma City for several days. She had a tent there and some household furniture, cooking utensils, etc.

Blanchard says that at two seconds after noon on April 22d, by his time, he ran from the railroad track about sixty feet, and drove a stake

on the land in controversy. One George Selby immediately picked up Mrs. Blanchard's tent which laid by the side of the railroad track, and ran to Blanchard. They pitched the tent at once, and Mrs. Blanchard and her child arrived just at this time and went into the tent, and thus Blanchard made settlement on the land. He testified that he never saw the tent till Selby brought it to him, did not know whose it was, has never been asked for it, has never paid for it, did not know about his wife being there. It appears that the soldiers had been trying to arrest him for being in the Territory, and at one time when absent, he had his "long sandy whiskers" shaved off and his mustache and eyebrows dyed black, and when he returned to Oklahoma City on the 19th of April, the corporal in charge of the patrol says "we did not recognize him." There is a great deal of Blanchard's testimony, and it is inconsistent with itself, contradictory and unreasonable, besides being contradicted by the circumstances of the case and the testimony of the witnesses.

The railroad company had issued an order to its employes that any who wished to take claims must "come out of the territory," and be out of it at noon on the 22d of April. This order was generally known and especially by the employes. Blanchard certainly knew it, but disregarded it (if an employe of the company), and he disobeyed the law, disregarded the President's proclamation, besides sacrificing his whiskers to destroy his identity that he might avoid arrest, thus showing that he intended to circumvent the law and the proclamation, if he could.

Cook presents a different case. He frankly admits that he came to the eastern boundary of the Territory on the 20th of April; that on the night of the 21st, he and three friends sent two men with eight horses into the Territory; four to be stationed five miles from the border on the road to Oklahoma City, and four to be stationed five miles further on. These relays were to aid them in reaching Oklahoma City in the quickest possible time. Cook insists that this was not done to take advantage of other persons who were to make the trip on horseback and in wagons, but that it was for the purpose of enabling them to beat a certain railroad train which they had heard was to run from the northern boundary to Oklahoma City. He says he paid his share of \$50 which was paid by four of them to the two men who took the horses into the Territory. They knew the law, and cautioned the men that if they went in then, they could never enter land in Oklahoma.

The frankness and truthfulness of Cook and his witnesses contrasts very favorably with much of the testimony in the case, but unfortunately for their enterprise and dash, they did not have in mind the old maxim of the law: "He who acts by or through another acts for himself" or as Lord Coke states the principle: "He who does anything through another is considered as doing it himself."

The relations of Cook and the man who took his horses into the Ter-

ritory were those of master and servant. The servant was employed to do a certain thing, and he did it. The master cannot avoid the consequences of this act, nor can he, as claimed, relieve himself from the responsibility by a contract with the servant that he will bear it. The servant cannot commit a trespass by the master's direction and relieve the master by an agreement, but both master and servant are liable.

In the case at bar, the statute is prohibitory. It places a condition precedent to making entry for land in the Territory, upon all persons. It, in effect, says persons otherwise qualified must have remained outside the boundaries of the Territory until after noon of the 22d day of April, 1889. This condition, or what is really an additional qualification to the entryman, was fixed by the act of Congress. Cook knowing the condition hired a man to violate it for his benefit, and then says to the Department, I did not violate the law, but simply hired a man to do it for me.

It is quite clear that Cook as well as Blanchard comes within the prohibitory operation of the law as it was understood generally, not only by the President of the United States and the Land Department, but by the great mass of the people. Counsel for Blanchard, however, claim that these lands were a part of the public domain from the date of purchase by the government from the Creek and Seminole Indians, and that it was error to construe the act of Congress to mean that any citizen could not of right go upon and inspect the public domain, to ride and walk over it at will, and they speak of the use of military force to prevent such inspection as a violation of rights guaranteed to citizens by the Constitution and laws of the country. They claim the President "acted without warrant of law and under a strained and unwarranted construction of the meaning of the language of the said act"—to all of which it is sufficient to say he acted, and his act has passed into history.

Counsel have made a labored distinction between the wording of the act of March 1, 1889 (25 Stat., 759) and the act of March 2, 1889 (25 Stat., 1004). The former act spoke of these lands as described in the agreement with the Indians. The latter speaks of the same lands as about to be opened to settlement. The former says "shall not be permitted to occupy or to make entry of such lands or lay any claim thereto." The latter says "but until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same." Counsel claim "enter upon *and* occupy" is equivalent to "make entry for and settlement upon" as those terms are used by the Land Department.

This matter was fully discussed in the case of *Townsite of Kingfisher v. Wood et al.* (11 L. D., 330-335) and it is therein said:

The words "enter upon and occupy" are used in their ordinary acceptation. "Enter" means to come or go into; and "occupy" to take in possession, or to fill up. The language carefully avoids the technical expressions of the homestead laws, under

which titles are to be obtained. In them, to "enter" lands, means to make that particular declaration in writing at the land office that is called an "entry." It is a formal proceeding and somewhat technical. In such connection, the word "upon" is not used or appropriate. It is one thing to "enter" a piece of land, and a wholly different act to "enter upon" a great domain like Oklahoma. Evidently the latter expression was used to prevent the people from coming into the lands—the territory—and cannot reasonably be restricted to a technical "entry" of a specific tract.

To claim that any and all persons could go into and over the Territory to "inspect the land" and remain there up to noon on the 22d of April, provided they did not "enter upon and occupy" any particular tract, is simply absurd; such construction of the act would render it nugatory; and the mass of the people did not so understand it, anxious as they were to secure homes in this Territory; they assembled along the borders and as law-abiding citizens awaited the hour fixed for their entry into it. A few attempted to violate or evade the act. Blanchard proposed to violate it and escape the consequences by fraud and deceit. Cook thought to evade its operation by procuring his servant to violate it for him. The application of each to make entry will be rejected.

Your decision is affirmed.

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APPLICATION TO ENTER—INTERVENING ENTRY.

RICHARDS *v.* MCKENZIE (ON REVIEW).

An application to enter, pending on appeal, is equivalent to an entry only so far as the rights of the applicant are concerned; and rights thereunder, as against a subsequent intervening entry, are dependent upon the status of the applicant at the date of his appeal.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
July 22, 1891.

Alice V. Richards has filed a motion for review of the decision of the Department of January 13, 1891, in the case of Alice V. Richards *v.* George P. McKenzie, 12 L. D., 47, alleging the following grounds of error:

1st. In holding that McKenzie's application to enter, made April 16, 1888, was equivalent to an actual entry, it being admitted that at the time said application was offered the land was legally appropriated.

2nd. In holding that said application of McKenzie withdrew the land embraced therein from any other disposition, it being admitted that at the time it was offered the land was legally appropriated.

3rd. In holding that Richards' entry, made October 15, 1888, was improperly allowed as against a prior applicant, it being admitted that at the time such prior application was offered it was properly rejected.

4th. In holding that any of the cases cited—*Pfaff v. Williams*, *Maria C. Arter, Saben v. Amundson*, *Arthur P. Toombs*, *Pettigrew v. Griffin*, are precedents against Richards under the existing facts.

5th. In holding that Richards should be called on to show cause within sixty days against the cancellation of her entry.

It appears from the record in this case that on April 16, 1888, at half past eight o'clock A. M., Alexander Douglas made homestead entry of the tract in controversy, and at nine o'clock A. M., the same day, George F. McKenzie applied to make homestead entry of the same tract, which was refused, because of the prior entry of Douglas. From this action of the local officers McKenzie appealed to your office, which sustained the action of the local officers, and from which McKenzie appealed to the Department.

While said appeal was pending before the Secretary, Douglas relinquished his entry—to wit, October 15, 1888,—which was canceled on the records of the local office, and Alice V. Richards, on the same day, made homestead entry of the tract.

When the appeal of McKenzie was taken up in its order, the Department, having its attention called to the relinquishment of Douglas, and not knowing of the entry of Richards, returned the papers to your office, with directions to allow McKenzie to make entry of the land.

In accordance with said instructions, the local officers allowed McKenzie to make homestead entry, February 15, 1890, but informed your office that Alice V. Richards had made homestead entry of the land October 15, 1888, immediately upon the relinquishment and cancellation of the entry of Douglas, and asked for instructions, and on March 11, 1890, transmitted the application of Alice V. Richards to contest the entry of McKenzie.

Your office in passing upon this application held that there is nothing in the record to show that the Secretary was advised of the existence of Richards' entry, and McKenzie's entry was therefore allowed, without in any manner considering her rights; that McKenzie did not acquire any preference right of entry by virtue of his application to enter the land, and he should be called upon to show cause why his entry should not be canceled and the entry of Richards allowed to stand as being the first legal entry after the tract was subject to entry.

From this decision McKenzie appealed, and the Department modified the decision of your office and required Richards to show cause why her entry should not be canceled, holding that—

in view of the fact that McKenzie had made application, on April 16, 1888, to enter the tract in controversy—which application was, while pending, equivalent to actual entry, so far as the applicant's rights were concerned, and withdrew the land embraced therein from any other disposition until final action thereon—Richards' subsequent application (of October 15, 1888,) was improperly allowed, and conferred upon her no rights as against the prior applicant,

and directing that—

if she should apply for a hearing it should be granted and the case re-adjudicated, in accordance with the facts disclosed at such hearing and in pursuance of the principles hereinbefore enunciated.

I can see no error in the decision complained of, or any reason why a new trial should be granted.

It is apparent that counsel for Mrs. Richards has misapprehended the effect of the decision of January 13, 1891. The Department in said decision merely held that McKenzie's application was, while pending, equivalent to actual entry, *so far as the applicant's rights were concerned,*" but it was not intended by said decision to hold that McKenzie's rights to the land were superior to the claim of Richards, merely by virtue of his application, irrespective of whether said application had been properly or improperly rejected. While that application was pending on appeal, it preserved the rights of the applicant against any further disposition of the land, until such rights could be determined, and Richards could therefore acquire no right by her entry, so far as it affected the rights of McKenzie; but said entry was subject to whatever rights he had, which must depend, however, not upon his application for the land, but whether his application was rightly rejected by the local officers.

In the appeal of McKenzie from the rejection of his application, he alleged that the application of Douglas should have been regarded as simultaneous with his own, and the privilege of making entry sold to the highest bidder. This appeal involved the validity of Douglas' entry and the question of McKenzie's right of priority.

If that claim had been sustained, the entry of Richards would be subject to the right of McKenzie, which, as before stated, must depend upon his status at the date of his appeal.

If Richards applies for a hearing, the case should be determined in accordance with the rulings above announced.

The motion is denied.

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#### VICTORIEN v. NEW ORLEANS PACIFIC RY. CO.

Motion for reconsideration of the departmental decision rendered June 7, 1890, 10 L. D., 637, denied by Acting Secretary Chandler, July 22, 1891.

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#### PRACTICE—MOTION TO RETAX COSTS.

##### JOHNSON v. BRUCE.

A motion to retax costs is not an original or independent proceeding but incidental to the case on trial; and after such case has passed beyond the jurisdiction of the local officers they have no authority to entertain said motion, nor will the Department pass on the same until the trial case comes up for final consideration.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 22, 1891.*

I have before me the motion filed by Wesley A. Bruce to retax the costs in a certain contest case wherein said Bruce was contestee and W. H. Johnson was contestant, involving the SW.  $\frac{1}{4}$ , Sec. 23, T. 12, R.

2 W., Guthrie, Oklahoma Territory, land district. Said motion comes before the Department on appeal by Johnson from your office decision of May 13, 1890.

I have examined the record in the case, and find that the motion to retax costs was not filed in the local office until some months after the contest had been heard and determined, the papers transmitted to your office and the money collected as costs paid into the United States Treasury.

Rules of Practice 54 to 65, inclusive, cover the subject of costs. There is no rule as to motions to retax, but it is a common practice in courts. Such motions have been entertained by the Land Department. But the "motion to retax costs" is not an original or independent proceeding. It is merely ancillary to the case being heard or tried, and we have nothing in the regulations providing for it as an original proceeding. After the case has passed beyond the jurisdiction of the local officers, they cannot take jurisdiction of such motion.

In the record before us it appears from the motion and from the statements in the appeal that some kind of an agreement was entered into by the parties and their attorneys as to the taxation of costs, but the matter is not clearly set out. The papers in the case of Johnson *v.* Bruce, out of which this motion arose, and of which it is a part, are in your office, Division "H," while the decision before me came up from Division "M." Whether there is any merit in the motion depends upon the agreement mentioned, and the nature and amount of testimony taken in the case, upon what branch of the case the testimony was taken. Therefore, without passing upon the merits of the motion, your decision, which is in effect a money judgment against Johnson and in favor of Bruce, is set aside and vacated, and the motion and papers transmitted by your letter of July 8, 1889 are returned to your office to be filed with the papers in the case of Johnson *v.* Bruce to be passed upon when the case comes up for consideration.

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CONTEST—ALLEGATION OF FRAUD—FINAL PROOF—GOOD FAITH.

PATTERSON *v.* DRESSER.

An entry will not be canceled on a charge of fraud if the allegation is not established by such a preponderance of the evidence, or circumstances surrounding the case, as will convince a reasonable mind of the existence of the fraud.

A change of circumstances, after settlement and before final proof, may be such as to render the intention of the settler to leave the land after final proof entirely compatible with good faith.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 24, 1891.*

I have considered the case of Frederick Patterson *v.* Elliott L. Dresser, on appeal of Patterson from the decision of your office of December 1, 1888, dismissing his protest and allowing the pre-emption filing of

Dresser, No. 23,948, for the SW $\frac{1}{4}$  of Sec. 8, T. 106 N., R. 59 W., in the Mitchell land district, South Dakota.

The pre-emption declaratory statement for this land was filed by Dresser February 26, 1886, who made settlement thereon the same day by commencing to dig a cellar for his dwelling-house. August 24, 1886, he gave the usual notice by publication of his intention to make final proof at Woonsocket, October 4, 1886, before the probate judge for Sanborn county.

On the 8th day of September, Patterson filed an affidavit of protest against this final proof, alleging that Dresser's filing had not been made in good faith for his own use and benefit, but jointly in the interest of himself and one George C. Terwilliger, under a fraudulent agreement entered into between them, whereby Terwilliger was to procure the relinquishment of an outstanding entry, in consideration of which he was to have a half interest in the land. This affidavit further alleged that the house built by Dresser on this tract was never intended for a dwelling, but was planned for a stable and was to be moved into the town of Diana and there used for that purpose after Dresser had made his final proof. This affidavit further alleged that the probate judge for Sanborn county was not a suitable person to take this final proof for the reason that he was the claimant's attorney, and was otherwise disqualified because of the social relations that existed between them and their families.

The foregoing allegations were substantially repeated in an affidavit subsequently made and filed by Patterson's attorney. Dresser denied these charges, and the probate judge afterwards filed a counter-affidavit, in which he stated under oath that he had no interest whatever in the case as attorney or otherwise; that he had a mere speaking acquaintance with Dresser, and that there was no intimacy existing between them or their families; that in the performance of his official duty he was influenced solely by a desire to comply strictly with the law and the regulations of the Department, and to perform his duties as a judge fairly and impartially, without prejudice or favor to either party.

At the time and place stated in the published notice, both Patterson and Dresser, with their respective attorneys and witnesses, appeared before the probate judge and submitted their testimony.

The case was under investigation and trial from the 5th to the 7th of October, 1886, without final adjournment. During that time a mass of testimony was taken, much of it, on both sides, being irrelevant and unnecessary. Several ineffectual efforts were made to have the further hearing of this case transferred from the probate judge to the local officers of the Mitchell land district, and on the 7th of October, 1886, the said parties, by their attorneys, stipulated and agreed in writing that the further hearing of said case should be postponed until the 19th of October, 1886, at one o'clock p. m; that during the interval Patterson's attorney was to make application to the local officers to have the fur-

ther hearing of the final proof transferred to their office. It was further stipulated and agreed by said parties that if said application failed, the further hearing of the case should proceed before the said probate judge at the time and place named in their agreement. What action was taken in the premises does not appear, but no order for the transfer of the hearing is found among the papers in the case, and the hearing proceeded before the probate judge October 19, 1886, according to agreement.

The testimony, when closed, was transmitted to the local officers, who, after considering the same, rejected the final proof of Dresser, and recommended the cancellation of his filing. He thereupon appealed, and your office reversed the ruling of the local officers.

In appealing from your office decision, Patterson contends, in effect, that the allegations of his protest were established by the evidence, and that the ruling of the local officers should have been sustained. Although present at the hearing, Patterson did not appear as a witness in support of his protest, but relied solely upon the testimony of his son-in-law, Sidney M. Cornell, who testified that on one occasion, during the month of March, 1886, as he was driving a team with a load of lumber from the town of Diana out to the land claimed by Dresser, Dresser rode with him and at that time told him that he (Dresser) was to have only a half interest in the land, and that George C. Terwilliger was to have the other half. Dresser, on the other hand, testified that no such conversation ever took place, and that the statement made by Cornell was absolutely untrue.

This, in brief, is all the testimony submitted by Patterson to establish the allegations of his protest. Conceding equal credit to the evidence given by Cornell and to that given by Dresser, there is no sufficient preponderance of the testimony to establish a contract, express or implied, as charged between Dresser and Terwilliger; and, in the absence of such a contract, the allegations of Patterson's protest relating thereto must fall to the ground.

The allegations against Dresser involved perjury and fraud, and imply a direct violation of the oath made by him to the effect that his filing was intended for his own use and benefit, and not for the benefit of any other person or for speculative purposes. Fraud is never to be presumed; it must be established by such a preponderance of the testimony, or circumstances surrounding the transaction, as will convince a reasonable mind that it exists.

The evidence of Cornell is not supported by that of another witness, or by a single corroborative circumstance. Terwilliger had filed a timber-culture application for this same land, but had relinquished it long before Dresser filed his pre-emption declaratory statement. The only outstanding entry of the land immediately prior to Dresser's filing was that of John W. Elliott, whose improvements Dresser bought and whose claim was relinquished in Dresser's favor; but there is no evidence in the case tending to show that Terwilliger had any agency whatever in procuring Elliott's relinquishment.

As it regards Dresser's claim to the land under his pre-emption filing, it appears in final proof that he made settlement on the day that he made his filing, by commencing to dig a cellar; that he proceeded immediately to build a house, which he completed on or before the 23d of March, 1886, at which time he and his family took possession of the premises, with their household effects, and occupied the same as their home, continuously, up to the time of his making final proof, having never been absent therefrom except for nine nights during the entire time, all of which absences he accounted for in a satisfactory manner. In addition to the improvements which he bought from the former occupant of the land, whose claim thereto under the homestead law had been relinquished, he built a comfortable frame dwelling-house eighteen by twenty feet in size, a story and a half high, with two doors, two windows, floors, and shingle roof. He dug a well, built a stable, had eighteen acres in cultivation in oats, and ten acres planted in trees in the manner required by the timber culture law. His house was well furnished, and, according to the evidence, he complied strictly with the requirements of the pre-emption law as to residence, cultivation and improvements. This much seems to have been conceded even by the protesting party.

His filing was made, as he declares under oath, in good faith, with no purpose to sell the land or to dispose of it on speculation, but to appropriate it to his own exclusive use in conformity with the provisions of the pre-emption law. It appears, however, that after making settlement on this land, and complying as above mentioned with the terms of the law, he found it necessary, in consequence of the ill health of his wife and infant children, to change his plans and purposes and move into the town of Diana, where his family could have the advantage of prompt medical advice. When this change of purpose was made does not appear, but, as is shown by the evidence, it was made after settlement and prior to final proof. The question then arises whether this change of purpose prior to final proof, accompanied with his avowed determination to remain in actual possession of the land until final proof was made, invalidated his claim under the pre-emption law.

In the case of Edward C. Ballew, 8 L. D., 508, although the claimant admitted that it was his intention to remove from the land with his family as soon as his final proof was made, it was held by this Department that a change of circumstances, after settlement and before final proof, may be such as to render the making of final proof with the view of leaving the land entirely compatible with good faith. In the Ballew case, the change of purpose originated with a desire to have his family near his place of business.

In the late case of *United States v. Alvin T. Searls*, 12 L. D., 20, it was held that one who settles on land in good faith, intending to make it his home, and subsequently complies with the requirements of the law, is not disqualified as a pre-emptor by the fact that through a

change of circumstances he formed an intention, prior to the submission of final proof, to sell the land. In the case last named, it appears that Searles filed his pre-emption declaratory statement in good faith, under the belief that his brother and sister, who lived in Iowa, would leave there, and live with him in Dakota; but his brother changed his mind, and his sister, after living with him for a time, returned to Iowa, and he became tired of the country and concluded to sell out and return to the last named State. He had this sale in contemplation when he made his final proof; he talked with different parties on the subject, and actually sold his interest in the land the day after his final proof was made. But there being no evidence to show that this contract of sale was executed prior to final proof, his filing was allowed and patent ordered to issue.

The claim of Dresser is equally meritorious with that of Searls. His improvements quite as valuable; his residence as continuous; and his cultivation as extensive. He remained upon the land until after making his final proof, and performing every act required of him under the pre-emption law. So far as the proof shows, he made no sale of his land or any part of it, either before or after final proof. He acted in good faith and complied strictly with the requirements of the law. In my judgment, his final proof should be accepted and his entry ordered to patent on his making the payments required.

The decision of your office is accordingly affirmed.

*Overruled, 23<sup>d</sup> Nov. 175*

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OTOE AND MISSOURIA INDIAN LAND—SECTION 7, ACT OF MARCH 3, 1891.

FLEMING *v.* BOWE (ON REVIEW).

Notice of a decision should be given a transferee where the fact of transfer is disclosed by the evidence submitted at the trial; and in the absence of such notice the decision does not become final as to said transferee.

An entry of Otoe and Missouri Indian land may be properly regarded as a pre-emption entry for the purposes contemplated in the confirmatory provisions of section 7, act of March 3, 1891.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 24, 1891.*

I have considered the motion for review of the departmental decision of December 2, 1890, in the case of Albert M. Fleming *v.* Frank E. Bowe, (11 L. D., 546), involving the cash entry of said Bowe for the S $\frac{1}{2}$ , NW  $\frac{1}{4}$ , Sec. 20, T. 1 N., R. 6 E., in the Otoe and Missouri Indian Reservation, for sale at the Beatrice land office, Nebraska.

The records shows that on December 30, 1879, Bowe, who was a boy about thirteen years of age, appeared before a notary public of Gage county, Nebraska, and made settlement proof for this tract of land, and on January 2, 1880, he applied at the land office to purchase the tract.

This application was approved and the entry allowed, Bowe paying for the land and receiving final receipt therefor.

On June 22, 1886, Fleming filed an affidavit of contest against said cash entry, alleging that Bowe was not at the time of said entry or purchase a settler on said land and that he never had made a settlement thereon, etc. A hearing was had on these allegations on March 16, 1887, at which the entryman appeared by his attorney, and the contestant in person and by his attorney, and the register and receiver found in favor of the entryman. Contestant appealed from this finding, and, on June 26, 1889, by decision of your office, said finding was reversed and the entry held for cancellation. Thereupon the entryman appealed to this Department, where, on December 2, 1890, the decision of your office was affirmed, and the entry directed to be canceled. Notice of this decision was served on the attorney for Bowe, on December 12, 1890, and on the same day said entry was canceled by your office.

On January 24, 1891, more than forty days after the service of notice of departmental decision of December 2, 1890, on the entryman's attorney, the motion now before me was filed. It is filed on behalf of "the contestee Frank E. Bowe, and James Colgrove, A. M. Norris, J. D. Lahman, Eliza J. Bristol, George and John Christie. The motion avers that long before the contest was initiated, to wit, on August 4, 1833, the tract had been conveyed to A. M. Norris by warranty deed for a valuable consideration, and that he conveyed the same to John D. Lahman before the initiation of said contest, to wit, January 29, 1886. Neither Lahman nor Norris received any notice of said contest. It also alleges that on December 20, 1887, Lahman conveyed the tract to Eliza J. Bristoe for and in consideration of \$1200, and on March 15, 1889, she mortgaged the tract to George and John Christie for \$2,000. On February 25, 1890, she conveyed the tract to James Colgrove for and in consideration of \$3,500. It is also alleged the tract was placed upon the tax lists of Gage County, Nebraska, in 1835, and that taxes have been regularly paid thereon ever since by the successive owners. The petition ends with a prayer that the transferees, naming them, be granted a re-hearing, and be allowed to support said application with affidavits.

The motion is not sworn to, and contains no averment that it is made in good faith and not for the purpose of delay, as required by rule of practice No. 78. While the motion might be dismissed for this cause, the Department has the power, under the general supervisory authority conferred upon it by law, to pass upon the motion on its merits. Enough is shown by the motion to indicate that those seeking relief want something more substantial than delay, and that the motion is made in good faith.

It appears in the evidence submitted at the trial before the local officers on the contest of Fleming, that testimony was introduced showing that the entryman had conveyed this tract to Norris before the initiation of said contest, and that he had conveyed the same to Lahman who

then was the owner thereof, and the public records of the county where the hearing was had disclosed these transfers. After these facts were brought to the knowledge of the register and receiver, the transferees were entitled to a notice of the decision in said case. Lahman was then the actual party in interest, and as such was entitled to notice of all the decisions had in said case. It is not shown that he or any of said transferees or mortgagees ever received any notice of the decision of your office in said case or of the decision of this Department of December 2, 1890.

I conclude that the present owner of the equitable title to this tract, as well as the mortgagees, were entitled to a notice of said departmental decision (notice to the attorney of the entrymen was not notice to them) and that they have received no notice of said decision.

It is alleged in the motion for review that the transferee and mortgagees only learned of the decision complained of about two weeks before filing their petition for review.

In view of all of the facts and circumstances, I am constrained to hold that the motion should be considered as filed in time, and will be duly considered.

It is insisted by the applicant—

That if the case had been properly presented as it would have been, had opportunity been given by those who were really interested in maintaining the entry, it would have appeared to the satisfaction of the most literal and exacting constructionist of the act that it had been in fact fully complied with by the entryman himself.

That—

In addition to the amount paid for the land by the original entryman, thousands of dollars have changed hands upon the strength of this entry, and years of toil and privation have been endured by the purchasers of this title in improving and making habitable the land—all of which is to be lost, if a rehearing is not granted, without any one of the real parties in interest ever having had a day in court.

It is further urged

that if a new hearing is granted, the recent law would require that the rights of these intervenors should be rejected, for such is the plain declaration of the law. See Sec. 7 of the act of March 3, 1891 (26 Stat., 1095).

It is quite evident that said section will not confirm an entry which was finally canceled at the date of said act of March 3, 1891. (James Ross 12 L. D., 446). But inasmuch as the record shows that the parties shown to have an interest in the land at the hearing received no notice of the decision of the local office or of the subsequent proceedings, and the motion for review being filed in time, it must be held that the entry was not finally canceled, and that prima facie it comes under the provisions of said section 7, provided that said section applies to Indian lands sold under the provisions of the acts of Congress approved August 15, 1876 (19 Stat., 208); March 3, 1879 (20 Stat., 471); and March 3, 1881 (21 Stat., 380).

By the first of said acts, the lands in the Otoe and Missouri Indian

Reservation in the States of Kansas and Nebraska were directed to be appraised and a certain part thereof to be sold "for cash to actual settlers only in tracts not exceeding one hundred and sixty acres to each purchaser." This act was amended by said act of March 3, 1879, so as to allow the sale of said land

in tracts not exceeding one hundred and sixty acres for cash to actual settlers, or persons who shall make oath before the register or receiver of the land office at Beatrice (now Lincoln) Nebraska, that they intend to occupy the land for authority to purchase which they make application, and who shall within three months from the date of such application make a permanent settlement upon the same, in tracts not exceeding one hundred and sixty acres to each purchaser.

The price of the land was not to be less than its appraised value, and in no case less than two dollars and fifty cents per acre. There was also a proviso extending the time of payment to "bona fide claimants at present occupying lands under the provisions of the act" of 1876 (*supra*).

By said act of March 3, 1881, the remainder of the reservation was directed to be sold under like provisions and limitations as those contained in said previous acts.

Instructions were issued under said act of 1876 requiring, among other things, "that the applicant must reside upon the land applied for." (2 C. L. L., 1350).

In cases of conflict of claims, the land was also awarded to the prior bona fide settler. *Frazier v. Lowe* (id., 1351).

The lands were not to be offered at public sale, and the evident purpose of Congress was to secure to the Indians a fair price for their lands, not less than two dollars and fifty cents per acre, and as much as their appraised value, and also to limit their sale to actual settlers upon the lands who could each rightfully acquire only one hundred and sixty acres of land upon which they had or should make permanent settlement as required by said acts.

In the case of *J. B. Raymond* (2 L. D., 854-855), the Department very fully considered the pre-emption right secured by law, and defined the same to be "The right, then, to hold the land before payment is made therefor, upon promising to buy the same at a stipulated time, together with the right to purchase at such time is the 'pre-emptive' right", citing *Bowers v. Keesecker* (14 Ia., 307) which defines the pre-emptor's right to be "a right to purchase at a fixed price, in a limited time, in preference to others". In *Myers v. Croft* (13 Wall., 291-295), the court, speaking of the pre-emption act of September 4, 1841, said "The act itself is one of a series of pre-emption laws conferring upon the actual settler upon a quarter section of public land the privilege (enjoyed by no one else) of purchasing it, on complying with certain prescribed conditions." This privilege is given to the purchasers of said Indian lands. By the second section of the act of May 14, 1880 (212 Stat., 140) a preference right of entry is given "in all cases where

any person has contested, paid the land office fees and procured the cancellation of any pre-emption, homestead, or timber culture entry", and it was held in *Fraser v. Ringgold* (3 L. D., 69) that "pre-emption" in said act includes the desert land law. It is also said in said decision (p. 71)

The word pre-emption is one of broad signification, and was in use under State laws and in other statutes before its incorporation into the United States land system. It is held, in general, that claims under the townsite laws are pre-emptions; so of the settlement statutes respecting certain Indian lands; and, broadly, that where a special preference is given to a claimant, dependent or contingent upon the performance of conditions which any one of a qualified class may reasonably fulfill, by which he may hold to the exclusion of others, such preference is a pre-emption, and inures to the individual upon the inception of his claim. Measured by these rules, a desert-land entry is much more clearly within the definition than many others which are so recognized.

See also *Jefferson v. Winter* (5 L. D., 694); *Sears v. Almy* (6 L. D., 1); *Mary Stanton* (7 L. D., 227).

It has also been held by the Department that persons contesting the entries of Indian lands and procuring the cancellation thereof are entitled to the preference right of entry under the provisions of said section of May 14, 1880.

*Bunger v. Dawes* (9 L. D., 329); citing Rule of Practice No. 1 (4 L. D., 37); *Buchanan v. Minton* (2 L. D., 186); also *Jacobs v. Bolinger* decided July 12, 1890, unreported.

The preference right of entry has also been awarded to the successful contestant of a swamp land selection. *Ringsdorf v. The State of Iowa* (4 L. D., 497).

The status of entries of Osage Indian lands has been frequently before the Department, and in the case of *United States v. Johnson* (5 L. D., 442), the purchasers were called pre-emptors, and it was stated that "until all of the preliminary acts required by law have been performed by the preemptor, he has acquired no right as against the government," citing *Frisbie v. Whitney* (9 Wall., 189); *The Yosemite Valley case* (15 Wall., 77).

In the case of *United States et al. v. Atterbery et al.* (8 L. D., 173) it was also held that "an actual settler" as contemplated by the act of May 28, 1880 (21 Stat., 143) is one who goes upon the public land with the intention of making it his home under the settlement laws, and does some act in execution of such intention sufficient to give notice thereof to the public."

See also *Hessong v. Burgan* (9 L. D., 353); *United States v. Atterbery et al.* (on review) (10 L. D., 36); *United States v. Sweeney* (11 L. D., 216); *Dusenberry v. Wall* (12 L. D., 12).

The seventh section of said act of 1891 provides (inter alia) that all entries made under the pre-emption, homestead, desert land, or timber culture laws, in which final proof and payment have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have

been sold or encumbered prior to the first day of March, 1888; and after final entry, to bona fide purchasers for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed, etc.

Aside from the foregoing, which clearly shows that the word preemption as used in said section includes entries made of Indian lands under said acts, the Department has settled the question so far as relates to the entries of Osage Indian lands.

In the case of *Johnson v. Burrow* (12 L. D., 440) involving two cash entries of Osage Indian lands, the Department said:

It is seen that, while either Burrow or Johnson's entry, in the absence of the other might be confirmed under the provisions of the 7th section of the act of March 3, 1891, yet, in each case there is a pending protest against the validity of the other entry.

I am unable to perceive any good reason why the entries of the Otoe and Missouri lands should be placed in any different category than the Osage entries. See also *United States v. Harp et al.* (13 L. D., 58).

It was said by the supreme court in the case of *Heydenfeldt v. Daney Gold, etc. Co.* (93 U. S., p. 634-638)

we are not to look at any single phrase in it, but to its whole scope, in order to arrive at the intention of the makers of it. "It is better always," says Judge Sharswood, to adhere "to a plain common-sense interpretation of the words of a statute, than to apply to them refined and technical rules of grammatical construction." *Gyger's Estate*, 65 Penn. St. 312. If a literal interpretation of any part of it would operate unjustly, or lead to absurd results, or be contrary to the evident meaning of the act taken as a whole, it should be rejected. There is no better way of discovering its true meaning, when expressions in it are rendered ambiguous by their connection with other clauses, than by considering the necessity for it, and the causes which induced its enactment.

Said act of 1891 must be held to be remedial and construed liberally so as to carry out the purpose of the enactment, and advance the remedy contemplated by the legislature. (Endlich on the Interpretation of Statutes, Sec. 108).

There certainly can be no good reason for holding that entries of Indian lands, which have been transferred to bona fide purchasers after the issuance of final certificates prior to March 1, 1888 are not within the spirit of said act. After the issuance of final certificate and upon full payment for the land by the entryman, he is allowed to sell the same, and surely there is as much necessity for the confirmation of such entries as for any other class of preemption entries conceded to be within the letter of the act of March 3, 1891. I, therefore, hold that the entry in question is prima facie within the provisions of said act, and since the applicant had no notice of the decision of the local office upon the testimony taken at the hearing, which clearly disclosed his interest as transferee, the subsequent proceedings must be, and they are hereby declared to be illegal and set aside, and the case is remanded to your office with directions to proceed in accordance with the instructions to Chiefs of Divisions, dated May 8, 1891, (12 L. D., 450).

## PRIVATE CLAIM—SURVEY—JURIDICAL POSSESSION.

## RANCHO BUENA VISTA.

In the location of a grant in which the decree of confirmation adopts the act of juridical possession, the survey is controlled by the record of juridical measurement.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
July 24, 1891.*

The survey made by Deputy Wheeler of the Rancho Buena Vista, in San Diego Co., California, was rejected by this Department, April 5, 1887 (5 L. D., 559), and a new survey thereof ordered. This decision was adhered to after review (6 L. D., 41). The case is again before the Department, on the appeal of the Rancho claimants, from the decision of your office, of June 12, 1890, rejecting the new survey made by Deputy Willey.

The Buena Vista grant was confirmed, May 16, 1854, by the board of land commissioners and by the United States district court, February 1, 1856, but no patent has yet been issued thereon, because there has been no final survey made and approved.

During the thirty-five years that have elapsed since the confirmation, some six or seven surveys have been made, each to be rejected in its turn for substantially the same faults.

When the case was last here the Department, in its two decisions, pointed out so clearly the errors in the Wheeler survey, that it is a matter of unpleasant surprise to find that the views of the Department have been entirely ignored by the deputy making the last survey, who, repeating the errors of the former, returns what is substantially a duplicate of the survey last rejected.

This case has been so often examined and discussed heretofore by your office, has been gone into so fully by this Department in its decisions, that it would be an unwarranted consumption of time to go over the record again in detail and decide anew matters fully considered and already adjudicated; because a subordinate officer, charged with the duty of making the new survey has set up his own judgment against that of the Department. It is sufficient herein to order that the judgment of the Department be executed. An examination of the specification of errors and of the argument of counsel for the claimants shows that the present proceeding is but an indirect effort to obtain a review and reversal of the former decisions in the case. The points are the same as before presented, clothed in somewhat different language; the arguments are but a repetition of what was said before; and a mass of testimony has been taken and filed, tending to prove matters, in relation to which the Department decided it would not consider parole testimony.

Your judgment, rejecting the survey of Deputy Willey, is affirmed, and you will direct the surveyor-general of California to cause a new survey of the Rancho to be made, in accordance with the views of the

Department, and to give such plain, written, instructions to the deputy appointed to do the work in the field as will insure its being properly performed.

The decree confirmed a tract of land, twenty-five hundred varas square—adopting the bounds and the description found in the certificate of the officer who delivered juridical possession to the grantee. That description becomes therefore the controlling part of the decree.

A tract of land, five thousand varas on each side, is a league square, or a square league, containing an area of twenty-five million varas, or 4,438.68 acres. The half of a square league is a tract five thousand varas long and two thousand five hundred in breadth, containing an area of twelve million, five hundred thousand varas, or 2,219.34 acres. (L. O. Rep., 1869, page 406.)

Therefore, the decree of the court, adopting the description of the juridical possession, when it confirmed a tract of land measuring twenty-five hundred varas on each of its four lines, confirmed the one-fourth of a square league, containing an area of six thousand, two hundred and fifty varas, or 1,109.67 acres, constituting a tract "half a league in length and one half in breadth," as petitioned for by the original grantee. The area of the Wheeler survey, heretofore rejected by this Department, was 4,269.60 acres, or 169.08 less than a square league, and the area of Willey's survey, now under consideration, is 4,072.12 acres, or 366.56 less than a square league; and 2,962.45 acres more than the area of the one-fourth of a square league, the amount of land confirmed. This exaggeration of the area of the grant is sought to be justified under the pretense of obeying the calls of the juridical possession, and because of the language of the decree where it is stated, after giving the measurements as above, that the tract contains "in all half of a square league." This error in the decree is as self-evident as though it had been stated that two and two make eight. Conceding that the language used is sufficient to create a doubt or uncertainty as to whether the confirmation was for the one-fourth or the one-half of a square league, it certainly is no justification for magnifying the dimensions of the grant to nearly a square league. But the rule in case of any uncertainty of description is too well settled to admit of discussion. The supreme court has said in a number of cases if there be any doubt or uncertainty as to the description of this class of grants recourse must be had to the juridical measurement, the record of which "must necessarily control the action of the officers of the United States in surveying a claim under a confirmed Mexican grant." *Graham v. United States*, 4 Wall., 259; *United States v. Pico*, 5 ib., 536.

The certificate of the juridical survey is as follows :

As we stood at one of the boundaries of the garden of the Indian Felipe, the line was drawn east and there were measured and counted two thousand five hundred varas, which terminated at the boundary of Don Lorenzo Soto, where the party interested was ordered to place his land mark. From this place the line was drawn in a south course, there were measured and counted two thousand five hundred varas,

which ended at a small peak where stand two rocks joined together. Here the party interested was ordered to place his land mark. From this point the line was drawn, course west, and there were measured and counted two thousand five hundred varas, which ended at a small red hill, where the party interested was ordered to place his land mark. From this point the line was drawn course north; there were measured and counted two thousand five hundred varas which ended upon a hill, where stands a large rock, and the party in interest was ordered to place his land mark. Here the party in interest was informed that he was now in secure and peaceful possession to the end that he might enjoy it freely and unreservedly, the proceeding being considered as ended.

In seeking for the corners described, Willey says that they were found as stated in his survey, and the establishment of these corners caused the amplification of the area of the grant, as reported by him.

The fact that nearly all of the previous surveys established the four corners at different points, which are described, by each deputy, as answering the descriptions of the juridical possession, shows plainly that in that locality there is nothing very remarkable or unusual in the described points. In fact, there is a large amount of testimony in the record tending to the identification of several other points, as the true corners of the juridical survey. In the experimental and private survey of the grant, made by Dexter at the instance of the settlers, who contest the present survey, points similar in character and answering fully the description of the juridical survey are said to be found at each corner of his survey, which only embraces an area of 1,111.01 acres, or approximately the one-fourth of a square league, the amount petitioned for and confirmed.

The area of the survey now ordered must approximate closely to the one-fourth of a square league; the northwest corner thereof and the point of beginning must be established at the northwest corner of the old garden of the Indian Felipe, as ordered by the decree—a point, which the record shows, can be readily ascertained. Thence, the course of the juridical survey must be followed, running to the east; to the south; to the west; thence, in as straight a line as may be, to the place of beginning.

A survey on these lines, and for the approximate quantity, will be approved, and none other.

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#### MINING CLAIM—CHARACTER OF LAND.

##### ROYAL K. PLACER.

In any case, either *ex parte*, or otherwise, where the character of land embraced within a mineral application is placed in issue, it must appear as a fact that mineral can be secured from such land in paying quantities.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
July 24, 1891.*

I have considered the case of Robert Berry and L. V. Bond, protestants, *v.* L. B. H. Brown and Joseph W. Kay, claimants and applicants for the Royal K. Placer claim, survey 2135, Leadville, Colorado.

Application for patent for said claim was filed on November 28, 1883. Notice of the application was published and no adverse claim was filed. The claim embraces 109.5 acres.

On March 2, 1886, said Berry and Bond filed protest against the application alleging that the Royal K. claim is not placer ground, but valuable for lode mining purposes only; that no work has been done on the claim or improvements made on the ground with reference to placer mining purposes or for the purpose of developing the same as such, either in the sum of \$500, or any other sum. Upon this protest a hearing was ordered and had before the local officers.

After consideration of the evidence the receiver held:

I am of the opinion that the area known as the Royal K. placer is more valuable for lode mining than placer purposes, from its proximity to valuable mines, the character of the developments, and the absence of any evidence that establishes the fact that it ever has been worked as a placer, or made to pay as such, or of any probability that it ever can be made to pay, or is at all clear that it is the intention of the claimants to utilize said area as a placer claim, and that patent should not issue.

The register found that said protest had been filed by said Berry and Bond "in the hope of making valid certain lode claims" located by them within the boundaries of the Royal K. placer; that in none of these locations had a discovery of any vein, lode or deposit of metalliferous ore in rock in place been made; but that the locations were based "upon mere holes dug, as they admit, in the wash;" that there has not been discovered within the limits of the placer claim any lead or lode of metalliferous rock upon which a lode location could be legally based and that the territory included within the placer appears from the testimony to be covered to a depth of at least one hundred feet over its entire extent by wash and alluvial deposits, containing gold in greater or less quantities. In conclusion, he held:

Accepting the definition of placers as given by section 2329 of the revised statutes of the United States, which reads as follows: "All claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place, shall be subject to entry and patent under like circumstances and conditions, and upon similar proceedings as are provided for vein or lode claims," I can reach no other conclusion than that the title to the Royal K. Placer is sought to be acquired according to law, and that the ground included within its boundaries is properly placer ground.

He further found that the work required by law had been done upon the ground, and recommended that the entry be allowed.

After an examination of the testimony your office, by letter of March 25, 1889, agreed with the register, "that no veins or lodes have been discovered within the placer claim such as are in section 2319, R. S., declared to be free and open to exploration and purchase;" found that the ground embraced in the placer claim contains no placer mineral deposits that will pay wages to work; that the certificate of the surveyor-general filed with the papers, and showing the improvements to be worth \$500, "enumerates such improvements as six shafts, each ten

feet in depth," but that it appears from the testimony that these six shafts were mere prospecting holes sunk in the wash, "that they were not worth \$500, to make," and could not be considered mining improvements made for the benefit of this claim as a placer mining claim, but like forty others shown to have been sunk on the claim, were evidently prospecting holes sunk with hopes of finding valuable mineral deposits. Your office, accordingly, rejected the mining application and held the same for cancellation on the records.

Applicants appealed.

Protestants offered eleven witnesses. They state that the tract has never been worked as a placer claim; that the formation to a depth of from fifty to one hundred feet below the surface is known as "wash", made up of boulders, gravel, and other loose material; that numerous shafts have been sunk, some of them upwards of one hundred feet in depth, that the dirt on the surface and from the shafts has been panned, but no gold in appreciable quantities has been found. Fred Hoffer says that in panning the dirt he would get a "color" once in a while. A color is defined as "a speck that you can see with the naked eye." These witnesses generally, believe that lodes underlie the wash but this is mere speculation. It appears that a shaft known as the Argo, within the boundaries of the Royal K., was sunk to the depth of seventy-three feet, when a small vein between two distinct walls, was struck. The shaft continued to a depth of 200 feet, but no further mineral has been found. This was the only actual indication of a lode within the placer claim.

Claimants offered six witnesses. These witnesses consider the tract placer. This judgment is not based on any results obtained from working the claim, but on the fact that the ground is "wash"—made up of boulders, gravel and other matter not in place. One witness says "any ground located in a mineral district is placer ground without reference to whether it contains gold or not." Another says it would be placer ground if it did not contain a particle of gold. Several of the witnesses panned the dirt at different places, but found only an occasional "color,"—"nothing like enough to pay." They all state that the claim may be placer notwithstanding it will not pay to work it. They state that gold in such claims can not be obtained in quantities except by sinking shafts to the vicinity of bedrock. Several of these witnesses have sunk deep shafts on this claim, but obtained no gold in appreciable quantities.

Brown, one of the applicants, testifies that the assessment and development work done by him consisted of sinking certain shafts. He expected to find gold at bedrock but found none. He went to a depth of seventy feet.

It thus appears from the testimony of both sides that no gold in appreciable quantities has ever been found in this claim, notwithstanding that numerous shafts have been sunk at various points over the

entire surface, some of them to a great depth. The claim is situated in a mining region, and is surrounded, at various distances, by mines. Numerous persons, through a series of years, have prospected the tract by panning and sinking shafts, and have failed to find gold in appreciable quantities. The tract has never been worked as a placer.

This case has been argued orally and by brief. It is contended that the mining statutes provide that in an *ex parte* case (as this is alleged to be), "land containing gold in *any quantity* is mineral land; and that they contemplate inquiry into the value of the deposit only when the application of the mineral locator conflicts with that of some other locator or claimant."

The patent in this case is sought under section 2325 of the revised statutes, which provides: "A patent for any land claimed and located for valuable deposits may be obtained in the following manner:"

It must be apparent that, for the purpose of issuing patent, there is lodged somewhere the authority and duty to ascertain whether a claim contains "valuable deposits," for no other land can be so acquired. It is equally clear that, for the same purpose, such authority is vested in this Department, charged as it is with the determination of the facts prior to the issuance of patent. Should the question of the character of the land be properly presented at any time before patent, it would manifestly be the duty of the Department to ascertain whether or not the land contain "valuable deposits," in an *ex parte* case, or a contest. The fact that a claim is contested would not change the character of the land to be taken under this law. In any event it must contain "valuable deposits."

In investigating this question the Department may adopt such proper and competent methods as it may deem fit. Among them is the ordering of a hearing upon a protest properly presented. I may say here that none of the cases cited by counsel impair in the slightest degree this ordinary function of the Department. In none of them was the question presented.

The supreme court has not determined what amount of gold will constitute "valuable deposits," and yet it has indicated in *United States v. Iron Silver Mining Company* (128 U. S., 673), that the deposit must be of substantial value. The suit was brought by the United States to cancel two patents for certain placer mining claims, alleging that they had been obtained by false and fraudulent representations. The court says:

It is the policy of the government to favor the development of mines of gold and silver and other metals and every facility is afforded for that purpose; but it exacts a faithful compliance with the conditions required. There must be a discovery of mineral, and a sufficient exploration of the ground to show this fact beyond question.

. . . . . If the land contains gold or other valuable deposits in loose earth, sand or gravel, which can be *secured with profit*, that fact will satisfy the demand of the government as to the character of the land as placer ground.

This view is in line with the repeated rulings of the Department. In *Cutting v. Reininghaus* (7 L. D., 265), it was said:

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.

That case also adopted the view expressed in *California Mining Company v. Rowen* (2 L. D., 719), that to constitute mining land it must be land which it will pay to mine by the usual modes of mining. See also *Peirano v. Pendola* (10 L. D., 536); *Searle Placer* (11 L. D., 441).

From this examination I have concluded that there is no legal necessity for changing the attitude of the Department on this question; and that, when the issue is made in any case, it must appear as a fact that mineral can be secured with profit. This fact of course may be shown, as other facts, by any competent evidence.

The preponderance of the testimony is clearly to the effect that this tract is not mineral land within the rulings of the Department.

The decision appealed from is accordingly affirmed.

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#### TIMBER CULTURE CONTEST—EVIDENCE.

##### CROPPER *v.* HOVERSON.

Evidence tending to show that the entry was made and held for speculative purposes is not admissible under a general charge of non-compliance with law in the matter of cultivation and planting.

Failure to secure the requisite growth of trees does not call for cancellation of the entry if such failure is not due to the negligence of the entryman.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 25, 1891.*

I have considered the case of *William H. Cropper v. Edward Hoverson*, involving the latter's timber culture entry, No. 7553, made January 20, 1881, for the N.½ of the NW.¼ and the W.½ of the NE.¼, Sec. 33, T. 4. S., R. 22 W., Kirwin land district, Kansas, on appeal by Cropper from your office decision of March 6, 1890, dismissing the contest.

The affidavit of contest in this case was filed October 27, 1887, alleging, in effect, that Hoverson had failed to plant and properly cultivate and protect ten acres of the said tract to timber, as required by the timber culture law, and that said section is not naturally devoid of timber.

Notice was served personally on defendant, November 3, 1887, and hearing was held January 10, 1888.

There was no testimony offered in support of the latter charge.

Upon the first charge considerable testimony was taken, which is

mostly devoted to acts performed by the defendant during the years of 1886 and '87.

It is shown beyond question that, as early as the fall of 1885, about ten acres had been broken, which were plowed and sowed to buckwheat in the spring of 1886. In the fall of that year, the crop, being poor, was turned under and the ground marked off, four by four feet, and planted to walnut and locust seeds. During the month of May, 1887, the land was cultivated, and the next month corn was planted between the rows where the seeds had been planted the previous fall. Of the seed planted in 1886, few came up, and at date of contest there was practically no timber growing upon the land.

The contestant sought to show that the land was not properly broken, cultivated and planted, prior to 1886, but the register properly held such testimony to be inadmissible, it being shown that full ten acres had been broken and planted during that year, which was prior to contest.

A contest must fail, if the default charged is cured prior to the initiation of the contest. *Tripp v. Diehl*, 10 L. D., 591.

The testimony of all parties agrees that the land was in good condition at the time of the planting in 1886, but it is contended that the manner in which the corn was planted and cultivated during the summer of 1887 retarded the growth of the seed planted the previous fall, and upon this point much testimony was introduced.

The corn was planted upon a ridge, midway between the timber rows, and after it began to grow the entire tract broken was cultivated.

As to whether such a cause interfered with the growth of the timber, the testimony is conflicting, and, as held by the local officers, "if this proposition was satisfactorily proven, it would show the bad judgment of the defendant, but would not tend to show that he had not honestly and in good faith endeavored to procure a growth of timber on said tract."

The defendant swears that the corn was planted to protect the young timber from the sun and hot winds in summer and to collect the snow to moisten the land in winter, while, on the other hand, it is urged by the contestant, that the planting of seed and corn was but a subterfuge to hold the land until a favorable sale of his relinquishment could be made.

In support of this position, the contestant attempted to show that other contests (which he claims were friendly contests) had been brought against this entry, which, after continuances, were finally dismissed for want of prosecution.

The register refused to allow the introduction of these records, which action I think proper, as, under the affidavit of contest, the sole question to be determined is as to the defendant's compliance with the requirements of the timber culture law in the matter of breaking, cultivation, and planting of timber.

To the date of contest he had failed to secure a growth of timber, but, I think that the weight of the evidence shows that prior to that date the requisite amount of breaking had been done, which was properly cultivated and duly planted to seed, and that its failure was not due to the neglect or wilful act of the defendant.

Failure to secure a growth of trees does not call for the cancellation of the entry, if such failure is not due to the negligence of the entryman. *Frohne v. Sanborn*, 6 L. D., 491; *Tripp v. Diehl*, 10 L. D., 591.

Both your office and the local officers found that the defendant had in good faith attempted to secure a stand of timber upon the land, and I find nothing in the testimony to warrant a reversal of such holding, and therefore affirm your decision dismissing the contest.

#### RESERVOIR LANDS—WITHDRAWAL—PRE-EMPTION FILING.

##### MARY E. LEONARD.

A withdrawal made for reservoir purposes, under the act of October 2, 1888, will be revoked as to the lands that are finally found not to be actually required for the purposes of the reservation.

A pre-emption filing for land included in such reservation, and canceled for conflict therewith, may be re-instated on the revocation of the withdrawal and release of the land embraced in said filing.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 25, 1891.*

I have considered the appeal of Mary E. Leonard from your decision of April 7, 1890 cancelling her pre-emption filing for the W.  $\frac{1}{2}$ , NE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$ , NW.  $\frac{1}{4}$ , Sec. 20, Tp. 9 S., R. 80 W., Leadville, Colorado, land district.

Your judgment cancels said filing because the said tract was reserved for reservoir purposes by Commissioner's letter "E" of October 29, 1889, and you state that said letter was based upon the act of Congress approved October 2, 1888. (25 Stat., 526.)

By act of Congress, March 3, 1891 (26 Stat. at Large, 1095), it was provided:

Sec. 17: That reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the government for the fiscal year ending June 30, 1889 and for other purposes; and amendments thereto shall be restricted to and shall contain only so much land as is actually necessary for construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

On October 11, 1889, the Director of the Geological Survey wrote the Secretary of the Interior, stating in substance that in conformity with the act of Congress of October 1888, reservoir sites had been selected

on the Tennessee and Lake forks of Arkansas River in the State of Colorado, and asking that certain lands, of which a schedule was furnished, be withdrawn from entry and sale. This schedule or list embraced Sec. 20, T. 9 S., R. 80 W., Leadville, land district.

On the 18th of same month, the Secretary directed your office to "instruct the register and receiver at Leadville, in accordance with the act approved October 2, 1888 not to allow further entries or filings on the lands named herein," in pursuance of which your office letter "E", of October 29, 1889, was written, reserving said lands "for reservoir purposes."

On February 27, 1891, the said Director of the Geological Survey transmitted to your office several plats of topographical surveys of reservoir sites, and among them the survey of No. 5, of Colorado, known as "Sugar loaf" reservoir site, and in his letter of transmittal says:

Topographical surveys have been completed covering the lands designated in letters . . . . . October 11, 1889 . . . . . and the lands finally selected have been designated on the herewith transmitted plats and correspondingly numbered schedules, as follows . . . . . "Sugar loaf No. 5".

It appears from an inspection of said plat and schedule that said reservoir site No. 5 "Sugar loaf" includes a part of the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of said section 20, T. 9 S., R. 80, and the whole of said NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  is appropriated to reservoir purposes by said survey. All the remainder of said section is excluded therefrom.

The original withdrawal of October 29, 1889, was made that the Geological Survey might select from the withdrawn lands such tracts as should, upon final selection and survey, be found necessary to reservoir purposes, and this having been found, said withdrawal of lands for said "Sugar loaf" reservoir site has served its purpose and as section 20, excepting the portion stated, is excluded from said survey, and rejected by said Director as unnecessary for the construction and maintenance of said reservoir, the withdrawal of October 29, 1889, of said section, except the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  is hereby revoked, and the remaining portion of the section is opened to settlement and entry. Mary E. Leonard's pre-emption filing was canceled before it was determined whether the land would be necessary for reservoir purposes or not, and it having, upon survey and final selection, been ascertained that it is not necessary, said cancellation will be set aside, and said filing re-instated. Your decision is accordingly reversed.

## SECTION 7, ACT OF MARCH 3, 1891—CONTEST.

BULMAN *v.* MEAGHER.

An order of the General Land Office, made within two years after the issuance of final receipt, requiring a locator of scrip to show his right of possession thereto, is such a proceeding as will except the entry from the confirmatory operation of the proviso to section 7, act of March 3, 1891.

An application to contest an entry during the pendency of government proceedings may be properly rejected.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 25, 1891.*

On August 14, 1883, Thomas Meagher made a homestead entry for the SE.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  Sec. 21, SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$ , Sec. 22, NW.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  Sec. 27 and NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  Sec. 28, T. 63 N., R. 23 W., Duluth, Minnesota.

On the 16th day of July, 1884, he commuted the same with supreme court scrip, certificate of location M No. 34, sub-division No. 1, issued by your office on August 2, 1879, in part satisfaction of the claim of the cities of Baltimore and New Orleans under a decree of the supreme court of the United States.

On October 13, 1884, your office in a letter addressed to the register and receiver at Duluth stated :

From James Austin, the assignee of the said confirmees, it is found that the scrip was assigned to some person unknown and the name was erased and that of Thomas Meagher substituted. You will please require Mr. Meagher to show by affidavit how he came in possession of said scrip and to account for the erasure in the body of said assignment, upon the receipt of which you will transmit the same to this office.

On March 11, 1891, William Bulman applied to your office, through the local office at Duluth, to contest the entry of Meagher. His affidavit is sworn to and corroborated and alleges substantially that Meagher never built a house or caused one to be built on said land, that he never established an actual residence thereon, etc.

On March 26, 1891, your office considering this application to contest, said :

The affidavit of contest was not filed until March 11, 1891, and in view of the provisions of the seventh section of the act of Congress of March 3, 1891, claimant is entitled to patent for his land. A hearing is accordingly denied and you will advise him hereof and that no appeal from this decision to the Hon. Secretary will be allowed.

Notice of this decision was served on Bulman on April 7, 1891, and on April 22, following, he filed this application asking that your office be directed to certify all of the proceedings up to this Department for its examination, and that a hearing on his affidavit of contest be ordered.

It is nowhere stated in this application nor in your letter rejecting applicant's offer to contest the entry in question, that the tract had been

sold or mortgaged by Meagher after final entry. It is therefore apparent that your office in refusing to entertain the contest of Bulman, considered that inasmuch as the final certificate in question had been held by Meagher for more than two years, his entry was confirmed by the proviso to section seven of the act of March 3, 1891 (26 Stat., 1095). There is nothing in the application to contest nor in your office decision rejecting it, to show that this entry is confirmed by the act cited.

In the letter of instructions dated July 1, 1891 (13 L. D., 1), it is held that "any action, order or judgment had or made in your office, cancelling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry and without which the entry would necessarily be canceled," will be sufficient, if within two years from the date of the final receipt, to take such case out of the operation of the statute, and such case will proceed to final judgment as if the act of March 3, 1891, *supra* had not been passed.

In view of the above, I am of the opinion that the decision of your office of October 13, 1884, requiring the entryman to furnish additional evidence, was such a proceeding on the part of the government instituted within two years from the date of the execution of the final certificate, as will prevent the confirmation of the entry under the act cited.

There is, however, nothing shown in this application to indicate that the proceeding instituted by the government in 1884, against this entry requiring additional proof has been concluded, and so far as the record discloses, said proceeding is still pending. As no rights can be acquired under an affidavit of contest filed during the pendency of proceedings against the entry by the government, the said application was properly rejected. *Dean v. Peterson* (11 L. D., 102); *Canning v. Fail* (10 L. D., 657); *Louis v. Taylor* (11 L. D., 193).

The application is accordingly denied.

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PRE-EMPTION ENTRY—SECTION 2260, R. S.

DAVID T. PETTY.

Under the first clause of section 2260, R. S., one who owns three hundred and twenty acres of land is not entitled to the right of pre-emption, and such inhibition extends to ownership under an equitable title.

The disqualification imposed by the second clause of said section includes removal from land held under equitable title.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 27, 1891.*

I have considered the appeal of David T. Petty from the decision of your office dated May 6, 1890, rejecting his application to enter under the pre-emption law the SE.  $\frac{1}{4}$  Sec. 15, T. 16 S., R. 23 W., Wa-Keeney, Kansas.

September 27, 1878, Petty made homestead entry for the SW.  $\frac{1}{4}$ , Sec. 15 of said town and range, for which he made final proof and final certificate issued thereon September 30, 1886.

On July 16, 1887, said party filed a declaratory statement for the first mentioned tract, alleging settlement July 14, two days previous to filing, and on March 15, 1890, he made proof showing residence since August 10, 1887.

Subsequently Petty filed affidavit with the local officers setting forth that on September 19, 1885, he contracted to purchase the NE.  $\frac{1}{4}$  of Sec. 16, said town and range, from the State as school land and that shortly after making proof on his homestead (September 30, 1886), he moved upon said school land tract, and thence on August 10, 1887, moved to his pre-emption claim.

The district officers rejected the application of Petty on the ground that he was not a qualified pre-emptor under Sec. 2260, Revised Statutes, in that he was the owner of three hundred and twenty acres of land, and moved from land of his own to reside upon that claimed by him as his pre-emption.

April 16, 1890, Petty appealed and on May 6, 1890, your office sustained the judgment of the local officers.

Petty again appeals, alleging that he did not move from his own land; that the title thereto still remains in the State of Kansas, and that when he left his homestead he had no intention of making a pre-emption and did not leave his home for that purpose. Furthermore, he claims that he is merely holding the land as a trustee for the State.

Section 2260, Revised Statutes, provides:

First, No person who is the proprietor of three hundred and twenty acres of land in any State or Territory. Second, No person who quits or abandons his residence on his own land to reside on the public lands in the same State or Territory shall acquire any right of pre-emption under section 2259 Revised Statutes unless otherwise specially provided by law.

In the case under consideration it appears that the appellant at the date of making said pre-emption application, was the owner of the SW.  $\frac{1}{4}$ , Sec. 15, containing one hundred and sixty acres, which he had acquired under the homestead law; also that he had entered into a contract with the State to purchase the NE.  $\frac{1}{4}$  of Sec. 16, school land, containing one hundred and sixty acres, making a total of three hundred and twenty acres.

The question presented in this case, therefore, is whether the contract referred to is of such a character as to inhibit the appellant from the benefits of the pre-emption law. It appears that the party had only partly paid for the land and had not received from the State a legal title therefor. It was from this tract that the appellant removed when he made settlement on his pre-emption. The fact that the appellant had not made full payment for this tract before settlement on his pre-emption and had not received a patent for the same from the State

will not in my opinion, exempt him from the inhibition of the statute as above quoted. In the case of *Ole K. Bergan* (7 L. D., 472) as also *Ware v. Bishop* (2 L. D., 616), it was held that where a party purchased land, although no deed passed, he is the owner of such land and can not become a pre-emptor. Furthermore, it is held that the inhibition in said section against persons who remove from or abandon their residence on their own land, is not restricted to those who hold legal title to said abandoned land, but also extends to those who hold the equitable title. *Frank H. Sellmeyer* (6 L. D., 792); *Nancy M. Maze* (10 L. D., 208); *George F. Hermann* (*ibid.*, 326).

Therefore, in the case under consideration, Petty owned the land that he acquired under the homestead and also held an equitable title to the land he had contracted to purchase (the legal title still being in the State) aggregating three hundred and twenty acres of land, and it is shown that he removed from the purchased tract to establish a settlement on the government lands, consequently, it follows that the appellant was not qualified to make a pre-emption entry for the tract involved, therefore his proof has been properly rejected and your office decision is accordingly, affirmed.

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RAILROAD GRANT—PRE-EMPTION FILING—INDEMNITY.

*JOHNSRUD v. NORTHERN PACIFIC R. R. CO. ET AL.*

Land covered by a prima facie valid pre-emption filing is not affected by a withdrawal for indemnity purposes, nor subject to the operation of a grant on definite location.

The right to select a particular tract as indemnity can not be recognized, if the loss for which indemnity is claimed is not specifically designated.

*Acting Secretary Chandler to the Commissioner of the Land Office,*  
July 28, 1891.

This record presents the separate appeals of the Northern Pacific Railroad and the St. Paul, Minneapolis and Manitoba Railway Companies from your office decision of October 26, 1885, in the case of *Arne G. Johnsrud v. said companies*, rejecting their respective claims to land within the indemnity limits of the grant to the former and the primary limits of the grant to the latter, particularly described as the S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 27, T. 133 N., R. 42 W., Fergus Falls, Minnesota.

It appears that *Ole J. Sorbun* filed pre-emption declaratory statement for said land, August 26, alleging settlement August 1, 1871; that the right of the St. Paul, Minneapolis and Manitoba Railway company under its grant attached by definite location December 19, 1871; that the tract was embraced in the indemnity withdrawal for the Northern Pacific Railroad company, ordered December 26, 1871, and received at the local office January 10, 1872; that May 3, 1883, *Johns-*

rud made homestead entry for the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section; that August 2, 1883, the Northern Pacific Railroad company applied to select the tract in question; that such application being rejected, said company appealed; that December 29, 1883, it again applied to select the same; that this application being rejected, the company again appealed; that March 10, 1884, Johnsrud applied to amend his homestead entry so as to include with the "forty" covered thereby, the "eighty" involved herein; that in support of such application he filed the affidavits of himself and one Johnson to the effect that he (Johnsrud) was poor, ignorant and unacquainted with the English language; that—

in the fall of 1880, he commenced to make improvements on the S.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  Sec. 27, T. 133 of R. 42 (the tract involved); he built a house on the place and moved his family on it and lived there until he took his homestead in May, 1883;

that on or about May 3, 1883, he applied at the local office to enter the three forties described in his application to amend; that he was wrongfully informed by the register that the "eighty" in question being railroad land he could not make such entry, and that relying upon such information, he made entry as aforesaid; that July 3, 1884, the St. Paul, Minneapolis and Manitoba Railway Company, applied to list the land in controversy, and that said application being rejected said company appealed.

By its said decision, your office rejected the said applications of both companies, and allowed in the event of its judgment becoming final, Johnsrud's said application to amend.

At the date of the indemnity withdrawal for the Northern Pacific Railroad company and at the time when the rights of the St. Paul Minneapolis and Manitoba Railway company attached, the Sorbun filing being of record, unexpired and *prima facie* valid, served to except the land from the said withdrawal and the said grant. Northern Pacific R. R. Co. *v.* Stovenour (10 L. D., 645); Malone *v.* Union Pacific Railway Co. (7 L. D., 13).

The tract being unaffected by the grant for the St Paul, Minneapolis and Manitoba Railway company, it became, notwithstanding its location within the primary limits thereof, subject to *proper* selection by the Northern Pacific Railroad company (Northern Pacific Railroad Co. *v.* Moling, 11 L. D., 138), unless the right of that company to so select was inferior to the settlement rights of Johnsrud.

It appears, however, that the said applications by the Northern Pacific Railroad company to select the tract, were as I am advised by your office, not accompanied by any specific designation of corresponding loss to its grant. The tract being unprotected by withdrawal, the case is in all material respects similar to that of the Northern Pacific Railroad Co. *et al.* *v.* John O. Miller (11 L. D., 1 and 428). In its decision in that case, adhered to on review, this Department held that the right to select a particular tract as indemnity, can not be recognized if the loss.

for which indemnity is claimed, is not specifically designated and (on review) that the rights of settlers can only be ascertained and protected by the enforcement of this rule.

The applications by the Northern Pacific Railroad company to select the land being rejected, it will be unnecessary to determine whether or not at the dates of said applications the rights of said company were greater or less than those of Johnsrud.

The land being, as heretofore shown, excepted from the grant to the St. Paul, Minneapolis and Manitoba Railway company, and the Northern Pacific Railroad company having failed to establish its right to the same as indemnity, I must find that the applications hereinbefore referred to by the appellant companies have been properly denied. The action of your office in rejecting the claims of said companies to the land in question, is accordingly affirmed.

This disposition of the case renders it unnecessary for me to discuss the action of your office in allowing Johnsrud's said application to amend.

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OKLAHOMA LANDS—HOMESTEAD COMMUTATION—TOWNSITE.

ORLANDO TOWNSITE *v.* HYSELL ET. AL.

The commutation of an entry under section 21, act of May 2, 1890, cannot be allowed where it is apparent that the land covered thereby is intended for townsite purposes and not for agricultural use.

Under section 22, of said act a homestead entryman may purchase for townsite purposes such legal sub-divisions of his entry as may be required therefor, and perfect title to the remainder under the homestead laws on showing due compliance therewith.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 28, 1891.*

I have considered the case of the townsite of Orlando *v.* Warren H. Hysell and Charles W. Ransom, involving the SE.  $\frac{1}{4}$  of Sec. 2, T. 19 N., R. 2 W., Guthrie, Oklahoma.

It is not necessary to repeat in detail all the facts recited by you. In brief the facts are:

Warren H. Hysell on June 4, 1889, made homestead entry for the SE.  $\frac{1}{4}$  of Sec. 2, T. 19 N., R. 2 W. On June 18, 1889, T. W. Boles, acting as mayor, presented an application for the townsite of Orlando, covering the E.  $\frac{1}{2}$  of said SE.  $\frac{1}{4}$ , stating that the land sought was used for trade and business.

On July 5, 1889, James M. Kuykendall, acting as mayor, presented the application for the townsite of Cherokee City, covering the whole of said SE.  $\frac{1}{4}$ , alleging that the tract was used for the purposes of trade and business, and that the occupants thereof had effected a town organization. On the receipt of these applications your office, by letter of April 24, 1890, decided that the mere statements of these appli-

cants would not warrant the order for a hearing, but that, if within thirty days the townsite companies would file sworn statements of facts of a character to show that said land, or any portion thereof, was selected as the site of a town or actually settled upon or occupied for purposes of trade and business, and not subject to disposal under the homestead law, at the time Hysell's entry was made, a hearing would be ordered, but that if such evidence was not furnished, the townsite applications would be rejected.

On receipt of this letter, the attorneys for the townsite notified your office that "no proof existed that the tract of land in question, to wit, the SE.  $\frac{1}{4}$  of Sec. 2, T. 19 N., 2 W., was occupied or selected as a townsite by any one prior to the date of Hysell's pretended homestead entry," and no further action was taken in the premises. The townsite applicants having thus failed to present any evidence in support of their claims, and in substance admitted that said claims are subordinate to that of Hysell, the applications filed by them were properly rejected.

On October 10, 1890, Hysell submitted evidence in support of his application for a patent under section 21 of the act approved May 2, 1890 (26 Stat., 81). The evidence submitted shows a residence on the land from October 9, 1889, to date of proof—one year, ten acres broken and improvements to the value of \$150.

In reply to the question, Is said tract within the limits of an incorporate town or selected site of a city or town, or used in any way for trade or business?" Hysell and his witnesses testified as follows:

Said tract is within the limits of what is known as the town of Orlando. It is not incorporated. There are about seventy-five people, men women and children in said town, said tract was first occupied by townsite settlers about the 20th day of June, 1889. No part of said tract was occupied as a townsite or by townsite settlers until nearly two weeks after said tract had been entered by claimant Hysell. The usual business and trade for a village of seventy-five people is carried on on said tract. There are also a number of business houses and residences to accommodate said people.

At the time of submitting final proof a protest was filed by Charles W. Ransom, alleging that the tract was occupied for trade and business and that the final entry was not sought for agricultural purposes, but was sought for the purpose of a townsite. After the testimony was submitted the local officers dismissed the protest and your office sustained their action. Ransom has appealed.

After a full consideration of the case you rejected the commutation proof of Hysell, but allowed him to make application and payment for the land for townsite purposes, under section twenty-two of the act of May 2, 1890, before cited. He has appealed from this ruling.

The section under which Hysell made his application to commute, reads:

Sec. 21. That any person, entitled by law to take a homestead in said Territory of Oklahoma, who has already located and filed upon, or shall hereafter locate and file

upon, a homestead within the limits described in the President's proclamation of April first, eighteen hundred and eighty-nine, and under and in pursuance of the laws applicable to the settlement of the lands opened for settlement by such proclamation, and who has complied with all the laws relating to such homestead settlement, may receive a patent therefor at the expiration of twelve months from date of locating upon said homestead upon payment to the United States of one dollar and twenty-five cents per acre for land embraced in such homestead.

That is in effect an embodiment of section 2301, Revised Statutes, as to commutation of a homestead, also of the act of March 3, 1891, on the same subject, except that it substitutes twelve months' residence instead of six, as provided in section 2301, and fourteen months, as provided in the act of March 3, 1891. In order, however, to be entitled to make such entry, and to receive a patent therefor, the land must be used for agricultural purposes and a compliance with the requirements of the homestead law for that character of entry must be shown, the language of the section is too clear to admit of any other construction; it says "and who has complied with all the laws relating to such homestead settlement;" that is, settlement under and in pursuance of the laws applicable to the settlement of the lands opened for settlement by the President's proclamation; the lands thus opened were those described in the act of March 2, 1889, which were expressly declared to be subject to disposal only under the homestead laws.

It can not be fairly claimed, as I view it, that Congress intended that a homestead claimant who desired to convert his farm into town lots should acquire title thereto under section 21. If such a construction is adopted, section 22 is practically a dead letter under the existing order of things. I cannot give this statute a meaning which will defeat the ends sought to be attained, of requiring of the townsite homesteader the ten dollars per acre provided for in the act.

There is considerable evidence in the record which goes far to force the conviction upon my mind that the homestead entry made by Hysell was made for speculative purposes, in other words, for the purpose of founding a town, but it is not of that convincing character that should be required to justify a forfeiture.

Abundant opportunity has been allowed the townsite settlers to seek a hearing on this point, by means of a contest, as well as at the time final proof was submitted, but they have failed to avail themselves of that opportunity and I do not feel that an order for a further hearing is warranted in the premises.

The question left for consideration is this: Is Hysell seeking to make a *bona fide* final entry for agricultural purposes, as contemplated by the provisions of the homestead law, or is he seeking to make a final entry under the provisions of that law for townsite purposes?

The very foundation of a final commuted cash entry is good faith. This principle is so well established that the statement requires neither the support of an argument, nor the citation of authorities.

Hysell claims that he is acting in good faith. His counsel argue

that he was not responsible for the settlement of those who are occupying the land as townsite settlers—that they went there in opposition to his wishes, and that their presence should not prevent him from perfecting his entry as a homestead claimant.

He made entry June 4, 1889. At the hearing he was asked,

When did you first hear of the project to locate a town on the tract embraced in your homestead? Ans. June 6, 1889. Ques. Where were you from June 6, until October 9, 1889? Ans. I was in Guthrie all the time except one day from June 6, to 21st, then I went to Illinois, stayed there until October 5, then come back to Guthrie—arrived here October 8, and went to my claim October 9, 1889.

Ques. When did you first meet T. W. Boise and W. B. Russell? Ans. The first time I saw Russell was April 22, 1889, first time I saw Boise was May 16, 1889.

Ques. When did you first learn that Boise and Russell or others, proposed to locate a town near the present site of Orlando?

Ans. About June 18, 1889, Mr. Huff told me that they were going to start a town on my claim.

Ques. Hadn't you and Russell, Boise and Huff been camping or living together during a part or all of the time after April 22, 1889, and up to about June 21, 1889?

Ans. No sir; I had stopped with Huff up till about the 6th of June 1889, have never camped with Russell or Boise.

Ques. Were you present in Judge Robertson's tent at the organization of the Orlando Townsite Company about the middle of June, 1889, or were you consulted or advised with about the action then taken in any way?

Ans. I was not present at any organization or meeting that they ever had; about that time Mr. Boise came to me and asked me if I wouldn't relinquish a part of the land for the benefit of a town, I told him I wanted no town on my land and would not relinquish any part for any purpose.

Ques. When did you first learn that Mr. Huff was surveying or was intending to survey a townsite on your homestead?

Ans. The first I knew of it was about June 18, when he told me that they were going to start a town there.

Ques. When did you first take steps to notify the public to keep off of your homestead and what were those steps?

Ans. The first step was to notify Mr. Huff not to have anything to do with it; that I had taken it for a homestead. I notified all parties in business there the 9th or 10th of October, 1889, that I had taken it for a homestead and did not want them to interfere with my rights.

We thus find that with a knowledge that his claim was to be occupied as a townsite, Hysell was careful to absent himself from the vicinity of the land until after settlement was made, and then went to Illinois where he remained for months, or until the townsite occupants were established in their homes, and had occupied their places of business. Mr. Huff, to whom reference is made, was Hysell's intimate friend, with whom he had lived in Guthrie since the eventful April 22, 1889, up to the time of his homestead entry, and Huff had made an entry on an adjoining tract of land.

Both had operated in town lots in Guthrie and had remained there since the opening of the territory, seeking tracts upon which to establish a home, they were together when they selected the tracts and said tracts were pointed out to them by their friend Boise, yet we find, according to his statement, that as soon as his entry was made, these

two friends, Huff and Boise, conspired to organize a townsite on the land their companion had entered for his home, and he, after protesting against such a use of his home in a manner, the solemnity and earnestness of which may be well imagined, instead of placing himself in a position where he could warn the people against occupying his land, and thus protecting his rights, hastened to a distant State, where it is safe to assume he was free from the din and confusion incident to the building of an Oklahoma town, and we hear no more of the "warning of people" until after his return, long after said town had been fully established, yet we find that his friend Huff was his witness in support of his final proof, and his other friend Boise, was named as a witness to prove his compliance with the requirements of the homestead law.

No argument can make clearer the weakness, not to say the absurdity of the proposition that this tract of land was occupied by townsite settlers in opposition to the will and desire of Hysell. The facts are stronger than any argument and can not be overlooked, and this Department can not be made a party to a transaction, the object of which is to obtain title under one law, to land which is to be used for a purpose not contemplated in that act, and in order that an entryman may have no excuse to attempt such a course, legislation has provided a way in which to obtain title to land upon which homestead entry had been made, but which is required for townsite purposes. The events attending the settlement of lands in Oklahoma are unprecedented in the history of the country, and as the results of such settlement became known, additional legislation was enacted to meet the changed condition of affairs. Thus tracts of land that were entered one day under the homestead law, were required the next day, or very soon after, for townsite purposes, in a country into which thousands of people had entered within a brief period of time, and in order that title might be perfected and necessary towns established, on a firm basis, Congress on May 2, 1890, enacted,—second proviso, section twenty-two:

That in case any lands in said Territory of Oklahoma, which may be occupied and filed upon as a homestead, under the provisions of law applicable to said Territory, by a person who is entitled to perfect his title thereto under such laws, are required for townsite purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for town-site purposes. He shall file with the application a plat of such proposed town-site, and if such plat shall be approved by the Secretary of the Interior, he shall issue a patent to such person for land embraced in said town-site, upon the payment of the sum of ten dollars per acre for all the lands embraced in such town-site, except the lands to be donated and maintained for public purposes as provided in this section. And the sums so received by the Secretary of the Interior shall be paid over to the proper authorities of the municipalities when organized, to be used by them for school purposes only.

It will be observed that under the provisions of this section no proof of compliance with the laws relating to homestead settlement is required,

as provided by section twenty-one of the act in question; but the party seeking title must be one "who is entitled to perfect his title thereto under such laws," in other words, he must have been qualified to homestead entry, and qualified to perfect title under that law, and if, possessing these qualifications, section twenty-two permits him to make application for the land and to receive a patent for the same, not as a homestead, but as for land to be used for townsite purpose, the money paid for the land does not go into the treasury of the United States, as provided in section twenty-one, but it is to be used solely for the benefit of the inhabitants of the town for school purposes. Had it been the intention of Congress to allow one who, like Hysell, had practically by his action, if not by express permission, allowed his claim to be occupied for townsite purposes, to make final proof for the same under section twenty-one of the act in question, it is not reasonable to assume that Congress would have enacted section twenty-two of said act, for the reason that the latter section would practically be a nullity, as no one who could make final proof under the 21st section for a townsite, would pay the increased price required by the twenty second section, and the latter section would only apply to those who should elect to pay for the land at ten dollars per acre rather than to reside thereon for one year. I can not think that Congress intended to pass an act of this limited application, but rather, that recognizing the sudden changes which had taken place within a year in the settlement of the Territory of Oklahoma, it provided a means of perfecting title to lands occupied as townsites without doing violence to the long established principles of the homestead law, and thus emphasizing the distinction which is to be recognized between the laws under which title may be obtained to lands to be used for homestead purposes, and those laws under which title may be obtained to lands which are to be used for townsite purposes. Believing this to be the correct interpretation of the act, I approve your action rejecting the commutation proof of Hysell. You also held that he must embrace the entire quarter in his townsite application, or relinquish the portion not thus applied for. I can see no reason, however, why he should be required to embrace in his townsite application more land than the legal subdivision used for townsite purposes, or why he may not perfect title to the balance, by showing compliance with the laws relating to homestead settlement. The act clearly seems to indicate that this may be done, as it provides that application may be made for any part of the homestead for townsite purposes.

Your decision, modified as above indicated, is affirmed.

Should Hysell refuse to thus avail himself of the provisions of the law, and the proper officers make application to enter the land as a townsite, alleging an illegal and speculative homestead entry, or a practical abandonment of the land, as contemplated by the homestead act, the case will be determined upon its merits.

## CONTEST—PROCEEDINGS BY THE GOVERNMENT—CONTESTANT.

FARRELL *v.* McDONNELL.

An application to contest an entry, filed pending proceedings against the same by the government, should be received and held subject to the result of said proceedings; and if said proceedings fail, the contestant is then entitled to proceed against said entry as of the date when his application was filed.

A supplemental affidavit of contest does not constitute an abandonment of the prior charge, or waive rights secured thereunder.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 29, 1891.*

I have considered the case of Barney Farrell *v.* Michael McDonnell, upon the appeal of the former, from your decision denying his application to contest the homestead entry of the latter for the E.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 8, T. 1 N., R. 2 E., Bozeman land district, Montana, except as to his non-compliance with the law since February 20, 1889.

Defendant made his entry on the 19th of March, 1883, alleging settlement in March, 1877, and made his final proof December 24, 1885. A special agent of the government investigated the case and made a report on the 24th of July, 1886, upon which his entry was held for cancellation, as fraudulent. While the investigation by the special agent was being made, Farrell filed an application to contest the defendant's entry, and you directed the local officers to advise him "that said case is in the hands of a special agent of this office for investigation, and that his application to contest cannot now be granted."

On the application of McDonnell, a hearing was ordered upon the report of the special agent, at the conclusion of which the register and receiver decided that the allegations of the government were sustained, and held the entry for cancellation. Upon appeal, that judgment was affirmed by your office, on the first of December, 1888. McDonnell did not appeal from your decision, but petitioned that it be so modified as to allow him to use the unexpired lifetime of his entry within which to comply with the law. This petition was granted by your office, on the 20th of February, 1889.

On the 15th of March of the same year, the local officers transmitted to your office an additional application by Farrell to contest the entry, and his attorney was informed that your decision of the 20th of February was not intended to abridge or prohibit the right of parties to contest said entry under the Rules of Practice. On the 23d of November, the local officers transmitted to your office a third application by Farrell to contest the entry, which contained in addition to the statements of his former applications, allegations that the claimant had made no effort to comply with the law since your decision of February 20, 1889.

On the 16th of January, 1890, you rendered a decision holding that

Farrell's application of November 23, 1889 was, in effect, a waiver of his rights under his two preceding applications, and limited his contest (at the hearing which you directed) to the question of the claimant's non-compliance with the law since February 20, 1889, stating that your decision of that date effectually disposed of the question of McDonnell's compliance with the law previous thereto.

On an application on the part of Farrell, for a review of said decision, you denied his motion, on the 8th of March, 1890, and the case came before me upon appeal from your judgment.

Owing to your decision of February 20, 1889, the entry of McDonnell was not canceled, as a result of the proceedings on the part of the government. Farrell's application to contest was properly suspended during the pendency of those proceedings, and had they resulted in the cancellation of the entry, his contest would also have ended then and there. The rule in regard to such contests is laid down in the case of *the United States v. Scott Rhea* (8 L. D., 578) as follows:

An application to contest an entry filed pending proceedings against the same by the government, should be received and held subject to the final determination of such proceedings, and if such proceedings fail the contestant is entitled to proceed against the entry, his right taking effect by relation as the date when the contest was filed.

To the same effect was the decision in the case of *Conly v. Price* (9 L. D., 490), where it was said that—

an application to contest an entry filed pending government proceedings against said entry, in the absence of some good reason for suspending such proceedings in favor of said applicant, should be received and held subject to the final determination of said proceedings.

The proceedings on the part of the government being in the nature of a contest, Farrell's became a second contest, and the case of *Eddy v. England* (6 L. D., 530) states the rule governing such cases, as follows:

An affidavit of contest, filed pending the disposition of a prior contest, should be received and held without further action, until final disposition of the prior suit; but the right of the second contestant will be held to take effect by relation as of the date when his contest affidavit was filed. The right of a second contestant cannot be defeated by curing the default charged, after his contest is filed.

As to the right of the entryman to cure his previous defaults, after the initiation of contest, the case of *Waldroff v. Bottomly* (10 L. D., 133) held:

If the status of an entry at the initiation of contest calls for cancellation, acts performed thereafter by the entryman will not relieve him from the consequences of his previous non-compliance with law.

To the same effect was the decision in *Davis v. Bott* (11 L. D., 423) which held that—

Acts in compliance with law performed after the initiation of contest, and induced thereby, will not relieve the entryman from the effect of a default existing at date of contest.

By the failure of the government proceedings to result in the cancellation of the entry, the rights of Farrell took effect as of the date of the filing of his affidavit of contest. Had his rights not intervened prior to the 20th of February, 1889, when you granted McDonnell further time within which to comply with the law, and to submit additional proof of the same, there would have been no one to question your right to grant that privilege. His rights having attached, however, the granting of that privilege tended to defeat them, and, according to the decisions cited, was unauthorized.

The only other question in the case is as to what effect the application of Farrell to contest, made on the 23d of November, 1889, had upon his two prior applications. In your decision, it is said:

The application of November 23, 1889, is in effect a waiver by the contestant of all rights under the two preceding applications.

In *Warthen v. Vance et al.* (11 L. D., 407) it was held that "A supplemental affidavit of contest does not constitute an abandonment of the prior charge, or waive rights secured under a hearing subsequently had thereon;" and in *Davis v. Bott*, page 423 of the same volume, it was held that—

The amendment of an affidavit of contest, by adding thereto an additional charge, does not preclude the contestant from showing a default originally charged.

After fully considering the case, I conclude that at the hearing ordered by your office letter of January 16, 1890, Farrell should not be restricted in his proof to "the question of claimant's non-compliance with the law since February 20, 1889," but that he should be allowed to make his contest, and present his proof, under his original and supplemental affidavits.

The decision appealed from is modified accordingly.

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#### TIMBER CULTURE CONTEST—SUFFICIENCY OF CHARGE.

##### LOVE *v.* HILLMAN.

A general charge of abandonment, unaccompanied by a specific allegation of non-compliance with law, will not warrant a hearing against a timber culture entry

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 29, 1891.*

H. K. Love has appealed from your decision of January 8, 1890, rejecting his application to contest William C. Hillman's timber culture entry for the SE.  $\frac{1}{4}$  of Sec. 27, T. 102, R. 61, Mitchell land district, South Dakota.

The reason assigned for such rejection was, that—

the allegations mentioned are not sufficient upon which to base grounds for contest, no failure to comply with the law being alleged.

The allegation of the contest affidavit is as follows :

Said William C. Hillman has personally and utterly abandoned said tract, and removed his family therefrom, and does not intend, as affiant has every reason to believe, to return thereto, or to further comply with the requirements of the timber-culture act.

The charge that the entryman "has personally and utterly abandoned said tract," standing alone, would be ambiguous, and suggestive of the idea that the contestant probably supposed personal residence upon a timber-culture entry to be necessary. The further statement that he has "removed his family therefrom" would confirm this supposition. If the entryman had failed to "break," or to "plant," or to "cultivate," as the law demands, it is to be presumed that the contestant would so state—especially in view of your suggestion that he would be afforded "an opportunity to amend his application so as to embrace, in specific expression, in what manner Hillman has failed to comply with the timber-culture law."

The statement as to what the contestant believes the entryman intends to do in future is entirely irrelevant.

I concur in your conclusion that the contestant's allegation is not sufficiently direct and definite to warrant your office in ordering an expensive, troublesome, and vexatious contest. Your decision is affirmed.

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PRE-EMPTION ENTRY—MINERAL LAND—ACT OF MARCH 3, 1891.  
SECTION 7.

HARNISH v. WALLACE.

In order to defeat a pre-emption entry, on the ground of the mineral character of the land, it must be shown that the mineral was known to exist at date of entry. The confirmatory provisions of section 7, act of March 3, 1891, for the benefit of a transferee who acquires title prior to March 1, 1888, are not dependent upon the entryman's compliance with law in the matter of residence and improvement.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 30, 1891.*

On January 29, 1885, William Wallace made pre-emption entry No. 260, for the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 17, T. 4 N., R. 11 E., Sacramento, California.

December 13, 1889, the register and receiver at Sacramento forwarded to your office the petition of J. C. Harnish, asking for a hearing to determine the character of the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of said section, which tract was embraced in the said entry of Wallace, he claiming that said forty acres are mineral in character, and not subject to entry as agricultural land. He also, in the same petition, alleges that Wallace did not comply with the pre-emption law as to residence and improvements.

Some time subsequent to December 13, 1889, and prior to February 28, 1890 (the exact date not appearing), Miss Francis Pearson Thomas, through her attorneys, Carter and Smith, requested you to make an order requiring "the petition and all papers," filed or hereafter to be filed, to be served upon them as such attorneys, and that action on the petition of Harnish be suspended, until such service has been made.

In such petition they allege that Miss Thomas is the owner, by purchase, of the land embraced in Wallace's entry.

By your office letter of February 28, 1890, you refused to grant their request, for non-compliance with Rule 102 of Practice, which provides that:

No person not a party to the record shall intervene in a case without first disclosing on oath the nature of his interest.

In said letter, you also held that—

the petition of Harnish (is) sufficient to warrant this office in investigating the entry as to the character of the land alleged to be mineral,

and directed the local officers to order a hearing for that purpose.

Thomas has appealed from this action of your office, and accompanies her appeal with affidavits showing that she became the purchaser of said land September 19, 1887, under a mortgage foreclosure, and asks that this Department shall exercise its supervisory power, set aside the order for a hearing, and direct a patent to issue to Wallace for the land embraced in his entry.

The petition of Harnish, in so far as it relates to the mineral character of the land, is not sufficient to authorize a hearing thereon, because of its failure to allege that at the time of Wallace's entry there were situated any "known salines or mines" on the land. On the contrary, his petition clearly shows that the alleged mineral character of the land was first discovered in the month of May, 1889, while the entry of Wallace was made and certificate issued in January, 1885, four years previous to the alleged discovery of mineral.

In order to defeat the entry, on the ground of mineral character of the land, it must be shown that mineral was known to exist at the time of the entry, and a discovery of mineral made, as in this case, more than four years after the allowance of the entry, will not warrant its cancellation. *Nicholas Abercrombie*, 6 L. D., 393; *Abraham L. Miner*, 9 L. D., 408; *Thomas J. Laney*, *Ib.*, 83; *Plymouth Lode*, 12 L. D., 513; see also *Colorado Coal and Iron Company v. United States*, 123 U. S., 307-328.

The allegation in his petition, that Wallace did not comply with the pre-emption law as to residence, improvements, etc., can not be entertained, for the record shows that prior to March 1, 1888, the title had been transferred to Thomas, appellant herein, which brings it within the provisions of the 7th section of the confirmatory act of March 3, 1891.

There is no allegation of fraud upon the part of the purchaser, Thomas, nor has there been any investigation by a government agent finding that there was any.

Patent will issue upon compliance by Thomas with the provisions of the circular of May 8, 1891, 12 L. D., 450.

The decision of your office is accordingly reversed, and you will recall the order for a hearing on the petition of Harhish.

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RIGHT OF WAY—CANAL COMPANY—ACT OF MARCH 3, 1891.

NORTHERN PACIFIC, YAKIMA & KITTITAS IRRIGATION CO.

An application by a canal company for the right of way granted by the act of March 3, 1891, can not be approved until presented in conformity with the departmental regulations formulated under said act.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 31, 1891.*

By letter of June 11, 1891, you transmitted articles of incorporation of the Northern Pacific, Yakima and Kittitas Irrigation Company, and also two maps showing the lines of the company's canals, and recommended that the papers be received, and placed on file, and that the maps be approved.

Sections eighteen to twenty-one inclusive of the act of March 3, 1891 (26 Stat., 1095), relating to the right of way over the public lands, are very similar in their provisions to the act of March 3, 1875 (18 Stat., 482), relating to the right of way for railroads; and in the circular letter to the local officers dated April 17, 1891 (12 L. D., 429), under the act of 1891 reference was made to the circular dated January 13, 1888 (12 L. D., 423), under the act of 1875. The papers now presented do not show a compliance with the requirements of these circulars.

The copy of the articles of incorporation is not certified by any officer of the corporation under its corporate seal. No copy of the law is furnished under which the company was organized, with the certificate of the governor or Secretary of the State that the same is the existing law.

If the law of Washington directs that the articles of association, or other papers connected with the organization, be filed with any State officer then the certificate of such officer should be furnished showing that the same have been filed according to law, with the date of the filing thereof. There is a certificate of the acting Secretary of the State of Washington, showing that the copy of the articles of incorporation furnished in this case, is a true copy of the original articles now of record in his office; but it neither states that the same have been filed according to law, nor the date of the filing thereof, and is clearly insufficient in these respects.

The maps presented appear to conform to the requirements of law

and the regulations, except in the affidavit of the chief engineer attached to the map of the lower canal, which does not state the year in which the survey was commenced, or that in which it was completed. These dates should be supplied.

For the foregoing reasons these maps cannot be approved, and they are, with the accompanying papers, returned to you without my approval.

In connection with the regulations referred to, you will call the attention of the company to the defects herein pointed out, and to such others as a careful re-examination of said maps and papers may disclose, and inform it that it will be allowed an opportunity to remedy the same.

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RAILROAD RIGHT OF WAY—STATION GROUNDS.

CONTINENTAL RY. AND TELEGRAPH CO.

A selection of station grounds will not be approved where the right of way and said grounds are so located as to exclude access to public land lying between said right of way and station grounds.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
July 31, 1891.*

I have approved as recommended the map of a section of the definitely located line of road of the Continental Railway and Telegraph Company, in Colorado; also one plat showing a selection by the company for station purposes, which were submitted with your letter of the 29th instant. The other plat submitted with your letter is not approved because it appears therefrom that the line of the company's road passes out of the tract selected and again enters it in such manner as to leave an intervening space between the boundaries of the right of way and the station grounds of more than one hundred feet, thus enclosing a tract of public lands, access to which is shut off on one hand by the right of way and on the other by the station grounds. Such action on behalf of the company is not sanctioned.

The map and plats, filed under the right of way act of March 3, 1875, are herewith returned.

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SECTION 7, ACT OF MARCH 3, 1891—RULE OF APRIL 8, 1891

UNITED STATES *v.* THOMPSON ET AL.

A motion under the rule of April 8, 1891, providing a means of disposing of cases arising under section 7, act of March 3, 1891, should state facts sufficient to bring the case within the operation of said section.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, July 31, 1891.*

I have considered the motion of E. P. Gates, mortgagee, in the case of the United States *v.* Isaac A. Thompson *et al.*, asking to have said:

case disposed of under the provisions of the 7th section of the act of March 3, 1891 (26 Stat., 1095)

The record shows that on October 11, 1884, Isaac A. Thompson made pre-emption cash entry for the tract in question, to wit, the NE.¼ of Sec. 18, T. 149 N., R. 56 W., Grand Forks, North Dakota, and on the same day mortgaged the tract to H. N. Bissell for \$250, and gave another mortgage to E. P. Gates for \$50.59.

On June 17, 1885, a special agent of your office reported that the entryman never had established his residence on the tract, and that said entry was fraudulent.

On October 2, 1885, the entry was held for cancellation.

A hearing was finally had, on November 15, 1889, and January 10, 1890. On this latter date, H. N. Bissell, as mortgagee, was represented by attorney, and the government was represented by special agent. No proof was submitted by the defense. After considering the evidence submitted by the government, the register and receiver found against the validity of the entry and recommended it for cancellation.

An appeal was taken to your office, where, on July 18, 1890, the finding of the local land officers was affirmed and the entry held for cancellation.

An appeal was taken by Bissell from your office decision to this Department, and was pending here when the act of March 3, 1891, was approved.

This motion is made by E. P. Gates, who is shown by the special agent's report to have held a mortgage on the tract in question on October 2, 1885, for \$50.59.

The motion is very brief, and fails to show facts from which the Department can determine that the mover is entitled to have the benefit of section 7 of the act cited.

It is stated in the motion "that he (E. P. Gates) is now the owner and holder of the land above described," etc., but it is nowhere stated through whom and by what process he became the owner of the property, nor the date when he became the owner, nor is it stated whether the mortgage, shown by the special agent's report to have been held by him on October 2, 1885, was executed before final entry or afterwards.

A motion, under the rule of April 8, 1891 (12 L. D., 308), providing a means of disposing of cases arising under section 7 of the act of March 3, 1891, should state facts sufficient to bring the case within the operation of said section.

A memorandum, called an abstract, is found in the record, neither signed nor certified to, which states that H. N. Bissell foreclosed his mortgage on the tract in question in 1887, and received a sheriff's deed therefor on May 1, 1888.

In view of the inadequate statement of facts found in the motion of Gates, which omission leaves the Department in uncertainty as to his rights under the section cited, this motion must be denied. However,

if Gates will file a new application in your office, setting up the necessary facts to show that he is entitled to protection under section 7, you are directed to consider the same.

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RESIDENCE—PREFERENCE RIGHT—FINAL PROOF.

LOGAN *v.* GUNN.

Temporary absences, made necessary by the poverty of the claimant or the exigencies of business, do not interrupt the continuity of residence where the same has been actually acquired.

One who contests an entry and secures the cancellation thereof is entitled to a preferred right of entry.

Final proof should not be accepted during the pendency of prior proof submitted by an adverse claimant for the same land, but may be considered after final disposition of the pending adverse proceedings, on republication of notice and the execution of new final affidavit.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 1, 1891.*

I have considered the appeal of Allison R. Logan and James H. Gunn, from the decision of your office, dated January 9, 1890, in the case of Logan *v.* Gunn involving the right to enter the W.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec. 12, T. 44 N., R. 11 E., M. D. M., Susanville, California.

On February 7, 1878, David T. Mills made a desert land entry covering, with other lands, the above described tract and paid the first installment required by law. Sometime in 1885, Mills was notified by the local officers to prove up his claim, but subsequently he relinquished his entry and the same was canceled by your office February 4, 1886.

On February 15, 1886, James H. Gunn made a pre-emption filing for the SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  Sec. 11, and W.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 12, T. 44 N., R. 11 E., and at the same time on the same day, Allison R. Logan made a pre-emption filing for the NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , N.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 12, town and range as above, both filings covering the W.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec. 12, the land in controversy, and both parties claiming settlement February 4, 1886, the day the prior desert entry was canceled.

On October 15, 1886, Logan published notice to make final proof and on December 4, 1886, presented the same, Gunn protesting against its acceptance, and therefore the local officers declined to receive it. August 6, 1887, Logan again gave notice of his intention to make proof before the local officers October 15, 1887, at which time both claimants appeared and submitted testimony in support of their respective claims.

The local officers accepted the proof of Logan, whereupon Gunn appealed and the case was transmitted to your office. On the 7th of July, 1888, Gunn made application to the register to make proof on his claim, the usual notice was published and on the day set, viz, August 25,

1888, the proof was made, Logan protesting, and the local officers rejected the same on the ground that Gunn's former appeal relative to the same question, was still pending. Gunn again appealed, and under date of January 9, 1890, your office reversed the decision below so far as to award the right of entry to Gunn, but required him to make new proof, thus affirming the action of the local officers in rejecting the proof submitted.

From this action Logan and Gunn both appeal; Logan on the ground of error in awarding the land to Gunn, and Gunn for the reason that new proof is required.

The testimony taken in this case is very conflicting and voluminous, covering several hundred pages of record, making it extremely difficult to arrive at a just and correct conclusion as to the rights of the parties in interest.

It appears from the record, that Gunn first went upon the land in question about November 11, 1884, and remained there all night; that he returned to the land again about the 24th or 25th of the same month, and built a house thereon; that subsequently he had the land surveyed and that early in 1885, he made application to file on the tract embraced in his present filing, but it was rejected by the local officers for the reason that the land was still covered by the desert land entry of Mills. He then commenced contest against the desert entry which resulted in the local officers deciding in favor of the contestant; Mills appealed but finally, for a consideration of \$50, relinquished his entry and the same was canceled February 4, 1886.

It appears on the part of Logan that on or about November 16, 1884, he purchased some improvements of a man named Linville, consisting of a small frame house and a corral of three or four square rods enclosed by a stone fence, and commenced residence there, but there is nothing in the record to show that Linville was other than a squatter on the public land, or that the improvements sold by him were on the tract claimed by Mills, the desert land entryman; furthermore there is nothing to show that Logan claimed the land in question until he filed his declaratory statement, February 15, 1886, several months after Gunn had made application and had contested the claim of Mills.

It is also shown by the record that at the time Gunn commenced his house in November, 1884, there were no other improvements of any kind on the eighty acres in question, his improvements consisting of a one-story box-house sixteen by eighteen feet, shake roof, board floor, door, fire-place and chimney, built of stone, well with curb, and about four acres sown with grass seed.

It is well established by the record that Gunn is the only one having improvements on the land at the date of filing; that the land was originally embraced in the desert land entry of Mills; that Logan never claimed the land prior to his filing and never took any steps whatever to contest or clear the record of the existing entry of Mills,

whereas Gunn claimed the land continuously from November 25, 1884, when he erected his house, and in 1885, attempted to file upon the same; furthermore, Gunn contested the Mills entry and secured decision of the local officers in his favor and as an evidence of his zeal in trying to secure the land, long prior to the initiation of the Logan claim, he did not wait for action on the appeal of Mills, but purchased his relinquishment at a cost, including expenses of contest, of \$143.

There is no evidence to show bad faith in any respect on the part of either party, both are single men and were obliged, on account of their poor circumstances, to work away from home to support themselves, and to improve their places. Logan has been able to reside on his tract more of the time than Gunn has on the land claimed by him, yet it is shown that Gunn has no other home and has evidently acted in good faith, never having been absent therefrom over two months at one time. Temporary absences on business or on account of the poverty of the party do not interrupt the continuity of residence where the same has been actually acquired. Peter Weber; 9 L. D., 150; Lewis F. J. Meyer; 10 L. D., 492; and Hilton *v.* Skelton; 11 L. D., 505.

In view of the fact that Gunn as the contestant has had the entry of Mills set aside and Logan took no steps whatever in the matter, I am of the opinion that Gunn was entitled to the preference right of entry. A preference right of entry is given to a successful contestant; Gardner *v.* Spencer *et al.* (10 L. D., 398); Boos *v.* Whitcomb (10 L. D., 584) and section two, act May 14, 1880 (21 Stat., 140).

The only question that now remains in this case is the exceptions taken by Gunn to your office decision requiring him to make new final proof. It has been shown that Gunn made proof August 7, 1888, and the same was rejected by the local officers on account of a pending appeal, although the publication of notice to make proof was regularly authorized and issued by the register.

The action of the local officers in declining to accept said proof while an appeal was pending, was proper and in accordance with the rulings of this Department. While it was irregularly made, it seems sufficient to show a compliance with the law, but in view of the fact that possibly there may be other claimants to the land in controversy, who have not made known their claims on account of the pending appeals, I deem it expedient that a new publication be made in this case for the period required by law.

Therefore your office decision is modified to the extent that you will return Gunn's proof to the local officers with instructions that after said publication, no adverse interests appearing, they will pass upon the proof and issue the final papers, on the party making new final affidavit and payment for the land.

In case any adverse interest should arise the local officers will proceed in accordance with the rules in such cases.

## TIMBER CULTURE CONTEST—BREAKING.

BOYD *v.* BARTLETT.

A contest for failure to break the requisite five acres the first year must fail, where it appears that through an error of the local office, in describing the land applied for, the breaking was done on an adjacent tract.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 3, 1891.*

David M. Boyd has appealed from your decision, adverse to him, in the case of said *Boyd v. Augustus Bartlett*, involving the timber-culture entry made by the latter, on September 10, 1885, for the NW.  $\frac{1}{4}$  of Sec. 28, T. 25, R. 40, Garden City land district, Kansas.

The contest was initiated February 19, 1887, upon the allegation that the defendant

Has wholly failed to comply with the timber-culture laws, in that he has failed to plow, break, or stir, or caused to be plowed, broken or stirred, five acres of said tract of land, and that the said tract is now all prairie sod.

The parties appeared before the local officers on September 23, 1887, when the case was submitted upon an agreed statement of facts. The local officers thereupon held the entry for cancellation; but your office reversed their judgment.

The facts agreed upon are in substance as follows:

The defendant filed an application for the "northwest" quarter of said section 28. The local officers, or some clerk in the office, upon filling out the other entry papers, inserted therein, by way of description of the tract, "SW." instead of "NW." Thereupon the surveyor employed by the entryman to locate the corners of his claim, misled by the description contained in the duplicate receipt, located him upon the tract named therein, and he (or his son for him) proceeded to break six acres on said "southwest" quarter of section 28. The next year, when the son went to do the second year's breaking, he found a claimant living on the tract. He came to the local office for an explanation. The clerk, upon examination, found an error in the receipt—as hereinbefore stated; and at once made a change therein, so that it should correspond with the application. The entry papers now agreed in designating the "northwest" quarter of section 28 as being Bartlett's entry. But the six acres broken by him had been broken upon the adjacent "southwest" quarter—and not upon the tract covered by his entry.

In view of these facts, I concur in your conclusion that the entryman acted in good faith, that his rights ought not to be prejudiced by the error of the local officers, and that the contest should be dismissed. Your decision is accordingly affirmed.

## SWAMP LAND—FIELD NOTES OF SURVEY.

## STATE OF MISSISSIPPI.

Where the field notes of survey are relied upon to determine the claim of the State, and the survey is made prior to the swamp land grant, it must satisfactorily appear from the field notes that the land claimed is swamp or overflowed land within the meaning of the grant.

The State may be permitted to adduce evidence outside of the field notes to show that the land is of the character granted.

*Acting Secretary Chandler to the Commissioner of the General Land Office, August 3, 1891.*

I have considered the appeal on behalf of the State of Mississippi from your office decision of May 14, 1890, rejecting the claim of the State under the swamp land grant of September 28, 1850, in and to the W.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 17, T. 2 S., R. 16 W., Jackson land district, for the reason that the field notes of the United States survey, on which the claim of the State is based, do not conclusively show that said tract is swamp or overflowed land within the meaning of said grant.

The record shows that Roscoe T. Doud and Thomas W. Pitts purchased the N.  $\frac{1}{2}$  of said section 17, March 5, 1883, as per cash entry No. 36,374.

In 1884, the State elected to have the field notes made the basis for the adjustment of the swamp land grant, and in 1885 selection was made of this tract from the field notes.

The appeal alleges the following grounds of error, viz :

1. In holding that the field notes of United States survey on which the claim of the State is based do not conclusively show that the tract in conflict is swamp or overflowed land within the meaning of the law.

2. In holding that in order to entitle the State to land under said act, the field notes must *conclusively* show that the tract is swamp or overflowed.

3. In not giving the State an opportunity to show by proof outside of the field notes of the United States survey that said land was, on September 28, 1850, swamp or overflowed land within the meaning of the act.

4. In holding for rejection the claim of the State to said tract.

In the matter of the adjustment of the swamp land grant in Louisiana, it was held

When the field notes of survey have been made since the passage of the act of 1849, and with reference thereto, they will be held to entitle the State *prima facie* to the lands returned as swamp and overflowed, without the additional words 'made unfit thereby for cultivation'; but where made *before* the passage of that act, all the descriptive words in the grant, or words clearly of a like import, must appear; and where they do not so appear, the State must show by other satisfactory evidence that the lands claimed are of the class contemplated by the grant. (5 L. D., 520.)

Under said decision, I am of the opinion that where the field notes are relied on, and the survey was made prior to the swamp land grant, it must satisfactorily appear from the field notes that the tract is swamp or overflowed land within the meaning of the grant.

The survey in this case was made prior to the swamp land grant, to wit, in the first quarter of 1841, and while the field notes show the west line of this section to be on "low wet pine land," it does not appear that the tract in question is "made unfit thereby for cultivation."

I do not deny the right of the State to show by evidence outside of the field notes that the land was, on September 28, 1850, of the character contemplated to be granted, and if she so desires, as would appear from the appeal, an opportunity should be afforded her to make such showing.

To this end, you will notify the State and allow ninety days within which to make any further showing desired, notice of which should be given the adverse entrymen.

Should no further showing be made, the claim of the State will stand rejected.

Your decision is accordingly modified.

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HOMESTEAD—ACT OF JUNE 15, 1880—SECTION 7, ACT OF MARCH 3, 1891.

PUGET MILL COMPANY.

A cash entry made under section 2, act of June 15, 1880, by a transferee holding under a soldiers' additional entry, is confirmed by the proviso to section 7, act of March 3, 1891, where the validity of said cash entry is not questioned within two years from the issuance of final receipt, and no contest or protest is pending against said entry at the date of said act.

The cancellation of the soldiers' additional entry prior to the passage of the act of March 3, 1891, does not defeat the confirmation of the cash entry, where such entry is made in accordance with the existing regulations of the Department.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 4, 1891.*

On February 17, 1876, John B. Sparks made soldiers' additional homestead entry for the N.½ of SE.¼ of Sec. 22, T. 26 N., R. 6 E., Olympia (now Seattle) land office, Washington, upon which he received final certificate the same day.

On June 13, 1876, the tract was sold to the Puget Mill Company.

On December 18, 1876, said entry was held for cancellation by your office for the reason that it was based upon spurious and forged papers.

An appeal was taken from this ruling but for some reason it was mislaid in your office and consequently was not acted upon, but in your decision of March 4, 1891, it is stated that this appeal was informal and irregular.

On March 11, 1886, the Puget Mill Company, as transferee, was al-

Allowed to purchase the tract under the second section of the act of June 15, 1880 (21 Stat., 237).

In said decision it is held by you that—

the Puget Mill Company, as transferee, by its purchase under the act of June 15, 1880, abandoned its appeal from the decision holding the entry for cancellation. Alonzo Swink (7 L. D., 342).

You also held the cash entry of the Puget Mill Company for cancellation being a purchase of a tract covered by an entry depending for its inceptive right upon false and fraudulent statements and forged documents, citing the case of J. S. Cone (7 L. D., 94), and the case of the Puget Mill Co. (7 L. D., 301).

On March 25, 1891, a motion was filed asking for a review of said decision "on the ground that the entry seems to be confirmed by the act of March 3, 1891."

After considering this motion on May 19, 1891, you denied said motion stating that "The seventh section has no reference to entries void *ab initio*. This entry, therefore, does not fall within the provisions of said act. The motion is denied."

An appeal has been taken from your judgment to this Department. The proviso to the seventh section of the act of March 3, 1891 (26 Stat., 1095), reads:

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

It is shown by the foregoing statement of facts, that the cash entry in question is based on an original soldier's additional homestead entry, and while this entry was canceled before the act cited was passed, said cancellation can have no bearing on the rights of the holder of the cash entry in question.

This entry was made, the tract paid for and a receiver's receipt issued thereon on March 11, 1886. The Puget Mill Company have held that receipt and possession of the tract ever since that date. The entry was allowed by the local officers and more than two years elapsed thereafter before the validity of the entry was, in any way, questioned by the government. In fact no steps were taken by it concerning this entry until March 4, 1891, after the act in question was approved, and more than four and a half years after the receiver's receipt was issued.

No contest or protest was pending against the entry at the date of the passage of the act. All the conditions named in the proviso to said section seven, exist. It follows that a patent should issue on this entry.

It is unnecessary here to discuss whether an entry void *ab initio* could be confirmed under this section, for the entry in this case is not a void

entry. It was an entry allowed by the rulings of the Department at the time it was made, and sanctioned at the time by the judgment of the land officers, who allowed it. The government owned the land and disposed of it to this entryman, receiving in return the regular price for such lands.

In view of the foregoing, you are directed to issue a patent on the entry.

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ALASKA LANDS—INDIAN OCCUPANCY.

A. S. WADLEIGH.

Land actually occupied in good faith by the natives of Alaska is reserved from disposition until such time as Congress shall prescribe the terms on which they may acquire title.

*Acting Secretary Chandler to Mr. A. S. Wadleigh, Klawack, Alaska,  
August 4, 1891.*

In reply to your letter of June 6, 1891, requesting "a decision as to the quantity of land a native is entitled to hold under the provisions" of section 14 of the act of Congress, approved March 3, 1891 (26 Stat., 1095), you are advised that by the eighth section of the act of Congress, approved May 17, 1884 (23 Stat., 24) the district of Alaska was created a land district, a United States land office was located at Sitka, and "the laws of the United States relating to mining claims" were extended to said district, "subject to such regulations as may be made by the Secretary of the Interior approved by the President. It was also provided—

That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to such lands are reserved for future legislation by Congress. . . . But nothing contained in this act shall be construed to put in force in said district the general land laws of the United States.

By sections 12 and 13 of said act of 1891, provision is made for the purchase of public lands in Alaska by persons therein designated, for the purpose of trade and manufactures, limiting, however, the amount to one hundred and sixty acres and fixing the price at two dollars and fifty cents per acre. But the fourteenth section of said act excludes from the operation of said sections 12 and 13, among others, lands "to which the natives of Alaska have prior rights by virtue of actual occupation." It is evident that this provision protects the actual occupation of land by the natives of Alaska, until Congress shall prescribe the terms by which they may acquire title to any part of the public domain under the general land laws, other than mineral. It applies only to lands occupied and possessed in good faith, and will not include lands to which there is only a pretended claim without any actual bona fide possession or occupation.

## HOMESTEAD CONTEST—CHARGE—AFFIDAVIT OF CONTEST.

ASHWELL *v.* HONEY.

An allegation that the claimant has never resided on the land, and that his home and place of business is elsewhere, is equivalent to a charge of abandonment; and a notice issued thereon to answer to the charge of abandonment is not bad for variance. •

Acts in compliance with law performed by the claimant prior to the service of notice, but induced by the impending suit, will not cure the prior default nor defeat the contest.

A contest should not be dismissed on the ground that the affidavit of contest was executed before an attorney of record in the case.

The government is not precluded by a contestant's withdrawal from considering the evidence submitted and rendering judgment thereon.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 4, 1891.*

I am in receipt of the appeal of Albert Honey from your office decision of December 19, 1888, holding for cancellation his homestead entry for the SE.  $\frac{1}{4}$  of Sec. 26, T. 3 N., R. 35 W., McCook, Nebraska. His entry was made June 25, 1884.

August 23, 1886, William C. Ashwell filed an affidavit of contest, charging, in substance, that Honey had never resided thereon, and that his home and place of business were at Trenton, Nebraska.

Notice issued on said affidavit ordering a hearing for October 25, and directing that the testimony be taken October 18, before a notary public, at Stratton, Nebraska. Both parties appeared before the notary at the time set, but, owing to a defect in the return of service of notice, the cause was continued until December 14, and an alias notice issued October 27, directing a hearing December 14, and that the testimony be taken before the same notary December 7, 1886.

December 6, the contestant was compelled to take another continuance, because he had been unable to get service on the defendant for the reason, as alleged and undisputed, that claimant "avoided him and concealed himself."

Under this application the case was continued until February 2, 1887, and a new notice issued, fixing January 25 for taking the testimony. On said last day the parties appeared, and the testimony was taken.

On February 2, 1887, the day set for the hearing in the last notice, claimant appeared before the local officers and moved to dismiss the contest, for the following reasons:

I. The affidavit of contest herein does not conform to Sec. 2297 of the Revised Statutes.

II. The notice served on defendant (filed herewith) does not conform to the allegations contained in the affidavit of contest.

III. The notice referred to is dated December 7, 1886, was served on defendant at his home on the land in dispute December 14, '86, and no testimony whatever is introduced showing any failure on the part of defendant up to the date of said notice.

IV. The evidence introduced by the contestant wholly fails to sustain the charge of abandonment or change of residence for six months.

V. The affidavit of contest being sworn to before attorney of record, there is no basis for hearing.

The register and receiver sustained the motion, as appears by the following endorsement thereon:

"Feb. 2, 1887.

"Motion sustained. Case dismissed. See section 376, page 677, Revised Statutes of Nebraska."

They have rendered no judgment other than the above, as to the merits of the case.

Ashwell appealed, and by your said office decision the action of the local officers was reversed, and the entry held for cancellation on the evidence submitted.

After an ineffectual motion for review, the claimant has appealed to this Department, alleging, substantially, the grounds set forth in his motion to dismiss; also error in overruling the motion for review.

Without reviewing the evidence in detail, it is sufficient to say that it has been examined, and shows an entire lack of good faith on the part of the entryman and fully sustains the allegations of contest and the judgment of your office thereon. This leaves for consideration the questions of practice raised by the record.

The allegation of default in the last notice and the one on which proof of service was properly made is "for abandoning his homestead entry." This, though not *in hæc verba*, is substantially the same charge alleged in the affidavit.

The affidavit charges that he had never resided on the land, and that his home and place of business was at Trenton (thirteen miles from the land). This is equivalent to a charge of abandonment of the entry and did not constitute a fatal variance between the affidavit and notice. *Durken v. Lindstrand*, 11 L. D., 418; *Green v. Berdan*, 10 L. D., 294.

It is also a compliance with section 2297 of the Revised Statutes, for more than six months had elapsed from the date of the entry, and the affidavit charged that he had never (up to that date) resided thereon.

There is no merit in the third alleged error. The evidence did not "show failure on the part of defendant up to December 14, date of service of notice."

It is true the evidence shows that at date of the service of the last notice, the defendant was at his house on the land, but it clearly appears that his being there was in consequence of his knowledge that these proceedings had been commenced against him, and it also satisfactorily appears that he had been dodging the service of notice and concealing himself from the officers until he could go back to his entry, and by such means endeavoring to defeat the contestant's action. While it has properly been held by this Department that a defaulting entryman may cure his laches before service of notice of contest, it has also been held in numerous decisions (and I know of none to the contrary)

that if it is shown that his haste to cure his default was due to knowledge of an impending contest, as is clearly shown in this case, and that his attempt was made solely to defeat the contest and not for the purpose of complying with the law in good faith, such action will not cure his default, nor defeat the contest. *Heptner v. McCartney*, 11 L. D., 400.

The fifth and last ground in the motion to dismiss and the one upon which the local officers based their judgment of dismissal (that the affidavit was made before an attorney of record) is not sustained by the decisions of this Department. *Gotthelf v. Swinson*, 5 L. D., 657; see also *Houston v. Coyle*, 2 L. D., 58.

The action of the local officers in sustaining the motion to dismiss the contest was wrong.

It is not necessary to consider the question as to whether claimant waived any of his rights by going into the trial of the case, after protesting against the jurisdiction of the local officers, as the record shows that they had full jurisdiction. Nor is it necessary to consider whether the appeal of claimant from the action of your office was timely or not, for after a full consideration of all the points raised on appeal and in the motion for review, I am satisfied that there has been no error committed to the prejudice of claimant. He has offered all his testimony before the register and receiver. The evidence is before me and has been considered, and in my opinion calls for a cancellation of the entry.

The evidence submitted on his motion to review the decision of your office has reference exclusively to his acts of residence and improvement, after the case had been heard before the local officers, and is insufficient to support his motion for review.

Your office, by letter of the 31st instant, transmits Ashwell's withdrawal of his contest and waiver of all rights in the premises "because of the full compliance with the law and the good faith shown by claimant Honey since the hearing in said contest."

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 between himself and the government (*Overton v. Hoskins*, 7 L. D., 394; *Taylor v. Hoffman*, 5 L. D., 40; *Hegranes v. Londen*, *ib.*, 385; *Saunders v. Baldwin*, 9 L. D., 391; *Wells v. Hewitt*, 11 L. D., 166; *Capelli v. Walsh*, 12 L. D., 334; *Stenoien v. Northern Pacific Railroad Company*, 12 L. D., 495).

If it be a fact that, since the hearing, the claimant has resided upon and improved the tract—

This does not give the entryman any additional right, as his entry must be weighed, in the balance of the law, as it stood at the time of the initiation of contest (*Waldroff v. Bottomly*, 10 L. D., 133; *Davis v. Bott*, 11 L. D., 423).

The decision appealed from is accordingly affirmed.

## TIMBER CULTURE CONTEST—PRIORITY OF CONTEST

## HOFFMAN ET AL. v. GEROULD.

When an affidavit of contest, setting forth a statutory ground of cancellation, has been filed and notice issued thereon, the contest is regularly initiated, so far as a stranger to the record is concerned, and can not be dismissed prior to the day fixed for hearing and without notice to the contestant.

An application to enter filed with a timber culture contest reserves the land covered thereby from any other disposition while the same is pending.

The fact that a timber culture contest is begun prior to the expiration of the year in which the default is charged, does not warrant the dismissal thereof, prior to the day fixed for hearing and without notice to the contestant.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
August 5, 1891.*

I have considered the case of Edwin H. Hoffman and Hervey A. Humphrey v. Henry M. Gerould, involving the right to the SE  $\frac{1}{4}$  of Sec. 14, T. 118, N., R. 69 W., Huron, South Dakota, as presented by the appeal of Hoffman from the decision of your office dated March 23, 1888, affirming the action of the local officers in dismissing his contest against timber culture entry No. 4387, for said land, made by Gerould on January 14, 1884.

The record shows that said Hoffman, on December 16, 1885, filed his affidavit of contest against said entry, alleging that the entryman

has failed in whole or in part to break or cause to be broken the five acres required to be broken during the second year after entry thereof, viz: from December 14, 1884, to December 14, 1885, and said default still continues, also the said Gerould has failed in whole or in part to cultivate or cause to be cultivated the five acres required to be cultivated during the second year after entry thereof, viz: from December 14, 1884, to December 14, 1885, and said failure still exists, five acres of said tract or any part thereof having not been cultivated to crop or otherwise up to this date.

Upon due showing, publication was ordered summoning said contestant and entryman to appear before one Morse, a notary public, at Faulkton, Dakota Territory, on February 24, 1886, to give testimony in the case. On January 15, 1886, without notice to the contestant, the local officers "of their own motion" dismissed said contest on the ground that it was invalid, and on the same day allowed said Humphrey who was the proprietor of the paper in which notice of contest was published, to file an affidavit of contest against said entry, alleging the same cause of action as charged by said Hoffman.

On February 18, 1886, Hoffman filed a motion in the local land office asking a reconsideration of the action dismissing his contest, which was overruled, and he appealed. Afterwards, to wit: on April 19, 1886, and while said appeal was pending, a hearing was had before the local officers on Humphrey's contest, and, upon the evidence submitted by the contestant, the entryman making default, the local officers rendered their decision in favor of the contestant and recommended that said

entry be canceled. From this decision there was no appeal by the entryman.

On March 23, 1888, your office "considered the contests of Edwin H. Hoffman and Harvey A. Humphrey," involving said entry, and affirmed the action of the local officers in dismissing Hoffman's contest upon the ground that it was invalid in its inception and could not be amended. Your office also affirmed the action of the local officers in favor of Humphrey, and held that, although "all proceedings in Humphrey's case, before your (the local) office decision became final, were irregular . . . the validity of the same is not thereby affected."

On May 2, 1889, you reconsidered said decision upon the ground that it was rendered upon an incorrect statement of fact in the decision of the local office. It is stated that said Hoffman obtained from the local office a diagram showing that said tract was covered by said entry made "December 14, 1883;" that the local officers, of their own motion, dismissed Hoffman's contest because the contest was prematurely made; that Hoffman applied to be allowed to amend his affidavit of contest so as to conform to the correct date of said entry, which was denied by the local office because the contest was void *ab initio*, having been initiated "about thirty days prior to the termination of the first year after entry;" that this statement was not true, as Hoffman's affidavit was filed only about thirty days prior to the expiration of the second year of entry, and hence his contest was not "absolutely void."

Your office therefore held that Hoffman's contest should be re-instated and he be allowed to amend the same, and the contest of Humphrey be held subject to the final disposition of that of Hoffman.

Again, on November 23, 1889, you considered a motion filed by said Humphrey for a reconsideration of said decision of May 2, 1889, and held that said decision of May 2, 1889, was based upon an error in the statement of the local office as to the time of filing said contest affidavit, which was erroneously regarded as "fundamental" instead of "clerical," and hence harmless; that being "based on a misstatement and misconception of the facts in the case," said decision of May 2, 1889, must be revoked and the decision of March 23, 1888, re-affirmed.

From the last decision an appeal was taken by Hoffman, in which errors are alleged—

(1) In entertaining a motion for a review of a review, especially after Hoffman had filed his amended affidavit on August 27, 1889, in accordance with said departmental decision dated May 2, 1889.

(2) In holding that the charge in the original contest affidavit was for the second year only.

(3) In holding that Hoffman's contest was invalid and not open to amendment.

(4) In dismissing said contest in view of the fact that Humphrey was the proprietor of the paper in which the notice of contest was published.

In addition to the foregoing, the record shows that Hoffman filed with his said affidavit of contest an application to enter said tract under the homestead law.

It is clear, in my judgment, that the local officers erred in dismissing his contest prior to the day set for hearing and without any notice to him. Indeed, your office held that such action was irregular but not invalid. The question to be determined is, was Hoffman's contest "absolutely void?" This must be determined in the negative. Section 3 of the timber culture act of June 14, 1878 (20 Stat., 113), provides:

That if at any time after the filing of said affidavit, and prior to the issuing of patent for said land, the claimant shall fail to comply with any of the requirements of this act, then and in that event such land shall be subject to entry under the homestead laws, or by some other person under the provisions of this act: *Provided*, That the party making claim to said land, either as a homestead settler or under this act, shall give, at the time of filing his application, such notice to the original claimant as shall be prescribed by the rules established by the Commissioner of the General Land Office; and the rights of the parties shall be determined as in other contested cases.

By Rule of Practice No. 1 (4 L. D., 37), the local officers have general jurisdiction, where final certificates have not issued, to order hearings to determine the validity of entries, either at the instance of adverse parties or other persons. The contestants are required to file an affidavit with the local officers setting forth fully the facts which constitute the grounds of contest. (Rule of Practice No. 2.) This requirement, however, is directory, for in the case of *Graves v. Keith* (3 L. D., 309), it was held that a contest was valid where the notice of hearing was issued upon the verbal allegations of the informant, without an affidavit of contest, in the absence of any objection by the contestee. In the case at bar, the service of notice was by publication, and it is required by Rules of Practice Nos. 7 to 15, inclusive, that—

a copy of the notice shall be mailed by registered letter to the last known address of each person to be notified thirty days before date of hearing, and a like copy shall be posted in the register's office during the period of publication, and also in a conspicuous place on the land, for at least two weeks prior to the day set for hearing.

In the case of *Parker v. Castle* (4 L. D., 84), it was held that said requirements "are all essential parts of notice."

The hearing was set for February 24, 1886, which was more than two years from the date of said entry, and, on the day set for hearing, the local officers would have had jurisdiction to determine the question whether the entryman had complied with the requirements of the timber culture law. The notice could not have been served until after the expiration of the second year, and if the entryman cured his default prior to the service of notice, the contestant would have failed in his contest.

On the other hand, if, on the day set for hearing, it was proven that the entryman had not complied with the requirements of law, the local officers would have been authorized to so find and recommend the entry for cancellation. The question of the sufficiency of the affidavit can only be raised by the entryman, and not by him prior to the day set for the hearing. *Jasmer et al. v. Molka* (8 L. D., 241).

In the case of *Tripp v. Stewart* (2 C. L. L., 707, decided May 11, 1880), it was shown that Stewart made timber culture entry on September 17, 1878, and on September 17, 1879, Tripp filed a contest affidavit against said entry, alleging failure to comply with the requirements of the timber culture law. On September 18, same year, one Allen applied to contest said entry, and his application was rejected by the local officers because of said prior application. Allen appealed, and your office affirmed the action of the local office in rejecting Allen's contest, and also dismissed Tripp's contest because brought prematurely. On appeal, the Department affirmed the decision of your office in dismissing Tripp's contest, on the ground that the proceedings therein were a nullity, and allowed Allen to proceed with his contest. But *Tripp v. Stewart* has not been followed in its full extent by the Department, for, in the case of *Stewart v. Carr* (2 L. D., 249, decided April 11, 1884), it appeared that Stewart, on April 27, 1883, filed his affidavit of contest dated April 26, same year, against Carr's timber culture entry made April 26, 1882, alleging failure to comply with the requirements of the timber culture law. The local office refused to allow said contest because "the full period of one year after the date of entry had not expired at the date when the affidavit was sworn to by James M. Stewart," and their action was affirmed by your office. But the Department, on appeal, held, referring to the *Tripp-Stewart* case (*supra*), that

on its face the affidavit did not justify the issuance of notice; that the reception of ante-dated papers in one case, although the uncovered period may be brief, would lead to confusion in the practice, and to unnecessary litigation, as there could be no rule fixing the time when such papers might be sworn to before filed;

that, as Stewart filed an application to enter the land with his original affidavit of contest (as Hoffman did in this case), he should be permitted a hearing on filing a new affidavit, "such right relating back to April 27, 1883, to the exclusion of any intervening claims to contest Carr's entry."

In the case of *Hanson v. Howe* (2 L. D., 220), the Department said:

The only person entitled to complain of a want of particularity in the affidavit was Howe (the timber culture entryman), but he made default. If Howe, on the day of hearing, had appeared and objected to proceeding under the information in its original form, and his objection had been held good, the right of amendment would have been accorded to Hanson (the contestant). If Hanson in his amended pleading set forth new matter, it might have furnished proper grounds for continuance. This being so, it follows that Mills (the second applicant) had no right to be heard at any stage of the proceedings.

In *Winans v. Mills et al.*, (4 L. D., 254) it was held that when an affidavit of contest setting forth a statutory ground for cancellation has been filed and notice issued thereon, the contest is regularly initiated, so far as a stranger to the record is concerned, and cannot be dismissed prior to the day fixed for hearing and without notice to the contestant. This is the settled rule of the Department. *Schneider v. Bradley* (1 L.

D., 132); *Hopkins v. Daniels* (4 L. D. 126); *Gotthelf v. Swinson* (5 L. D., 657).

In *Durkee v. Teets* 4 L. D., 99, it was held that two contests should not be allowed at the same time against the same entry, but the second contest affidavit may be received and held to await the disposition of the prior contest.

So in *Melcher v. Clark* (id., 504), the Department held that where a pending contest is attacked for fraud, by one who makes application to enter the land, notice should not issue on such application, but it should be held to await the final disposition of the prior contest. See also *Churchill v. Seeley et al.* (ib., 589); *Gallagher v. Tarbox et al.* (5 L. D., 231).

In the case of *Stebbins v. Felder* (6 L. D., 795), the ruling in *Tripp v. Stewart* was questioned, and Secretary Vilas said:

I think this doctrine too refined and technical to defeat a contest otherwise meritorious, and should not be willing to follow the decision referred to if a determination were to turn on that point.

He also said:

The hearing of the contest must necessarily have occurred after the expiration of the second year; and, therefore, the interests of the entryman are entirely protected, because if he could show actual compliance within the period limited by the statute, whether before or after the actual filing of the affidavit, he would prevail.

In the case of *White v. McGurk et al.* (6 L. D., 268), the contest affidavit was filed prior to the expiration of the year in which the default was alleged, notice issued by publication, the hearing was set after the expiration of the year in which the default was charged, and the attorney for the second applicant, pending said publication, and without notice to the prior contestant, filed a motion with the local officers to dismiss the contest. They granted the motion, but, on appeal, your office reversed their action, and directed them to proceed with the hearing on the first contest.

The second applicant appealed, and the Department held that:

It was clearly error in the local officers to dismiss White's contest without notice and before the day set for hearing. If the affidavit was defective, the right to amend it would have been accorded the contestant upon application therefor upon the day set for the hearing.

In the case of *Burdick v. Robinson* (11 L. D., 199-202), the Department held that:

The second point, namely: insufficient affidavit to authorize notice by publication, can only be invoked by the entryman or those claiming under him. \* \* \* If the notice to the claimant was insufficient, it was the duty of the register and receiver to cause a proper notice to be issued, and if this was not done, then the judgment of cancellation is irregular, and this fact may be shown by the entryman or waived by him, and cannot affect the priorities of opposing contestants.

The Department has also held that where an affidavit of contest was filed, but the local officer failed to issue notice thereon, a subsequent

contestant, who had procured service of notice and hearing thereon, could not prejudice the right of the prior applicant to contest. *Hawkins v. Lamm*, 9 L. D., 18; *Baird v. Chapman's heirs et al.*, 10 L. D., 210; *Burdick v. Robinson*, 11 L. D., 199.

Since the local officers had no authority to dismiss Hoffman's contest prior to the day set for the hearing, which was after the expiration of the year in which the default was charged, their action must be held invalid, and all subsequent proceedings of Humphrey under his contest affidavit unwarranted and illegal. Besides the application of Hoffman to enter said tract under the homestead law, filed with said affidavit of contest, reserved the land from any other disposition while the same was pending. *Townsend v. Spellman*, 2 L. D., 77; *Davis v. Crans*, 3 L. D., 218; *Pfaff v. Williams*, 4 L. D., 455; *Maria C. Arter*, 7 L. D., 136; *English v. Noteboom*, id., 336; *Peterson v. Ward*, 9 L. D., 92; *Rosenberg v. Hale's heirs*, ib., 161; *Griffin v. Pettigrew*, 10 L. D., 510.

There is no evidence of bad faith on the part of Hoffman, and he was erroneously advised by the local officers of the date of said entry.

From the foregoing it must necessarily follow that the order of the local office dismissing Hoffman's contest was erroneous and all proceedings subsequently had are invalid. They are, therefore, hereby set aside and vacated. Hoffman having, on August 27, 1889, filed his amended affidavit under the authority of your office letter dated May 2, same year, will be allowed to proceed with his contest upon due notice to the entryman.

The decision of your office is modified accordingly.

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CALIFORNIA SWAMP LAND—SECTION 2488 R. S.

DAVIS *v.* STATE OF CALIFORNIA.

Land to which no claim has attached prior to survey, and which is represented as swamp and overflowed upon the approved township plat, enures to the State of California, irrespective of the actual character of the land.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 5, 1891.*

I have considered the appeal of L. L. Davis from your office decision of October 14, 1889, in the case of *L. L. Davis v. State of California*, rejecting his application to enter the NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 2, E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , Sec. 3, and NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec. 10, T. 19 S., R. 29 E., M. D. M., Visalia, California.

It appears in this case that said Davis made application at the local office September 25, 1889, to enter the above described tracts under the homestead law, but the same was rejected by the local officers on the ground that the land in question is designated on the official plat of survey as swamp land and therefore not subject to such entry. Davis

appealed and under date of October 14, 1889, your office affirmed the decision below. Davis again appeals.

Section 2488 Revised Statutes, provides: that,

it shall be the duty of the Commissioner of the General Land Office, to certify over to the State of California as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23rd day of July, 1866, under the authority of the United States.

The survey of the township in question was made by authority of the United States and the same was approved by the surveyor-general of the State of California, December 28, 1883.

The tracts above described are represented on said approved plat as swamp land and therefore would seem to come within the provisions of the statute above quoted.

The appellant, however, alleges that the land in question is not swamp land, but is high and dry land, partly covered with brush and small timber; that when it is cleared off, the land would be suitable for agricultural purposes. Furthermore, he alleges that the action of the surveyor-general in returning said land in the survey as swamp, was false and fraudulent, and that the same is public land subject to entry under the homestead law.

In support of these allegations the appellant submitted his own affidavit corroborated by two witnesses, wherein it is set forth that the land is high and dry and partly on the side of a mountain; that it is not swamp land and never has been.

The Department has repeatedly held that where a tract of land has been returned as swamp by the surveyor-general, the question of the character of the land cannot be raised as under the law the land enures to the State.

In the case of the *Central Pacific Railroad v. State of California* (2 C. L. L., 1052), Secretary Schurz in construing section 2488, above quoted, held that: "This clause secures to California all the lands which the surveyor-general officially reports to be swampy, whether they are so or not." Subsequently, in the case of *Wright v. Roseberry* (121 U. S., 488), the supreme court sustained the construction of Secretary Schurz and held that:

The representation of the lands as swamp and overflowed on the approved township plat would be conclusive as against the United States, that they were such lands, if they had not been patented before the return of such township plat to the Land Office.

In the case of *Tubbs v. Wilhoit* (73, Cal., 61), the supreme court of California, following the supreme court decision above referred to, held that: "When the plat of the township representing lands upon it to be swamp and overflowed is approved, the title to such land vests in the State, though the Commissioner has not made the certificate required by the act," and furthermore, that—

the title to the land under such circumstances had passed entirely beyond the control of the United States Land department, and beyond the power of the federal government.

In the case before me, no entry of any kind had been made on the land at the date said plat was filed in 1883, therefore the land was subject to the operation of the statute referred to.

The ruling laid down by the United States supreme court and followed by the supreme court of California is clear and plain and admits of no doubt as to the status of land under such circumstances. The land in question was returned on the plat as swamp, approved by the surveyor-general, and no claim made prior to the filing of said survey had attached, therefore, although the land has not yet been certified to the State; nevertheless, the tracts so returned clearly come within the provisions of the statute and belong to the State of California.

The allegations that the land is dry and not swamp land do not alter the case; they are immaterial under the foregoing authorities.

The Department has invariably held that under such circumstances, where the plat shows it to be swamp, the State is entitled to the land. *State of California v. United States* (3 L. D.; 521); *Ibid v. Martin* (5 L. D., 99).

The application of Davis to enter said tracts under these circumstances was properly rejected, as the land is no longer under the control of the Land Department, and, therefore, your office decision is affirmed.

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#### HOMESTEAD ENTRY—DEATH OF ENTRYMAN.

##### ALCOTT'S HEIRS.

If a homesteader dies before final proof, and his widow also dies, not having made proof, the homestead right vests in the heirs of the original entryman, and not in the heirs of the widow.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 5, 1891.*

The record in this case shows that Harvey Alcott made homestead entry for the NW.  $\frac{1}{4}$  of Sec. 13, T. 4 S., R. 9 W., Kirwin land district, Kansas, on the 23d of April, 1878. On the 14th of February, 1882, he died, leaving a widow, Hester A. Alcott, by whom he had no children, and she died on the 12th of April, following. Alcott had two children by a former marriage, a son named Anson, and a daughter named Diana, who married a man named Welch. On the 1st of May, 1883, O. D. Luther, a brother of Mrs. Hester A. Alcott, in behalf of her heirs, made final proof upon the entry, and the register and receiver issued final certificate and receipt to the heirs of said widow.

When the case came before you for consideration, you directed the register and receiver to call upon one of the heirs of Harvey Alcott for a final homestead affidavit in the case, and when furnished to issue to the "heirs of Harvey Alcott" a new final certificate in lieu of the one already issued to the heirs of his widow, and making the new one of the same date and number as the old. These instructions were issued

by you on the 7th of August, 1883, and the case is before me upon an appeal from that decision and direction of your office.

The grounds of error alleged by the appellant in his notice of appeal, are as follows :

1. Said decision is contrary to the law of descents and distributions of the State of Kansas.

2. In the case at bar, the said law of descents and distributions of the State of Kansas obtain to the exclusion of any other contrary authority.

3. At the death of Harvey Alcott, the above named homestead claimant, without issue, his widow took said homestead by descent in her own right, and at her death, under the authority referred to, whatever of title or right she had descended to her heirs.

At the time of his death, the entryman had no title to the land in question, and consequently there was nothing to descend to anybody. Whatever rights he had in the land, by virtue of his entry, must be disposed of in accordance with the laws of the United States, and not in accordance with the State laws of Kansas, when such laws conflict with those of the general government, relating to the public domain.

This case is governed by section 2291 of the U. S. Revised Statutes, which provides when and by whom final proof shall be made, and which says that at the proper time for making such proof if "the person making such entry, or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death," make the proper proof, they "shall be entitled to a patent, as in other cases provided by law."

Here the person making the entry was dead, and his widow was dead. He left no devisee, but he did leave heirs, and they are the proper ones to make the proof, and to receive the patent. The question involved herein was decided in the case of *Wise v. Swisher* (10 L. D., 240), where it was held that :

If a homesteader dies before final proof, and his widow also dies, not having made proof, the right vests in the heir or devisee of the original entryman and not in the heir or devisee of the widow.

The statute quoted, and the decision cited, dispose of the question before me, and the decision appealed from is, therefore, affirmed.

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#### SPECULATIVE CONTEST—PREFERENCE RIGHT.

##### TAYLOR *v.* OVERING.

No preference right is acquired through a speculative contest that can be asserted as against an intervening entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 5, 1891.*

I have considered the case of *Jesse A. Taylor v. Edwin J. Overing*, involving the NE.  $\frac{1}{4}$  of Sec. 12, T. 24 N., R. 48 W., Chadron land district, Nebraska, on appeal by Taylor from your decision of March 8, 1890,

holding his homestead entry No. 1202, for said tract, subject to the right of Overing to perfect his application to enter same tract under his contest of homestead entry No. 9604, by Almira E. Bowen, formerly covering the land in question.

On April 5, 1887, Overing filed an affidavit of contest against the entry of Bowen, alleging abandonment, upon which notice issued for trial June 20, 1887.

April 11, 1887, Taylor filed an affidavit of contest against same entry, alleging abandonment, and, on May 31, 1887, he filed a second affidavit of contest, and, in addition to the charge of abandonment, the affidavit contains the following:

And said claim has been relinquished and the relinquishment held by a third party for speculation, and that E. J. Overing, the first contestant of this claim, has contested for the purpose of speculation and not for settlement and cultivation.

No notice appears to have issued upon either of these affidavits, but, on April 4, 1888, Bowen's entry was canceled upon relinquishment, and on June 6th following Taylor was permitted to make homestead entry No. 1202 for the land.

The first notice issued upon Overing's contest was not served, and he made affidavit for the purpose of securing a continuance, June 6, 1887.

At this time the land was within the North Platte land district, and, in view of the contemplated change of districts, the case was, on June 10, 1887, continued indefinitely.

On February 24, 1888, new notice issued from the Chadron office, the hearing being set for April 16, 1888.

No service made, case continued, and new notice issued April 12, 1888, hearing set for May 25, 1888, notwithstanding entry had been canceled upon relinquishment, April 4, 1888.

No service was made under this notice, and a motion for further continuance was denied, May 25, 1888, from which action Overing appealed.

In forwarding said appeal, the local officers state:

Overing is a professional contestant, having no less than seven contests in his own name now pending before this office, besides innumerable ones in the names of persons under his control. These contests he so manipulates as to delay them in every possible way, and when notice is issued, he repeatedly fails to procure service under some pretext or another, which we know is unfounded, but which we can not get hold of the evidence to show.

Frequently four, five and six notices will be issued in a single case, all of them failing in some way of being served.

In this case three notices have been issued and none of them served. . . . Being satisfied that his action was not in good faith, but was taken solely for the purpose of delaying the determination of the contest, until he could make sale of his preference right, he having probably in his hands all the time a relinquishment of the contested entry.

Overing's appeal was considered by your office letter of December 13, 1888, and therein it was held that the filing of the relinquishment

was presumably the result of his contest, and that Overing should have been notified of the cancellation of Bowen's entry, but, as no notice appeared to have been given him, you directed the local office to advise him of his right and allow him thirty days from notice in which to make entry, and that if he come forward within the time that Taylor should be called upon to show cause why his (Taylor's) entry should not be canceled.

Overing was advised, and within the time presented a timber culture application, and upon notice of the same, Taylor filed an affidavit alleging, in effect, that Overing's contest against Bowen's entry was fraudulent and speculative.

Under the authority of your office letter of May 4, 1889, hearing was ordered upon Taylor's charges, the same being held November 9, 1889.

Upon the testimony introduced the local officers found that Overing's contest was speculative, but, upon appeal, your office held that the evidence was meagre and unsatisfactory, and reversed their decision and held Taylor's entry subject to the right of Overing to perfect his application to enter.

From a review of the matter, I agree with the opinion of the local office that the contest of Overing against the entry by Bowen was speculative, and that there was no preference right of entry gained thereby.

The testimony shows that Almira E. Bowen relinquished her entry, leaving the same with one W. G. Simonson; that Simonson informed Overing that he had the relinquishment, and said Overing requested Simonson to hold the same until he could use it, and he would call for it and take same; that after he was advised of his preference right of entry under your office letter of December 13, 1888, he requested one Snedker to go and see Taylor, with a view of making a settlement with Taylor, but he was unable to find Taylor.

These facts considered together with the numerous continuances granted and applied for in this case, and the general reputation of the party as evidenced by the local officers' report, leave no room for doubt.

I therefore reverse your decision, and hold that the contest by Overing was no bar to Taylor's entry, which will be permitted to stand, subject to compliance with law.

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SETTLEMENT—NOTICE OF CLAIM.

POOLER *v.* JOHNSTON.

The notice given by settlement and improvement extends only to the technical quarter section upon which they are located.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 5, 1891.*

I have considered the case of William Pooler *v.* John E. Johnston, upon the appeal of the latter, from your decision rejecting his final proof for a portion of the land embraced in his declaratory statement, filed on the 20th of October, 1887, at the Stockton land office, California.

The land in question was a part of the indemnity lands of the Southern Pacific Railroad Company, but was restored to the public domain on the 20th of October, by the order of this Department, of the date of August 15, 1887.

On the day of the restoration Johnston filed declaratory statement for the NW.  $\frac{1}{4}$  of Sec. 3, T. 11 S., R. 10 E., alleging settlement on the 11th of August prior thereto. The same day that Johnston made his filing, Pooler made homestead entry for lot 4, SW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of Sec. 3, T. 11 S., R. 10 E., alleging that he was then residing thereon.

Johnston gave due notice that he would make final proof on the 21st of April, 1888, and Pooler was specially cited to be present. On that date the parties appeared; the final proof was presented; Johnston and his witnesses were cross-examined; Pooler and his witnesses testified, and on the 11th of May thereafter, the register and receiver rendered their decision, in which they held that Pooler was the prior settler, and "that Johnston's proof should be accepted for the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of said section 3, T. 11 S., R. 10 E., but rejected as to the tract in contest."

An appeal was taken by Johnston from that judgment to your office, where it was affirmed, on the 9th of April, 1890, for the reason:

In view of all the testimony in the case I find that plaintiff Pooler was in point of time the prior settler, and so much of Johnston's filing as conflicts with the SW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of said section 3, is held for cancellation and his final proof for the E.  $\frac{1}{2}$  and the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  is hereby accepted.

An appeal by Johnston from your judgment, brings the case before me for consideration.

That Johnston made settlement on the 11th of August, 1887, upon the land for which he afterward made filing, is not disputed, and that his residence thereon was continuous from that time to the hearing is not brought into question.

According to the evidence, Pooler, with his family, consisting of a wife and four children, first went upon the tract mentioned in his homestead entry, on the 30th of June, 1887. He took with him a stove, bed, trunk, dishes, and provisions, and proceeded to erect a house. The house was not then completed, but made habitable, and he and his family remained there until the 4th of July, when they returned to Chor Chilla Ranch, where he was employed as a herder and his wife as a cook. The furniture and effects were left in the house which he had erected, and in the latter part of July, he returned and completed the house. At this time he remained only two days, but on the 29th of August, accompanied by his family, he again went to the tract, and has ever since resided there.

The house and improvements of Pooler were on the south-west corner of the south-west quarter of section three, and did not indicate that he claimed to have made settlement on any other land than in that

quarter section. Had he made filing or entry, describing his land, that would have been notice to all subsequent comers, but the notice given by his settlement and improvement extended only to the quarter section upon which they were located, as defined by the public surveys. This is held in the case of *L. R. Hall* (5 L. D., 141), in *Reynolds v. Cole*, page 555 of the same volume, and in *Hemsworth v. Holland* (7 L. D., 76). In the case of *Cooper v. Sanford* (11 L. D., 404) it was held that "actual notice of the extent of a settlement claim will protect such claim as against the subsequent claim of another."

In the case at bar, there was no actual notice to Johnston, and no notice of any kind to anybody, of the extent of Pooler's settlement claim. He had done nothing at all on the north-west quarter of section three, and had only built a shanty and lived a few days on the south-west quarter of the section. Under the decisions cited, the notice given by such settlement and improvement extended only to the quarter section upon which they were located, and did not extend to the quarter section for which Johnston made filing.

The decision appealed from is therefore reversed, and as Johnston's final proof shows a compliance with law on his part, he will be allowed to complete his entry for the land for which he made filing, and Pooler's entry will be canceled, so far as it conflicts therewith.

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PRACTICE—APPEAL—FINAL PROOF.

HALEY v. HARRIS.

When notice of a decision is given through the mails by the local office, ten days additional are allowed within which to file appeal, irrespective of the time actually required for the transmission of said notice.

A pre-emptor who gives notice of intention to submit final proof, and cites an adverse claimant to appear but fails to offer his proof on the day named, is not debarred from subsequently submitting final proof, after due notice, and in the absence of any valid adverse claim.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 7, 1891.*

I have considered the case arising upon the appeal of George Haley from your decision of June 5, 1889, in the case of said Haley v. Nina M. Harris, (formerly Redwood), involving the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 26, T. 30, R. 21, Valentine land district, Nebraska.

Miss Redwood filed pre-emption declaratory statement for the tract on March 25, alleging settlement March 20, 1884.

Haley filed declaratory statement for the same October 22, alleging settlement October 20, 1884.

Miss Redwood offered final proof on May 29, 1885; whereupon Haley appeared, protested against its acceptance, and submitted testimony tending to show that she had not complied with the requirements of the pre-emption law.

The register and receiver, in view of the showing made by the protestant, rejected the proof, and returned to Miss Redwood her money.

Haley gave notice that he would make final proof, before the clerk of the court of the county in which the land is located, on November 11, 1885. He failed to appear for some reason not set forth in the record; but Miss Redwood's counsel, on that day, appeared before the clerk of the court, and took the testimony of two witnesses, tending to show that she had fulfilled the requirements of the law.

On November 20, 1885, counsel for both parties appeared at the local office. Miss Redwood's counsel asked that the register and receiver forward the testimony filed on the 11th of November in support of her claim with her final proof previously taken to your office, with their opinion that the same should be allowed. This the register and receiver refused to do.

Haley again gave notice of his intention to make final proof, and offered the same on February 18, 1886. On this occasion, Miss Redwood (who had by this time married Mr. Montgomery P. Harris) filed by way of protest the affidavits of herself and her husband.

On September 3, 1887, the register and receiver rendered their joint judgment in favor of Haley, holding that Miss Redwood never had established *bona fide* residence on the land, and recommending that the former be allowed to perfect entry, "providing he can furnish supplementary evidence showing continued residence, cultivation, and improvements, to the present date."

Miss Redwood appealed to your office, which, on June 5, 1889, reversed the judgment of the local officers, directing them to accept her proof. From this decision, Haley appeals to the Department.

Miss Redwood contends that the appeal should not be recognized for the reason:

That the same was not taken within the sixty days allowed by the rules of practice after service of the notice of the decision on the said Haley; that the register and receiver at Valentine, Nebraska, mailed a copy of said decision to said George Haley and his attorney on the 12th day of June, 1889, and that the records show that the same was duly received by said Haley on the 13th day of June, 1889; and that a copy of the notice of the appeal in this case was served on C. H. Bane, the attorney of record of said Nina M. Harris, on the 20th day of August, 1889.

Rule 87 of Practice provides that where notice of a decision of your office is given through the mails by the register and receiver

Five days additional will be allowed by those officers for the transmission of the letter, and five days for the return of the appeal through the same channel.

The contention of the contestant herein evidently is that, as Haley acknowledged receipt of the notice within *one* day after mailing, the *five* days named in the Rule should not be allowed for its transmission.

In the case of John H. Moore (1 L. D., 110,) it was held that where notice was given by the register and receiver through the mails, "it is immaterial whether the time actually required for the transmission of

the notice from the local office, or the return of the appeal thereto, is less or more than five days in either case." This was Commissioner McFarland's statement of the rule then prevailing in the land department. In the case of *Boggs v. West Las Animas townsite* (5 L. D., 476), notice of the decision of your office was received by counsel on the same day it was mailed; but the Department held that the full seventy days were allowed in which to file appeal. In short, since the rule was established, such has been the uniform interpretation it has received by your office and the Department. It is therefore apparent that Haley's appeal was filed in time.

The first four grounds of error alleged by appellant are, in substance, that your office erred in its conclusion of fact and its construction of law. Fifth, that it erred in considering the *ex parte* affidavits of Montgomery P. Harris and Nina W. Harris (formerly Nina M. Redwood); and sixth, that it erred in giving any weight to the *ex parte* affidavits introduced by Miss Redwood in her own behalf before the clerk of the district court on November 11, 1886—the day when Haley had advertised to make final proof, but failed to appear.

It is not easy to determine whether your office in rendering its decision attached any weight to the *ex parte* affidavits complained of in the last two allegations of error.

Your decision states:

The record is objectionable by reason of the *ex parte* nature of portions of the testimony submitted in behalf of each of the opposing claimants; but after examining the proof offered by each, and all the affidavits and counter-affidavits, as well as the testimony of such witnesses as were cross-examined, my conclusion is that Miss Redwood (now Mrs. Harris) is legally entitled to enter the tract in controversy.

It is not necessary, however, to carefully distinguish between and decide what evidence was properly considered by your office, and *vice versa*; for whether any weight be given to the testimony and affidavits objected to by one or the other of the parties, or whether such testimony and affidavits be wholly ignored, I am constrained to arrive at the same conclusion in either case.

Ignoring *ex parte* affidavits, and giving due weight to such evidence only as is properly in the case—the following appear to be the facts relative to the residence and improvements of the parties:

L. G. Dunn, one of Miss Redwood's witnesses, on final proof, states, that her improvements were worth about thirty five dollars; that she "has been absent half the time." On cross-examination, he testified that there was a bed and bedding, but no stove nor utensils; that he knew of her having offered her claim for sale for fifty dollars.

Montgomery P. Harris, her other witness, her attorney at the time, and afterward her husband, stated in his testimony, that he "was not in the State when she commenced her residence;" that "since August, 1884, she has resided on the land one-third of the time—before that time I know nothing about it." On cross-examination, he testified that

in October, no one was living on the land; and that Haley moved thereon about the 20th of October, 1884.

John Weyer, advertised to be one of her witnesses on final proof, testified that he lived on a quarter section adjoining that claimed by Miss Redwood; being asked, "Could you swear that she lived there from the time she made her settlement till fall?" he answered, "No, sir." To the question, "Do you think she has lived on the land and cooked, eaten and slept there one-tenth of the time?" he answered, "I could not tell." To the question, how he knew that Miss Redwood lived on the tract even a part of the time, he answered "I saw her go backward and forward; she would go to the claim in the evening, and go back to Franklin's in the morning; she took her meals at Franklin's." (Franklin was Miss Redwood's step father).

She offered to sell her claim to a man who lived with this witness, for sixty-five dollars; he intended to accept the offer, but before he did so, Haley moved on to the place; when he moved on, the roof was off the sod house, and had been for between two and four weeks.

It is unnecessary to go beyond the testimony of Miss Redwood's own witnesses, actual and advertised, to find sufficient ground for the action of the local officers in rejecting her proof.

As to Haley, the evidence shows that he was told the claim was for sale for fifty dollars, the relinquishment being in the hands of a neighbor, one Fitzmorris; that he moved on to the tract with the understanding that he could have it for that price; but that on meeting Fitzmorris, the latter charged him sixty-five dollars; that he agreed to give that amount, but was referred to Miss Redwood; that she told him "she wanted to dispose of it, but her mother had brought her word that a lawyer by the name of Harris wanted the claim, and that he would pay her one hundred and twenty-five dollars, if she would hold it for him;" that a few hours later Harris came, and acting as Miss Redwood's lawyer, served upon him a notice to quit the premises; that at that time "there was no indication that any one had lived there for months; there was no roof on the house, no floor, no doors, no windows, and one gable-end had caved in;" that there was but about a quarter of an acre of ground broken on the claim; that he has been ready at any time to pay to Miss Redwood the sixty-five dollars agreed upon as the price of her improvements, and has not heeded the notice to quit.

His final proof shows that he settled upon the tract October 20, 1884, and proceeded to build a house, sixteen by sixteen feet, with board and tar paper roof; that he established residence in the house about November 1, 1884; that he built a barn sixteen by twenty-two feet, and a chicken-house, and ploughed ten acres, which he planted to corn and vegetables; that he and his family resided upon the tract continuously until the time of making final proof.

Counsel for Miss Redwood contends that Haley, by failing to make proof as advertised, after citing her to appear, "made default, thus virtually abandoning his rights if he had any."

In this respect, the case at bar is essentially similar to that of *McCracken v. Porter* (3 L. D., 399), in which the Department said :

The action of the local officers in issuing a special notice to McCracken, citing him to appear and contest the application of Porter, did not \* \* \* \* \* necessarily make it imperative upon the pre-emptor to proceed, at the time and place designated, with his proof; for it has been repeatedly held by this Department that he is entitled to the whole period prescribed by the statute, within which to make his final proof and entry. The fact that he has given notice of his intention to make such proof on a day named, ought not to preclude him from abandoning his purpose for the time being, or postponing it to some more convenient period, if he thinks proper.

In the case above cited, the contestant did not claim settlement prior to that of the pre-emptor who had advertised to make final proof and then postponed it. But it is manifest that a similar rule would obtain where prior settlement was claimed, but where, upon investigation, it was clearly shown that such claim was without foundation.

In view of the facts hereinbefore set forth, which satisfactorily show that Miss Harris never established and maintained residence upon the land in accordance with the requirements of law, while Haley has shown full compliance therewith, I reverse the decision of your office appealed from, and direct that patent issue to him upon the proof already made.

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PRACTICE—APPEAL—EVIDENCE.

FALL v. TAYLOR.

An appellant from a decision of the General Land Office is entitled to have all the record on which action was taken transmitted to the Department.

If said decision, in accordance with a stipulation of the parties, is rendered on evidence taken in another case, but not copied and filed with the case under consideration, a copy of said evidence must be transmitted with the appeal without expense to the appellant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 7, 1891.*

On November 2, 1889, you rendered a decision in the above stated case, dismissing the contest of Robert C. Fall, and accepting the final proof of Charles H. Taylor on his desert land entry for the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 34, T. 18 S., R. 18 W., Visalia, California.

In your judgment you directed that, "In case this decision is appealed from, the testimony in the case of Charles Fall v. Wm. Z. King, on which the contest was submitted, should be copied and filed with the case; 3 L. D., 445."

Fall appealed from said decision within the time provided by the rules, but without furnishing a copy of the testimony in the case of Charles Fall v. W. Z. King, above referred to, and you declined to transmit said appeal, unless the contestant perfected the record, in accordance with the instructions contained in said decision. Fall failed to

comply therewith, and the claimant filed a motion to dismiss said appeal, because of his non-compliance with said direction.

You denied said motion, for the reason that the filing of the appeal removed the case from your jurisdiction, but forwarded it to the Department for final action.

From the record, it appears that at the hearing of this case before the local officers, the parties entered into the following agreement:

That this case . . . . . be and the same is hereby submitted . . . . . upon the same testimony given and taken in the case of Charles Fall v. William Z. King, heretofore submitted to said register and receiver, and not yet decided; and that the testimony so taken in said last mentioned case shall be considered as taken in this case . . . . . it being considered that the land referred to in such testimony is the land involved in this action.

Upon the testimony taken in said case of Fall v. King, the local officers dismissed the contest, from which contestant appealed.

Pending the consideration of the contest by the local officers, the claimant gave notice of intention to make final proof on May 17, 1889, at which time both parties appeared and submitted evidence. The local officers rejected the final proof, from which the defendant appealed.

The local officers having transmitted the record in the case of Fall v. King, you, on November 2, 1889, took up the appeal of Fall from the action of the local office dismissing his contest, and the appeal of Taylor from the action of the local office rejecting his final proof, and, considering said cases together, rendered the decision of November 2, 1889, dismissing the contest of Fall and accepting the final proof of Taylor.

In the case of Davidson v. Parkhurst (3 L. D., 445), the Department directed that when it is desired in one case on appeal to use testimony taken in another case under stipulation of parties, such portions upon which they rely should be copied and filed with the case. The stipulation to use the testimony in this case was filed with the local officers on the hearing before them, and the appeal of Fall from the decision dismissing his contest should not have been considered by your office, without requiring him to complete the record in said case, but it having been considered by your office, he is entitled on appeal from said decision to have all the record upon which your office acted transmitted to the Department.

In rendering the decision of November 2, 1889, now appealed from, it appears that you did consider the testimony taken in the case of Fall v. King. Whether that testimony was favorable or unfavorable to the contestant, is immaterial. It was considered in arriving at your decision, and a copy of said testimony should be made a part of the record, without expense to contestant.

The motion to dismiss is denied, and the record is returned to you that it may be completed, in accordance with the above suggestions, after which it will be returned to the Department, and it will take its place on the docket as of the date when the appeal was first transmitted.

## SETTLEMENT RIGHTS—PURCHASE OF IMPROVEMENTS.

ESPERANCE *v.* FERRY.

Settlement rights under the public land laws cannot be acquired by the purchase of the improvements and possessory rights of another. Such rights are only acquired through acts of settlement performed in person by the party seeking to secure the benefit thereof.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 8, 1891.*

I have considered the appeal of Donald Ferry from your decision rejecting his claim to lot 1 and NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and S W.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 9, Tp. 22 S., R. 10 E., M. D. M., San Francisco, California, and holding for cancellation his homestead entry and pre-emption filing for said land.

He made homestead entry for the said tract on November 19, 1885, and on June 21, 1886, he filed declaratory statement for the same, alleging settlement November 5, 1885.

Esperance filed declaratory statement for lot 1, SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of said section 9, May 24, 1886, alleging settlement November 7, 1885.

Ferry gave notice of his intention to make final proof under his pre-emption claim, and Esperance appeared to oppose the same, and evidence was submitted.

The land in question was within the limits of the withdrawal for the Atlantic and Pacific R. R. Co. and was restored to the public domain May 24, 1886 under the decision of this Department, of March 23, 1886 (4 L. D., 458).

At the time Ferry made his homestead entry, the land was withdrawn from entry and the same was therefore illegally allowed; in addition to this fact, however, Ferry is only asserting a right under his pre-emption claim and filing based on his alleged settlement November 5, 1885.

Your office found that he made settlement upon the tract in question, in bad faith and in the interest and for the benefit of another. There is much connected with the circumstances attending his settlement to justify this finding, but the case can be determined on points about which there is no controversy.

It is shown that Esperance made a valid settlement on the land on November 7, 1885, and has followed it by bona fide residence and improvement. Ferry alleges settlement November 5, 1885.

The land was not subject to settlement until May 24, 1886, and neither party could obtain any rights as against the government, but as between themselves, priority of settlement will be considered (*Pool v. Moloughney* (11 L. D., 197).

The alleged settlement of Ferry, November 5, 1885, consisted of the claim of a purchase by him on that day, of the improvements on the land from one Abadie who was holding under the railroad company. He testifies that he never saw the land nor went upon the same until November 21, 1885, two weeks subsequent to the settlement of Esperance.

Settlement rights under the public land laws can not be acquired by the mere purchase of the improvements and possession of another. Such rights are only acquired through acts of settlement made in person by the party seeking to secure the benefit thereof. *Willis v. Parker* (8 L. D., 623).

Thus, as it is shown that Esperance is the prior settler, he has the prior right. Your decision is therefore affirmed.

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TOWNSITE—DECLARATORY STATEMENT—CONTEST.

CARNAHAN *v.* HAYWOOD ET AL.

Lands selected as the site of a town are not subject to homestead entry.

A preferred right to contest a townsite selection may be equitably accorded a bona fide homestead settler on a tract covered by a townsite declaratory statement.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 10, 1891.*

On June 7, 1887 Will C. Higgins, probate judge of Hamilton county to which Kearney county was attached for judicial purposes), filed a townsite declaratory statement, under section 2388 of the Revised Statutes, for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , Sec. 28, T. 24 S., R. 36 W., Garden City, Kansas.

On September 14, 1888, William P. Haywood applied to make homestead entry on said land, accompanying his application with a contest against the townsite declaratory statement. His application was rejected, and on the 22d day of that month John Quimby presented his homestead application for the land, which was also rejected,

for the reason that a prior H. E. application had been made, and is now on file in this office for same tract, which application, viz: that of William P. Haywood, was erroneously not allowed to go to record upon September 14, 1888—the day presented—having accompanied contest papers in a contest against a D. S. filing for tract involved as within, which prior applicant will this day be notified of his right to enter the land without process of contest, the tract merely having a D. S. filing upon it, and not being legally appropriated by any entry. Thirty days is allowed for appeal.

From this rejection Quimby on the same day (October 22) appealed, and on the 24th day of that month Haywood's homestead application was made of record.

On November 2, 1888, William R. Carnahan presented his homestead application for the land, which was rejected because of Haywood's prior entry, and on the 14th day of that month he filed his corroborated affi-

davit, alleging that he was qualified to make a homestead entry, and that on September 24, 1888 (date of Haywood's entry), he and his family resided on the land in controversy, and had valuable improvements thereon, and that at that time it was his intention to enter the tract within ninety days from the time it became subject thereto.

Hearing was duly had, and the register and receiver on February 9, 1889, found that Carnahan was an actual settler on the land at date of defendant's entry, and at said time it was his intention to make homestead entry of the land. They accordingly recommended the cancellation of Haywood's entry.

From this action Haywood duly appealed.

Such was the condition of the record when you, on February 12, 1890, dismissed the appeals of both Quimby and Haywood, and held the latter's homestead entry for cancellation, and allowed Carnahan thirty days in which to initiate a contest against the townsite declaratory statement.

Haywood brings this appeal from that judgment, and "suggests" error in substance as follows :

In holding that plaintiff ever made continued, legal settlement on said tract such as should give him a preferred homestead and contestant's right prior to the 14th of September, 1888.

In holding that plaintiff shall have a preferred right of contest over the defendant.

The alleged error is sufficiently specific, and plaintiff's motion to dismiss the appeal, "for failure to allege wherein the decision appealed from is erroneous," is overruled.

Section 2289 of the Revised Statutes provides that homestead entries may be made upon land "subject to pre-emption," and section 2258 prohibits the pre-emption of lands "selected as the site of a city or a town."

It follows, therefore, that lands selected as the site of a town are not subject to homestead entry, and that Haywood's entry was erroneously allowed.

Haywood applied to contest the townsite declaratory statement, when he applied to enter the land, but he appears to have acquiesced in the erroneous judgment of the local officers, when they subsequently permitted him to make his entry, without securing the cancellation of the townsite declaratory statement. Acquiescing in that erroneous judgment he is estopped from subsequently complaining of the error.

The sole question is one of fact—namely, whether Carnahan was an actual settler on the land with the *bona fide* intention of making homestead entry thereon at the time Haywood applied to enter the same.

Both your office and the local office decide that issue in the affirmative, and I find no sufficient reason to disturb that finding.

It appears that Carnahan, at the time of the hearing, was the only resident of the land; he was not a member of the townsite company,

but he had lived on the land from 1887, and had improved four lots. It was doubtless his intention when he first moved to the land to secure title to the lots under the townsite laws. But, finding that the projectors of the townsite had abandoned making entry of the same, he decided to make homestead entry.

These facts considered, I think he has the superior right to bring the contest—the equities, at least, are in his favor.

I think the proof shows that the townsite has been abandoned, but, inasmuch as the projectors thereof have not had an opportunity to be heard, Carnahan will be given thirty days in which to file a contest against the same.

The decision appealed from is affirmed.

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#### RAILROAD GRANT—REVOCATION OF WITHDRAWAL—SETTLEMENT.

##### SOUTHERN PACIFIC R. R. CO. *v.* WASGATT.

The order of August 15, 1887, revoking the indemnity withdrawal, made for the benefit of this company, took effect as soon as issued, and a settlement on land included within such order, existing at the date of its issuance, will be protected as against a subsequent selection by the company.

*Acting Secretary Chandler to the Commissioner of the General Land Office*  
August 11, 1891.

I have considered the appeal by the Southern Pacific Railroad from your office decision of April 19, 1890, sustaining the rejection of the selection by said company of the N $\frac{1}{2}$  NE $\frac{1}{4}$  and N $\frac{1}{2}$  NW $\frac{1}{4}$  Sec. 3, T. 17 S., R. 16 E., M. D. M., Visalia land district, California.

Said tract is within the indemnity limits of the grant for this company, the withdrawal for which was revoked by departmental order dated August 15, 1887, and on October 4, following, the company sought to select the land, and upon the rejection of such application it appealed.

On June 8, 1887, prior to the revocation of the withdrawal, Moses Wasgatt was permitted to file declaratory statement No. 8956 for the tract under consideration, alleging settlement June 3, 1887, and after due notice, by publication, he tendered final proof and made payment, upon which cash certificate No. 4877 issued April 11, 1888. The proof shows that Wasgatt made settlement as alleged, and that he was residing upon the land at the date of the revocation of the withdrawal and also at the date of attempted selection by the company.

The company's appeal is based upon the ground that Wasgatt's settlement made June 3, 1887, prior to the revocation of the indemnity withdrawal, was unauthorized and that he can reap no benefit therefrom.

Conceding that a valid settlement could not be made upon land covered by a railroad indemnity withdrawal, yet it must be remembered that the order revoking such withdrawal took effect as soon as issued, and a

settlement on land included within such order, existing at the date of its issuance, will be protected as against a subsequent selection. *Central Pacific R. R. Co. v. Doll*, 8 L. D., 355.

The every day act of a resident upon land is a settlement, hence Wasgatt had a legal settlement upon the land *eo instanti* upon the issue of the order of revocation.

Your decision sustaining the rejection of the company's selection is therefore approved.

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LODE CLAIM—INTERSECTING MILL SITE.

ANDROMEDA LODE.

The provisions of section 2336, R. S., relative to the priority of title upon the intersection of two or more veins, have no application to patented mill sites that intersect and divide lode claims.

A lode claim that is divided into two parts by an intersecting patented mill site must be confined to that part which contains the discovery shaft and improvements. The proof of expenditure should show that the improvements have been made for the purpose of developing the particular claim for which application is made.

*Acting Secretary Chandler to the Commissioner of the General Land Office, August 11, 1891.*

I have considered the appeal of Rufus Batchelder from the decision of your office dated April 25, 1890, holding for cancellation that part of mineral entry No. 3274 covering the Andromeda location lying east of the patented mill-site claim, and requiring additional evidence relative to the improvements on the several claims included in said entry.\*

The record shows that the Bobtail Mill site claim passes clear across the Andromeda lode claim, thereby separating it into two separate parts which are non-contiguous, the southwesterly (not southeasterly, as stated in said decision) part containing about 450 feet, while about 976 feet of the claim lying northeast and beyond the mill-site claim, and the balance 254 feet being within said mill-site which was patented as agricultural land, the same being expressly excepted from said entry.

In the decision appealed from it is stated that the location of the Andromeda claim was made July 23, 1886, upon a discovery located on that part of the survey which is situate west of the mill-site claim, and it was held that the claim could not be extended beyond the west line of the patented mill-site. It was further stated that the improvements on the Andromeda claim consist of a discovery-shaft and cut amounting to \$105; that where more than one lode is embraced in a single entry, and \$500 has not been expended upon each lode, it must be shown that the sum of \$500 in labor and improvements has been so expended for the common benefit of all the lodes embraced in a single

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\* The application in this case included the Rarus, Comet, and Andromeda Lode claims.

entry. The claimant was accordingly required to furnish another certificate from the surveyor-general showing in what way the improvements upon the other lodes conduce to the development of the Andromeda claim, if, in fact, the amount expended tends to the development of the entire claim.

The appellant insists that your office erred in holding that the two portions of the Andromeda claim became separated by said mill-site patented claim because mill-sites being patented under the mining laws the same rule should apply as where lode claims conflict; that it was error to require said additional evidence relative to the improvements and their tendency to improve the whole claim.

The contention of the appellant cannot be maintained. While mill-sites are sold under the mining laws (Sec. 2337, R. S. U. S.), yet they are disposed of as "non-mineral land" and the provision of section 2336 R. S. U. S. relative to the priority of title upon the intersection of two or more veins, has no application to mill-sites which have been patented and lie across, separating in two parts, lode claims.

There was, therefore, no error in said decision in holding that the entry of the Andromeda claim east of said mill-site patented claim was invalid and must be canceled to that extent. Nor was there any error in requiring said additional evidence. In the case of John Downs (7 L. D., 71) the Department said "The proof should show that the improvements have been made for the purpose of developing the particular claim applied for." In the case of Smelting Co. v. Kemp (104 U. S., 636-655), the court said :

Labor and improvements, within the meaning of the statute, are deemed to have been had on a mining claim, whether it consists of one location or several, when the labor is performed or the improvements are made for its development, that is, to facilitate the extraction of the metals it may contain, though in fact such labor and improvements may be on ground which originally constituted only one of the locations, as in sinking a shaft, or be at a distance from the claim itself, as where the labor is performed for the turning of a stream, or the introduction of water, or where the improvement consists in the construction of a flume to carry off the debris or waste material.

See also *Nichols et al v. Becker*, (11 L. D., 8).

A careful examination of the whole record shows no error in said decision, and it is accordingly affirmed.

## RELINQUISHMENT—APPLICATION TO ENTER—SETTLEMENT RIGHT.

ZASPELL *v.* NOLAN.

A timber culture entryman who files a relinquishment and thereupon applies to enter the land under the homestead law, can not thereby defeat the adverse right of a settler who is residing upon said land at the date of the relinquishment. The case of *Tilton v. Price*, cited and distinguished.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 11, 1891.*

Emil F. Zaspell made timber culture entry of the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 34, T. 22 S., R. 44 W., Lamar, Colorado, November 13, 1885. On January 13, 1886, he filed a relinquishment of said entry, which was canceled the same day, on account of said relinquishment, and immediately thereafter he made homestead entry of the tract.

On February 1, 1886, while the land was covered by the homestead entry of Zaspell, Patrick Nolan filed declaratory statement for said land, alleging settlement November 20, 1885. November 26, 1886, Nolan applied to make final proof under his filing, which was rejected by the local officers because of conflict with the homestead entry of Zaspell, but having filed an affidavit regarding the initiation of his claim, and its priority to the claim of Zaspell, your office directed that "the entry of Zaspell will therefore stand subject to Nolan's prior right," and his application was returned for the proper action in such cases. In pursuance thereof, Nolan was permitted to submit final proof, on May 12, 1887, after due notice of such intention, and Zaspell appeared and protested against the allowance of such proof.

Upon the proof taken under such notice and protest, the local officers dismissed the protest, and held that Nolan's proof should be considered on its merits. It does not appear that the entry was allowed, but the papers were transmitted to your office. From this decision Zaspell appealed. You sustained the action of the local officers dismissing the protest, and held that Nolan being a settler on the land at the date of the filing of the relinquishment, his rights attached *eo instanti*, and are superior to those of a homesteader who enters the land immediately after the filing of a relinquishment, citing *Wiley v. Raymond*, 6 L. D., 246. From this decision Zaspell appealed.

It appears from the record in the case that Nolan was a settler upon the land at the date of the filing of the relinquishment, and it is not claimed by the protestant that he was then or ever had been an actual settler on the land, but he contends that it was not necessary for him to be an actual occupant of the land, for the reason that the land being covered by his timber culture entry, he was as much in actual possession as if he were living upon the land, and, further, that the case should be determined by the rule announced in *Tilton v. Price*, 4 L. D., 123, which was the rule in force when his homestead entry was made.

The rule announced in the case of *Wiley v. Raymond*, *supra*, to the effect that on the relinquishment of an entry, the right of a settler then residing on the land attaches *eo instanti* and is superior to that of a homesteader who enters the land immediately after said relinquishment, is decisive of the issue presented in this case, and is not in conflict with the rule announced in *Tilton v. Price*, 4 L. D., 123, relied on by protestant. In the case last cited it is true that there is an apparent conflict between the principle announced in that case and that announced in the case of *Wiley v. Raymond*; but in the case of *Tilton v. Price* both parties were in actual possession of the land as settlers, and the prior rights of Price, who relinquished the entry and made another simultaneously, were sustained, mainly upon this ground. The ruling in the case of *Wiley v. Raymond* has been uniformly followed.

Your decision dismissing the protest of Zaspell is affirmed, and the record will be returned to the local office for further action thereon.

[Circular.]\*

RULES AND REGULATIONS GOVERNING THE USE OF TIMBER ON  
THE PUBLIC DOMAIN.

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 5, 1891.

By virtue of the power vested in the Secretary of the Interior by the act of March 3, 1891 (26 Stat., 1093), entitled "An act to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled 'An act to repeal timber-culture laws and for other purposes,'" the following rules and regulations are hereby prescribed:

1. The act, so far as it relates to timber on the public land, applies only to the States of Colorado, Montana, Idaho, North Dakota, South Dakota, Wyoming, and Nevada, the District of Alaska, and the Territory of Utah.

2. The right of railroad companies to procure timber for construction purposes from the public land adjacent to the lines of their roads, authorized by the several granting acts and the act of March 3, 1875 (18 Stat., 482), is in no way enlarged by this act.

3. The act of June 3, 1878 (20 Stat., 88), authorizing the cutting of timber for building, agricultural, mining, and other domestic purposes, from public lands which are known to be mineral and not subject to entry under existing laws of the United States except for mineral entry, is not repealed by this act, but remains in force subject to the rules and regulations prescribed thereunder by the Secretary of the Interior.

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\* This circular is the same as that published in 12 L. D., 456, with the exception of the insertion of the word "non-mineral" in the third line of paragraph six, this modification being authorized by Acting Secretary Chandler, August 13, 1891.

4. Settlers upon the public lands, miners, farmers, and other bona fide residents in either of the States, District, or Territory named in this act, who have not a sufficient supply of timber on their own claims or lands for fire-wood, fencing, or building purposes, or for necessary use in developing the mineral and other natural resources of the lands owned or occupied by them, are permitted to procure timber from the public lands strictly for the purposes enumerated in this section, but not for sale or disposal or use on other lands or by other persons; but this section shall not be construed to give the right to cut timber on any appropriated or reserved public lands, and the Secretary of the Interior reserves the right to prescribe such further restrictions as he may, at any time, deem necessary, or to revoke the permission granted hereby in any case or cases wherein he has information that persons are abusing the conceded privileges, or where it is necessary for the public good.

5. Section 2161, U. S. Revised Statutes, is still in force in the States, District, and Territory named in this act, as well as in all other States and Territories of the United States. Its provisions may be enforced as heretofore against any person who shall cut or remove, or cause or procure to be cut or removed, or aid or assist or be employed in cutting or removing, any timber from public lands of any other character or description, or for any other use or purpose whatever than as above defined in sections 2, 3, and 4 of these rules and regulations, unless special permission is first obtained from the Secretary of the Interior specifically designating the particular sections or tracts from which timber may be cut, and under what restrictions and limitations.

6. Persons, firms, or corporations residing in either of the States, District, or Territory named in this act, who desire to procure permission to cut or remove timber from non-mineral public lands for purposes of sale or traffic, or to manufacture same into lumber or other timber product as an article of merchandise, or for any other use whatsoever other than as defined in sections 2, 3, and 4 of these rules and regulations, must *first* submit an application therefor in writing to the Secretary of the Interior, designating the lands by sections, townships, and ranges, if surveyed, and, if unsurveyed, describing the land by natural boundaries, and the estimated number of acres therein. They must also define the character of the land and the kinds of trees or timber growing thereon, giving an estimate as to the quantity of each kind, stating which particular kind or kinds they desire authority to cut or remove, and the specific purpose or purposes for which the timber or the product thereof is required. The application must be sworn to and witnessed by not less than four reliable and responsible citizens of the State, District, or Territory in which the land is situated, and who reside in the locality of the particular land described.

7. The petitioner or petitioners should also submit with the application such evidence as can be procured to conclusively show that the preservation of the trees or timber on the land described is not required for

the public good, but that its use as lumber or other product and for the purposes named in the application, is a public necessity. Upon receipt of the application, with accompanying papers, it will be duly considered, and if deemed for the public interest, the desired permission will be granted, subject to such restrictions and limitations as may be deemed necessary; but if it shall appear that the cutting of timber in the locality described in the application will be detrimental to the public interests or infringe upon the rights and privileges of the settlers in that locality, the application will be rejected.

8. In order that farmers who desire to have the forests preserved in the interest of water supply for irrigation and all others having adverse interests may have due notice of such applications, the parties making an application, as herein provided, shall cause a notice of such application, describing the lands and timber which it is desired to use, to be published at least once a week for three consecutive weeks, in a newspaper of general circulation in the State, District, or Territory, and also in a newspaper in the county, or, where there is more than one county, in each of the counties wherein the lands are situated, and a printed copy of the published notices must be submitted with the application, together with the affidavit of the publisher or foreman of each newspaper, attached thereto, showing that the same was successively inserted the requisite number of times, and the dates thereof.

9. The cutting or removing of any timber from public lands described in an application, by or for the applicant, *before* authority has been officially granted by the Secretary of the Interior, will render the party so offending liable to prosecution for trespass, and subject his application to rejection.

10. Saw-mill owners, lumber dealers, and others, who in any manner "cause or procure" timber to be cut or removed from any public lands in violation of law or these rules and regulations, whether directly by men in their employ, or indirectly through contract or by purchase, are equally guilty of trespass with the individuals who actually cut or remove such timber, and are alike liable to criminal prosecution. The procurer or manufacturer of timber so cut, as well as the purchaser of such timber or its products, is also liable in civil suit for the value thereof.

11. Special agents will diligently investigate and report all such cases to this office for proper action.

Very respectfully,

T. H. CARTER,  
*Commissioner.*

Approved May 5, 1891.

JOHN W. NOBLE,  
*Secretary.*

[PUBLIC—No. 160.]

AN ACT to amend section eight of an act approved March third, eighteen hundred and ninety-one ; entitled "An act to repeal timber-culture laws and for other purposes."

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section eight of an act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

"SEC. 8. That suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands."

Approved March 3, 1891.

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

WILLIAM H. RAMBO ET AL.

Failure of the entryman to comply with the law in the matter of residence, will not defeat the confirmatory operation of section 7, act of March 3, 1891, where the entry is made in the absence of any adverse claim, and the land sold prior to March 1, 1888, and no fraud is found as against the transferee.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 3, 1891.*

I have considered the motion of Wm. H. Rambo and George B. Wilbur, by their attorney, to dismiss the appeal pending here and asking that a patent under section seven of the act of March 3, 1891 (26 Stat., 1095), be issued.

The record shows that on December 6, 1884, Rambo made pre-emption cash entry for the tract in question, to wit, SE.  $\frac{1}{4}$ , Sec. 5, T. 22 S., R. 17 W., Larned, Kansas, and received a final certificate same day.

This entry was made under the act of Congress approved August 4, 1882, being an act for the disposal of the Fort Larned military reservation (22 Stat., 217). Among other things in this act it is provided "the land shall be sold to actual settlers only, at the appraised price and

as nearly as may be in conformity to the provisions of the pre-emption laws of the United States."

The tract was sold in accordance with the practice in pre-emption cases, and the actual settler mentioned in the act above cited was, by the Department, held to mean one who had resided on the tract at least six months before final entry. *Cook v. Wilbur* (6 L. D., 600).

As appears from the certified abstract of title, accompanying the motion, the tract was mortgaged by Rambo on the same day his entry was allowed, to Frank E. Sage for \$400, and on January 14, 1885, he sold and conveyed the tract to the Pawnee Valley Stock Breeders' Association, for a consideration stated to be \$1000.

On April 27, 1885, the entry was held for cancellation, on a report previously made by a special agent of your office. It was stated in this report, among other things, "that the entry was apparently made in the interest of the Pawnee Valley Stock Breeders' Association."

Upon the application of said transferee a hearing was had on March 9, 1888, and after considering the testimony submitted, the register and receiver found that the entryman had not complied with the requirements of the law as to residence and they recommended the cancellation of the entry.

Before this trial an affidavit of the president of the association was filed in the local land office, stoutly denying the allegation in the special agent's report, that the entry had been made in the interest of said association. In their finding the local land officers make no mention of any proof tending to show that the entry was made in the interest of said association. And it appears that no evidence was introduced at this hearing in any way tending to show that the entry was made in the interest of said association.

An appeal was taken from the ruling of the register and receiver to your office, where, on July 5, 1890, their finding was affirmed and the entry held for cancellation. The following statement is found in your decision: "I think it is shown by a fair preponderance of the testimony that the entryman has failed to comply with said law as to residence, and, therefore, concur with your office in its decision."

In view of the fact that no proof was introduced showing the truthfulness of the assertion made in the special agent's report, to the effect that the entry was made in the interest of said association, although the association had requested the government to furnish said proof, I am of the opinion that the suggestion of fraud made in the special agent's report is rebutted by the affidavit of the transferee. I therefore hold that there is no proof, nor finding, that the entry was made in the interest of said association.

An appeal was taken from the ruling of your office to this Department, and was pending here on March 3, 1891, when the act in question went into effect.

On September 10, 1888, the Pawnee Valley Stock Breeders' Associa-

tion mortgaged the tract to George B. Wilbur, to secure the payment of an amount stated to be \$37,000, and on September 19, 1889, sold and conveyed said tract to him for a stated consideration of \$1.00.

On November 17, 1890, George B. Wilbur sold and conveyed the tract to Charles A. Wilbur for a consideration of \$1.00.

It appears from the statement of facts above given, that the entry in question was made on December 6, 1884, and that the tract was sold after final entry and before March 1, 1888, to the Pawnee Valley Stock Breeders' Association. No fraud has been found against the transferee and no adverse claim originating prior to final entry exists. *Prima facie* this case has all the necessary elements to bring it under the provisions of section seven of the act above cited. You will call on the transferee and present owner of the tract to furnish proof as required by the letter of instructions to chiefs of divisions, dated May 8, 1891, (12 L. D., 450). After receiving this proof you will adjudicate the case in the light of the act and instructions above cited.

The appeal of Wm. H. Rambo from your decision of July 5, 1890, is hereby dismissed.

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#### HOMESTEAD APPLICATION—RESIDENCE.

##### RICE *v.* LENZSHEK.

Prior to the allowance of a homestead entry the applicant is not required to establish nor maintain residence on the land covered by his application.

An application to enter initiates a right under the homestead law that relates back to the initial act, and cuts off all intervening claims.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
August 11, 1891.

This appeal is brought by Nils H. Rice from the decision of your office of March 15, 1890, affirming the action of the local officers in rejecting his application to file declaratory statement for the NE.  $\frac{1}{4}$  of Sec. 17, T. 48 N., R. 40 W., Marquette, Michigan, and in dismissing his protest and accepting the final proof of Alexander Lenzshek under his homestead entry for said tract.

The land in controversy is within the indemnity limits of the Marquette, Houghton and Ontonagon Railroad, which was withdrawn for the benefit of said road, but said withdrawal was revoked by order of the Secretary on August 15, 1887, in which it was directed that as to lands covered by non-approved selections, applications to make filings and entries thereon may be received, noted and held subject to the claim of the company, which will be allowed to present objections to the allowance of said filing or entry.

The lands within the indemnity limits of this road were opened to settlement October 10, 1887, but the tract in controversy having been

selected by the railroad company, and said selection not having been approved at the date of the order of revocation, Lenzshek, on October 10, 1887, as soon as the lands within the indemnity limits of said road were opened to settlement, filed his application to make homestead entry of said tract, and an investigation was ordered upon the application of Lenzshek, under the directions contained in the order of revocation.

The local officers decided in favor of allowing the application, from which decision no appeal was taken by the company, and, after the expiration of the time allowed for appeal, Lenzshek's application was allowed by your office, and in pursuance thereof he made entry of the tract, December 14, 1888.

Pending the investigation upon the application of Lenzshek—to wit, April 28, 1888—Rice filed with the local officers pre-emption declaratory statement for said tract, alleging settlement April 23, 1888. It appears that the local officers made the following endorsement upon this declaratory statement: "Conflicts with selections made by M. H. & O. R. R. Co. Oct. 17, 1883, & Oct. 8, 1887, and Hd. application of Alex. Lenzshek," and suspended action thereon until Lenzshek's application was disposed of.

On December 15, 1888, the day after the entry of Lenzshek had been allowed, the local officers rejected said application "for the reason that land applied for is included in H. E. No. 4909, made by Alexander Lenzshek on Dec. 14, 1888, on application made Oct. 10, 1887."

From the rejection of this application Rice appealed, and pending said appeal Lenzshek, on September 11, 1889, submitted final commutation proof, and Rice filed a protest against the allowance thereof, claiming a superior right to the land by virtue of settlement thereon, April 23, 1888, and his application to file declaratory statement therefor April 28, 1888.

The local officers dismissed the protest, and accepted the final proof of Lenzshek, and from this decision Rice also appealed.

On March 15, 1890, your office took up both appeals and considered them as one case. By said decision you dismissed the appeal of Rice from the action of the local officers rejecting his application to file declaratory statement, and you also affirmed the decision of the local officers dismissing his protest and accepting the final proof of Lenzshek. From this decision Rice appeals.

The appellant contends that your office erred in not holding that Lenzshek failed to make sufficient *prima facie* showing against the company's right of selection, and therefore failed to acquire any right by virtue of his application; that if Lenzshek acquired any rights by virtue of his application, they attached at once, or, at least, as soon as the company was concluded for want of appeal, and failing to establish residence on the land for more than nine months after the claim of the company ceased, was an abandonment of the land, and that it was not sufficient to establish residence within six months after the allowance

of his entry. He further contends that it was error to hold that Lenzshek was not bound to comply with the law as to settlement and residence, pending the contest between himself and the railroad company, and his failure to do so was an abandonment of the land, which subjected it to the settlement and adverse claim of Rice.

It appears from the record that Lenzshek first settled upon the land in August, 1887, and remained until September of that year. On October 10, 1887, he filed his application to make homestead entry of the tract, when the investigation was ordered as to the claim of the railroad company, under the decision of the Department revoking the withdrawal, and from that time to January 9, 1889, he lived in Negaunee, Michigan, at which date he made actual residence on the land. His compliance with the law from that date to the time of offering final proof does not seem to be questioned, and it is only necessary to consider whether he forfeited any rights by his failure to reside upon the land pending the investigation as to the validity of the railroad selection, under his application to enter, and whether Rice could, either by settlement or an application to file, initiate an adverse claim to the land during that period.

While the application to enter is the initiation of a homestead right, yet such right is not perfected until the entry is allowed, and when the entry is allowed, it relates back to the initial act and cuts off all intervening claims. The entry upon this application was suspended until the investigation as to the validity of the company's selection, in strict accordance with the direction in the order of revocation, and pending the investigation to determine the validity of said selection, Rice could not acquire any right either by settlement or an application to file for the land. Action upon said application was properly suspended by the local officers, and was properly rejected after the rejection of the selection by the company and the allowance of the homestead entry of Lenzshek.

But while the application of Lenzshek to make homestead entry was the initiation of his right, he was not bound to reside upon the land, or to make any compliance with the homestead law, until his entry had been allowed. *Goodale v. Olney*, 12 L. D., 324.

The entry of Lenzshek was made December 14, 1888, in due time after the rejection of the railroad claim and the allowance of said entry by your office, and, on January 9, thereafter, within less than one month, he established residence, and appears from the proof transmitted to have complied with the homestead law from that date to date of final proof.

As the protestant did not offer to prove failure to reside upon the land, except from October, 1887, to January 9, 1889, I see no reason for any further hearing in this case.

The decision of your office is affirmed.

## RAILROAD GRANT—SETTLEMENT CLAIM—ACT OF FEBRUARY 8, 1887.

NEW ORLEANS PACIFIC RY. CO. *v.* ELLIOTT.

By the express terms of section 2, act of February 8, 1887, lands occupied by actual settlers at the date of the definite location of the New Orleans Pacific road, and still remaining in their possession, are excepted from the operation of the grant made by said act.

The effect intended to be given to the Blanchard-Robertson agreement by section 4 of said act, is the right to purchase from the company lands that were confirmed to it, by said act, and that were in the actual occupancy of a settler on December 1, 1884.

The act of 1887, in confirming the grant of March 3, 1871, provided that it should not take effect upon lands that were free when the grant to the original grantee took effect, but only upon such lands as were free when the New Orleans Pacific road was definitely located.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
August 12, 1891.

By decision of August 28, 1889, your office rejected the claim of the New Orleans Pacific Railway Company to the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 13, T. 13 S., R. 1 W., New Orleans, Louisiana, upon the ground that at the date of definite location of the New Orleans Pacific Railway, the tracts were covered by a certification made October 7, 1859, to the New Orleans, Opelousas and Great Western Railroad Company, and while the grant to said company had been forfeited, the title was not recovered by the United States until February 24, 1888, and upon the further ground that at date of said definite location of the New Orleans Pacific Railroad the tracts were settled upon and occupied by Orrin Elliott, which excepted them from the operation of said grant, under the second section of the act of February 8, 1887 (24 Stat., 391).

From this decision the company appealed, assigning several grounds of error, the material ones being (1) that Elliott was not an actual settler within the meaning of section 2 of the act of February 8, 1887, for the reason that the land had been withdrawn at date of his alleged settlement, and he could not settle thereon under any laws of the United States; (2) that if he is entitled to the land at all, it must be under section 4 of the act of February 8, 1887, as a "settler or occupant, covered by the Blanchard-Robertson agreement, which took effect prior to the date of the definite location of the road;" and (3) that it was error to hold "that the tracts were excepted from the grant by reason of certification of October 7, 1859, to Louisiana, for the benefit of the New Orleans, Opelousas and Great Western Railroad Company."

Said tracts are within the granted limits of the grant to the New Orleans, Opelousas and Great Western Railroad Company, and were certified to the State for the benefit of said company, October 7, 1859,

but said grant was forfeited by the act of July 14, 1870 (16 Stat., 277), and the lands restored to the public domain, and, on February 24, 1888, they were formally reconveyed to the United States by the State of Louisiana. Said lands are also within the granted limits of the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company, made by the grant of March 3, 1871 (16 Stat., 579), as definitely located by the New Orleans Pacific Railway Company, November 17, 1882, as assignee of the New Orleans, Baton Rouge and Vicksburg Railroad Company.

On November 6, 1871, Orrin Elliott applied to make homestead entry of the land, and a certificate was issued to him, to the effect that he would be entitled to enter it when it was placed on the market. On September 10, 1883, he applied to file pre-emption declaratory statement for the tract, and upon this application a hearing was finally ordered, by letter of November 27, 1886, and at this hearing it was shown that Elliott had continuously occupied and improved the land since 1857.

The material and controlling question presented by this appeal is, whether this tract was occupied by an actual settler on November 17, 1882, the date of definite location of the New Orleans Pacific Railroad Company. If so, it was excepted from said grant by the express terms of the proviso to section 2 of the act of February 8, 1887.

This case is ruled by the decision of the Department in the case of *Victorien v. New Orleans Pacific Railway Company*, 10 L. D., 637, but, as counsel for the railway company have contended that the ruling in said case embodies a construction of section 4 of the act of February 8, 1887, apparently based on a misconception of the language of counsel for the company, and turns upon a point that was not discussed by counsel, I have concluded to re-examine the entire question, in view of the additional argument of counsel.

It is necessary to a clear understanding of the issues involved in this appeal to briefly refer to the acts under which this company claims its grant.

By act of March 3, 1871 (16 Stat., 579), a grant of lands was made to the New Orleans, Baton Rouge and Vicksburg Railroad Company, from New Orleans to Baton Rouge, and thence by way of Alexandria to connect with the eastern terminus of the Texas Pacific Railway Company, incorporated by said act. A map of general route of said road was filed from Baton Rouge to Shreveport, November 11, 1871, and from New Orleans to Baton Rouge February 13, 1873, and withdrawals were made thereon, respectively, November 29, 1871, and March 27, 1873. The line of road was never definitely located by said company, and, on January 5, 1881, it assigned all right, title and interest in the grant to the New Orleans Pacific Railway Company, which latter company definitely located parts of said road, respectively, October 27, 1881, and November 17, 1882.

A protest was filed in the Interior Department by E. W. Robertson and N. C. Blanchard, members of Congress from said State, protesting against the further recognition of said grant in favor of the assignees, until the rights of certain settlers within the limits of said grant were protected, and, as the result of said protest, an agreement was entered into by said company, known as the Blanchard-Robertson agreement, whereby it was agreed, substantially, that settlers and occupants of lands within the limits of said grant, up to the date of said agreement (January 4, 1882), shall have the right to purchase the land occupied by them, to the extent of one hundred and sixty acres, at a price not to exceed two dollars per acre, in payments of one-third cash and the balance in one and two years at six per cent interest.

The validity of this assignment was questioned by the Department, and, although the Attorney-General, on June 13, 1882, submitted, upon the request of the Secretary of the Interior, an opinion that the assent of Congress was not necessary in order to entitle the assignee to the benefit of the grant, yet the issuance of patents to this road was suspended, for the reason that the time allowed for the construction of the New Orleans, Baton Rouge and Vicksburg Railroad had expired, and the legislature of Louisiana had forfeited its charter before the assignment to the New Orleans Pacific Railway Company was made.

In view of these facts, it was considered by the Secretary of the Interior a matter of grave doubt whether the New Orleans, Baton Rouge and Vicksburg Railroad Company had the right to assign its whole grant to another road, and he therefore submitted to the consideration of Congress the propriety of passing an act curative of the defect, if any existed, vesting the title originally granted to the New Orleans, Baton Rouge and Vicksburg Railroad Company, from White Castle to Shreveport, in the New Orleans Pacific Railway Company.

In view of this object, the act of February 8, 1887, was passed, forfeiting the grant to the New Orleans, Baton Rouge and Vicksburg Railroad Company, made by the act of March 3, 1871, as to that part of the grant east of the Mississippi River, and that part of the grant west of the Mississippi River opposite to and coterminous with the New Orleans Pacific Railway Company, which was completed on the 5th day of January, 1831, and relinquished, granted, conveyed and confirmed the title of the United States and of the original grantee to the New Orleans Pacific Railway Company as to all other lands granted by said act of March 3, 1871.

The act of February 8, 1887, had this primary and important object in view, as shown by the proviso to the 2d section, to wit: to protect the rights of all settlers upon lands occupied by them at date of definite location of the latter road. It may be urged that the rights of the settlers who were on the land prior to definite location were protected without said proviso; but it must be observed that the act of February 8, 1887, *relinquished, granted, conveyed, and confirmed* to the New

Orleans Pacific Railway Company, as *assignee* of the New Orleans, Baton Rouge and Vicksburg Railroad Company, the title of the United States and of the *original grantee* to the lands granted by the act of March 3, 1871; to the New Orleans, Baton Rouge and Vicksburg Railroad Company, not declared forfeited by the said act of February 3, 1887. The confirmation of the title of the *original grantee*, without further limitation or qualification would have operated upon all lands within the limits of the general route of the New Orleans, Baton Rouge and Vicksburg Railroad, which were free at the date of filing of the map of said general route with the Secretary of the Interior, and which also fell within the limits of the definite location of the New Orleans Pacific Railway. But the lands of which confirmation of title was made were—

to be located in accordance with the map filed by said New Orleans Pacific Railway Company in the Department of the Interior October twenty-seventh, eighteen hundred and eighty-one, and November seventeenth, eighteen hundred and eighty-two, which indicate the definite location of said road: *Provided*, That all said lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs or assigns shall be held and deemed excepted from said grant and shall be subject to entry under the public land laws of the United States.

This proviso therefore expressly excepted from the grant all lands occupied by settlers, respectively, on October 27, 1881, and November 17, 1882, the dates of definite location of the New Orleans Pacific Railway.

But it is urged by counsel for the railway company that this proviso is repugnant to the 4th section of the act, and under the rules of construction the earlier must give way to the later. They further insist that the Blanchard-Robertson agreement being made part of the act, must be referred to in order to determine the purpose and effect of section 4 of the act, and said agreement, as enforced by the act of February 8, 1887, provides a right of purchase for all "settlers and occupants," who, on the first day of December, 1884, were in the actual occupancy of any of the lands included within the limits of said grant to the New Orleans, Baton Rouge and Vicksburg Railroad, and withdrawn from market, whether settlement was made before or after definite location."

From an examination of the act, it is apparent that there is no such conflict, and that the rights secured by the 4th section refer to a different class of settlers and to lands that were confirmed to the New Orleans Pacific Railway Company by the act of February 8, 1887.

The proviso to the second section excepted absolutely from the grant or confirmation to the New Orleans Pacific Railway Company "all lands occupied by actual settlers at the date of the definite location of said road and still remaining in their possession or in possession of their heirs and assigns," and, as to these lands, it provided that they "shall be subject to entry under the public land laws of the United States."

The fourth section provided that all persons, who, on the first day

of December, 1884, were in actual occupancy "of any of the lands to which the New Orleans Pacific Railroad Company is entitled under the provisions of this act," shall have the right to secure title to the lands so held by them, not exceeding one quarter section, "on the payment to said company," at the rate of two dollars per acre for the lands so occupied.

It is thus clearly shown that the "binding force and effect" intended to be given to the Blanchard-Robertson agreement by the act of February 8, 1887, was the right to purchase from the company lands which were confirmed to it by the act and which were in the actual occupancy of a settler on the first day of December, 1884, and has no reference whatever to lands "occupied by actual settlers at the date of the definite location of said road," which lands were by the express terms of the proviso to the second section absolutely excepted from the operation of the grant or confirmation to the road, and were declared to be "subject to entry under the public land laws."

Even if this question admitted of a doubt, it is the only construction that can be given to this act, without violating the well known rule that effect is to be given, if possible, to every clause of the statute.

It is also contended by counsel that the act of February 8, 1887, confirms the title of the original grantee, which attached upon the filing of the map of general route, and that the right of the original grantee, which was confirmed to the assignee, was that no settler should acquire title to these lands after filing of map of general route under the original grant; and it is further submitted that Congress had no power to "rescind the contract" with the original grantee after its assignment to the New Orleans Pacific Railway Company.

While it is true, that the act of February 8, 1887, did not make a new grant, it was a confirmation of the grant of March 3, 1871, with certain conditions and qualifications, the principal one being that the confirmation should not take effect upon lands that were free at the date when the grant to the original grantee attached, but only upon such lands as were free when the New Orleans Pacific Railway was definitely located, and there is nothing in the act to indicate that it was intended to extend the benefits of the withdrawal in favor of the original grantee to the latter company. Whatever rights the original grantee might have had under the grant of 1871, the New Orleans Pacific Railway Company can only claim whatever rights were granted or confirmed by the act of February 8, 1887, for the reason that by the 3d section of the act it was provided that the relinquishment of the lands and confirmation of the grant provided for by the 2d section should only take effect when the company has accepted the provisions of the act, and as such acceptance has been signified by the company and patents have been issued in accordance with its provisions, the company is bound by the condition that if a settler was on the land at date of definite location, it is excepted from the grant, and if a settler went on the land after definite

location and prior to December 1, 1884, he is entitled to purchase from the company at two dollars per acre.

This tract having been excepted from the grant to the company by the proviso to the second section of the act of February 8, 1887, the case is controlled thereby, and it is unnecessary to consider the other assignments of error.

The decision of your office is affirmed.

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APPLICATION TO CONTEST—PRIORITY.

DARKNELL *v.* TAYLOR.

Applications to contest are entitled to precedence in the order in which they are received at the local office.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 13, 1891.*

I have considered the appeal by C. W. Darknell from your office decision of March 20, 1890, sustaining the action of the local office in holding that his application to contest timber-culture entry No. 1475, by Charles H. Noll, for the SE.  $\frac{1}{4}$  of Sec. 34, T. 123 N., R. 76 W., Aberdeen land district, South Dakota, should be held subject to the application by Abram T. Taylor to contest same entry.

Both applications were received at the local office on February 14, 1889. Taylor's application was received at 9:30 A. M., upon the opening of the office, while Darknell's was not received until 10:15 A. M., the same having been forwarded through the mails, in a registered letter.

It appears that on February 13, 1889, Darknell requested Taylor to corroborate his affidavit of contest, which he refused to do. After securing a corroborating witness, he sent it to his attorney, who forwarded the complaint by registered letter to the local office at Aberdeen.

It appears that the letter containing said complaint was received at the post office at Aberdeen, on the evening of February 13, 1889, after the close of the local office, and in accordance with the usual custom (the reasons for which are set forth in register's letter of April 26, 1889), the receiver did not receive the same of the postmaster until after 10 o'clock the following day.

After refusing to corroborate Darknell's affidavit of contest, it appears that Taylor conceived the idea of filing a contest against said entry himself, and he set to work at once to get his application in ahead of Darknell, with the result as before stated.

The appeal urges that an application to contest an entry received through mail has preference over an application presented on the opening of the office, and cites in support thereof the decision in the case of John Nicholson, 9 L. D., 54.

In that case the application to contest was received through the mail and placed of record before office hours, and such application was held to take precedence over an application presented at the opening of the office, for the reason that while the local officers are not expected or required to transact business out of office hours, yet there is no law of the United States to prohibit them from doing such business, and in case they do, their acts are valid. The decision in that case can have no application to the case under consideration.

It is also claimed that the local officers had notice before the opening of the office, on the morning of February 14, 1889, that Darknell's contest was in the mail, unless called for by them, in which case that said contest was in their office, and that had they called for it in due season the same should have been first of record; further, that Taylor took undue advantage of his (Darknell's) trust in him, and that all the equities in the case are in Darknell's favor.

From a review of the matter, I can see no good reason for depriving Taylor of the advantage gained by him in first presenting his application to contest at the local office.

As stated by you, "I think the issue is between Darknell and Taylor as simply a case wherein the latter used greater energy for the accomplishment of his purpose, and was also favored by circumstances."

There is no fraud or collusion shown on the part of the local officers, and the registered letter seems to have been called for, as was the established practice, shortly after 10 o'clock each day. Darknell chose this course of presenting his application, and can not now be heard to complain that it was not earlier received.

The fact that Taylor knew that Darknell contemplated contesting this entry, did not deprive him (Taylor) of his right to contest the same entry.

I therefore affirm your decision, and direct that the case proceed upon Taylor's application, and that Darknell's be held subject thereto.

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#### MINERAL ENTRY—APPLICATION—CONFLICT.

##### STEAMBOAT LODGE.

That a lode application expressly excludes land in conflict with a prior entry, will not operate to except such land from the claim if in fact there is no conflict.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
August 13, 1891.*

I have considered the appeal of John Farish *et al.*, from the decision of your office dated April 16, 1890, holding for cancellation mineral entry No. 1537, made December 31, 1888, at the Salt Lake City land office, Utah Territory, upon the Steamboat lode claim, located January 1,

1887, to the extent of conflict with certain mineral entries therein particularly described.

It appears from the record that the Steamboat lode claim conflicts with other mineral claims previously entered, namely: mineral entries Nos. 1230 and 1231 of the Stewart and Riel lode claims, entered May 28, 1886, and also the Mikado and Potomac lode claims, entered October 18, 1886; and your office held the entry of the Steamboat lode claim for cancellation so far as it conflicted with the Riel, Mikado and Potomac lode claims, and also as to that part of the Stewart claim, lot 392, which lies east of a line drawn parallel with the east end line of said Stewart claim, and intersecting the Stewart lode line at a point where said line intersects the easterly side line of the Nemrod lode claim and passes within it.

The appellant insists that it was error to hold for cancellation said entry, as aforesaid, for the reason that in the mineral applications No. 1434 of the Little Nettie lode mining claim, No. 1465 of the Potomac lode mining claim, and No. 1466 of the Hecla lode mining claim, the ground in conflict with the Nemrod mining claim was expressly excluded; that as

the Hecla, Potomac, Mikado, Little Nettie, Stewart and Riel lode claims, having expressly excepted and excluded the ground in conflict with the Nemrod lode mining claim in their applications for patents, left this surface ground vacant free and subject to exploration and location according to the approved surveys at the dates of applications for patent of said last-named mining claim.

While the allegations of the appellant may be true as to the exceptions in said applications, yet it appears that on April 15, 1890, your office acknowledged the receipt of a corrected diagram from the United States Surveyor-General of Utah showing that there was no conflict between the Mikado lot 429, the Potomac lot 430, and the Nemrod lode claim lot 181; that the conflict between the Riel lot 391, and the Nemrod lode claim lot 181, covers only a small area of surface ground, and, as no part of the Riel lode line intersects the side line of said Nemrod lode claim, the survey, as originally made, does not violate the provisions of the mining circular of December 4, 1884 (3 L. D., 540), and the former action of your office dated September 5, 1888, requiring amended surveys of the Riel, Mikado and Potomac lode claims, was revoked.

The fact that said applications for the Mikado, the Potomac and the Riel claims expressly excluded the land in conflict with the Nemrod lode, as shown by the plats and field notes, could not operate to except it from said claims, if, in fact, there was no conflict.

The plats and field notes having been shown to be erroneous, the subsequent applicant, namely the Steamboat lode claimant, is not authorized to take the land included in the prior locations of the Riel, Mikado and Potomac lode claims, when, in fact, there was no conflict with the Nemrod lode claim.

Upon a careful examination of the whole record, I am unable to conclude that there is any error in said decision, of which the appellant has just ground of complaint.

The decision of your office is accordingly affirmed.

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RAILROAD GRANT—MINERAL LAND—INDEMNITY.

SOUTHERN PACIFIC R. R. CO. *v.* ALLEN GOLD MINING CO.

Mineral lands are expressly excluded from the grant to this company, and it has no right, therefore, to select mineral land as indemnity.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
August 13, 1891.

I have considered the appeal of the Southern Pacific Railroad Company from the decision of your office dated June 6, 1890, holding for cancellation the company's selection (list No. 13, made July 13, 1885,) of 14.61 acres of the SE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Sec. 5, T. 6 S., R. 3 W., S. B. M., Los Angeles, California, because of conflict with mineral entry No. 61, made October 26, 1887, by the Allen Gold Mining Company, upon the Menifee lode claim.

The company claims that the land in question was withdrawn long prior to said entry, and that it was unlawful for said mining company to enter upon and make mineral entry of said land. It is not denied by the company that at the date of said selection the land was covered by said entry and that the land was and is mineral land. This being so, and mineral lands being expressly excluded from the grant to said company (Sec. 3, act of July 27, 1866, 14 Stat., 292-294), it follows that said land was not granted, and the railroad company had no right to select mineral lands as indemnity. *Central Pacific R. R. Co. v. Valentine*, 11 L. D., 238.

The decision appealed from must be and it is hereby affirmed.

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RIGHT OF WAY FOR CANAL PURPOSES.

JAMES W. MCKNIGHT ET AL.

The right of way through reservations of the United States for canals and ditches is granted by section 18, act of March 3, 1891, but, under the proviso to said section, all maps of location must be submitted for approval to the Department having jurisdiction over the reservation involved.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
August 13, 1891.

By letter of July 6, 1891 addressed to this Department and forwarded through your office, James W. McKnight and Edward D. Hastie request permission to dig, build, and construct a ditch through the Fort Shaw military reservation.

The papers thus presented are herewith returned to your office for examination and such action thereon as may be appropriate.

While by section 18 of the act of March 3, 1891 (26 Stat., 1095) the right of way through reservations of the United States is granted for canals and ditches, yet by the proviso to said section all maps of location are subject to the approval of the Department having jurisdiction of such reservation, and therefore before final action can be taken approving said map, it must be submitted to the War Department.

RIGHT OF WAY—ACT OF MARCH 3, 1891.

FARMERS CANAL CO.

An application by a corporation for a right of way under section 18, act of March 3, 1891, should be accompanied by the certificate of the proper officer of the State showing that the articles of incorporation have been filed in accordance with local requirements.

The certificate of the engineer as to the survey of the proposed line of route should definitely describe and locate the termini of said route.

Maps of survey filed under provisions of this act must show the lines of each smallest legal sub-division of land affected by the proposed right-of-way, and should be drawn to a scale of not less than 2,000 feet to one inch.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
August 14, 1891.*

I have examined the papers filed by the Farmers' Canal Company of Nebraska to secure the benefits of the provisions of sections 18 to 21 inclusive of the act of March 3, 1891 (26 Stat., 1095), and transmitted by you with the recommendation that they be received and placed on file.

The regulations require that, when the law under which the corporation was organized directs that the articles of association shall be filed with any State or Territorial officer, there shall be presented a certificate of such officer that the same has been filed, but in this case although the law directs that corporations for the construction of works of internal improvement must file in the office of the Secretary of State a copy of the articles of association, no certificate, as required by said regulations, has been presented. You will call upon the company to supply this omission in the proofs filed.

I have also examined the map filed by said company and transmitted by you with the statement that upon examination it is found to agree in all essential particulars with the lines of the public surveys, and the recommendation that it be approved.

The termini of this canal are not definitely fixed and located in the certificate of the engineer. The only information to be obtained from this certificate is that the survey of the line of route of this canal from the head to a point in section 35, T. 22 N., R. 52 W. was made by him. That these termini should be definitely fixed and described is equally as important in these cases as in those of railroads where it is absolutely required as a prerequisite to the approval of a map.

Rio Grande Southern R. R. Co. (12 L. D., 92).

Continental Ry. and Telegraph Co. (13 L. D., 18).

One of the purposes of these maps is to enable the local officers to designate on their records the subdivisions touched by the canal or reservoir for which the right of way is asked. In order that this may be seen at a glance, the map itself should show the lines of each smallest congressional subdivision of land through which such canal runs or which such reservoir touches. The map here presented displays only the section and quarter-section lines, and hence it would be impossible to declare with exactness what forty-acre tracts are affected by said canal. It must be insisted on that maps filed under the provisions of this law shall show the lines of each smallest legal subdivision to be affected by the right of way asked for.

Upon this map I find marked a reservoir, but whether such reservoir is upon public land, I am not informed, and inasmuch as it is not mentioned in the engineer's certificate, I take it for granted that nothing is asked on account thereof. If the right to the use of the ground upon which it is located is asked, then its location and dimensions should be specifically set forth.

In this connection, I would call your attention to another fault in this map, which, while not perhaps sufficient of itself alone to cause a refusal to approve it, is one to be avoided in these cases, and that is the size thereof.

The map is drawn on a scale of six hundred feet to the inch, and when it is remembered that the canal delineated thereon is seventy-one miles in length, it will be perceived at once that the map is very large and inconvenient to handle. In the maps under the act granting right of way to railroads it has been said that they should be drawn to a scale of not less than 2000 feet to one inch (Minneapolis, St. Paul and Sault Ste Marie Ry. Co., 12 L. D., 552) and the same rule should apply in cases of canals. Said map will not be approved in its present condition.

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**RAILROAD GRANT—INDEMNITY WITHDRAWAL—SETTLEMENT RIGHT.**

**PRICE *v.* MISSOURI, KANSAS AND TEXAS RY. CO.**

An executive withdrawal for indemnity purposes of "vacant land" does not take effect upon land embraced within an unexpired pre-emption filing; and the fact that under present rulings such filing would not be permitted, can not operate in aid of said withdrawal.

Lands not withdrawn, and covered by the settlement claim of a qualified pre emptor, are not subject to indemnity selection.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
August 14, 1891.

I have considered the case of William Price *v.* The Missouri, Kansas and Texas Railway Company, involving the NE.  $\frac{1}{4}$  of Sec. 9, T. 26 S., R. 15 E., Independence land district, Kansas, on appeal by the com-

pany from your office decision of August 20, 1887, holding the claim of Price superior to that of the company under its indemnity selection.

This tract is within the indemnity limits of the grant for said company, under the act of July 25, 1866 (14 Stat., 236), the order of withdrawal for which was made by your office letter of March 19, 1867, which reads as follows:

You will upon its receipt proceed to mark on your plats the limits as therein designated and will reserve from sale, location or entry of any kind, except in case of bona fide pre-emptions initiated prior to withdrawal, all the odd numbered sections within the ten mile limits and all the vacant land between the ten and twenty mile limits.

This letter was acknowledged as received at the local office, April 3, 1867, and the company made selection of the tract under consideration September 25, 1882.

Price offered to file pre-emption declaratory statement for the land December 10, 1886, which was rejected by the local officers for conflict with the prior selection by the company.

In his appeal from said rejection Price alleged settlement upon the land in 1880, and continuous residence thereafter, and upon such allegations a hearing was regularly had April 19, 1887, in accordance with your office letter of February 16, 1887.

The evidence shows that Price began to improve the land in February, 1880; that he built a house, sixteen by twenty-four feet, into which he moved his family May 24 following, and in which they have since resided. In addition to said house, he has a smoke house, a chicken house, a well, between thirty and forty acres broken, one hundred fruit trees set out, and the entire tract enclosed with a fence.

He attempts to show that he made several applications to file for the land prior to that made on December 10, 1886, all of which were refused, but I deem it unnecessary to review the testimony relative thereto, it being clearly shown that he was residing upon and improving the land at the date of the company's selection of the tract, and for a long time prior thereto.

He is shown to have been a qualified pre-emptor at the date of selection, and any question as to his default in placing his claim of record can not be successfully pleaded by the company, for such failure would only render his claim liable to forfeiture in favor of the *next settler* in order of time who had complied with the law.

The only question for consideration is, whether the land was subject to settlement in 1880, or at any time prior to the date of the company's selection?

The records of your office show that one Conrad Follmer filed offered declaratory statement No. 2589, for this tract July 14, 1862, alleging settlement same day, and that he also filed offered declaratory statement No. 3296, for same tract, August 18, 1866, alleging settlement the 16th of same month.

As before stated, the order of withdrawal was received at the local office April 3, 1867, and under its terms only the "vacant" lands within the indemnity limits were to be withdrawn.

It will be seen that the second filing by Follmer was of record, unexpired, at that date, and, as the land was not "vacant land," it was not withdrawn.

The fact that under present rulings it would be held that Follmer exhausted his rights under the pre-emption law by the first filing, made in 1862, can in no wise affect the question.

At the date of this withdrawal, it was the recognized practice to allow a party to make more than one filing for the same tract, and, further, this being an executive withdrawal (in so far as the indemnity limits are concerned), it should be given effect only to the extent which the Department intended it should have. *St. Paul, Minneapolis and Manitoba Ry. Co. et al. v. Pederson*, 8 L. D., 21.

I therefore hold that this land was not withdrawn under the order of March 19, 1867, and that it was subject to Price's settlement in 1880; further, that the claim of Price was a bar to the company's selection on September 25, 1882, and therefore sustain your decision and direct the cancellation of such selection and the allowance of the filing by Price as of the date originally presented, December 10, 1886.

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#### TIMBER CULTURE ENTRY—SUCCESSFUL CONTESTANT.

##### AUGUST W. HENDRICKSON.

Section 1, act of March 3, 1891, repeals the statute authorizing timber culture entries, and a successful contestant who does not make application to enter until after the passage of said act, can not make entry under the timber culture law by virtue of his preference right.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 15, 1891.*

I have considered the case arising upon the appeal of August W. Hendrickson from your decision of April 8, 1891, rejecting his application to make timber-culture entry of the NW.  $\frac{1}{4}$  of Sec. 26, T. 12 S., R. 27 W., Wa Keeney land district, Kansas.

From the record it appears that on March 29, 1887, Samuel Bowser made timber-culture entry of said tract. On April 7, 1890, Hendrickson initiated contest against the same. A hearing was had, and on the evidence submitted the entry was canceled on the records of your office on February 9, 1891. Hendrickson was duly notified, and on March 6, 1891, he transmitted to the local office, by mail, the affidavit required when application for timber-culture entry is made, but no application therewith—the description of the land which he desired to enter being simply endorsed on the margin of the affidavit. The affidavit was at

once returned to him with the information that if he desired to make timber-culture entry, he must file application in proper form; and the necessary blanks were mailed to him for that purpose. His application in due form was presented March 10, 1891; but was rejected by the local officers because of the repeal of the timber-culture laws by the act of March 3, 1891.

He appealed to your office where you affirmed the judgment of the register and receiver, whereupon he appealed to this Department, alleging that your decision is erroneous, in brief, for the following reasons:

1st. That said decision is contrary to the timber-culture law of March 3, 1891, as it was not the intention of Congress to deprive one of the right to make an entry who had taken any steps towards securing a claim under prior laws.

2d. That Hendrickson had initiated said contest for the express purpose of taking said land when canceled as a timber-culture claim.

3d. That under the law and the notice which he had received from the land office regarding the cancellation of the former entry his thirty days had not expired to enter said land, and Congress, by the proviso of the act of March 3, unquestionably intended to protect parties in their rights, although their claims were not perfected prior to the passage of the law.

4th. That the claimant had made out his papers prior to the passage of the law, and only the ignorance and carelessness of the notary prevented him from having it filed and timber-culture receipt issued prior to repeal of the law.

5th. That at and before the initiating of his said contest, it was not the custom of the local office to require applications to enter to be filed at the time of initiation of contests.

6th. As between the government and individuals, the laws should not be technically and harshly construed.

7th. If claimant is not permitted to enter said land, his time and money has been spent in vain, and contrary to the spirit and intention of the former or present timber culture laws.

8th. The claimant having at all times acted in complete and entire good faith should not be deprived of his right to make the entry.

The gist of his complaint is, that he has a vested right, of which he can not and should not be deprived by act of congress, and that it is not the intent of the legislation referred to, to take from him his preference right. He relies for his privilege upon section 2, of the act of May 14, 1880, 21 Stat., 140, which reads as follows:

In all cases where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands: *Provided*, That said register shall be entitled to a fee of one dollar for the giving of such notice, to be paid by the contestant, and not to be reported.

Your office held that while contestant was not deprived of his preference right of entry, yet that right can be only exercised by him in the manner provided by law at the time the application is made.

Section 1 of the act of March 3 1891, provides :

That an act entitled "An act to encourage the growth of timber on the western prairies," approved June fourteenth, eighteen hundred and seventy-eight, and all laws supplementary thereto or amendatory thereof, be, and the same are hereby, repealed. *Provided*, That this repeal shall not affect any valid rights heretofore accrued or accruing under said laws, but all bona fide claims lawfully initiated before the passage of this act may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures and contests as if this act had not been passed.

As I view this legislation, the act of May 14, 1880, gave to the appellant a privilege which he might, or might not, avail himself of, as he deemed for his interest, and therein he was not confined to any particular entry, but might avail himself of the pre-emption, homestead, or timber-culture laws; and said act of March 3, 1891, having repealed the timber-culture and pre-emption acts, the way is still open to him to acquire title to this land by homestead entry, if he has the proper qualifications and has not heretofore exercised his homestead privileges.

The preference right given him by said act of May 14, 1880, certainly is no more vested than a pre-emption filing or claim; and the supreme court has decided repeatedly, that a party by mere settlement upon lands of the United States, with a declared intention to obtain a title to the same under the pre-emption laws, does not thereby acquire such a vested interest in the premises as to deprive Congress of the power to divest it by a grant to another party. The Yosemite Valley Case (15 Wall., 77); Rector *v.* Ashley (16 Wall., 142); Simmons *v.* Wagner (101 U. S., 260); Buxton *v.* Traver (130 U. S., 232); and this same doctrine has been followed by the Department in United States *v.* Johnston (5 L. D., 442); Smith *v.* Custer (8 L. D., 269); and Thomas M. Knight *et al.* (8 L. D., 297).

There can be no question, I think, that until the land is actually segregated from the public domain by entry, the disposition thereof is under the absolute control of Congress; and in this particular instance it having repealed the law under which the claimant insists that he intended to acquire title, that particular mode is taken from him. It is a well known canon of construction that where a right depends upon a statute, the repeal thereof takes away the remedy unless protected by a saving clause; and there is no evidence to my mind that Congress intended to protect a preference right by this legislation. On the contrary, it is evidenced by the language used that it only intended to allow those claims which were initiated in the manner prescribed by the timber-culture act, prior to its repeal, to stand.

The language used in the last section quoted, to wit: "That this repeal shall not affect any valid rights heretofore accrued or accruing

under said laws," has no reference whatever to the act of May 14, 1880, or any preference right thereby provided, but applies solely to the timber culture laws and rights which have been acquired thereunder, and it is only such rights that Congress intended to protect. This is made very clear to my mind for the reason that the only laws mentioned as "said laws," are, "An act to amend an act entitled 'An act to encourage the growth of timber on the western prairies and all laws supplementary thereto and amendatory thereof,'" hence the act can not be fairly made to yield to a construction as applying to a preference right acquired under some other law. A claim is "lawfully initiated" when one who is qualified to enter makes written application, accompanied with the requisite amount of fees (see R. H. Trusdle, 2 L. D., 275; Whitmore v. Tufts, ib. 278) to enter land that is subject to entry.

In this particular instance, the entryman has not shown that he is even qualified to make the entry, neither had he at the time of the repeal of the act offered a written application, nor tendered the fees to the register and receiver, nor had he taken any steps by which he could perfect a timber culture entry, and Congress having seen fit to repeal the timber-culture act prior to the time that he disclosed these qualifications, he is remediless. As well might he insist that he intended to enter these lands under the pre-emption laws as under the timber culture act, and that Congress deprived him of a valuable privilege by repealing that act. Whatever may have been his intention, and however unfortunate he may be in not having been permitted to exercise that right prior to the repeal of the act, the Department is without power to aid him. The same rule applies to this class of cases which does to the repeal of usury laws, statutes of limitation, laws regulating forfeitures, licenses, penalties, etc. No one will question that upon the repeal of the act all the remedies which were existing at the time thereof go with it, as do all suits which are pending under such laws at the date of repeal, unless there is a provision saving existing suits and rights. The saving clause in the act of March 3, 1891, only relating in express terms to rights accrued or accruing under the timber-culture acts, I do not believe that the rights of the appellant have wrongfully been denied him by your decision, and from a careful examination of the entire record of this case, I can not find any foundation upon which he can rest his claim. Believing that your decision is right, the same is hereby affirmed.

## MOTION TO DISMISS—RULE OF JANUARY 17, 1891.

JOHNS *v.* JUDGE *ET AL.*

A motion to dismiss, filed under the rule of January 17, 1891, will not be entertained if it raises a question that calls for an examination of the whole record.

*Acting Secretary Chandler to the Commissioner of the General Land Office, August 15, 1891.*

I have considered the motion of James F. Judge, a party in the case of *Ellen Johns v. James F. Judge et al.*, asking that the contest of Johns be dismissed and that the case be disposed of under the order of January 17, 1891 (12 L. D., 64).

The tract involved in said case is the SE $\frac{1}{4}$  of SE $\frac{1}{4}$  Sec. 23, and N $\frac{1}{2}$  of NW $\frac{1}{4}$  Sec. 25, T. 48 N., R. 41 W., Marquette, Michigan. The order under which the motion is made is as follows:

It is hereby ordered that until otherwise directed, motions to dismiss pending cases on jurisdictional questions arising on the record, may be presented, orally or otherwise, before the office of the Assistant Attorney-General, on the first Monday in each month; such motion to be filed at least five days previous to its presentation, with ten days' notice thereof to the opposite party, where such party is represented by a resident attorney, and thirty days' where such attorney is non-resident. Ten minutes to each party will be allowed on the presentation of such motion orally, and no question will be considered in any case that involves an examination of the testimony.

From an examination of the motion and the arguments of counsel, it is apparent that the attorneys for Judge base their claim for relief on the averments found in an affidavit of Ellen Johns, in which she disclaims any interest in the case and denounces the whole case as being in existence and being prosecuted in her name without her knowledge or consent. She asks to dismiss the contest. This motion, however, is not made by her attorney, but by the attorney for the opposing party, and is strenuously resisted by counsel who have, all through the case, appeared for her.

In answer to the motion it is suggested by her counsel that the affidavit alleged to have been made by her asking to have her contest dismissed is not genuine.

The appeal from the decision of your office in favor of contestant was taken by Judge, and should he desire to have it dismissed under the order in question, the Department might consider the proposition; but the motion is made not to dismiss the appeal, but to dismiss the contest. The order under which relief is asked only provides for "motions to dismiss pending cases on jurisdictional questions arising on the record;" enough appears in the motion and arguments for and against it to clearly indicate that questions other than those going to the jurisdiction are raised, which would require an examination of the whole record to determine.

The order providing that motions to dismiss may be heard and determined out of the regular order does not provide for the determination

in any case where questions are raised to adjudicate which it would be necessary to examine the record. For these reasons the motion is denied.

WAGON ROAD GRANT—FINAL PROOF—SPECIAL NOTICE.

OREGON CENTRAL MILITARY WAGON ROAD Co. v. CANTER. (On Review.)

The company is not entitled to special notice of a settler's intention to submit final proof, if it has no specific claim of record for the tract claimed by the settler.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
August 17, 1891.*

I have considered the motion for review of departmental decision dated April 13, 1891 (12 L. D., 362), rejecting the claim of the Oregon Wagon Road Company to the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 3, T. 30 S., R. 46 E., Lake View, Oregon, and sustaining Alexander F. Canter's homestead entry of the same.

The error alleged in said motion is the failure of the Department to order a hearing upon the question of Canter's settlement upon the land.

I do not deem it necessary to recapitulate in detail the record facts as stated in said departmental decision, for it is sufficient to state that no showing is made by the company which would warrant a revocation or modification of said decision. The Department held that the claim of said Canter, based upon settlement and residence, as shown in his final proof, when the right of said company attached to the lands granted under the act of Congress approved July 2, 1864 (13 Stats., 355), as amended by the act of December 26, 1866 (14 Stat., 374), served to except the lands covered thereby from the operation of said grant. Canter alleged settlement upon said land on June 15, 1873, in his pre-emption declaratory statement filed February 23, 1874. On May 15, 1880, he transmuted his filing to a homestead entry, upon which he made final proof December 10, 1883, and certificate issued thereon January 16, 1884. The company failed to appear and protest against said final proof, and now contends that because Canter alleged in his declaratory statement that he settled on said land June 15, 1873, he can not be heard to allege and prove a different and prior settlement so as to defeat the grant. It is further urged that the company was entitled to special notice when Canter made his final proof. It is not denied by the company that Canter made his settlement and residence as shown by his final proof. Indeed, under the settled ruling of the Department, the company is concluded by the record, and if the record shows, which is not denied, that Canter settled and resided upon said land prior to the date of withdrawal and at the date of the definite location of the road, then the land was not granted. Nor can the company complain that it was not specially notified to appear at the date of making said final proof. It had no claim of record for said tract, other than the

grant, as shown by the definite location of its road, and the published notice of intention to make final proof was an invitation to every one, with or without interest, to come in and contest claimant's right to the land. *Manderfield and O'Connor v. McKinsey* (2 L. D., 580).

The company certainly cannot rightfully claim any greater privilege than settlers, and the latter, unless they have filed applications for the specific tracts mentioned in the published notices, are not entitled to special notice of the intention of the claimant to make final proof.

Upon a careful examination of the motion and arguments of counsel, it clearly appears that said departmental decision is correct and in accordance with the rulings of the Department. *Randolph v. Northern Pacific R. R. Co.*, 9 L. D., 416; *Florida Railway and Navigation Co. v. Dodd*, 11 L. D. 91; *Northern Pacific R. R. Co. v. Harrendrup*, id., 633; *Northern Pacific R. R. Co. v. Stuart*, id., 143; *Northern Pacific R. R. Co. v. Harris*, 12 L. D., 351.

Said motion must, therefore, be, and it is hereby, denied.

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MINING CLAIM—MILL SITE—SECTION 2337, R. S.

GOLD SPRINGS AND DENVER CITY MILL SITE.

The requirements of the statute, where a mill site is claimed in connection with a mine, are: (1) The land must be non-mineral, (2) non-contiguous to the lode, and (3) used or occupied by the proprietor of the lode for mining or milling purposes.

The use and improvement of land for the maintenance of a water supply, necessary to the operation of a mine, is such a use and occupancy as will authorize a mill site entry, where the land is also required for the location of reduction works.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 18, 1891.*

On December 20, 1886, Herbert H. Logan made mineral entry No. 162, at the Prescott, Arizona, land office, for a mill-site claim of five acres, known as the Gold Springs and Denver City Mill-site.

The mill-site, lot No. 37 B., is claimed in connection with the lode lot 37 A.

By your office letter "N" of July 10, 1889, claimant was required "to furnish satisfactory evidence, under section 2337 U. S. Revised Statutes, that said mill-site is used or occupied in connection with the lode claim for mining or milling purposes."

Claimant states in an affidavit, sworn to December 30, 1889, that the mill-site has been improved and developed by building tanks, a spring house and a stone cabin; water has been developed in sufficient quantities to successfully mill the ore in the mine. These springs are occupied and used for the purpose of furnishing the water necessary to develop the mine and for no other purpose.

Your office, by decision of February 6, 1899, held the entry for cancellation, to the extent of the five acres embraced in said mill-site (Lot No. 37 B.), because, as there said, "under departmental decisions it is

held that the use of the water is not such a use of the land as is contemplated by section 2337 R. S."

In a supplemental affidavit, claimant states:

That the mill-site is absolutely necessary for the purpose of working the Denver City mining claim; that there is on this claim no tract or piece of land, suitable to erect the necessary reduction works to successfully work the ores contained in this mine, or where the necessary machinery could be erected without causing the expenditure of very large sums of money . . . . The mill-site has been selected by a very competent mining engineer, as being the only feasible point to locate reduction works . . . . That he requires the land contained in said mill-site for the use and in connection with the working of his said mine; that he has about closed negotiations to procure the necessary capital to erect the necessary machinery on said mill-site to successfully reduce the ores of his said mine . . . . That he is in good faith attempting to acquire title to the mill-site . . . . under the first clause of Sec. 2337 R. S. of the U. S.

Thomas W. Hine, deputy U. S. mineral surveyor, in an affidavit states that he made the survey for the Gold Springs and Denver City Mill-site; that after several careful examinations of the surrounding country, he is unable to find any suitable or practicable place in that vicinity on which reduction works could be built or successfully operated other than the place described as the said mill-site; that in order to work the mine with any degree of success, it is absolutely necessary to have some place or spot as near thereto as possible on which the ore taken from the mine can be reduced, without which the mine would be valueless; that the only practical way to utilize the ores of this claim and reduce them would be to build a tramway from this mine to the mill-site and erect reduction works thereon.

Section 2337 of the Revised Statutes provides as follows:

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.

It will be observed that the mill-site is claimed in connection with a mine, and the only requirement of the statute in such cases is that—

1. It shall be non-mineral.
2. Non-contiguous to the lode.
3. It must be used or occupied by the proprietor of such lode "for mining or milling purposes."

The sole question in this case is, whether the proof shows such use of the non-adjacent surface ground—the mill-site—as entitles claimant to patent therefor.

A tank, a spring house, and a stone cabin have been erected on the mill-site. The tank was built "for the storage of water sufficient for

operating the mine," the water was used to develop the mine and for no other purpose.

Under the last clause of said statute, the existence of a quartz mill or reduction works upon the mill-site is a condition precedent to patent. *Le Neve Mill-site*, 9 L. D., 460; *Hecla Consolidated Mining Company*, 12 L. D., 75.

But such mill or reduction works is not required, when the mill-site is included in an application for a lode claim. Claimant shows, however, that his mining claim will be valueless, unless he can obtain the mill-site upon which he expects to erect reduction works, and that he "requires the land contained in his mill-site for use in connection with his mine," and that he has about closed negotiations to procure the necessary capital to erect the machinery.

It is said in the *Charles Lennig* case (5 L. D., 190), that "the manifest purpose of Congress was to grant an additional tract to a person who required, or expected to require, it for use in connection with his lode—that is, to one who needed more land for working his lode or reducing the ores than custom or law gave him with it.

In the case of the *Sierra Grand Mining Company v. Crawford* (11 L. D., 338), the mill-site was used "solely for the purpose of supplying water through pipes to the companies' claims—the 'Annie P.' and others," and it was there held that such use of the land, in connection with the lode mine (being necessary to its operation), satisfies the conditions of the first clause of section 2337 of the Revised Statutes.

In the case at bar, lasting improvements have been made on the land embraced in the mill-site, indicating good faith. There is more than the mere use of water—the mill-site itself is improved and used, as above seen, in connection with the mine.

Moreover, it is shown that claimant requires the mill-site upon which to erect his mill to reduce the ores from the mine.

Claimant's good faith is manifest, and I think the evidence shows a sufficient compliance with law, as to the use and occupation of the land, to justify the issuance of patent, which is hereby directed.

The decision appealed from is accordingly reversed.

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PRE-EMPTION ENTRY—SECOND FILING.

GEORGE THORNILEY.

The right to make a second pre-emption filing will be recognized, where the failure to perfect title under the first is not attributable to the fault or negligence of the claimant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 18, 1891.*

I have examined the appeal in the record of *George Thorniley* from your office decision of December 18, 1889, rejecting his final pre-emption.

emption proof for the NW.  $\frac{1}{4}$  of Sec. 33, Tp. 51 N., R. 11 W., Ute series, Gunnison district, Colorado.

His proof was rejected because it appeared therefrom that he had formerly made and abandoned a pre-emption filing for other lands, and had thereby exhausted his pre-emption rights.

While it is true that the law makes no provision for the exercise of a second pre-emptive right, and the department has very generally held that when it has been once exercised, the privilege is exhausted, yet it has made exception to the general rule in cases where great equities and peculiar merit have made such a showing that it would be grossly inequitable and unjust to deny the entryman the right of a second filing. It is based upon the principle that he has not and can not enjoy the benefit Congress intended to confer upon him, from the circumstances of the case, and that the mere manual act of filing upon a piece of land where no benefit can accrue and the entryman has acted in good faith, and is not at fault, is not as a matter of fact the exercise of the pre-emptive right.

The Department has frequently allowed a second filing where the entryman has been misled into locating upon land, believing it to be of a certain description, when, as a matter of fact, his filing papers covered worthless land and not that upon which he was located and which he intended to make his home, also where the entryman settled upon land which from its peculiar topography and upon its face would indicate that it would make a good home, and afterwards turned out to be uninhabitable on account of the failure of the water supply, or where it was unfit for the use of man or beast. Edward C. Davis, 8 L. D., 507. Latterly it has been the disposition of the Department where, through no fault of the entryman himself he has been prevented from reaping the full fruition of his filing, and has shown good faith and an honest endeavor and intent to comply with the law, and has not been able to do so on account of circumstances over which he had no control, to award him a second filing upon his making a reasonable showing that to deprive him of the right would sacrifice his privilege and defeat his acquiring title to land under the provisions of the pre-emption law. As I take it, Congress did not demand impossibilities or unreasonable exactions from the entryman, but did intend that every qualified pre-emptor might avail himself of the benefit of the law if he made a reasonable effort, and endeavors to comply therewith and exercises such ordinary care and precaution as a reasonably prudent man would under like circumstances. Applying this rule, and the principles herein indicated to this case, I think your decision erroneous and that this entryman should be permitted to make this second filing, as prayed for. The circumstances under which he made his first filing, according to his proof, are, that he entered into an agreement with eleven other parties to settle upon that and other land and to irrigate it for the purpose of making it their respective homes. Pursuant to the agreement,

Mr. Thorniley settled upon the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 8, Tp. 34 N., R. 8 W., Lake City, Colorado series, and for the purpose of complying with the agreement placed forty dollars worth of improvements upon that tract, whereupon the parties with whom he had associated refused to settle upon the land according to their contract and left the country.

To irrigate the land upon which Mr. Thorniley settled would require the construction of a ditch three miles long, an expenditure, or outlay of about \$3,000, and he being a poor man and unable to raise this amount of money, or construct the ditch, and was forced to abandon the tract, and consequently filed for and submitted his proof to secure the tract in question with the result that his proof was rejected as heretofore suggested, on account of his having exhausted his pre-emption right by filing for and abandoning the tract first settled upon.

It seems to me, that to refuse to accept this proof, under the circumstances, is a practical denial of justice. This entryman relied in the first instance, as he had a right to, upon the agreement, believing that each of the parties thereto, for the purpose of securing a home, would observe the compact entered into, and he, in furtherance of his portion of the agreement, actually settled upon and improved the land and attempted to carry out the terms thereof, but was prevented from so doing through no fault of his, but through the default of his associates.

As I view it, this is as much a fortuitous circumstance as an act of God, a failure of water, the striking of alkali water in the sinking of a well, etc., and that the entryman should not be charged with the failure of those whose combined undertaking would have allowed him, as well as themselves, to reap the benefit of the statute and thereby avoid the necessity of abandoning the tract and attempting avail himself of the provisions of the act by this second filing. Certainly the equities are quite as strong in favor of the entryman in this case as in those cited, where the Department has recognized the right to make a second filing.

In the case of *Paris Meadows et al.*, 9 L. D., 41, it is laid down as a rule of law that

The right to make a second filing will be recognized where, through no fault or negligence of the pre-emptor, consummation of title was not practicable under the first.

In discussing the scope of the pre-emption law in the case of *Hannah M. Brown*, 4 L. D., 9, it is said :

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.

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 pre-emptive right thereby claimed could ripen into an entry.

In this case, the question is one between the government and the entryman. No adverse rights have intervened, nobody is prejudiced by the grace of the government in allowing him to acquire title to this land. The register, speaking of the conduct of the entryman says:

This office would recommend that his entry be allowed from the fact that his action in the matter has been in the utmost (good) faith; he still owns the land and is expending money right along in improving his place and the cancellation of this entry would work great hardship to the claimant financially and otherwise.

In view of all the circumstances surrounding this filing I think the register is right and that the entry should be allowed. I am not unmindful of the fact that the Department, from motives of sympathy, can not swerve to an unlimited extent from the rigid rules of the law; that it is not to legislate upon these subjects to meet every conceivable emergency which may arise and that there must be some stability in order to have safety in the execution of the law, yet it has seen fit to make exceptions in the cases cited and in my judgment this one comes within the line of those decisions.

I do not think that the case of Homer C. Stebbins, 11 L. D., 45, should govern or control this. They are quite dissimilar; and as to the equities, there is no sort of comparison. Stebbins sought to make a second filing on the ground of defective eye-sight and his excitement in looking over the land at the time he made his selection, which was due to the bursting of a gun, and the Department held that it did not appear at what time time in the proceedings he received the injury which impaired his eye-sight, whether it was at the time he made his selection or before, and that his statement was so indefinite and general in its character and his laches so great, that it did not feel warranted in requiring the law to yield to his application. In that case, whatever failure there was, was personal to the entryman himself; was his own error, or laches. Here such is not the case. Mr. Thorniley was prevented from the consummation of his right in the first instance by a power over which he had no control, by the act and conduct of others, by circumstances beyond his reach, by the failure of those with whom he had entered into an agreement in good faith to reclaim this tract of land, and he ought not, in my judgment, to be held to answer for their conduct by paying the penalty of a forfeiture of his right in addition to the sum of money which he honestly expended in attempting to reclaim the first tract.

This case is nearly allied to that of Edward C. Clement, 10, L. D., 338. Therein the claimant settled upon the land, being led to believe that a company then organized would bring water to a point near the land embraced in his entry, but the scheme was abandoned about two months after his filing; and the water for family use was so deep that it could not be obtained without such great expense as to make the undertaking wholly impracticable.

Upon this state of facts the government allowed Mr. Clement to

make a second filing. Certainly the equities and facts in this case are quite as strong as in that. And in the case of Frank N. Page, 10 L. D., 17, the government accorded the right to make a second filing where a failure to perfect title under the first was due to ill-health of the pre-emptor, in consequence of which he relinquished his first, and afterwards made a second.

Believing, as I do, that it is but just to accept Mr. Thorniley's proof and allow him to make this entry and that there is justification therefor in the precedents heretofore cited, I reverse your decision and direct that the proof be accepted.

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SECTION 7, ACT OF MARCH 3, 1891—PRE-EMPTION.

KENOYER *v.* GARDNER ET AL.

Section 7, act of March 3, 1891, confirms an entry where the tract covered thereby is encumbered after final proof and prior to March 1, 1888, and no fraud is found as against the transferee, or adverse claim originating prior to final entry.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
August 18, 1891.

On December 23, 1883, Edith A. Gardner made a pre-emption cash entry for the NW.  $\frac{1}{4}$ , Sec. 9, T. 130 N., R. 57 W. Fargo, North Dakota.

On December 29, 1884, she mortgaged said tract to F. J. Day for a valuable consideration.

On July 13, 1887, said mortgage was foreclosed, and Day received a sheriff's deed for said tract.

On July 27, 1889, the entrywoman was required by your office to publish a new notice of intention to make proof, owing to the fact that one of the witnesses who testified for her at the trial was substituted for an advertised witness. In answer to this requirement, Day filed an affidavit stating that he was the owner of said tract, and that Edith A. Gardner was not a resident of Dakota.

On September 11, 1889, your office modified the order of July 27, 1889, and permitted Day to make the new publication which was made, and on the day specified in said publication where proof would be made.

Eli Kenoyer filed a protest alleging that Edith A. Gardner had not established a residence on said tract, and maintained the same for a period of six months, as required by the pre-emption law.

On March 3, 1890, your office refused to order a hearing on said protest, and held that the protest should be dismissed.

Protestant appealed from said decision to this Department.

In considering this appeal, it will not be necessary to decide the case upon the merits of the alleged errors assigned, because the entry in question is confirmed by section 7 of the act of March 3, 1891 (26 Stat.,

1095). In this case, it is shown that the final entry was made, and receiver's receipt issued on December 23, 1883. The tract was encumbered after final entry and before March 1, 1888. No fraud has been found against the mortgagee, and no adverse claim originating prior to final entry exists. Prima facie, the facts show that a patent should issue for this tract under said section.

Axford *v.* Shanks *et al.* (12 L. D., 250); Charles C. Cranson *et al.* (12 L. D., 279); Fuller *v.* Hill *et al.* (12 L. D., 600); Joseph S. Taylor (12 L. D., 444); Geo. De Shane *et al.* (12 L. D., 637); Gerlach *v.* Kindler (12 L. D., 571); Edward Brotherton *et al.* (12 L. D., 305) Northern Pacific R. R. Co. *v.* Edgar *et al.* (12 L. D., 540); Patrick H. McDonald (13 L. D., 37).

You will accordingly call on the present owner of said tract to furnish testimony, as required by the letter to chiefs of divisions, dated May 8, 1891 (12 L. D., 450). After receiving this evidence, you will adjudicate the case in the light of the act and instructions cited.

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SETTLEMENT RIGHTS—ALIEN—MOTION FOR REVIEW.

WILMARTH *v.* LAYBOURNE.

The settlement of an alien is made good by a subsequent declaration of intention to become a citizen, filed prior to the intervention of any adverse claim.

After the cancellation of an entry the land covered thereby is open to settlement. A motion for the review of the decision cancelling such entry does not operate to reserve the land from settlement, though the settler's right thereon is subject to the final disposition of said motion.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 18, 1891.*

I have considered the appeal of Albert W. Wilmarth from your decision dismissing his protest against the final proof of Eliza A. Laybourne for the NE.  $\frac{1}{4}$  of NW.  $\frac{1}{2}$  and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  of Sec. 35, and SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 26, Tp. 114 N., R. 56 W., Watertown, South Dakota, and rejecting his homestead application for said tract.

The cash entry of Wilmarth for this land was canceled by decision of this Department dated February 27, 1889. Due notice of this decision was given by your office on March 20, 1889, and the entry was canceled. Subsequently, on March 28, 1889, Wilmarth filed a motion for review, which was denied October 31, 1889.

Laybourne filed declaratory statement for the tract April 11, alleging settlement April 10, 1889, and on October 25, 1889, submitted final proof showing a substantial compliance with the law.

You dismissed the protest of Wilmarth against said proof, and rejected his application to enter the land as a homestead.

He has appealed, alleging as error, first, "in holding that an entry-

man can make a legal settlement before declaring an intention to become a citizen of the United States."

It appears that Laybourne did not declare her intention to become a citizen until the day she filed her declaratory statement, which was one day subsequent to the date of settlement.

It is the settled ruling of this Department that where 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. *Mann v. Huk* (3 L. D., 452).

Laybourne became qualified as to citizenship before any adverse claim attached, hence her settlement and filing as between herself and the government is recognized as valid.

The second ground of error alleged is "in holding that a settler can acquire any right to land once segregated by a former entry, while a review is pending to determine the rights of said entryman."

At the time Laybourne made settlement and filed her declaratory statement, the cash entry of Wilmarth had been canceled.

It is true that had that decision been recalled, and the entry re-instated, Laybourne would have acquired no rights under her settlement. It is true that she could not perfect title during the pendency of Wilmarth's application for a review of the decision canceling his entry, but as said entry was properly canceled before she made settlement, her rights under that settlement must be recognized, as Wilmarth's application only preserved his rights, provided he had any to preserve, but it did not reserve the land from settlement in the event that he had no right to the same.

Your decision seems to be in accordance with the law and the facts, and the same is affirmed.

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HOMESTEAD ENTRY—ACT OF JUNE 15, 1880.

J. F. FISHER.

The validity of a cash entry under the act of June 15, 1880, made through one acting under power of attorney, is not affected by the fact that the requisite affidavit is made by said attorney.

A cash entry thus made, and subsequently canceled for want of an affidavit executed personally by the entryman, must be re-instated and intervening claims excluded.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
August 21, 1891.*

I have considered the appeal of J. F. Fisher from the decision of your office of April 16, 1890, holding for cancellation his timber culture entry No. 11,622, of the NE.  $\frac{1}{4}$  of Sec. 27, T. 2 S., R. 24 W., in the Kirwin land district, Kansas.

The record shows that Clayton Forbes made homestead entry No. 8884 of this land December 2, 1878, and on the 28th of April, 1884, by

his attorney, under a power of attorney duly executed, made cash entry No. 3416 of the same tract under the second section of the act of June 15, 1880 (21 Stat., 237). Having paid the purchase money, he obtained final certificate on the same day, which entitled him to a patent. Your office, by letter bearing date April 18, 1885, suspended this cash entry for the reason that the affidavit required was made by the claimant's attorney, and not by the claimant in person, and the local officers were instructed to notify Forbes to furnish his personal affidavit within sixty days. In pursuance of this order, notice was sent to him by letter (not registered), but no answer was received thereto, and your office was so informed.

On the 26th of November, 1888, the local officers were further instructed to notify Forbes that his entry would be canceled unless he should furnish his personal affidavit within sixty days from date of said notice. This notice was sent by registered letter, but no answer having been made thereto by Forbes, your office, by letter bearing date April 27, 1889, canceled his cash entry.

On the 8th of May, 1889, Fisher, the present claimant, was allowed to make timber culture entry of the same land, and claims to have complied with the requirements of the timber culture law. But, from evidence found in the record, under an affidavit of Forbes' attorney, corroborated by two witnesses and dated June 13, 1885, your office was notified that Forbes died in September, 1884, some months before either of the above-mentioned notices were mailed to him, and that it was impossible, therefore, for him to comply with the order requiring him to furnish the personal affidavit.

An attorney of this city, acting in behalf of the heirs of Clayton Forbes, by letter bearing date June 6, 1889, called the attention of your office to the facts above stated, and requested that your official action in ordering the cancellation of Forbes' cash entry be rescinded, and that his said entry be re-instated. Thereupon, your office, by letter dated December 17, 1889, directed the local officers to notify Fisher of the foregoing alleged facts, and that he would be allowed sixty days within which to show cause why his timber culture entry for said land should not be canceled, and why the cash entry of Forbes should not be re-instated. Fisher, in reply, filed an affidavit in which he alleged that at the time he made application to enter said land the land was vacant; that his entry was made in good faith; that he had complied with the law, and asked that his entry be allowed to remain intact. But your office, having considered said affidavit, held his entry for cancellation, and re-instated the cash entry of Forbes. From this decision Fisher has appealed to this Department.

Under the power of attorney above referred to, Francis M. Snow was authorized by Forbes to purchase for him the land in question under the second section of the act of June 15, 1880, and, in general, to do all other acts and things necessary in connection with the said purchase.

Accordingly, the said attorney filed an affidavit with the local officers complying with the requirements of the law, and completed the purchase. Like affidavits, made by the attorney of record, have been held by this Department to be sufficient; (see the cases of *George T. Jones*, 9 L. D., 97; *Graham v. Garlichs*, 11 L. D., 555, and *McFarland v. Elliott*, id. 587) and *Forbes*, having in his lifetime complied with the terms of the act of June 15, 1880, and obtained final certificate, the decision of your office is affirmed.

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INDIAN LANDS-ALLOTMENT.

AMY HAUSER.

A Cheyenne Indian who has received an allotment in Oklahoma under section 4, act of February 8, 1887, can not, while said allotment is outstanding, receive a further allotment within the Cheyenne and Arapahoe reservation under the agreement ratified by the act of March 3, 1891.

*Acting Secretary Chandler to the Commissioner of Indian Affairs, August 21, 1891.*

I acknowledge the receipt of your communication of 8th instant, submitting for the decision of the Department, whether Amy Hauser, a Cheyenne Indian, and her four children, all under eighteen years of age, who received allotments in Oklahoma Territory in 1889, under section four of the act of February 8, 1887, can now receive an allotment of lands within the Cheyenne and Arapahoe reservation, under the agreement with said Indians ratified by act of March 3, 1891.

In response I transmit herewith an opinion, in which I concur, of the Chief Law Clerk of the Office of the Assistant Attorney General for this Department, to the effect that neither Amy Hauser nor her children can claim other and additional allotments, so long as their said allotments shall remain intact.

OPINION.

DEPARTMENT OF THE INTERIOR,  
OFFICE OF THE ASSISTANT ATTORNEY-GENERAL.

*August 20, 1891.*

The SECRETARY OF THE INTERIOR.

SIR: On the 13th instant the Honorable Acting Secretary Chandler "referred to the Hon. Asst. Att'y General for the Department of the Interior with request for an opinion upon the matter herein presented," namely, a communication from the Acting Commissioner of Indian Affairs, dated the 8th instant, relative to the right of Amy Hauser and family to allotments on the Cheyenne and Arapahoe reservation.

It appears from the paper before me that said Amy Hauser is a Cheyenne Indian, the wife of a white man who settled upon unoccupied

lands east of the Cheyenne and Arapahoe reservation prior to the passage of the act of Congress approved March 2, 1889 (25 Stat., 980-1004), opening the Creek and Seminole lands to settlement; that after said lands were opened Mrs. Hauser and her children, who were then under eighteen years of age, took allotments under the provisions of the fourth section of the act of Congress approved February 8, 1887 (24 Stat., 388), giving to her one hundred and sixty acres and to each of the children forty acres; that by article III of the agreement with the Cheyenne and Arapahoe Indians, ratified by the act of Congress approved March 3, 1891 (26 Stat., 989-1023), it was stipulated that:

Out of the lands ceded, conveyed, transferred, relinquished, and surrendered by article II hereof, and in part consideration for the cession of lands named in the preceding article, it is agreed by the United States that each member of the said Cheyenne and Arapahoe tribes of Indians over the age of eighteen years shall have the right to select for himself or herself one hundred and sixty acres of land, to be held and owned in severalty, to conform to legal surveys in boundary; and that the father, or, if he be dead, the mother, if members of either of said tribes of Indians, shall have a right to select a like amount of land for each of his or her children under the age of eighteen years.

The Acting Commissioner states that he is unable to determine whether "Mrs. Hauser and her children are now recognized as members of the tribe;" that the Hauser family were given said allotments because it was shown that they had settled upon the lands claimed, under the information given by the agent that they were within said Cheyenne and Arapahoe reservation, and, having settled upon and improved said lands, it was considered by the Department that they should be protected in their possessions and allowed to take said lands under the fourth section of said act of 1887. (Letters Indian Affairs, Dept. Int., from Feb. 1889 to May 1889, p. 236.)

The question is submitted "whether, in view of the facts and circumstances in the case as shown, those people are now entitled to further allotments of land within the limits of the Cheyenne and Arapahoe reservation under the agreement of 1891."

Upon the foregoing statement, in my judgment, Amy Hauser and her children are not entitled to allotments of lands within said Cheyenne and Arapahoe reservation, so long as their allotments already made under said act of 1887 are outstanding and uncanceled.

In an opinion rendered by this office on June 22, 1889, 8 L. D., 647, relative to the object of the general allotment act of 1887, it was stated that—

Its immediate purpose is to obliterate the tribal relations of the Indians, so far as to induce them to become individual land owners, thence stepping by easy gradation, it is hoped, along the path of civilization into the dignity of citizenship. To make such act effective to accomplish the purpose in view, it was doubtless intended it should be administered, so far as practicable, like any other law based upon settlement.

Again, on July 14, 1890 (11 L. D., 103), the Secretary of the Interior adopted the opinion of this office holding that members of the citizen

band of Pottawatomie Indians may elect whether they will take allotments under the act of May 23, 1872 (17 Stat., 159), which required the allottee to pay to the United States the cost of said lands, or under the general allotment act of 1887, but they could not take under both of said acts. On July 15, 1890, the Secretary concurred in the opinion of this office that an Indian who has received the full benefit of the pre-emption and homestead laws was not entitled to an allotment under said general allotment act of 1887 (12 L. D., 181).

The object of the allotment acts, being to secure homes to the individual Indians and to make them separate owners of the land, was accomplished when Amy Hauser and her children took allotments under said act of 1887. I am therefore of the opinion, and so advise you, that neither she nor her children can now claim other and additional allotments, so long as their said allotments remain intact.

The papers submitted by said reference of the 13th instant are herewith returned.

Very respectfully,

F. L. CAMPBELL,  
*Chief Law Clerk.*

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RAILROAD GRANT—ACT OF APRIL 21, 1876.

SIoux CITY AND PACIFIC R. R. Co. v. HAMILTON.

Where no withdrawal is directed on filing map of general route, and a homestead entry of land within the limits of the grant, as indicated by said map, is made subsequently thereto, and prior to definite location, such entry is confirmed by section 1, act of April 21, 1876.

*Acting Secretary Chandler to the Commissioner of the General Land Office, August 22, 1891.*

I have considered the motion for review of departmental decision, dated March 13, 1891 (unreported), filed by the Missouri Valley Land Company, successor in interest, in the case of the Sioux City and Pacific Railroad Company v. Chester M. Hamilton, in which the claim of the company was rejected, for the lots 1 and 2 of Sec. 1, T. 19, R. 11 E., Neligh, Nebraska, and the homestead entry of Chester M. Hamilton of said tracts, with others, was sustained.

The grounds of said motion are error: (1) In holding that the right of said company attached to its granted lands under the act of Congress approved July 2, 1862 (12 Stat., 489), as amended by the act of July 2, 1864 (13 Stat., 356), on January 4, 1868, the date of filing of its map of definite location; (2) In not holding that the line of said company's road was not definitely located upon the filing of its map of general route in the Department of the Interior on June 27, 1865; (3) In not holding that upon the filing of said map of general route, the law withdrew the odd numbered sections "from all disposition by the

United States," and upon the filing of the map of definite location the right of the company related back to the filing of the map of general route, and fixed in the company the title to all tracts granted within the primary limits, not sold, reserved, or otherwise disposed of by the United States, at the time of the filing of such map of general route; and (4) In not holding that the settlement and entry of Hamilton were illegal and void because made upon lands reserved for and granted to said company.

It is urged in the argument of counsel that the Sioux City and Pacific Railroad Company, which had been designated by the President to build a railroad under the provision of section 17 of said act of July 2, 1864, filed in this Department, on June 27, 1865, a map showing the general route of said road, and that "the statute *proprio vigore* withdrew from pre-emption, private entry, and sale every tract in the odd numbered sections, lying within ten miles on each side of said road," etc.

The case of the Northern Pacific Railroad Company *v.* Buttz (119 U. S., 55) is cited as authority for the proposition "that as to every tract, free, etc., at the date of the filing of the map of general route, there was a legislative withdrawal, which, being followed by the filing of the map of definite location, the right of the company became absolute." That this especially is true, where, as in the case at bar, the maps of general route and definite location coincide and pass over the same tracts upon the same line.

It may be conceded that the map of general route was filed, as stated by counsel, on June, 27, 1865, and that it operates as a statutory withdrawal of the odd numbered sections within its limits which came within the terms of the grant.

The original grant for the benefit of said company, by section 14 of said act of July 1, 1862, was upon the "same terms and conditions" as contained in the grant by said act to the Union Pacific Railroad Company, and by section 17 of said amendatory act of July 2, 1864, enlarging the grant, it is stipulated that the grant to the company designated by the President to operate and construct a railroad from Sioux City to connect with the Union Pacific Railroad shall be upon "the same terms and conditions as are provided in this act, and the act to which this is an amendment, for the construction of the said Union Pacific Railroad and telegraph lines and branches."

Turning now to the grant, we find that by section 3 of said act of 1862 there was granted "every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed."

By section 7 of this act, the company was required to duly file its

assent to the act, and to complete its road to the western boundary of Nevada before July 1, 1874, with a proviso—

That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the lands within fifteen miles of said designated route or routes to be withdrawn from pre-emption, private entry, and sale; and when any portion of said routes shall be finally located, the Secretary of the Interior shall cause the said lands hereinbefore granted to be surveyed and set off as fast as may be necessary for the purposes herein named.

By section 4 of said amendatory act the grant was enlarged from five to ten and from ten to twenty miles in section 3, and section 7 by striking out the word fifteen and inserting twenty-five.

There can be no question, I think, that under the express terms of the grant the right of the company to its granted lands attached at "the time the line of said road is definitely fixed," and this must be held to be when the map is filed with the Secretary of the Interior and accepted by him. This was the express ruling of the supreme court in the case of *Van Wyck v. Knevals* (106 U. S., 360-366), decided at the October term 1882, and it has since been uniformly followed by the Department and the courts. *Cedar Rapids Railroad v. Herring* (110 U. S., 27, 38); *St. Paul R. R. v. Winona R. R.* (112 U. S., 720-726); *Kansas Pacific Ry. Co. v. Dunmeyer* (113 U. S., 629-635); *Wisconsin Central R. R. Co. v. Price Co.* (133 U. S., 496-509); *California and Oregon R. R. Co. v. Pickard* (12 L. D., 133); *Morgan v. Southern Pacific R. R. Co.* (11 L. D., 582); *Showell v. Central Pacific R. R. Co.* (10 L. D., 167); *Neilson v. Northern Pacific R. R. Co. et al.* (9 L. D., 402); *Hastings and Dakota Ry. Co. v. McClintock* (7 L. D., 207); *Graham v. Hastings and Dakota Ry. Co.* (1 L. D., 362).

But it appears that no withdrawal was made upon the filing of said map of general route, and, in the meantime, Hamilton was allowed to make homestead entry of said land, and live upon and improve the same as required by law, and obtained final certificate upon his entry.\* His entry was made before the map of definite location was filed and without any notice of the filing of the map designating the general route of its road.

By the first section of the act of Congress approved April 21, 1876 (19 Stat., 35) it is provided:

That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land office of the district in which such lands are situated, or after their restoration to market by order of the General Land Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patent for the same shall issue to the parties entitled thereto.

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\*The record shows that Hamilton's entry was made May 7, 1867.

This section confirms the entry of Hamilton.

Even conceding that the effect of section 7 of said act of 1862 was to create a statutory withdrawal in the same manner as provided for by the 6th section of the act of July 2, 1864 (13 Stat., 365), making a grant to the Northern Pacific Railroad Company, and which was considered by the court in the Buttz case, yet, under the well settled rulings of the Department, the withdrawal in either case can not affect entries confirmed under the provisions of the act of 1876 (*supra*). Northern Pacific Railroad Company *v.* Dudden (6 L. D., 6); Northern Pacific Railroad Company *v.* Burns (*id.* 21); Jacobs *v.* Northern Pacific R. R. Co. (*id.*, 223); Kimberland *v.* Northern Pacific R. R. Co. (8 L. D., 318); Catlin *v.* Northern Pacific R. R. Co. (9 L. D., 423); Knapp *v.* Northern Pacific R. R. Co. (11 L. D., 85).

This long established ruling of the Department is too well settled now to be disturbed.

The motion must be, and it is hereby denied.

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#### CONTEST PROCEEDINGS—PRIORITY OF APPLICATION.

##### KING *v.* ARDELL ET AL.

Applications for the right of contest are entitled to precedence in the order in which they are actually received at the local office, in the absence of any showing of fraud, collusion, or undue advantage.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 22, 1891.*

I have considered the appeal of William A. King from your office decision of March 1, 1890, holding that James P. Loftus had a prior right to contest the timber culture entry of George A. Ardell, for the NE.  $\frac{1}{4}$  Sec. 10, T. 22 S., R. 63 W., Pueblo land district, Colorado.

The local officers docketed the case of King prior to that of Loftus, from which action Loftus appealed, and your office reversed their action and placed Loftus ahead of King, from which action King appealed. The testimony (affidavits) shows that King had contemplated contesting Ardell's entry and making timber culture entry for the land; that he had taken Loftus to this land and an adjoining tract some fifteen or twenty miles from Pueblo, and located him on a homestead adjoining the tract in controversy and had consented to allow him to proceed to secure this tract, for all which Loftus was to pay him \$75. King was, however, to act as his attorney in the contest case. Afterward, Loftus wrote him thanking him for his past favors, but saying that he was "by no means so favorably impressed regarding possibilities, values, etc., as I formerly have been. You will therefore proceed no farther in the matter on my authority." Thereupon King considered the matter with Loftus closed, and proceeded to initiate contest against the entry of

Ardell, in his own behalf. It appears that the first year of Ardell's entry would not expire, so as to allow a contest for non-compliance with law, until March 2, 1888, and, this being Sunday, proceedings could not be commenced until Monday morning, March 3. It appears that King's partner, Betts, had to be at the land office on that morning as a witness in some matter then pending, and King, having prepared his affidavit of contest, sent it by him to be filed. The office opened for regular business at nine a. m., but evidence on final proofs was taken from eight a. m. So Betts was in the office as a witness prior to nine o'clock. When the doors were thrown open for the general public, Betts walked to the proper desk, or "counter," as it is called, and producing the affidavit asked to have it filed; the register took it, swore Betts to it as a corroborating witness, and was about to enter it on the record, when Loftus, who was at the counter by this time, asked to file an affidavit of contest. The register took it, and, seeing it was against the same entry, informed him that he had just received an affidavit of contest against Ardell's entry which was prior to his. It was claimed that Betts was wrongfully in the office, and that he thus obtained an advantage over Loftus. This the register denied, and says that Betts was given no advantage by reason of being an attorney; he states that about fifteen seconds elapsed between the receipt of the two papers, and he refused to docket Loftus' case first. From this Loftus appealed.

Loftus, who is acting as his own attorney, has filed a statement, not under oath, and King and Betts have filed affidavits. The register sends a statement of the case; from all of which the above statement is drawn.

It is certainly clear that the rule "prior in time, superior in right," applies in contests, and King, having presented his affidavit first, would be entitled to be first heard—unless for some substantial reason the rule does not apply in this case.

King was a land attorney, and Loftus manifests a very fair acquaintance with the land business. It is quite evident from all the statements and circumstances that Loftus, having been taken to the land and furnished such information as to the surroundings, water-supply, etc., as King could furnish,—that he had made up his mind to dispense with his further service and thus save paying him the agreed price. It appears from his letter to King that he had abandoned the idea of contesting the claim; but it is evident from his subsequent conduct that this was to throw King off his guard, that he (Loftus) might secure the prior contest. There is nothing tending to show that there was any conspiracy between King or Betts and the register. The latter says Betts was there and actually being examined as a witness in a final proof, and Loftus disclaims any intention of charging the register with any unfair conduct. It was a mere coincidence that Betts was called as a witness at the particular time when the filing of the contest became important, but otherwise it was a matter of diligence. That he was

called in the office before nine o'clock, would not prevent him from doing regular business therein after that hour; and as to any "sharp practice" or unfair conduct on the part of the officer, such is not charged, but is especially disclaimed. Whether King's contest is speculative or not is not before me. I do not find any such fraud, deceit, or unfair conduct on the part of King or his agent Betts as will warrant me in saying that the case should be taken from under the rule of priority of time, and upon full consideration of the entire case I have determined not to interfere, but to leave the parties where their acts have placed them.

Your decision is therefore reversed.

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PRACTICE—APPEAL—SETTLEMENT RIGHTS.

STONE *v.* COWLES.

In computing the time allowed for taking an appeal the period covered by an intervening motion for review should be excluded, and this rule is not affected by a withdrawal of said motion before decision thereon.

The right of a settler who is residing upon land covered by the entry of another attaches *eo instante* on the relinquishment and cancellation of such entry, and is superior to that of a homesteader who makes entry of the land immediately after its relinquishment.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 24, 1891.*

In the appeal of Alfred Cowles from your office decision of March 14, 1891, the following facts appear of record:

February 4, 1888, Cowles made homestead entry 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. 13, T. 14 S., R. 2 W., Los Angeles, California.

March 1 of the same year, plaintiff, Stone, applied to make homestead entry for the same tract, alleging therein that he had made settlement on the land "on or about the 17th day of November, 1887," that he had improved the same, and that he was residing on it with his family at the date of his application; that his improvements consisted of "frame house fifteen feet by thirty feet, good frame stable fifteen feet by twenty feet, well, chicken house, etc., and that the value of the same is \$600." His application was rejected on account of the prior entry of Cowles, and subsequent thereto your office directed a hearing to determine the rights of the two claimants as to priority.

The testimony was taken before the county clerk of San Diego county, and, on December 29, 1888, the register and receiver recommended "that the homestead entry of Cowles be allowed to stand and the application of Stone rejected."

On appeal, your office by its said decision reversed the action of the

local officers, and held the entry of Cowles for cancellation, directed that Stone be allowed to perfect his homestead entry.

From this action of your office Cowles has appealed to the Department.

The evidence at the hearing shows that E. D. French had made additional homestead entry for this land, April 9, 1885, and received final certificate.

February 11, 1887, your office held said additional entry for cancellation, because the original eighty acre entry had been made subsequent to the passage of the act of March 3, 1879.

French appealed, and while his appeal was pending and before a decision thereon (to wit, September 27, 1887), he relinquished his additional homestead entry and made timber culture entry for the same. A month prior to this last entry, Stone applied to make homestead entry therefor, and his application was rejected, because of the pending appeal of French.

Stone did not appeal from the rejection of his said application, and nothing further was attempted of record as to the land until February 4, 1888, when French relinquished his timber culture entry, which was canceled, and Cowles, who is his brother-in-law, was allowed to make homestead entry for the same.

It appears that some time subsequent to receiving his final certificate for his additional homestead entry and before the same was canceled by your office, French had sold three acres of the same to a neighbor, who in turn had sold the same to one Cambron. It was upon this three acres that Stone had settled in November, 1887, and upon which he was residing at the date of his application to enter, in March 1888. He went upon this by permission of Cambron, although, as clearly appears from the evidence, he asserted his right and laid claim to the whole eighty, while Cowles claimed the same, including the three acres sold to Cambron, and upon which Stone resided.

Several errors are assigned by counsel for Cowles, all of which may be condensed into the three following :

1st. Error in not holding that Stone was a trespasser and forcible intruder upon the land, with the sole intention of holding three acres under a claim of title by Cambron, and not as a settler upon the land.

2nd. Error in not holding that, even if he did begin settlement on the claim in October and established actual residence on the land in November, 1887, he had forfeited all rights as such settler by his failure to contest the timber culture entry of French, or to apply to enter within three months after such settlement.

3rd. That he lost his rights, whatever they may have been, by failing to appeal from the decision of the local officers within the time prescribed by the rules of practice.

As to the first two grounds it is clear from the evidence that he all

along, from August, 1887, laid claim to the whole eighty acres. Laying no stress upon his offer to make entry of the whole eighty, August 17, 1887, it clearly appears that when he made settlement and took up his residence on the three acres, which had been sold to Cambron, he did so with the expressed intention of claiming the whole subdivision in dispute. This is shown by his own and Cambron's testimony—in fact, Cowles must have understood this, for he admits that he notified Stone "to leave and quit the premises."

It is true that Stone, not having applied to contest the timber culture entry of French, must be regarded as a trespasser up to the time of the relinquishment and cancellation of such entry. While the entry remained of record, he could establish no rights by his settlement, residence and improvements as against French, or the government; but the instant the entry was canceled, his settlement ceased to be a trespass, and he by operation of law became a settler on the public domain. His settlement must therefore be regarded as of the date of the cancellation of French's entry, and such right of settlement "is superior to that of a homesteader who enters the land immediately after the said relinquishment." *Wiley v. Raymond*, 6 L. D., 246.

Had Cowles, at any time subsequent to the actual settlement of Stone, and prior to the relinquishment of French, filed a contest against the entry of French, instead of depending upon French's relinquishment for his rights, he would have received a preference over Stone by reason of his having taken steps to clear the record. He did not do this, but waited until the entry of French had been canceled, when he made entry of the land, which must be held to be subject to Stone's settlement rights.

Thus, it will be seen that Stone, by his failure to initiate contest, subjected himself to the rights of any claimant who might chose to contest the entry; but, no such contest having been instituted prior to the cancellation, Stone's rights as a settler took effect *eo instanti*, and gave him priority over the entry of Cowles. Stone could gain no rights by applying to enter, while the timber culture entry of French remained of record, and he lost none by his failure to contest, because he had none to lose, his rights as a settler not attaching until the relinquishment of French.

It follows, then, that he had no more rights for three months after settlement (actual) than subsequent thereto, for settlement on land segregated by an entry confers no right, not even the preference right of contest, over that of any one else not a settler.

As between several settlers on land reserved or covered by an entry of record, this Department will inquire into the bona-fides and priorities of such conflicting claimants (*Etnier v. Zook* 11 L. D., 452), but such inquiry is not based upon any recognition of their rights as against the entryman, reservee or government, for they have none, but as their

rights of settlement attach instantly and simultaneously on relinquishment of the claim of record, and as only one can be allowed to perfect title to the land, it is necessary to inquire into their priorities to determine to which one of the several settlers the land should equitably be granted.

The third error has reference to a question of practice.

It appears that Stone filed a motion to review the decision of the local officers. He afterwards withdrew this motion and filed an appeal from such decision. From the date of notice of the decision of the local officers until the date of filing the appeal, forty-eight days had elapsed, while but thirty days were allowed for appeal, or at the utmost forty, allowing ten days for transmission. Deducting the time the motion for review was pending from the forty-eight days, it would leave less than thirty days from notice of appeal until the filing of the same.

Counsel for Cowles insists that Stone should be charged with the whole forty-eight days, which would make his appeal from the register and receiver out of time.

Rule 79 of Rules of Practice prescribes that "The time between the filing of a motion for rehearing or review and the notice of the decision upon such motion shall be excluded in computing the time allowed for appeal."

Counsel insists that, as there was no decision upon the motion for a rehearing, the appellant can not invoke this rule, but must be charged with the whole forty-eight days, just as if no motion had been filed.

This position is in my opinion untenable.

A motion to review a judgment of court suspends the operation of such judgment until such motion is determined or disposed of, and the order allowing thirty days in which to appeal means only that, after thirty days acquiescence in the judgment, the party so acquiescing shall not thereafter be heard to complain.

In the absence of Rule 79, following the practice in all the courts, I should be compelled to suspend the running of the time granted for appeal, during the pendency of a motion for review or rehearing, unless it should be made to appear that such motion was frivolously made, which is not shown in this case.

It follows that the decision of your office is right, and it is affirmed.

## PRACTICE—SECOND CONTEST—RELINQUISHMENT.

WESTENHAVER *v.* DODDS.

The dismissal of a contest by the local office, and failure to perfect appeal from such action, effects a final disposition of said contest.

An affidavit of contest filed during the pendency of a prior contest, should be received and held without further action until final disposition of the prior suit; but the right of the second contestant will be held to take effect by relation as of the date when his contest affidavit is filed.

The filing of a relinquishment during the pendency of a contest is *prima facie* the result of the contest, but such presumption may be overcome. The relinquishment, however, cannot defeat the right of the contestant to be heard on the charge as laid by him.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 24, 1891.*

John D. Westenhaver appeals from your decision of February 18, 1890, rejecting his application to make timber culture entry for the SW.  $\frac{1}{4}$  of Sec. 35, T. 25 N., R. 48 W Chadron land district, Nebraska.

On the 21st of June, 1886, Jethro M. Dodds made timber culture entry for the land in question, and on the 14th of March, 1888, Lewis K. Moore filed affidavit of contest against the same. A hearing was ordered, at which the contestant failed to appear, and his contest was accordingly dismissed. Moore appealed from that decision, but failed to make service of notice of appeal upon the claimant. The local officers returned the notice to him in order that he might complete the service and make proof thereof. He claims never to have received the notice, and he never returned that or any other one to the register and receiver.

On the 19th of June, 1889, Jethro M. Dodds executed a relinquishment of his entry, which was filed in the local office on the 25th of that month and his entry canceled, and on the same day Irwin S. Dodds made timber culture entry for the land. On the 1st of July following, the contestant was notified, and his contest dismissed.

On the 15th of June, 1889, an affidavit of contest made by John D. Westenhaver was filed against the entry of J. M. Dodds, subject to that of Moore then pending, according to the endorsement thereon by the local officers. On the 24th of the same month, he filed another affidavit of contest subject to that of Moore, and his own of the previous date mentioned. On the 2d of August following, he filed a timber culture application for the land, which the local officers rejected on account of the prior entry of Irwin S. Dodds.

Westenhaver appealed from the decision of the register and receiver to your office, and on the 18th of February, 1890, you affirmed their judgment. The case is before me upon an appeal by Westenhaver from your judgment.

In your decision, you hold that Westenhaver gained no right by his contest, for the reason that it was filed subject to the contest of Moore

and the relinquishment was filed and the entry canceled before Moore's contest was disposed of.

I think you are in error in your conclusion. In my opinion Moore had no contest pending against the entry of Dodds, after the dismissal of his contest, upon his default at the hearing before the local officers, on the 27th of April, 1888. His attempted appeal from the decision of the register and receiver to your office was never perfected, but the jurisdiction of the local officers in the case terminated with such act of dismissal, and their notification to him, on the first of July, 1889, that a relinquishment of the entry had been filed, and that his contest was accordingly dismissed, was without authority, as was also their endorsement upon the contest affidavit of Westenhaver, that it was filed subject to the contest of Moore.

Westenhaver's affidavits of contest were both filed prior to the filing of Dodd's relinquishment, and the cancellation of his entry. Even if Moore's contest had been then pending, Westenhaver's rights would not have been cut off by the cancellation.

The rule governing such cases was stated in the case of *Eddy v. England* (6 L. D., 530) to be that

An affidavit of contest, filed pending the disposition of a prior contest, should be received and held without further action, until final disposition of the prior suit; but the right of the second contestant will be held to take effect by relation as of the date when his contest affidavit was filed.

This rule was repeated in the case of *Conly v. Price* (9 L. D., 490); and in that of *Farrell v. McDonnell*, decided by this Department on the 28th of July of the present year. (13 L. D., 105.)

In his first affidavit of contest, Westenhaver alleged that Dodds failed in the second year to cultivate the five acres which were broken the first year, and his second affidavit alleged failure to plant trees, seeds or cuttings, during the third year, as required by law, and that the default continued to exist. The filing of Dodds' relinquishment, and the cancellation of his entry, did not necessarily give Westenhaver a preference right over any other person to make entry for the land. The filing of a relinquishment during the pendency of a contest is *prima facie* the result of the contest, but it is not conclusive on that point, and such presumption may be overcome. It cannot, however, defeat the right of the contestant to be heard on the charge as laid by him in his affidavit of contest. *McClellan v. Biggerstaff* (7 L. D., 442); *Webb v. Loughrey* (9 L. D., 440).

The act of May 14, 1880 (21 Stat., 140) provides that when a claimant files a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry. The second section of the act gives a contestant who has procured the cancellation of such entry, a preference right to make entry for the land, provided he does so within thirty days after receiving notice of such cancellation. If the contestant applies to make entry within the

time allowed, and some other person has, in the meantime, made entry, the prior entryman should be required to show cause why his entry should not be canceled, on account of its conflict with the preference right of the contestant.

Such should be the proceeding in this case, and at the hearing, Irwin S. Dodds will be allowed to show that the relinquishment and cancellation of the entry was not the result of Westenhaver's contest, in which event the rights of the contestant must depend upon his ability to sustain the charges as laid by him in his contest affidavits. *Sorenson v. Becker* (8 L. D., 357).

I am of the opinion that the rights of these respective parties can be determined only by a hearing had for that purpose. You will, therefore, direct the local officers to order one, of which all parties in interest should have due notice, to determine whether or not there was a failure on the part of Jethro M. Dodds to comply with requirements of the law under which his entry was made, and whether the execution or filing of his relinquishment was due to the attack by Westenhaver upon the validity of his said entry, and such other facts as may be of service in determining the rights of these parties.

The decision of your office is modified accordingly.

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PRE-EMPTION ENTRY—ALIENATION—ESTOPPEL.

MURDOCK *v.* FERGUSON.

A mortgage given in good faith on the purchase of the improvements and prior possessory right of another, and to secure the repayment of money advanced to pay the government price of the land, does not defeat the pre-emptive right.

A settler who definitely declares the extent of his settlement claim is estopped from subsequently claiming a larger tract to the injury of one who relies upon such declaration.

*First Assistant Secretary Ohandler to the Commissioner of the General Land Office, August 24, 1891.*

I have considered the case of *H. M. Murdock v. C. C. Ferguson*, upon the appeal of the former from your decision holding for cancellation his homestead entry, so far as it conflicts with the pre-emption filing of the latter for the W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  and fractional SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , and fractional SW.  $\frac{1}{4}$  of Sec. 29, T. 16 S., R. 1 E., Los Angeles, California.

The record in this case shows that Ferguson filed declaratory statement for the land on the 1st of April, 1885; that he made settlement thereon on the 17th of February of that year, and established his actual residence on the 24th of that month. On the 10th of April, 1885, Murdock made homestead entry for the SE.  $\frac{1}{4}$  of the same section, which covered eighty acres of Ferguson's claim.

Ferguson gave due notice by publication that he would submit final proof on the 4th of January, 1886, and Murdock received special notice

of the fact, and appeared at the time and place designated, and protested against the acceptance of such final proof, on the ground that Ferguson had violated the law by mortgaging the land, and on the further ground that he (Murdock) had a prior right to eighty acres of the tract, being the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the section, under his homestead entry of April 10, 1885.

A hearing followed, at which Ferguson and his witnesses were cross-examined, other witnesses were introduced by both parties, and a decision reached by the register and receiver on the 18th of January, 1888, in which they held that the contest of Murdock should be dismissed, but that Ferguson should be required to furnish additional proof as to residence, occupation and cultivation. Upon appeal to your office, the judgment of the register and receiver was affirmed, so far as it related to the dismissal of the contest of Murdock, and modified so as to accept the final proof of Ferguson, without additional evidence.

Your decision was made on the 20th of March, 1890, and an appeal from your judgment, by Murdock, brings the case to this Department for consideration.

All the land embraced in the filing of Ferguson, and the entry of Murdock, together with other land adjoining, or in that immediate vicinity, were possessed or controlled by Dr. J. C. Stockton, prior to such filing and entry, and he had made very valuable improvements thereon, having previously made application to purchase the same from the Texas Pacific Railroad Company, and been granted the option to do so by the land commissioner of that company. The land was afterwards restored to the public domain, but prior to that time Stockton had contracted to sell to Murdock eighty acres, being the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said section 29, and to Ferguson the land embraced in his subsequent filing. Murdock agreed to pay Stockton \$200 for the improvements upon the eighty acres contracted to him, and Ferguson agreed to pay \$2,000 for the improvements upon his tract. Murdock paid \$50 down, and gave his note for \$150, which he has not yet paid. Ferguson gave a mortgage to secure the whole of the purchase price of his tract, and Dr. Stockton agreed to advance him \$500 more, to enable him to make improvements upon the land, and to procure title from the government.

At the time Ferguson went upon the land with Dr. Stockton, on the 17th of February, 1885, Murdock was occupying the doctor's house upon the Ferguson tract, but at once proceeded to erect a house on his own land, and removed from the doctor's to his own house on the 24th of that month. According to the evidence of Stockton and Ferguson, Murdock at that time pointed out to Ferguson the line between his eighty acres, and Stockton's other land, and stated that he had no claim to any land, except that purchased by him of the doctor. N. H. Conklin, who was Stockton's agent for the management of his property, testified that Murdock made similar statements to him on several occasions,

upon being inquired of as to the truth of the rumor that he intended to "jump" a portion of the doctor's land. Murdock denied having made these statements to either of the witnesses, and stated that he did not intend to pay the note which he gave Stockton, as he did not think the doctor had any interest in the land which he could transfer.

I deem it unnecessary to recount the improvements which Stockton had made upon the land sold by him to Murdock and Ferguson. They consisted of a house, barn, and windmill, the clearing and cultivation of a large portion of the land, and the planting of orchards and vineyards, and were fully worth, in the case of Murdock, the \$200 which he agreed to give, and the \$2,000 which Ferguson promised to pay.

In the case of *Larson v. Weisbecker* (1 L. D., 409) which has been repeatedly cited and approved in nearly every volume of departmental decisions from that time to the present day, it was held that "A mortgage given by a pre-emptor as security for money loaned him with which to pay the government price for the land filed upon is not an alienation of the land, nor is it such an agreement as is prohibited by 2262 Rev. Stat." The principle is the same in that case and the case at bar, and it can not therefore be held that Ferguson violated the law by giving Stockton the \$2,000 mortgage.

There is certainly nothing in the case tending to show what the attorney for Murdock, in his notice of appeal, asks me to find, viz: "That the attempted entry of Ferguson was fraudulent, and that it was a scheme concocted between Stockton and Ferguson whereby the former should ultimately obtain title to the land, and that the mortgage given by Ferguson to Stockton was given for the purpose of securing that end." Both Stockton and Ferguson swear positively that such is not the case, and no one testifies differently, or attempts to impeach their evidence.

The preponderance of evidence in the case is to the effect that, at the time Ferguson made his purchase of Stockton, and established his residence upon the land, Murdock did not lay claim to any of the land included in Ferguson's filing. If he made the statements to them, which are sworn to by Stockton, Ferguson and Conklin, that he had no claim to any land except the eighty acres he bought of Stockton, he is estopped from afterwards asserting to the contrary. According to the evidence of these witnesses, there was at that time an agreed statement of facts, and the case of *Tyler v. Duncan et al.* (2 L. D., 571) held that "An agreed statement of facts precludes a contradiction or variation of such statements."

I deem it unnecessary to further discuss this case. I have considered it carefully, have read the evidence produced upon the trial, the errors alleged to have been committed by your decision, the points, arguments and briefs of counsel upon this appeal, and am of the opinion that the conclusions reached by you were correct.

The decision appealed from is therefore affirmed.

## RAILROAD GRANT—INDEMNITY SELECTION.

NORTHERN PACIFIC R. R. CO. *v.* BASS.

The mere fact that a tract is within the geographical limits of another grant will not defeat the right to select the same as indemnity, if it is otherwise subject to selection.

The Northern Pacific company must exhaust the lands in the first indemnity belt before it can obtain title to lands in the second, but this does not prevent selections in the second belt, on proper basis, pending final adjustment of the grant within the primary limits and first indemnity belt.

*Acting Secretary Chandler to the Commissioner of the General Land Office, August 24, 1891.*

I have considered the case of the Northern Pacific Railroad Company *v.* Thomas J. Bass, as presented by the appeal of the former from the decision of your office dated March 2, 1887, rejecting its application to select the N. E.  $\frac{1}{4}$  of Sec. 13, T. 127 N., R. 33 W., Saint Cloud, Minnesota.

The record shows that said tract is within the granted limits of the St. Paul, Minneapolis and Manitoba Railway Company, formerly the St. Vincent extension of the St. Paul and Pacific Railroad Company, under the grant by acts of Congress approved March 3, 1857 (11 Stat., 195); and March 3, 1865 (13 Stat., 526); and also within the indemnity limits of the grant to the Northern Pacific Railroad Company.

It appears that John H. Morris made homestead entry for said tract on the 10th day of January, 1871, which was canceled February 28, 1879.

The rights of the Manitoba Company under its grant became effective December 19, 1871. The withdrawal in favor of the Northern Pacific Railroad Company was ordered by your office on the 26th day of December, 1871, and was received at the local office on January 6, 1872.

On the 7th day of November, 1883, the Northern Pacific Railroad Company made application to select indemnity, and included in its list of selections the tract in question; said list of selections was rejected by the local officers, and the company appealed to your office, where it is still pending.

On June 25, 1884, Thomas J. Bass was allowed to make homestead entry for the tract, and on December 14, 1886, made final proof and payment, upon which final certificate was issued.

On the 2d day of March, 1887, your office held that :

It has often been held by this office that one company cannot go into the granted limits of the other to seek indemnity. . . . A rule has also heretofore been made by this office that the Northern Pacific Railroad Company has no authority to select lands in the forty mile limits until it shall be positively ascertained that the quantity of lands in the twenty and thirty mile limits is insufficient to make up the full complement of its grant. When the Northern Pacific Company's application to select the land in controversy was presented it was not known (and is not now) whether

the grant in Minnesota could or could not be satisfied from the lands within the primary and first indemnity limits. . . . It is held that neither of the railroads named has, or can acquire, any legal claim to the land in controversy by virtue of the grants in aid of the construction of their lines.

The Northern Pacific Railroad Company appeals.

The appellant assigns errors as follows :

1. Error to rule that the Northern Pacific Railroad Company cannot select lands for indemnity within the geographical limits of the grant to another road.
2. Error to rule that the selection of the company was premature.
3. Error not to admit said selection, and not to reject the entry of Bass.

The homestead entry of Morris served to except the land from the operation of the grant to the Manitoba Company, and also from the withdrawal in favor of the Northern Pacific Company, because it was a subsisting *prima facie* valid entry at the dates when the rights of the respective roads attached under the grant and withdrawal; but Morris' entry was canceled by your office on the 28th day of February, 1879, and, so far as the record before me shows, the tract in question then became vacant public land, and if it shall finally be determined that the selection of the Northern Pacific Railroad Company was properly made, then the mere fact that the tract is within the geographical limits of the grant to the Manitoba Company, will not defeat the right of the Northern Pacific Company to it as indemnity. *Allers v. Northern Pacific R. R. Co., et al., (9 L. D., 452.) Northern Pacific R. R. Co. v. Moling (11 L. D., 138.)*

The case of the Northern Pacific Railroad Company *v. Halvorson (10 L. D., 15)*, was similar to the case at bar, and in that case it was said :

If the land selected is of the right kind and character, there seems to be no good reason why the company should not be allowed to select the same, upon a proper *prima facie* basis being shown . . . . While it is true that the company must exhaust the lands in the first indemnity before it can obtain title to lands in the second indemnity belt, it by no means follows that it cannot select lands, designating a proper basis therefor, until the final adjustment of the grant.

The homestead entry of Bass was improperly allowed while the appeal of the Northern Pacific Railroad Company was pending before your office from the decision of the local officers rejecting its list of selections; it is accordingly suspended until the final disposition of the company's appeal.

If, upon the final adjustment of the railroad grant in the State of Minnesota, it shall appear that said company is entitled to said tract, the selection will be approved and the entry of Bass canceled.

The decision appealed from is modified accordingly.

## FINAL PROOF PROCEEDINGS—PROTEST—HEARING.

BURKHOLDER *v.* SWEET.

A protestant against final proof is under no obligation to submit testimony before the officer designated to take such proof, in the absence of an order therefor under rule 35 of practice.

When the record in such a case comes before the local officers they should order a hearing on the protest, at such time and place as may seem best in their discretion.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 25, 1891.*

I have considered the case of L. M. Burkholder *v.* Othello J. Sweet, upon the appeal of the former from your decision, accepting the final proof of the latter for the NE  $\frac{1}{4}$  of Sec. 34, T. 115 N., R. 81 W., Huron land district, Dakota.

Sweet filed declaratory statement for the land on the 24th of May, 1886, alleging settlement on the 10th of that month. On the 12th of August, 1887, he gave notice by publication that he would make final proof before the judge of the district court of Sully county, or in his absence before the clerk of said county, at Onida, Dakota, on the 18th of October, 1887.

At that time Burkholder appeared and filed a paper which was entitled "Lorenzo M. Burkholder, adverse claimant, *v.* Othello J. Sweet, final proof claimant." The paper stated that he was the identical person who had filed soldier's declaratory statement for the same tract, and demanded the right to cross examine the witnesses of Sweet, and to introduce testimony of his own. The paper was signed by him, with the words "adverse claimant" added. At the same time he made and filed an affidavit, stating that he was an adverse claimant for the land and that he had two witnesses whose attendance could not be procured at that time, by whom he could prove that Sweet removed from the land on the 18th of July, 1887, to Fort Sully, where he was engaged in keeping a restaurant and boarding house, and that he had abandoned the land, and he asked that the cause be continued for sixty days, to enable him to procure the attendance of his witnesses, and make such proof.

The record contains no ruling on this motion, but Sweet made his proof, and he and his witnesses were cross-examined by Burkholder, who was also sworn in his own behalf. The proofs and proceedings were certified to the register and receiver, and on the 18th of November, 1887, they rendered a decision, recommending that the final proof of Sweet be accepted, and that the protest of Burkholder, "if it can be considered that there is any proper legal protest," be dismissed.

Upon appeal to your office the judgment of the register and receiver was affirmed, on the 2d of November, 1889. On the 12th of February,

1890, you denied the plaintiff's motion for a review of your decision, and on the 10th of May, 1890, you also refused to reconsider the case, upon his petition. From these several decisions of your office, the plaintiff appeals to this Department.

Prior to the time when Sweet made his final proof, Burkholder had filed his soldier's declaratory statement for the land, and within the time allowed by law after making such filing, he made homestead entry for the same. He was therefore an "adverse claimant," when he objected to the acceptance of Sweet's proof.

The register and receiver, and your office, while treating the papers filed by Burkholder at the time the proof was offered, as a protest, afterwards question the regularity and formality of such protest. Without determining the question of their formality, it is certain that the papers filed were sufficient to make it evident to Sweet, and to the officer before whom the proof was to be made, that Burkholder objected to the acceptance of the same, as an adverse claimant.

In his motion for a review, and his petition for a reconsideration of your decision of November 2, 1889, Burkholder only asked for a hearing before the register and receiver, or some officer designated by them to take the testimony, under Rule 35, at which he might establish, or attempt to establish the allegations contained in his affidavit of protest, viz: that he had a prior right to the land, and that Sweet had abandoned the same.

The rule governing cases of this character was clearly stated in the case of *Martensen v. McCaffrey* (7 L. D., 315), where it was held that—

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.

In the case of *Hoover v. Lawton* (9 L. D., 273) the rule is still more fully stated, as follows:

In the absence of an order under rule 35 of practice, a protestant, in final proof proceedings, who appears as an adverse claimant, is under no obligations to submit his testimony at the time and place, and before the officer, designated for taking the final proof.

Where an adverse claimant enters protest against the submission of final proof, it is the duty of the local officers to order a hearing at such time and place, and before such officer as they in their discretion, may determine.

Under these decisions, it seems to me that all that Burkholder asked for in the first instance, all that he sought to obtain by his appeal from the judgment of the register and receiver, in his motion for a review of your first decision, in his petition for a reconsideration of the same, and in his appeal to this Department, it was the duty of the local officers to grant him, as a matter of course. He was not obliged to submit his testimony before the officer taking the final proof without an order under rule 35; neither was he obliged to make a case for a continuance, under rule 20 of practice.

The department is disposed to give each party asserting a right to the land a full and fair opportunity to establish priority of right, which seems to me has been denied in this case, hence I think the hearing for which Burkholder has prayed with such persistency should be granted him, as an adverse claimant, and you will therefore direct the local officers to order the same, giving the parties in interest due notice thereof, at which the respective claims of the parties to this land may be fully investigated, and their rights determined.

The decisions appealed from, being those of your office of November 2, 1889 and of February 12, and May 10, 1890, are accordingly reversed.

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HOMESTEAD ENTRY—PRELIMINARY AFFIDAVIT.

ARTHUR P. TOOMBS.

A specific right of entry accorded by departmental decision must be exercised within the period designated, unless some good reason for delay is shown.

The provisions of the Revised Statutes relative to the qualifications of homestead entrymen, and the requirements preliminary to making entry, are not repealed by the act of March 2, 1889, except as therein explicitly stated.

The preliminary affidavit required of a homestead entryman should be executed within a period reasonably approximate to the date of the application.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 25, 1891.*

On February 8, 1890 (10 L. D., 192), the Department rendered a decision that Arthur P. Toombs had the right to make a second homestead entry under the act of March 2, 1889—the specific tract in controversy being the SE.  $\frac{1}{4}$  of Sec. 18, T. 31 S., R. 28 W., Garden City land district, Kansas.

On March 22, 1890, the local officers notified Toombs of the substance of said decision.

On May 16, 1890, he presented an application to enter the land, which the local officers rejected, "for the reason that he does not present homestead affidavit, as required by law, and no fees being tendered."

On June 3, he transmitted the fee and commissions—fourteen dollars—which were returned to him the same day, for the reason that more than thirty days (allowed in your letter) had elapsed after receiving notice before he applied to enter; and because "the original affidavit and application did not accompany the same, or are sworn to before the proper officer."

From this action he appealed to your office, which, on July 5, 1890, in substance affirmed the action of the local officers—adding the further reasons that he could not execute in Colorado the affidavit required in connection with a homestead entry in Kansas, and that the affidavit used in his former entry be accepted as sufficient under his present application.

Toombs appeals to the Department, alleging that your decision erred—

(1) In holding that Toombs failed to present his application to enter said land within a reasonable time after receiving notice of his right to do so.

Having been notified that thirty days from receipt of notice would be allowed him in which to make entry, his failure to do so would deprive him of that right, unless some good reason for the delay were shown. No reason is offered.

(2) In rejecting his application because the same is not made upon blanks furnished for the use of parties making original homestead entries.

Upon a careful reading of your decision I fail to find that it gives the above as a reason for rejecting the application.

(3) In holding that the affidavit presented by Toombs does not show his qualifications to make such entry under the provisions of said act of March 2, 1889.

(4) In holding that the act of March 2, 1889, requires applicants to personally appear before the register and receiver.

The provisions of the Revised Statutes relative to the qualifications of homestead entrymen, and the requirements preliminary to making entry, are not repealed by the act of March 2, 1889, except as therein explicitly stated. "Repeal by implication is not favored; but any construction involving it is to be rejected in favor of any other which the language will rationally bear" (Maxwell on Interpretation of Statutes, page 134). "The governing principle in all these cases is, to construe the acts, if possible, as reconcilable and capable of co-existence" (Ib., 136).

Toombs' affidavit, accompanying his application dated March 29,—presented May 16—1890, was not made before the register and receiver of the district in which the land is situated; it does not assert that the entry is made for his own exclusive use and benefit; nor that it is for the purpose of actual settlement and cultivation by himself—all of which are required by section 2290 of the Revised Statutes, and these requirements are not repealed by the act of March 2, 1889. For this reason, therefore, the application was properly rejected.

(5) In holding that the affidavits executed in the former entry cannot be applied and made use of in the present application.

"The former entry" was made August 9, 1884. The statements therein made, if true at that time, as to his qualifications and intentions, may be far from true at the date of his application on May 16, 1890. In the case of George H. Morey (10 L. D., 325), the preliminary affidavit was held to be insufficient after the lapse of two months and ten days from the date of its execution. In the case at bar nearly six years had elapsed.

Your decision is affirmed.

## DESERT LAND ENTRY—INSPECTION OF LAND.

## THOMAS v. BLAIR.

The initial act in establishing a desert land claim is the payment of twenty-five cents per acre, and prior thereto no rights can be acquired under the act of 1877. A personal inspection of a tract, preliminary to making application therefor under the desert land act, confers no priority as against other applicants or settlers.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 26, 1891.*

This is an appeal by Addie Thomas from your office decision of February 12, 1890, in the case of said Thomas v. George W. Blair, involving the SW.  $\frac{1}{4}$  of Sec. 4, T. 22 N., R. 20 E., North Yakima, Washington.

The records show that on March 24, 1884, Thomas, under the provisions of the desert land law, act of March 3, 1877 (19 Stat., 377), filed her declaration of intention to reclaim said tract; that the township plat was filed February 23, 1885; that May 18, 1885, Blair filed pre-emption declaratory statement, alleging settlement on the land September 17, 1883; that August 16, 1886, Thomas submitted, before the clerk of the district court, at Ellensburg, proof showing reclamation of the land; that August 23, 1886, Blair made, before the same official, pre-emption proof, showing improvements valued at \$500, consisting chiefly of a house, stable and twenty-five acres cultivated, and continuous residence by himself and family from October 17, 1883; that upon receipt of these proofs, the local officers ordered a hearing, which was had before the said clerk at Ellensburg, November 27, 1887, when the parties appeared with counsel; that the record of said hearing being transmitted for instructions, your office, by letter dated February 27, 1888, returned the testimony to the local office, and directed a decision by the register and receiver upon the merits, who, upon considering the evidence, recommended the acceptance of Blair's proof and the rejection of Thomas'. The latter appealed from this judgment to your office, where said decision was affirmed and his entry was held "subject to final payment and cash entry of said Blair."

It appears from the testimony that Thomas, with her husband, personally examined the land for entry, October 15, 1883; that she then proceeded to the local office, about a hundred miles distant, where October 23, 1883, she paid \$40 to the receiver, who, in the absence of the register, gave her, in lieu of the regular certificate, a memorandum showing the "payment of twenty-five cents per acre on 160 acres desert land;" that the local officers subsequently issued her regular certificate, dated March 14, 1884, showing her said filing; that thereafter until about July 1886, when she had some small ditches plowed thereon, she did nothing towards reclaiming the land; that Blair made settlement on the tract October 16, 1883, by hauling logs thereon, and

that he has since lived there with his family, and made improvements to the value of one thousand dollars.

It is urged by counsel for the appellant that having, in pursuance of "the regulations under the desert land act," personally inspected the land prior to Blair's settlement thereon, Thomas acquired a priority of right, and consequently upon making proof, her rights attached by relation as of the date of said inspection.

I am not favorably impressed with this view of the case.

By the act of March 3, 1877, *supra*, the desert land applicant is permitted "upon payment of twenty-five cents per acre" to file a declaration of intention to reclaim the land he seeks to enter by conducting water thereon within three years, and is entitled to patent therefor upon satisfactory proof of such reclamation.

Thus it appears that the initial act in establishing a desert land claim is the payment of twenty-five cents per acre, and that prior thereto no rights can be acquired under the act of 1877, *supra*. That the applicant is required by the Land Department to examine the land before declaring his intention to reclaim the same is manifestly a regulation made of abundant caution, to the end that he may be better fitted to make the required affidavit as to the land's desert character, and the local officers consequently better informed as to the merits of his application.

Within the scope of a statute a regulation by the Department undoubtedly has the force of law, but such regulation can neither add to nor take from the statutory provisions.

Blair's settlement was admittedly made before Thomas' said preliminary payment, and being followed, as shown by his proof, by continuous residence and substantial improvements, gives to him the better right to the land. It is urged, however, that Blair's settlement is in bad faith, because made with knowledge of Thomas' intention to file her said declaration of intention to reclaim.

It is not satisfactorily shown that Blair at the time of his settlement knew that Thomas intended to claim the land. It is, however, immaterial if he did. Blair having acquired the prior right, the question of his good faith goes only to his compliance with the pre-emption law, and is between himself and the government.

Blair's compliance with the law in the matter of residence and improvement being unquestioned, his proof, if in other respects regular, will be accepted, and that of Thomas rejected.

The judgment of your office is accordingly affirmed.

This disposition of the case renders it unnecessary for me to consider the proof submitted by Thomas. I deem it proper to add, however, that the evidence tends to impeach the sufficiency thereof.

## PRE-EMPTION—FILING—SETTLEMENT RIGHTS.

DUTCHER *v.* TILLINGHAST.

The settlement right of a pre-emptor who fails to file declaratory statement within the statutory period, cannot be asserted as against the intervening adverse claim of a homesteader, who has duly complied with the law.

No rights are acquired under the pre-emption law by a settlement effected through forcible intrusion.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 26, 1891.*

I have examined the record in the appeal of John B. Tillinghast from your decision of March 27, 1890, holding for cancellation his homestead entry for lots 1 and 2 and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , Sec. 1, T. 21 N., R. 18 W., Neligh, Nebraska, made June 10, 1886.

September 8, 1886, Robert Dutcher filed his pre-emption declaratory statement for the same tract, in which he alleged settlement June 2 of the same year.

June 24, 1887, Tillinghast applied to the local office for a hearing to determine his rights as against the claim of Dutcher. His application was denied by the register and receiver. He appealed, and by letter of February 6, 1888, your office directed a hearing, which was had in March following, and upon which the local officers held in favor of Dutcher and recommended the cancellation of Tillinghast's entry.

On appeal you affirmed their action, and Tillinghast now further prosecutes his appeal to this Department.

The material facts are correctly stated in your decision, but I am unable to concur in your conclusion.

The record shows that Dutcher did not make his claim of record until six days after expiration of the time allowed by law. His settlement was made June 2, and his filing September 8. The entry of Tillinghast having been made June 10, became, on September 3, the only valid claim to the land, and the filing of Dutcher on September 8, following, in which he alleged settlement as of June 2, did not establish a legal adverse claim as against the entry of Tillinghast, because whatever rights he may have established by his settlement expired September 2. When he took possession of the partly constructed house of Tillinghast, about September 16, 1886, he was a trespasser.

His settlement could avail him nothing, for, in the face of an adverse claimant of record, he had allowed three months to pass without making his claim of record. He can gain nothing by his filing if it was made in the face of a homestead entry, which segregated the land, and he did not allege settlement within three months of the date of his filing. His claim of record, then, in no manner interfered with the rights of Tillinghast, which could only be questioned by him under an affidavit of contest, alleging some default or noncompliance with law on his

part. He did not do this, but chose rather to take forcible possession of the house of a *bona fide* entryman, moved his household effects into it, and denied him admittance thereto, and has ever since been in the possession and occupancy of the same, and the land covered by the entry, to the exclusion of Tillinghast, notwithstanding he had no shadow of right when he so invaded the premises.

Your decision admits these facts, but because Tillinghast did not, subsequent to his being dispossessed by Dutcher and within six months after his entry proceed to erect another house and re-establish his residence on the land, and holds that he has lost his rights, and that his entry, made in good faith, should be canceled.

This, in my judgment, would be to reward a trespasser at the expense of a *bona fide* claimant. It is, in effect, saying to Dutcher that, although you forcibly moved into the house of Tillinghast and took possession of his claim when you had no right in law or equity to do so and have usurped and "forbidden him going on the premises," yet, inasmuch as you have held possession thereof for more than six months, and he has not in the meantime built another house on the land, you have thereby established a priority of right over him, and may hold the property thus acquired.

In other words, although Tillinghast had the undoubted right to the land when he was summarily and unlawfully evicted therefrom by Dutcher, yet, because he chose to resort to the department for the maintenance of his rights, he shall not be upheld.

This department has held in several cases that a settlement established by forcibly entering the house of another claimant confers no rights upon the settler, even though such other claimant may be in default as to some of the requirements of the law. Surely, when the claimant is in full compliance with the law, such a settlement ought not to defeat his claim nor confer superior rights upon the settler so forcibly intruding.

Such an intrusion, though made under pretence of pre-empting the land, is but a naked, unlawful trespass, and can not initiate a right of pre-emption. *Atherton v. Fowler*, 96 U. S., 513.

Entertaining this view of the case, it is not necessary to consider whether or not the words and actions of Dutcher were sufficient to raise a well grounded fear upon the part of Tillinghast that he would be in danger of life or limb, in the event he undertook to re-assert his rights by establishing another residence on the land.

Dutcher's settlement so as aforesaid made, can not receive the sanction of this Department, and does not therefore stand in the way of Tillinghast's entry, which will be allowed to stand, subject to his making final proof.

The decision of your office is accordingly reversed.

## RESIDENCE—APPEAL—MOTION FOR REVIEW.

W. W. WISHART.

Evidence as to acts performed by the entryman, after the submission of final proof, may be properly considered for the purpose of ascertaining his *bona fides* during the period covered by said proof.

Under a decision of the Commissioner holding an entry for cancellation, with the right to furnish new or supplemental proof, the entryman may refuse to furnish such proof, and, standing on his case as made, appeal to the Department; but if the decision below is finally affirmed the appellant will not be allowed to subsequently submit supplemental proof.

Evidence withheld by the appellant, until he can secure the judgment of the Department on the validity of his final proof, can not be set up in support of a motion for review.

*Secretary Noble to the Commissioner of the General Land Office, August 27, 1891.*

This is a motion, filed by W. W. Wishart, for review of the decision of the Department of December 11, 1890, canceling his pre-emption cash entry of the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 18, and the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  or Sec. 19, T. 154 N., R. 65 W., Devils Lake, North Dakota.

This entry was held for cancellation by your office upon the report of a special agent, and claimant was allowed sixty days to apply for a hearing to show cause why the entry should be sustained.

A hearing was had, and the local officers found that there were not sufficient grounds to warrant a reversal of their decision allowing the entry, but your office found that while the evidence was not of that positive character to require the cancellation of the entry, it was sufficient to shift the burden of proof upon the claimant to show due compliance with the law, and he was allowed to submit new or supplemental proof within a reasonable time.

The claimant declined to avail himself of the privilege of submitting new or supplemental proof in support of his entry, but appealed to the Department, insisting that the proof submitted showed that he has complied with the law and was entitled to patent upon his entry. He further insisted that after the register and receiver had accepted the proof and proof final certificate, the Department, in the absence of an adverse claim or contest, has no authority to inquire into the *bona-fides* of the entryman, or the sufficiency of his proof.

Upon the record brought up by this appeal, the Department held that the claimant had not complied with the law as to residence and the proof was not sufficient to warrant the conclusion that he entered the land with the intention of making it his home, and the entry was therefore canceled.

Claimant now files a motion for review of said decision, alleging that it was error to hold that the evidence showed bad faith, in view of the fact

that he considered the tract his home to the exclusion of one elsewhere; that he had cultivated and placed in crop thirty-five acres; had a house thereon ten by twelve,

and a frame barn; that the house was habitable, and that he had therein his household goods, sufficient to make it home-like and comfortable; that he ate and cooked his meals while there; and that his mail was delivered to him at Grand Harbor post-office, the nearest to the land, at which place he obtained his groceries and provisions (see testimony of Wagness, witness for the government, who stated that he gave him his mail at Grand Harbor, sold him his groceries, and had seen him frequently going to and coming from the claim).

He also alleges error in that the Commissioner held that "he be granted a reasonable time in which to submit new or supplemental proof," showing his good faith as to residence, and it was error to cancel his entry without according him this opportunity.

The above embody the material grounds upon which the motion is asked.

The proof showed that claimant is a lawyer, engaged in the practice of his profession at Devils Lake, Dakota, about ten miles from the claim; that his residence consisted of periodical visits to the claim while he was engaged in the practice of law at Devils Lake. The character of his residence is shown by claimant's own statement, in which he says:

I rode to my claim each Saturday night and remained until the following Monday morning, and during the week would go out two, three, and sometimes four times and remain over night. Sometimes the weather would be so bad I could not go. Again, some business or engagement would detain me in Devils Lake.

Even if the final proof be considered alone, it can not be shown that the claimant fully complied with the law as to residence, and when his conduct and relation to the claim subsequent to final proof is taken into consideration, it shows clearly that his periodical visits to the claim were not in fulfillment of a bona-fide intention to make the claim his home, but a mere pretence of residence.

While a claimant does not forfeit his claim by his acts after final proof, if the proof shows that he complied with the law, yet his subsequent acts may be considered for the purpose of determining his *bona fides* or *mala fides* during the period covered by his final proof, especially when the proof is of a doubtful character.

The claimant offered his proof in less than seven months after the date of his alleged settlement, and the day after making proof he moved all of his effects from the claim, except a stove and table. He never pretended to visit the claim after submitting final proof, and the testimony offered on the hearing showed that in August, 1885, there was nothing on the claim but the shanty, which was then uninhabitable and in such a rickety condition that by placing a hand on the corner it could be rocked back and forth, and at the date of the hearing it had been blown down and no buildings of any kind were on the land.

While residence after entry is not required of the entryman, the failure to continue his residence after final proof may be considered in determining the bona fides of the claimant and the immediate cessation of his visits to the claim after final certificate was issued, when the

proof as to residence is of a doubtful character, is strongly corroborative of the fact, as decided by the Department, that the pretended residence of claimant was a mere evasion and attempt to acquire title upon a mere pretended residence.

But the ground upon which claimant mainly relies in support of his motion is, that it was error to cancel the entry without giving him the opportunity to offer new or supplemental proof, as alleged by the Commissioner, and files in support of this ground five affidavits of witnesses, who testify as to the residence of claimant upon the tract during the summer and fall of 1884.

When the Commissioner holds an entry for cancellation, with the right to furnish new or supplemental proof, the claimant may refuse to furnish such additional proof and rely upon the proof submitted. But, if the Department upon appeal should affirm the decision of the Commissioner canceling the entry, the claimant will not afterwards be permitted to supply the additional proof, but will be bound by the decision canceling the entry. *W. B. Ennis*, 5 L. D., 429; *James Hill*, 6 L. D., 605.

A contrary rule would have the effect to burden the Department with frivolous appeals by claimants, who would decline to submit such proof until they could test the judgment of the Department upon the proof submitted.

It is a well established rule that a motion for review upon the ground of newly discovered evidence will not be granted, unless the party brings himself within the rules applicable to the granting of new trials at common law. In the motion now under consideration it is not pretended that the evidence was newly discovered, but, on the contrary, in a statement attached to the report of the special agent, made in June, 1888, he gives the names of five witnesses who, he says, could testify to his residence and cultivation. This is the testimony which he declined to produce, but withheld until he could obtain the judgment of the Department upon his proof. Further, the affidavits submitted with the motion tend to show that during the period covered by his final proof the affiants considered that claimant's home was on the tract, and that they believe claimant considered it to be his home and endeavored in every way to comply with the provisions of the pre-emption law.

These affidavits are merely cumulative of the claimant's own testimony, which shows that such residence consisted of periodical visits to the tract, which, when viewed in the light of his subsequent conduct, was not sufficient to satisfy the Department that the claimant settled upon the land with the intention of making it his home, or that he established and maintained a bona fide residence thereon.

The motion is denied.

## RAILROAD LANDS—SETTLEMENT—APPLICATION.

SMITH *v.* PLACE.

No rights are acquired under an application to file a declaratory statement for land included within an existing indemnity withdrawal.

A settlement upon land withdrawn for indemnity purposes confers no rights as against the government, but as between two claimants for such land priority of settlement may be properly considered.

The validity of a settlement right is not affected by absence from the land in obedience to a judicial order.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 28, 1891.*

I have considered the case of Oscar E. Smith *v.* Joseph E. Place, involving the NE.  $\frac{1}{4}$  of Sec. 23, T. 10 S., R. 10 E., M. D. M., Stockton land district, California, on appeal by Place from your office decision of April 25, 1890, holding his homestead entry for cancellation, and accepting the final proof tendered by Smith.

This tract is within the indemnity limits of the grant for the Southern Pacific Railroad Company, and not having been selected, was restored under departmental order of August 15, 1887, (6 L. D., 84,) under which notice was given, and the lands opened to filings and entries on October 20, 1887.

At the date of said order directing the restoration, an application by Smith to file pre-emption declaratory statement for the land was pending before your office, on appeal from its rejection for conflict with the indemnity withdrawal for said company.

By your office letter of September 10, 1887, the local officers were directed to "advise Mr. Smith that the land applied for will be subject to his filing on the day fixed by you for the restoration."

On October 20, 1887, Smith filed declaratory statement No. 13,995, for this land, alleging settlement September 6, 1886, and same day Place made homestead entry No. 4871.

On March 7, 1888, Smith made final proof, in accordance with published notice, when he was met by Place, who protested against the acceptance of the same, claiming that he (Place) was the prior settler, and that Smith's settlement was a trespass upon his rights.

Both parties being duly represented, the hearing was thereupon proceeded with.

The evidence shows that this tract was claimed by the firm of Miller and Lux, under a purchase from the railroad company, and that for more than two years prior to September 1, 1886, Smith had resided upon and improved the land under agreement with said firm.

This firm dealt in lands and paid taxes upon more than 200,000 acres in Merced county, its headquarters being at the "Canal farm," distant more than a mile from the land in question.

September 3, 1886, Smith moved off the land, his term under the agreement with Miller and Lux having expired, and next morning again moved upon the land in adverse possession. He built a house, in which he and his family resided until ejected, in January following, under a suit brought by said firm.

In October, 1886, he applied to file for the land, and upon the rejection of his application appealed, which appeal was pending at the date of the order of restoration, as above set forth.

As soon as he learned of the order of restoration, he again, on September 8, 1887, moved his family upon the land, where they continuously resided to date of proof, his improvements being valued at between six and seven hundred dollars. At this time, the land had been enclosed by a fence and the entrance was made through the gateway.

It appears that one H. G. Tanner was superintendent for said firm, and upon Smith's re-entry on September 8, 1887, he advised Miller, who was then at San Francisco, and thereupon Miller made affidavit, alleging ownership and possession of the tract in question, and that Smith had formerly been dispossessed, and petitioned the superior court to issue an order or citation requiring the said Smith to show cause why he should not be adjudged guilty of contempt, for disobeying the order of the said court. He further petitioned said court to issue an alias process, directed to the proper officer, and requiring the said officer to restore the party entitled to the possession of said property, under the said original judgment and process, to said possession.

A citation issued, upon which hearing was had October 28, 1887, and judgment was thereupon entered in favor of Smith.

Place has been employed as clerk for the firm of Miller and Lux, since he came to California in 1886, and lived at the "Canal farm," the headquarters of said firm.

It appears that Miller had given Tanner, the superintendent, directions to dispose of the improvements upon the land in question, in the event that the railroad title failed, and Place's prior claim is based upon an alleged purchase from Tanner on September 1, 1887, under which he took possession same date.

The bill of sale was not executed until after the re-entry by Smith, and no consideration was stated therein, but Place inserted \$500.00, for which he is alleged to have given his promissory note, which was yet unpaid at the date of hearing.

Miller's affidavit of ownership and possession, which was made September 17, 1887, is attempted to be explained upon the ground that he was distant from the land more than a hundred miles, and no mention was made of the sale in the letter from Tanner advising him of the re-entry by Smith.

Tanner was not produced as a witness, although present during the trial.

The local officers found that "the presumption that his testimony

would be adverse to contestant's is strengthened by the testimony of J. K. Law, that Tanner disclaimed knowledge of Place's homestead proceedings at the contempt trial."

The admission of this testimony was improper, for the reason that claimant should himself have called Tanner, his testimony being the best obtainable, and the same will not be considered.

The local officers found—

the equities are in his (Smith's) favor, and his legal rights dating from August 15, 1887, found him owning and claiming a habitation on the tract in contest as a settler under the laws of the land.

The contestant was aware of claimant's acts, of his improvements, of his claim, and the proceedings to prevent his inhabitation of the land. Whether the alleged sale was in fact made on the date claimed, it is apparent that the contestant was no a settler in good faith, and the circumstances indicate a combined attempt on failure of judicial proceedings, to oust claimant by an alleged prior settlement, favored, and, in fact, suggested by Miller and Lux's agent.

Your office decision treats the matter as though Smith had been granted a preferred right of entry by your letter "F" of September 10, 1887 (which merely directed the local officers to advise Smith that the land would be subject to his filing upon the date fixed by them for the acceptance of filings and entries under the order of restoration), and does not therefore consider the evidence relative to the settlement by Place.

Smith's pending application could give him no rights, as the lands restored were not subject to filings or entries until October 20, 1887, and, as against the government, he could gain no rights by reason of his settlement prior to August 15, 1887.

It has been repeatedly held by this Department that while a party can not secure any rights by virtue of a settlement made upon a tract withdrawn from entry, still, as between two claimants, the question of priority of settlement can properly be considered in determining their rights to the tract in contest. *Pool v. Moloughney*, 11 L. D., 197, and cases therein cited.

There can be no question in the present case but that Smith was the prior settler, and that his absence at the date of the order of restoration was excusable, being in obedience to the order of the court. He returned to the land as soon as he had knowledge of the order of restoration, and at the date when filings and entries were permitted he presented his application.

His equities are clearly superior to those of the protestant, who made a settlement with full knowledge of Smith's claim to the land, and without considering the apparent collusion in the matter of the alleged transfer to Place prior to Smith's re-entry, I sustain your decision, direct the cancellation of Place's entry, and the acceptance of Smith's proof.

## HOMESTEAD—SECOND ENTRY.

JOHN HALBLIEB.

Under section 2, act of March 2, 1889, a second homestead entry may be made by one who fails to secure title under the first, through non-compliance with the law in the matter of residence.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 29, 1891.*

I have considered the appeal of John Halblieb from the decision of your office dated July 10, 1890, rejecting his final proof for the NW  $\frac{1}{4}$  of Sec. 30, T. 15 S. R. 21 W. Wa-keeney, Kansas.

June 21, 1883, the appellant made homestead entry for the tract above described and on March 22, 1890, notice of intention to make final proof on May 5, following was published.

On the day specified in the notice proof was submitted by the appellant to the local officers who, not finding the same satisfactory, temporarily suspended the same, and required him to present the additional testimony of another one of the witnesses named in the published notice.

May 3, 1890, such supplemental proof was presented, and not being satisfactory to the local officers the same was rejected as insufficient. The entry-man appealed and your office under date of July 10, 1890, affirmed the judgment below.

The entry-man again appeals—

The proof in this case fails to show continuous residence upon the land covered by the homestead entry.

It appears from his own testimony that he made settlement on the land about May 15, 1884, nearly 11 months after the entry was made; that he left the land June 1, 1884, and did not return until sometime in October following, and that he remained thereon about two weeks and then left the land again returning in April 1885, after an absence of about six months.

It further appears that the entry-man was on the land about three and a half months in 1885, about the same time in 1886 and 1887, about two months in 1888, three months in 1889, and in 1890, up to time of making final proof, four months, making a total of about twenty or twenty-one months' residence only in nearly seven years.

The testimony also shows that the claimant lived with his parents, not far from his homestead most of the time, and made his home there; that no portion of the land was ever broken or crops raised thereon, but that it had been used to some extent for pasturage.

The proof shows conclusively to my mind that the homestead party has failed to establish and maintain a bona-fide residence upon the land in question as required by the homestead law, and therefore the entry should be cancelled.

Section 2, act of March 2, 1889, (25 Stat., 854), provides that the person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one quarter section of public land subject to such entry, therefore the appellant, if he so desires, after the cancellation of his present entry, may re-enter the land in question or any other tract subject to entry under the homestead laws.

The decision of your office is accordingly affirmed and the papers in the case herewith returned.

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CONFLICTING CLAIMS—RES JUDICATA—FINAL PROOF.

STEVENS *v.* REGAN.

A final decision holding a homesteader's entry subject to the right of another is an adjudication of all questions of priority as between the parties, and leaves only for determination the subsequent compliance with law on the part of the successful party.

During the pendency of contest proceedings, a claimant for land involved therein is not required to submit final proof, and the local officers should not allow such proof to be made until final determination of the contest.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, August 29, 1891.*

I have considered the appeal by F. J. Stevens, from your office decision of April 22, 1890, in the case of F. J. Stevens *v.* Daniel E. Regan, involving the NE.  $\frac{1}{4}$ , Sec. 17, T. 123 N., R. 62 W., Aberdeen land district, South Dakota, affirming the final proof submitted by Regan under his pre-emption filing for said tract, and holding the homestead entry of Stevens for cancellation.

The matter of the controversy between these parties, involving said tract, has before been the subject of departmental decision.

In accordance with published notice, Regan offered final proof April 5, 1883, when he was met by Stevens, and hearing was had; the local officers rejected his final proof and held his entry for cancellation, but your office decision permitted Stevens' entry to stand subject to Regan's compliance with law.

This decision was affirmed by the Department, February 26, 1885 and the respective rights of the parties became thereby adjudicated in so far as priority of claim is concerned, and any rights Stevens might have in the land thereafter depended upon Regan's failure to comply with the law as to residence and improvements.

During the pendency of the proceedings arising upon Stevens' offer of proof, Regan himself offered proof, which was first rejected by the local officers on account of the contest pending between the parties, but it was afterwards approved upon the promulgation of said departmental decision of February 26, 1885, and cash certificate issued to Regan.

Upon reviewing the facts relative to Regan's offer of proof (Stevens having been permitted to show cause why his entry should not be canceled for conflict with Regan's cash entry), your office required him within ninety days to offer new proof, so that Stevens or any other party might have an opportunity to question his compliance with law.

Notice was given and proof was submitted, which your office decision holds should be accepted.

Stevens protested, and relies upon the ground that Regan should be concluded by his failure to make proof by regular and legal proceedings in the proper time.

During the pendency of contest proceedings, a claimant for land involved therein is not required to submit final proof, and the local officers should not allow such proof to be made until final determination of the contest. *Laffoon v. Artis*, 9 L. D., 279.

In this case the proof of Regan was submitted and approved upon the promulgation of the decision upon the contest, and in order to give Stevens an opportunity to question the compliance shown, and in view of the irregular proceedings, Regan was required to offer new proof after due notice, within a stated time, which he did.

Such proof is deemed to have been regularly and legally made, and as it shows full compliance with law as to residence and improvements, your decision accepting the same is affirmed, and Stevens' entry will be canceled.

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#### CONFLICTING ENTRIES—RE-SURVEY.

##### FRANK P. RYAN.

In case of conflict between entries arising through a change of sub-divisional descriptions caused by a re-survey, and the local office taking action without regard thereto, the rights of the prior entryman are superior.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 1, 1891.*

The appeal of Frank P. Ryan from the decision of your office, dated May 15, 1890, rejecting his desert land entry for the SW  $\frac{1}{4}$ , W  $\frac{1}{2}$  of S E  $\frac{1}{4}$ , N.E  $\frac{1}{4}$  of SE  $\frac{1}{4}$  and lot 2, Sec. 23, T 33 N., R. 76 W., Cheyenne, Wyoming, has been considered.

September 17, 1889, Edward L. Fleming made a timber-culture entry for lots 1, 2, 6 and 7, section 23, of said township and range containing about 140 acres.

March 20, 1890, Frank P. Ryan made application to enter as a desert land entry the tract first above described containing about 318 acres.

It appears by a reference to the plats of survey of said township that the original survey was approved by the surveyor-general, May 29th, 1884, and that in the southeast corner of said section 23, about fifty acres was cut off by the Fort Fetterman hay reservation causing the

south half of said section to be described by lots from 1 to 9 inclusive, 8 and 9 lying within the hay reservation.

Subsequently a re-survey of said reservation was made, approved by the surveyor-general November 22, 1887, and accepted by your office February 23, 1888, in which the north boundary line of the reservation intersected the east and south section lines of said section 23, several chains south of the former point of intersection, as shown in the plat of 1884, thereby increasing the area of the S  $\frac{1}{2}$  of said section outside of the hay reservation some forty-five acres and materially changing the area and description of the sub-divisions therein.

It will be observed however, that in the re-survey of 1887, only two lots appear in said section, lot 1, within the hay reservation containing five acres and lot 2, outside of the same containing thirty-five acres, both of which comprise the SE  $\frac{1}{4}$  of SE  $\frac{1}{4}$  of said section.

As stated above, Fleming described his entry as lots 1, 2, 6 and 7, by the survey of 1884, lot 1, being the fractional E  $\frac{1}{2}$  of SE  $\frac{1}{4}$ ; lot 2, the NW  $\frac{1}{4}$  of SE  $\frac{1}{4}$ ; lot 6, the fractional SE  $\frac{1}{4}$  of SW  $\frac{1}{4}$  and lot 7, the fractional SW  $\frac{1}{4}$  of SE  $\frac{1}{4}$ , all of which are covered by the subsequent entry of Ryan, described in accordance with the survey of 1887. Furthermore, the entry of Ryan not only covers the land embraced in the entry of Fleming, but it includes one hundred and twenty acres lying on the west thereof and also about forty-five acres in the SE  $\frac{1}{4}$  between the old and the new boundary lines of the Fort Fetterman hay reservation.

It appears that both entries were made subsequent to the filing and approval of the plat of 1887, but in some manner the local officers overlooked the fact of the re-survey of said section and allowed Fleming to make his timber-culture entry under and in conformity with the plat of 1884, when it should have been made in accordance with the plat of 1887.

Your office decision also overlooked the plat of 1887.

The fact that the entry of Fleming was made under the plat of 1884, however, does not invalidate the entry, and therefore the entry of Ryan being subsequent thereto, must yield to the superior right of Fleming to the extent of the land in conflict.

Counsel for appellant claims, however, that before the entry of Ryan is held for cancellation, appellant should be given an opportunity to show cause why his entry should not be canceled, and in the event a proper showing is not made, the appellant should be allowed to elect which portion of his entry, not in conflict, he will retain, the portion lying west of Fleming's entry or that part lying southeast of the same mentioned above as containing forty-five acres. In view of the circumstances in this case, I do not think that a hearing could in any way affect the legal right of Fleming to the land in question, the fact that the land was not described by the plat of re-survey does not alter the case, therefore, I deem it inexpedient and a useless delay to accede to such request; furthermore an entry of the tract of forty-five acres in

the S.E.  $\frac{1}{4}$  of said section would necessarily have to conform to the re-survey and in so doing would conflict in part with the present entry of Fleming, and therefore such entry could not be allowed.

The entry of Fleming having been made subsequent to the re-survey of 1887, he should be required to amend the description of his entry to conform to it.

Your office decision holding the entry of Ryan for cancellation on account of the prior entry of Fleming as above set forth, is affirmed.

PRACTICE—REVIEW—APPELLATE JURISDICTION.

KENDALL *v.* HALL (ON REVIEW).

When a case is returned to the General Land Office, on the request of the appellant, for further consideration in view of new facts appearing of record, the appellate jurisdiction of the Department terminates, and can not again attach except through a subsequent appeal from the final action of the General Land Office.

Departmental procedure as regulated by the Rules of Practice does not provide for, or recognize, technical dilatory pleas.

*Secretary Noble to the Commissioner of the General Land Office, September 2, 1891.*

This is a motion by Augustine Kendall for review of a decision of this Department, rendered on the 27th day of March, 1891, in the case of Augustine Kendall *v.* Milton S. Hall, involving the right of the former to purchase, under the coal law, the NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 30, T. 19 N., R. 104 W., Evanston, Wyoming (See 12 L. D., 419).

The first ground of the motion under consideration is that the Department erred in holding,—

That said Kendall 'has nothing before the Department. He is not in court to say that the Commissioner had no jurisdiction or that he rendered a decision when he had no power to do so,' as he has not 'brought his case within the jurisdiction of the Department' by an appeal from the decision of the Commissioner of the General Land Office of July 10, 1890.

This assignment does not point out wherein or in what particular, the ruling complained of is erroneous. The fact that neither party appealed from your judgment of July 10, 1890, within the time prescribed for taking appeals was not denied or questioned at the time the case was considered here, nor is it questioned in argument upon this motion; but it was then and is now conceded, that no appeal was taken from your judgment of July 10, 1890, within the time allowed for appeals. That the appellate tribunal can only acquire jurisdiction of a case appealed to it, in the manner pointed out by law, is a proposition elemental in its nature, and needs no elaboration in order to make its soundness understood. In the branch of the opinion questioned by

the first ground of the motion under consideration this elemental rule of law was stated and correctly applied.

The second and sixth grounds of the motion will be considered together; they are as follows:

2nd. That the reference of this case, at the request of Kendall, from the Department, where it was pending on an appeal upon the record of the hearing on the merits, to the Commissioner "for further consideration in view of (final) "entry by Hall" of the land covered by his coal D. S. filing not in conflict with the claim of Kendall "was in effect Kendall asking, and the Department granting, a new trial upon newly discovered evidence," and that when the case was so sent back to the Commissioner, "the appeal which brought it here having served its purpose became at the request of Kendall and by the action of the Department "a nullity."

6th. That when said decision of July 10, 1890, was rendered, said Commissioner "had jurisdiction over the entire case, and could have recalled and modified your (his) decision of May 27, 1889, or reversed it and in the light of the newly discovered evidence rendered the judgment *de novo* upon the case then before you" (him).

In order to a clear understanding of the questions presented by these assignments, it seems to be necessary to refer to the status of the controversy between Kendall and Hall prior to March 1, 1890. A hearing had been ordered and duly had before the local officers, a vast amount of evidence was taken before them; they were divided in opinion; your office considered and decided the case upon its merits in favor of Hall; Kendall alone appealed from your decision; the case had been fully argued on both sides; and was pending for decision on the merits as presented by Kendall's appeal.

On the 24th day of February, 1890, Kendall's attorney addressed a communication to the Commissioner of the General Land Office in which he called the attention of the Commissioner to the contest of Kendall *v.* Hall, and to the fact that on September 3, 1888, Hall had made coal entry No. 54, for two of the forties covered by his coal declaratory statement not in conflict with Kendall's claim, and stating:

As the fact of his having made this entry was not known in the mineral division at the time of the decision in said case, owing to the entry not then having been posted, and as I regard it as a very important feature of the case, I respectfully ask that you will transmit the papers in said entry to the Secretary to be filed in the contest record.

This was corroborated by the records of your office and you, accordingly, forwarded the papers as requested in the attorney's letter. This brought the fact that Hall had made said entry into the case, as it then stood before the Department for determination on Kendall's appeal, but on the 1st day of March, 1890, Kendall's attorney filed here a motion to remand the case to your office, in which he stated:

I now desire to call your attention to a matter of record, occurring since the hearing herein, or about the time thereof, which was not before the Commissioner at the time of his action and which constitutes a waiver and abandonment by Hall of any and all claim by him to said land. It is this: On September 3, 1888, said Hall applied to the local officers at Evanston to be allowed to enter the NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of said section, town and range, which application was finally allowed by the local

officers as coal entry No. 54, Evanston series, these two tracts being that portion of Hall's claim not in conflict with Kendall's claim. In view of this action on Hall's part, I respectfully move that this case be remanded to the General Land Office with instructions to take action thereon as upon a relinquishment or withdrawal of all his claim to said land by Hall, without passing upon the record of the hearing.

On the 25th day of June, 1890, the Department considered the questions raised by the motion and application of Kendall, to remand the case to your office, and after stating the facts it was said :

It appears, furthermore, that although said entry was made prior to your office decision of May 27, 1889, such fact had not been brought to your attention at the time of rendering said decision. The papers in the case are therefore herewith returned, without consideration by the Department of the question raised upon appeal, for further consideration by your office in view of said entry by Hall of a portion of the land embraced in his original coal declaratory statement as above set forth.

It is now insisted by Kendall's counsel that the application of Kendall was never allowed or granted ; that the action of the Department in remanding the case to your office was had independent of his motion ; and that " there is absolutely nothing in this reference of the case back to the Commissioner to warrant the statement made in the decision sought to be reviewed here, that this reference back to the Commissioner was in effect Kendall asking and the Department granting, a new trial upon newly discovered evidence " etc.

And it is broadly charged that, " Kendall's attorney asked for no such action as was taken by the Department." What he did ask in his motion of March 1, 1890, was, " I respectfully move that this *case* be remanded to the General Land Office with instructions to take action thereon " etc. He thus distinctly asked that the *case be remanded*, and also asked that your office be instructed to take action thereon in a certain manner. The Department acting upon this motion saw fit to comply with the request contained in the motion so far as to return the papers in the case, but did not see proper to give the instructions as asked. The plain and obvious import of the language used in the motion was to the effect that the appellant, who brought the case here, had discovered a fact, which he relied on as materially affecting the case favorably to his side of it, and which fact was not known or considered by your office when it passed upon the merits of the case, and he desired the *case* sent back to your office with directions to consider this newly discovered evidence with the other evidence in the case, and render such decision upon the entire case as the facts and the law demanded.

With the view of giving Kendall the full benefit of the newly discovered evidence, and of having it considered with all the other evidence in the case, the Department remanded the *case*, or what was the same thing, returned it to your office for further consideration in the light of all the evidence. After having secured the favorable action of the Department upon his application, the party will not be heard to say that he did not mean what the language he made use of would nat-

urally convey as his meaning. The Department conclusively presumes that parties litigant before it, mean what the language used by them, in its ordinary acceptation, imports. It is now claimed that the motion to remand was in effect a plea in abatement. A sufficient answer to this is that there is no authority for technical dilatory pleas of this character, in connection with the administration of the land laws. The Rules of Practice nowhere recognize any system of technical pleading; under them these controversies can, in every case, be commenced, prosecuted, and terminated, in such manner as to protect the rights and interests of the parties and attain the ends of justice.

The case having been sent back to the Commissioner upon the request of the appellant, for further consideration by him in view of Kendall's entry, the appellate jurisdiction of the Department ceased, and such jurisdiction could not attach again except by pursuing the methods pointed out by the law and Rules of Practice.

This familiar rule was announced in the opinion sought to be reviewed, and no reason is perceived for holding now that there was any error in it; no injustice was done, Kendall lost no right by it; his right of appeal from your decision upon the whole case, if he saw fit to exercise it, was in no manner abridged or limited, he had the unquestioned right to appeal from it and to have a hearing here on such appeal, upon the merits of the whole case. In fact he did appeal but not in time.

The tenth ground of the motion for review vigorously assails the filing of Hall as being shown to be illegal from its inception, by reason of a contract entered into between Hall and one Gray, before Hall made his declaratory statement, whereby said Gray was to furnish Hall all the money necessary to enable him to carry on the work in the mine to be opened upon the land. It is claimed that this arrangement between Hall and Gray is shown to have been a sale of a one-half interest in said coal land.

This question was argued by counsel on both sides, when the case was before the Department, and it was fully considered then, with all of the other questions involved in the case. It was then found that the evidence failed to establish the alleged contract of sale. A careful re-examination of the evidence has led to the same conclusion now. In the light of the evidence and record of the case this contention is not well taken.

The decision sought to be reviewed held that the Department acquired no jurisdiction of the case by Kendall's appeal and dismissed it for that reason, yet under the peculiar circumstances of the case, and the supervisory authority conferred upon the Secretary of the Interior, all of the testimony was carefully reviewed and the entire record examined, the same in all respects as if the appeal had been regularly taken and it was found that there was no disregard of the law or the regulations, "nor any exercise of authority or power not granted your office, nor any injustice done in the case".

The motion under consideration was orally argued and the original arguments in the case have been carefully considered and all the evidence in the case, patiently re-examined, and the same conclusion reached therefrom upon the whole case, as in the original determination. The motion for review is therefore denied.

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## PRACTICE—NOTICE OF DECISION—APPEAL—TIMBER CULTURE ENTRY.

AYERS *v.* ANNIS.

Time within which to file an appeal does not begin to run until after due service of notice of the decision, and such service is not secured through mailing a copy of the decision to an address not given by the appellant.

The occupancy and possession of land by one who asserts no record claim thereto within the period prescribed by law does not exclude such land from timber culture entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 2, 1891.*

I have considered the case of Thomas B. Ayers *v.* Charles Annis, upon the appeal of the latter from your decision reversing that of the register and receiver, and rejecting his final proof for the S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 35, T. 32 N., R. 51 W., Chadron land district, Nebraska, so far as it conflicted with the timber culture entry of the former.

Annis filed declaratory statement for the land on the 11th of June, 1884, alleging settlement on the 4th of February of that year. On the 19th of August, 1886, he submitted final proof, at which time Ayers filed protest against the same, alleging a prior claim to the east half of the land, under a timber culture entry made by him on the 4th of April, 1884. His entry was for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said section 35.

The hearing which followed resulted in a decision by the register and receiver on the 24th of March, 1888, in which they held that the final proof should be approved, and the timber culture entry, so far as it conflicted with the land claimed by Annis, should be canceled. The case was taken to your office upon appeal, and on the 19th of February, 1890, you decided that the timber culture entry of Ayers should remain intact, and the final proof of Annis, so far as it related to the land in controversy, should be rejected.

An appeal from your judgment, by Annis, brings the case before me for consideration.

The record in this case shows that the decision of the register and receiver was rendered on the 24th of March, 1888, and that the parties in interest were notified by registered letters on the 26th of that month, the one to the plaintiff being addressed to him at Chadron, Nebraska. On the 21st of May, 1888, the attorney for Annis admitted service of a

copy of notice of appeal by Ayers from the decision of the register and receiver, "without waiving any rights under law or rules." A copy was also left with the register and receiver which they refused to file for the reason that it was not served within the time prescribed by the Rules of Practice.

Rule 44 provides for the service of notice of the decisions of registers and receivers upon the parties in interest, either personally or by registered letter through the mail to their last known address, and gives them thirty days in which to appeal from such decision to your office. Where the notice is served by mail, the time is extended ten days. The appeal in this case was not taken within forty days from the time of the mailing of the notice of decision to the parties in interest.

The protest against the final proof of Annis was made in the name of Ayers by one Ballard, who conducted the proceedings at the hearing as his attorney. Subsequent to the hearing and prior to the decision, Ballard was disbarred or suspended from practice before the register and receiver, and hence was not notified of the decision. At the hearing he was requested to disclose the place of residence and post-office address of Ayers but declined to do so.

On the 30th of April, 1888, Ayers appointed P. E. Baird his attorney in the case, and when he applied to the register and receiver for information as to its status, he was informed that it had been decided, notice sent to plaintiff at Chadron post-office, and the papers sent to your office. He obtained the notice, and the appeal was perfected within thirty days thereafter.

In his notice of appeal from your judgment, the appellant urges that you erred in accepting and considering the appeal taken from the decision of the register and receiver, it not having been brought within the time allowed by Rules of Practice, and that you also erred in not holding that the settlement and improvements of Annis upon the land was notice to Ayers that it was already occupied, and that his timber culture entry should be subject to the rights of Annis as a prior settler.

The last ground of error would be a good one, had Annis made his filing within three months after making his settlement. This he neglected to do, and that neglect rendered the land subject to the entry of any other qualified claimant.

In *Bender v. Voss* (2 L. D., 269) it was held that

timber culture entries should be made upon vacant unimproved land, not upon cultivated land covered by the valuable improvements of another and in the possession of another,

and in the case of *John A. Adamson* (3 L. D., 152) it was held that if the entryman

makes entry of a tract of land upon which some other person is living and has improvements, although not having a claim of record, the fact of such occupation and improvement is notice, and the entry is made at the same risk as in the case of a claim of record.

While these decisions have not been formally overruled, a decision which seems to be more in harmony with the provisions of the statute was made in the case of *Farris v. Mitchell* (11 L. D., 300) where it was held that

the occupancy and possession of land by one who asserts no record claim thereto within the period provided by law does not exclude such land from entry under the timber culture law.

This disposes of that alleged error, and leaves for consideration the question as to whether the appeal from the decision of the register and receiver was or was not taken in time.

Notice of the decision was sent to Ayers by registered letter addressed to him at Chadron, Nebraska on the 26th of March, 1888. The rule requires that it should be sent to the parties in interest to "their last known address." At the time the notice was mailed the record did not show that Chadron was ever the address of Ayers. Affidavits were afterwards filed in the case, showing that he never had resided there. Under these circumstances, I think it cannot be held that addressing the notice to Ayers at Chadron was a compliance with the rule, and limited his time for appeal to forty days from the date of mailing the notice. In the case of *John P. Drake* (11 L. D., 574) it was held that "notice of a decision by mail, will not bind the party to be served if such notice fails to reach him." That case goes farther, however, and holds that

the failure to receive notice cannot be set up by one whose own laches has prevented service in the manner prescribed.

Upon the hearing in this case, the attorney for Ayers refused to disclose the place of residence or the post-office address of his client, and if no effort had been made in his behalf to obtain information as to the result of the trial, I would hold that his failure to receive notice was due to his laches, in failing to furnish the local officers with his post-office address. It is shown, however, that his former attorney applied to the register and receiver for information as to their decision, and was refused because he had been suspended from practicing in their court, while the new attorney was refused until he filed his authority for appearing in the case. As the appeal was brought within thirty days after notice of the decision was actually received, I think you did not err in accepting and considering it.

I have given the case careful consideration, and while the equities are largely in favor of Annis, I think the conclusion reached by you is correct, and the decision appealed from is, therefore, affirmed.

## HOMESTEAD—ALIEN HEIRS—PATENT.

AGNEW *v.* MORTON.

Alien heirs of a deceased homesteader are incompetent to make proof and perfect title under section 2291 of the Revised Statutes.

The heirs of a deceased homesteader are not required to personally reside on the land covered by the entry of the decedent in order to perfect title thereto, it being sufficient for such purpose to show cultivation for the requisite period.

Patent should issue in the name of the heirs generally where final proof is submitted by the heirs of a deceased homesteader.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 2, 1891.*

The case of Jessie B. Agnew *v.* Barney Morton is before me on appeal of the former from your decision of April 18, 1890, in which you affirm the action of the register and receiver dismissing his contest against homestead entry No. 3835, made by said Morton, June 29, 1885, for the NE.  $\frac{1}{4}$  of Sec. 34, T. 17 S., R. 25 E., Visalia, California.

The facts are substantially set forth in the decision appealed from.

The contest affidavit, filed December 12, 1887, charges abandonment, change of residence, etc.; that claimant "has died leaving no heirs who are entitled to perfect said homestead entry."

The service of notice was clearly defective, and the motion made to dismiss the contest should have prevailed. But, since the attorney for the defendant (the heirs) had full power to represent them, and since he subsequently made a general appearance for his clients, by invoking the power of the local officers on questions other than that of jurisdiction, he thereby waived his rights as to the defective service and can not thereafter be heard to complain. *Ulmer v. Hiatt et al.*, 4 (Greene) Iowa, 439; *Clark v. Blackwell*, *Ibid.*, 441; *Anderson v. Rey*, 12 L.D., 620.

It is insisted, as the grounds of this appeal, that the entryman left no heirs competent to make final proof.

The proof shows that the entryman died April 21, 1887; that his true name was Bernard Murtaugh; that he resided upon and cultivated the land from date of entry until his death. He left no widow, or children. His nearest surviving relatives are his father and mother (Michael and Bridget Murtaugh), who were at date of hearing residents of Ireland; a sister (Bridget Curley), who resided in the city of New York; the children of another sister (deceased), who also lived in the city of New York; and an aunt (Ann McGinn), who was residing upon the land at the time of the hearing, having moved there February, 1888, for the purpose of cultivating the same for the heirs of the deceased entryman.

The evidence fails to show any lack of residence or cultivation on the part of the entryman prior to his death, or lack of cultivation by Ann McGinn after his death.

Volume 2, Civil Code of California (1885), Sec. 1383, defines succession as "the coming in of another to take the property of one who dies without disposing of it by will." Subdivision 2, under the general head of "*Succession*" is as follows :

If the decedent leave no issue, the estate goes, one half to the surviving husband or wife, and the other half to the decedent's father and mother, in equal shares, and if either be dead, the whole of said half goes to the other; if there be no father or mother, then one half goes in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation. If the decedent leave no issue, nor husband, nor wife, the estate must go to his father and mother, in equal shares, or if either be dead, then to the other.

Under the statute above quoted, the father and mother in Ireland—the entryman having left no will—succeeded in equal shares to his entire personal estate, amounting to the sum of \$1,881.43.

Section 2291 of the Revised Statutes provides for the issuance of patent, after satisfactory final proof, to the "heirs or devisee," in case of the death of the entryman, leaving no widow. But such heirs or devisee shall be citizens of the United States at the time final proof is made.

It is manifest that the father and mother, while citizens of Great Britain, can not make proof and obtain patent for the land. Being thus incompetent, their right to make final proof and receive patent for the land while subjects of a foreign country is the same as if they had no existence.

Subdivision 3, Sec. 1386, of said Code provides as follows :

If there be neither issue, husband, wife, father, nor mother, then in equal shares to the brothers and sisters of the decedent, and to the children of any deceased brother or sister by right of representation.

It is shown that the sister and the children of the deceased sister were citizens of the United States at date of entryman's death, and being the only heirs, at that time, capable of succeeding to the rights of the entryman, and having given full power to Ann McGinn, who cultivated the land for them, there was no default on their part, though not personally residing on the land. *Swanson v. Wisely's heirs*, 9 L. D., 31; *Reed v. Heirs of Plummer*, 12 L. D., 562.

When satisfactory proof shall have been made, patent should be issued in the name of the heirs of the entryman generally, without specifically naming them, leaving it to the courts of the State to determine who the particular heirs are, their several rights, etc. (See Instructions, July 16, 1891, 13 L. D., 49.)

The proof failing to show the alleged abandonment, and there appearing to be heirs of the deceased entryman, capable of making final proof, the entry will remain intact, subject to future compliance with law.

The decision appealed from is accordingly affirmed;

*Overruled so far as in conflict, 49 L.R. 391*

## RAILROAD GRANT—INDIAN LANDS—INDEMNITY SELECTION.

## NORTHERN PACIFIC R. R. CO. ET AL. v. WALTERS ET AL.

The orders for indemnity withdrawals made November 2, 1866, and December 16, 1871, for the St. Paul and Duluth Company, and the Northern Pacific Company, respectively, did not take effect upon lands embraced within the former Mille Lac reservation, upon which the Indians, through treaty stipulation, had a right of use and occupancy, which then existed, and was not extinguished until due provision was made therefor by the act of January 14, 1889.

Until selection is made and approved no title vests to indemnity lands; and the right of selection cannot be exercised upon land that is covered by existing entries, and is not protected by withdrawal.

The provisions made in the act of January 14, 1889, for the disposition of lands released under said act, did not recognize the claims of said companies, and effectually defeats any selection of said land.

*Secretary Noble to the Commissioner of the General Land Office, September 3, 1891.*

After considering the status of certain lands in townships 42 N., range 25 W., 42 N., range 26 W., and 42 and 43 N. range 27 W., 4th principal meridian Minnesota, formerly embraced in the reservation set apart for permanent homes for the Mississippi bands of Chippewa Indians, under the treaty of February 22, 1855 (10 Stat., 1165), and known as the "Mille Lac Reservation," your office held that the odd-numbered sections in said townships falling within the primary or granted limits of the grant to the Northern Pacific Railroad Company passed under said grant, but that the lands in said townships falling within the indemnity limits of the grant to that company and also of that to the St. Paul and Duluth Railroad Company were excepted from the orders of withdrawals under said grants and that entries made of said lands prior to the date of selections by the companies should be allowed to stand. There has been no appeal from so much of your decision as is favorable to the Northern Pacific Railroad Company. Each of said companies, however, filed an appeal from so much of said decision as was adverse to its claims.

Subsequently to the treaty of 1855, two other treaties were entered into with these Indians, one under date of March 11, 1863, proclaimed March 19, 1863 (12 Stat., 1249), and the other under date of May 7, 1864, proclaimed March 20, 1865 (13 Stat., 693), by each of which the said lands were declared ceded to the United States. In each of said treaties it was declared not to be obligatory upon the Indians to remove to the new reservation until the United States had complied with certain stipulations, and in each there was a special provision in regard to the Mille Lac Indians, in the following words:

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

It seems that in 1871 many filings, entries and locations, embracing lands within the limits of the original reservation were allowed, most of which were in September of that year and January following canceled by your office.

The further history of departmental action in regard to these lands is fully set forth in the cases of David H. Robbins (10 L. D., 3), and Amanda J. Walters *et al.* (12 L. D., 52), and it is unnecessary to repeat it here.

The act of July 4, 1884 (23 Stat., 89), directed that said lands should not be patented or disposed of in any manner until further legislation by Congress. The act of Congress approved January 14, 1889 (25 Stat., 642), provided means for obtaining from the Chippewa Indians in Minnesota a complete cession

of all their title and interest in and to all reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake Reservations,

for the approval of such cession by the President, for the allotment of lands in severalty, and for the sale of the ceded lands, except those tracts upon which there should be "a subsisting, valid preëmption or homestead entry." In regard to such allotments it was provided as follows:

Provided further, That any of the Indians residing upon any of said reservations may, in his discretion, take his allotment in severalty under this act on the reservation where he lives at the time of the removal herein provided for is effected, instead of being removed to and taking such allotment on White Earth reservation.

It may be stated in this connection that the Indians residing on the Mille Lac reservation at the dates of the treaties of 1863 and 1864, or a large proportion of them, had continued there and were still residing there at the date of said act of 1889, but have since relinquished all claim to such right of occupancy, one of the provisions of the agreement with said Indians of October 5, 1889, being as follows:

And we do also hereby forever relinquish to the United States the right of occupancy on the Mille Lac reservation, reserved to us by the twelfth article of the treaty of May 7, 1864 (13 Stat., p. 693).

and consented to remove to the White Earth reservation.

This was the fact when the opinion of the present Secretary was rendered in the case of Amanda J. Walters, *et al.*, (12 L. D., 52).

The St. Paul and Duluth Company claims under the grant to the State of Minnesota by act of May 5, 1864 (13 Stat., 64), which purports to grant "every alternate section of public land of the United States not mineral," etc., and provides further as follows:

but in case it shall appear that the United States have, when the line or route of said road is definitely fixed, sold, appropriated, reserved, or otherwise disposed of any sections, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, then it shall be the duty of the Secretary of the Interior to select from the lands of the United States nearest to the

lines of sections above specified, in alternate sections or parts thereof, so much public land of the United States, not mineral, as shall be equal in amount to such lands as the United States have sold or otherwise appropriated, or to which the rights of pre-emption or homestead settlement may have attached, as aforesaid.

The Northern Pacific Company claims under its grant of July 2, 1864 (13 Stat., 365), and the acts amendatory thereof, which grant is of every alternate section of public land, etc., on each side of said railroad line,—

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.

By the joint resolution of May 31, 1870 (16 Stat., 378), said company was authorized to change the location of its road, and it was provided that if there should be in any State or Territory a deficiency in the amount of lands granted, within the limits prescribed, then said company should be entitled—

to receive so many sections of land belonging to the United States and designated by odd numbers, in such State or Territory within ten miles on each side of said road, beyond the limits prescribed in said charter, as will make up such deficiency on said main line or branch, except mineral and other lands as excepted in the charter of said company of eighteen hundred and sixty-four, to the amount of lands that have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of subsequent to the passage of the act of July two, eighteen hundred and sixty-four.

The map of definite location of the St. Paul and Duluth road opposite this land was filed in your office on September 24, 1866, and on November 2, 1866, an order of withdrawal of lands within the limits of said grant was issued. This order directed the withdrawal of the odd sections within the several limits, "except in so far as valid, pre-emption claims may have attached to the same," and contained the following statement:

As the act of 1864 reserves from the grant any and all lands theretofore reserved for the purpose of aiding in any object of internal improvement, or for any other purpose whatsoever, no land south of the north fifteen mile limit of the grant to the St. Paul and Pacific Railroad is included therein.

The map of definite location of the Northern Pacific Railroad opposite this land was filed on November 21, 1871, and a withdrawal of the lands in the several limits was ordered by letter of December 16, 1871, which letter contained among other instructions the following:

You are now directed to withhold from sale or location, pre-emption or homestead entry, all the odd-numbered sections within the limits designated on the map herewith and not heretofore withdrawn. \* \* \*

Nor can the company make selections of any lands heretofore reserved for the Lake Superior and Mississippi Railroad or reserved or granted for any other purpose and which were still reserved at the date of definite location of the road and map thereof filed in this office.

Therefore in the examination of any lists of lands selected by the company, you will require that those in the twenty mile or granted limits and those in the thirty mile or first indemnity limits shall be presented in separate lists, and you will eliminate or reject therefrom any lands to which the United States had not full title or which were 'reserved, sold, granted or otherwise appropriated' and not free from pre-emption or other claims or rights at the time the line of said road was 'definitely fixed and plat thereof filed in the office of the Commissioner of the General Land Office' which was 21st November, 1871.

There could be selected under the direction of the Secretary as indemnity only lands not reserved, sold or otherwise appropriated, and the orders of withdrawal, especially the one under the Northern Pacific grant, were so framed as to clearly indicate this and to affect only that class of lands.

Your office held that these lands in question were not included in these withdrawals, because the Commissioner who issued the orders thought said lands were already in a state of reservation and they were not in his mind as a part of the lands included in his order; that is, the inclusion or exclusion of these lands in or from said orders of withdrawal is made to depend upon the inferred belief of the Commissioner as to their status rather than upon their actual condition.

This position is untenable as to any lands within the granted limits, and is acceptable only in so far as it affects the question whether the Secretary did in the one case (that is the St. Paul and Duluth road) select or in the other direct the selection of the lands within the indemnity limits. The facts set forth in your opinion give strong support to your conclusion that the Secretary did in neither case act favorably to the railroad companies as to the lands in question, but did in intent and by actual expression refuse to select or approve the selection of these particular lands.

It may be well nevertheless to proceed to determine whether these lands were actually excepted from said orders of withdrawal so the Secretary could not lawfully have selected them or allowed them to be selected, nor the Northern Pacific Company lawfully have received or claimed them even under the joint resolution of 1870. It is contended on the part of these companies that the Indians by the treaties of 1863 and 1864, conveyed all their title to said lands to the United States, and that thereafter they were public lands of the United States; that this had been so determined by this Department, and that as public lands they were subject to and included in the orders of withdrawal; that said treaties had the effect of conveying the title to these lands theretofore held by the Indians to the United States, has been uniformly held; and that, after the dates of those treaties there no longer existed a technical Indian reservation including these lands, such as came within the purview of the act of January 14, 1889 (25 Stat., 642),

as was held, it is claimed, in the case of *Amanda J. Walters et al.* (12 L. D., 52).

It does not necessarily follow, however, that because the original Indian title to these indemnity lands had been extinguished they were subject to and affected by said orders of withdrawal; and although they may not, at the dates of such orders of withdrawals, have been included in any technical Indian reservation, yet they may have been so appropriated to the use of the Indians as to be excepted from such orders. In fact by the same instrument by which the original Indian title to these lands was conveyed to the United States another interest in said lands was created in the Indians, that is, the right to the use and occupancy thereof for an indefinite period of time was conferred upon and guaranteed to said Indians. While this interest, or easement, or privilege, thus given was at one time held as not constituting a bar to the entry of said lands yet it was subsequently recognized by this Department, as shown by the refusal to allow entries made thereon to be perfected, and by Congress, as shown by the act of July 4, 1884, *supra*, prohibiting the disposal of said lands until further legislation, as a real and substantial interest or right in the enjoyment of which the Indians were entitled to protection. Nor did the present Secretary pass upon the right of the entryman, as was done in the case of *Amanda J. Walters, supra*, until he had by a commission duly authorized, consulted with the Mille Lac Indians and been assured by the chairman of that commission of the Indians' consent to remove from these lands to White Earth. This was, in my opinion, such appropriation as excepted them from said orders. The language of these orders as to the Secretary's selection or direction is quoted above and will be perceived to be remarkably strong against allowing lands to the companies, except those to which the United States has "full title" and "free from claims or rights" etc. These orders of the Commissioner were in effect those of the Secretary and must be taken as approved and required by the head of the Department. Evidently, the condition of these very lands subject to the easement of the Indians was not only well known and fully understood at the time, but was the cause of these broad and most pertinent expressions. If these were lands not free from claims or rights, they were not withdrawn or directed to be for the companies. Certainly the lands in question were not free in law or fact. The Indians could not be compelled to remove therefrom, as things were.

This conclusion renders it unnecessary to consider whether the sixth section of the act making the grant to the Northern Pacific Company prohibited an executive withdrawal of lands for indemnity purposes, the correctness of the ruling in the case of said company *v. Miller* (7 L. D., 100), being now under consideration in another case.

Lists of selections as indemnity embracing these lands were filed by the Northern Pacific Company, in 1883, and by the St. Paul and Duluth Company in April, 1884, and the right of selection was denied by the local officers, from which action the companies appealed.

The doctrine that until selection is made no title vests as to indemnity lands under grants of this character, has become well settled by a long line of decisions by the supreme court. *Wisconsin Central R. R. Co. v. Price County* (133 U. S., 496), and authorities there cited.

I do not think it was intended to overthrow this long line of decisions and to lay down a different rule in the case of *St. Paul and Pacific Railway Company v. Northern Pacific Railroad Company* (139 U. S., 1).

In that case it was held that, there not being a sufficient quantity of lands in Minnesota to meet the requirements of the Northern Pacific company, the lands there in question (being those which were in the granted limits as shown by the map of general route, and withdrawal thereunder, and within the indemnity limits on definite location) were so appropriated as to come within the terms of exception in the subsequent grant and that as to those lands no selection was necessary to preserve said company's rights as against the subsequent grantee. That case did not involve any questions as to when title to lands, appropriated when the rights of the grantee company would otherwise have attached but subsequently becoming subject to selection as indemnity vested, nor was any rule as to such lands attempted to be laid down. That case does not control the question here involved.

If these lands were public and subject to selection at the dates these companies presented their applications then they were public and subject to entry at the times the entries in conflict therewith were made, the status of the lands had not in the meantime been changed so as to relieve them of any claim before existing. Under such circumstances said entries would constitute a bar to the selection of the lands embraced by them and your decision was to that extent clearly right.

Another question, however, that was not apparently considered by your office is presented and that is as to the effect of the act of January 14, 1889, upon these lands. That act provided for the division of all lands, freed from the claims of the Indians under that act, into "pine lands" and "agricultural lands," for the appraisal of the pine lands upon the basis of the pine timber thereon, for the sale of said pine lands at public auction to the highest bidder, and for the disposal of the agricultural lands to actual settlers under the homestead law with the additional requirement of the payment of one dollar and twenty-five cents per acre. Said act also contained this further proviso:

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

At the time of the passage of this act the lands in question had not been subject to selection and the companies had not by their applications for such lands as indemnity acquired any vested rights thereunder nor had those selections been approved.

Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose; and the indemnity lands remain unaffected in their title. Until then, the lands which might be taken as indemnity were incapable of identification; the proposed selections remained the property of the United States. *Wisconsin R. R. Co. v. Price County* (133 U. S., 512).

This rule is peculiarly applicable to the case now under consideration, not only had the selections not been approved, but the lands had not been free for such selections. Until the right of the company attached by selections made the title remained in the government, subject to disposal at its pleasure. (*Kansas Pacific R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.*, 112 U. S., 414). Congress evidently did not consider the claim of said companies to these lands sufficient to prevent their disposal as provided for in said act and hence made no exception in favor of said claims. The effect of this act was to defeat any attempted selection by these companies of the lands in question for indemnity purposes and all applications to make such selections must be denied.

The land embraced in the claim of Shaw-vosh-kung, under Article I of the treaty of May 7, 1864, was clearly excepted from the grant to said Northern Pacific Company, and said decision, so far as it thus holds, is affirmed.

The foregoing disposes of all the questions presented by the appeals herein and you will act in accordance with the views herein expressed.

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#### HOMESTEAD ENTRY—CULTIVATION—FINAL PROOF.

##### BUNN *v.* THE HEIRS OF FRANKLIN.

An applicant for the right of entry under the homestead law is bound to personally know the character of the land he claims, and whether it is suitable for purposes of residence and cultivation. Any mistakes that may be avoided by proper diligence are at his own risk.

Final proof should not be submitted during the pendency of a contest that involves the land in question.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 3, 1891.*

On October 11, 1882, Isaac Franklin made homestead entry, No. 8236, for the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  (not the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , as you have it), Sec. 34, T. 20 N., R. 11 E., Neligh, Nebraska.

January 20, 1888, C. B. Bunn filed his affidavit of contest against the entry, alleging said Franklin's death, and

that the heirs at law have wholly abandoned said tract since his death, and that they have failed to cultivate the same continuously or any part thereof for the year 1885 or 1886, until June, 1887, when they broke about one acre, and in October of said year they broke about one and a half acres more . . . . that they failed to exercise any ownership over said land prior to the year 1887.

Hearing was duly had, and the register and receiver found that "Franklin failed to establish residence on the land within six months from date of entry, and that he had abandoned the land for more than six months previous to his death, that the allegations set up in the contest have been sustained" and recommended the cancellation of the entry.

Upon appeal you by decision of April 23, 1890, affirmed that judgment. An appeal is further prosecuted to this Department.

It appears that the entry was made upon land lying in a low swale, and that it was for that reason unfit for cultivation.

In the spring of 1883, claimant erected a small house upon the land, setting it on blocks, presumably to prevent the water from entering it. The house was a frame, about fourteen by sixteen feet; he placed a small amount of furniture in it. Several witnesses swear he had no other home, but just how much time he occupied it, the evidence fails to disclose. He was a single man. No other improvements were made on the land by the entryman, nor did he cultivate any of the land. In November, 1884, more than two years after the entry, he was taken sick, left the land, and went to F. F. Burdick's, distant about two miles from the land, where he remained until February, 1885, when he died. He left a will, bequeathing all his property—real and personal—to Frederick Burdick "in trust, jointly and equally, for the benefit of his children." The house upon the land was thereafter left vacant, becoming very much dilapidated, and the land was not cultivated until June, 1887, when Burdick broke about five acres of the same, sowed a bushel of timothy seed, set out a few forest trees, and mowed about sixty acres of the grass and weeds. He gave as an excuse for not cultivating the land in 1885-6, causes over which he had no control—namely, the wet condition of the land.

It appears that in the years, 1883, 1884, and 1885, a ditch was constructed, seventeen miles in length, twelve feet wide, and six feet deep which ran through the land, and it is alleged that during its construction and before it was entirely completed, it made the land wetter than before, by bringing thereon water from distant points which overflowed it. But in 1887 the ditch, by erosion, became deeper, carrying off the water sufficiently to dry the land, thus making it susceptible of cultivation, and that the trustee in that year began the cultivation thereof it being the earliest possible time in which the work could be performed.

Non-cultivation for the period charged is admitted, but it is claimed that it was impossible to cultivate the land for the reasons above given and the failure is attributed to "the act of God."

While the proof is not clear that claimant abandoned the land for more than six months before his death, yet the evidence showing that he was in indigent circumstances, it is difficult to reconcile his good faith in the light of his conduct in remaining more than eighteen months in that swamp, and doing absolutely nothing by way of cultivation or

improvement. He knew the condition of the land before he entered it, and was advised by Burdick (trustee of appellants herein) that "it would be pretty wet for him to do anything upon it," but he determined to make the entry, thinking that the ditch then about to be constructed would render it dry enough to cultivate. It does not appear that he expended either money or labor upon the ditch, but entered the land relying upon the proposed ditch to dry it. The land being too wet for cultivation when he entered it, and relying, as he did, upon others to drain it, his devisees can not be heard to urge its wet condition, as an excuse for such non-cultivation claiming it to be the "act of God."

A person desiring to enter land should first carefully examine the same and satisfy himself as to its character and desirability for purposes of residence and cultivation. He is bound to personally know the land he claims, and any mistakes that might have been avoided with proper diligence are at his own risk. General Circular, 1889, page 8.

Conceding that claimant resided on the land, yet he failed to cultivate the same for more than two years after entry, and there was no pretense of cultivation by his devisees for more than two years after his death. The reasons for this failure, as above given, can not be accepted. Improving the land being a positive requirement, and the failure in that regard being so clearly shown, the entry must be canceled. It is so ordered, and the decision appealed from is affirmed.

It appears that contestant was permitted to file a declaratory statement upon the land May 5, 1890, after he received notice of your said decision of April 23, 1890. He submitted final proof upon the same December 29, 1890. This filing was permitted, because of an erroneous entry on the tract-books. But, in the meantime, an appeal was duly filed from your said decision holding the entry for cancellation. The local officers should not have allowed him to make final proof until the final determination of the contest. *Laffoon v. Artis*, 9 L. D., 279.

Defendant in the case at bar filed a protest against the acceptance of this final proof, and claimant should be required to re-advertise and submit final proof anew.

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#### TOWNSHIP SURVEY RESURVEY.

P. M. NARBOE.

No action should be taken toward the re-survey of a township during the pendency of an appeal before the Department from the decision rejecting the original survey.

*Secretary Noble to the Commissioner of the General Land Office, September 4, 1891.*

The appeal of P. M. Narboe from the decision of your office dated January 3, 1889, in refusing to direct C. A. Ensign in making a re-survey of township 7 north, range 15 West, (S. B. M) California, to note

all the evidence found in the field of a former survey, has been considered.

It appears that August 25, 1884, said Narboe entered into a contract with the government to survey certain townships in California, including the township above described. In due course of time the surveys were made, field notes duly platted, and the same approved and transmitted with the approved plats to your office. Some time after these surveys were made they were examined in the field by a special agent, and upon his report they were rejected by your office May 6, 1886. Narboe appealed, and under date of December 21, 1888, this Department directed that a hearing be ordered before the surveyor-general of California, in order to give appellant an opportunity to present testimony in support of his survey.

January 3, 1889, your office addressed a letter to this Department in the matter, calling attention to the fact that on January 11, 1888, the grand jury of the northern district of California found indictments against said Narboe and one W. H. Norway for conspiracy and perjury in the matter of surveying contracts, and that on February 17, 1888, the surveyor-general of California was instructed to institute civil suits on the bonds of said Narboe, securing the contract above referred to, numbered 364.

In view of the foregoing, the Department under date of January 7, 1889, directed that action in said hearing be suspended until the final determination of the criminal prosecution and the civil suits then pending against Narboe. Said suits are still pending.

May 28, 1889, a contract (No. 50) was entered into by U. S. Deputy Surveyor C. A. Ensign to survey, or rather resurvey T. 7 N., R. 15 W., which was originally included in contract 364 by P. M. Narboe, the returns of the survey of which were rejected by your office.

Narboe learning of this new contract to re-survey said township, requested the surveyor-general to direct Ensign "to mention in his field notes all the corners, monuments or other marks of previous surveys which he may find."

The surveyor-general, under date of May 5, 1890, submitted the question to your office for authority to take such action in the matter as may be considered proper, stating that he could see no objection to granting the request.

Under date of May 17, 1890, your office denied the request of Narboe on the ground that in view of all the circumstances in the case "it is deemed inexpedient to grant the request." Narboe appealed.

As heretofore stated a hearing was ordered by this Department, December 21, 1888, and on January 7, 1889, said hearing temporarily suspended until the criminal proceedings and civil suits pending against Narboe shall be determined.

May 28, 1889, subsequent to this action by the Department and before the question of the Narboe survey had been adjusted a second contract was entered into with C. A. Ensign to survey the same township.

This is an error. The appeal of Narboe from your office decision rejecting his survey was then, and is now, still pending before this Department and no steps whatever, with a view of again surveying said township should have been taken until the validity of the first survey shall be fully determined. Therefore, as the question of the first survey is still in abeyance, pending said proceedings in the local courts, you will suspend all action in relation to a survey of said township until the question of the Narboe survey is definitely settled by this Department.

Under the circumstances, as no second or resurvey of the township will be made until the first survey has been passed upon by this Department, and the rights of Narboe definitely settled, I deem it unnecessary to consider the appeal in the case at bar therefore the same is hereby dismissed. The papers in the case are herewith returned.

It is not intended by any of the proceedings taken or allowed, or anything herein contained to prevent the courts from proceeding in this or like cases; but to aid them rather to an early and free investigating and trial.

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PUBLICATION OF NOTICE—MOTION TO SET ASIDE SERVICE.

MUSSER *v.* PARKER.

Publication of notice is only authorized when it is shown by affidavit of the contestant, and such other evidence as may be required by the local officers, that, due diligence having been exercised, personal service can not be obtained.

If evidence is offered in support of the affidavit, filed as the basis of publication, it should be written out and attached to said affidavit.

On motion to set aside service of notice the local officers may properly review their action in directing publication of notice.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 4, 1891.*

I have before me the appeal of John Musser, in case of himself against James D. Parker, from your decision of April 18, 1890, dismissing his contest against the timber culture entry of said Parker for the SE.  $\frac{1}{4}$  of Sec. 35, T. 6, R. 31; Oberlin, Kansas, land district.

Your statement of the case is misleading in this: You say, "both parties appeared, the defendant specially, who filed a motion to dismiss the contest, for the reason that the affidavit made as a basis for publication does not set forth sufficient facts for service by publication." This would not be sufficient ground for dismissing the contest, and I find by the record that the motion was not to dismiss the contest, but only "to set aside the service made herein, for the reason that the affidavit as a basis for notice by publication does not set forth facts sufficient for service by publication.

This motion was sustained, the service set aside, and leave given the

contestant to amend his affidavit for service by publication. This he refused to do, and, upon this refusal to amend and proceed to obtain service upon the entryman, the contest was dismissed for want of prosecution.

It is asserted and not controverted, that the local officers examined the contestant as to the diligence used in attempting to obtain personal service, or learn the whereabouts of defendant, and ordered service by publication upon the affidavit filed, as aided by this other evidence taken upon oral examination.

Rule 11, Rules of Practice, provides that :

Notice may be given by publication alone only when it is shown by affidavit of the contestant, and by such other evidence as the register and receiver may require, that due diligence has been used, and that personal service can not be made, etc.

The evidence so taken should be written out and attached to the affidavit so the record would be complete. Any other practice leaves your office and the Department in the dark upon a matter material to the case. *Prima facie* the "other evidence" was such as the register and receiver required, for upon it they ordered publication to be made, which was accordingly done ; but the action of the local officers is not conclusive, and upon motion to quash the service, they could review their former action, which was *ex parte*, and find that the facts stated were not sufficient.

The affidavit is not as full or complete as that in the case of *Allen v. Leet* (6 L. D., 669), which was held insufficient. It says :

he has no knowledge as to the residence, whereabouts, or post office address of defendant, and cannot ascertain the same by any means within his, the affiant's, control, and, further, he has made diligent inquiry of all persons residing in the vicinity for such information and has wholly failed to obtain the same.

In *Allen v. Leet*, Allen's affidavit showed—

that he has made due and diligent search for Leet and that he can not be found nor heard of, and that personal service of notice of this contest can not be made on said defendant in the State of Nebraska (the land was in Nebraska).

It is apparent, following the practice, that the affidavit, unsupported by other evidence, is insufficient, and whatever other evidence the local officers may have had, there is none before me.

As the question of jurisdiction depends upon service of notice, it must affirmatively appear that proper service has been made.

The motion having been sustained, the contestant declined to proceed to make service on the contestee. This being so, and no appeal having been taken from the order quashing the service, there was nothing left for the local officers to do but dismiss the contest. For the reasons herein stated, your decision dismissing the contest is affirmed.

## SETTLEMENT RIGHTS—CITIZENSHIP.

## ROUGEOT v. WEIR.

An alien who has not declared his intention to become a citizen can acquire no rights by settlement filing, or entry, as against a *bona fide* adverse claimant; but an intervening claim, set up in bad faith to wrong and defraud such settler, will not defeat his right to file such declaration, and perfect his entry on due compliance with law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 5, 1891.*

Peter Weir has appealed from your office decision of January 6, 1890, holding for cancellation his homestead entry, so far as the same conflicts with the pre-emption filing of Theodore Rougeot.

From the record it appears that, on the 27th of October, 1885, Weir filed his declaratory statement for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , Sec. 31 T. 25 S., R. 13, San Francisco, California, alleging settlement three days prior thereto.

On the 28th of June, 1886, he changed his pre-emption filing to a homestead entry.

June 24, 1886, eight months after Weir's pre-emption filing and four days prior to his homestead entry, Theodore Rougeot filed his declaratory statement for the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the same section, alleging settlement November 10, 1884, their respective claims thus coming in conflict as to the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section, and the only question to determine is, which of these parties is entitled to the said last described forty acres.

March 15, 1887, Rougeot published notice that he would offer proof on May 10, and notified Weir to appear and contest, if he so desired.

Both appeared, and they and their witnesses were examined touching their respective rights to the land.

July 8, 1887, the local officers found in favor of Weir, and recommended that the "filing of Rougeot, in so far as it affected the land in contest (NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ ), be canceled; that he be permitted to enter that portion of his land not claimed by Weir, and that the *filing* of Weir be allowed to stand."

Rougeot appealed, and your office, by its said decision, reversed their action and gave the disputed land to Rougeot.

For many years (June, 1874,) prior to the initiation of the claims of these parties, the section in which this land was situated was supposed by the settlers thereon to be within the grant to the Atlantic and Pacific Railroad Company, and, although these, with other parties, had from year to year cultivated and to some extent improved the land along the supposed route of said railroad, the evidence shows that no one except Weir had ever laid claim to the same as government land prior to March 23, 1886, when, by the decision of Secretary Lamar (At-

.antic and Pacific Railroad Company, 4 L. D., 458), this route (from Buenaventura to San Francisco) was declared to be not within the terms of the grant, and so the land contiguous thereto was opened to settlement.

The land, however, embraced in the entry of Weir, was, it seems, understood by him to have been exempt from the operation of the grant by reason of a homestead claim of his brother to the same, made in 1872, and existing at the date of the filing of the map of definite location; so that, as appears from a report of the local officers, the forty acres in dispute would not have been subject to the grant, even though the same had embraced the land along the route described.

It is shown in evidence that Weir was of foreign birth, and at the time he made his pre-emption filing and also when he transmuted the same to a homestead he had not declared his intention of becoming a citizen of the United States.

It further appears that he had, during some portion of the War for the Union, served in the Missouri State Militia, and, at the time he initiated his several claims for the land, believed that such service entitled him to the privileges of citizenship. Although there is no official evidence of such military service, the testimony leaves no doubt in my mind of the fact, and that he was acting in entire good faith when he filed for the land. On discovering that his military service did not entitle him to take government land, he declared his intention to become a citizen, but this was not done until September 8, 1886, subsequent to the filing of Rougeot.

Although Rougeot claims to have cultivated a portion of this land prior to the date of Weir's first filing, the evidence is clear, I think, that such cultivation was due to a mistake in the boundary of the land really occupied by him, and was done, not with the intention of claiming the land from the government, but when he believed it was not open to settlement and entry by reason of its being within the grant to the railroad company. His main reliance is upon the fact that, at the time he filed his declaratory statement, there was no valid claim against the land, because Weir, the only adverse claimant, was disqualified to pre-empt or make entry of land, or assert any claim thereto, by reason of his non-citizenship.

Shortly after the date of his filing (October, 1885), Weir moved his house on the land in controversy, and had continued to live there, with his family, ever since, and at the date of the hearing his improvements were worth from \$1000 to \$1200, including a good orchard of about a hundred trees, enclosed by a wire fence. Rougeot had no improvements on it.

The evidence discloses that, within a few days after Weir filed for the land, Rougeot went to him and told him that he claimed the land and should dispute his right to enter the same; that after some conversation in relation to the rights of each claimant, it was agreed that, if

Weir would give up all his improvements, except his house and barn, on the forty acre tract upon which he then lived (not described), that he, Rougeot, would make no further claim to the disputed tract. Rougeot denies this, but on this question the clear preponderance of the evidence is in favor of Weir. Rougeot claims that he agreed to this only on condition that Weir should leave his house on the abandoned forty; that Weir refused to do this, and their bargain was therefore never consummated. Weir and his son both testify to the contrary, while Rougeot's testimony is unsupported by any other witness.

Although the interview in which this matter was considered occurred in October, 1885, a few days after Weir had filed on the land, and just previous to his moving his house, Rougeot made no further objection to Weir's occupancy until in June, 1886, when he filed his declaratory statement, which embraced the abandoned forty about which the agreement or attempted agreement was made, and he now claims, and is in possession of the same with Weir's improvements, consisting of twenty-five acres of breaking and a good well, over ninety feet in depth, walled and curbed.

At the date of the contest, Weir's improvements on the land in dispute consisted of a house, sixteen by twenty-four feet, with two rooms, three doors and three windows; a barn, twenty by twenty feet; a stable, or shed, eight by twenty; an orchard, surrounded by a wire fence, and containing about a hundred thrifty trees; a well, forty-three feet deep, walled and curbed; and a large acreage of cultivation—all of the value of ten or twelve hundred dollars.

Weir, not having declared his intention of becoming a citizen, could establish no rights by his settlement, improvements, pre-emption filing, or homestead entry, prior to such declaration as against a *bona fide* adverse claimant. If, however, there was no valid adverse claim prior to his declaration of intention to become a citizen (September 8, 1886), his disqualifications were thereby removed, and his entry should be allowed to stand Jacob H. Edens, 7 L. D. 229.

The question then is, under the facts as above set forth, was the adverse claim of Rougeot such a valid *bona fide* claim as will preclude Weir from curing his defects of citizenship as pertaining to the entry of this land. I think not.

Rougeot's claim to the land at date of Weir's pre-emption filing was without merit, for he admits in his evidence that he then thought it was railroad land. His claim was therefore with no intent to perfect title thereto under the pre-emption law. Learning that Weir had filed on it, he went and notified him that he was in possession and claimed the right of occupancy.

It does not appear in evidence that at that time Rougeot knew, or suspected that the land was not subject to the railroad grant, but whether he had such knowledge or not can not, in my judgment, affect the merits of the controversy, for he agreed that, if Weir would turn

over to him his improvements (well and breaking), he would abandon whatever claim he might have to the forty acres in dispute, and, as the evidence shows he thereafter made no objection to Weir's improving the land, until after the decision of Secretary Lamar, *supra*, declaring all this supposed railroad land open to settlement, when he files his declaratory statement for the land formerly occupied by Weir and the land in controversy, which contained the improvements of Weir made in good faith under and in pursuance of the agreement aforesaid.

To sustain such conduct on the part of Rougot would be to use the authority of this Department in aid of a fraud upon the rights of Weir.

The case in all its material aspects is parallel with the case of Johnson *v.* Johnson, 4 L. D., 158, in which it is said that, "under no circumstances will it (this Department) permit itself knowingly to be made an instrument to further the fraudulent designs of an individual who is seeking to acquire title to land to which he has no right." See also Newbaur *v.* Bush, 12 L. D., 533.

There being no valid adverse claim against the land at the time Weir became qualified to make entry, his transmuted homestead entry will be held intact and subject to final proof.

The decision of your office is accordingly reversed.

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PRE-EMPTION—SECTION 2269, R. S.—PRACTICE.

GOTT *v.* SHULAR.

Section 2269 R. S., does not authorize an administrator to complete the claim of a deceased pre-emptor, where the heirs are of age and proceeding to comply with the law and perfect the entry.

A pending motion to set aside a decision of the General Land Office and remand the case to the local office, is waived and abandoned by a subsequent appeal of the Department.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 5, 1891.*

I have considered the case of Peter R. Gott *v.* Eli W. Shular, on appeal by the former from your decision of April 11, 1890, dismissing his protest against the final proof of the latter and accepting the same, for the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , and Lot No. 5 of Sec. 34, T. 1 N., R. 9 W., Los Angeles, California, land district.

Your decision states the record and testimony fairly and substantially, and, in connection therewith, states the record in the case of Eli W. Shular *v.* Frederick H. Payne, the latter case having been considered by the local officers and your office in connection with the case at bar, but as neither of said parties appealed from your decision, and the land involved therein is not embraced in the lands herein involved, that the case is not before the Department.

The facts appear to be that on May 15, 1890, one Z. Decker, admin-

istrator of the estate of Margery Shular, deceased, filed in your office, a motion, asking that your decision be set aside and vacated, and that the whole matter be remanded to the local land office; that he be allowed as such administrator to introduce evidence in support of the declaratory statement of Margery Shular, deceased, as filed November 13, 1875, and amended June 3, 1878. Secondly, he says:

without withdrawing the foregoing request and motion for remanding . . . the said Z. Decker, administrator, . . . hereby intervenes herein, for the purpose of appeal from the decision of the Hon. Commissioner . . . in the above entitled matter, dated April 11, 1890. This appeal is taken on both questions of law and fact.

This appeal then sets forth five specifications of error.

The paper is entitled "Notice of appeal," and is accompanied by a copy of Decker's letters of administration.

As the pleading or appeal was not filed in your office until after your decision, no action was taken upon it, and it was transmitted to the Department with the papers in the case, which came up on the appeal of Gott.

The paper is inconsistent with itself, and the appeal taken from your decision must be considered as a waiver or abandonment of the motion to remand.

Decker, however, was not a party to the record before the local office or your office, is a stranger to the case and strict practice would strike his motion and appeal from the files, but, in view of all the circumstances in the case, and as the jurisdiction of the Department is acquired by the appeal of Gott, to avoid delay and a multiplicity of suits, I have considered the paper as though it were a motion addressed to the Department and interposed in the case here pending.

I do not find that Decker has any right to intervene herein. Section 2269 (Revised Statutes) provides that when a person dies before consummating his pre-emption claim, it shall be competent for the executor or administrator of the estate of such person, or one of the heirs, to file the necessary papers.

Margery Shular, a widow, died in 1882, leaving six children, all of full age except one son. Eli W., the elder brother, and John lived on the land. They paid all of the mother's debts, including expenses of last sickness and funeral, and by an agreement with their four sisters the brothers agreed to pay to each sister \$100, in addition to paying the deceased mother's debts, and they were also to take the mother's place in a contest brought by one Loudy for one "forty acre" tract, the unpaid costs in which were \$134. One of the sisters is the wife of Gott, the plaintiff herein. She had deeded all her right, title, and interest in the land to Eli, on May 20, 1883. John and Eli did not have the money to pay this indebtedness, but they assumed it, and gave their joint notes for such as they could not pay. Soon after this arrangement John died, and left several hundred dollars of indebtedness. Thereupon the four sisters agreed with Eli that, if he would pay up John's indebtedness and pay them \$25 each, that they would release

all their rights as heirs at law of John, he having died unmarried. This arrangement having been completed, Eli continued to cultivate and improve the land, and paid the debt as rapidly as he could.

It appears that two of the sisters lived in Washington, and letters from them show that they had each received \$50, and each expressed herself ready and willing to sign the deed whenever Eli could pay the balance of the purchase money.

Pending these matters, and while Eli was financially embarrassed, by the unexpected death of John, and the consequent additional expenses to be paid, he was trying to comply with the law and secure the land, as heir of Mrs. Shular, but being fearful that it would not be so held he had made a filing for it in his own name.

Gott, after his wife had sold her interest to Eli and received pay and executed her deed therefor, went on to the land and erected a shanty, and made a homestead entry therefor. When Eli offered final proof, Gott appeared and protested, and the register and receiver awarded the land to Eli W. Shular, dismissing Gott's protest.

After nearly seven years had elapsed and Mrs. Shular's estate had been thus amicably settled, as between the heirs and also by her creditors, substituting Eli for her, and when it appears that she had no personal estate, Z. Decker, for some reason which does not appear, is appointed administrator of her estate, and asks to intervene in this case.

The law is so worded that the administrator or an heir can take up her pre-emption claim and complete it. Ordinarily, when the heirs are of full age, they would have preference by the common law; the real estate is not assets in the hands of an administrator.

Under the homestead law (Section 2292), where both parents die leaving minor children, the executor, administrator, or guardian may sell the land for the benefit of such heirs, but, if the heirs are of full age, the administrator has no right to interfere, and it was certainly not intended by the statute relating to pre-emptions that the administrator should interfere where the heirs were of age and attempting to comply with the law and complete the entry.

Besides, in the case at bar, the administrator is entirely too late. It is quite evident that the matter of his appointment and application are simply to defeat the claim of Eli. It is the outgrowth of the effort of Gott to get the land, with all the valuable improvements placed on it by Eli, to take from him, if possible, seven or eight years of toil, this, too, after his wife had received all she asked for her claim and probably all it was worth at the time it was sold.

Carefully reviewing the record, I find no reason for disturbing your conclusions, which concur with those of the register and receiver.

The application of Z. Decker, as administrator, to intervene is rejected, and as his appeal was irregular, he not having been a party to the case, that branch of his case is dismissed.

Your decision is affirmed.

## PRE-EMPTION SETTLEMENT—SECTION 2260 R. S.

WILSON *v.* BERGEN ET AL.

One who quits or abandons land, in which he owns an undivided interest, to reside on public land in the same State is within the inhibition of section 2260 R. S.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 5, 1891.*

I have considered the appeal of William Wilson from the decision of your office of April 10, 1890, rejecting the final proof of Wilson for the SE.  $\frac{1}{4}$  of Sec. 21, T. 27 S., R. 37 E., Gainesville, Florida, and accepting the final proof of John F. Bergen under his pre-emption declaratory statement for said tract.

This tract was claimed by William H. H. Gleason under homestead entry made October 14, 1885, also by John F. Bergen under pre-emption declaratory statement, filed October 9, 1885, alleging settlement October 1, 1885, and by William Wilson under declaratory statement filed October 29, 1885, alleging settlement September 24, 1885.

A hearing was had, and upon the testimony offered at said hearing the local officers recommended "that Gleason's entry be canceled, Wilson's proof be rejected on the ground that he is not a qualified pre-emptor, and that Bergen be allowed to make cash entry of the land in controversy." From this decision Gleason did not appeal.

On appeal by Wilson, you affirmed said decision, and held that Gleason having failed to appeal from the decision of the local officers, so far as it affects his entry, it has become final. Wilson again appealed, alleging error in holding that he removed from land of his own to reside on the public land, as he only owned an undivided one-fourth interest in the SW.  $\frac{1}{4}$  of Sec. 21, T. 27 S., R. 37 E., and in rejecting his final proof, notwithstanding the admitted fact that he had complied with the law and was a prior settler.

The material issue involved in this case is, whether Wilson moved from land of his own to reside on the public land when he made his settlement upon the tract in controversy.

The evidence shows, as found by the local office and by your office, that he lived on land adjoining the tract in controversy when he made his settlement, in which he owned one-fourth interest. This fact is not denied by the appellant, but he claims that such fact does not bring him within the inhibition of section 2260 of the Revised Statutes, for the reason that he was only the owner of an undivided one-fourth interest in said property.

The facts in this case bring it within the rule announced in the case of *Richards v. Ward*, 9 L. D., 605, to wit: that one who quits or abandons land in which he holds an undivided interest, to settle on public land in the same State or Territory, is within the inhibition of section 2260 of the Revised Statutes, and must be ruled thereby.

The decision of your office is affirmed.

## RESERVATION FOR GOVERNMENT USE.

JOHN F. WEH ET AL.

The reservation of one acre for government use at Guthrie, Oklahoma, is not defeated though the tract selected is not located in exact accordance with the proclamation of the President.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 5, 1891.*

By letter of September 2, 1889, you approved the action of the local officers rejecting the claims of John F. Weh and Samuel S. Marsh to certain lots situated on the acre of land reserved for government use on the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of section 8, T. 16 N., R. 2 W., Guthrie, Oklahoma.

From your action, said parties by their attorneys, file an appeal.

The grounds of appeal are stated as follows:

First, That said Hon. Commissioner of the General Land Office erred in approving and confirming the decision of the said register and receiver in this case;

Second, That said Hon. Commissioner of the General Land Office erred in not reversing the decision of said register and receiver and in not directing them to take and hear testimony in this case.

The only attempt at a valid assignment of error is contained in the closing sentence of the second specification, and this is so general in its character that it hardly reaches the standard required by the rules of practice, and in my opinion, the appeal might be dismissed under rules 88 and 90 of the rules of practice; *McLaughlin v. Richards* (12 L. D., 90).

But aside from the technical defect in the appeal, I do not think the claims of Weh and Marsh have any foundation, either in law or in equity. By the proclamation of the President of the United States, dated April 20, 1889, one acre in square form in the NW. corner of the NE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 8, T. 16 N., R. 2 W., was reserved for government use, but it can not, I think, be successfully maintained, that the tract thus to be reserved, must of necessity, be located in the extreme northwest corner of the legal subdivision designated. The primary object in reserving the tract was to secure a place for the occupancy of the United States land office. An acre was selected and thus occupied by the proper officers of the government and the intention of the President was thus carried into effect, even though the tract selected was located a few rods east of the extreme corner designated in the proclamation. Hence the action of the local officers, and of your office, was correct, and is affirmed.

## PRACTICE—APPEAL—APPLICATION TO ENTER.

JOHN A. STONE.

An applicant for public land who fails to appeal from an order of rejection loses all rights under his application.

The local officers have no authority to extend the time within which an appeal may be taken from their action, or to stipulate that a rejected application shall be held in abeyance to await departmental action in a similar case.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 5, 1891.*

This is an appeal by John A. Stone from your office decision of May 26, 1890, rejecting his desert land application for Sec. 28, T. 14 N., R. 18 E., North Yakima, Washington.

It appears that on April 25, 1888, Stone applied at the local office to make desert entry for said tract; that with said application he tendered an "initial payment" of twenty-five cents per acre; that said application was rejected "for the reason that the price of the land was double minimum;" that no appeal was taken from this action "but it was stipulated between Stone and the local officers" to abide the decision in the like application of Richard Strobach, then pending on appeal in your office; that June 20, 1888, your office affirmed the local office in rejecting Strobach's application; that August 1, 1889, the Department affirmed this action; that February 24, 1890, Waterman A. Bowen made timber culture entry for the SE.  $\frac{1}{4}$  of said section 28; that March 13, 1890, Stone again made desert application for said section, and tendered "as an initial payment therefor" fifty cents per acre; that said application, as shown by endorsement was rejected by reason of conflict with Bowen's timber culture entry, and that on appeal by Stone, your office by its said decision sustained said action.

It is alleged on appeal that by said stipulation the local officers agreed to give Stone written notice of your office decision in the Strobach case, and thereafter for thirty days suspend the land from entry and filing, and that such notice was not given. It is accordingly urged, in effect, that Bowen's entry is invalid because made when Stone's first application was in fact pending, and that his second application should therefore be allowed.

By Stone's failure to appeal from the rejection of his first application such action became final. An appeal to your office within thirty days was, in the premises, the remedy prescribed by the department. See rules 43 and 67 of practice.

The local officers being without authority to enlarge the time prescribed for appeal from their action, the stipulation referred to was without effect and could not operate to preserve any rights which Stone may have acquired because of his first application.

It follows that when Bowen made his said entry, the land embraced therein was vacant. Bowen's entry being consequently valid Stone's second application was properly rejected for conflict therewith.

The judgment appealed from is affirmed.

PRE-EMPTION CLAIM—TIMBER-CULTURE ENTRY—HOMESTEAD.

HOCHREITER v. FINLAYSON.

One who makes pre-emption filing for a tract, and subsequently abandons such filing and enters a portion of the land under the homestead law, exhausts thereby his pre-emptive right.

A pre-emption filing, and possession thereunder, by one who has previously exhausted his rights under the pre-emption law, will not exclude the land covered thereby from appropriation under the timber culture law.

The right to make an additional homestead entry under section 6, act of March 2, 1889, can not be exercised upon land covered by the existing entry of another.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 7, 1891.*

I have considered the case of John T. Hochreiter v. Daniel Finlayson, upon the appeal of the latter from your decision, rejecting his final proof, and holding for cancellation his pre-emption filing, for the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 26, T. 13 N., R. 16 W., Grand Island land district, Nebraska.

Finlayson filed declaratory statement for the land on the 1st of July, 1886, and on the 21st of March, 1887, Hochreiter made timber culture entry for the same tract. After giving due notice, Finlayson submitted final proof before the local officers, on the 9th of September, 1887, at which time Hochreiter filed protest, alleging that Finlayson's filing was in the interest of a third person, and that he had exhausted his pre-emption right prior to the filing in this case.

After considering the final proof, the evidence, and the stipulation of the parties, the register and receiver, on the 14th of March, 1888, rendered their decision, in which they rejected the final proof of Finlayson, and recommended that his filing for said land be canceled. Upon appeal to your office, that judgment was affirmed, on the 30th of January, 1890. A motion for a review of your decision, filed on the 15th of February, 1890, was denied by you on the 2d of April, of that year, and on the 23d of that month Finlayson filed in the office of the register and receiver an application to make homestead entry for the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said section 26, as an additional homestead entry, under the provisions of the act of March 2, 1889 (25 Stat., 854). The local officers denied this application, for the reason that the land was already covered by the timber culture entry of Hochreiter. From this decision Finlayson appealed to your office, where it was affirmed on the 16th of July, 1890.

Appeals from the three decisions rendered by your office, bring the case to this Department for consideration. The first appeal was filed on the 24th of June, 1890, and was from the decision of January 30, and April 2, of that year, and in it the appellant alleged that you erred in holding that Finlayson had exhausted his pre-emption right by making the alleged declaratory statement on land in the Lincoln district, Nebraska; in rejecting his final proof; in overruling his motion for a review; and in not holding that he was entitled to enter at least eighty acres of the land in controversy as an additional homestead under section 6, act of March 2, 1889. The second appeal was filed September 20, 1890, and was from your decision of July 16, of that year, and alleges that you erred in rejecting Finlayson's application to enter said land, under act of March 2, 1889; in holding the timber culture entry of Hochreiter a bar to his entry; in holding that he had no such valid filing or entry of record as would enable him to make a homestead entry under act of March 2, 1889, notwithstanding the timber culture entry of Hochreiter.

At the hearing which followed the protest of Hochreiter when Finlayson presented his final proof, a stipulation, signed by the attorneys for the respective parties, was admitted in evidence, which it was agreed set forth the facts of the case. It was as follows :

It is hereby stipulated and agreed that said Daniel Finlayson, on or about August 30, 1869, made pre-emption declaratory statement No. 4769, upon the SE.  $\frac{1}{4}$  of Sec. 24, T. 12 N., R. 3 E., at the Lincoln land office, in Lincoln, Nebraska, and afterward, and on the first day of September, 1870, said Daniel Finlayson made homestead entry on the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 24, T. 12 N., R. 3 E.; and Daniel Finlayson, junior, a son of former, made homestead entry on the N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of Sec. 24, in T. 12 N., R. 3 E., on the 6th day of October, 1871; all of which entries were made at Lincoln, Nebraska, and that each of said parties made final proof and obtained title to said tracts embraced in their respective homesteads.

Section 2261 of the United States Revised Statutes, provides that,

No person shall be entitled to more than one pre-emption right by virtue of the provisions of section twenty-two hundred and fifty-nine; 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.

Under the stipulation filed, and the statute quoted, the register and receiver were justified in finding that Finlayson had exhausted his pre-emption right, and they properly rejected his proof, and recommended the cancellation of his filing. His filing being invalid, the land was subject to the entry of any other qualified claimant. It was in that situation on the 21st day of March, 1887, when Hochreiter made his timber culture entry. It was held in *Farris v. Mitchell* (11 L. D., 300), that "the occupancy and possession of land by one who asserts no record claim thereto within the period provided by law does not exclude such land from entry under the timber culture law." If this be so when the land is occupied and in the possession of a person who has a right to make a record claim therefor, the rule will certainly not be relaxed

when the person in possession is prohibited by law from making entry or filing.

By the stipulation in the case it appears that while Finlayson filed his declaratory statement for the SE.  $\frac{1}{4}$  of section 24, at the Lincoln land office, he made homestead entry for only the south half of said quarter section, while his son took the north half. Under the provisions of section six of the act of March 2, 1889, such persons are allowed to make an additional entry for land sufficient to make up one hundred and sixty acres in all, upon complying with the provisions of that law, and the other laws relating to public lands. The land for which this second entry is made need not be contiguous to that embraced in his original entry, neither can it be land occupied by some prior qualified claimant. It follows therefore that Finlayson's application, of April 21, 1890, to make homestead entry for eighty acres of the land in controversy, under the provisions of that act, was properly rejected by the register and receiver, because of the prior entry of Hochreiter, which gave him a prior right in the land.

The occupancy of the land by Finlayson, and the improvements made thereon by him, were without authority of law, which brings the case within the rule stated in *Howell v. Bishop* (6 L. D., 608), where it was held that "the wrongful enclosure of public land will not take it out of the class of lands subject to timber culture entry." In *Moss v. Quincey* (7 L. D., 373), it was held that although land had been broken, yet if it were devoid of timber, it could be entered under the timber culture law. In the case of *John A. Adamson* (3 L. D., 152), it was held that if a person makes a timber culture entry of a tract of land upon which some other person is living and has improvements, although not having a claim of record, the fact of such occupancy and improvement is notice, and the entry is made at the same risk as in the case of a claim of record.

That case and numerous others unnecessary to cite, recognize the right to make timber culture entries upon land devoid of trees, although cultivated and improved, the entryman taking the risk of final adjudication. That is precisely what was done in the case at bar. Hochreiter made his entry upon land occupied and improved by Finlayson, taking his risk of final adjudication. Upon such adjudication, it was found that Finlayson at the time of Hochreiter's entry, had exhausted his rights under the law then in force, and had no right to make pre-emption filing for that or any other land, which left the entry of Hochreiter the only one upon the tract.

From the facts of the case, and the decisions of the Department, I think the land in question was subject to entry when Hochreiter made entry therefor, and that you did not err in rejecting the final proof of Finlayson, nor in denying his motion for a rehearing, nor in rejecting his application to make a second homestead entry for eighty acres of

the land in controversy, under the provisions of section six of the act of March 2, 1889.

The decisions appealed from are therefore affirmed.

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TIMBER CULTURE CONTEST—REHEARING.

GRIFFIN *v.* FORSYTH.

The failure of the entryman to plant the full acreage, or secure the growth of the requisite number of trees, does not necessarily call for cancellation of a timber culture entry where good faith is manifest.

A rehearing directed by the Department upon the general merits of a case, brings the record before the General Land Office for decision upon all questions that may be thus presented.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 8, 1891.*

I have considered the case of Michael Griffin *v.* Charles Forsyth, upon the appeal of the former, from your decision holding the timber culture entry of the latter intact, for the NW.  $\frac{1}{4}$  of section 6, T. 106 N., R. 32 W., Marshall land district, Minnesota.

Forsyth made entry for the land on the 7th of March, 1878. On the 27th of July, 1885, Griffin filed affidavit on contest against said entry, alleging failure to comply with the requirements of the timber culture law by the entryman, each and every year up to that time.

Upon the trial, Griffin asked to be allowed to amend his contest affidavit, by adding thereto an allegation that Forsyth had sold part of the land to his father, and the other part to his brother, that the brother had purchased the part from the father, and then owned the whole tract, and that Charles Forsyth, the entryman, had no interest therein whatever.

The amendment or motion was not allowed and trial was had upon the issues raised by the original affidavit. It resulted in the register and receiver holding Forsyth's entry for cancellation. This judgment was affirmed by your office on the 28th of May, 1886, except that you expressed disapproval of the action of the local officers in disallowing the proposed amendment to the plaintiff's affidavit of contest. The judgment being in his favor, Griffin was satisfied therewith, notwithstanding his amendment had been disallowed, but Forsyth appealed therefrom to this Department. The decision upon that appeal was rendered on the 13th of June, 1888, and is reported in 6 L. D., 791.

Without expressing any opinion as to whether the entry should or should not have been canceled upon the proof produced upon the trial this Department ordered that a re-hearing before the local officers should be had, and they should be instructed to permit the contestant to introduce the evidence proposed, relative to the sale of said land, and the parties should also be allowed to offer any additional evidence they

might have, relative to the validity of the entry and the entryman's compliance with the requirements of law.

The re-hearing in pursuance of such order, was set for the 18th of September, 1888, at which time the proposed amendment was allowed, and the evidence introduced was confined to that subject, neither party offering any as to the compliance of the entryman with the requirements of the timber-culture law.

On the 10th of December, 1888, the register and receiver rendered their decision, holding that Griffin had failed to show that Forsyth had parted or agreed to part with his interest in the land, but expressing no views as to his compliance with the law, stating that their views upon that subject could be found in the record of this case, evidently referring to their decision rendered upon the first hearing.

From this last decision of the register and receiver, Griffin appealed to your office, and on the 26th of March, 1890, you affirmed the judgment so far as it held that Griffin failed to establish the transfer of the land by Forsyth, and reversed the former decision of the local office, which held the entry for cancellation, and held the timber-culture entry of Forsyth intact. An appeal by Griffin from your judgment, brings the case to this Department for consideration.

I find no difficulty in concurring with the local office and your office in the conclusion reached as to the transfer of the interest of Forsyth in the land. The evidence upon this point is that at one time Forsyth made an arrangement with his father, by which the latter was to have the west eighty acres of the tract, in consideration for which he was to let his son have a horse, wagon, and some other property. Before any transfer of the land, of any character, was made, Forsyth paid his father for the horse, wagon, etc., and thus became released from any obligation to make the transfer. His arrangement with his brother George, was that the latter might live upon the land and have what crops he could raise, in consideration of his planting and cultivating the trees required by law. George never claimed to have any interest in the land other than in accordance with this arrangement, and his father never claimed any interest in it whatever. The house upon the land was built and occupied by George. Several witnesses testified to certain hearsay statements, of a negative character, but there was no evidence in the case to disprove or discredit that of Forsyth, on the question of his interest in the land. This disposes of that branch of the case, and leaves for consideration the question of the entryman's compliance or non-compliance with the requirements of the timber-culture act.

That a large portion of the land was cultivated to crop each year, is not disputed, leaving the number of acres planted to trees, and the result of such planting, the only matter in controversy. Griffin and his witnesses, including his surveyor, place the number of acres planted in trees at six and three-fourths, and the number of trees growing

thereon at 3040. The surveyor for Forsyth gives the quantity of land planted in trees as eight and fifty-four hundredths acres in one piece, and four-tenths of an acre in another. His witnesses who counted the trees put the number at 3625.

The surveyor of Griffin testified that he did not measure the small piece which went to make up the quantity found by Forsyth's surveyor, and that he ran his lines quite close to the rows of trees on the other part of the land, while the surveyor for Forsyth said he ran his lines two feet outside of the outside row of trees embraced in each lot. He also testified that there was another piece containing one and forty-six hundredths acres, which had been planted in trees, and upon which were a few living trees at the time of his survey, but he did not include this in his estimate of land occupied by trees.

In *Thompson v. Sankey* (3 L. D., 365), it was held that in view of the claimant's good faith, the fact that he had but eight and a half acres, instead of ten under cultivation and planted as required, should not cause cancellation of his entry. In that case, and in *Jackson v. Grable* (7 L. D., 365), the entryman was advised of the importance of fully complying with the requirements of the law, both as to the number of acres planted, and the number of trees growing, before making final proof. To the same effect are the decisions in *Purmort v. Zerfing* (9 L. D., 180), and *Harrison v. Schlagenhauf* (11 L. D., 189).

In *Kelsey v. Barber* (11 L. D., 468), and in *Friel v. Bartlett* (12 L. D., 502), as also in *Cropper v. Hoverson* (13 L. D., 90), it is held that the failure of the entryman to secure the requisite growth of trees does not call for cancellation, where such result is not due to negligence in planting and cultivation, if good faith is manifest.

In his notice of appeal to this Department, and in his argument in support thereof, the counsel for Griffin insist that you erred in reversing the former decision of your office, in the absence of any motion for review or reconsideration, and without additional evidence on the question of the entryman's compliance with law, and in not holding the entry for cancellation as to part of the land, or subject to amendment in that respect as suggested in the decision of this Department directing a re-hearing.

This Department in ordering a re-hearing in this case, distinctly directed that the proposed amendment to the affidavit of contest should be allowed, and that evidence upon that and the main question should be received, if offered. This opened the whole case for review and consideration, and justified you in rendering a decision upon all the questions involved. The suggestion in the decision of this Department, to which reference is made, was that there might sometime be a case, as in *Linderman v. Wait* (6 L. D., 689), where the equities required the exercise of its discretion, as therein stated. That case has never been cited or followed in any volume of the decisions since the one in which it is reported, and the rule as here stated, has since been adhered to.

The decision appealed from is affirmed.

## SECOND HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

JOSEPH H. NIXON.

Section 2, act of March 2, 1889, does not authorize a second homestead entry where the entryman, prior to the passage of said act, has purchased the land covered by his first entry under the act of June 15, 1880; nor does the temporary suspension of the certificate issued under said purchase bring the applicant within the terms of said section.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 9, 1891.*

I have considered the appeal of Joseph H. Nixon, from the decision of your office dated August 2, 1890, rejecting his homestead entry for the W.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , Sec. 4, and W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$ , Sec. 9, T. 7 S., R. 7 W., New Orleans district, Louisiana.

It appears that on April 5, 1877, Nixon made homestead application for the W.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 7, T. 7 S., R. 7 W., and NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec. 13, T. 7 S., R. 8 W., and on September 15, 1885, he purchased the land embraced by his entry under the provisions of the act of June 15, 1880 (21 Stat., 237).

In due course of time the papers in said cash entry were reported to your office with the current returns for September, 1885, and subsequently November 12, 1885, the entry was suspended, and the certificate returned to the local office for correction of the first name, it being given as John H. instead of Joseph H. Nixon.

June 7, 1890, Nixon filed homestead application for the first above described tract, claiming the right to enter the same under the provisions of the act of March 2, 1889 (25 Stat., 854). This entry was allowed by the local officers but was rejected by your office on the ground that the entryman was not entitled under the law to make the second entry. From this decision Nixon appeals.

Section 2 of the act of March 2, 1889, above referred to, provides:

That any person who has not heretofore perfected title to a tract of land of which he has made entry under the homestead law, may make a homestead entry of not exceeding one quarter section of public land subject to such entry, such previous filing or entry to the contrary notwithstanding; but this right shall not apply to persons who perfect title under the pre-emption and homestead laws already initiated.

The language of this section seems plain and admits of but one construction. All duly qualified parties are entitled to the benefits of the above section except the following: first, those who have perfected a homestead entry prior to the passage of said act; second, those who have initiated a homestead entry prior to the passage of the act and have perfected or shall perfect the same subsequent thereto.

The original homestead entry of appellant, as you will observe, was made April 15, 1877, prior to the passage of the act of March 2, 1889,

and has been perfected to the extent of payment of the purchase money and the issue of the cash certificate, hence the entryman falls within the second inhibition mentioned above; therefore as he has exhausted his homestead right, he is clearly not entitled to the privilege of making another homestead entry under the act above referred to.

The fact that the original homestead entry has been temporarily suspended until the certificate can be properly corrected as to the name of the party, does not affect or alter the case.

I have examined the authorities cited by counsel for appellant and find that they have no bearing on this case. They refer more particularly to cases where the applicants have never had the benefit of the homestead law and to cases where a pre-emptor applies to transmute his filing to a homestead, although he has already had the benefit of the homestead law.

In view of the foregoing the decision of your office is affirmed.

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TIMBER CULTURE CONTEST—AFFIDAVIT OF CONTEST.

McCLELLAN v. CRANE ET AL.

An objection as to the sufficiency of an affidavit of contest can only be raised by the defendant, and not by him prior to the day set for the hearing.

A contest is not prematurely initiated where the day fixed for the hearing is subsequent to the expiration of the year in which the default is charged, and the notice is not served until after the expiration of said year.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 9, 1891.*

On March 23, 1887 (not 1889 as you have it) Wilhelm Munch made timber culture entry of the S.E.  $\frac{1}{4}$ , Sec. 2, T. 29 S., R. 25 E., Visalia, California.

On or about March 20, 1888, Clarence McClellan appeared at the local office with the intention of filing a contest against the entry, on the grounds that claimant had not complied with the provisions of the law as to the first year's requirements. He was advised by his attorney and the local officers that a contest filed at that time would be premature and that he had better wait until the year had expired.

On March 23, 1888, Horace G. Crane appeared at the local office and filed his contest, alleging that claimant "has not broken, plowed, or cultivated said land or any portion thereof."

In the morning of the next day (March 24,) McClellan returned to the office and was allowed to file his contest against the entry. Notice was issued on both affidavits, service was obtained by publication, and hearing was had before the register and receiver on November 14, 1888. On the trial, McClellan moved to dismiss Crane's contest, on the grounds that the same was prematurely brought; that Crane did not have personal knowledge of the averments in his affidavit of contest and because his

(McClellan's) affidavit was the first filed after the entry became subject to contest. This motion was overruled and McClellan appealed.

The evidence was heard on Crane's contest, the defendant making default upon the evidence submitted the register and receiver recommended the entry for cancellation.

On January 21, 1890, you dismissed McClellan's appeal and affirmed the action of the register and receiver, and McClellan further prosecutes his appeal to this Department.

It is evident that McClellan had no right to complain that Crane did not have personal knowledge of the averments in his affidavit of contest, since the question of its sufficiency can only be raised by the entryman and not by him prior to the day set for hearing. *Jasmer et al. v. Molka*, 8 L. D., 241.

Had McClellan insisted on filing his affidavit when he first appeared at the local office, he would doubtless have had the better right as a contestant—as shown by subsequent developments—the entryman making default. But he appears to have adopted the plan suggested by his attorney, and waited until the year had fully expired. In the meantime, Crane filed his contest.

The hearing was fixed for a time long after the expiration of the year in which the default was charged, and the notice could not have been served until the expiration of that year.

Since "jurisdiction vests in the local officers by service of notice and not by the affidavit of contest" (*Seitz v. Wallace*, 6 L. D., 299), the contest was not prematurely brought. See *Hoffman et al. v. Gerould* (13 L. D., 124).

I find no sufficient grounds for disturbing the judgment appealed from, and the same is accordingly affirmed.

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#### CERTIORARI—APPEAL—CONTEST—SWAMP SELECTIONS.

##### STATE OF OREGON.

The authority of the Commissioner of the General Land Office to order a hearing may be properly reviewed on application for certiorari.

A question that involves the jurisdiction of the Commissioner in the disposition of public land is properly the subject of appeal.

During the pendency of an investigation instituted by the government to determine the character of lands covered by swamp selections, contests against such selections should not be accepted, nor hearings ordered thereon.

A contest against a swamp selection of land reported as of the character granted, should not be allowed except upon a *prima facie* showing that would warrant cancellation of the selection if the allegations were proven.

*Secretary Noble to the Commissioner of the General Land Office, September 10, 1891.*

The matter of list No. 5 of the Oregon swamp lands has been repeatedly before this Department, and is now here on certiorari. It is necessary for a proper consideration of the matters involved to rehearse a

large part of the history of that list and the rulings of the Department in connection therewith.

The provisions of the swamp land grant of 1850 were extended to the State of Oregon by the act of March 12, 1860 (12 Stat., 3). In the administration of said grant it was agreed, with the approval of the Secretary of the Interior, between the State of Oregon and your office, that the rights of the State under said act should be determined, through an examination made in the field, by two agents, one of whom was to be appointed by each party. Your office appointed Agent Ankeny, and the State, Whittaker. (3 L. D., 334.) Of the tracts reported upon by the agents, 97,641.24 acres, in the Lakeview land district, were embraced in list five, which was subsequently approved on September 16, 1882, by Mr. Secretary Teller, and which approval was duly certified to the governor of Oregon and to the local land office. Subsequently, it being alleged that said approval had been brought about through the fraudulent action of Special Agent Ankeny, Secretary Lamar, on January 20, 1887, laid a rule upon the State to show cause why the entire list should not be canceled. (5 L. D., 374.) After considering the showing made by the State, in response to said rule and the evidence before him, Secretary Vilas, on December 27, 1888, declared that the "certification" of list number five is "revoked and canceled, and that list entirely set aside." He then directs the Commissioner of the General Land Office to prepare another list, in which will be included such lands only as are "unquestionably shown to be swamp." Such lands in list five as are "satisfactorily disclosed" not to be swamp were to be restored "to the public domain." Such other lands included in said list as are "doubtful" in character are to be included in another list, and two trustworthy agents are to be detailed to carefully and thoroughly examine them, with a view to determine their true condition at the date of the granting act in 1860; and in making this examination opportunity is to be afforded the State and her grantees to be represented. (7 L. D., 572.)

Under this decision 11,962.38 acres were patented to the State as "unquestionably shown to be swamp;" 20,000 acres were restored to the public domain as not being swamp land; 58,000 acres were declared doubtful and Special Agents Armington and Roe were detailed to examine and report upon them. It is in relation to this last list that the interposition of the Department is again invoked.

Upon the report of Special Agents Armington and Roe, in October, 1889, your office rejected the claim of the State to some 5,000 acres, not reported as swamp and overflowed, and approved to it 37,742.67 acres which were reported as swamp lands. In addition, there are about 16,000 acres also reported as swamp lands by said agents, of which approval to the State is refused, because of alleged settlements and entries made thereon since the date of the order of cancellation by Secretary Vilas, and in relation to which tracts hearings have been ordered at the request of the settlers, to allow them to show that said lands are

not swamp lands as reported. From the action of your office in ordering these hearings an appeal was taken by the State and its transferees, but your office refused to entertain said appeal, and, on application here, you were directed, on January 19, 1891, to certify to this Department the papers in the case. (12 L. D., 64.)

The matter here to be inquired into is, your authority to order the hearings, as before stated. If you had such authority, then the State was not entitled to appeal from the order and the present proceedings should be dismissed; conversely, if without authority you directed the hearings, certiorari was properly ordered upon refusal of your office to entertain the appeal of the State.

The question here presented seems to be entirely jurisdictional, and therefore was properly the subject of appeal. It involves not merely an appeal from the order directing hearings to be had, but also the right of your office to permit filings and entries upon the lands in question, as well as the refusal to certify those lands to the State after their return by the agents as swamp lands.

It needs not the citation of authorities to sustain the assertion that jurisdictional questions may be raised at any time, and when raised must be taken notice of.

Without going at length into a discussion of all the arguments presented by counsel for the State and its assignees, I am of the opinion that none of the entries or filings referred to should have been allowed, and consequently that the hearings in relation thereto should not have been permitted.

When this same matter was here in 1886, there were applications by alleged settlers, as now, to contest the State selections. Your office treated these applications as conferring absolute rights of contest; whilst the State strenuously denied that right, and insisted that, inasmuch as the Department and State having agreed upon one plan of ascertaining the character of lands in question, the former was estopped from employing any other agency. In relation to this contention, my predecessor, Mr. Lamar, was of the opinion that there was no provision in the act authorizing such contests, but they might be allowed in furtherance and aid of the duty devolved upon the Secretary to determine the character of the lands, and not from any absolute right given by law. (5 L. D., 31, 35.)

Accepting this as the correct rule, I do not see that in the present instance the Department can be aided by the proposed contests. The tracts in question were first reported as swamp land in 1880 by Special Agents Ankeny and Whittaker, then by Special Agent Shackelford, and again by Special Agents Armington and Roe.

It seems to me, in view of the long years during which said list has been pending before this Department, and during which the character of said tracts have been under investigation by all the instrumentalities at its command, the personal examination and investigation of its agents,

specially selected under the direction of the Secretary because of their fitness for the investigation, the concurring report of all the agents as to the swampy character of the land, most of it being located, as shown by the map adjacent to, if not parts of, Lakes Harney and Malheur, and shown also by the careful examination of Special Agents Armington and Roe, and testimony taken in relation thereto, to be clearly lands to which the State is entitled under said grant—in view of this, I think a strong *prima facie* case, at least, should be presented before a contest should be permitted for the purpose of again investigating that which has been so often investigated, always with the same result.

Surely there must be some end to investigation. Even that is not to be permitted continuously under the mere claim of seeking to find the right. The indefinite postponement of the enjoyment of a right is the practical denial of that right. If, after all this investigation, the present contests be permitted, upon their defeat, why may not others like them be also permitted? In the case of an ordinary land entry, it is not permitted that the entryman shall be twice vexed by a contest on the same grounds. Why should the State or its assigns, in the present instance, be again vexed and required to furnish proof for the fourth time of what has been three times before decided in its favor? The rights of the State under a congressional grant are of equal dignity with those of the settler, both have their common origin in the law, and both stand equal before the law.

Where the government has initiated an investigation against an entry of the public lands under any of the settlement laws, it is not permitted that any other contest should be instituted against that entry pending the investigation, or even afterwards, on the same grounds. (*McAllister v. Arnold*, 12 L. D., 520.) But here, pending investigation by the government, contests have been initiated as to the very matter thrice investigated.

In directing the papers in this case to be certified up, it was said :

it is the duty of the Secretary to determine what lands are of the description and character granted by the act, his office being the sole tribunal charged with the duty of passing upon that question. (12 L. D., 64.)

This being so, the reason for the rule, affirmed in the *McAllister* case, applies much more strongly here, as the Secretary alone must determine the character of the land, and he has not invited these contests to aid him, but selected other agencies for that purpose.

In the certiorari case it was also said :

contests should not be allowed, unless the applicants present such a *prima facie* showing as to the character of the land as would warrant the rejection of the claim of the State, if the allegations were proven. (Ib.)

The affidavits of contest in the record make no such *prima facie* showing. The only allegation contained in them is to the effect that the land sought to be contested is now dry and fit for cultivation. This sole allegation is followed by the statement of affiant, "that such, I

believe, was the character" of the tract at the date of the swamp land grant.

This last statement is the mere expression of an opinion, and does not even amount to an allegation or charge. I do not think that the affidavits present such a case as to justify the ordering of hearings herein.

Entertaining these views, your action, permitting the contests and ordering hearings therein, is reversed; said contests are dismissed, and all entries and filings on the lands in controversy are canceled; and you are directed to cause to be prepared clear lists of said lands and send to me that the same may be approved to patent.

Since the papers in this case were transmitted to this Department, application has been filed here, in behalf of L. B. Applegate, claiming as assignee of the State, for a re-examination of certain lands, in respect to which, under the report of the special agents, you have rejected the claim of the State. For the reasons heretofore stated, as to the other contestants, I must deny the hearing asked for in behalf of Mr. Applegate.

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#### OKLAHOMA TOWNSITES—TOWN LOTS—PRACTICE.

##### BYINGTON *v.* TOWNSITE TRUSTEES.

An application for town lots, in proceedings before townsite trustees, should set forth specifically the claim of the applicant, and show *prima facie*, that he is entitled to the lots in question.

The failure of an applicant for town lots to properly present his claim before the board of townsite trustees, will not preclude the amendment of his application, nor the subsequent initiation of contests against adverse claimants.

*Secretary Noble to the Commissioner of the General Land Office, September 10, 1891.*

On October 6, 1890, Le Grand Byington filed with Townsite Trustees, Board No. 2, at Oklahoma City, Oklahoma, his applications for a large number of lots, viz., 74.

The applications recite

that his claim is based upon the following grounds: before the said trustees acquired title to said land, this applicant staked and entered upon said lots for the purpose of improvement, trade and business, and still holds the same for such purposes; that there is no other occupant in the possession thereof, so far as he knows, and that he is a citizen of the United States, over age and an inhabitant of said city. That he did not enter upon said lots nor into said Territory in violation of the act of Congress, approved March 2, 1889, nor of the proclamation of the President of the United States issued thereunder,

and said applications are supported by affidavits, the jurats of which read as follows:

Le Grand Byington being duly sworn, on his oath states, that he executed the foregoing applications and knows the contents thereof, and that the matters and things therein stated as to his entry into said territory are true.

The board of trustees rejected the applications on the following grounds :

1st. The application does not state facts sufficient to entitle him to a hearing;

2nd. He has failed to show qualifications which entitle him to become a legal occupant of said lots;

3rd. He has failed to show by affidavit that he is an occupant of said lots or any of them.

4th. The said applicant has presented no valid reason why occupants of, and applicants for said lots, should not acquire title;

5th. The applicant is a stranger in interest.

By your decision of March 30, 1891, you affirmed the action of the board of trustees. In said decision you state,

the plat of that portion of the townsite of Oklahoma City embracing the SE.  $\frac{1}{4}$  of Sec. 33, T. 12 N., R. 3 W., upon which tract the lots in question are located, as approved by your board, September 6, 1890, in conformity with paragraphs five and six of the circular of instructions issued by the Department, shows that you did not find the appellant to be the owner of any of the lots applied for. On the contrary, said plat does show that you found the majority of said seventy-four lots to be owned and possessed by various other parties.

There is nothing in the record before me throwing any light on this subject, but I assume the facts are correctly stated by you, but as expressly provided by section 6 of the instructions issued June 18, 1890 (10 L. D., 666), this finding is not conclusive as to ownership.

It is further stated in your decision that

these applications were properly rejected by you for the reasons above quoted, and, as the majority of the lots had been designated upon the town plat as belonging to other parties, the proper course for the appellant to have pursued would have been to file an amended application for the few unclaimed lots in the list above given, on or prior to the day designated "to set off to persons entitled to the same according to their respective interests, the lots, block, or grounds to which each occupant thereof shall be entitled" as provided by the eighth paragraph of said instructions, and to initiate contests against the claimants of the remainder of said lots in the manner and under the terms and conditions prescribed in said instructions and the circular letter explanatory thereof issued by the Department July 10, 1890.

On the receipt of your decision, Byington, on April 4, 1891, addressed the following application to the board of trustees :

In deference to the decision of the Commissioner of the General Land Office, of March 30, 1891, holding insufficient my applications for allotment and deeds, which were filed in your office October 6, 1890, I hereby apply to your board for leave to amend said applications, by attaching thereto full affidavits and otherwise, and to refile the same as amended for hearing thereon.

Byington states that the board of trustees refused to receive or file the above notice or to entertain it for any purpose; therefore on April 6, 1891, he filed an appeal from your decision.

I see no error in your decision, on the other hand, however, the record fails to disclose any reason why Byington should not be allowed to present his claim in a proper manner, before the board of trustees, and the

case be determined upon its merits. The law and the instructions of the Department thereunder, point out the way in which all claims, conflicting and otherwise, may be determined.

The fact that Byington may have failed to present his applications in a correct manner should not deprive him of the right of amending the same, and of a determination of his rights upon their merits.

You will, therefore, notify Mr. Byington that he will be allowed to file amended applications and to initiate contests in case of adverse claims, in strict accordance with the instructions of the Department, and upon his failure to thus act, his applications will be dismissed, and the case closed.

You will also at the same time, give proper instructions in the premises to the board of trustees.

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PRACTICE—NOTICE OF DECISION—MOTION FOR REVIEW.

HOLLOWAY'S HEIRS *v.* LEWIS.

The time within which a motion for review must be filed, except in case of newly discovered evidence, begins to run from the date when notice of the decision is first received; and notice to one of the attorneys for a party is notice to such party.

The affidavit required under rule 78 of practice accompanying a motion for review filed out of time, cannot be taken in aid of a previous motion that is not thus supported.

Motions for review based on newly discovered evidence should be supported by the affidavits of the witnesses who will testify to the alleged newly discovered facts, or satisfactory reasons for their non-production should be given.

Review will not be granted on the ground of newly discovered evidence unless it is made to appear that the alleged discovery was acted upon without unnecessary delay, and the proof of diligence must be clear.

*Secretary Noble to the Commissioner of the General Land Office, September 10, 1891.*

On January 9th. 1891, this Department rendered a decision in the case of Heirs of Nancy K. Holloway *v.* Frank B. Lewis, involving their respective claims to the N. W $\frac{1}{4}$  of Sec. 25, To. 9 N. R 33 W., San Francisco, California land district in favor of the latter.

On March 17th. M. D. Hyde as attorney for the plaintiffs filed in the local office a motion for review of said decision based upon alleged newly discovered evidence, and on March 23d. the opposing attorney, a motion to dismiss said motion for review.

On March 25th. Messrs. Phillips and McKenney of this city, as attorneys for the plaintiffs, filed a motion for review of said decision. These papers were transmitted to this Department by your letter of April 7th., and on June 15th. the attorneys for the defendant filed a motion to dismiss the motion for review filed by Phillips and McKenney, because not filed within the time prescribed by the rules of practice.

It is admitted that neither of the motions for review was filed within the time prescribed by the rules of practice after notice of said decision was given the attorneys resident in this city, and that under the rule laid down in the case of *Peterson v. Fort*, (11 L. D., 439), that notice to any one of the attorneys is notice to the party, both were too late except so far as they are based upon newly discovered evidence. It is urged however, that the ruling in the case of *Peterson v. Fort*, is a harsh one, calculated to do injury and injustice to parties litigant. It is not shown, or even asserted, that in this particular case the motion might not have been filed within the time prescribed and hence no good reason appears for changing said rule or making this case an exception. The rule was well considered at the time of its adoption, seems well calculated to expedite the business of the Department, and is not in my opinion liable to inflict any unnecessary hardship upon any one. At any rate until it shall be shown more clearly than in the case now presented, that the administration of that rule does work an injustice or inflict unnecessary hardships, I do not feel inclined to revoke or modify it.

The motion filed in your office on March 25th. by Messrs. Phillips and McKenney does not purport to be based upon newly discovered evidence, and it is therefore hereby dismissed because not presented within the time prescribed by rule 77 of the Rules of Practice. The motion for review filed in the local office, purports to be based in part upon newly discovered evidence and so far as that point is concerned, time did not run against it.

This motion is not accompanied by any affidavit, as required by rule 78, that it is made in good faith, and not for the purposes of delay. The attorneys in an argument subsequently filed, make this statement.

The affidavit of good faith, accompanying the motion for review, was sworn to by Mr. M. D. Hyde. If the jurat is not properly signed, that is a clerical omission which is supplied by the accompanying certificate of the receiver. Besides this, the proper affidavit accompanies the motion filed by Messrs. Phillips and McKenney, so that, in any event, the motion is properly supported.

I do not, however, find among the papers any certificate of the receiver which supplies such omission nor can the affidavit attached and relating to the other motion for review, which is not, as hereinbefore stated, entitled to consideration, be taken as supporting this motion.

It is further objected that it is not shown or even alleged that this evidence, claimed to be newly discovered, might not with reasonable diligence have been discovered and produced at the trial, and that the affidavits of the witnesses who will testify to these new facts are not submitted.

In answer to these objections it is said.

We do not find in the Rules of Practice any requirement that the affidavit must be corroborated, that it must state that the evidence could not have been earlier procured or that it must show that it would be material in changing the decision.

Rule 76 of the Rules of Practice declares that motions for review "will be allowed in accordance with legal principles applicable to mo-

tions for new trials at law," and the requirements to be observed in presenting these motions have been fully set forth in numerous decisions of this Department.

To sustain a motion for review on the ground of newly-discovered evidence, it must be shown that the party presenting such motion did not know of said evidence at the time of the trial, and that it could not have been discovered by the exercise of proper diligence. *Bishop v. Porter* (3 L. D., 103.), *St. Paul, Minn., and Man. Ry. Co. v. Morrison* (4 L. D., 509), *Weldon v. McLean* (6 L. D., 9.), *Sutton et al v. Abrams* (7 L. D., 136), *Kelley v. Moran* (9 L. D., 581), *Collier v. Wyland* (10 L. D., 96), *Cobby v. Fox* (10 L. D., 483), *Connelly v. Boyd* (10 L. D., 849).

No attempt has been made to present the facts required by these decisions to be shown in support of such motions as the one now under consideration.

In motions for new trials based on newly discovered evidence it must be made to appear that the alleged discovery was acted upon without unnecessary delay and the proof of diligence must be clear. *Weldon v. McLean* (6 L. D., 9.) *Kelley v. Moran* (9 L. D., 581), *Collier v. Wyland* (10 L. D., 96), *McKinnis v. State of Oregon* (11 L. D., 618).

Although more than three years had elapsed between the date of the trial in this case and that of the presentation of this motion, no statement is made as to the date of the discovery of the alleged new evidence nor are any facts given that would enable this Department to find that diligence was used in the premises.

A motion for review on the ground of newly discovered evidence will not be allowed if such evidence is merely cumulative in character. *Caledonia Mining Co. v. Rowen* (on review) (2 L. D., 719). *Waldon v. McLean* (6 L. D., 9), *Davis and Pennington v. Drake*, (6 L. D., 243), *Anderson et al v. Byam et al* (9 L. D., 295), *Kelley v. Moran* (9 L. D., 581), *Cline v. Daul* (11 L. D., 565). *Tucker v. Nelson* (12 L. D., 233).

Nearly, if not all, the evidence now proposed to be submitted would be cumulative in character and some of the facts which it is said can now be established, such as that the ownership and possession of said tract by Mrs. Holloway were recognized in the neighborhood, are distinctly stated in the decision complained of to have been established.

Motions on the ground of newly-discovered evidence should be supported by the affidavits of the witnesses who will testify to the alleged newly-discovered facts, or satisfactory reasons for their non-production should be given. *Hilliard on New Trials Chap. 15, Secs 35 and 37. McKinnis v. State of Oregon* (11 L. D. 618).

The affidavits of the witnesses who will give the testimony now sought to be introduced are not filed nor are the names of those witnesses given. If it was impossible to obtain such affidavits that fact should have been set forth and the reasons therefor given so that it might have been determined whether the failure to file the affidavits was excusable.

For the many defects and failures to comply with the requirements of the rules and regulations applicable to such matters, said motion for review is denied and the papers are herewith returned.

OKLAHOMA TOWNSITE—PRACTICE—PUBLIC RESERVATION.

HOLLENBECK *v.* TOWNSITE TRUSTEES.

Under the rules of procedure adopted for the disposition of claims presented before townsite trustees, an appeal from the Commissioner must be filed within ten days from notice of the decision.

An applicant for a town lot will not be permitted to take land that has been previously surveyed and set apart by the townsite authorities for a public purpose.

*Secretary Noble to the Commissioner of the General Land Office, September 10, 1891.*

By your letter of August 7, 1891, you transmitted the appeal of William Hollenbeck from your decision of June 9, 1891. Said decision sustained the action of Townsite Trustees, Board No. 2, in rejecting the application of Hollenbeck for a deed for "Court in Block 51" of Oklahoma City, Oklahoma.

In transmitting the appeal of Hollenbeck the board of trustees state that "notice of your decision was given said Hollenbeck June 12, 1891, as is shown by acceptance of service on original decision and acknowledgment of receipt of copy thereof by Charles H. Eagin, attorney for Hollenbeck." The appeal to this Department was filed July 17, 1891.

As said appeal was not filed within ten days from date of receipt of notice of your decision, as required by section 13, of the instructions issued under the act of May 14, 1890, (10 L. D., 666), the same might be dismissed and the case thus disposed of.

But aside from the defect in the appeal, there is no merit in his claim. The townsite of Oklahoma City, was surveyed prior to his settlement; he admits that "said tract of land for which he asks a deed was by the then existing streets and alleys at the time of his settlement, the same as its present relation to the streets and alleys as since adopted by the board of townsite trustees, but that at the time the said tract of land was not occupied by the city authorities, nor ever had been, for the city for any purpose whatever."

We thus find from his own statement that he is seeking to obtain title to a tract of land which the townsite authorities had surveyed and designated as a public court, and his contention that the townsite authorities are seeking to appropriate a tract claimed by him, is not founded on a fact, but on the contrary he is seeking to appropriate to his own use, a tract of land which had been reserved for the use of the public, by said authorities, hence the action of the board of townsite trustees in rejecting his application, was correct.

This decision is not to be construed by you as an approval of the doctrine announced in your decision that "the action of the board of townsite trustees in making or adopting a survey and plat of a townsite, is not subject to review and approval by your office or the Department." Should a case come before you where that question is properly raised, it must be determined upon its merits.

PRACTICE—REVIEW—INDIAN OCCUPANCY.

MISSION INDIANS *v.* WALSH. (ON REVIEW).

A question as to the regularity of a trial will not be considered when raised for the first time on motion for review.

Land subject to Indian occupancy cannot be taken under the settlement laws, and an executive order creating a reservation that excludes the major portion of such land from the boundaries thereof does not operate to confer settlement rights that could not otherwise be obtained.

*Secretary Noble to the Commissioner of the General Land Office, September 10, 1891.*

This is a motion by the attorney for John J. Walsh for a rehearing, reconsideration and review of the departmental decision of May 16, 1891, (12 L. D., 516), in the case of *The Mission Indians v. said Walsh*, involving lot 1, the NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec. 25, the SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  Sec. 24, T. 10 S., R. 3 E., and the SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 19, T. 10 S., R. 4 E., Los Angeles, California.

It appears that on March 21, 1888, Walsh filed pre-emption declaratory statement, alleging settlement March 1, 1888; that April 25, 1888, Indian Agent Preston, on behalf of the Mission Indians, filed a protest against said filing, alleging that said "Indians were then occupying said tract and had been in uninterrupted possession of the same for many years;" that after a hearing, had November 21, 1888, at which both parties submitted testimony before the deputy county clerk, the local office finding said allegation sustained, recommended the cancellation of said filing; that on appeal by Walsh your office affirmed said ruling and held the same for cancellation and that on further appeal by Walsh, this action was affirmed by the decision that I am now asked to reconsider.

It is alleged in the motion—

- 1st. That said decision is based upon a mistake of the law and the facts.
- 2nd. That it is based in part upon false testimony.
- 3rd. That we produce newly discovered evidence, not known at the trial of said case, showing that the Indians did not occupy or place any improvements on the land.
- 4th. Having acquired a valid right under the public land laws, Walsh is entitled to the land by said laws, and also by the act of January 12, 1891.

The evidence thus claimed as newly discovered is contained in affidavits of S. L. Ward, Chatham Helm and the said Walsh, filed with the motion.

These affidavits set out that one Keele settled on the land about 1866, cleared and cultivated fifteen or sixteen acres, built a house, planted an orchard of pear, apple and peach trees, set out some grape vines and remained thereon until 1876, when he died; that the Indians neither improved nor resided upon the land; that all the improvements thereon prior to Walsh's settlement, were put there by Keele; that after Keele's death the said Indians were "in the habit of collecting the fruit and grapes on the trees and vineyard of said Keele;" that an examination of the land, made May 6, 1889, showed some sixteen acres enclosed of which only two or three had any appearance of recent cultivation; that the fruit trees and grape vines were "crowded" upon one acre, and that besides Walsh's house, there was a shanty made of rushes, apparently uninhabited for a long time.

The use and occupancy of the land by said Indians prior to and at the time of Walsh's settlement, is the issue upon which the case has been three times decided against him. The affidavits referred to have been filed to show that such use and occupation did not exist. The matters therein set out and heretofore outlined are therefore simply in conflict with some of the testimony already in the case, and cumulative as to other testimony therein, and consequently can form no basis for review. *Anderson et al. v. Byam et al.* (9 L. D., 295); *Hilliard on New Trials*, 2d Ed., p. 499.

The allegation that the said decision was made in part "upon false testimony," is apparently based upon Walsh's said affidavit to the effect that the deputy clerk refused at the trial to let him offer certain rebutting testimony. The regularity of said trial being unassailed, either on appeal from the local or your office, such question can not be raised by motion for review.

Concerning the allegation that Walsh acquired a "valid right under the public land laws" it is sufficient to say that under the circular (cited in said decision) of October 26, 1887 (6 L. D., 341), he could in the premises acquire no such right.

By said circular the Department directed that "lands occupied by Indian inhabitants in any part of the public land, states and territories," were not subject to entry.

The foregoing is an established rule of the Department and the land involved has been found subject to Indian occupancy. This being so the President's order of May 6, 1889, (See Report Com'r Indian Affairs 1889, p. 479, referred to by counsel), which made for said Indians a reservation excluding the major part of Walsh's claim, did not operate to give him any right that he could otherwise not obtain.

The act of January 12, 1891, (26 Stats., 712), under which it also claimed that Walsh acquired a valid right creates (sec. 2) a commis-

sion "to select a reservation for each band or village of Mission Indians residing within said state," and provides (section 3), in effect that unless by acquiescence existing rights under the public land laws shall not be disturbed. Walsh, as stated having acquired no such right, his claim is not within the purview of said act. The motion is denied.

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PREFERENCE RIGHT—SECOND CONTEST.

PADGETT *v.* BELL.

The failure of a successful contestant to exercise the preference right of entry within thirty days from notice of the decision will not defeat such right, where the delay is occasioned by the local office referring the matter to the Commissioner for instructions.

A contestant who has obtained a judgment of cancellation as to part of an entry, may waive the preference right thus secured and attack said entry in its entirety on new grounds, or, exercise such right, and then proceed against the remainder of said entry.

The pendency of a contest does not excuse non-compliance with law on the part of the entryman.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 11, 1891.*

This record presents the appeal of John T. Bell from your decision of February 27, 1890, in the case of Elijah Padgett *v.* said Bell, involving the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  Sec. 2, and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 11, T. 7 S., R. 13 E., of the Hailey district, Idaho.

Without going into the evidence which was offered upon the trial of the first contest, the facts as disclosed by the record appear to be that the defendant Bell, on the 26th of March, 1885, made desert land entry for the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 2, and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 11, T. 7 S., R. 13 E., and on the 16th of April, following, he made homestead entry for the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and lot 1 of Sec. 2, and the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 11, in said township.

On May 22, 1885, the plaintiff made application to make homestead entry for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said Sec. 2, and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of said section 11, which was rejected by the local office for the reason that it conflicted both with the homestead and desert land entry of Mr. Bell. On the following day, Mr. Padgett initiated a contest against each of said entries, alleging prior settlement and residence upon the land embraced in his application.

Thereupon a hearing was ordered by the local officers, at which both parties appeared and submitted their evidence and after considering the testimony, the register and receiver awarded the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 11, and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 2, to Padgett, and gave Bell the tract which he had homesteaded.

Both parties appealed from this judgment to the Commissioner of the General Land Office, who affirmed the action of the register and receiver and upon the case being still further prosecuted by appeal to this department, the judgment of the Commissioner was affirmed June 20, 1889, 8 L. D., 630, with the direction that

If Padgett shall exercise his preference right to enter the eighty awarded him within thirty days from the receipt by him of notice of this decision, Bell's desert land entry to that extent will be canceled, otherwise it will remain intact.

Each of the parties was notified of this decision on July 9, 1889, and on the 1st of August, following, Padgett applied to enter all the land embraced in Bell's desert land entry. This application was rejected by the register and receiver on the ground that the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 2 was not involved in the contest, nor included in the judgment of the department. Thereupon he filed an affidavit of contest against Bell's entire desert entry, alleging a failure to reclaim the land; "that none of it had been irrigated and the same was and still is in a desert condition."

Thereupon the register asked for instructions as to whether the application and affidavit of contest of Padgett would be considered a compliance with terms of the Secretary's decision. In the meantime, notice for the second contest initiated by Padgett was issued, fixing the hearing for September 16, 1889.

On the 28th of August, prior thereto, the Commissioner, in response to said letter of inquiry from the register, instructed the local officers that Padgett must enter the eighty acres awarded him within the time specified in the Secretary's decision in order to obtain a preference right thereto, or if he so elected, he could waive the right of entry under the said decision and trust to a successful termination of his second contest, in which event, he would be allowed to enter the entire tract covered by Bell's desert land entry, provided he proved a failure as charged.

Upon the day set for the hearing of this contest, both parties appeared in person and by counsel, but before proceeding to trial, Padgett elected to make homestead entry for the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 2, and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 11, the land awarded him by said decision, and dismissed his second contest as to that tract.

Bell protested against this action of the local office and objected to the same, upon the ground that Padgett did not make said entry within the time allowed by said decision, but the objection was overruled and the entry allowed.

Thereupon the parties went to trial upon the charge of non-reclamation, so far as it related to the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section 2, submitted their respective proofs, which is sufficiently and fully set out in your decision, and need not be repeated here. Considering the same, the local officers found that the tract had not been reclaimed, and recommended that Bell's entry thereof be canceled.

Thereupon he took an appeal to your office, where, on February 27th, 1890, you affirmed the judgment of the local officers, both in allowing Padgett's homestead entry and in finding that Bell had failed to reclaim the forty acres in contest and holding his entire desert land entry for cancellation.

From this judgment, he appeals to this department, specifying ten grounds of error, which are supported by argument of appellant's counsel. In brief, the contention is, relative to the allowance of Padgett's homestead entry,

1. That not having completed his entry within the time required by the order of the Secretary, he forfeited his right, and the register and receiver improperly allowed the same ;

2. That by initiating a second contest against Bell's entire desert land entry, he waived the preference right granted him by the Secretary for the eighty acres secured by the first contest.

3. As to the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section 2, that the entryman prior to the initiation of contest had taken sufficient steps to show that he attempted in good faith to reclaim the tract and that he ought not to be held to make further improvements looking to the reclamation thereof during the pendency of the contest, hence that tract was improperly awarded to Mr. Padgett.

In my judgment, none of these alleged errors is well taken. The delay was occasioned in part at least, by the local officers referring the matter for your instructions. Under such circumstances, the order of the Secretary should be held to be merely directory and not to have the arbitrary effect of destroying Padgett's preference right, or to work either a waiver or forfeiture of his claim. There is nothing in the record showing that there was any intent on his part to abandon his success, but on the contrary, there was a manifest desire to reap the full benefit of the award, as well as the forty acres now in dispute. He appeared as soon as notified of the ultimate conclusions of the Commissioner and exercised the right therein given him. He had fairly earned this land by contest. All the tribunals examining the evidence, concurred in the findings that Bell had failed to comply with the law and to say that because Padgett did not enter this land within thirty days provided by the order of the Secretary, he should therefore be sacrificed, is to promulgate a rule which, in my judgment, does violence to the rights of the contestant. Neither do I think that the fact that he included Bell's entire desert land entry in his second contest prior to the time that he was notified by the Commissioner that he must either enter the eighty, or await the result of the second contest, should be held as a waiver of his right to enter the eighty acre tract successfully contested. I do not see that Mr. Bell is in a position to complain. He certainly had no exclusive right to enter any portion of the public domain under the desert land law and allow it to remain idle, without making any effort to reclaim the same, and when Mr. Padgett desires

to show his neglect, that he should be charged with greed and condemned for his effort to secure the cancellation of a desert land entry which had failed for non-compliance with the law, and have the title vested in himself, if the evidence would justify him in doing so. In my judgment, it was proper for him, when he ascertained the ultimatum of the department, to elect which remedy he would pursue and having chosen to enter the eighty that he was very properly permitted to dismiss his contest against the same for the reason that there is no necessity for again going over the ground which he had once gone over successfully and that he might secure his right as to the forty which had not theretofore been in the controversy. As to that, as heretofore suggested, the evidence set out in your opinion which is justified by the record, fully sustains the claim of the contest and that the entryman had failed to reclaim the forty acre tract in accordance with the provisions of the desert land act. As to this tract, in his brief he begs the entire question, practically admitting that he has not complied with the law and had done nothing looking to the reclamation of the land during the pendency of the contest, and insists upon general principles, that he should not be required to do so. He says :

Shall he then be required to go ahead with his improvements, construct lateral ditches, and spend hundreds of dollars, perhaps his last cent, in reclaiming a piece of land for the benefit of another? Such a requirement is manifestly unjust and erroneous in its very essence. It is held that final proof should not be submitted during pendency of contest proceedings, and that during the pendency of an appeal the local officers should take no action affecting the disposition of the land; but still, all during these successive adjudications in the first contest against the validity of his entry, the Honorable Commissioner would have him continue in his work and expenditure of money therefor, for the almost certain benefit of another party.

If the entryman has acted in good faith in this matter and is conscious of having complied with the law, why should he be impressed premonitorily with the fact that if he had improved this tract during the pendency of the contest, the improvements would almost certainly be for the benefit of another party. While it might be a wholesome rule to adopt, that during the pendency of a contest, neither party should be permitted to improve the land, yet it has been the universal rule of this department, so far as my knowledge goes, to hold that during the pendency of the contest, the entrymen will not be permitted to suspend his improving the claim. *Byrne v. Dorward*, 5 L. D., 104; *Swain v. Call*, 9 L. D., 22; *Cyr v. Fogerty*, 10 L. D., 616; *Wills v. Bachman*, 11 L. D., 256.

It would seem, however, that an entryman who is convinced that he has complied with the law, would much prefer continuing his improvements and reclaiming the land, to allowing it to lapse into a state of nature, and his ditches to fill up by the elements during the years that the contest is pending.

From an examination of this case, I am impressed that Mr. Bell is relying more upon what he believes to be sharp, keen cut, technical

rules than the merits of his cause, and is seeking to protect his failure to comply with the law with what should be refined rules of practice and nice spun theories of waiver, which do not meet with favor, either in the law or equity, or in a broad, liberal administration of the public land laws. Had he manifested good faith in his attempted reclamation of this tract and performed acts looking to a consummation thereof, which the department, upon an examination of the record, could observe, then there might be some excuse for his claim.

Believing that substantial justice has been done by your judgment, and that there is no error therein of which Mr. Bell can justly or fairly complain, the decision appealed from is affirmed and the record herewith returned.

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SOLDIER'S ADDITIONAL HOMESTEAD—APPROXIMATION.

RICHARD DOTSON.

The right to make a soldier's additional homestead entry is personal and can not be assigned.

A soldier's additional homestead entry can not be allowed for a tract the area of which when added to the land covered by the original entry exceeds one hundred and sixty acres by a greater amount than the area required to make up the deficiency.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 12, 1891.*

I have considered the appeal by Thomas H. Brents, attorney in fact for Richard Dotson, from your office decision of June 25, 1890, holding for cancellation soldier's additional homestead entry No. 3499, final certificate No. 1161, made August 31, 1885, for the NW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec. 31, T. 10 N., R. 39 E., Walla Walla land district, Washington.

This entry is made under section 2306 of the Revised Statutes, which provides that

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.

On February 27, 1878, your office certified to the fact that Richard Dotson, who made original homestead entry No. 2908, at Springfield, Missouri, dated November 6, 1869, containing 142.22 acres, is entitled to an additional homestead entry of not exceeding 17.78 acres, as provided in section 2306 of the Revised Statutes, and upon the face of the certificate is the following note:

This certificate cannot be used in the entry of any subdivision of land except where the excess shall be less than the area herein certified to.

Notwithstanding this restriction, the local officers at Walla Walla permitted the entry to be made, as before described, covering forty acres.

On April 8, 1878, Dotson appointed J. Vance Lewis, of Washington, D. C., his true and lawful attorney, giving him the right in his (Dotson's) name, place and stead, to make application for and locate any land that he (Dotson) may be entitled to enter under the provisions of section 2306, and further authorizing him to receive duplicate certificate of such entry, and to receive and receipt for patent issued for the land.

On May 1, 1878, Lewis appears to have executed a power of substitution in blank, upon the back of said power of attorney, and the name of Thomas H. Brents, of Walla Walla, Washington Territory, seems to have been afterwards inserted and the entry under consideration would seem to have been made by him, although the register failed to sign the application, or to fill in the space left for the name of the party filing the same.

Claimant's affidavit was executed March 1, 1888, and therein he swears—

that this additional entry, save as hereinafter declared, is made for my own exclusive benefit . . . . that I have not made, nor agreed to make, any . . . . except by the powers of attorney made and acknowledged by me on the 8 April, 1878.

This clearly shows to my mind, that claimant had assigned his right to make a soldier's additional entry, and that the present entry was not made for his benefit.

It has been repeatedly held that this right of entry is a personal one and can not be transferred.

It further appears that the acreage covered by this entry when added to that embraced in the original entry is largely in excess of one hundred and sixty acres, and under the general rules of approximation, i. e., where the excess above one hundred and sixty acres is greater than the deficiency would be should a subdivision be excluded, this entry must be canceled.

In the case of Miles Schoolcraft, 2 C. L. O., 99, the Commissioner instructed the officers at Eau Claire, Wisconsin, that under section 2306, a party is entitled to enter so much land as added to his original entry shall not exceed one hundred and sixty acres—

but where a party applies to enter a tract or tracts of land, the area of which added to that of his original entry shall exceed one hundred and sixty acres by a greater excess than the area it would require to make up the deficiency, the application should be rejected.

This rule seems to have been uniformly followed by your office, as is evidenced by the note placed upon the face of the certificate, before referred to.

The appeal in this case seems to be based upon the ground that, in answer to a letter from Messrs. Drummond and Bradford, your office, under date of May 9, 1887, informed those gentlemen that Dotson's entry will be submitted, in regular order of business, to the board of equitable adjudication for confirmation, and that any question as to the

validity of the entry was thereby adjudicated. This was not a decision, but a mere letter of information, intending to give the status of the entry.

The land had been included in the indemnity withdrawal for the Northern Pacific Railroad Company, and was restored December 15, 1886, and it was for this reason that it was deemed necessary to send the entry to the board for confirmation.

The entry is clearly shown to be illegal, and I therefore affirm your decision and direct its cancellation.

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RULES OF PRACTICE—APPEAL—NOTICE—ACT OF OCTOBER 1, 1890.

WILLIAM E. DARGIE.

A petition presented to the Commissioner of the General Land Office requesting the submission of a case to the Department for summary action should not be acted upon in the absence of due notice to the opposite party.

The right of appeal from the final decision of the local office, as provided in the rules of practice, should not be denied or abridged on the plea that such action is necessary for the protection of selections that must be located within a limited period, where such selections are made with full knowledge of the fact that the lands covered thereby are embraced within prior adverse claims.

*Secretary Noble to the Commissioner of the General Land Office, September 12, 1891.*

By letter of July 15, 1891 you transmitted certain papers in the matter of a number of desert land entries in the Visalia, California, land district, and subsequent applications to select the lands embraced in such entries under the provisions of the act of October 1, 1890 (26 Stat., 644), and by various letters of later dates you transmitted additional papers.

The desert land entries in question are a part of those referred to in the case of *United States v. Haggin* (12 L. D., 34), wherein the order suspending said entries was revoked. In that decision the fact that contests had been allowed as to some of the entries there referred to and applications to contest others had been filed and refused by the local officers was mentioned, and said papers were returned to your office for appropriate action it being said:

I see no objection, however, to passing upon the contests initiated prior to said order of suspension, where hearings were held and evidence submitted by the respective parties, and also allowing the parties, who have filed applications to contest to proceed with their contests where the grounds thereof are the invalidity of said entries.

This decision was rendered January 12, 1891, and by your office letter of February 10, 1891, the local officers were advised of the revocation

of the order of suspension and the applications to contest were returned to those officers for appropriate action it being said :

The said decision also provides that the parties who have since filed many applications to contest different entries included in the said order of suspension, most of which were rejected by your office, by reason of such order, and appeals filed, should be allowed to proceed where the invalidity of the respective entries is charged . . . Before taking any action on the above you will carefully note each contest on the docket in the order of its priority, and in each case the prior contestant should be allowed to proceed, the others being held suspended until the first has been finally disposed of. The papers in each case should be carefully examined before the parties are allowed to proceed, to see that the affidavit of contest is properly executed, corroborated, and alleges sufficient grounds of contest, also that the entryman, and the tract involved, are properly described. Where several parties have filed separate contests against the same entry, and have also filed their respective applications to enter different parts of the tracts involved, they may be allowed to proceed as joint contestants.

On January 19, 1891, being after the departmental decision in the Haggin case and before the issuance of the instruction to the local officers thereunder, the various desert land entries were relinquished and applications made by William E. Dargie, as attorney in fact, to select the lands under the provisions of the act of October 1, 1890, *supra*. By your office letter of March 17, 1891, the selections by said Dargie were suspended and the local officers were directed to proceed with the applications to contest the desert land entries in accordance with the instructions of February 10. Afterwards the attorney for Dargie filed motions to dismiss the contests against the desert land entries and the contestants filed applications for hearings to determine all conflicting claims to said lands asserting the superiority of their rights under their contests and their applications to enter filed with their contest affidavits. The local officers dismissed the contests and rejected the applications to enter. Before the expiration of the time within which appeals from said decision might be taken the attorney for the claimants, under the act of October 1, 1890, filed in your office a petition asking that the entire record be submitted to the Secretary of the Interior with a request for his adjudication and instructions in the premises. You granted the prayer of the petition and forwarded the papers. All but two or three of the contestants have now filed appeals from the decisions of the local officers dismissing said contests.

In support of the petition filed in your office asking that the papers be sent to this Department, it was urged that it was of the utmost importance that the rights of the claimants under the act of October 1, 1890, should be speedily adjudicated because any selection of lands under that act must be made within one year from the date thereof and the ordinary course of appeals if followed here would postpone a decision thereon, until it would be too late for these claimants to select other lands if it should be finally determined that they were not entitled to those here involved, and that inasmuch as the whole duty of executing the said law of 1890 is placed upon the Secretary of the In-

terior, and as his final adjudication of the questions presented, whether by way of appeal or review will be equally full, fair and complete none of the interested parties could complain of unfair treatment if the whole matter were promptly submitted to him without awaiting the delays necessary to the usual course of decision by your office and appeal therefrom.

The attorney for the contestants has filed argument upon the questions involved, and has at the same time filed a motion to remand the record in each of said cases to you with instructions to take appropriate action thereon. It is urged in support of this motion that no notice of the petition upon which you transmitted the cases to this Department was ever served upon the contestants or their attorney, that your action was in violation of the rules and the law, both of which declare that appeal from the decision of the local officers lies in every case to the Commissioner of the General Land Office; that you could not under the rules and the law refuse to pass upon the appeal from the local officers, and that this Department has neither primary or appellate jurisdiction in the premises.

The petition or motion presented to you asking that the cases be submitted to this Department is certainly of the class contemplated by rule 99 of the Rules of Practice, which declares that "No motion affecting the merits of the case or the regular order of proceedings will be entertained except on due proof of service of notice," and should not have been acted upon by you in the absence of such notice to the opposite party as is prescribed by the rules. I find no evidence of the service of notice, nor is there any denial of the statement that no notice was served. Even if it be held that this was not such an error as would demand a refusal to consider the papers sent up in accordance with such motion, yet the fact that these parties had no opportunity to present to you their objections to that motion presents in itself sufficient reason for now considering such objections to the proposed course of action as they may see fit to make.

The Rules of Practice declare that appeals from the final action of the local officers "lie in every case to the Commissioner of the General Land Office" (Rule 43), and that an appeal may be taken from the decision of the Commissioner of the General Land Office to the Secretary of the Interior "upon any question relating to the disposal of the public lands and to private land claims" except in case of interlocutory orders etc., (Rule 81).

The fact that the law of October 1, 1890, places the entire duty of its execution upon the Secretary of the Interior, furnishes no reason for suspending the Rules of Practice and depriving parties of the rights given thereby, for by section 441, Revised Statutes, the Secretary of the Interior is charged with the supervision of the public business relating to public lands and by section 453, the Commissioner of the General Land Office is charged with the performance, under the direc-

tion of the Secretary of the Interior, of "all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands," and section 2478, found under the title "The Public Lands" reads as follows:

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

The duty of the Secretary under the act now in question is not different in character or extent from what it is under other laws relating to the disposal of public land; in all cases he is required to see that the provisions of the law are properly carried into execution.

The usual and ordinary mode of seeking a decision from the Secretary upon questions of this character is by way of appeal pointed out in the Rules of Practice which have been formulated and approved as best adapted to protect the interest of claimants for the public lands and, at the same time, to expedite the transaction of the business in relation to such lands.

In the case of *Stevens v. Robinson* (5 L. D., 111), it was said:

The rules of practice were adopted to subserve the public interests and for the good of the practice in the transaction of business; and so long as they exist they have in effect the force of a statute. *Parker v. Castle*—on review—(4 L. D., 84), and although it is quite true that none of them "shall be construed to deprive the Secretary of the Interior of the exercise of the directory and supervisory powers conferred upon him by law," it is also equally true, that where they are not in conflict with the law, and have prescribed a plain and adequate course of action, they are to be followed, for there is then no occasion for invoking the Secretary's directory and supervisory powers.

The importance of having uniform rules in these matters and of enforcing them has been often recognized by the decisions of this Department. *Ariel C. Harris* (6 L. D., 122); *Groom v. Missouri, Kansas and Texas Ry. Co.* (9 L. D., 264); *State of Oregon* (9 L. D., 360).

A time may come, however, and a case may arise when for the protection of public interests it would become necessary for the Secretary to disregard such rules; and such course might possibly become necessary to protect even an individual right. Such course would not, however, be adopted unless the necessity were apparent and urgent, nor for the protection of an individual right unless it were clearly shown that no other right could be adversely affected by such action.

The case now presented does not in my opinion, justify a disregard of the rules of practice in the particular asked.

It is true the beneficiaries under said act of October 1, 1890, must make their selections within one year from the date of that act, and that if they select lands not of the character contemplated by said act they do so at their peril; but these claimants were fully advised of these matters by letters and instructions (11 L. D., 512 and 550), long prior to the time the selections here in question were made. The fact that the relin-

quishments of the desert land entries were filed on the same day these selections were made, indicates that they were filed in pursuance of some understanding or agreement between the parties interested, but however that may be, the parties making such selections must be held to have acted with a knowledge of all the facts, as to the status of the land selected, shown by the records. Among the facts so shown two may be mentioned: (1) Affidavits of contest against said desert land entries had been filed and were not yet finally disposed of; (2), Various applications to enter said lands had been presented upon which final action had not been taken. That there were then claims to said lands still pending undisposed of they must have known, and must, also, have known that those claims could be finally determined only under and in accordance with the rules of practice applicable to such cases. These rules of practice involved action by the local officers and upon appeal, action by your office, and upon further appeal, action by this Department. It was not at all probable those adverse claims could be finally disposed of in the ordinary course of business within the time limited for making selections under said act of October 1 1890, but these parties chose to take that risk or the risk of finally obtaining an adjudication of the questions involved, favorable to the validity of the selections then made. They do not and can not claim to have been in any manner, misled into selecting those lands in the belief that they were free from all claims. It may be of the utmost importance to these parties to secure such an early consideration of their claims under these selections as will leave them time, in case that adjudication should be adverse to them, to make other selections, but that would not justify this Department in extricating them from the position in which they voluntarily placed themselves when to do so would involve the setting aside of the established rules of practice, and the disregard of the rights of others in the premises, under such rules. As said before, this is not, in my opinion, a case that demands the exercise of the supervisory authority of the Secretary in utter disregard of the usual mode of procedure.

There is another feature of this case which should be noticed. These selections have been attacked as having been improperly made, and in some instance as being of land not of the character prescribed by the act under which they were made, and it is asked that hearings be ordered that evidence may be submitted in support of such allegations, with a view to the cancellation of such selections. The duty of passing upon such matters is primarily with the local officers and your office and your action therein will very rarely be interfered with by this Department. The Secretary will not ordinarily assume the duty of passing upon such questions, and I find no sufficient reason for doing so in this instance. The mere fact that some individual may suffer a loss because of the time necessarily involved in considering his claim in due

course of procedure is not a sufficient reason for departing from that course. I must decline to take jurisdiction in the manner proposed.

The papers are therefore returned to your office for consideration and appropriate action.

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RESERVOIR SITE—DUPLICATE MAP.

CHARLES E. DAY ET AL.

Maps or plats filed on application for right of way or reservoir sites must be submitted in duplicate, and the map transmitted to the Department must bear the certificate of the register that it is an exact copy of the map filed in the local office.

*Secretary Noble to the Commissioner of the General Land Office, September 14, 1891.*

On April 21, 1891, B. C. Carr, Esq. attorney for Charles E. Day and Frank B. Davis, owners of the Second Creek reservoir, situated on the SE.  $\frac{1}{4}$  of Sec. 31, T. 1 S., R. 66 W., Denver, Colorado, filed an application enclosing therewith a map of said reservoir, with a certificate stating that said Charles E. Day and Frank B. Davis are the owners thereof, and asking that the same be filed with the Secretary of the Interior, and approved, in order that they may secure the benefits of the act of March 3, 1891 (26 Stat., 1095), providing for the granting of right of way and sites for reservoirs over the public lands.

In the circular of April 17, 1891 (12 L. D., 429), it is stated that—  
it is imperatively necessary that all maps or plats submitted under this section should be filed in duplicate.

In the letter of the attorney, accompanying this application, it is stated that a copy of the map has already been filed in the local office, and that it appears from the records of said office that said section 31 is government land.

The object of requiring the maps or plats to be executed in duplicate was to assure the Department that the map in the local land office was an exact duplicate of that filed in the office of the Secretary for his approval, and the evidence of such fact should appear upon the map submitted for file and approval in the Department.

You will therefore return the plat to the register with directions to amend his certificate so as to show that said map is an exact copy of the map filed in his office, if such be the fact, and return the same for further action.

## TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

ENOS *v.* FAGAN.

A contestant who commences action against a homestead entry, and at the same time initiates a contest against a timber culture entry, accompanied with an application to enter under the timber culture law, is bound by such application as against another who subsequently settles on the tract covered by the homestead entry, and will not be heard to assert any right thereto under the timber culture law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 15, 1891.*

I have considered the case of Abner A. Enos *v.* James E. Fagan, on appeal by the latter from your decision rejecting his final proof and holding for cancellation his pre-emption filing for the SE  $\frac{1}{4}$ , Sec. 20, T. 12 S., R. 28 W., Wakeeny, Kansas land District.

On May 6th 1886, Fagan filed a declaratory statement for this land, and on the 28th of same month, Enos made a timber-culture entry for it.

On June 18, 1887, Fagan gave notice of intention to offer final proof on August 17, following, at which time Enos appeared and protested against the proof, alleging a superior right to the land by virtue of having a preference right of entry.

The cause was continued for hearing until in September following, when the parties appeared and the testimony was taken and the register and receiver, upon consideration of the record and testimony found for Fagan, and recommended the cancellation of Enos' entry. From this action he appealed, and your office on February 12, 1890, reversed the local officers decision and held the filing of Fagan for cancellation, from which decision he appealed.

The record shows that one Amos T. Diggs had a homestead entry for this land, and one Joseph Moulding had a timber-culture entry for the SW.  $\frac{1}{4}$  of same section, and on May 29, 1885, Enos commenced a contest against each of said entries. At the filing of the affidavit of contest against Moulding's entry, he filed an application to make timber-culture entry for the tract. It appears that these entrymen had really abandoned their entries and each made default. The contests were to clear the record, as is stated, and in due course of business both entries were cancelled, on April 29, 1886. Enos and one W. L. Cearns were partners, advertised as "Cearns and Enos, Government Land Locators, does a general land office business at Grainfield, Kansas." They dealt in relinquishments, contests and claims generally for government lands—instituted contest and sold preference rights, initiated "friendly" contests to prevent bona fide ones from being initiated, and located persons desiring land.

On the second day after initiating these two contests, Enos made

homestead entry for a tract in the vicinity—and afterward sold his relinquishment thereof. He thus had used his right to homestead, and had previously exhausted his right of pre-emption, so he could take but one tract. He abandoned his application for the SW.  $\frac{1}{4}$  after trying for nearly a month to sell his claim thereto, and then made a timber culture entry for the SE.  $\frac{1}{4}$  of the section, upon which Fagan was located, and upon which he had a declaratory statement filing.

You find that while the evidence shows that Enos was connected with a firm whose business consisted in buying and selling relinquishments and starting contests with speculative intent, etc., that the merits of this case are not affected thereby, but I think his conduct reflects upon the question of his good faith.

You hold that as a matter of law his application to make timber culture entry for the SW.  $\frac{1}{4}$  in no way affected his right to make timber culture entry for SE.  $\frac{1}{4}$  of the section, and that he could contest any number of entries, and upon cancellation of all of them, could have thirty days to select upon which he would exercise his preference right.

When he initiated contest against the timber culture entry of Moulding for the SW.  $\frac{1}{4}$ , the regulations of the Department made the application to enter either as a homestead or timber culture an essential part of the contest proceeding. This was the rule until August 13, 1885, when it was revoked by Rule 1, Rules of Practice—See *Bundy v. Livingston* (1 L. D., 152) as to the rule prior to August 13, 1885, and see circular relating to timber culture entries (6 L. D., 280), wherein it is directed that Rule No. 1, Rules of Practice, shall thereafter govern, and that application to enter need not be made as a part of the contest proceeding.

But Rule No. 1, Rules of Practice, cannot be considered as retroactive, and when this contest was initiated application to enter was in fact made in accordance with the law then in force.

The person making such application to make timber culture entry must do so on his corporal oath, and among other averments he must state that he makes the application *in good faith* and not for speculation nor directly or indirectly for the use of another, “that I intend to hold and cultivate the land, and to fully comply with the provisions of this said act, and that I have not heretofore made an entry under this or the acts to which this is amendatory.”

In *Pfaff v. Williams et al.* (4 L. D., 455), it was said:

A legal application to enter is, while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from other disposition until such time as it may be finally acted upon.

This rule was followed in *Patrick Kelly* (11 L. D., 326).

Enos is estopped from saying that his application enter was not in good faith and that he committed perjury, and he will not be heard to say that he made the application merely for the purpose of initiating a

speculative contest, as this would be trifling with his oath and the Land Department.

Had he desired to make entry for the SE.  $\frac{1}{4}$ , he should have made his application for it, and as he did not do so, I am bound to conclude that he intended to enter the south-west quarter.

His application was on file, suspended until the Moulding entry should be canceled, and the instant the cancellation was made of the entry which had formerly segregated the land, his application became vitalized and segregated it as effectually as an entry would have done, so far as all other applicants were concerned, and he had only to proceed to complete the entry by payment of the office fees, if this had not been done.

Enos knew that a mere preference right was personal and not transferable, and he knew that this application was something more than a mere preference right. He considered it valuable and proposed to sell it. Fagan says that he knew that Enos would have a preference right when he successfully contested an entry, and when he went to the land office he had the clerk look over the record, and the clerk read the record showing that Enos had selected the south-west quarter. He says he knew about the homestead and had heard that Enos had used his pre-emption privilege, and so he filed for the south-east quarter. He states further that after he had settled on the land in controversy, Cearns, the partner of Enos, came to him and tried to sell him Enos' timber culture claim, as it lay adjoining his pre-emption. He says that two men were at that time looking over the south-west quarter, and Cearns said he had full authority to sell the timber claim of his partner, Enos, and if those men did not take it, he (Fagan) could have it at \$175.

If it were admitted, as you say, that a party having more than one tract on his hands would have thirty days in which to exercise his preference right as to each, yet if he elect which he will take of the tracts subject to such preference, he will be bound by such election. It is very clear that Enos, in this case, made his election. This was an abandonment of his preference right to the other tract. *Northern Pacific R. R. Co. v. Harris* (12 L. D., 351, p. 353) and cases there cited. Furthermore, he stood by and saw Fagan erect upon the land a fairly good house with board roof, board floor, two windows, two doors, estimated to be worth \$75. He moved his family into it and established his residence there while Enos was holding to his claim on the south-west quarter and trying to sell it. There is no evidence that he ever intimated to Fagan, in any way, that he (Enos) had any right to the south-east quarter or ever intended to assert any claim thereto. Fagan had a right to rely upon the record which showed that Enos had elected to take the south-west quarter, and also upon the words and acts of Enos which showed that he retained his claim upon it, and Enos having thus stood by, seeing Fagan making lasting improvements upon

the tract in controversy is estopped to assert a claim to the land which will take them from him. He would not speak when he should have spoken. He will not now be heard to say that he intended during all this time to take the land. It would be a fraud upon Fagan.

I find that the law and equity of the case are both with Fagan; that Enos has no claim to it that should be enforced. The final proof of Fagan, which appears satisfactory, will therefore be accepted and the timber culture entry of Enos will be canceled. Your decision is accordingly reversed.

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MINING CLAIM—PUBLICATION—ADVERSE CLAIM.

BONESELL ET AL. *v.* McNIDER ET AL.

An adverse claim must be filed within the sixty days of publication, and in the computation of such period the first day of publication is excluded.

A misstatement in the published notice as to the termination of the period of publication will not excuse the adverse claimant from filing his claim within the statutory period.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 15, 1891.*

I have considered the appeal by E. J. Bonesell *et al.*, from your decision rejecting the adverse claim of himself and co-claimants, offered for filing in the office of the register and receiver of the land office at Glenwood Springs, Colorado, on December 19, 1889, against mineral application, No. 286, filed by Charles McNider *et al.*, for the Hudson, Champion, Legal Tender and Fairview lode claims.

Publication was made in a weekly newspaper from October 19, 1889, to December 21, 1889. Said adverse claim was presented for filing, December 19, 1889.

The appellant in his fourth ground of appeal contends "That the period of publication as required by law had not yet expired on the 19th day of December 1889."

His claim was rejected on the ground that it was presented for filing one day too late, the period of publication having expired December 18, 1889, as held by you.

Section 2325 of the Revised Statutes requires newspaper publication for the period of sixty days as notice of application for mineral patents, and further provides that

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.

It appears by the case of *Miner v. Mariott*, 2 L. D., 709, and the mineral circular of January 14, 1884, p. 40, ed. of 1889, that it is a long established rule of the Department that the first day of publication

should be excluded from the computation of the sixty days. If October 19, 1889, which is the first day of publication in this case, be excluded, the count would begin with October 20, 1889, and the sixtieth day of publication would be December 18th, 1889, and inasmuch as the adverse claim was not presented till December 19, 1889, it was not therefore filed within the sixty days required by law.

The appellant in his second ground of appeal alleges

That the said publication is misleading in this, that it gives the last day of publication, December 21st, 1889, thereby leading this appellant and his co-owners to believe that they had until the said 21st day of December, 1889, within which to file their adverse claim.

This contention can not be maintained. The general rule above cited, it is true, is not inflexible, and may be laid aside to subserve the ends of justice, and the first day of the statutory period may be counted without violating the law if equity demands it. *Ryckman v. Lasell*, 10 L. D. 620. But this will not help the appellant. The 19th day of December, 1889, was the sixty-first day of publication in this case by either mode of computation, and no rule of computation or rule of equity can be invoked by which to reach a different result.

The decision first above cited has the force of law, and was notice to the appellant that he should have presented his claim by December 18, 1889. Furthermore the statute itself fixes the period absolutely, and this Department has no power by legislation of its own to extend that period because some one has blundered, especially where the rights of third parties have attached, "at the expiration of the sixty days of publication", as in this case.

The appellant does not state that he was actually misled by the statement in the printed notice that December 21, 1889, was the last day of publication, and that he really so believed, but his allegation is that the notice was "misleading," "leading him to believe," etc. Parties usually state their claims as strongly as the truth will allow.

December 21, 1889, was in fact the sixty-third day from October 19, 1889, and the notice was so obviously incorrect that the appellant apparently recognized the error, and did not rely upon the notice, but wrongly fixed upon December 19, 1889, as the sixtieth day.

This is his error and the Department can not change the plain provisions of the statute on account thereof.

The judgment of your office is accordingly affirmed.

## OSAGE FINAL PROOF—NOTICE—ADVERSE CLAIM.

WYDLER *v.* KEELER (ON REVIEW).

Notice of intention to submit Osage final proof, given after the expiration of the period within which it should be submitted, but prior to the intervention of any adverse right, protects the claimant as against one who subsequently initiates an adverse claim.

*Secretary Noble to the Commissioner of the General Land Office, September 15, 1891.*

This motion is filed by George E. Keeler, asking that the decision of the Department of February 14, 1891 (12 L. D., 194), in the above stated case, be reviewed and a rehearing ordered, upon the following grounds :

1. Because said decision is contrary to law.
2. Because of accident and surprise, which ordinary prudence could not have guarded against.

This case involves the right to lots 1 and 2, and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 20, T. 26 S., R. 14 W., being Osage Indian trust and diminished reserve lands, and was claimed by George E. Keeler and Fred Wydler, under their declaratory statements filed September 9, 1884, and February 23, 1886, respectively.

In the decision sought to be reviewed, the Department rejected the final proof of Keeler and held his declaratory statement subject to that of Wydler, for the reason that the final proof was not made within the time required by the statute, under the ruling in the case of *Hessong v. Burgan*, 9 L. D., 353, which overruled *Epley v. Trick*, 8 L. D., 110, and re-affirmed the ruling in *Rogers v. Lukens*, 6 L. D., 111.

It appears, however, that while the proof in this case was not submitted within the time required by the regulations, nor was notice of intention to submit proof given within that time, yet such notice was given prior to the initiation of the claim of Wydler by settlement, made February 10, 1886, followed by filing the 23d of the same month.

In the case of *Ramage v. Maloney*, 1 L. D., 461, it was held that the filing of notice of intention to submit proof under a pre-emption filing on a certain day, although given after the expiration of the time required by law in which to submit such proof, operates to save the right of the claimant for that period, and prevents another party from initiating an adverse claim and thereby defeating the rights of the prior claimant, for the reason that the giving of such notice is the beginning of the statutory proceedings for the making of final proof, and when such proof is made, it relates back to said initial step and cuts off all intervening claims.

This ruling was cited approvingly in this case of *Reed v. Buffington* (on review, 12 L. D., 220), involving the entry of Osage lands, in which case the proof was submitted after the expiration of the six months

required by the regulation, although the notice was given prior to the expiration of said period, and the failure to submit proof in time was not the fault of the claimant. The Department did not place its decision upon that ground, however, but upon the principle announced in *Ramage v. Maloney, supra*, to wit, "that Reed's final proof should relate to the date of the initial step in making the same, and be held to have been made in time."

Upon a full consideration of this case, I am satisfied that the fact that Keeler had given notice of his intention to make final proof prior to the initiation of the claim of Wydler was not considered in rendering the decision of February 14, 1891, and while the claim of Keeler was subject to be defeated by an adverse claim initiated after the expiration of the time required by the regulation for the submission of proof, and prior to the giving of notice, it was not subject to such adverse claim after the notice to submit final proof had commenced to run. See also *Steele v. Engelman*, 3 L. D., 92.

The decision of the Department of February 14, 1891, is therefore revoked, and your decision of June 3, 1889, holding for cancellation the declaratory statement of Wydler and allowing Keeler to perfect his entry upon the proof submitted, is affirmed.

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TIMBER CULTURE CONTEST—APPLICATION TO ENTER—COSTS.

LAMB *v.* SHERMAN.

An application to enter, filed with a timber culture contest that is accepted and then dismissed on technical grounds, takes effect as of the date when filed, on the subsequent relinquishment of the entry, and precludes other disposition of the land, until due opportunity has been accorded the contestant to furnish evidence as to non-compliance with law on the part of the entryman.

A timber culture contestant who attacks an entry for the purpose of securing the land under the provisions of the act of June 14, 1878, must pay the costs of the contest.

*First Assistant Secretary O'handler to the Commissioner of the General Land Office, September 23, 1891.*

I have considered the case of Milton Lamb *v.* Charles F Sherman, upon the appeal of the former from your decision dismissing his contest and denying his preference right to make timber culture entry for the NE.  $\frac{1}{4}$  of Sec. 22, T. 22 S., R. 14 W., Larned land district, Kansas.

Sherman made timber culture entry for the land on the 13th of March, 1884, and Lamb initiated contest on the 23d of March, 1889, alleging failure to comply with requirements of the timber culture law, on the part of the entryman.

The trial which followed was commenced on the 14th of May, 1889, and concluded on the 2d of October of that year by the case being dis-

missed by the register and receiver upon motion of the counsel for Sherman, for the reason that Lamb refused to make a deposit of money to pay the costs of the contest in accordance with rule 54 of practice.

From this judgment, Lamb appealed to your office, alleging that the local officers erred in dismissing said cause after he had proved his case and shown by three witnesses that defendant had failed to comply with the law, as alleged in the affidavit and notice; and asked that the decision of the register and receiver be reversed, the entry held for cancellation on the evidence introduced, and he be held a preferred claimant under his timber culture application filed at the time of instituting said contest.

Upon that appeal you rendered judgment on the 29th of January, 1890, concluding the same by saying:

Regarding plaintiff's appeal, I have to state that the contestant's preference right to make timber culture entry depends upon the establishment of the default alleged (see *Sorenson v. Becker*, 8 L. D., 357), and failing to comply with rule 54 of Rules of Practice, he did not establish the defaults alleged in his declaration and secure the preference right to make timber culture entry for the land in controversy, therefore the appeal and prayer for preference right are denied and the contest dismissed and closed, subject to appeal.

From that judgment Lamb appeals to this Department, alleging that you erred in applying rule 54 to his contest, which rule is applicable only to parties "claiming preference right of entry under the second section of the act of May 14, 1880," (21 Stat., 140), whereas his contest was under the third section of the timber culture act of June 14, 1878, (20 Stat., 113), and would therefore come within the provisions of rule 55. He also alleged that you erred in holding that he did not establish the default alleged, when his witnesses had testified in support thereof and no testimony was offered in defense.

Rules 54 and 55 of the Rules of Practice of this Department, read as follows:

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

55. In other contested cases each party must pay the costs of taking testimony upon his own direct and cross-examination.

In the application to enter, made on the 23d of March, 1889, and filed with his affidavit of contest, Lamb distinctly states that they are made "under the provisions of the act of June 14, 1878," giving the title and purpose of law.

When the case was dismissed, the taking of evidence had not been completed. Lamb was upon the witness stand, undergoing a cross-examination by counsel when he refused to proceed further therewith until the witness should make a deposit to pay for reducing the testimony to writing. Lamb expressed his inability to do so at that time, and asked to be allowed to sign his evidence. This was objected to by counsel for defendant "for the reason that the examination has not

been closed." He, however, refused to proceed with the cross-examination, Lamb was allowed to sign his testimony, and the case was dismissed.

Lamb then had three additional witnesses whose evidence was to have been taken by deposition, and the interrogatories which were to be propounded to them are attached to the record in the case. The evidence taken upon the trial tended to show that the defendant had not fully complied with the requirements of law, but it is not sufficiently complete to warrant a judgment upon the merits of the contest. Lamb had paid \$10 for reducing testimony to writing, but whether that sum had been exhausted or not is not stated by the local officers.

On the 3d of October, 1889, the day after the case was dismissed, Sherman executed a relinquishment of his timber culture entry, and one George H. Woodruff immediately filed declaratory statement for the land. At that time, however, the application of Lamb to make timber culture entry for the tract was on file in the local office, having been accepted on the 23d of March, 1889. Had his application to contest been rejected, his accompanying affidavit [application] to enter would have shared the same fate. *Drury v. Shetterly* (9 L. D., 211). But both were accepted, and their acceptance gave him certain rights in the nature of those secured by a second contestant who files his application during the pendency of a prior contest. The rule in such cases is that the application shall be received and held without further action until the prior contest is determined, but the right of the second contestant will be held to take effect by relation as of the date of his filing. *Farrell v. McDonnell* (13 L. D., 105); *Westenhaver v. Dodds* (ibid. 196). The prior entry of Sherman having been relinquished, the land became open to settlement and entry, and the application of Lamb attached as of the date when it was filed.

Section three of the act of June 14, 1878, 20 Stat., 113, provides that in the event of the claimant failing to comply with any of the requirements of that act, after his entry and before receiving patent, the land shall be subject to entry under the homestead or said act (timber-culture) by some other person, provided he shall at the time of his making application to enter, give such notice to the original claimant as shall be prescribed by the Commissioner of the General Land Office. This is what was done by Lamb in the case at bar. He made his application to enter, alleging that the claimant had failed to comply with some of the requirements of the law, and he gave the prescribed notice to the original claimant. In such a case, the law says the land was subject to entry by Lamb, "and the rights of the parties shall be determined as in other contested cases."

These rights have never been determined, owing to the dismissal of the contest by the register and receiver on a technical ground, and not upon the merits of the case. The law gave Lamb the right to make entry for the land, in case Sherman had failed to comply with any of

the requirements of the timber-culture act of June 14, 1878. He had produced evidence tending to show such failure, but failed to complete his proof owing to the advice of his counsel that he was only required to pay his own costs, in accordance with rule 55. I think that he should not be deprived of the legitimate fruits of his diligence for bringing the failure of Sherman to comply with the law to the notice of the proper authorities, upon a technicality, and that the rights of the respective parties should be determined by a hearing had for that purpose, Lamb paying the expenses thereof, as he expressed a willingness to do in his affidavit of contest. You will, therefore, please direct the local officers to order a hearing of which all parties in interest should have due notice, to determine whether or not there was a failure on Sherman's part to comply with requirements of the law under which his entry was made, and whether the entry of Woodruff should not be held as subject to the prior rights or superior equities of Lamb, and such other facts as may be of service in determining the rights of these parties, and the case will be re-adjudicated upon the evidence which shall be submitted at such hearing in connection with that already in the case.

The decision appealed from is modified accordingly.

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

AXFORD *v.* SHANKS (ON REVIEW).

In the enactment of the body of section 7, act of March 3, 1891, Congress contemplates the relief of incumbrancers and purchasers described therein, and the illegality of the entry, or the pendency of a contest, does not defeat confirmation thereunder.

The protection extended to pending contests and protests under the proviso to said section is limited to entries falling within the terms of said proviso, and does not include entries specified in the body of the section.

*Secretary Noble to the Commissioner of the General Land Office, September 22, 1891.*

I have considered the motion for review of departmental decision of March 18, 1891, in the case of *Axford v. Shanks et al* (12 L. D., 250).

In said decision it was held that the cash entry of David Shanks for the SW.  $\frac{1}{4}$  of Sec. 34, T. 115, R. 52, Watertown, South Dakota, was confirmed by the seventh section of the act of March 3, 1891, entitled "An act to repeal timber culture laws and for other purposes." (26 Stat., 1095.)

The facts in the case are that Shanks made cash entry for the tract February 17, 1880; that he sold the land for a valuable consideration on March 5, 1880, and that there was no fraud on the part of the purchaser. That on May 28, 1887, Axford initiated contest against said entry, alleging in substance that the same was fraudulent. After a

hearing, both the local officers, and your office held the entry for cancellation, and on appeal departmental decision, of which review is asked, was rendered.

In the motion for review, attorney for Axford states:

That in said decision the Assistant Secretary has overlooked the proviso in section seven, of said act of March 3, 1891. Under this proviso no contest or protest is cut off; in fact a contest or protest instituted before a patent has issued and pending between the date of the final receipt and the issuing of the patent, is left in full force and vigor and the rights of a contestant or protestant are not affected by that act.

The only reply that it seems to be necessary to make to this statement, is, that the attorney has failed to distinguish between the proviso to section seven and the body of the section.

The body of the section provides that a certain class of entries, viz.

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

The intention of Congress in this legislation, is too clear to require any lengthy discussion. Thousands upon thousands of parties, had, in the aggregate, paid out immense sums of money in the purchase of, or in the loaning upon, lands for which final entries had been made, and this money had been paid out upon the strength of the final receipts and certificates issued by the proper officers of the government, and had been paid for the most part, by those who were not familiar with the rulings of the land department in the matter of entries. When these entries were canceled as illegal, or as the result of contests, loss resulted to those who had invested their money in good faith, and from this class a demand for relief was presented to Congress, and was heeded, and the act in question was passed. Neither illegality, nor contests prevented the confirmation of the entries specifically described, they were absolutely confirmed in the furtherance of a specific purpose by Congress, viz., the relief of a certain class of purchasers.

The entries referred to in the proviso to section seven of the act in question are of a different character, viz: those in which no innocent purchasers were interested, and only such entries are confirmed as are specially described therein.

In the case under consideration, had there been no sale, prior to March 1, 1888, the entry of Shanks would not have been confirmed, in view of the fact that a contest against the same was pending at the date of the passage of the act of March 3, 1891.

I see no error in the decision of which review is asked, and the motion is therefore denied.

## PRIVATE CLAIM—COSTS OF SURVEY.

## PUEBLO OF MONTEREY.

Before the confirmees of a private land claim, or those claiming under them, are entitled to receive a patent, the government must be reimbursed for surveying the claim.

The costs that are thus required to be paid, are only the costs of the survey finally decided to be the legal and correct survey of the claim.

*Secretary Noble to the Commissioner of the General Land Office, September 22, 1891.*

In the departmental decision of April 13, 1891, (12 L. D., 364), it was said that the Garber survey of the Pueblo lands of Monterey, California, then being considered was

In accordance with the former decisions of this Department and in strict compliance with the decree of confirmation and therefore should be approved.

It appears that on the return of the papers in said case to your office the city of Monterey was called upon to pay the costs of said survey, amounting to \$555.00; and upon its refusal to make such payment you have declined to formally approve said survey or to issue patent for the land thus surveyed.

The appeal of the city from your action brings the case before me again; and as the question has not been directly decided, so far as I can find, a brief review of the legislation of Congress, bearing upon the matter seems proper.

Upon the acquisition of California all persons, claiming land by virtue of any right or title derived from the Spanish or Mexican governments, were required to present the same for confirmation to the board of land commissioners organized under the act of March 3, 1851, (9 Stat., 631): and by section 13 of said act the owner of said claim became entitled to a patent therefor upon presenting a certificate of confirmation to the Commissioner of the General Land Office, and a plat of survey approved by the surveyor general of California; whose duty it was made to survey such claims and furnish plats thereof. By act of June 14, 1860, (12 Stat., 33), it was directed that notice by publication should be given of surveys made under the provisions of the previous act; and that thereupon on application of any party in interest said survey should be ordered into the proper United States district court, for examination, reformation and adjudication; that when approved by the court the Commissioner should issue a patent thereon. And section 8 of the act declares that the costs of survey and publication thereunder shall be charged to and paid by the United States. The act of May 30, 1862, (12 Stat., 409), repealed the last cited provision, and directed that an account of said surveys be kept and that patents shall not issue thereon until said costs shall be paid into the Treasury of the United States by

claimant. The act of June 2, 1862, (12 Stat., 410), was to the same effect, but as it was entirely repealed by the act of February 18, 1871, (16 Stat., 416), it need not be further referred to.

The act of July 1, 1864, (13 Stat., 332), repealed the act of June 14, 1860, and restored the control of the surveys to the executive department, except in case where they were then pending in court under the act of 1860, and required them to be sent to the Commissioner of the General Land Office for approval. It also modified the provisions of the act of May 1862, requiring the costs of the survey to be paid into the United States Treasury, and provided that claimant requesting survey of a private land claim shall first deposit in the district court of the district within which the land is situated a sufficient sum of money to pay the expense thereof, which money is to be applied under the direction of the court to the payment of said expenses upon the completion of the survey.

It may be remarked here that the appellants claim to have made a sufficient deposit of money in court, under the provisions of said section, to cover the then estimated costs of survey.

In the clause of the general appropriation bill of March 3, 1875, (18 Stat., 343), making appropriations for the survey of private land claims it is provided on page 384, that section three of the act of May 1862, requiring that the cost of survey and platting shall be paid by the claimant for any private land claim before patent therefor shall be issued, be, and the same is hereby, repealed.

Next year Congress again changed its mind, for in the general appropriation bill of July 31, 1876, (19 Stats., 121), it was enacted, on page 121,

That an accurate account shall be kept by each surveyor general of the cost of surveying and platting every private land claim, to be reported to the General Land Office with the map of such claim; and that a patent shall not issue, nor shall any copy of any such survey be furnished for any such private claim until the cost of survey and platting shall have been paid into the Treasury of the United States by the party or parties in interest in said grant or by any other party.

This provision is substantially embodied in section 2400 Revised Statutes, and is reiterated in the general appropriation bill March 3, 1885, (23 Stat., 478-499), as follows:

That hereafter in all cases of the survey of private land claims the cost of the same shall be refunded to the Treasury by the owner before the delivery of the patent.

Thus stands the law to-day, and from this review of it there is no doubt in my mind that it is the intention of Congress that before the confirmees of a private land claim or those claiming under them, shall receive evidence of their legal title from the United States, the government shall be fully reimbursed for the expense of surveying the claim.

In this view, I therefore think you acted properly in refusing to attach your formal approval to the last survey, or to carry the same into patent, if the cost of the survey has not been paid to the government.

The contention of the city that the survey shall first be formally approved and patent issued thereon before payment shall be required cannot be tolerated, because, were the survey formally approved, or the patent signed and recorded, it might be that the city would conclude the evidence of its title was sufficiently complete and decline to make the payment. The payment must be made first, and only when it is made should the survey be formally approved and the patent signed and recorded.

But in the case under consideration, it is claimed in behalf of the city that it deposited in the United States district court, under the provisions of the act of 1864, *infra*, a sufficient sum of money to defray the then estimated cost of the survey, and that it ought not to be charged with any further or additional amount. It seems to be conceded by your office that such deposit was made and the amount thereof has been received by the land officers.

It appears that the claim in question was surveyed in three separate and disconnected tracts. The survey of tract No. 3 was approved in 1881 by my predecessor, Secretary Schurz (6 L. D., 181), and the surveys of Nos. 1 and 2 were rejected under my predecessor, Secretary Lamar in 1887, *ib.*, 190, and new surveys ordered. These new surveys when made were approved by me, April 13, 1891, (12 L. D., 364).

In a letter found in the record, from the surveyor general of California, dated November 29, 1890, it is stated that

prior to the examination by A. T. Herrman, United States deputy surveyor, made in 1879, the surveying and platting was paid by the parties in interest direct.

It thus appears that the claimants have paid considerable sums on account of the survey of the lands in question, which sums were applied, in part at least, to the former erroneous surveys. When Congress requires the confirmees, or those claiming under them, to pay for the surveys of their claims, I do not believe it is intended they shall pay for anything but a legal and proper survey of the same. To my mind it would seem to be an injustice of the grossest character to require them to pay for the errors or mistakes of the officers of the United States, over whom they have no control.

Entertaining these views, you are directed to ascertain what amounts have been paid to the land officers on account of the survey of the premises, and if it be sufficient to cover the costs of the surveys decided to be right, then you will issue patent for the lands in question without further charge. If however the amount already paid is not enough to cover the costs of the surveys decided to have been rightly made, you will call upon the proper parties to pay such sum, as, with that already paid, will cover said costs, and upon the making of such payment, and not before, you will formally affix your approval to said surveys and cause patents to be issued thereon.

Your decision being thus modified, the papers in the case are herewith returned to you.

## SOLDIER'S ADDITIONAL ENTRY—PRIVATE CLAIM—TOWNSHIP PLAT.

## LUDWIG MAY.

A prima facie valid soldier's additional homestead entry, while of record, segregates the land covered thereby, and precludes the allowance of a pre-emption filing therefor.

The Higley survey locates substantially the claimed limits of the Moraga grant, and lands excluded from said survey are public, and subject to entry, so far as any conflict with said grant is concerned.

An entry made while the township plat is on file is not annulled by the subsequent withdrawal of said plat, but suspended during such withdrawal.

*Secretary Noble to the Commissioner of the General Land Office, September 22, 1891.*

This is an appeal by Ludwig May from the decision of your office of August 1, 1888, sustaining the action of the local officers in refusing to allow him to file pre-emption declaratory statement for the SW.  $\frac{1}{4}$  of Sec. 10, T. 2 S., R. 2 W., Mount Diablo Meridian, San Francisco district, California.

The said declaratory statement was dated June 20, 1888, and alleged settlement on the 13th day of that month, and was rejected by the local officers, "because of the appropriation of the tract," by the soldiers' additional homestead entries of J. N. Browning and James M. Haines, both made July 8, 1878, and upon which final certificates had been issued January 17, 1882, more than six years before the date of May's alleged settlement and his offer of said declaratory statement.

These entries of Browning and Haines were entries of record, valid on their faces, and until they were canceled, segregated the land from the public domain. (*Graham v. Hastings and Dakota Railway Company*, 1 L. D., 362). The application of May was therefore properly rejected (*Ernest Trelut*, 3 L. D., 228).

It is claimed by May in his appeal, that these entries are void, because, 1st, "the land involved was within the granted and confirmed exterior named and designated boundaries of the private Mexican grant, Laguna de los Pales Colorados (Moraga), from August 10, 1841, to August 10, 1878," and, 2d, "the plat of T. 2 S., R. 2 W., was withdrawn . . . . . October 24, 1878, and not" re-instated "until February 24, 1882." Embodied in the appeal is an application, that a hearing be ordered for the purpose of taking testimony as to the truth of these allegations.

The first proposition raises the same question, that was settled adversely to the appellant's contention by this Department in the case of *Joel Docking*, 3 L. D., 204. By the sixth section of the act of March 3, 1853 (10 Stat., 246), "lands in the State of California . . . . . claimed under any foreign grant or title," were reserved from entry

as public lands of the United States. In said case of Joel Docking it is held that:

The sixth section of the act of March 3, 1853, as construed by the decision of the supreme court of the United States in the case of *Newhall v. Sanger* (92 U. S., 761), reserved until the grant in this case (*Laguna de los Palos Colorados*) was finally located, only such land *as was claimed* . . . Holding, as I do, that the Higley survey locates substantially the exterior boundaries of the rancho *Laguna de los Palos Colorados*, *as claimed*, and it appearing that the tract in question is excepted from said survey and was public land on the 8th day of August, 1878, when it was entered with certain soldiers' additionals, I affirm your decision rejecting the filing of Docking. (See also, *Ernest Trelut, supra*).

The land in the present case is located in T. 2 S., R. 2 W., no part of which falls within the Higley survey. It was, therefore, under the decision of this Department, in so far as its status was affected by the *Laguna de los Palos Colorados* grant, public land and subject to the entries of Browning and Haines, at the date when made, July 8, 1878. (The land, it is admitted, is not within the final, Boardman, survey of the claim, approved by this Department August 10, 1878.) As to the withdrawal of the plat of survey, it is to be observed, that the entries of Browning and Haines were made, July 8, 1878, about three months and a half prior to said withdrawal. The withdrawal of the plat of survey in this case did not have the effect of annulling or rendering void the entries made before such withdrawal. The plat having been reinstated or restored, February 24, 1882, the withdrawal operated at most a suspension, during its continuance, of proceedings on such entries. While the issuance of final certificates to Browning and Haines on their entries, January 17, 1882, during the period of suspension, was irregular, yet this irregularity did not render the entries void, and was cured by the subsequent restoration of the survey. It is not, therefore, matter which May, six years after, on application to pre-empt the land, can set up as ground for allowance of such application.

There is no necessity or reason for a hearing to determine any matter of fact involved in the said two propositions of the appellant.

It is further alleged in the appeal, substantially, that the entries are illegal and fraudulent and in violation of section 2306 of the Revised Statutes, but there is no specification as to what the fraud or illegality consists of. If there be fraud or illegality in the entries, the appellant may institute on the ground thereof a contest in conformity with the rules and regulations of this Department.

The decision of your office is affirmed.

## SCRIP LOCATION—TIDE LANDS.

JAMES KASSON.

On the admission of a State to the Union it acquires, by virtue of its inherent sovereignty, absolute title to all tide lands on its borders, to the exclusion of any rights under pending unadjusted scrip locations for such lands.

*Acting Secretary Chandler to the Commissioner of the General Land Office, September 21, 1891.*

I have considered the appeal by James Kasson from your office decision of June 20, 1890, rejecting his application to locate with Valentine scrip unsurveyed lands, which if surveyed would be the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 34, T. 21 N., R. 3 E., Seattle land district, Washington, for the reason that the tide ebbs and flows over the land.

On the admission of a state to the Union it acquires by virtue of its inherent sovereignty absolute title to all *tide* lands on its borders, to the exclusion of any rights under pending unadjusted scrip locations for such lands. Frank Burns, 10 L. D., 365.

Your decision is therefore affirmed.

## OSAGE LANDS—SECOND ENTRY.

JOHN A. ELLIOTT.

Second entries of Osage land to which at the time there were no adverse claims, are confirmed by section 23, act of March 3, 1891, where compliance with the law in the matters of residence and improvements is duly shown.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 21, 1891.*

John A. Elliott has appealed from your decision of July 2, 1890, holding for cancellation his application to make entry for lot 1 and the S  $\frac{1}{2}$  of the NE  $\frac{1}{4}$  of Sec. 2., T. 24. S., R. 6 E., Topeka land office, Kansas.

The grounds of said decision is that the entryman

Testified in his final proof that he had entered the SE  $\frac{1}{4}$  of Sec. 26, T. 33 S., R. 6 E., in June, 1875, which is Osage trust and diminished reserve lands in Kansas. Having made one entry upon Osage lands to the maximum extent of one hundred and sixty acres, he is debarred from making another.

The question as to whether or not your decision was correct, under the law as it existed at the date when it was rendered, need not now be discussed. But since the date of said decision, Congress has passed an act "To repeal timber-culture laws, and for other purposes," approved March 3, 1891 (26 Stat. 1095), the 23d section of which provides:

That in all cases where second entries of land on the Osage Indian trust and diminished reserve lands in Kansas, to which at the time there were no adverse claims, have been made, and the law complied with as to residence and improvement, said entries be, and the same are hereby, confirmed.

In view of the act above cited, if upon examination you shall find that at the date of the entry of the tract in question, there was no adverse claim, and that the final proof shows compliance with the law as to residence and cultivation, patent will issue to the entryman for said tract.

Your decision is accordingly reversed.

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TIMBER CULTURE CONTEST—DEVOID OF TIMBER.

LAVELL *v.* MORK.

The timber culture law restricts entries to *sections* "devoid of timber," and the restriction does not vary in proportion to the amount of land entered in such section.

*Secretary Noble to the Commissioner of the General Land Office, September 21, 1891.*

Hugh Lavell has applied for a review of departmental decision of June 8, 1891, dismissing his contest against the timber-culture entry of Rasmus L. Mork for 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. 25, T. 103, R. 26, Marshall land district, Minnesota.

Said decision affirmed your office decision of November 21, 1889, dismissing the contest on the ground that the evidence shows that there are less than two acres of timber on the section, from two to eight feet high, and from half an inch to three inches in diameter, none of which could be used for farm purposes, and but a small portion for fuel. One of contestant's witnesses, who had known the land for years, said, "It would hardly do to call it timber, as it was too bushy and small, and not fit for use as timber trees are."

The applicant for review alleges that said decision was in error,

In not considering the fact that the entry attacked is for but eighty acres, and in not deciding that a quantity of timber of natural growth on such a tract, or near it in the section, would prevent an entry of eighty acres, while it might not render illegal one of one hundred and sixty acres.

There is no validity in this objection. Whether the entry be for one hundred and sixty acres, or for eighty, or forty, the law requires that *the section* (a portion of which is thus entered) shall be "devoid of timber;" and the meaning of these words—"devoid" and "timber"—does not vary because a larger or lesser proportion of the section is so entered.

The motion is denied.

RULES AND REGULATIONS ADOPTED BY THE COMMISSIONER OF THE GENERAL LAND OFFICE, WITH THE APPROVAL OF THE SECRETARY OF THE INTERIOR, RELATIVE TO THE PRESENTATION AND ADJUSTMENT OF CLAIMS UNDER THE SWAMP-LAND LAWS.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., September 19, 1891.

The numerous lists of swamp-land selections heretofore presented to this office, as claims for lands in place and for cash and land indemnity, under the acts of March 2, 1849, September 28, 1850, and March 12, 1860, relating to swamp-lands in place, and the acts of March 2, 1855, and March 3, 1857, relating to cash and land indemnity in lieu of swamp-lands sold and located with warrants and scrip, and the continued presentation of numerous selection lists in which additional claims for large quantities of land situated in the same townships or counties as were the previous selections, and the necessity for putting a term to the work of examining such selected lands in the field by special agents and of repeatedly adjusting claims in this office, have suggested the following rules and regulations for the closing and adjustment of all claims under the swamp-land laws :

1. Preference in the order of consideration will be given to the adjustment of conflicts between homestead, pre-emption, and cash entries and warrant locations and the swamp-land claims of the States over other claims arising under the same law.

2. Claims for swamp lands in place will be taken up for consideration in preference to cash or other indemnity claims.

3. Cash-indemnity claims will be adjusted in the third order, *i. e.*, after cases of conflict and claims for lands in place.

4. Land-indemnity claims will not be adjusted when there are no public lands with which to satisfy such claims, in the States in which the warrants or the scrip were located.

5. The surveyors-general when constructing and approving segregation maps and surveys, or approving selection lists of swamp and overflowed lands must, in their certificates, find and recite, affirmatively, facts showing that the principal conditions required by the swamp-land act to establish the character of the lands, as swamp and overflowed, existed at the date of the passage of the granting act. All evidence taken by surveyors-general to establish the character of the land must be transmitted with the maps or lists approved. This office will not approve maps, or accept lists in which it does not affirmatively appear, in the surveyor-general's certificate, that the lands reported as swamp and overflowed were in reality of that character *at the date of the grant*.

6. Before final action is taken on the claim of a State for swamp lands in place or cash or land indemnity, a certificate should be re-

quired of a duly authorized agent of the State reciting that the lands selected in each and every township involved in the selection list constituting the claim represents the full and final claim of the State to lands under the swamp-land acts in the said townships, and that the State waives all claims or rights, under the said acts, if it have any, to all other lands not selected in the said townships. Such a certificate will be accepted as evidence that the claim of the State to swamp-lands in the particular townships to which it applies is final and complete; and it will be recorded in a book kept for that purpose, and as far as practicable all such completed claims will be acted upon as promptly as possible and in the order of their completion.

7. In the case of cash and land-indemnity claims, now pending or which may hereafter be presented for the benefit of counties, a certificate of a duly authorized agent of the county of the character and effect of that provided for in the 6th section of these instructions, relating to claims of States, will be required of county agents, covering the entire area of the county.

8. Waivers must be unconditional, and a copy of the authority from the State legislature or from the county authorities to act for the State or the county and to make certificates of waiver must be filed in this office by the State and county agents.

THOS. H. CARTER.  
*Commissioner.*

Approved,  
JOHN W. NOBLE,  
*Secretary.*

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TIMBER CULTURE ENTRY—INDIAN OCCUPANCY.

FREER'S HEIRS *v.* BURCH'S HEIRS.

Under the circular regulations of May 31, 1884, land occupied and improved by Indian claimants is not open to other appropriation, and a timber culture entry allowed in violation of said regulations must be canceled.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 19, 1891.*

The record in the case of *The Heirs of Franklin Freer v. The Heirs of Everett D. Burch*, which is here on appeal of the latter from your office decision of December 11, 1889, shows the following facts:

September 1, 1885, Everett D. Burch made timber culture entry for lots 2, 3, 6, and 7, Sec. 34, T. 23 N., R. 20 E., North Yakima, Washington.

September 21, 1886, David Freer, as guardian of the orphan children of Franklin Freer, filed a contest against said entry, claiming that the land had been occupied since 1873, and was resided upon and cultivated by Franklin Freer, deceased, and is now claimed, occupied, and cultivated by David Freer as a homestead for said children; that the im-

provements upon the land at date of Burch's entry were well worth thirteen thousand dollars, among which was an orchard of about seven acres, containing a choice variety of fruits, around which was a wind break, composed of one hundred and sixty-one lombardy poplar trees, from twelve to twenty inches in diameter, and that the whole tract was enclosed with a good and substantial post and rail fence.

The evidence was taken before a notary public at Wewatchee, W. T., June 20, 1887.

The register and receiver rendered separate opinions—that of the receiver being in favor of the defendants, that of the register assenting as to the facts, showing that at the time of Burch's entry the land was unappropriated, but thinks that equity would justify finding for contestants.

The contestants appealed, and by your said office decision the timber culture entry of Burch was held for cancellation.

The evidence has been examined and found to be substantially as stated in your said decision, and in my opinion sustains all the material allegations of the contest.

These orphan children are shown to be half-breeds, the product of a common law marriage, their mother having been a full blood Indian woman, and the land in controversy had been in the possession of the father and mother for several years prior to their death, in 1878 and '79, and in the possession of these children ever since. This was their home at the time Burch made his entry.

The circular of Commissioner McFarland, approved by Secretary Teller, May 31, 1884 (3 L. D., 371), is as follows:

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

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

The entry of Burch was allowed in violation of this instruction. (See also *Mission Indians v. Walsh*, 12 L. D., 516.)

The entry of Burch will be canceled. The decision of your office is affirmed.

## TIMBER CULTURE CONTEST—BREAKING.

DAVIS *v.* MONGER.

A timber culture entryman who enters a tract broken by a previous claimant, and in condition to be utilized for timber growing purposes, is entitled to credit for such breaking, and not required to use the same until the second year.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 16, 1891.*

I have considered the case of B. J. Davis *v.* Augustus C. Monger, involving timber-culture entry No. 4295, for the SE  $\frac{1}{4}$  of Sec. 3., T. 4 N., R. 31 W., McCook land district, Nebraska.

The entry was made September 24, 1886. Contest was initiated one year and two days thereafter, i. e., September 26, 1887.

The local office found that the entryman had failed to comply with the requirements of the law; and on appeal, your office affirmed the judgment of the local office, and held the entry for cancellation, on the following grounds:

It is shown on the part of the contestant that the defendant did not break nor plow, nor cause to be broken or plowed, any of the land in question, from the date of the entry to the time of the contest. The defendant does not deny this; but seems to rely for his compliance with the law upon some breaking that had been done, before his entry, by a former occupant. Allowing defendant the benefit of the breaking done in 1886, by a former occupant, then there was no breaking or plowing done in 1887; nor were there five acres thereof cultivated in the latter year. If the defendant claims that the breaking done previous to his timber-culture entry was a compliance with the law as to the first year, he should have cultivated the full five acres the succeeding years.

As to the breaking, contestant's witnesses (as well as those for the defendant), testify that a few weeks prior to date of entry, one Buckels broke five and a half acres of the tract in controversy, for one Lee, who held the claim at that time, but whose relinquishment the defendant obtained.

The law requires that five acres of the tract should be broken by the end of one year from the date of entry. The end of a year from the date of Monger's entry found more than five acres of the tract broken, and in a condition to be utilized for timber-growing purposes; such being the case, it matters not when or by whom such breaking was done. (See *Gahan v. Garrett*, 1 L. D., 37; *Flemington v. Eddy*, 3 L. D., 482; *Clark v. Timin*, 4 L. D., 175; *Donly v. Spring*, 4 L. D., 542; *Vargason v. McClellan*, 6 L. D., 829; *McKenzie v. Kilgore*, 10 L. D., 322; *Lamson v. Burton*, 11 L. D., 43; *Grengs v. Wells*, 11 L. D., 460).

Counsel for contestant cites *Beattie v. Dow* (3 L. D., 483), to the effect that

breaking done in some previous year can not be deemed a compliance with the law by a subsequent entryman, who does nothing himself, *and makes no use of the previous breaking.*

It is true that it is the duty of the entryman to utilize the previous breaking in accordance with the requirements of the law. But the law does not require the cultivation of any portion of the tract until the *second year* of the entry, nor the planting of any portion of it until the third year.

In the case at bar, contest was brought a year and two days after entry; hence there remained a year lacking two days, in which to "make use of the previous breaking." The large amount of testimony taken as to the proportion of the breaking that was backset by the entryman, sown to millet, etc. during the first year of his entry, was therefore wholly irrelevant and useless.

Your decision is reversed.

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TIMBER LAND ENTRY—TRANSFEREE.

JAMES M. STREETEN.

A transferee who purchases land after a judgment of cancellation has been entered against the entry, is not entitled to a hearing on the grounds that he had no notice of said cancellation, and purchased said land without knowledge of any fraud on the part of the entryman.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 16, 1891.*

I have considered the appeal of James M. Streeten, from your decision of May 1, 1890, rejecting his application for a hearing to show cause why the timber land entry of John Webb, No. 5584, for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 27, T. 11 N., R. 1 E., H. M., Humboldt, California, should be re-instated.

The record shows that on August 15, 1883, John Webb made timber land entry for said tract. On October 16, 1884, special agent Goncher, examined said entry and reported it to be fraudulent, being made in the interest of one David Evans.

On January 9, 1885, said entry was suspended and a hearing ordered at which the entryman made default, but Evans as transferee, appeared by attorney. It was agreed between Evans' attorney and the special agent, that the testimony of said Evans might be taken before the register and receiver at San Francisco on June 1, 1885, but it appears that Evans failed to appear at said date and submit his testimony. As default was made by both the claimant and his transferee, your office on June 25, 1885, canceled said entry.

On the 7th day of February, 1890, James M. Streeten filed with the local officers an application addressed to your office, in the nature of a petition for a hearing, for the purpose of showing that Webb's entry was made in good faith. Streeten alleges that he is the owner in fee

simple of three-fourths of said land through mesne conveyances dated July 23, and August 28, 1886. He further alleges that he

had no notice or knowledge whatever of the fact that said land or said entry had been canceled, or held for cancellation at the time he purchased said land or for a long time after the same had been canceled; whereupon, learning such fact, he applied to the Hon. Commissioner for a hearing, which was denied because more than one entry was embraced in said application. That your petitioner is informed and believes and is ready to prove by way of defense, that said John Webb, made said entry in good faith and for his own exclusive use and benefit, and not fraudulently, or in violation of any law, which fact, your petitioner believes he will be able to prove in the event a hearing is granted.

This application was denied as aforesaid, from which judgment Streeten appeals.

The only specification of error is that "Said appeal is taken on the ground that said decision is contrary to law." This is so indefinite and general in its nature that it does not present any question for consideration. Rule of Practice 88. *Pool v. Moloughney* (11 L. D., 197); *Deveraux et al., v. Hunter et al.* (11 L. D., 214).

Your office held that—

At the date said entry was canceled, Mr. Streeten was not entitled to notice of the action taken, as it appears that a he did not acquire an interest to the land until over a year after date.

He does not claim to have had any interest in the land at the date of the cancellation of Webb's entry, but bases his claim to it entirely upon conveyances dated July 23, and August 28, 1886—more than a year after Webb's entry was finally canceled. Under such circumstances it is clear that he was not entitled to any notice of the cancellation. The claim he makes is that he purchased on the strength of the receiver's duplicate receipt, without knowledge of any fraud on the part of the entryman. Whether this be true or not it cannot avail him, as one who purchases land before patent issues takes no better title than the entryman has to the land. In other words, the doctrine of innocent purchaser does not apply in such cases, but the rule of *caveat emptor*—does apply.

The cancellation of Webb's entry extinguished whatever rights he or his transferee Evans, had in the land at that time, so that at the date Streeten claims to have purchased the land, neither Webb nor Evans owned any interest in it, and hence could transfer none to Streeten.

If Webb were hereasking to be heard, upon the showing made by Streeten, there can be no doubt but what a hearing would be denied him. The application under consideration is in the nature of a motion for review and it has been held that if the showing made by the transferee would not entitle the entryman to be heard on review, the application should be denied. *A. A. Joline* (5 L. D., 589); *James Ross* (11 L. D., 623).

I discover no error in the decision appealed from, and it is accordingly affirmed.

## SIOUX INDIAN LANDS—ALLOTMENT—ABANDONMENT.

## INSTRUCTIONS.

Under the provisions of the treaty of April 29, 1868, Indians holding certificates of allotment have only the right to the exclusive possession of the land covered by the certificate so long as they may continue to cultivate the land; hence selections under said treaty give no rights that descend to the heirs of the allottee.

The act of March 2, 1889, however, validates allotments made under said treaty, and directs the issuance of patents in the name of the allottees, for the sole use and benefit of the Indian, or in case of his decease, of his heirs. The marriage of a widow, therefore, does not affect the status of the land covered by the certificate of her former husband.

Certificates of allotment issued under the treaty of 1868, may be surrendered and new allotments taken under the act of 1889.

In case of an application to select land covered by the prior selection of another under said treaty, on the ground that said selection has been abandoned, action should not be taken without due notice to the prior claimant.

*Acting Secretary Chandler to the Commissioner of Indian Affairs, July 22, 1891.*

I acknowledge the receipt of your communication of 16th ultimo, asking decision as to status of Sioux allotments under treaty of 1868, in view of sections 15 and 11 of the Act of Congress approved March 2, 1889 (25 Stat., 888).

In response I transmit herewith, for your guidance in the matter, an opinion of the Hon. Assistant Attorney General for this Department, dated 21st instant.

## OPINION.

*Assistant Attorney General Shields to the Secretary of the Interior, July 21, 1891.*

By your reference of the 18th of May, my opinion is requested upon a communication from the Indian Office, dated the 16th of May, submitting certain questions relative to the status of lands covered by certificates of allotment issued to Sioux Indians under the provisions of the treaty of April 29, 1868 (15 Stat., 635), in view of sections 15 and 11 of the act of Congress, approved March 2, 1889 (25 Stat., 888).

By the sixth article of said treaty it is provided that any individual Indian, the head of a family, could select a tract of land within the reservation, not exceeding three hundred and twenty acres,

which tract, when so selected, certified, and recorded in the "land book" as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it;

other persons, not heads of families, were allowed in like manner to select eighty acres, and certificates were to be issued and after being recorded in the "Sioux Land Book" were to be delivered to parties entitled thereto.

By section 15 of the act of Congress approved March 2, 1889 (25 Stat., 888-893), it is provided that if any Indian has, under said treaty or any existing law—

taken allotments of land within or without the limits of any of the separate reservations established by this act, such allotments are hereby ratified and made valid, and such Indian is entitled to a patent therefor in conformity with the provisions of said treaty and existing law and of the provisions of this act in relation to patents for individual allotments.

By section 11 of said act it is provided:

That upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the lands thus allotted for the period of twenty-five years, in trust for the sole use and benefit of the Indian, or in case of his decease, of his heirs, according to the laws of the State or Territory where such land is located, and, at the expiration of said period, the United States will convey the same by patent to said Indian or his heirs, as aforesaid, in fee discharged of said trust, and free of all charge or incumbrance whatsoever, and patents shall issue accordingly.

It was further provided that every allottee should have all of the rights and privileges, and "be subject to all the provisions" of the general allotment act, approved February 8, 1887 (24 Stat., 388), and that the law of descent and partition in force in the State or Territory where the lands may be situated shall apply thereto after patents therefor have been executed and delivered.

The questions submitted for an expression of opinion are: (1) Where a certificate of allotment under said treaty was issued to "A" who afterwards died leaving a widow who afterwards married "B," who also has an allotment under said treaty: in whom does the title to "A's" land vest? (2) What would have been the status of the case if "A" had left issue; also in the event he had died without legal heirs?

The Indian Office expresses the opinion that under the treaty the selection does not vest in the allottee any title that will descend to the heirs of the allottee; that the family has only the right of occupancy, so long as they continue to hold and cultivate the land; that under said act of 1889 patents must be issued to those Indians who have received allotments under said treaty, but the allottees thereunder may surrender their allotments and take under said act of 1889; and that—

In case an Indian has unquestionably abandoned his land with the intention of not returning thereto, it may be regarded as vacant and be allotted to another Indian. This fact, however, should be clearly shown by proper evidence and the certificate of the Indian Agent, which evidence and certificate should be filed in this (Indian) office with the schedule of allotments made.

The Acting Commissioner further states that, if the Department concurs in the views expressed in said communication, the special agent will be directed to report the names of all allottees under said treaty who have died since the issuance of certificates, and the names of all

allottees now living who have not abandoned their allotments and desire to retain the same in order that patents may be duly issued in the names of the allottees.

It is clear, I think, that under the provisions of said treaty the Indians holding certificates had only the right to the exclusive possession of the land covered by the certificate, "so long as he or they may continue to cultivate" the land. Hence, the selections under said treaty gave no title that would descend to the heirs of the allottee. But the provisions of said act of March 2, 1889, validated the allotments under the treaty, and directed that the trust patents should issue in the name of the allottees "for the sole use and benefit of the Indian, or in case of his decease, of his heirs," etc. The marriage of the widow, therefore, would not affect the status of the land covered by the certificate of her former husband, for, under the law, the trust patent issues in his name, for his use, and in case of his decease for the use of his heirs.

It is also manifest that under said act of 1889 certificate holders under said treaty are entitled to patents therefor in conformity with the provisions of said treaty "and of the provisions of this act in relation to patents for individual allotments." Now, the provisions of section 11 of said act of 1889 unquestionably change the character of the title and make it inure to the benefit of the allottee and, in case of his decease, to his heirs, and prescribes the law that shall apply to descents and partitions. Besides, since by section 8 of said act of 1889 a larger amount of land is allotted to the Indians than under said treaty, in my judgment the suggestion of the Indian Office is eminently proper, allowing the Indians to surrender and relinquish their certificates under said treaty and take new allotments under the act of 1889.

There is no express provision in said treaty forfeiting the right to the lands covered by certificates issued thereunder on account of abandonment. It may be that the Indians to whom certificates have been issued have in fact left their lands and ceased to cultivate the same, and yet, upon being notified that they are entitled to trust patents for said lands, they may be extremely anxious to secure them. In order, therefore, to avoid confusion, and conform as nearly as may be the manner of allotments to the practice of the Land Department with reference to other selections and entries, it seems to me that only one selection or allotment of a tract of land should be allowed of record at the same time. In case an Indian applies to select or have allotted to him a tract of land covered by a prior selection under said treaty, alleging that the former allottee has abandoned the land, notice should be given the Indian charged with abandonment, and, in case it is proved that he has abandoned the land, the former certificate may be canceled and the land allotted to another. Special care should be taken not to allow the improvements of one Indian to be taken by another and that each allotment shall "embrace the improvements of the Indians making the selection."

## ALLOTMENT—OKLAHOMA INDIAN LANDS.

## DAVID TRENKLE.

Lands within the ceded portion of the Pottawatomie Indian reservation in the Territory of Oklahoma, cannot be allotted to non-reservation Indians under section 4, act of February 8, 1887.

*Secretary Noble to the Commissioner of Indian Affairs, August 28, 1891.*

I acknowledge the receipt of your communication of 22d instant relative to the right of an Indian to obtain an allotment under the fourth section of the general allotment act of February 8, 1887, (24 Stat., 388) as amended by the act of February 28, 1891, (26 Stat., 794), within the ceded portion of the Pottawatomie Indian reservation in the Territory of Oklahoma.

In response I transmit herewith an opinion dated 26th instant from the Honorable Assistant Attorney General for this Department, in which I concur, to the effect that the lands in question cannot be allotted to non-reservation Indians under the fourth section of the general allotment act.

You will please notify David Trenkle of Shawneetown, Oklahoma, of this decision.

## OPINION.

*Assistant Attorney General Shields to the Secretary of the Interior, August 28, 1891.*

I have the honor to acknowledge the receipt, by reference from Hon. Acting Secretary Chandler, for an opinion thereon, of a communication from the Acting Commissioner of Indian Affairs dated the 22d instant, relative to the right of an Indian to obtain an allotment under the fourth section of the general allotment act of February 8, 1887 (24 Stat., 388), as amended by the act of February 28, 1891 (26 Stat., 794), within the ceded portion of the Pottawatomie Indian reservation in the Territory of Oklahoma.

In said communication it is stated that one David Trenkle, from Shawneetown in said Territory, alleges that "he is a homeless Indian," and asks to be advised as to the proper course to take to secure an allotment under said fourth section in said ceded land.

The Acting Commissioner, after referring to said fourth section and also to said sixteenth section, requests to be advised whether section 16 of the said Indian appropriation act, under a proper construction thereof, constitutes such an appropriation of the lands therein referred to, as to preclude their allotment to non-reservation Indians as provided under the fourth section of the said severalty acts approved February 8, 1887, and February 28, 1891.

By the 4th section of said allotment act as amended, it is provided That where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in quantities and manner as provided in the foregoing section of this amending act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions provided in the act to which this is an amendment.

Section 16 of said act of March 3, 1891 (26 Stat., 989, p. 1026), enacts That whenever any of the lands acquired by either of the three foregoing agreements respecting lands in the Indian or Oklahoma Territory shall by operation of law or proclamation of the President of the United States be opened to settlement they shall be disposed of to actual settlers only, under the provisions of the homestead and town site laws (except section twenty-three hundred and one of the Revised Statutes of the United States which shall not apply): *Provided, however,* That each settler, on said lands shall before making a final proof and receiving a certificate of entry, pay to the United States for the land so taken by him, in addition to the fees provided by law, and within five years from the date of the first original entry, the sum of one dollar and fifty cents per acre, one-half of which shall be paid within two years: But the rights of honorably discharged Union soldiers and sailors as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States shall not be abridged except as to the sum to be paid as aforesaid, and all the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their non-mineral character shall not be required as a condition precedent to final entry.

There can be no question, in my judgment, but that Congress intended just what the language indicates, namely, that the lands opened to settlement "shall be disposed of to actual settlers only, under the provisions of the homestead and town site laws" except as to the right of commutation and that payments must be made for the lands entered at the rate of one dollar and fifty cents per acre, within the time designated in said act.

It will be observed that the section also declares that the rights of honorably discharged Union soldiers and sailors shall not be abridged "except as to the sum to be paid as aforesaid."

This is a plain direction as to the disposition of said ceded land and must be followed by the Executive Department.

I am therefore of opinion, and so advise you, that the lands in question cannot be allotted to non-reservation Indians under said fourth section of the general allotment act.

## ALLOTMENT OF INDIAN LANDS—ACTS OF 1872 AND 1887.

JOHN ANDERSON.

Members of the Citizen band of Pottawatomies are entitled to but one allotment, to be taken either under the act of May 23, 1872, or the act of February 8, 1887.

*Secretary Noble to the Commissioner of Indian Affairs, September 3, 1891.*

I acknowledge the receipt of your two letters of June 23rd last, one submitting the claim of John Anderson for allotment for himself and family under the act of February 8, 1887, and the other as to the rights of certain citizen Pottawatomies to take allotments under the acts of May 23, 1872, and February 8, 1887.

In response, I transmit herewith an opinion of the Hon. Assistant Attorney General for the Department of the Interior, in which I concur, to the effect that these Indians are entitled to but one allotment, to be taken either under the act of 1872 or 1887 and as Anderson and family have taken under the former act, no allotment will be granted them under the act of 1887.

The action of Special Agent Porter in making allotments under the act of 1887, to nine Citizen Pottawatomies who received allotments under act of 1872, is disapproved, and action will be taken accordingly.

## OPINION.

*Assistant Attorney General Shields to the Secretary of the Interior, August 28, 1891.*

It appears that on April 2, 1891, John Anderson, a member of the citizen band of Pottawatomie Indians, made application to Special Agent Porter, for the allotment of land to himself and family, under the provisions of the act of February 8, 1887, 24 Stat., 388. Said application was rejected by the special agent, and on appeal to the Commissioner of Indian Affairs, the action of the agent was approved; from which approval an appeal has been taken to you. On July 16, 1891, Acting Secretary Chandler referred the papers, transmitted with the appeal, to me "with request for opinion on the questions herein presented."

With the appeal, counsel for Anderson has filed an argument wherein it is insisted that appellant is entitled to two allotments; one under the act of May 23, 1872, 17 Stat., 159, because he is a "member of the Pottawatomie band known as the Pottawatomie citizen band," to whom it is therein specifically directed that allotments be made; and to another allotment under the act of 1887, *supra*, which is a general act, directing allotments to be made to any member of a "band of Indians" located upon a reservation created for their use, etc.

Apart from the one act being special and the other general, it is urged, that the spirit and purpose of the two acts have nothing in

common; for the act of 1872 requires the Indians to pay the cost price of the land allotted to them under that act, whilst the act of 1887, contemplates a free gift of the land to the allottees.

In these views I cannot concur.

When the matter of Anderson's allotment under the act of 1872, was before this Department, I submitted an opinion on the subject, which was adopted and acted upon by you, and which I think will be found, upon examination, to cover the present application without the necessity of answering each of the arguments of counsel. See case of John and Peter Anderson (11 L. D., 103).

In that case John Anderson claimed the right to have allotted to him, under the act of 1887, free of payment, the larger quantity of land allowed to allottees under the act of 1872; that if this was not so then "he had the right to allotments under both acts as both were in force;" and if wrong in both claims he should be allowed the quantity of land named in the act of 1872, upon payment of the price thereof. The Indian office held that Anderson must elect to take his allotment, "under one or the other of said acts" and that he "would not be allowed to take under both."

In the opinion which was then submitted, on these claims it was held that Anderson could only take allotment under the act of 1887, unless, as recommended by the Commissioner, the President authorize the Pottawatomies to take their allotments under the act of 1872, on paying the price of the lands. On this point it was said in the opinion,

I see no objection, if authority be given by the President, to allowing the Indians to elect under which of said acts they will take allotments. *ib.*, 103.

I see no reason to change the views expressed in that opinion and I think they are conclusive of the present matter. The President having authorized the Pottawatomie Indians "to elect whether they will take allotments under the act of 1872 or 1887," *ib.*, 103, and John Anderson having elected to take his allotment under the act of 1872, and having received it, cannot now be permitted to have another allotment under the act of 1887.

Accompanying the papers in the case of John Anderson is a letter from the Commissioner of Indian Affairs, also referred to me, wherein he states that previously to the passage of the act of 1887, eleven certificates of allotments had been issued to certain members of the Citizen Band of Pottawatomie Indians under the act of 1872; and that Special Agent Porter has made allotments under the act of 1887, also, to nine of said parties.

The Commissioner is inclined to think that these last allotments should be permitted to stand inasmuch as the first allotments, received by said parties, were made prior to the passage of the general allotment act of 1887; and at a time when the Indians could only take allotments under the act of 1872, and were compelled to pay the price of the land so allotted.

In my opinion, there is no material difference between the Anderson application, *infra*, disapproved of by the Commissioner and the case of the nine allottees, which he thinks ought to be approved. The fact that the nine Indians received their allotments before the passage of the act of 1887, and the promulgation of the order of the President, authorizing that tribe to elect under which act to take allotments, does not seem to me to be a sufficient reason for holding that they should be entitled to another allotment.

Congress in its dealings with the Indians, by treaty and legislation, has made many provisions for the allotment of particular reservations in severality: the act of 1887 was the first general act applicable to all tribes and reservations alike, if deemed advisable by the President. But I fail to see in this general legislation, any provision that directs, or any language from which it may be implied or inferred, that all prior allotments made in accordance with previous laws or treaties, were to be considered as naught, and that other allotments were to be made anew under the act of 1887; and certainly I find nothing therein which shows that it was the intention of Congress to give to such Indians as had already received one allotment, another one under said act.

It is therefore my opinion the nine allotments referred to ought not to be approved.

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ALLOTMENT OF POTTAWATOMIE LAND—ACT OF MAY 23, 1872

JOHN C. SCHALLIS.

The right to purchase lands as a citizen Pottawatomie under the act of May 23, 1872, can not be exercised by one who is not recognized as a member of the band.

The decease of an allottee who holds a certificate of allotment under the act of 1872, does not warrant the assignment of the land to another, as the interest of the allottee descends to his heirs.

The heirs of an allottee, if they so elect, may take an allotment of vacant land instead of ousting a subsequent allottee who improperly holds the lands covered by the certificate of the decedent.

*Secretary Noble to the Commissioner of Indian Affairs, September 3, 1891.*

I acknowledge the receipt of your communication of May 9th last, in relation to the claim of John C. Schallis, to purchase lands as a Citizen Pottawatomie, under the act of 1872, and to the claim of the heirs of George and Elizabeth Pettifer, to whom certain lands were allotted under said act, and which were abandoned after their deaths, and allotted to other parties, to those lands or other lands in lieu of them. In response I transmit herewith an opinion of the Hon. Assistant Attorney General for the Department of the Interior, of August 31, 1891, in which I concur.

The allotments to George and Elizabeth Pettifer to be made in lieu lands, and the certificate should issue in the name of the original allottee, or his (or her) legal representatives.

## OPINION.

*Assistant Attorney General Shields to the Secretary of the Interior, August 31, 1891.*

On May 9, 1891, the Commissioner of Indian Affairs transmitted to this Department certain papers relating to the claim of John C. Schallis for an allotment in the Pottawatomie Reservation, and asked for instructions in respect thereto, which papers were referred to me, on July 16, 1891, by Acting Secretary Chandler for an expression of opinion as to whether said Schallis is entitled to an allotment under the act of 1872.

The Commissioner, in his letter of transmittal, says that Schallis "is a white man married to a Pottawatomie woman, but has not been adopted by the tribe and his name is not borne on any roll thereof," and that "Mr. Schallis appears to have joined the tribe since the removal to the Indian Territory and has never been recognized as a member."

These being the facts, he is not entitled to an allotment under said act of 1872.

In addition to the case of Schallis, my opinion is asked in relation to another matter disclosed by the papers transmitted.

It appears that heretofore certain lands within said reservations were allotted, under the act of 1872, *supra*, to George and Elizabeth Pettifer, who lived upon the same until their death; after which said lands were treated as abandoned and allotted to other parties. Claim for those or other lands in lieu of them, is now made in behalf of the heirs of the Pettifers. It is insisted that there was no abandonment of said lands, in fact, during the life-time of the allottees, and there could be none in law, after their death, when the title became vested in their heirs.

The material portions of the law bearing upon the question here presented, are in the first section of the act of 1872, *supra*, and are as follows.

The Secretary of the Interior be and he is hereby authorized and directed to issue certificates by which allotments of land . . . shall be made to each member of the Pottawatomie band, known as the Pottawatomie citizen band . . . such allotments shall be made in severalty, specifying the name of the individuals to whom they have been assigned, and that said tracts are set apart for the exclusive and perpetual use and benefit of such assignees and their heirs. . . . *Provided* that such allotments shall be made to such of the above described persons as have resided or shall hereafter reside three years continuously on such reservation, and that the cost of such lands to the United States shall be paid from any fund now held, or which may be hereafter held by the United States for the benefit of such Indians, and charged as a part of their distributive share or shall be paid for by said Indians before such certificates are issued.

The Commissioner states in his letter of transmittal that it was held by the Department in the case of Mrs Anderson that her heirs were entitled to the issuance of a certificate, in her name, for the lands al-

lotted to her, and he thinks that under that decision the heirs of Pettifer would also be entitled to a certificate for the lands assigned to the deceased allottees, if they had never been abandoned or passed into the possession of other parties. He further says that there is no provision of law which works a forfeiture, because of abandonment, and if the heirs are willing to accept unoccupied lands in lieu of those heretofore allotted, it is possible they may have the right to do so. But the matter is submitted for the Secretary's decision.

It seems to me there ought to be no difficulty about this matter. When the allotments, contemplated by the act of 1872, are made, it is intended to vest in the Indians, to whom made, an interest in perpetuity in the particular tract subject to the condition that the same could only be disposed of to the United States or, by permission of the President, to persons of Indian blood, residing in said Territory. This interest, it is expressly provided by the act, goes to the allottees "and their heirs." The allottees are required either to pay in cash for the land selected before the certificate is issued, or the cost of such lands is to be deducted from funds which are now or may hereafter be held by the United States for the benefit of said Indians.

Under these circumstances, when the allotments are made, and I understand they were made in the case under consideration, and there being no declaration of forfeiture in the act, because of abandonment, either during the life of the allottees, or after their death, the Indian Bureau, in my opinion, assigned the lands of the Pettifers to other parties without authority of law. And those lands now belong to the heirs of the deceased allottees. If those heirs instead of ousting the present holders under the improper assignment, are willing to accept other unoccupied lands in lieu thereof, I do not see that there is any law to prevent such exchange, and think it can be done under the general administrative and supervisory power of the Department.

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ALLOTMENT OF INDIAN LANDS—ABSENTEE SHAWNEES.

JOE CHARLEY.

Under the agreement with the Absentee Shawnees, ratified by act of Congress, March 3, 1891, failure to make selection, or application therefor, prior to said act will not defeat the right to receive an allotment.

An unapproved schedule of allotments may be amended by adding thereto such allotments as should be properly included therein.

*Secretary Noble to the Commissioner of Indian Affairs, September 9, 1891.*

I acknowledge the receipt of your communication of 7th instant, asking that the schedule of allotments to the Absentee Shawnee Indians should be amended so as to include Joe Charley and his son, Douglas Charley, members of said tribe of Indians.

In response thereto I transmit herewith an opinion of the Hon. Assistant Attorney General for the Department of the Interior, to whom the matter was referred, and return herewith the Absentee Shawnee roll in order that the allotments of the above named Indians may be noted thereon.

## OPINION.

*Assistant Attorney General Shields to the Secretary of the Interior, September 9, 1891.*

I have the honor to acknowledge the receipt by reference of the letter of the Commissioner of Indian Affairs, dated September 8, 1891, in reference to the right of Joe Charley and his son, Douglas Charley, Absentee Shawnee Indians, to allotments, with a request for an opinion upon the questions presented.

On June 6, 1890, an agreement was entered into between the United States and the Absentee Shawnee Indians whereby the Indians ceded certain lands to the United States. Article 2 of that agreement recited that certain allotments had been made, were then being made and were to be made under the provisions of the act of February 8, 1887 (24 Stat., 388) and provided that all then made should be confirmed, that all in process of making should be completed and confirmed, and that all to be made should be made under the same rules as those theretofore made, and when made should be confirmed; and also contained the following:

And *provided further*, that all such allotments shall be taken on or before January 1st, 1891, after which time and up to February 8, 1891, the allotting agent then on said reservation shall make allotments to those Absentee Shawnees resident in said tract of country, who have failed or refused to take their allotments as aforesaid, and such allotments so made by such allotting agent shall have the same force and effect as if the selections were made by the Indians in person. After said date of February 8th 1891, any right to allotment hereunder or by act of Congress, shall be deemed waived and forever cease to exist.

This agreement was recited in full in section 9 of the act of March 3, 1891 (26 Stat., 989-1018) and declared accepted, ratified and confirmed.

At the date of this act, the time specified in said agreement for selecting allotments had expired, but until ratification thereof there was no authority for the officers of the government to act thereunder or to make selections as therein provided. In reference to this subject, the views of the Department were expressed in letter of April 2, 1889 to the Commissioner of Indian Affairs in these words:

I acknowledge the receipt of your communication of 14th ultimo, relative to allotments to certain Absentee Shawnee Indians who have heretofore refused to take their allotments wherein you refer to certain provisions of the agreement concluded with said Indians and ratified by the act of March 3, 1891 (Public No. 144) and express the opinion that it was clearly intended by the agreement that lands shall be assigned to all members of said band entitled to receive it.

I concur in your views and Special Agent Porter should be directed to make the assignments.

The special agent did make selections of allotments for a large number of Indians who had failed or refused to select for themselves, and reported his actions under date of April 14, 1891.

There is no doubt but it was the intention to provide all these Indians with land and that it is the duty of this Department to see that land is selected for all entitled thereto who have not made selections for themselves. The fact that the officers charged with the performance of that duty failed or were unable to make the selections within the time fixed therefor ought not to be held to deprive the Indians of their right to allotments. The only objection presented to making the allotments in question is that no application was made therefor prior to March 3, 1891. I do not think this objection has any weight. It was to protect just this class of beneficiaries that provision was made for the officer in charge of the work to make allotments to those who failed to select for themselves, and it was to this class of cases that the instructions of April 2, 1891 quoted above applied. When those instructions were issued, these parties were there on the reservation, and under the statements made, entitled to the allotments, and should have been provided for. The allotments not having been approved, and the matter not having been so far completed as to have passed beyond your control, I can see no objection to acting upon the recommendation of the Commissioner of Indian Affairs, and adding to the list of allotments the two for these parties.

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#### ALLOTMENT OF POTTAWATOMIE LANDS—SELECTION.

##### ANTHONY BOURBONNAIS.

The right to make selections for allotment, either under the act of May 23, 1872, or of February 8, 1887, continued until the expiration of thirty days from the date of the act ratifying the agreement with the Citizen Pottawatomies.

The heirs of an allottee may be permitted to perfect the allotment of their ancestor, where this can be done, but where the lands covered by former approved allotments have been allotted to other parties, by direction of the Department, the heirs may select other lands, of like quantity, in lieu of those lost by the allottee

*Secretary Noble to the Commissioner of Indian Affairs, September 3, 1891*

I acknowledge the receipt of your communication of April 23d last, requesting instructions relative to the applications of certain members of the Citizen Band of Pottawatomie Indians, for allotments under the act of May 23, 1872, (17 Stat. 159) made since March 3, 1891, and relative to the claim of Benjamin, deceased son of Anthony Bourbonnais.

In response, I transmit an opinion of the Hon. Assistant Attorney-General for the Department of the Interior, dated May 14th, 1891, in which I concur, to the effect that the right to make selections of lands for allotment, either under the act of May 23, 1872, or of February 8, 1887, continued until the expiration of thirty days from the date of

the act of Congress ratifying the agreement with the Citizen Band of Pottawatomies, March 3, 1891, but that Anthony Bourbonnais may select an allotment for his deceased son, in lieu of the allotment approved to said son but for which a certificate never issued.

## OPINION.

*Assistant Attorney-General Shields to the Secretary of the Interior, May 14, 1891.*

I have the honor to acknowledge the receipt, by reference from the Honorable First Assistant Secretary, of a communication from the office of Indian Affairs requesting instructions relative to the applications of certain members of the Citizen Band of Pottawatomie Indians for allotments under the act of May 23, 1872 (17 Stat., 159), made since March 3, 1891.

In said communication it is stated that Mr. D. A. McKnight, as the attorney of William Williams, on April 9, 1891, advised the Indian Office that he had suggested to said Williams, who was "an original allottee on the Knox allotment of 1875," to select lands for himself and forward the description to be filed, claiming that the limitation within which selections must be made under section 11 of the act of March 3, 1891 (Pub., 144, p. 36), has no application to a case where the selection was made many years ago and the land afterwards was improperly allotted to another, because said act of 1872 did not require payment within any fixed time; and he asks that, in case it shall be decided otherwise, the date of Mr. Williams' letter and power of attorney, to wit: April 2, 1891, should be considered the date of his application to select.

The first question submitted is whether the ratification, on March 3, 1891, of the agreement made with the Pottawatomies on June 25, 1890, terminated the right to take allotments under said act of 1872.

The second article of said agreement recites that certain allotments of land have been and are being made to members of said band under the act of February 8, 1887 (24 Stat., 388), and

that all such allotments so made shall be confirmed—all in process of being made shall be completed and confirmed, and all to be made shall be made under the same rules and regulations, as to persons, location, and area, as those heretofore made, and when made shall be confirmed.

It was further agreed—

That all such allotments shall be taken on or before February 8, 1891, when any right to allotment, in any one, shall be deemed waived and forever cease to exist.

By section 11 of said act of March 3, 1891, it was provided that selections might be made within thirty days after the approval of said act, "and not thereafter." The right of allotment under said act of 1872 was fully considered in my opinion submitted on June 11, 1890 (11 L.

D., 104-108), and it was held that as the act of 1887, section 1, expressly provided—

That where the treaty or act of Congress setting apart such reservation provides for the allotment of lands in severalty in quantities in excess of those herein provided, the President, in making allotments upon such reservation, shall allot the lands to each individual Indian belonging thereon, in quantity as specified in such treaty or act;

that since, under the act of 1872, a larger amount of land may be taken than under said act of 1887, the applicants should be allowed allotments under the former act. It was also said that the fact that under said act of 1872 the lands allotted must be paid for by the allottees, would not deprive the Indians of the right to take under said act, if they so elect.

It was further stated in said opinion that the Indian office considered—

that, although the lands selected by said applicants for themselves and families, except the allotment in the name of Julia Anderson, are not those approved by Secretary Chandler, as aforesaid, yet, since the Department has generally allowed allottees to change their selections upon sufficient showing, at any time prior to the "issuance of the evidence of title," said applicants should be allowed allotments for lands selected by them under said act of 1872, if there are no prior valid claims thereto, upon the payment of thirty and fifteen cents per acre, respectively, and that certificates shall issue in the name of Julia Anderson upon the allotment made in her name in 1875, upon a like payment of fifteen cents per acre.

In his letter of transmittal, the Secretary of the Interior concurred in the opinion of the Indian Office relative to the right of said Indians to have the lands selected allotted to them under the act of May 23, 1872, and that certificates should issue in the name of Julia Anderson for the land allotted to her in 1875. This appears to be a direct adjudication upon the right of the heirs to pay for the lands allotted to their ancestors.

In a subsequent opinion, rendered by me on March 26, 1891 (12 L. D., 357), upon the right of said Indians to have their selections perfected, when made prior to the passage of the act of 1891, reference was made to said former opinion, and it was held that the selections thus made, were, when made, authorized by law and the express authority of the President, and were not prohibited by the act of March 3, 1891 (*supra*). It is true that this ruling had special reference to selections under the act of 1872, made prior to the passage of the act of 1891, but the controlling reason for allowing selections under the act of 1872 is that the act of 1887, section 1, expressly provides for allotments under former acts or treaties where they provide for the allotment of lands in larger quantity than under the later act. The act of 1887 was not intended to and did not take away any rights secured by former acts or treaties, so far as relates to the quantity of land to be allotted. Hence, it must be held, I think, that the right of selection, either under the act of 1872, or the act of 1887, continued until the expiration of thirty days from the approval of the act of 1891.

The Indian Office asks to be instructed upon another question submitted by Mr. McKnight dated March 24, 1891, relative to the claim of Benjamin, deceased son of Anthony Bourbonnais.

It appears that in 1875 an allotment was made to Benjamin Bourbonnais, under the act of 1872, and in October, 1890, Mr. McKnight filed an application for allotments for Anthony Bourbonnais and family, including said Benjamin; that upon an investigation by a special agent it was found that Benjamin Bourbonnais had died, and that the land allotted to him in 1875 had been abandoned and re-allotted to some other parties. It is now insisted that the selection for said Benjamin should be allowed because his prior selection was approved by the Department, and the act of 1872 does not fix any time within which the money must be paid, and besides, when Anthony Bourbonnais was ready to pay for this allotment in 1890, he found that the government had allotted said land to another, and he was compelled to select other land in lieu thereof. It is also insisted that, by virtue of his first selection in good faith "there vested an equitable right in Bourbonnais to the tract of land so selected and approved for his son Benjamin," and that allotting said land to other parties, without his knowledge and consent ought not to be held to divest that right, and that upon the death of said Benjamin title under the law properly passed into the hands of his heirs, and that such has been the ruling of the Department in similar cases. No cases are cited in support of said contention.

Under the act of 1872, each minor was allowed "not more than eighty acres;" the allotments were to include, as far as practicable, the improvements of the allottees; and it was further provided that certificates of such allotments shall be made in severalty, specifying the names of individuals to whom they have been assigned, and that said tracts are set apart for the exclusive and perpetual use and benefit of such assignees and their heirs.

It was also provided that the allotments should be made to those who had or should reside upon their allotments for three years, and that the cost of the lands to the United States should be paid from the funds held by the government for the benefit of the Indians, or by the Indians, before such certificates are issued.

Although the statement of the Indian Office is quite incomplete as to the selection of lands for Benjamin Bourbonnais under said act of 1872 and his age at the date of said selection, yet, upon inquiry, I find that the first selection for him, No. 37, was for the SE  $\frac{1}{4}$  SE  $\frac{1}{4}$  Sec. 29, and the NE  $\frac{1}{4}$  NE  $\frac{1}{4}$  of Sec. 32, town 6, range 2, containing eighty acres, thus indicating that at the date of selection said Benjamin was a minor. But the application of the father, dated October 16, 1890, includes (No. 3) the SE  $\frac{1}{4}$  of Sec. 12, town 9, range 3 E., one hundred and sixty acres, on account of the right accruing to him as the heir of his deceased son, being just double the amount of the former selection.

It is clear that the selection for Benjamin Bourbonnais, deceased,

under said act of 1872, can not be allowed for a greater amount than that covered by the original allotment. But the act requires that the certificates of such allotments shall be made in severalty, specifying the names of individuals to whom they have been assigned, and that said tracts are set apart for the exclusive use of such assignees and their heirs.

The required term of residence is a condition precedent to allotment, and, since there is no provision in said act forfeiting said allotment for subsequent abandonment by the allottee, in my judgment the heirs should be permitted to perfect the allotments of their ancestors, where this can be done, and that where the lands covered by former approved allotments have been allotted to other parties by direction of the Department, the heirs may select other lands, of like quantity, in lieu of those lost by the allottees. This procedure would be in entire harmony with the view expressed in my said opinion of June 11, 1890, wherein it was stated that "as they relinquish these lands for the new allotments desired, it is practically an exchange of lands."

Anthony Bourbonnais should therefore be allowed to select an allotment in lieu of the allotment approved to said Benjamin by the Department for which certificate never issued.

With reference to the application in behalf of Mr. Williams, the Indian Office holds that it comes too late, and that the fact that he originally had a selection under the act of 1872, which he afterwards abandoned and allowed to pass into the hands of others, can not affect his right. The power of attorney and letter of Mr. McKnight do not accompany the communication from the Indian Office, and were not filed with his said application; consequently I am unable to determine his rights thereunder. I am of opinion, however, that all rights of selection either under said act of 1872 or under the general allotment act of 1887 must be exercised by the members of the Citizen Band of Pottatomies within the time prescribed by the eleventh section of the act of March 3, 1891 (*supra*). If, upon inspection of the power of attorney and letter of said Williams to Mr. McKnight, the Commissioner shall be of opinion that it was the intention of said Williams to make a selection under either of said acts, I see no objection to allowing the same.

## COMMUTATION FINAL PROOF—RESIDENCE—ADVERSE CLAIM.

VAN DEREN *v.* HOOVER.

One who, for a valuable consideration, formally abandons, by written agreement and relinquishment, a pre-emption claim, is not thereafter entitled to credit for residence during the period covered by said claim, on a subsequent homestead entry of the same land.

A homesteader who makes final commutation proof, in the presence of an adverse claim, must submit to an order of cancellation if his proof is found insufficient.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 23, 1891.*

I have examined the record in the case of James B. Van Deren *v.* Blanche S. Hoover, which is here on appeal of the former from your decision of March 17, 1890, dismissing his protest against the commuted homestead entry of Hoover for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 32, T. 19 S., R. 27 W., Wa Keeney, Kansas.

It appears that on June 11, 1886, Miss Hoover filed her declaratory statement for the land in controversy.

March 2, 1887, Van Deren made settlement thereon, by commencing the erection of a house, digging a well, etc.; that he finished his house within a few days thereafter, moved into it, and has resided there ever since, and continued to improve the land:

April 16, 1887, Miss Hoover executed and delivered to Van Deren the following agreement to abandon her claim:

I, Blanche S. Hoover, who made pre-emption D. S., for the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  Sec. 32, Tp. 19 S., R. 27 W., 6th P. M., hereby agree to abandon said claim as a pre-emption, and to set up no claim to such land by virtue of my pre-emption filing thereon.

On the same day, she subscribed to the following endorsement on the receipt, showing that she had filed for the land:

I, Blanche S. Hoover, who made the within pre-emption filing, did on the 19th day of January, 1886, abandon the within described land as a pre-emption, and that I have not held said land under or by virtue of said filing since said time, and that it has not been my intention to perfect said entry for said land under or by virtue of said pre-emption filing since said 19th of January, 1886, and I hereby relinquish all my right to said land by virtue of said filing.

It is evident that January, 1887, is intended as the date of her abandonment, instead of 1886, because her filing was not made until June, 1886.

April 20, 1887, four days after executing this relinquishment, for which she admits having received seventy-five dollars from Van Deren, she made homestead entry for the same land.

June 9, 1887, Van Deren made his claim of record, alleging settlement March 2d of the same year, the date when he commenced the construction of his house, well, etc.

Miss Hoover advertised to make commutation proof, September 1, 1887, at which time Van Deren appeared and filed protest against its allowance, alleging his priority of right for the land.

Hearing was had on this protest November 27, 1887. The local officers found in her favor and recommended that her homestead entry remain intact and "her application to make final proof and cash entry for said land be allowed."

Upon appeal you affirmed the action of the register and receiver and dismissed the protest. You also held that Hoover's proof was sufficient, and directed that final certificate should issue thereon.

I do not concur in your judgment.

An examination of the evidence shows that her residence, both before and after her relinquishment, was not such as to convey to my mind a sincere intention of making her home on the land, but consisted in staying there intermittingly with her mother (who resided in the neighborhood), for the purpose of keeping up a show of residence. Her improvements are very meagre, and by a preponderance of the evidence are shown to be worth not to exceed twenty dollars. The stable is shown to be of no practical value and was placed on the land by a neighboring claimant through a mistake in the boundaries of his claim.

But aside from this, it is shown that on April 16, 1887, she acknowledged that she had abandoned her pre-emption claim January 19th, previous, and that she had not held under her said claim since said abandonment, and yet by your said decision she is given credit for residence made upon said tract while the same was covered by her declaratory statement.

In this I think you are in error, for she had for a consideration abandoned all her rights under her pre-emption claim hence it is my judgment that her residence should be held to date from April 16, 1887, from which time up to the date of her commutation proof (September 1, 1887,) would be but four months and a half, while the regulations of this Department require six months residence under a homestead entry before commutation can be allowed.

Having submitted her proof in the presence of an adverse claim, she must be held to the proof then offered, and, as shown, it is deficient in length of residence. *Wade v. Meier*, 6 L. D., 308.

Her commuted cash entry will therefore be canceled.

The decision of your office is accordingly reversed.

## PRICE OF FORFEITED RAILROAD LAND—ACT OF MARCH 2, 1889.

## TRINIDAD RODRIGUEZ.

An excess in the area covered by a homestead entry may be paid for at single minimum rate, where the land, though double minimum at date of entry, is, prior to payment, reduced to single minimum by the act of March 2, 1889.

*Secretary Noble to the Commissioner of the General Land Office, September 24, 1891.*

I have considered the appeal of Trinidad Rodriguez from the decision of your office, of January 14th, 1889, in relation to his homestead entry made at the land office at Los Angeles, California.

The material part of the decision is as follows:

By office letter of May 10, 1883, Trinidad Rodriguez was allowed to amend his homestead entry No. 3067, December 30, 1883, fracl. NW.  $\frac{1}{4}$ , sec. 25, T. 15 S., R. 1 E., to embrace lots 1 and 2, sec. 26, and lot 1, and N.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , sec. 35, Tp. S., R. 1 E., containing 18.04 acres. Final proof has been submitted on said entry, and final certificate No. 1210, issued thereon October 25, 1889.

The land was double minimum in price at date of original entry and at date of amendment, (see act February 23, 1885, declaring forfeited lands granted to the Texas Pacific R. R. Co.), but was reduced to minimum rate by act of March 2, 1889. . . . .  
. . . . . As at date of entry the land was double minimum in price, you will require the claimant to pay for the excess in area at the double minimum rate.

The fourth section of the act of March 2, 1889, (25 Stat., 854), provides That the price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and, also, of all lands within the limits of any such railroad grant, but not embraced in such grant lying adjacent to and co-terminus with the portions of the line of any such railroad which shall not be completed at the date of this act is hereby fixed at one dollar and twenty-five cents per acre.

This language is clear and unequivocal, and broad enough to cover the lands granted to the Texas Pacific Railroad Co. and which were afterwards declared forfeited, (23 Stat., 337,) although the price of those lands was continued at the double minimum rate by the act declaring such forfeiture. It follows that the price of the land in question was distinctly "fixed" at \$1.25 per acre, on March 2, 1889, by the act of that date, and to that effect have been the decisions of this department.

In the "Texas Pacific Grant" (8 L. D. 530), it appears that lands had been actually paid for at the double minimum price, when that was the legal rate, and it was decided that "re-payment of any part of the purchase money paid for lands within the limits of the forfeited grant to the Texas Pacific Railroad Company prior to the act of March 2, 1889" could not be made. The decision was based upon the principle that payment for forfeited lands should be made at the rate that is legal at the date when the entry is made. In relation to the act declaring

said grant forfeited and the effect of the act of March 2, 1889, it was said:—

By the very terms of the act the even sections which had been raised to double minimum on the filing of the map of general route remained at that price, and the price of the sections declared forfeited and restored to the public domain was also declared to be "the same as heretofore fixed for the even sections within said grant," that is, double minimum. So that the even sections from the date of withdrawal upon the map of general route and the odd sections from the date of their restoration by the act of forfeiture, were fixed at double minimum and so continued until the act of March 2, 1889, (25 Stat., 854), fixing the price of all public lands within the limits of railroad grants which have been or may hereafter be forfeited, at the price of \$1.25 per acre. George T. Clark, (6 L. D. 157).

In the case of Jacob A. Gilford, (8 L. D. 583), \$2.50 an acre was paid March 22, 1889, for land "within the granted limits of a part of the Northern Pacific Railroad Company, which had not been completed March 2, 1889," and it is said—

It appears that this entry was made before the receipt of the instructions of your office by the local office, but at the time payment was made for the land, the land had been reduced in price to one dollar and twenty-five cents per acre, and therefore the sum of two dollars and fifty cents was erroneously charged.

That case is in point so far as the effect of the act of March 2, 1889, upon the status of the land in question is concerned.

The decision of the office in this case was based upon the undoubted fact that "at the date of entry the land was double minimum in price," and it is no less a fact that if the excess in area had then been paid for, the payment must have been made at that rate per acre. But the land was not in fact paid for at that date, and the price is still a matter of controversy, and is unpaid. In the meantime the land has been reduced to the minimum price, and the question arises whether in the face of that reduction the double minimum price ought to be exacted, although due and payable at the date of the entry at that rate.

In the case of Jacob R. Krater, 2 C. L. L., 936, the facts of the case and the decision of the Department are stated as follows:—

The tract in question was within the ten mile limits of the line of the road as surveyed and definitely located by the Atchison, Topeka and Santa Fe Railroad Company in 1869.

\* \* \* \* \*

Krater settled upon the tract June 20, 1870, and made proof of settlement, and cultivation, and residence, September 25, 1871, at which time he made a payment of \$1.25 per acre for the land. This amount was accepted by the local officers, and a certificate issued in due form. September 23, 1871, this Department accepted a map of an amended route of the said railroad.

By this change of route the land in question is situated more than ten miles from the road, and as a consequence is subject to disposal at \$1.25 per acre.

Instructions authorizing the disposal of the land located outside of the ten-mile limits at minimum price, were issued September 28th, 1871, and took effect at the local office on the 19th, October following.

You held that at the time Mr. Krater made his entry the land could only be sold at \$2.50 per acre, and called upon him to make additional payment of \$1.25 per acre.

This decision was affirmed by me on the 28th of December last.

It is the established ruling that where payment at the rate of double minimum has been made, and the land is subsequently reduced to minimum price, this Department is not permitted under the statute to refund the excess thus paid.

In the case under consideration, however, the excess has not been paid, and to require such payment at this time would be to exact a double minimum price for land which was reduced to minimum seven years since, and as no relief, under the laws at present in force, can be extended to parties who have made the excess payment, I am of the opinion upon further consideration of the case that the Department should at this time, owing to the present status of the land, dispense with such requirement.

This decision disposes of the ground upon which the ruling of your office was based, and, so far as it covers the same ground, is in harmony with the two later decisions above cited.

The act of March 2, 1889, is a remedial statute and should be construed so as to accomplish the object for which it was enacted.

Your judgment requiring Rodriguez to pay for the excess in area at the double minimum price is reversed.

#### ADDITIONAL TOWNSITE ENTRY—SCHOOL LANDS.

##### CITY OF CHEYENNE.

The fact that the surveyed lines of a claimed townsite embrace a certain area, and a portion of such land is occupied by townsite settlers, does not entitle them to enter as a townsite, the lands within said boundaries, irrespective of the statutory limitation as to the number of acres that may be thus appropriated.

The extension of a townsite survey over a school section, prior to the filing of the official plat of the public survey, confers no rights upon the townsite claimants, if such section is not in fact settled upon by said claimants prior to the official survey.

The right to make an additional townsite entry of lands "which may be occupied for townsite purposes" can not be exercised upon lands reserved or granted for school purposes.

The exclusion of a portion of the land embraced within the boundaries of a townsite on the adjustment of said townsite to the public survey, confers no right to an additional entry where no vested rights are disturbed by such adjustment.

*Secretary Noble to the Commissioner of the General Land Office, September 24, 1891.*

Your office, by letter of February 27, 1890, transmitted to this Department the papers in the case of the United States *v.* the City of Cheyenne, Wyoming, involving lots 5, 6, 7 and 8 of section 36, T. 14 N., R. 67 W., Cheyenne, Wyoming land district.

Since the case has been pending in the land office, Congress has passed an act, approved July 10, 1890, (26 Stat., 222) providing for the admission of Wyoming into the Union as a State, and by the fourth section of the act sections sixteen and thirty-six of each township in the State are granted to the State for school purposes. This is in pursuance of a provision of the act of July 25, 1868 entitled "An act to provide a temporary government for the Territory of Wyoming." (15 Stat., 178).

In view of this act, the State of Wyoming should have been made party hereto and notified of the appeal, but inasmuch as the conclusions I have reached do not affect its rights, it is not in position to complain of want of notice.

The case has been held since March 28, 1891, to enable the city to furnish further proof of the occupancy of the land in section thirty-six, prior to the filing of the plat of survey of township 14, N., R. 67 W., which was filed December 2, 1870.

The Department is in receipt of copies of the original proceedings of the people organizing the city of Cheyenne, Dakota Territory, in August, 1867, and subsequent proceedings, together with duly certified copies of the acts of the Territory of Dakota and of Wyoming after its establishment as a Territory, also the plat of a survey retracing the lines of the original city, with the affidavit of a witness named Talbot who claims to have knowledge of the boundary lines of the city as early as 1867.

I find from these papers that the original city included sixteen square miles, was "chartered" by the people of the city in August, 1867, and that on December 24, 1867, the Territory of Dakota passed an act (Chapter 11 Session laws, 1867) incorporating the territory, "surveyed, laid out and platted" as a townsite situate on Crow Creek where the Union Pacific Railroad crosses the same, to be known as the City of Cheyenne.

The city organized in 1867 by electing officers, and in 1870, July 14, the trustees resolved

to proceed in due form of law to obtain a survey of a tract of land consisting of 1562 $\frac{25}{100}$  acres situate upon unsurveyed lands of the United States, (and following the general description, say it is) the territory known as the City of Cheyenne. . . . preparatory to the entry of the same under the act of Congress passed March 2, 1867 entitled an act for the relief of the inhabitants of cities and towns (14 Stat., 541).

It appears further that on December 17, 1875, a patent was issued to Messrs. Cassalls, Hanna, Leiby, Whipple and Davis, as trustees of the city of Cheyenne, Wyoming Territory, for 639.47 acres of land in Sec. 6, T. 13 N., and Sec. 32, T. 14 N., R. 66 W. (The odd numbered sections 5 in T. 13 N., and 31 in 14 N., adjoining, completed the city. These last were railroad lands.) According to the plat of survey filed herein, the city embraces over 2500 acres of land about one-half of which is in even numbered sections, to wit, 4, 6, 30, 32 and 36, but when application was made for entry and patent for the townsite, the land in sections 4, 30 and 36 was omitted from the application.

The plat shows that the south-west corner of the city, the initial point of the survey, lies in Sec. 7, T. 13, R. 66 W., S. 56 11 E., 2364.5 feet from the north-west corner of said section. Thence the west line bears N. 26 28 W., 10360 feet, crossing the range line, then entering Sec. 36 about twenty chains west of south-east corner. The distance from the south line of the section to north-west corner of the town is

not given. The north line is at right angles to the west line, and passes out of Sec. 36 about twenty chains south of the north-east corner. The area lying in Sec. 36 is not given, but it is about one hundred and sixty acres.

The affidavit of Talbot filed herein shows that the corner of the survey is about where the corner was located several years ago, and we may assume that the plat on file is from an accurate retracing of the original city boundary lines. He says that there was a cemetery on this land about the time he first went there; that it was used as such for a time "and that there are some graves on the said tract at the present time." He does not, however, show that there are any persons living on this part of the land, nor does he say that any one ever lived there.

There is some testimony showing that there are at the present time some inhabitants on the land sought to be appropriated, but the evidence taken all together tends to show that they made settlement after the government survey of the township was filed in the local office. When the townsite was patented in 1875, the testimony showed three hundred and seven inhabitants on the land applied for and patented. By Sec. 2389, R. S., this number of inhabitants could enter for townsite purposes only six hundred and forty acres of land, and before they could enter a larger tract they must have one thousand inhabitants. The trustees selected the land the city desired to enter, and it was their business to apply for the land on which the people were located, so their town would be on the townsite. It is to be presumed they did this. They asked for no land in section thirty-six, so far as the record shows, and having selected within fifty-three hundredths of an acre all the land that they were entitled to under the law, they are bound by their action. The fact that lines of a survey enclose a body of land and a few people settle upon a portion of it and call it a city does not entitle them to the land in the boundaries, but for two hundred people or less they may enter three hundred and twenty acres and from two hundred to one thousand, they may enter six hundred and forty acres, no matter if the survey embraces, as did the first "charter" of Cheyenne, sixteen square miles. So the fact that lines were run over into section thirty-six before the official plat was filed does not entitle them to the land as a townsite when the land was not settled upon. Burying the dead there tends to disprove the claim that it was a part of the occupied portion of the city. The parcel in section thirty-six is quite a distance from the depot of the railroad, and was evidently an unoccupied, quiet place when used as a burial ground, and when the original application for a patent for a townsite was made.

I have examined the authorities cited by counsel, and I find in each case that the townsite was on surveyed lands and conformed to the government lines, and the general proposition is maintained, that the residents of a townsite need not reside upon each quarter-quarter section

of the tract included in the site any more than an entryman need live on each quarter-quarter of his tract.

In the case of *Slosser v. Price and Salt Lake City* (1 C. L. L., 586), cited by counsel it was said by the Assistant Attorney General and approved by the Secretary that "under the act of 1867, the selection need not, in my opinion, be accompanied by actual occupation of the entire surveyed site." But part of the tract in this case was occupied, and Slosser went into a house already built upon the land he afterwards sought to enter. He built a brewery and opened a saloon, used it as a place of trade, and it was held he could not make an entry for the tract as agricultural land.

In the townsite of *Milton v. Ganns et al.* (11 C. L. O., 318) the survey covered the NE $\frac{1}{4}$  of Sec. 15, and it had been laid off in blocks and lots and a house was erected on a block in the S $\frac{1}{2}$  of the said quarter section, Ganns sought to make a homestead entry for the S $\frac{1}{2}$  and NW $\frac{1}{4}$  of the quarter section so laid out as a townsite. It was said because the population and principal improvements are upon other tracts than those last described does not render the land subject to entry for the entire tracts selected need not be populated and improved.

In *Townsite of Concordia v. Linney*, (3 C. L. O., 50), the lands had been surveyed, and some of the quarter-quarters were unoccupied, but the jail, court house square, school-house and cemetery were located upon the tract "homesteaded" and streets were laid out, graded etc., and it was held that the fact that people did not have residences upon each quarter-quarter section of fractional legal subdivision, did not affect their rights.

But these cases are very different from the case at bar. Lands included within the limits of any incorporated town or selected as the site of a city or town, are not subject to pre-emption. In the case at bar the land is excepted from entry, because it is school land and there never was any settlement on this tract or any part of it until after the government survey.

Counsel say that, "In *Frazer v. Ringgold* (3 L. D., 69), it is said, "It is held in general that claims under townsite laws are pre-emptions." I accept this as correct.

By the act of Congress March 3, 1877, (19 Stat., 392), it is provided that where a town has made entry for less than the maximum quantity of land which it is entitled to enter it may

make such additional entry, or entries of contiguous tracts, which may be occupied for townsite purposes as when added to the entry or entries theretofore made will not exceed . . . . the area to which the town may be entitled at date of the additional entry by virtue of its population as prescribed.

This act applies to towns and cities the policy theretofore adopted and applied to adjoining farm homesteads, (Rev. Stats., 2289), in which an occupant of land where the person has "filed a pre-emption claim," etc., for less than one hundred and sixty acres he may make an addi-

tional entry that will, with the land occupied, aggregate one hundred and sixty acres. The land must be contiguous and "unappropriated lands."

It is quite certain that the words "which may be occupied for townsite purposes" were not intended to allow an additional entry, in violation of the inhibition as to entries or filings on school lands.

This application is for an additional cash entry, to the townsite of Cheyenne, and it was made in June 1889, long after the filing of the township plat, and it asks to take for the people of the city of Cheyenne lands which no citizen could take as additional farm lands or as a homestead.

I very much doubt the authority of the Department to exercise jurisdiction over the land, to sell it to the people of Cheyenne. The territorial act reserved it and the act creating the State, as I have said, conveyed it to the State, it was not occupied when so set apart, nor was it surveyed for a townsite except by the railroad company.

By section 2389 Rev. Stats., it is provided, as to locating townsites,

If upon unsurveyed lands the entry shall in its exterior limits be made in conformity to the local subdivisions of the public lands authorized by law.

This can only mean that the exterior limits shall be run north and south and east and west, as public lands are authorized to be surveyed, and by section 2383 Rev. Stats., it is provided that

it may be lawful after the extension thereto of the public surveys, to adjust the extension limits of the premises according to these lines where it can be done without interference with rights which may have vested by sale.

In the case at bar the lines traversed the government lines at an angle of twenty-six degrees and twenty-eight minutes west of north as has been stated, and by the application for the original townsite, patented in 1875, the exterior lines were made to conform, as nearly as practicable, to the government lines and in so doing all of section thirty-six was omitted, no lot had been sold therein, and there was therefore no vested rights, in any person, to any lot, block or parcel lying in this section. I do not, therefore, find that the inhabitants of Cheyenne have any right to make additional cash entry for said tract sought to be appropriated and having fully considered the entire case I do not find any reason for disturbing your decision, which affirmed that of the local officers. The application will therefore be dismissed, and your decision affirmed.

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

## JENNIE ROUTH.

An order of the General Land Office holding an entry for cancellation prior to the expiration of two years from the issuance of final certificate, defeats the confirmation of said entry under the proviso to section 7, act of March 3, 1891.

*Secretary Noble to the Commissioner of the General Land Office, September 24, 1891.*

On April 16, 1882, Jennie Fine filed a pre-emption declaratory statement for the N $\frac{1}{2}$ . NW $\frac{1}{4}$ . and N $\frac{1}{2}$ . NE $\frac{1}{4}$  of Sec. 18, T. 9. N., R. 45 E., Walla Walla, Washington. On February 14, 1885, she made out an application before the probate judge of the county in which the tract is situated, to change her filing and enter the tract under the homestead law.

Said application was transmitted by mail to the register and receiver the same day; it is stated, however, by the register of the land office at Walla Walla in a letter dated December 6, 1889, that in good weather mail from Asotin, Washington, the point from which this application was mailed, generally arrives at Walla Walla, within four days from the time mailed.

He also states that this application was not received at the local land office until after the 20th of February 1885.

Applicant was married on the 15th day of February 1885, the next day after mailing her application. Said application was imperfect, and had to be returned for correction, so that it was not finally admitted until June 16, 1885.

On February 25, 1888, she submitted final proof on her entry, which was approved by the local land officers and on March 8, 1888, a final certificate was issued to her in her present name of Jennie Routh.

On August 20, 1889, the record having been transmitted to your office in due course of business, upon examination her entry was suspended, and on December 23, 1889, said entry was held for cancellation by your office for the reason that on February 15, 1885, the entry woman became the wife of E. L. Routh, and thereby ceased to be a legally qualified homesteader, and that the entry in question was not perfected until after she became a married woman.

She appealed from this ruling of your office to this Department, and said appeal was pending here at the date of the passage of the act of March 3, 1891. (26 Stat., 1095).

She has now filed a motion to have the case disposed of under the provisions of the 7th section of the act above cited.

The record shows that the final certificate in question was issued on March 8, 1888. The entry was held for cancellation by your office on December 23, 1889, two years had not therefore elapsed after the issuance of the final certificate before the entry was held for cancellation.

The order holding it for cancellation was the initiation of proceedings against said entry, and having been initiated before two years had elapsed after the date of the issuance of the final certificate, will prevent its confirmation under the proviso to section 7, of the act cited. See letter of instructions of July 1, 1891 (13 L. D. 1).

Said motion is accordingly dismissed.

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SOLDIERS' ADDITIONAL HOMESTEAD-AFFIDAVIT OF CONTEST.

MOSES ET AL. v. FICK ET AL.

A soldier's additional homestead entry is not authorized, where the original entry is made subsequent to the adoption of the Revised Statutes.

A soldier's additional entry, illegal for want of proper basis, may not be perfected through a re-entry under section 6, act of March 2, 1889, where application for such relief is not made until after the initiation of a contest against said entry, charging such illegality.

A letter from the receiver of a local office attached to an affidavit of contest, in support of the charge contained therein, may be accepted as due corroboration under rule 3 of practice, where the charge against the entry involves a matter of record within the official knowledge of said officer.

*Secretary Noble to the Commissioner of the General Land Office, September 24, 1891.*

I have considered the appeals by W. E. Moses and Dorliska P. Mitchell from your office decision of February 20, 1890, holding for cancellation soldier's additional homestead entry No. 2248, final certificate No. 5599, by William P. Fick, made October 27, 1888, covering the S $\frac{1}{2}$  NE $\frac{1}{4}$  Sec. 11, T. 20 S., R. 65 W. of the 6th principal meridian, Pueblo land district, Colorado, and awarding the preference right of entry to H. E. Pack, upon the cancellation of said entry.

The entry under consideration is based upon original homestead entry No. 16,508, made August 12, 1874, for the W $\frac{1}{2}$  NW $\frac{1}{4}$  Sec. 26, T. 20 N., R. 4 E., Salina land district, Kansas, upon which final certificate No. 5486 issued July 26, 1880, and patent issued thereon December 10, 1880.

On May 4, 1889, W. E. Moses filed an affidavit of contest against Fick's additional entry, alleging that the entry is illegal, because the original entry upon which it is based was made subsequent to June 22, 1874. This affidavit was not corroborated, but was accompanied by a letter from the receiver of the Salina office, containing a statement from the records of that office as to the date of the original entry by Fick.

On the 15th of the same month, Herbert E. Pack filed an affidavit of contest against said entry, alleging the same ground of invalidity in the entry, and further, that the entryman has wholly abandoned the land. Five days later he filed an affidavit attacking the contest

by Moses, on the ground that there was no corroborating witness to the affidavit of contest, and that the same is brought in bad faith and for a speculative purpose. Moses thereupon made affidavit alleging that the contest was brought solely in his own interests, and that he had been advised by the local land office at Pueblo that corroboration of said affidavit by one or more witnesses was not necessary, they deeming the letter from the Salina office as abundant corroboration, the facts charged being matters of record in your office.

These applications to contest were forwarded by the local officers to your office for consideration (certificate having issued upon the entry) with separate letters of the same date, viz: July 16, 1889.

You find that the charge of invalidity in Fick's entry is sustained by the records of your office, and for this reason deem it unnecessary to order a hearing, and thereupon hold his entry for cancellation; but "in view of the plain requirement of Rule 3 of practice, which has the force of a statute," you reject the application to contest, filed by Moses, and hold that, upon the cancellation of the entry, the preference right of entry should be accorded Pack.

That the additional entry by Fick was illegal appears to be conceded. Fick did not appeal; but Dorliska P. Mitchell, who claims under transfer from Fick, dated October 27, 1888, filed an appeal out of time under the notice to Fick, urging that claimant should be permitted to perfect his additional entry under the provisions of the act of Congress approved March 2, 1889 (25 Stat., 854), by actual residence, if need be. The deed, or a copy thereof, under which the party claims, is not filed, but, accepting the appeal as regular, no objection having been filed thereto, I must sustain your decision, and direct the cancellation of the entry.

It is true that under section 6 of said act of March 2, 1889, Fick is entitled to make an additional entry, with the condition of residence and cultivation of the land embraced in the additional entry, to be made and proved as in ordinary homestead entries.

It must be remembered, however, that the entry under consideration, being a soldier's additional homestead entry, was made without residence or improvement, and if entry were permitted under said act it would be in the nature of an original entry requiring full compliance with the homestead laws. There is nothing in the act of 1889 giving validity to an illegal entry, nor was there an application pending by Fick to re-enter the land under that act, at the date of the filing of the applications by Moses and Pack to contest the entry, and, as neither Fick nor the transferee are alleged to have improvements on the land, I am unable to determine upon what grounds the claims of the transferee under that act are based.

Having determined that Fick's entry must be canceled, I will proceed to consider the respective rights of Moses and Pack under their application to contest.

The application by Moses was first in time, but he was deprived of this advantage, upon the ground that his affidavit was not corroborated, as required by Rule 3, of practice. The object of a contest is to clear the record of an abandoned or illegal entry and restore the land to the government. To secure an assurance of good faith on the part of the contestant, a rule, requiring his allegations on which the contest is based to be corroborated by the affidavits of other persons prior to the issuance of the notice of contest has been very properly prescribed by the Department. *Houston v. Coyle* (2 L. D., 58).

In the present case, instead of the affidavits of others to corroborate the allegations contained in the affidavit of contest, a letter from the receiver of the Salina office, where the original entry was made, was filed to substantiate the charge.

It would seem that this fully serves the purpose of the rule and is superior to the affidavit of an individual not having charge of the records, for his affidavit must rest upon information and belief; further, you found that the charge of invalidity in the entry is sustained by the records of your office, and therefore deemed it unnecessary to issue notice of contest. I must, therefore, overrule your objection to the affidavit filed by Moses.

It will be remembered that Pack filed an affidavit supplemental to his affidavit of contest, and therein he alleges that the contest by Moses was brought in bad faith and for a speculative purpose. The charge therein contained would seem to warrant a hearing, and the papers in the case are herewith returned for that purpose.

Your decision is accordingly modified.

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PRE-EMPTION ENTRY—CONFLICTING SETTLEMENT RIGHTS.

NELSON *v.* HORNE.

In case of conflicting settlements on unsurveyed land, with definite boundaries fixing the possessory right of each, either party may enter the entire tract in dispute on tendering to the other a written agreement to convey to him the part covered by his possessory right.

If both parties fail to make entry on these conditions joint entry may be made under the provisions of section 2274 R. S.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 25, 1891.*

I have considered the case of Charles J. Nelson *v.* James A. Horne, on appeal by the former from your decision of April 24, 1890, holding for cancellation his pre-emption filing for the SE  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of Sec. 16, T. 155 N., R. 65 W., Devils Lake, North Dakota, land district.

Your decision states the record and testimony fairly and substantially, but, I think in view of the good faith of the parties and the equities in the case, that it should be disposed of differently.

These parties went upon this section of land prior to survey, and mutually laid it off by a process of their own by what they call "squatters lines," into what they thought would be quarter sections. They jointly hired a man to plow some furrows to mark the lines, and they "staked" the corners and broke sod for a building to be erected on each tract so laid out and marked, and they jointly hired a man to put up a sod structure for each, and then returned to their homes for their families. Each in good faith brought his family and established residence on the tract claimed by him. A "squatter" line running, as they supposed, east and west separated their improvements. This line, however, bore about twelve degrees north of east. When the government survey was made, it was ascertained that the SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of the section lay on both sides of this "squatter line." The "forty" was thus divided so as to throw about seven and a half acres of it north of the line. This parcel contained the house and some other improvements of Nelson, while the thirty-two and a half acres south of the line contained the house and other improvements of Horne. They had broken and cultivated this entire tract in connection with the adjoining tracts not in controversy, and until the government survey, each supposed he was improving his own premises, but by this survey they both resided on the same tract. As soon as the official plat was filed in the local office, to wit, March 22, 1884, they each filed for this tract. It appears by the numbers of the filings that Nelson was first in order of time, but both bear the same date. Nelson claimed in his protest priority of settlement, but the settlements are simultaneous.

The local officers decided that they could make joint entry. This you held to be error, and canceled Nelson's filing.

A joint entry would make them tenants in common, owning equal undivided moieties. This would be inequitable. Again Nelson had not offered final proof, and joint entry can only be made when each has offered final proof. See *Coleman v. Winfield* (6 L. D., 826).

In the case at bar, there appears to have been a partition line between the lands claimed by the respective parties. It is claimed that this line crosses the tract from a point fifty-seven rods north of the southeast corner to a point seventy-four rods north of the southwest corner. Exactly where the line lies is a matter to be determined, if it has not been done. It is not for the Department to fix it at any given point; but following the case above cited, if Nelson submits final proof showing compliance with the pre-emption laws and regulations within ninety days from notice of this decision, Horne will be permitted to make entry for the entire tract (SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ ) upon the condition that he tenders to Nelson an agreement in writing to convey to him that part of the tract occupied by him, lying north of the said "squatter line," containing seven and a half acres more or less. If Nelson refuses or neglects to offer final proof, as indicated, his declaratory statement for the tract in controversy will be canceled, and his protest dismissed.

If he shall make final proof, and Horne refuses to make the agreement indicated, then Nelson by giving like bond to deed to Horne the land occupied by him lying south of said line, he (Nelson) will be allowed to make entry for the tract, and following the ruling in *Lord v. Perrin* (8 L. D., 536) if both parties fail to make entry upon these conditions, then they will be allowed to make joint entry in accordance with section 2274, Revised Statutes. Your decision is modified accordingly.

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TIMBER CULTURE CONTEST—SPECIFIC CHARGE.

JENKS *v.* HARTWELL'S HEIRS.

In a timber culture contest the defendant has the right to insist on a specific statement of the grounds of contest, and a retrial will be ordered where both charge and notice are indefinite, and due exception is taken thereto.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 25, 1891.*

I have considered the case of George E. Jenks *v.* Heirs of Helen E. Hartwell, deceased, upon the appeal of Peter A. Hartwell from your decision holding for cancellation the timber culture entry made by the said Helen E. Hartwell for the SW.  $\frac{1}{4}$  of Sec. 5, T. 101, R. 61, Mitchell land district, South Dakota.

Helen E. Hartwell made timber culture entry for the land in question on the 15th of May, 1879. On the 23d of March, 1886, Jenks filed affidavit of contest, alleging that

The heirs of said Helen E. Hartwell have failed to cultivate and keep in a growing condition ten acres of trees, seeds, or cuttings on the land described, and at present there is not to exceed one thousand trees, seeds, or cuttings on said tract.

Notice of contest was personally served on Peter A. Hartwell, and on the day fixed for the hearing he appeared in person and by attorney, the latter appearing specially for the purpose of moving that the contest be dismissed on the ground that the affidavit and notice did not set forth a cause of action against the entry, in that it did not specifically allege the year or years in which the pretended failures occurred, nor did it specify what those failures were. This motion was overruled, the defendant excepted, and the trial took place.

After considering the case, the register and receiver reached the conclusion that they made a wrong decision when they overruled the defendant's motion to dismiss the contest, and inasmuch as the defendant had not alleged nor proved the death of Helen E. Hartwell, or that Peter A. Hartwell was a relative or heir of the said Helen, that the affidavit and proof were both defective. In their decision bearing date, September 30, 1886, they conclude by saying :

The proceedings are set aside, and the contestant given thirty days in which to amend his affidavit in conformity to this order. On failure thereof his contest will be dismissed.

Jenks appealed from this decision, and the register and receiver were directed by your office to render a decision in the case upon the merits. In accordance with that direction, they found the entryman in default, and recommended the entry for cancellation, which judgment was affirmed by you on the 30th of January, 1890. An appeal from your conclusions brings the case to this Department.

The first ground of error alleged by the appellant in his notice of appeal is that you erred in overruling his motion to dismiss said contest, on the ground that the charges in the affidavit of contest were not sufficiently specific and did not state facts sufficient to constitute a cause of action. He also alleges that you erred in not sustaining that motion, and in overruling the decision of the register and receiver in which they sustained it, and in holding the entry for cancellation. There are nine grounds of error alleged, but those stated are sufficient for a proper consideration and decision of the case.

In contesting the claim of a deceased entryman due diligence should be exercised to ascertain the names and last known addresses of the heirs or legal representatives of the decedent, and if ascertained, the notice should be to them by name, and served personally if possible. *Bone v. Dickerson's heirs* (8 L. D., 452). In the case at bar, it does not appear that any diligence at all was exercised to ascertain the names of the heirs of Helen E. Hartwell, and certainly the notice was not addressed to them by name, but it simply alleged that "the heirs of Helen E. Hartwell have failed to cultivate," etc., and the notice was served upon Peter A. Hartwell, the plaintiff neither alleging nor proving that Helen was dead, and that Peter was her heir. The notice certainly did not conform to the requirements of law, as stated in the decision cited.

In his motion to dismiss, the defendant asked that the plaintiff be required to specify the particular year or years in which defendant has failed to cultivate and keep in a growing condition ten acres of trees, seeds or cuttings. In the case of *Miller v. Knuttson* (10 L. D., 593) it was held that a notice that does not set forth the grounds of contest is defective, and does not warrant proceedings thereunder. In the case at bar, the notice is but little more than a general allegation that the entryman has failed to comply with the requirements of the timber culture law. I think the defendant had a right to ask that the grounds of the contest should be specifically set forth by the plaintiff, and that the register and receiver were correct in their conclusion, when, in their decision of September 30, 1886, they said: "The heirs at law are entitled to a specific statement as to the years wherein the default occurred." If the plaintiff had been required to make specific charges of failure, and had failed to establish those charges by his evidence, he would not have been allowed to succeed, although the evidence might have disclosed defaults not specifically charged. *Platt v. Vachon* (7 L. D., 408). The doctrine of that case is that a plaintiff will be required

to make specific charges of default, and to prove the defaults as charged, and in case of his failure to do so the issue is between the entryman and the government.

I think the decision of the register and the receiver, of September 30, 1886, (which you refer to as of October 1, of that year) was correct, and that you erred in overruling the same. The decision of your office, holding the entry for cancellation, is therefore reversed, and the case will be returned to the local officers, with instructions to allow the contestant, within thirty days after notice thereof, to amend his contest affidavit in conformity with their order of September 30, 1886, and proceed with his contest, the appellant being duly notified of the proceedings. In case of failure to comply with the judgment of the register and receiver, of the date last stated, his contest will be dismissed, as therein directed.

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TIMBER CULTURE ENTRY—EXTENSION OF TIME.

MORRIS COLLAR.

The timber culture act does not contemplate an extension of the statutory period within which final proof is required; but proof submitted after the expiration of said period, either under the act of 1878, or the commutation clause of section 1, act of March 3, 1891, will receive due consideration.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 25, 1891.*

I have before me the appeal of Morris Collar, from your decision sustaining the action of the local officers in refusing to grant him an extension of time on his timber culture entry on lots 1 and 2 and SE.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$ , Sec. 2, T. 26 S., R. 25 W., Garden City, Kansas, land district.

The applicant made his timber culture entry June 6, 1877. His application was made to the local officers for extension of time, and rejected by them June 3, 1890—three days before the expiration of the thirteen years which he was allowed by law, within which to make final proof. The reason given by the local officers was substantially that there was no time within the life-time of the entry within which to grant an extension. From this he appealed, and your office sustained said ruling, and having reviewed the evidence offered in support of the application you say, "should Collar's entry be contested while he is endeavoring to show the cultivation required, the facts in the case will be considered, or when final proof shall have been received here it will be submitted to the board of equitable adjudication" etc. From this ruling he appealed.

I do not find any decision of the Department directly in point upon a timber culture entry, but there are several on homestead extensions.

In John C. Mounger (*ex parte*) (9 L. D., 291) it was said :

The Department has no power to extend the time within which a homestead entryman is *required by statute* to make proof showing compliance with the law under his entry.

In case of Edward Fullmer (8 L. D., 614) it was said

Inasmuch as there is no adverse claim and as bad faith is not established, I will not cancel the entry for the sole reason that the entryman has failed to make final proof within the statutory period,

and it was said when satisfactory proof is offered it will be referred to the board of equitable adjudication.

It appears, therefore, that your decision granted to the entryman all you could grant him under the practice, and if he delays his final proof he does so at his peril.

By the act of Congress, June 14, 1878, (20 Stat., 113) known as "The timber culture act," an extension was provided for in certain cases, as unusual drouth, grasshoppers, etc., but it says "the time for planting such trees, seeds, or cuttings, shall be extended one year for every year that they (the trees) are so destroyed," but it was provided that a corroborated affidavit should be filed setting forth the fact of such destruction.

In the case at bar, the entryman complains of a season of unusual drouth, and two hail storms within the several years covered by his entry. He did not apply when the drouth came, nor when the hail storms came, but waited until the very close of the time within which final proof should be offered, and then aggregated the several calamities that had befallen him, and asks an extension of the time within which he should make final proof.

The statute did not contemplate an extension beyond the life-time of the entry, for immediately following the provision for extension of the planting time, it is provided that final certificate shall not be given until after the expiration of eight years, then, or at any time *within five years thereafter*, upon making final proof as specified in the act, patent shall issue. Like the homestead law there is no provision for extending the time beyond five years after the eight years provided for. There is nothing, however, to prevent the consideration of final proof submitted after the expiration of the statutory period, whether such proof be made under the provisions of said act of June 14, 1878 (20 Stat., 113) or under the commutation clause of section one of the act of March 3, 1891 (26 Stat., 1095.) For the reasons herein set forth, the decision denying the application for an extension of the time for making final proof is affirmed.

## SWAMP LAND—RES JUDICATA—CHARACTER OF LAND.

TONNINGSEN *v.* THE STATE OF OREGON.

A decision of the local office adverse to the claim of the State under the swamp grant is not final, though not appealed from, as it is the duty of the Commissioner of the General Land Office to examine the evidence taken at the hearing and render decision thereon.

In asserting a claim under the swamp grant, the burden of proof is upon the State where the field notes do not show the land to be of the character granted.

Valley land that is subject to annual overflow to such an extent that the native grass growing thereon can not be harvested without diverting the water therefrom, is of the character contemplated by the swamp grant.

*Secretary Noble to the Commissioner of the General Land Office, September 29, 1891.*

On July 3, 1890, your office rendered a decision in the contested case of Nes P. Tonningsen, timber-culture claimant, against the State of Oregon, claimant under the swamp land grant, involving the SW.  $\frac{1}{4}$  of Sec. 27, T. 39 S., R. 24 E., Lakeview, Oregon, affirming the decision of the local officers awarding said tract to the State of Oregon upon the ground that it was of the character of lands contemplated by the act of September 28, 1850 (9 Stat., 519), which was extended to the State of Oregon by the act of March 12, 1860 (12 Stat., 3). Tonningsen's entry was therefore held for cancellation.

From this decision he appealed, alleging several grounds of error, which may be embraced under the two general heads that your office erred (1) in not holding that said case had been formally adjudicated between these parties in favor of Tonningsen, and (2) in holding that the land was swamp and overflowed within the meaning of the grant of March 12, 1860.

In support of the first proposition, it is contended by counsel for Tonningsen that in 1877 the State filed list No. 6 of swamp land selections, which embraced the tract in controversy, against which a contest was initiated by Tonningsen; that a hearing was ordered upon said contest for December 15, 1879, of which the State authorities were duly notified, and the State having made default, it was continued to December 16, when the register rendered the following opinion:

I have examined the evidence in the contest case of Peter Tonningsen *v.* State of Oregon, involving title to SW.  $\frac{1}{4}$  of Sec. 27, T. 39 S., R. 24 E., claimed by the State of Oregon under the act of March 12, 1860.

The records of this office show that the E.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of Sec. 27, T. and R. as above, were selected by the State as per list No. 6, filed in this office — 1877. The State authorities were notified by this office of pending contest, acknowledged service of such notice by letter. Having failed to appear and contest their right, I am of the opinion from the evidence adduced at the hearing that the claim of the State should be canceled.

The record of these proceedings did not appear in the files of your office, and upon the affidavit of Tonningsen the local officers were required to make report thereof, which was forwarded to your office on October 26, 1886. Said report merely showed that the contest was filed in 1879, upon which a hearing was ordered for December 15, 1879, and that the register rendered the decision as above stated. The record of evidence upon which said decision was rendered does not appear to have been forwarded, nor does it appear that the receiver took any part in said hearing.

It is unnecessary to recite any of the subsequent proceedings in this matter had prior to November 26, 1887. On that date the Commissioner ordered a hearing upon the contest of Tonningsen, which was had August 16, 1888, and at which the State and Andrew Morris, who had also offered a contest against the State, May 19, 1885, were present.

The decision of the register upon this hearing, above referred to, was not an adjudication of the rights of the State.

The doctrine of *res adjudicata* can only apply where the matter was adjudicated by a court competent to render a final judgment in the case, and which judgment would be conclusive against all parties thereto and their privies, unless reversed upon appeal.

The local officers have no power to render a final judgment in any case, and especially in determining the character of lands under the swamp land grant. (Sullivan v. Seeley, 3 L. D., 567.)

It is the duty of the Secretary to determine what lands are of the description and character granted by the act, his office being the sole tribunal charged with the duty of passing upon that question, and who alone can render final judgment, thereupon. State of Oregon, 12 L. D., 64; same, 5 L. D., 30.

While the Secretary of the Interior is charged with the duty of ascertaining and determining what lands are of the character contemplated by the swamp land grant, and while such fact can not be ascertained and determined by any other tribunal, the Secretary may employ various agencies as auxiliaries to aid him in the discharge of this duty, as, for instance, hearings upon contests before the local officers. But in such cases, although no appeal is taken from the findings of the local officers, it is the duty of the Commissioner to review the testimony taken at the hearing, and to render a decision upon the whole evidence. State of Oregon, 3 L. D., 474; same, 4 L. D., 225.

The important question is whether the land was swamp and overflowed within the meaning of the swamp land grant. Upon this question the evidence is conflicting and irreconcilable.

Tonningsen, the contestant, testified that no portion of the tract in controversy was subject to overflow or of a swampy nature, and that during the cropping season it would require irrigation to make it produce the staple crops of that vicinity; that no portion of the tract would require drainage in order to render it productive, and that the dams placed across the stream that passes through the land were placed

there for the purpose of irrigation; that he has visited the tract at all seasons since 1874, and that it has not been subject to overflow, but, on the contrary, in his knowledge it has been irrigated since 1874 to raise crops of hay.

The testimony of the contestant is in the main corroborated by four witnesses as to the fact that the land could be plowed, planted, and cultivated to an agricultural crop through the crop season without artificial drainage, and several of the witnesses testify that they have known the land since 1868.

On the other hand, the witnesses offered by the State—thirteen in number—testify, substantially, to the effect that from 1868 up to 1880 the water from Lake Warner covered the land a great portion of the time during the planting season, and that it has been reclaimed since 1880 by the construction of a ditch near the land in question, which connects with what is known as Deep Creek; that prior to 1880, the land was too wet during the greater part of the year to cultivate, but, on the contrary, that crops could not have been raised prior to the construction of said ditch in 1880, and that since that time the land has been reclaimed partly from the water going down in the lake, from the channels of the creek cutting down deeper, and by means of the ditch, which has diverted the water from its natural channel.

The field notes of survey do not show the land to be swamp and overflowed, and, hence, the burden of proof is upon the State. *Wisconsin v. Wolf*, 8 L. D., 555.

The weight of testimony in this case shows the land to be of the same character of land as that involved in the case of *Boyd v. Oregon*, 10 L. D., 315. In that case the land in controversy was situated in Coleman Valley, a small mountainous valley, almost level, and subject to an annual overflow from rain and melting snow from the mountains, commencing from the last of February to the first of April, and continuing through the season.

The local officers found that the land produced a fair growth of native grass, which was harvested for hay, and while the grass grew well, partially inundated, it could not be harvested without turning off the water. At the date of the trial, the land was much dryer than when first seen by the witnesses, who testified that the change was brought about by the cutting of several ditches, for the purpose of diverting the water from the natural channel, and by reclamation to such an extent that the water is allowed to flow over the meadow while the native grasses require it for their growth, but it is turned off in time to permit the harvesting of the same.

The local officers and the Commissioner found that the land was swamp and overflowed, which was affirmed by the Department.

The facts shown by the testimony in the case now under consideration are parallel to those in the case of *Boyd v. Oregon*, *supra*, which are very fully set forth in said decision, and upon the authority of said case your decision must be affirmed.

## SWAMP LANDS—RETURNS OF THE SURVEYOR GENERAL.

RAKE *v.* THE STATE OF IOWA.

A certificate of the surveyor general that lands embraced within a specified list are of the character granted by the swamp act, is *prima facie* evidence as to the character of such lands when said grant became effective.

The swamp land act intended to grant not solely such lands as were swamp, but such as were "so wet as to be rendered thereby unfit for cultivation."

*Secretary Noble to the Commissioner of the General Land Office, September 30, 1891.*

The record in the case of James A. Rake *v.* The State of Iowa, *ex rel.* John A. Lawless, is before me on appeal of the latter from your decision of April 28, 1890, holding for rejection the claim of the State (and its assignees under the swamp-land act) to the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 32, T. 83, R. 32 W., Des Moines, Iowa.

Contestant has filed a motion to dismiss this appeal, on the grounds—

1. Because no notice of appeal has been served upon appellee, as required by Rule of Practice 86.

2. Because no assignment of errors relied upon by appellant has been filed herein, and a copy served upon appellee, as required by Rules of Practice Nos. 88 and 90.

It appears that service of a copy of your decision was accepted by Lawless, May 15, 1890, and by the Auditor of the State May 5, 1890.

The appeal, with specification of errors, was accepted by the attorney for contestant July 5, 1890, and, on the same day, it was filed in the local office, and on July 12, 1890, argument in support of said appeal was filed, and, since Lawless as transferee of the State is the real defendant, it is seen that his appeal was filed within sixty days from the service upon him of the decision appealed from. The appeal sufficiently sets forth the errors complained of, and the motion to dismiss the same is therefore overruled.

It appears that the tract in question was embraced in a list, certified under date of May 11, 1859, by the surveyor-general of the United States for the State of Iowa,

as a correct transcript of the original lists of selections made by the county surveyors or State locating agents; that the same has been carefully compared with the field notes, plats, and other evidence on file in this office, and by the affidavits of said county surveyors or State locating agents it appears that the greater part of each smallest legal subdivision of the lands embraced in said list is swampy or subject to such overflow as to render the same unfit for cultivation, and is therefore of the character contemplated by the act of 28th September, 1850.

The swamp lands granted to the State of Iowa were, by act of the general assembly, in February, 1853, conveyed to the several counties in which they were situated.

It appears that Lawless, through mesne conveyances from Greene county, Iowa, claimed the land, and in November, 1887, he made application to present evidence of its swampy character, and, on October 23, 1888, you ordered a hearing "to determine its true character," and directed the local officers to give proper notice, and, after the hearing, examine the evidence and render a decision thereon, giving due notice thereof to all parties in interest, with the right of appeal, etc.

The hearing was duly had, and the evidence appears to have been filed, but I am unable to determine, as alleged by swamp-land claimant, that the local officers ever passed upon the same, "deciding it to be swamp land within the meaning of the act."

Referring to this hearing, the present register and receiver say:

It seems clear that a decision should have been rendered by the register and receiver of this office at that time. In that contest the land was proved to be swampy, and that no decision was made appears from the records to have been the fault of this office.

On September 9, 1889, the contestant (Rake) filed his affidavit of contest, alleging the tract "to be dry and fit for cultivation," and that such was its character at the date on which the swamp land law was passed.

Hearing was duly had, and on December 6, 1889, the register and receiver found that the tract in question "is swamp land within the meaning of the swamp land act of 1850."

In reversing that judgment, you say (*inter alia*):

The evidence has been carefully examined in this office, and found to be so conflicting as to render the character of the land at least doubtful.

On a careful examination of the evidence, it is very clear that the witnesses for the swamp land claimant have known the land for a much longer period than the witnesses who testified for the contestant, and their longer acquaintance with the land enabled them to give a better description of the same. One witness, Mr. Cromwell, had known the land for nineteen years, and swears that three-fourths of it was submerged, and that not more than eight or ten acres could have been cultivated; he further said: "In my opinion it was swamp land ever since God made it." Another witness, Coleman, had known it eighteen years, and had often seen three-fourths of it covered with water. He admits, however, that in consequence of the dry seasons of 1888 and '89, much of the swampy land had become fit for cultivation. He says the land was good hunting place for ducks. Other witnesses corroborate the above evidence.

John Thomas, who testified for contestant, had known the land four years. He says not over twelve or fifteen acres are unfit for cultivation, but admits that the first ten years he knew the land the largest part was too wet to cultivate.

John Rake and the contestant had only known the land two years, and the evidence shows those years to have been very dry.

Another witness (Badger) had only known the land two years and testifies they were the dryest for ten years.

One Bean, who surveyed the land just before the hearing, and in a very dry time, says that 29.7 acres of the forty acre tract can be cultivated, but he knew nothing of its condition prior to his survey, and the dryness of the season at that time makes his evidence of little value.

Although the testimony is conflicting, yet I am led to concur in the finding of the local officers, that the weight of the evidence tends to establish the fact that the land is of the character contemplated in the swamp land act.

The tract may not come under the description "swamp lands," but the act intended to grant not solely such lands as were swamps, but such as were "so wet as to be rendered thereby unfit for cultivation." *Powesheik County v. United States*, 9 L. D., 12.

Conceding the correctness of your finding that "the evidence is so conflicting as to render the character of the land at least doubtful," the certification of the surveyor-general of May 11, 1859, as above given—namely, that the tract "is of the character contemplated by the act of 23th September 1850"—would turn the scale in favor of the swamp land claimant. Such finding, based upon the same certificate, in the same terms, was held by the supreme court of Iowa to constitute a *prima facie* showing that the land was of a swampy character at the time the swamp land grant took effect.

This was the ruling in the case of *Page Co. v. the Burlington and Missouri River Railroad Company*, 40 Iowa, 520, where it is said:

The acts of these officers, state and federal, in selecting and setting apart the lands under the grant and their official certification of their swampy character, must be regarded as *prima facie* evidence at least that they are swamp lands. See also *Connors v. Mesermy*, 76 Iowa, p. 691.

After the passage of the swamp-land act, the State authorities were requested to indicate a method of selection which they would adopt in adjusting the grant. Some of the States, notably Michigan, Wisconsin, and Minnesota elected to accept the returns of the surveyor general's office, as disclosed by the field notes, as their method of adjustment, and in all such cases the field notes constitute *prima facie* evidence of the conditions given, and imposes the burden of proof against the party alleging the contrary. *Lachance v. The State of Minnesota*, 4 L. D., 479. And the State adopting this method is bound thereby, until such survey shall be proved to be fraudulent. (*Idem.*)

Other States, including Iowa, agreed to ascertain the swamp lands by examination in the field. In such cases the State is not bound by the field notes, but may furnish other evidence to sustain or disprove them. *State of Oregon*, 3 L. D., 474.

The certification by the surveyor general that the land is of the character contemplated by the swamp land act, and the selection of such lands by the State authorities (since the act of March 3, 1857, 11 Stat.,

251), while not determining *ipso facto* that the land is swamp or overflowed within the meaning of the act, yet it serves to withhold the land from entry, and further proof is required to establish the swampy character of the land, the burden of proof being upon the State to establish that fact. Circular of Instructions, December 13, 1886, 5 L. D., 279.

In the case at bar, the preponderance of the evidence is to the effect that the greater part of the tract for a long series of years was so wet as to be rendered thereby unfit for cultivation. This fact, together with the certification of the surveyor general in 1859 as to its swampy character, is sufficient to determine the issue in favor of the swamp land claimant.

The decision appealed from is accordingly reversed.

I find among the files in this case two letters from the register of the local office, addressed to one of the parties litigant, "as a friend," advising him to procure certain kinds of evidence to "prevent" his adversary from succeeding; also advising him to employ an attorney, and suggesting the name of the lawyer, "a friend of mine," who "will do it well." Such conduct on the part of a public official, whose duty it is to pass in judgment upon the merits of the controversy, is very reprehensible, and subjects him to the suspicion of favoritism, which can not be tolerated.

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PRACTICE—APPEAL—INTERLOCUTORY DECISION.

BROSE *v.* SMITH.

A decision of the Commissioner of the General Land Office holding an affidavit of contest sufficient, and directing hearing to proceed thereon, is interlocutory in character and not appealable.

*Secretary Noble to the Commissioner of the General Land Office, September 28, 1891.*

Heber A. Smith has applied for an order directing your office to transmit to the Department the record in the case of J. W. Brose against said Smith, involving the timber-culture entry made by the latter for the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 21, T. 3 N., R. 2 E., Boise City land district, Idaho.

Said timber-culture entry was made September 27, 1887. The contest affidavit was filed on November 30, 1890, alleging failure to fulfill the law in certain respects specified. Defendant, on December 24, ensuing, filed in the local office a motion to dismiss the contest, on the ground that the notice and affidavit did not contain facts sufficient, if proved, to warrant the cancellation of the entry. The local officers sustained the motion and dismissed the contest. From their action the contestant appealed to your office, which, on March 21, 1891, sustained the appeal, and directed that the contestant be allowed "to proceed with his suit." Defendant's counsel filed an appeal from your office to

the Department; and plaintiff's counsel filed a motion to dismiss said appeal, alleging that

the only question before your office was the preliminary one as to whether Brose's contest affidavit was sufficient or not. You held that it was sufficient, and ordered a hearing. It is unnecessary to cite any of the numerous rulings which hold that a decision ordering a hearing is not appealable.

Your office allowed the motion and rejected the appeal.

Counsel for defendant alleges that such rejection was improper, and asks that the Department direct your office to transmit the record in the case, and examine and pass upon the issue therein raised.

Defendent contends that "here is no question involving the discretionary power of the Commissioner to order a hearing;" that permission to continue a suit is not the equivalent of ordering a hearing, and is not a merely interlocutory question.

"Interlocutory," says Bouvier's Law Dictionary, is

something done between the commencement and the end of a suit or action which decides some point or matter which, however, is not a final decision of the matter in issue; as, interlocutory judgments, or decrees, or orders.

Freeman on Judgments, Sec. 12 (second edition), says:

Any judgment or decree, leaving some further act to be done by the court, before the rights of the parties are determined, and not putting an end to the action in which it is entered, is interlocutory.

Your decision holding that the contest affidavit was sufficient, and directing that the contestant be allowed to proceed with his suit, was clearly not a "final decision" of the matter in issue, on the contrary, it was a "judgment or decree leaving some further act to be done by the court" (the local office) "before the rights of the parties were determined." It was therefore "interlocutory," and not appealable, under Rule 81 of Practice.

Counsel for the defendant inquires: "Can any practice be found, common law, or statutory, which does not give the unsuccessful demurrant the right to bring his case, by proper pleading, before the tribunal of last resort?" Rule 81 of Practice provides for this:

Interlocutory orders and decisions, and orders for hearing, and other matters resting in the discretion of the Commissioner . . . . . will be noted in the record, and will be considered by the Secretary, in case an appeal upon the merits be finally allowed.

Or, if the defendant desires to bring the question of the sufficiency of the contest affidavit in issue, *without* a decision of the case upon its merits, he can decline to plead, and allow judgment as for want of plea to go against him. Such a judgment would be final, and he could appeal therefrom, assigning as error the order overruling his demurrer.

I find no error in your decision complained of and the application for certiorari is therefore denied.

## RAILROAD GRANT—DIRECTIONS FOR ADJUSTMENT.

ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO., AND ST. PAUL  
AND NORTHERN PACIFIC R. R. CO.

The St. Paul and Pacific Company had no grant from Crow Wing to St. Vincent, until the act of March 3, 1865, as changed by the act of 1871, conferred a new grant between those points, and it therefore follows that the grant for this part of the road can not be adjusted in connection with the earlier grants to said company as an entirety.

The grant is properly charged with lands relinquished by the governor, under the State act of March 1, 1877, though the title thereto does not pass to the company. In estimating deductions on account of prior grants, in accordance with section 3, act of March 3, 1865, the St. Paul and Sioux City grant is not to be included within the grants increased by the act of 1865, as special provision for said road was made by section 7, act of May 12, 1864.

Action should not be taken on indemnity selections for land covered by expired pre-emption filings until after notice to the claimants to assert any rights they may possess.

In the selection of indemnity the loss, on which the selection rests, should be specified, tract for tract, not exceeding, however, in any case an entire section.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
June 10, 1891.*

With letter of January 25, 1890, was submitted by your office an adjustment of the land grant to the then Territory of Minnesota by the act of March 3, 1857 (11 Stat., 195), and, after the admission of the State, supplemented and amended by the joint resolution of July 12, 1862 (12 Stat., 624), the act of March 3, 1865 (13 Stat., 526), of March 3, 1871 (16 Stat., 588), and of June 22, 1874 (18 Stat., 203), in aid of a railroad "from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the Mouth of Sioux Wood River, with a branch *via* St. Cloud and Crow Wing to the navigable waters of the Red River of the North."

The adjustment follows the departmental decision in 8 L. D., 255, which directs that the grants for the main and branch lines of said road be adjusted as an entirety; and thus is found to be due, on account of said grants, 69,070.80 acres. With the adjustment were sent up for my approval list 10 for 56,667.10 and list 11 for 10,435.48 acres, and with a letter of February 14, 1890, was sent list 12 for 1,992.03 acres, aggregating 69,094.61 acres of land within the indemnity limits along the line of road between Watab and Crow Wing, and a slight excess over the amount shown to be due; which lists it is recommended be approved for the benefit of the St. Paul and Northern Pacific Railroad Company, the grantee of the State of Minnesota for that portion of the road.

It is stated in the letter of January 25, 1890, that the adjustment is made under the departmental decision of May 13, 1873 (Vol. 15, L. & R., p. 332), which holds that, in the matter of the conflict of lines between the St. Vincent's extension of said road and the Northern Pacific

Railroad, near Glyndon, the rights of the first-mentioned company are superior to those of the latter.

Inasmuch as the supreme court has decided to the contrary, in the recent case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., p. 1), it will be necessary to return said adjustment that the same may be readjusted to accord with that decision.

In arriving at the above conclusion, the supreme court holds, in the decision cited, that at the date of the grant to the Northern Pacific Company in 1864, the St. Paul and Pacific Company had no grant from Crow Wing to St. Vincent, and that the grant made for this line by the act of March 3, 1865, *supra*, was a new grant, the route of which was subsequently authorized to be changed by the act of March 3, 1871, *supra*. It being thus decided by the highest judicial tribunal that the grant for the St. Vincent Extension, as it is called, is a new grant, made by acts of Congress subsequent in date to those by which the original grant was made for the main line to Breckenridge and the branch to Crow Wing, it seems that the decision of my predecessor, Secretary Vilas, in 8 L. D., *infra*, cannot be followed so far as to adjust the grant for the extension in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later one; and whenever it conflicts with the older grants, as at St. Cloud and perhaps elsewhere, they will have priority of right. To this extent, I think the decision of Secretary Vilas must be modified, and this modification would seem so effectually to sever these grants as to preclude the right of indemnity selection by the older grants along the line of the younger grant, and *vice versa*.

Further than this, the rule laid down in that decision should not be disturbed; but the main line and branch, as far as Crow Wing, taking their grants under the act of 1857, *supra*, should have the same adjusted as an entirety.

This ruling does not seem to be in conflict with the departmental decision in the case of the Grand Rapids and Indiana Railroad Company (10 L. D., 676), for there it was expressly held that the additional grant for the southward extension of that road is but an amendment of the original grant; which the supreme court, in the case cited from 139 U. S., expressly decides the grant for the St. Vincent's Extension is not. In any event, it seems that this change is made necessary by the decision of the supreme court.

In your statement it is observed that the grant is charged with 28,800 65 acres of land within the primary limits as "vacant, except expired filings." Exactly what is meant by this item is not clearly understood. If the filings on said tracts expired prior to the date of definite location of the line of road, the lands should be patented to the company, unless it be shown they had not been abandoned. Northern Pacific Railroad Company *v.* Stovenour, 10 L. D., 645-9. If,

on the contrary, it is meant that the filings existed at the date of definite location, and expired afterwards, the grant should be credited with the item, not charged therewith, and allowed indemnity for the land thus lost. (Ib., 648).

The charge of 14,856.62 acres for land in the same limits, relinquished by the State, under its own act of March 1, 1877, which authorized the Governor to execute such relinquishment in favor of those who were settlers on such lands at that time, seems to be proper in aid of the adjustment of the grant.

The supreme court, in the case of the St. Paul, Minneapolis and Manitoba Railway Company *v.* Greenalgh, 139 U. S., 19-22, pass upon this act, in connection with the act of Congress of June 22, 1874, *infra*, and hold that they are both valid, and that the company's continued possession of the property, after the expiration of the time fixed for the completion of the road, was subject to the condition that the rights of settlers upon the lands at that time should not be interfered with. As the acts, last referred to, were passed and the settlements made after the definite location of the road, it is proper to charge the lands in question to the grant, though, under the circumstances, the title to them is not to be passed to the company. This charge is a proper one, as indemnity is not to be allowed for said lands.

Deductions, aggregating 53,133.06 acres, on account of prior grants are made, under the provisions of section 3 of the act of March 3, 1865, *supra*, which provides that such deductions shall be made within the limits of the extension, and to the full quantity, of the grants made by said act. The prior grants, on account of which said deductions are made, are derived from the act of 1857, *supra*, under which several roads are entitled; and section 7 of the act of May 12, 1864 (13 Stat., 72), under which only one road is entitled, namely, the St. Paul and Sioux City, formerly the Minnesota Valley Road.

The act of 1865, *supra*, provided that the quantity of land granted to the State of Minnesota by the act of 1857, *supra*, to aid in the construction of the roads therein described, shall be increased to ten sections per mile, etc. As the construction of the St. Paul and Sioux City road was one of those provided for by the act of 1857, it might seem that road was also included in the increased grant made for all of said roads by the act of 1865. And so it would be, were it not for section 7 of the act of 1864, *supra*, which grants four additional sections per mile to that road. Congress having thereby made special provision for said road, it is not reasonable to hold that it was intended to be also included in the general provisions of the act of 1865; nor should it be held that the latter act repealed the former by implication, when the two can thus be made to stand together. This construction is understood to be insisted upon by that company, and your adoption of it in the statement made is, I think, correct.

The correctness of the amount of some of the deductions made is

questioned by the attorneys for the St. Paul, Minneapolis and Manitoba Railway Company. Without passing upon this matter now, their brief is sent you that it may be considered in the new statement to be made.

As to the item of 2,577.27 acres described as "vacant," and that of 71,997.80 acres, described as "selected," both in the granted limits, it is assumed that they are composed of lands to which the grant is entitled, but are not yet in a condition to be patented; otherwise the propriety of charging them against the grant for the purpose of making a final adjustment of the same, seems to be questionable and is not easily understood.

The allowance of lands to the Brainerd Branch as far north as Crow Wing, within the fifteen miles limit of the grant of 1857 and the primary limits of the Northern Pacific, under its grant of 1864, is in accordance with rulings of this Department in the case of the Chicago, St. Paul, Minneapolis and Omaha Railway Company (6 L. D., 195), and of the Wisconsin Central Railroad Company in 10 L. D., 63; and of Mr. Justice Harlan in the case of the same company *v.* Forsythe, in 43 Federal Reporter, 867.

You state that 765.79 acres of the selected land in list 10 is covered by "old expired filings under which no one is asserting claim." It is assumed the filings expired before the selection by the company.

In the case of *Allers v. Northern Pacific Railroad Company*, 9 L. D., 452, it was held (syllabus) that:

An expired pre-emption filing, under which no claim is asserted, does not exclude the land covered thereby from indemnity selection.

In the *Stovenour* case, before cited, it was said

Upon the expiration of the time limited by statute for the making of proof and payment, without such proof and payment having been made, the presumption arose that whatever claim, or claims, had previously attached to the land, under or by reason of such filings, had been abandoned, and no longer in fact existed. This presumption, however, was not conclusive, but was open to rebuttal by any one claiming an interest in or right to the land, who might allege the contrary. The claimant, *Stovenour*, has made no such allegation in this case. So far as the record shows, the land in dispute was prima facie subject to the grant to the company at the date of the definite location of its road, and must be held, therefore, in the absence of any allegation or showing to the contrary, to have passed under the grant. (Page 649.)

The rule here laid down was enlarged by the requirement of notice, to the claimant, in the later case of the *Little Rock and Memphis Railroad Company*, 11 L. D., 595, where it was said (syllabus):

No action should be taken on indemnity selections for land covered by expired filings until after notice to the claimants to assert any rights they may possess.

The *Allers* case is not mentioned, but it is said:

There is nothing in the *Stovenour* case to prevent this. While the rights under filings have ceased, settlement, if continued, would defeat the right of selection.

In the case of the Missouri, Kansas and Texas Railway Company, 12 L. D., p. 88, the Little Rock and Memphis case was quoted and approved, and you were directed to follow the rule there laid down.

In view, then, of these two later decisions, it is apparent that the tracts covered by expired filings ought not to have been included in the list until notice had been given "to the claimants" to assert any rights they may possess. You will therefore correct this error.

Examining the lists sent up for approval, it does not appear that the losses or selections are specified with sufficient detail to meet the requirements of the law and the rules of the Department.

The act of 1857, making the original grants to these roads, provides that where, at the time of the definite location, the United States have disposed of "any sections or any parts thereof," it shall be lawful to select in lieu thereof so much land in "alternate sections or parts of sections as shall be equal to" the lands disposed of. A similar provision is found in most of the other railroad grants. The requirement of the law seems to be plain. The selection must be made tract for tract of the lost lands, not exceeding, however, in any case, an entire section. To make the selection properly in accordance with the rule, it is absolutely essential that the losses should be specified with particularity and the selections correspond therewith in quantity as nearly as legal subdivisions will permit.

If the loss is of an entire section, because, perhaps, of the swamp land grant, it will be lawful to select as indemnity therefor an entire section, or parts of a section, or sections, in one group; not exceeding in quantity the lost land. And so, in like manner, for the loss of any smaller quantity of land. Each loss, however, must be separately specified and the selection therefor designated. It is not proper to group losses on account of several claims, and make one selection to cover the lot, but the losses and selections should correspond to the extent of the claim, which caused the loss, not to exceed, however, in any specification of loss or selection of indemnity, the amount of one section. With lists thus prepared, I think the law and rules of the Department will be sufficiently complied with.

Herewith are returned said lists and are also sent the arguments of counsel filed in relation thereto.

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#### RAILROAD GRANT—DIRECTIONS FOR ADJUSTMENT.

#### ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO., AND ST. PAUL AND NORTHERN PACIFIC R. R. CO.

In view of the provisions in the act of March 3, 1887, requiring the adjustment of railroad grants "in accordance with the decisions of the supreme court," and the recent decision of said court as to the relation of the act of March 3, 1871, to the acts of 1857, and 1865, the Department must recede from its former rulings with respect to the adjustment of the Manitoba railway grant as an entirety.

The grant for the St. Vincent extension of the St. Paul, Minneapolis and Manitoba Ry, is a new grant, made by act of Congress subsequent in date to those by which the original grant was made for the main line, and it therefore follows that the grant for said extension should not be adjusted in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later, and wherever the latter conflicts with the older grant, priority of right must be accorded the prior grant.

The separate adjustment of the grants for the main and branch lines precludes the right of indemnity selection by the older grants along the line of the younger, and *vice versa*.

The Department adheres to its ruling of June 10, 1891, and modifies the departmental decision in the case of the St. Paul, Minneapolis and Manitoba Ry. Co., 8 L. D., 255.

*Secretary Noble to the Commissioner of the General Land Office, October 1, 1891.*

With your letter of January 25, 1890, was forwarded, for my approval, certain indemnity lists of selection by the St. Paul and Northern Pacific Railroad Company, and in said letter was presented an adjustment of the grants made by the acts of March 3, 1857 (11 Stat., 195), March 3, 1865 (13 Stat., 526), and March 3, 1871 (16 Stat., 588), to the Territory and State of Minnesota, to aid in the construction of a railroad "from Stillwater, by way of St. Paul and St. Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* St. Cloud and Crow Wing to the navigable waters of the Red River of the North." This adjustment, proceeding under departmental decision, 8 L. D., 255, recognized the grants for the main and branch lines of the Manitoba road as an entirety.

Subsequent to your letter, to wit, March 2, 1891, the supreme court handed down an opinion in the case of the St. Paul and Pacific Railroad Company *v.* Northern Pacific Railroad Company (139 U. S., 1), in which the grants under consideration were discussed, and in applying that decision to the adjustment, it was held by me June 10, 1891, 849-50

It being thus decided by the highest judicial tribunal that the grant for the St. Vincent Extension, as it is called, is a new grant, made by acts of Congress subsequent in date to those by which the original grant was made for the main line to Breckenridge and the branch to Crow Wing, it seems that the decision of my predecessor, Secretary Vilas, in 8 L. D., *infra*, can not be followed so far as to adjust the grant for the extension in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later one; and whenever it conflicts with the older grants, as at St. Cloud and perhaps elsewhere, they will have priority of right. To this extent, I think, the decision of Secretary Vilas must be modified, and this modification would seem so effectually to sever these grants as to preclude the right of indemnity selection by the older grants along the line of the younger grant, and *vice versa*.

It was for the review in this decision in the matter of the adjustment of its grant, that the Manitoba Company requested a suspension of action thereunder, and that opportunity be afforded it to present the matter orally, which was granted, the case being heard July 15th last.

A brief history of these grants is necessary to a proper understanding of the matter now under consideration.

The grant made by the act of March 3, 1857 (*supra*), was for a main line from Stillwater to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River, with a branch *via* St. Cloud and Crow Wing to St. Vincent, and was conferred upon the Minnesota and Pacific Railroad Company. In November, 1857, this company located the branch line as far north as Crow Wing, and in March, 1862, the State transferred the grant to the St. Paul and Pacific Railroad Company.

By the joint resolution of July 12, 1862 (12 Stat., 624), a grant was made to the State of Minnesota for a *new* branch line having its southwestern terminus at any point on the existing line between the Falls of St. Anthony and Crow Wing, and extending in a northeasterly direction to the waters of Lake Superior, in lieu of that part of the original branch line extending northwesterly from the intersection of the 10th standard parallel with the fourth guide meridian.

By the 9th section of the act of March 3, 1865 (*supra*), which increased the grant made by the act of March 3, 1857 (*supra*), from six alternate sections per mile on each side of the roads and branches to ten sections per mile, provision was made that said act should be so construed as to apply and extend to that part of the line authorized to be vacated by the joint resolution of July 12, 1862 (*supra*), as though said resolution had not been passed, and also to the line adopted by the State in lieu of the portion of the line so vacated.

We now have two branch lines, one from St. Cloud *via* Crow Wing to St. Vincent, and another from some point on the line between the Falls of St. Anthony and Crow Wing to Lake Superior.

By the act of March 3, 1871 (*supra*), the Saint Paul and Pacific Railroad Company was authorized to so alter its branch lines that, instead of constructing a road from Crow Wing to St. Vincent, and from St. Cloud to the waters of Lake Superior, it might locate and construct in lieu thereof a line from Crow Wing to Brainerd to connect with the Northern Pacific Railroad, and from St. Cloud to a point of intersection with the line of the original grant at or near Otter Tail or Rush Lake, so as to form a more direct route to St. Vincent, "with the same proportional grant of lands to be taken in the same manner *along said altered lines*, as is provided for the present lines by existing laws." Provision was also made for a relinquishment by the company of all the lands along the "abandoned lines from Crow Wing to St. Vincent and from St. Cloud to Lake Superior."

After the passage of this act there were yet two branch lines, the first comprising that portion of the original branch line as far north as Crow Wing with the extension authorized by this act to Brainerd, and the second, being an entire new line terminating, as intended the original branch line should, at St. Vincent. Of these lines the Manitoba Company claims the grant appertaining to that portion of the first, south of Watab, and the entire new line to St. Vincent while the St. Paul and Northern Pacific Railroad Company claims the grant for the line between Watab and Brainerd.

Locations were made under the act of March 3, 1871, which were accepted, and the roads have been constructed practically upon said locations.

It is now urged that in view of the decision of Mr. Secretary Chandler, in which it was held that under the act of March 3, 1857, the main and branch line were considered as one and the same road, and that the act of March 3, 1871, was an amendment of the act of March 3, 1857, and should be construed as though it were inserted in it, which decision was re affirmed by Mr. Secretary Vilas, February 26, 1889 (8 L. D., 255), and declared to have become "a rule of property," it ought and can not be overruled, unless very clearly shown to be wrong; further, that all that was meant by the court, in the case referred to, was that (in respect to the time when the grant of 1871 was to take effect), as against an adverse railroad grant or other claim, it was to be considered a new grant.

In answer to the first proposition, I have but to refer to the act of March 3, 1871 (24 Stat., 556), which directs an immediate adjustment, "in accordance with the decisions of the supreme court," of all railroad land grants made by Congress then unadjusted.

There can be no question but that these grants come under that act, and it is but necessary to consider whether, under the decisions of that court, these grants are to be considered and adjusted as one or separate grants.

In the case before referred to, the St. Paul and Pacific Railroad Company contended that the acts of March 3, 1865, and March 3, 1871, are to be treated, not as distinct acts, but simply as amendments to the act of March 3, 1857.

In answer to such contention the court says :

the act of 1871 *does not purport in any sense* to be an amendment of the act of 1857. It simply authorizes the St. Paul and Pacific Railroad Company to change its lines in consideration of the relinquishment of certain lands. The *old* lines were to be given up, and *all* the benefits attached to them, in consideration of which *new* lines were authorized. *The old lines were not amended, but were abandoned.* There was no partial release of the accompanying grants, but whatever rights attended the original lines were to be surrendered.

This language is very plain and can not be misunderstood.

In the argument, both oral and by brief, counsel for these companies lay particular stress upon certain words used in the act of 1871—viz : "may so alter its branch lines . . . . with the same proportional grant of lands *to be taken in the same manner along said altered lines,* as is provided for the present lines by existing laws."

It is urged that lands are taken *in the same manner* as was provided by the then existing laws when they are taken under and according to the conditions and limitations of the acts of 1857 and 1865, and that the altered lines consist of the portions located pursuant to the act of 1871, together with the portions of the line originally contemplated, which were not affected by the alteration; hence, it follows that they are taken along the altered lines when they are taken anywhere along the line as

finally located, pursuant to the provisions of the acts of 1857, 1865, and 1871.

This contention can not be sustained, in the light of the decision above referred to.

It will be remembered that the grants made by the acts of 1857 and 1865 were to the Territory and State of Minnesota, and that lands were only to be disposed of in the manner as therein provided, under the direction of the State, who was to see that they were applied for the purposes intended. The act of 1865 provided for the issue of patents to the State as the road was constructed, applying the "coterminous principle."

The act of 1871 recognized the action of the State in conferring the grants upon the St. Paul and Pacific Company, and authorized that company to alter its lines, but that the grant for such altered lines (for which no previous grant had been made) was to be taken in the same manner as though the company had built and earned the grants for existing lines, *i. e.*, through the State, and as the road was constructed, recognizing the coterminous principle.

The amount of the grant was fixed by the words, "the same proportional grant of lands," and they were to be taken where? Along the altered lines, *i. e.*, the new or changed lines.

I am clearly of the opinion that the directions heretofore given for the adjustment of these grants, and embodied in my letter to you of June 10th last, are correct, and I have therefore to direct that you proceed without delay in this matter, as great interests are involved and demand immediate attention.

Other questions were attempted to be raised by the St. Paul and Northern Pacific Railroad Company, in the matter of certain deductions made in the adjustment before submitted by your office, but I prefer to leave the same until the matter is again presented in accordance with the directions herein given.

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RIGHT OF WAY—ACT OF MARCH 3, 1891.

H. B. JONES ET AL.

An application for a right of way for a ditch and reservoir, under the act of March 3, 1891, should be accompanied by evidence as to the person authorized to make the survey therefor, and that the line of route and location, as surveyed and represented on the map, were duly adopted, as of a certain date, by the owners of such ditch and reservoir.

The affidavit of the person employed to make the survey should also be filed, setting forth the facts as to the date of the survey, the distance and termini, and that the survey is correctly shown by the map.

Where the line of route passes through a school section it should be shown whether said section passed to the State or was excepted from the grant; and it should be further shown whether said ditch, or reservoir, passes through, or embraces, land included within a government reservation.

*Secretary Noble to the Commissioner of the General Land Office, October 2, 1891.*

By letter of September 7, 1891, you transmitted the application and diagram of H. B. Jones and J. D. Patterson of Walsenburg, Colorado, for an irrigating ditch and reservoir, known as the extension of the Mahan ditch and reservoir. The head-gate of the extension is located in the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 33, T. 26 S., R. 67 W., Colorado. Said application is made under the provisions of the act of March 3, 1891 (26 Stat., 1095). It appears that the Mahan ditch and reservoir is a private enterprise, owned by private individuals. It appears from your letter that the diagram submitted has been examined, in connection with the public surveys and found to agree therewith in all essential particulars, and you accordingly recommend that said papers and diagram be received and placed on file.

Sections 18 to 21 inclusive, of the act of March, 1891, relating to the right of way over the public lands are very similar in their provisions to the act of March 3, 1875 (18 Stat., 482), relating to the right of way for railroads; and in the circular letter to the local officers, dated April 17, 1891 (12 L. D., 429), under the act of 1891, reference was made to the circular dated January 13, 1888 (12 L. D., 423), under the act of 1875.

The twentieth section of the act of 1891 provides:

That the provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be, etc.

The papers now presented do not show a compliance with the requirements of this section, and the circulars above referred to. The papers submitted consist of an affidavit of Joseph D. Patterson, and a certified copy of what purports to be a statement of the extension of the Mahan ditch, filed in the office of the county clerk of Huerfano county, Colorado, on the 6th day of August, 1891, and a map showing the location of the extension of the ditch from the headgate in section 33, to a reservoir located principally upon the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of section 36, T. 26 S., R. 67 W., and thence a waste ditch running in a northeasterly direction and emptying into an arroyo near the center of the west side of the NE.  $\frac{1}{4}$  of said Sec. 36. The map was filed with the register of the Pueblo, Colorado, land office, on the 8th day of August, 1891. It has a statement on it as follows: "Surveyed by L. W. Burtch, county surveyor, Huerfano Co., Colorado, January 9, 1889," but it does not contain any other evidence that it was surveyed by him. Section 20 of the act of March, 1891, requires the map to be filed by individual owners of canals, ditches, or reservoirs, under it, to be the same "as in case of a corporation," and the regulations, *supra*, require the affidavit

of the person employed to make the survey setting forth that the survey of the route from the point of starting giving termini and distance, was made by him, as surveyor, employed for the purpose on or between certain dates, giving them, and that such survey is accurately represented on the map.

The affidavit of Joseph D. Patterson shows that he is one of the owners of the ditch and reservoir and that the map shows the true line thereof. It should have stated the name of the person employed to make the survey and that the line of route so surveyed and represented by the map was adopted by the owners on a certain date.

Congress by act of March 3, 1875 (18 Stat., 474), granted, to the State of Colorado, for school purposes, sections sixteen and thirty-six in every township, except where said sections had been sold or otherwise disposed of by any act of Congress, and except where said sections were mineral in character. I am not advised as to whether this particular section thirty-six, was included in, or exempted from, said grant. If it were not excepted from said grant, then it passed to the State and in that event the Department would not be justified in approving the map in question further than the western boundary line of said section thirty-six. If said section thirty-six were excepted from said school grant, and is now government land, then the Department might properly approve the map thereon, provided there exists no other legal obstacle.

It should further be made to appear as a fact, that neither the ditch nor reservoir run through or embrace any part of land in a government reservation, or if it does, then the map of location should be submitted to the Department having charge of such reservation for approval, as well as to this Department. All maps presented for approval should be filed in duplicate.

For the foregoing reasons this map cannot be approved, and it and accompanying papers, are therefore returned to you without my approval. You will call the attention of the parties interested, in connection with the regulations referred to, to the defects herein pointed out, and to such others as a careful re-examination of the map and papers may disclose, and inform said parties that they will be allowed an opportunity to remedy the same.

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REPAYMENT—ACT OF JUNE 16, 1880.

ARTHUR L. THOMAS.

There is no statutory authority for the repayment of purchase money, fees, or commissions, where the entry fails through no fault or error on the part of the government.

*Secretary Noble to the Commissioner of the General Land Office, October 6, 1891.*

I herewith enclose a copy of a letter received from Hon. A. C. Matthews, First Comptroller of the Treasury, with reference to the application of Arthur L. Thomas for repayment on his canceled desert land

entry, also a copy of my reply thereto; and I have to direct that in future you will be governed by the principles therein announced, in the consideration of applications for the repayment of purchase money, and of fees and commissions.

TREASURY DEPARTMENT,  
FIRST COMPTROLLER'S OFFICE,  
Washington, February 6, 1891.

HON. JOHN W. NOBLE,

*Secretary of the Interior :*

SIR: I respectfully invite your attention to section 2 of an act of Congress entitled :

An act for the relief of certain settlers on the public lands and for the payment of certain fees, purchase money and commissions paid on void entries of public lands. Approved June 16, 1880, 21 Stat., 287.

That section provides in substance that where entries have been erroneously made and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry the fees and commissions upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claim to said land. That is to say, if the government has allowed an entry to be made, which proves to be erroneous and the entry cannot be confirmed by the government, then the purchase money should be refunded to the entryman. This follows by a common law principle, in my judgment, which is the right of the purchaser to recover the purchase money of the vendor when the purchase fails where a proper warranty is contained in a deed of conveyance. I have invited attention to this section with the view of further calling your attention to a case now pending in this office, where application has been made for a refund under this statute of the purchase money. Report No. 53380, in favor of Arthur L. Thomas, who is governor of Utah, says :

That on February 2, 1887, he made desert land entry of section 29, township 6, N. R. 5, W: That previous to making said entry he was driven upon the land by one Meacham, a surveyor: That said Meacham in pointing out the lines bounding said section, located the west line of it about a half mile further west than it proved to be: That he (Thomas) secured water to reclaim six hundred and forty acres of the land, and that because of the mistake of said Meacham he was forced to relinquish two hundred and eighty acres of his entry, because of his inability to reclaim.

That part of his entry for the two hundred and eighty acres was canceled by the General Land Office, and he claims a refund of \$70.00 paid for said two hundred and eighty acres of the land.

My judgment is that this sum should not be allowed Governor Thomas. The mistake is not the mistake of the government; it was his own mistake. There is no reason shown why the entry in question cannot be confirmed on the part of the government. He should, therefore, be held to his entry and not be allowed to plead in his own behalf a mistake of his own, through which he expects to recover a part of the purchase money.

My attention has been called to what purports to be an opinion of your office, by your predecessor, in which in reply to an inquiry, he says:

You say in your decision that "there was no error in the part of the government in allowing the second entry" and seem to assume that in order to afford the relief provided for in the act the error must always be one committed by the government. I think such construction is too narrow. The statute says: "where from any cause the entry has been erroneously allowed."

My judgment is that the quotation of your predecessor should at least have concluded the sentence, and then it would read, "where from any cause the entry has been erroneously allowed, *and cannot be confirmed;*" evidently meaning, cannot be confirmed on the part of the government, the purchase money should be refunded. His construction of the statute is broader than the statute itself, not only in the letter of the statute, but in the meaning of the law as well, and in my judgment should not be permitted to stand as the correct interpretation of the law in question. However, I do not undertake to control this matter, and if the interpretation I have quoted, shall be your interpretation, after a review of this question, the accounts for the refund of said money will hereafter be passed, although the error is not one growing out of the act of the government, but arising from an error, or carelessness or neglect of the entryman himself.

I wish also to add, that if the entry is to be canceled and the money refunded, the whole entry should be canceled and the law should not be so construed that the entryman should be permitted to take the good land and throw the bad land back on the government as it is apparently sought to do in the case of Governor Thomas.

I will hold the account in question awaiting your reply.

Very respectfully,

A. C. MATTHEWS,  
*Comptroller.*

*Secretary Noble to the First Comptroller of the Treasury, October 3, 1891.*

I am in receipt of your letter of February 6, 1891, calling my attention to the application of Arthur L. Thomas, for the repayment of the purchase money paid by him on two hundred and eighty acres, embraced in his desert land entry of six hundred and forty acres, at Salt Lake City, Utah Territory, now before you for adjustment.

The facts in connection with this case are as follows: Before Thomas made his entry of the section containing six hundred and forty acres, he consulted a surveyor who pointed out to him the lines or the boundaries of said section, but in doing this the surveyor made a mistake, and located the boundary one half mile too far to the west, and Thomas found that he had entered two hundred and eighty acres which he stated he was unable to reclaim. He, therefore, relinquished that quantity of land and asks for the repayment of the purchase money. The applica-

tion is made under the second section of the act of June 16, 1880 (21 Stat., 287), which provides that—

In all cases where homestead or timber culture or desert land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same.

You state that your attention has been called to the decision of this Department in the case of Duthan B. Snody (1 L. D., 532).

In that decision, my predecessor, addressing the Commissioner of the General Land Office, used the following language:

You say in your decision that there was no error on the part of the government in allowing the second entry, and seem to assume that in order to afford the relief provided for in the act the error must always have been one committed by the government. I think such construction is too narrow. The statute says, "where *from any cause* the entry has been erroneously allowed." The entryman, in a case like the present, necessarily forfeits his improvements, which often, as in this case, are of much value. The law does not favor forfeiture, and the object of this act was to prevent them, in certain cases, to the extent of fees, commissions, and purchase money.

In your letter, you say:

My judgment is that the quotation of your predecessor should at least have concluded the sentence, and then it would read, "where from any cause the entry has been erroneously allowed, *and cannot be confirmed*;" evidently meaning, cannot be confirmed on the part of the government, the purchase money should be refunded. His construction of the statute is broader than the statute itself, not only in the letter of the statute, but in the meaning of the law as well, and in my judgment should not be permitted to stand as the correct interpretation of the law in question. However, I do not undertake to control this matter, and if the interpretation I have quoted shall be your interpretation, after a review of this question, the accounts for the refund of said money will hereafter be passed, although the error is not one growing out of the act of the government, but arising from an error, carelessness or neglect of the entryman himself.

The application of Gov. Thomas, seems to have been allowed in accordance with the interpretation put upon the decision above cited, together with the decisions of the Department in the cases of Hiram H. Stone (5 L. D., 527), and George H. Goble (6 L. D., 665); it therefore seems to be necessary to discuss and to review the same.

In the case of Snody the entry upon which repayment was made, was a second homestead entry, an entry which under the law and the uniform rulings of the Department was illegal, and which the Land Department, in the discharge of its duty, was obliged to cancel, and which could not be confirmed, hence repayment was proper. I concur with you, that said opinion would have been more complete had the important words "and cannot be confirmed" been added thereto, thus stating the true and correct reason why repayment should be made. Applying the law to the real facts in the Snody case, I can see nothing

therein to sustain the application of Thomas for the reason, he made a legal entry and said entry could have been confirmed; it was not an illegal entry which could not be confirmed as in the case of Snody.

Your letter was referred to the Commissioner of the General Land Office for his report thereon, and in his reply he states, that the change in the location of the lines of the section, "threw the eastern half of his entry upon high bluffs and land not susceptible of irrigation, and therefore not subject to entry under the desert land law, because the same could not be irrigated." So far as the facts in the case are concerned, an intelligent statement could only be made after a careful investigation or a full hearing, neither of which took place so far as the record shows. It may be true, that it would have been difficult to irrigate the land, and that the returns would not have compensated for the outlay in reclaiming the same, but even if we admit that a portion of the land could not have been irrigated, it does not follow that the entry was erroneously allowed, or that it could not be confirmed in the sense these words are employed in the statute under consideration.

It was not erroneously allowed as far as any prior appropriation of the land was concerned, neither was it in violation of the law under which it was made. The law provides that a claimant upon the payment of twenty-five cents per acre may file a declaration under oath, with the register and receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land, &c. The Commissioner of the General Land Office reports that the entire section immediately adjoining the tract in question on the east, has been entered as desert land, and it must be assumed that the tract in question is of that character. The statute provides,—

That all lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands within the meaning of this act.

The action of Thomas in entering the land was voluntary. It may have been the result of an erroneous impression, or it may have been the result of erroneous information given him, but the entry was not erroneously allowed, so far as either the law or the records of the land office show, and neither the law nor the government interposed any obstacles to the confirmation of said entry by the performance of the acts necessary to confirm the same. The fact that it may not have been advantageous nor practicable to reclaim the land, did not prevent the confirmation of the entry made by the claimant—in fact the entry for the greater portion of the land embraced therein, has been confirmed.

In his report the Commissioner cites the case of Hiram H. Stone (5 L. D., 527), in support of the application of Thomas. The entry of Stone embraced land in an even and in an odd numbered section—the land in the odd numbered section had, prior to entry, passed to the grant to a railroad company, hence the entry was erroneously allowed and could not be confirmed by the government for that portion thus

situated, and when this portion was canceled, but two hundred and eleven acres remained; the entry was also made prior to survey, when it was impossible to ascertain that the greater portion of the land was not subject to the same. It was held that such being the facts, the entry could not be confirmed in its entirety and that to restrict the claimant to the quantity of land embraced in his entry, that was subject thereto, would be to restrict the entry to a quantity less than that allowed by statute, hence repayment was made.

A glance will show how different the facts are in the Thomas case, a case where the entry was not erroneously allowed and where it could be confirmed so far as the government was concerned. The Commissioner also cites the case of George H. Goble (6 L. D., 655). In this case Goble made desert land entry for six hundred and forty acres and subsequently ascertained that he could not irrigate one hundred and sixty acres of said tract, and he relinquished the same, and his application for repayment was allowed by my immediate predecessor. This action was based upon the decision in the case of Stone. But the facts in the two cases were entirely different, and I do not think repayment was properly allowed in the Goble case, as his entry was not erroneously allowed, and the government interposed no obstacles to its confirmation.

You say in your letter, that in your judgment, repayment should not be allowed Gov. Thomas. I concur in this view.

John Carland, who was an officer in the United States army, made a homestead entry under the supposition that he was not required to reside on the land. On being informed of his mistake he relinquished his entry and made application for repayment of fees and commissions. This was refused by my predecessor, Secretary Teller, who in his opinion said:

That act of June 16, 1820, allowed such repayment in cases where an entry has been canceled for conflict, or has been erroneously allowed and can not be confirmed. The present case, so far as appears, is not within either of these provisions. There was no conflict, the entry was not erroneously allowed, and might have been confirmed. As there has been no fault or error on the part of the government, this Department is without authority in the matter. (1 L. D., 532).

This, in my opinion, is a correct construction of the law, and it has been followed by this Department under its present administration. Albert S. Hovey (9 L. D., 670); W. S. Jackson (10 L. D., 12); David J. Morgan (12 L. D., 78).

The application of Gov. Thomas was inadvertently approved, and I have to request that the same be returned to this Department.

A copy of this letter will be sent to the Commissioner of the General Land Office, with instructions that the principle announced therein, will control in the consideration of applications for repayment.

## APPLICATION TO ENTER—APPEAL.

HENRY HALE.

An application to make entry under the timber culture law should be presented within a reasonable time after the execution of the preliminary affidavit.

Failure to appeal within the prescribed period, from the rejection of an application to enter, defeats the right of the applicant to be heard in the presence of an intervening adverse claim.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 7, 1891.*

I have examined the appeal of Henry Hale from your decision of November 8, 1888, in which you approve the action of the local officers in their rejection of his application to make timber culture entry for the SE.  $\frac{1}{4}$  of Sec. 30, T. 11, R. 37 W., North Platte, Nebraska, land district.

The record shows that he filed his application and affidavit January 24, 1888, together with the relinquishment of Johnson, a former entryman, dated December 3, 1887. Hale's affidavit was sworn to November 18, 1887. The local office rejected the application for the "reason that affidavit is too old, being sworn to as far back as November 18, 1887."

February 15, 1888, one Winchell made timber culture entry for said land.

On appeal to your office you sustain the ruling of the local officers. The grounds upon which your office decision was based, however, were that the application of Hale could not be received because the affidavit was made while the land was under appropriation by a timber culture entry, and for the further reason that he did not appeal from the decision of the local officers within the time prescribed by the rules of practice.

The application of Hale was properly rejected by the local officers. The language used in the case of George H. Morey (10 L. D., 325), is applicable to this case. On page 326 it is said:

More than two months therefore intervened and for this delay the applicant offers no explanation. In the absence of a proper explanation I deem such a delay unreasonable, etc.

It seems that the first official notice to Hale of the action of the local office and of his right to appeal, was communicated to his attorney at Williamston, Michigan, the post office address of applicant. This notice was dated March 24, 1888. From the date of the receipt of that notice he had thirty days in which to file his appeal, and ten days additional for transmission by mail. (Rule 67, Rules of Practice.) The appeal was filed June 14, about eighty days after receiving the notice. This certainly comes too late in the face of an adverse claim. If it were only between the government and the entryman, the rule might be

waived, on account of the amount of money which Mr. Hale has invested in this tract, but I cannot see my way clear to sacrifice Mr. Winchell, who presumably has acted in good faith, to protect Mr. Hale from the effect of his laches. The decision appealed from is accordingly affirmed.

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RES JUDICATA—PRE-EMPTION SETTLEMENT—ABANDONMENT.

BUELL *v.* AYERS.

A matter once in issue and determined by final decision of the Department is *res judicata* as between the parties litigant.

It is not an act of abandonment for a pre-emptor who is residing on the half of a quarter section, and has a pending contest against an existing entry on the entire quarter, to remove to the other half on the cancellation of said entry, where he maintains a settlement on the whole quarter section.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 7, 1891.*

I have considered the case of Alexander T. Buell *v.* James L. Ayers, (Orpha L. Ayers, administratrix for the heirs) on appeal by the former from your decision of June 4, 1890, dismissing his protest against the final proof of the latter and accepting said proof for the E.  $\frac{1}{2}$ , SW.  $\frac{1}{4}$ , Sec. 5, T. 110, R. 61, Huron, South Dakota, land district.

This case originated ten years ago, and has been twice before this Department. Secretary Teller, on February 21, 1884 (2 L. D., 257), having the case before him as then presented, held that the agreement entered into by and between the parties, by which Ayers withdrew his filing for the entire SW.  $\frac{1}{4}$  and allowed Buell to make timber culture entry for the west half of the same, and Buell waived his preference right to enter as to the east half of the same, allowing Ayers to file a pre-emption declaratory statement therefor, should be upheld.

The record of the case up to this time (February 21, 1884) is fully presented in said decision, and will not be repeated here except so far as may be necessary to a proper understanding of the case. Upon the promulgation of said judgment Buell filed a motion in the Department "for a reconsideration of said decision, and prays that the same may be set aside and that upon further consideration of said cause the Commissioner's decision be affirmed."

In this motion, special attention was directed to the alleged fraud perpetrated by Ayers in bringing about the said agreement. It was said therein that

The proof shows that Buell repudiated this agreement the moment he ascertained his rights and discovered the fraud, which was within a few hours after its perpetration and that he immediately commenced proceedings to expose and nullify it, which proceedings he has ever since faithfully and diligently prosecuted.

This motion was duly considered by the Secretary, in the light of all that could be presented pro and con.

At the rehearing, counsel introduced in evidence various affidavits to prove the alleged fraud in said agreements, and also ex parte affidavits were taken against Ayers upon the proceeding to disbar him for his conduct in connection with the case, and as appears by the evidence, they were taken without notice to Ayers, and without opportunity to cross-examine. All these matters being before the Department, the Secretary held, April 17, 1884 (45 L. and R., 130) that "the decision of February 21st 1884 in this case is reaffirmed." This decision upholding the agreement which was clearly made to avoid litigation was cited and followed in *Daniel v. Danforth* (5 L. D., 118).

On March 5, 1885, the said Ayers gave notice of his intention to make final proof on his filing on April 17, 1885. Buell appeared and protested. On October 19, 1885, the local officers, evidently regarding the matter as settled, dismissed the protest. Buell appealed, and your office, on November 13, 1885, reversed the decision of the local office and ordered a hearing, which was duly had, and on January 27, 1888, the register and receiver recommended the rejection of Ayers' proof, the cancellation of his filing and that Buell be allowed to make entry for the E.  $\frac{1}{2}$  of the quarter section, retaining his entry on the W.  $\frac{1}{2}$ . Ayers died after the testimony was taken, but before the decision, leaving a widow (Orpha L. Ayers) and two minor children. She was duly appointed administratrix, and in behalf of the heirs, appealed to your office, and on June 4, 1890, you reversed said action of the local officers and held that the administratrix should be allowed to make cash entry for said E.  $\frac{1}{2}$  in the name of the heirs at law of James L. Ayers, deceased. From this ruling and decision Buell appealed.

From the record it appears that Buell, in the first instance, filed an affidavit of contest against a timber culture entry of one Connelly for the SW.  $\frac{1}{4}$ , Sec. 5, without accompanying it with an application to make entry for the land, which was not allowable under the regulations then in force. The entry was, by the local officers, recommended for cancellation upon this contest, and the case went to your office on an appeal. While this was pending, Connelly's relinquishment was placed on record, and the entry canceled, and at the end of thirty days, without notice having been given Buell of the cancellation, notwithstanding this, Ayers was permitted to file a declaratory statement for the entire quarter section. He went upon the land and began erecting a house. Buell learning of this applied to make timber culture entry for the tract, and delivered his entry papers to the local officers. He claimed a preference right of entry by reason of his contest. While he claimed this preference right, Ayers claimed that the thirty days had elapsed, and he says he claimed that Buell's contest was void because of failure to apply to make entry for the land upon the initiation of it. The local officers, it appears, offered to place Buell's entry

on file subject to Ayers' filing, but at this point, the parties came to the agreement, by which Ayers consented to withdraw his papers and restore the tract to the public domain, and then file for the east half, and allow Buell to file for the west half. This contract was actually executed in the interest of peace, and it has been upheld by the Department as heretofore stated, and your office did not err in holding that the matter was *res adjudicata*. I may say that the record and testimony shows that the parties were acting upon that agreement and making improvements upon their respective tracts when your office, on December 1, 1882, canceled the filing of Ayers and the entry of Buell, made under this agreement, and re-instated Connelly's entry which had been canceled upon relinquishment.

On December 29, 1882, your office letter "C" dismissed Buell's contest because he had failed to apply to enter the land, and on January 6, 1883, Ayers filed affidavit of contest against said entry as re-instated.

I mention these matters because it is so earnestly insisted that the agreement was a fraud upon Buell, while this action of your office places Ayers on the vantage ground, but on a motion for review by Buell, all this was reversed, Ayers' contest properly initiated was dismissed, and Buell's that had been properly dismissed was re-instated against an entry that had been canceled on relinquishment and re-instated without an application being made therefor.

On June 6, 1883, your office canceled the Connelly entry and awarded Buell the preference right of entry for the entire quarter section. This was the confused condition of the case when the Secretary relegated the parties to their rights under the contract.

Ayers moved from the east half of the tract on to the west half when your office canceled Buell's entry and dismissed his contest, and he (Ayers) had begun a contest against the Connelly entry, and when your office dismissed his (Ayers) contest and re-instated Buell's, he (Ayers) moved back to the east half. The protest by Buell alleged that Ayers had not complied with the pre-emption law, had abandoned the land, etc., and it set up the alleged fraud and misrepresentation in said agreement, and your office in directing a hearing ordered the local officers to rehear, try and determine the question of the fraud and misrepresentation in the agreement between the parties. This last direction as to the contract was clearly erroneous. It, as I have said, had been tried and determined. The question of compliance with the pre-emption law, charging that Ayers had moved off of the land and abandoned it had not been before the local office, your office or the Department, and was a proper matter for a hearing.

The testimony at the trial was drawn out to an unreasonable length, the military history of Ayers, as well as his "life and adventures" were of no importance except so far as it went to affect his credibility as a witness, and counsel in arguing the case in your office and to the Department have gone outside of the record and dragged in matters nowhere

appearing in the evidence, and which tends only to encumber the record without serving any good purpose. The only matter properly before the local office, your office, or this Department is the simple question of compliance with the pre-emption law under his filing. The fact that Ayers moved upon the west half of the tract when Buell's entry was canceled, and he thought he would get both, by his contest, was not an abandonment, for he maintained his settlement on the whole quarter section, the greater including the less.

The local officers find that Ayers had complied with the pre-emption law as regards settlement and residence, you so find, and it is not seriously controverted. His proof will, therefore, be accepted, the protest dismissed, and your decision affirmed.

*Overruled so far as in conflict, 25<sup>th</sup> D. 575*  
TOWNSITE PATENT—KNOWN LODE CLAIM.

#### CAMERON LODE.

Although a townsite patent conveys no title to a known lode or mining claim, it can only be invalidated by judicial proceedings, and with the view to such action a hearing may be properly ordered, on due showing of the existence of such lode or claim within a patented townsite.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October 7, 1891.*

I have considered the appeal of Catharine Cameron from the decision of your office of July 8, 1890, dismissing her application for a hearing, and holding her mineral entry for cancellation, Central City land district, Colorado.

The record shows that the White Sand lode claim, now called the Cameron lode claim, was located December 19, 1867, and on the same day was duly recorded in the records of Gilpin county, Colorado, that patent was applied for August 19, 1887, and entry made December 5, 1887, by Catharine Cameron.

It appears that this claim lies within the limits of the townsite of said Central City.

The townsite entries were made May 16, 1873, and May 27, 1874, and patent issued therefor July 10, 1876.

On July 3, 1889, Catharine Cameron made affidavit, duly corroborated, alleging the conflict with said townsite, and that there was within the limits of said claim "a well-defined vein or lode of quartz or other rock in place, bearing gold and silver," and that said claim was "known long prior to the cash entry of the townsite of Central City made May 16, 1873," and asking "that a hearing be ordered to determine the character of the land, priority of claim, and existence of a vein or lode therein;" said affidavit was accompanied with a certified copy of the record of the original location of said White Sand lode claim.

The affidavits were transmitted to your office by the local officers by letter dated November 27, 1889.

By your office letter of July 8, 1890, you decided that

The title to the land having passed from the government when the patent for the townsite was issued, it is no longer within the jurisdiction of this office, and the claimant must seek for a remedy, if there is one, in the courts. The application for a hearing is therefore dismissed, and mineral entry 3297, held for cancellation.

An appeal now brings the case before me.

On September 17, 1890, Catherine Cameron submitted an affidavit, duly corroborated, "that said claim and tract has been worked, more or less, from its discovery and location until now, and mined for ore and mineral, valuable for the gold it contained," and she asks that the proper proceedings be instituted to render in-operative so much of the townsite patent of said Central City, as is in conflict with and embraced in said Cameron lode claim, and that her said mineral entry may not be canceled, but may be allowed to stand suspended pending the suit or proceeding to be instituted in pursuance of her application, if granted, alleging error in your dismissal of said application for a hearing, and in holding said entry for cancellation.

By section 2392 of the Revised Statutes, in the chapter regulating the reservation and sale of townsites, it is provided that—

No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining-claim or possession held under existing laws.

It follows that the patent issued to Central City, conveyed no title to any such "mine," "mining-claim," or "possession," as the Cameron lode is indicated, by the evidence submitted, to have been at the date of said patent.

As the Cameron lode claim was located prior to the passage of the act of May 10, 1872, (17 Stat., 91), and as no adverse claim existed at that date, the owners were entitled by the third section of that act thereafter, to "have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth," so long as they complied with the laws. As the affidavits submitted show that there was no abandonment or forfeiture of the Cameron lode, but that it was worked from the time of its discovery, and that its existence was well-known long prior to the entry of the townsite, it appears that the owner of this lode is entitled to the benefit of the above-cited provision of law.

Inasmuch as a patent has issued to the townsite of Central City, it can only be invalidated by proper proceedings in court. *Moore v. Robbins* (96 U. S., 530); *Pacific Slope Lode* (12 L. D., 686).

In the latter case it was held that where it appears that a townsite patent has issued for land embracing a known lode claim, based on a record location made prior to the townsite entry, judicial proceedings should be instituted looking toward the vacation of said patent, so far

as in conflict with said mining claim, and the subsequent issuance of proper title to the mineral claimant. In that case, however, your office had ordered a hearing to ascertain whether the grounds embraced in the mineral claim were known to be valuable for minerals at the date of the townsite entry, or prior thereto.

In the Plymouth Lode case, (12 L. D., 513), where the evidence was submitted upon affidavits, as in the present case, this department directed a similar hearing.

I am of the opinion that there was error in your decision in dismissing said application for a hearing, and in ordering said entry for cancellation.

You are therefore directed to order a hearing, after notice thereof has been served on all parties concerned, at which the proprietor of the Cameron lode will have an opportunity to prove the allegations made in her appeal and affidavits, in order that it may be determined whether or not the evidence submitted will warrant the institution of a suit to vacate any part of said patent.

After this hearing has been held, the local officers will transmit the papers to your office, together with their opinion on the evidence submitted, after which you will consider the same for the purpose of determining whether or not you will recommend the institution of a suit to vacate so much of said patent as includes the Cameron lode.

After such examination you will transmit the record with your opinion thereon, to this Department. Said mineral entry will be suspended pending further proceedings.

Your judgment is modified accordingly.

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#### PRACTICE—NOTICE—HOMESTEAD CONTEST.

##### YORK *v.* WILKINS.

In contest proceedings against the entry of a deceased homesteader, the heirs of the entryman are entitled to notice.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 3, 1891.*

I have considered the case of Sumner York *v.* John Wilkins, deceased, on appeal of the former from your decision dismissing his contest against the homestead entry of the latter for S.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$ , SW.  $\frac{1}{4}$ , Sec. 9, T. 27 N., R. 6 E., Seattle land district, Washington.

The record shows that John Wilkins made homestead entry for this land July 27, 1886, and died intestate on July 1, 1888.

On January 2, 1889, one Otto Erickson filed affidavit of contest against said entry, which was, on the following day, dismissed because it was insufficient in law, and on January 4, York filed contest affidavit against the entry, charging abandonment for more than six months;

that the entryman had been dead during the time, and that no heir or legal representative had resided upon or improved the tract according to law. Notice issued upon this affidavit directed to John Wilkins, deceased, and return was made that he could not be found because he was dead. An affidavit was thereupon filed for service on him by publication, and publication was accordingly made. On January 12, 1889, Erickson filed a motion for the re-instatement of his contest and for leave to amend his affidavit, which was done and granted, and he amended his affidavit, and upon affidavit for notice by publication, he gave notice to the *deceased* of a hearing on March 18, following.

The hearing in York's case was set for February 25. At this hearing, Erickson appeared, and it is said he "protested." He was at least allowed to intervene and set up his prior claim by reason of prior contest, and it was agreed that both contests should be heard at the same time and the priority determined.

It appears that the testimony offered by each was considered by the then acting local officers, and they decided adversely to both parties. A change was, however, made of the local officers, before the papers were transmitted to your office and York and Erickson appeared and agreed to resubmit the cases to the newly appointed officers who dismissed both contests for the reason that the cases were brought against the deceased entryman and not against his heirs at law. Each party appealed to your office, and on July 10, 1890, you affirmed their action and dismissed said contests, from which decision York appealed. Erickson failed to appeal, and your decision as to him has become final.

In the case of York, the affidavit alleges that no heirs or legal representatives of said Wilkins, deceased, have resided upon or improved said property during the six months, etc.

It appears that an effort was made to bring the action against the heirs of Wilkins, but for some reason they were not made parties nor notified of the hearing. From the record before me, Erickson's contest is dismissed, and the judgment of dismissal is final. If I now affirm your decision on the York case, the entry will remain intact, segregating the land. It appears that both these contests were brought in good faith, and that the parties are trying to clear the record of the homestead entry of Wilkins, deceased. The contests are in the nature of actions *in rem*, and the entry of record being to some extent a bar to an entry or filing being made for the land, therefore the heirs of Wilkins, if there be any, known or unknown, should be notified of any proceedings to cancel the entry and they should be allowed their day in court. I will, therefore, set aside all the proceedings in the case of York from the filing of his affidavit of contest, charging that the heirs or legal representatives of Wilkins have not resided upon or improved the land, and return the case to be remanded to the local office for a hearing *de novo*, upon proper service upon the heirs at law of John Wilkins, deceased, and upon proper notice to all parties interested, a hearing will

be had if York shall desire to proceed, and upon a report of the testimony taken at such hearing, you will re-adjudicate the case. As Erickson's case is not before me, any question of priority as between these parties will be determined when such question shall arise. Your decision as to York's case is vacated and set aside.

RAILROAD GRANT—INDIAN LANDS—ACT OF JULY 27, 1866.

ATLANTIC AND PACIFIC R. R. Co.

The act of July 27, 1866, did not confer upon the Atlantic and Pacific Railroad Company any grant of lands within the limits of the Indian Territory.

*Secretary Noble to Messrs. Britton and Gray, Washington, D. C., October 3, 1891.*

I have considered the matter presented in your letter of April 25, 1891, signed also by John J. McCook, general counsel, and J. A. Williamson, land commissioner, on behalf of the Atlantic and Pacific Railroad Company, requesting official recognition of the claimed rights of said company to lands opposite its constructed road in Indian Territory.

In said letter it is stated—

One hundred and twelve miles of said road have been constructed in the Indian Territory, extending from the eastern line thereof, and such construction has been duly accepted by the President of the United States, in accordance with the provisions of section 4 of said act.

The Commissioner of the General Land Office reports, under the date of May 18, 1891,

within that Territory eighty-six miles of road appears to have been constructed and accepted by the President of the United States, with that in Missouri, forming a continuous line from Springfield, Missouri, to Vinita, Indian Territory. . . . The constructed road traverses the Shawnees', Wyandottes', and Cherokees' lands. . . . There is nothing on file in this office showing the construction of the road west of Vinita.

The company's claim to recognition is based upon the following, taken from section 2 of the act of July 27, 1866 (14 Stat., 292), making a grant of lands to aid in the construction of said road:

The United States shall extinguish, as rapidly as may be consistent with the policy and the welfare of the Indians, and only on their voluntary cession, the Indian title to all lands falling under the operation of this act and acquired in the donation of the road named in this act.

Your letter in conclusion states,

it is assumed by the Railroad Company, upon the authority of *Buttz v. Northern Pacific Railroad Company* (119 U. S., p. 55), and of *Cherokee Nation v. Southern Kansas Railway Company* (October term, 1890), that upon the extinguishment of the Indian title, the right of the company to its land grant opposite the constructed parts of its road, will be perfect.

The contention here presented was urged upon this department as early as 1877, and Mr. Commissioner Williamson, in a very elaborate report to this department upon the subject, in which the history of this grant is fully set forth, held: "it is clear to my mind that the company has not the shadow of a claim therefor under the act of 1866." (4 C. L. O., 123.) This position was also taken by the public lands committee of the 49th Congress. In its report on a bill to forfeit the grant to this company it is stated:

The public land system has never been extended over it. Congress has never taken any action to have it surveyed as public land. Much of it is held by four nations, the Choctaw, Chickasaw, Cherokee and Creek, who have patents in accordance with treaties and laws, and all attempts to induce Congress to organize it into a Territory of the United States have, up to this time, failed. This is enough to show that the company has no grant of land in this Territory, neither present or prospective, in our opinion. None was intended to be conferred by the act, except as such grant might be acquired from the Indians.

See ~~Act~~ No. 193, H. R.—49th Cong., 1st session.

I might refuse <sup>House Report 193</sup> the request for recognition based upon these authorities, but, from an examination of the decisions now relied upon by the company as recognizing its right to lands opposite constructed road, I fail to find anything upon which to base such claimed recognition, or to cause me to reconsider the former position taken by this department in the matter, viz: that there was no grant made to the company within the Indian Territory by the act of 1866.

In the Buttz case the land in controversy was a part of the Indian country occupied by the Sisseton and Wahpeton bands of Dakota or Sioux Indians, extending over a great area of country, and by the treaty of 1867 the Indians ceded all their right, title, and interest in and to this country occupied by them, except certain tracts which were expressly reserved as permanent reservations.

In that case the court says, speaking of the third or granting, section (which is similar to the granting section of the act under consideration), the provisions of the third section limiting the grant to lands to which the United States had full title, they not having been reserved, sold, granted, or otherwise appropriated, and being free from pre-emption or other claims or rights, did not exclude from the grant Indian lands not thus reserved, sold, or appropriated, which were *subject solely to their right of occupancy.*

The case of the Cherokee Nation *v.* Kansas Railway Company (135 U. S., 642,) is nowise in point, as the question there involved is a constitutional one, governing the power of Congress to grant the right of way, with due provision for just compensation, over the lands held by that nation, and the court held such grant to be a valid exercise of the power of Congress to regulate commerce among the several States and with the Indian tribes.

The status of the lands within the Indian Territory is entirely different from that involved in the Buttz case. They were, at and prior to the definite location of the road, set apart and reserved to the Indians,

under certain conditions, by treaty stipulations, and, although a portion of them may have subsequently reverted to the United States, they did not inure to the company under its grant. The question of the reversion of certain of the lands is now in the courts, and it is deemed unnecessary, in the present controversy, to consider that matter.

As stated in the case of *Worcester v. The State of Georgia*, 6 Pet., 557,

the treaties and laws of the United States contemplate the Indian Territory as completely separated from that of the States.

The grant made to the Atlantic and Pacific Railroad Company was of every alternate section of *public land* . . . . . 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 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* . . . . . at the time the line of said road is designated by a plat thereof filed in the office of the Commissioner of the General Land Office, etc.

At the date of the definite location of the Atlantic and Pacific Railroad Company, in this vicinity, the United States was not possessed with *full title* to these lands. Neither at the date of the act nor the definite location of the road were they *public lands*, and they were not then embraced within the limits of "the Territories of the United States," or one of the States.

These lands were, therefore, not embraced within the grant made by the act of July 27, 1866 (*supra*), and any claimed right to the same must be asserted through the courts, as this Department will refuse, in anywise, to recognize any right in the company, either present or prospective, in and to these lands.

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PRE-EMPTION CONTEST. SECTION 2260 R. S.

MURDOCK *v.* HIGGASON.

A pre-emptor is not within the inhibitions of section 2260 R. S., who in good faith, and prior to settlement, has disposed of the land then owned by him, though a formal transfer of such land is not executed until after settlement.

*First Assistant Secretary and Handler to the Commissioner of the General Land Office, October 5, 1891.*

The land involved in this contest is the NE.  $\frac{1}{4}$  of Sec. 11, T. 3 S., R. 26 W., Oberlin land district, Kansas. The case has been before this Department several times, Secretary Lamar having rendered a decision therein on the 18th of July, 1887, and Secretary Vilas on the 6th of March, 1888. The decision of Secretary Lamar is published in 6 L. D., 35, and the conclusion reached by Secretary Vilas is given on page 571 of the same volume.

The facts in the case are that Higgason filed a pre-emption declaratory statement for the land on the 24th of November, 1884, alleging settlement on the 18th of the same month. On the 2d of December of that year, Murdock made homestead entry for the tract. On the 22d of July, 1885, Higgason offered final proof, and Murdock protested against the acceptance of the same, alleging among other things that Higgason was not a legal pre-emptor on the 18th day of November, 1884, the date of his alleged settlement.

A trial followed, at which both parties submitted evidence and on the 21st of January, 1886, the local officers decided that Higgason's settlement was prior to Murdock's entry, and that the former should be allowed to complete his entry, and that of the latter should be canceled. On the 8th of July, 1886, your office rendered a decision sustaining that of the local office, but on the 9th of December of the same year you reviewed your decision of July 8th, and ordered the cancellation of Higgason's entry, and held the entry of Murdock subject to final proof.

On the 18th of July, 1887, the decision of Secretary Lamar, already referred to, was rendered, in which he reversed your decision of December 9, 1886, and directed that the entry of Higgason be approved for patent. In accordance with such order, the local officers, on the 15th of August, 1887, issued to Higgason final certificate and receipt for the land.

On the 6th of March, 1888, on a motion for review, Secretary Vilas considered the case at great length, and came to the conclusion that a rehearing should be ordered, at which each party should have an opportunity to offer evidence and cross-examine the witnesses of the opposing party, and after receiving the record of said hearing, with the report of the local officers upon the testimony taken thereat, you were directed to re-adjudicate the case.

On the 24th of January, 1889, after considering the several hundred pages of testimony taken at such rehearing, the register and receiver united in a decision, in which they recommended that Higgason's entry be approved for patent, and that the homestead entry of Murdock be canceled.

Murdock appealed from that decision to your office, and on the 11th of April, 1890, you rendered judgment in the case, holding Higgason's filing and cash entry for said land for cancellation, and directing that the homestead entry of Murdock be re-instated. An appeal by Higgason from that judgment again brings the case to this Department for consideration.

The question of settlement, residence, cultivation and improvements, have been too frequently decided in the case to need consideration by me, and the only question requiring attention is as to whether Higgason was or was not a legal preemptor when he made his settlement and filing for the land.

The facts in regard to this are that on the 10th of September, 1884, he

became the owner of one hundred and sixty acres of land under the homestead law. In October following, he made settlement upon a tract of one hundred and sixty acres of land belonging to the State of Kansas as school lands, and on the 15th of November of that year he made a contract for the purchase of said land from the State, making the first payment thereon, \$48, as required by law, and received a certificate of purchase. On the same day, he sold his interest in these school lands to one J. H. Wiltsey for \$75, and delivered to Wiltsey the certificate which he had received, and surrendered to him the possession of the land. John B. Wiltsey, a son of J. H., made the necessary payments for the land, after the \$48 paid by Higgason, and received patent therefor from the State. Although the sale of the land, the delivery of the certificate, and the surrender of possession, were made on the 15th of November, 1884, the certificate was not formally assigned in writing until the 20th of that month. This was two days after he made settlement upon the land in controversy, but four days before he filed his declaratory statement for the same. It was also twelve days before Murdock made homestead entry for the land, and before any adverse interest had attached.

The counsel for Murdock contends that Higgason was the *owner* of the school lands until the 20th of November, 1884, when he assigned the certificate *in writing*, and that those lands, with his one hundred and sixty-acre homestead, made him the proprietor of three hundred and twenty acres of land, which made him ineligible as a pre-emptor under the first clause of section 2260, Revised Statutes, and that by quitting his residence on the school lands, and going to reside upon the land in controversy, he also violated the second clause of that section.

In my opinion, the contract received by Higgason for the school lands was only an evidence of an equitable interest in the land—the legal title remaining in the State of Kansas—and that he divested himself of his equitable interest therein when he received from Wiltsey the price agreed upon, surrendered to him the possession of the land, and also delivered to him the certificate of purchase.

In the case of *Davidson v. Kokojan* (7 L. D., 436) it was held that 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.

Had he not, however, made the disposition of his equitable interest in the school land, prior to his settlement upon the land in question, he would not have been qualified to make such entry, according to the decision in the case of *Ole K. Bergan* (7 L. D., 472), where it was held that

the prohibition in the second clause of section 2260, Revised Statutes, extends to a removal from land held under a contract of purchase, although the payments thereunder had not been completed at the time of said removal.

The elementary writers, and the state courts, are uniform in holding

that a contract in parole for the sale of real estate, or any interest therein, with part performance and possession can and will be specifically enforced.

Fry on Specific Performance, sections 388 and 417.

Brown on the Statute of Frauds, sections 443-487.

Galbraith *v.* Galbraith, 5th Kansas 403, and cases cited.

Murray *v.* Jayne, 8th Barb. (N. Y.) 612.

Kelley *v.* Stanbury, 13th Ohio, 408.

The counsel for Murdock insists that it was required of Higgason to prove that he was a qualified person to acquire a pre-emption right. This he did, by making oath to the matters required of a pre-emptor by section 2262 of the Revised Statutes, the statements of which affidavit were in no way contradicted, except by the disclosure of the facts already stated and commented upon.

In your decision from which this appeal is taken, you state that you adjudicated the case upon the basis that the settlement of Higgason upon the school lands was *bona fide*, and that his settlement upon the land in controversy was made on the 18th of November, 1884. These propositions seem to be clearly established by the evidence, as does also the fact that at the time Murdock made his entry for the land, on the 2d of December, 1884, he had full knowledge of the prior settlement, filing and improvements of Higgason. He therefore made his entry at his peril, and subject to all the rights of Higgason.

From all the facts and circumstances of the case, I am of the opinion that you erred in reversing the decision of the register and receiver of the 24th of January, 1889. The decision appealed from is therefore reversed, and it is hereby ordered that the recommendation of the register and receiver, that the entry of Higgason be approved for patent, and the homestead entry of Murdock be canceled, be carried out.

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SCHOOL INDEMNITY SELECTION—ACT OF FEBRUARY 22, 1889.

SHARPSTEIN *v.* STATE OF WASHINGTON.

The authority conferred upon county commissioners in Washington Territory to locate school indemnity selections may be properly exercised through a duly authorized agent of said commissioners.

The act of February 26, 1859, is a general provision applicable alike to all States and Territories, and authorized the Territory of Washington to select indemnity to cover deficiencies caused by the reserved sections being covered in part by permanent bodies of water; and land thus selected is not released from reservation by the act providing for the admission of said Territory into the Union.

*Secretary Noble to the Commissioner of the General Land Office, October 6, 1891.*

On December 7, 1889, Frank B. Sharpstein made homestead application for the NE.  $\frac{1}{4}$  of Sec. 10, T. 25 N., R. 4 E., Seattle, Washington, and the same was rejected by the register and receiver, "for the reason that

the land applied for is embraced in list No. 2 of indemnity school selections, in lieu of deficiencies in sections 16 and 36, which last was approved January 27, 1872." Upon appeal, you, by your decision of February 24, 1890, affirmed that judgment, and he appeals therefrom, assigning the following grounds of error :

1st. In finding said land was legally held as indemnity school land.

2d. In finding that said alleged selection withdraws said land from homestead entry.

3d. In not finding that said selection is in excess of the legal basis, and is void.

4th. In not finding that the State of Washington is not entitled to the number of acres selected in said township.

5th. In not finding the act of February 22, 1889, repealed all previous acts authorizing the selection of indemnity school lands in the State or Territory of Washington, and canceled and annulled all selections made previous to said date.

6th. In not finding that said State is only entitled to selections of indemnity school lands in compliance with the provisions of said act of February 22, 1889.

7th. In not finding that said selection was not made in compliance with said act of February 22, 1889.

8th. In not finding that said act of February 22, 1889, limits the amount of indemnity school lands to which the State of Washington is entitled, and said selection is in excess of the limit of indemnity school lands allowed said State in said township.

9th. In not finding that said tract is not included in the grant of school lands made to said State of Washington by the said act of February 22, 1889.

10th. In not finding that the indemnity selection was not properly made in that the act of February 26, 1859, adopting the act of May 20, 1826, requires that the selections to be legal should be made by the Secretary of the Treasury.

It is unnecessary to deal with the voluminous assignment of errors seriatim. The determination of the question as to whether the land was legally reserved from settlement and entry at the date of the homestead application settles the issues.

The record discloses the facts, which are undisputed. The questions to be determined are, therefore, purely legal.

It appears that the county commissioners of King county, on February 8, 1870, appointed P. H. Lewis to select school indemnity land for the county.

On May 24, of that year, the agent filed in the local office list No. 2, embracing selections to compensate for deficiencies in nine townships, by reasons of portions of sections 16 and 36 being under water.

Township 25 N., range 4 E., is covered in part by Lake Washington, Union Lake, Green Lake and Elliott's Bay. The public survey, ap-

proved in 1863, shows the township to contain 13,504.32 acres. Sections 16 and 36 of that township have respectively 341.76 and 83.25 acres in place, making a total of 425.01 acres of school land. The township containing more than one-half and less than three-fourths of a nominal township, would, under section 2276 of the Revised Statutes, be entitled to three-fourths of a section, or 480 acres. But in cases where two sections of land are granted for school purposes (and that number has been so reserved ever since the territorial government of Oregon was established, August 14, 1848,) the Department has decided (*O'Donald v. State of California*, 6 L. D., 696,) that twice the amount specified in said section will be allowed for deficiencies in fractional townships.

It follows, therefore, that if the territory of Washington was authorized to select school indemnity lands by reason of the 16th or 36th sections being "covered with water" (and that question I will hereafter consider), the area of school land due on account of T. 25, R. 4 being thus fractional, is not 480 but 960 acres. The number of acres in place in said township, as above seen, is 425.01. To make up this deficiency would require 534.99 acres, and since only 520 acres were selected, no complaint can be properly urged on the score of excess in the selection.

Appellant insists that the act of February 26, 1859 (11 Stat., 385), adopting the act of May 20, 1826 (4 Stat., 179), requires that the selection to be legal or authorized must be made by the Secretary of the Treasury, and that "the selection made by any other officer or person than the particular one required by law would be void and of no effect."

It has never been held that the personal intervention of the Secretary is necessary in making these selections; besides, the act of March 2, 1853 (10 Stat., 172), establishing the territorial government of Washington, in its 20th section expressly authorizes the county commissioners to locate indemnity school lands.

The selections were in fact made by an agent, who, as above seen, was duly authorized; and the selections, if not approved at the time, were for nearly twenty years acquiesced in.

The method of selection by a duly authorized agent is not only a very feasible and convenient one, but it is the one usually practiced, and its validity is recognized by the Department. (*Hulda Smith*, 11 L. D., 382.)

It is insisted that the Territory had no authority to make the selections upon the basis employed—i. e., the presence of water upon the granted sections (16 and 36). Also that, if the selections were legally made while the territorial condition existed, the act of February 22, 1889 (25 Stat., 676), admitting the State in the Union, made no provision for the selection of lieu lands by reason of such basis, and that the 17th and 25th sections of that act, properly construed, repealed section 2275 of the Revised Statutes, in so far as that section provides for indemnity "where sections 16 or 36 are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever."

As to the right of Washington territory to select indemnity school land under the provisions contained in the act of February 26, 1859 (11 Stat., 385—section 2275 R. S.), upon the basis of the granted sections being fractional in quantity, or where one or both are wanting by reason of any "natural cause," but little need be said. The act of 1859 (*supra*) is a general provision, applicable alike to all the states and territories, and the Department has uniformly held, so far as I am advised, that authority was therein conferred for the selection of indemnity lands to cover deficiencies caused by fractional school sections. John W. Bailey *et al.*, 5 L. D., 216; L. H. Wheeler, 11 L. D., 381.

By the act of March 2, 1853 (*supra*), establishing the territorial government of Washington, Congress "reserved, for the purpose of being applied to the common schools of the Territory," sections 16 and 36, and in all cases where said sections "or either or any of them" shall be occupied prior to the survey, the county commissioners, in the counties where the lands were situated, were authorized to locate other lands to an equal amount in lieu of the sections so occupied.

By the act of 1859 (*supra*), being a general provision, additional bases were designated from which indemnity school selections were authorized to be made, so that, subsequent to the act of 1859, selections for the granted sections were not confined to those parts of the school sections which were "occupied prior to survey," but, in addition thereto, selections were authorized where the granted sections "are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever."

The reservation of these lands for school purposes in the several territories, while not being a grant *in praesenti*, had the same power and effect as school grant to a state, so far as it affects the reservation of the land. Thomas F. Talbot, 8 L. D., 495.

I do not think it was intended by the act of February 22, 1889 (*supra*), to repeal or annul the provisions then made for reserving the lands for school purposes. Levi Jerome *et al.*, 12 L. D., 165.

On a careful examination of the 17th section of that act, I am unable to discover any conflict between its provisions and those contained in the last clause of section 2275 of the Revised Statutes.

Moreover, the act of February 28, 1891 (26 Stat., 796), amending that section and section 2276, and incorporating anew the same provisions respecting indemnity school lands as were contained in the original statute, places it beyond question that the State has the right to its indemnity upon the basis herein employed. See Instructions, April 22, 1891, 12 L. D., 400.

The land having been legally reserved from settlement and entry was not subject to the homestead application of Sharpstein, which was properly rejected.

The decision appealed from is accordingly affirmed.

## WASHINGTON SCHOOL LANDS—SETTLEMENT BEFORE SURVEY.

## ELDER v. STATE OF WASHINGTON.

Under the provisions of the act of March 2, 1853, the occupancy of school lands prior to survey by actual settlers operates to exclude from the reservation for school purposes only such parts of sections sixteen and thirty-six as are included within said occupancy.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 7, 1891.*

On March 11, 1887, William Elder made application to file a pre-emption declaratory statement for lot 11 and the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 36, T. 22 N., R. 4 E., Olympia (now Seattle), Washington.

The same was refused for the reason that the tracts therein described are in section 36, and are reserved for the purpose of being applied to common schools in Washington Territory by section 1947 of the Revised Statutes of the United States.

On appeal, you, by your decision of September 21, 1888, affirm that judgment, and he appeals therefrom to this Department, assigning the following grounds of error:

1. In not finding from the records of the General Land Office that the greater portion of said section 36 had been legally and duly entered prior to the date of said application, under the donation and other land laws of the United States, and that thereby said section 36, or the portion thereof remaining unentered, remained public lands of the United States, subject to entry under the land laws of the same, and said Honorable Commissioner erred in not so deciding.

2. In not deciding that the act of March 2, 1853, reserving sections 16 and 36 in the Territory of Washington for school purposes provided that, when either of such sections was settled upon prior to survey thereof, and any portion of the same entered under any of the land laws of the United States, such section was and remained public land of the United States and subject to entry under the land laws of the United States.

3. Error in deciding that parts of sections 16 and 36 are reserved or were reserved for school purposes.

4. In rejecting said application to enter said lands.

On examination of the records of your office, I find that the greater part of said section 36 is covered by the donation claims of Beaty, Cox, and Thomas, aggregating 376.90 acres, "settled upon prior to survey."

These claims were so located as to subdivide each one of the remaining forty acre tracts in the section, with the exception of the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ . When the survey was made and approved, there remained in place in said section 263.10 acres—183.10 acres of which are designated on the official plat as lots 1, 2, 3, etc.

The act of March 2, 1853 (10 Stat., 172), establishing the territorial government of Washington, in its 10th section provides as follows:

That when the lands in said Territory shall be surveyed, under the direction of the government of the United States, preparatory to bringing the same into market, or otherwise disposing thereof, sections numbered sixteen and thirty-six, in each township in said Territory, shall be, and the same are hereby, reserved for the purpose of being applied to common schools in said Territory.

And in all cases where said sections sixteen and thirty-six, or either or any of them, shall be occupied by actual settlers prior to survey thereof, the county commissioners of the counties in which said sections so occupied as aforesaid are situated, be and they are hereby authorized to locate other lands to an equal amount in sections or fractional sections as the case may be, within their respective counties, in lieu of said sections so occupied as aforesaid.

It does not follow from this act that, because a portion of a school section has been excepted from reservation, indemnity must be selected for the entire section. Sections sixteen and thirty-six in each township were by the act organizing the territory "reserved for the purpose of being applied to common schools." That part of section thirty six which was appropriated by donation claims "prior to survey" was thereby lost to the school grant, subsequently to be made. Authority for selecting an equal area "or lands of like quantity" was given; but a part of the section, remaining in place amounting to 263.10 acres, was reserved for the common schools, and the county commissioners were not authorized, much less required, to select indemnity for the lands thus found in place and "not wanting, by reason of the township being fractional or from any natural cause whatever."

It follows that the tracts applied for, having been reserved by legislative authority for the purpose of being applied to the common schools in the territory, were not public lands, and therefore not subject to entry, and the application was properly rejected.

The decision appealed from is accordingly affirmed.

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#### HOMESTEAD CONTEST—DEPARTMENTAL JURISDICTION.

##### GATES *v.* SCOTT.

The action of the local office in accepting final proof and issuing final certificate thereon does not preclude the Land Department from subsequently inquiring into the good faith of the transaction and canceling the entry, if obtained through fraud, or allowed in violation of law.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 7, 1891.*

I have considered the case of Elmer D. Gates *v.* Edwin C. Scott, upon the appeal of the latter from your decision, holding for cancellation, and denying a re-instatement of his homestead entry for the SW.  $\frac{1}{4}$  of Sec. 14, T. 133 N., R. 60 W., Fargo land district, North Dakota.

He made homestead entry for the land on the 29th of June, 1882, and after due notice by publication, made final proof before the clerk of the district court, at Grand Rapids, La Moure county, N. D., on the

9th of October, 1883, which was filed in the local office on the 13th of that month.

On the 26th of March, 1884, Gates filed affidavit of contest, alleging abandonment. Being unable to make personal service upon Scott, notice of contest was served by publication. This notice did not come to the knowledge of Scott, and at the hearing he made default. Upon the evidence submitted the register and receiver recommended the cancellation of the entry, which was ordered by your office on the 24th of March, 1885, and on the 10th of April of that year, Gates filed declaratory statement for the land, claiming settlement on the 17th of November, 1884.

It appears that the final proof of Scott was not considered by the local officers, when it was filed with them in October, 1883, for want of payment, and on the 16th of May, 1884, over seven months after proof was made, and nearly two months after contest was initiated, a clerk in the local office inadvertently accepted the proof, and issued final certificate and receipt.

On the 15th of July, 1886, Scott made affidavit and motion for a rehearing in the case, which was ordered by your office on the 11th of March, 1887. On the 12th of March, 1888, the register and receiver, after considering the evidence submitted upon such rehearing, rendered a decision which your office considered as meaning that the entry of Scott should not be re-instated. From that ruling, an appeal was taken to your office, where it was affirmed on the 3d of March, 1890, and a further appeal brings the case to this Department.

The specification of errors complained of by the appellant are as follows:

First. It was error on the part of the Hon. Commissioner, in finding that defendant never established his residence upon the tract involved.

Second. The Hon. Commissioner erred in finding that defendant had failed to comply with the requirements of the law, prior to his making final proof for said tract.

Third. It was error on the part of the Hon. Commissioner in not considering the evidence submitted in behalf of the defendant.

Fourth. The Hon. Commissioner erred in not taking into consideration the fact that the burden of proof is upon the plaintiff as the moving party.

Fifth. Final certificate having been issued in this case, the Hon. Commissioner erred in assuming jurisdiction of the subject matter.

Sixth. The Hon. Commissioner erred in not holding that the entry was not subject to contest at the time this action was initiated.

Seventh. It was error on the part of the Hon. Commissioner in rendering a decision adverse to the defendant.

The first four grounds of error, and the last, are disposed of by carefully considering the facts in the case, as established by all the evidence submitted at the trial. These facts are stated very fairly, and with sufficient fullness in your decision from which this appeal is taken. On the part of the defendant no evidence was produced except his own deposition, and in all particulars in which he testifies as to settlement

and residence, he is directly at variance with the evidence of the plaintiff and the five witnesses who testify in his behalf. Holding that the burden of proof is upon the plaintiff to establish his case, I find that the preponderance of evidence is very largely in his favor, and fully justified a decision adverse to the defendant.

The questions raised by the fifth and sixth specifications of error have been fully discussed, and the principles of law applicable thereto, stated in numerous decisions by this Department and the courts. In the case of Samuel H. Vandivoort (7 L. D., 86), it was held that a final certificate, until approved by the General Land Office, is only *prima facie* evidence of equitable title, and that the official acts of the register and receiver are subject to supervision and may be approved or disapproved by the Commissioner. The same doctrine was held in the case of Traveler's Insurance Company (9 L. D., 316) where it was held that

The action of the local officers in accepting final proof and payment does not preclude the Land Department from subsequently inquiring into the good faith of the transaction, and canceling the entry, if obtained through fraud, or allowed in violation of law.

The position assumed by the counsel for the appellant, in his elaborate argument on this appeal, has not been followed by this Department, or by the United States courts, so far as I am aware, in any case where the questions involved were similar to those in the one at bar. In the case of *Frisbie v. Whitney* (9 Wallace, 187), in discussing this question the court say :

When all these prerequisites (settlement, improvements, payment of entrance money, etc.,) are complied with, and the claimant has paid the price of the land, he is entitled to a certificate of entry from the register and receiver; and after a reasonable time to enable the land officer to ascertain if there are superior claims, and if in any other respects the claimant has made out his case he is entitled to receive a patent, which for the first time invests him with the legal title to the land.

In the case of *Carroll v. Safford* (3 Howard, 460), cited by counsel to support his position that after certificate has issued the case is beyond the jurisdiction of the Department, the court say: "But where there has been fraud or mistake the patent may be withheld."

That decision covers the case at bar, where the certificate was issued inadvertently, by a clerk in the local office, after contest had been initiated, and without the knowledge of the register and receiver.

In the case of *Smith v. Custer et al.* (8 L. D., 269), it was held that a claimant acquires no title to public land, until he has fully complied with all the prerequisite requirements, and paid for the land, and he takes by final proof, payment and the receipt of final certificate, only a right to a patent, in the event that the General Land Office, or the Department on appeal, find that the facts warrant the issuance thereof.

The language used by the court in the case of *Steel v. Smelting Co.* (106 U. S., 450), which is one of the cases cited by the appellant to sustain his position, partakes almost of the nature of a personal rebuke. In that case, the court say :

We have so often had occasion to speak of the Land Department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on the subject. That department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of Congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions.

It is unnecessary to multiply authorities on this question. The courts and the Department are in harmony on the subject, and the decision appealed from is affirmed.

APPLICATION TO ENTER—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* PUGET MILL CO.

An application to enter lands included within the existing entry of another confers no rights upon the applicant.

Where the validity of an entry is questioned, and the matter is before the Department on appeal from an order holding the same for cancellation, no rights can be acquired by appealing from the rejection of an application to enter the land covered by said entry, and urging the invalidity thereof.

The case of the Puget Mill Company, 13 L. D., 118, cited and followed.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October 8, 1891.*

I have considered the motion of the Puget Mill Company in the case of the United States *v.* said company, asking that said case be disposed of under the 7th section of the act of March 3, 1891 (26 Stat., 1095).

The record shows that on February 9, 1876, Charles M. Jacobs made soldier's additional homestead entry for the tract in question, to wit, the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 18, T. 26 N., R. 7 E., Seattle, Washington. Soon after said entry was made, the tract was purchased by the Puget Mill Company, and, on December 18, 1876, said entry was held for cancellation by your office, for the reason that it was based on spurious and forged papers.

An appeal was taken from this ruling by the Puget Mill Company, and while this appeal was yet undisposed of the act of June 15, 1880, was passed (21 Stat., 237).

As a transferee under the original soldier's additional homestead entry, said company applied, and was allowed to purchase the tract in question under the second section of said act. This purchase was

made and the receiver's receipt issued on March 11, 1886. The Puget Mill Company have held that receipt and possession of the tract ever since that date.

On June 14, 1890, your office finally passed on the appeal of the company from your office decision of December 18, 1876, and held that the purchase of the tract by the company, under the act of June 15, 1880, operated as an abandonment of its appeal, citing case of Alonzo Swink (7 L. D., 342). The original entry was canceled, and the cash entry of said company was also held for cancellation, citing as authority therefor the case of J. S. Cone (7 L. D., 94), and the case of the Puget Mill Company (7 L. D., 301).

On March 25, 1891, a motion was filed in your office by said company, asking that your office decision be reconsidered, "on the ground that the entry seems to be confirmed by the act of March 3, 1891." This motion was denied on May 19, 1891, and the company appealed to this Department.

It is shown that the cash entry in question was made and a receiver's receipt issued on March 11, 1886. More than two years therefore elapsed before any action was taken by the government in any way questioning the validity of the entry. In fact, no action was taken until June 14, 1890, when said entry was held for cancellation.

More than four months thereafter, to wit: on October 17, 1890, Charles Shaeffer offered to file in the local land office at Seattle, Washington, his pre-emption declaratory statement for the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 18, T. 26 N., R. 7 E., and lots 1 and 2. Parts of the above described tracts are included in the Puget Mill Company's entry in the case at bar, and the residue is included in cash entry No. 9716 made by said company. His application was rejected by the register and receiver, because of conflict with the entries of said company. On November 3, he appealed from said rejection to your office, where on November 29, 1890, the ruling of the local land office in rejecting said application was affirmed. Shaeffer appealed from the ruling of your office, and the appeal is now pending in this Department.

It is a well settled principle that lands embraced in an entry of record are not subject to further disposition, and that an application to enter the same confers no rights upon the applicant.

The validity of the entry of record having been questioned, and the matter being before this Department on appeal for an order holding the same for cancellation, no rights could be acquired by appealing from the rejection of an application to enter land covered by said entry and urging its invalidity. *Patton v. Kelley*, 11 L. D., 469; *Cappelli v. Walsh*, 12 L. D., 334.

Your action rejecting Shaeffer's applications is therefore approved.

This leaves the case in all respects similar to that considered in departmental decision of August 13, 1891 (13 L. D., 118), involving other land purchased by the Puget Mill Company, in which it was held that

the entry is confirmed under the terms of the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095), and that patent should issue to the company.

Your decision is therefore reversed, and you are directed to issue patent upon the entry.

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

GEORGE HAGUE ET AL.

In the enactment of section 7, act of March 3, 1891, Congress contemplated existing entries, and an entry that is finally canceled prior to the passage of said act is not within the confirmatory operation of said section.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
October 8, 1891.*

On March 21, 1883, George Hague made a pre-emption cash entry for the NW.  $\frac{1}{4}$  Sec. 12., T. 133 N., R. 60 W., Fargo, North Dakota, and on August 29, 1889, it was canceled on the ground of fraud on the part of said entryman.

After the final entry was made by Hague, he borrowed from the Traveler's Insurance Company, the sum of five hundred dollars (\$500.00), and gave as security therefor a mortgage on the tract embraced in his entry.

On April 3, 1891, said mortgagee applied for the re-instatement of said entry and confirmation thereof, under section 7 of the act of March 3, 1891 (26 Stat., 1095).

On June 6, 1891, the Department considering this application fully, denied the same and held that inasmuch as the cancellation of the entry of Hague had become final before the passage of the act of March 3, 1891, *supra*, said entry could not be confirmed under the seventh section thereof.

I am now in receipt of a motion filed by the attorneys for the Traveler's Insurance Company, asking that the departmental decision of June 6th be reviewed and set aside and that the entry of Hague be re-instated and passed to patent under the act cited.

The motion is based upon the following assigned error.

Your honor erred in holding that the cash entry involved, was, by reason of its being canceled, by decision of the Department, prior to date of the act of March 3, 1891, without the confirmatory provisions of section 7 of said act, and in thereupon denying the application for patent thereunder.

In the argument of counsel, it is contended that the language of the part of section 7, sought to be applied to this case should be construed to mean that Congress intended to cover past transactions and that wherever an entry of the kind enumerated in said seventh section, in which final proof and payment *may have been made and certificate issued* and where the other conditions named in said section exist, such an

entry is confirmed without reference to whether it had been canceled before the confirmatory act was passed or not. An attempt is made to fortify this contention by stating that Congress had in view when the section was passed, the protection of innocent purchasers and incumbrancers alone, and it is argued that one who has loaned his money in good faith, relying on the final receipt, should not be cut off from this protection for the reason that because of the acts of the entryman, the entry has been canceled, when protection is given to the same kind of a mortgagee, who by reason of aggressive opposition or some other cause may have prevented or put off, the cancellation of an entry until after March 3, 1891, when the act in question was approved.

Prior to the passage of the act in question, there was no such thing as an innocent purchaser before patent and the Traveler's Insurance Company when it loaned this money, loaned it only on the strength of the title that Hague had, and it must have known, for all men are presumed to know the law, that his title was subject to confirmation or rejection at the hands of your office or this Department, and that his title must depend on whether or not his acts in securing the final receipt were bona fide and whether or not he had complied with the law under which the entry was made.

The system adopted for the disposal of the public lands is administered by the register and receiver of the local land office, the Commissioner of the General Land Office, and the Secretary of the Interior, and a case is only partly adjudicated by the register and receiver, and one who loaned money upon or purchased land of an entryman, is not an innocent purchaser, but a conditional incumbrancer or purchaser.

*Steele v. Smelting Co.* (106 U. S., 447).

*United States v. Schurz* (102 U. S., 378).

*Carroll v. Safford* (3 Howard, 441).

*Smith v. Custer et al.* (8 L. D., 269).

*United States v. Johnson* (5 L. D., 442).

On authority of the decisions of the Department and of the supreme court, it was always held that the doctrine of *caveat emptor* applied with all its rigor to purchases made prior to patent, such purchases can give no rights not earned by the entryman, by complying with the law in good faith.

That part of section 7, which is relied upon to allow the confirmation of the entry in question, is as follows:—

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

It will be noticed that all pre-emption, homestead, desert-land and timber-culture *entries*, in which final proof and payment have been made, etc., and where certain other conditions exist, are confirmed.

In the passage of this section, Congress evidently intended to deal with existing entries. It has from time to time made appropriations for the purpose of hiring special and other agents for the Land Department, in order that investigations might be made to ascertain whether certain entries were valid or not.

In view of all this, it could not, it seems to me, have meant by this act to resurrect some of these same entries, found on the investigations provided for by means of Congressional appropriations to have been fraudulent, and for that reason finally canceled, in order that they might pass to patent. Besides when an entry is canceled, other and valid claims are often asserted and new rights are acquired.

If an entry that was canceled three months or a year before the passage of the act of March 3, 1891, is confirmed, an entry canceled three or ten years before the passage of the act would also be confirmed, and this too without regard to present claims for the land.

It is apparent that Congress did not mean to raise up and confirm entries which have been canceled, and the rules of construction will not allow any such interpretation to be placed on the section in question.

Said section was intended to confirm certain entries but no where is any statement found in the act indicating an intention to give life to and confirm an entry not in existence at the date of the passage of the act cited.

James Ross, 12 L. D., 446;

R. M. Chrisinger, *id.*, 610

Niels C. E. Jorgenson, 13 L. D., 33.

The motion for review in this case is accordingly denied.

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PRACTICE—CONTINUANCE—DEFAULT.

JOHNSON *v.* PRICE.

Where a case is continued to a day certain, in compliance with the terms of a stipulation, and the contestant fails to appear on the day thus fixed for the hearing, an order dismissing the contest may be properly made.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 8, 1891.*

On September 7, 1886, Isaac C. Price made homestead entry, No. 10900, for the SE $\frac{1}{4}$ . Sec. 12. Tp. 32 S., R. 37., at the Garden City land district; Kansas.

On January 3d, 1889, Silas B. Johnson filed a contest against said

entry. A hearing was ordered by the local office for November 22, 1889, and the parties were duly notified. On October 30, 1889, the following stipulation was filed.

Silas W. Johnson, Plaintiff, v. Isaac C. Price, Defendant.	}	Before the Register and Receiver, Land Office, Garden City, Kan.
Stipulation.		

It is hereby agreed and stipulated that the above case be continued thirty days from Nov. 2d 1889.

SILAS W. JOHNSON,  
 By S. N. WOOD, his atty.  
 ISAAC C. PRICE.

The hearing was thereupon continued to December 2, 1889, and S. N. Wood was "fully aware that his stipulation for continuance was granted," as appears by the register's letter of January 25, 1890, to your office. On November 22, 1889, G. L. Miller, the other attorney of said Johnson, appeared at the local office and learned that the case had been continued

On December 2, 1889, the plaintiff made default of appearance, and the case was dismissed. An appeal was duly taken to your office, and by your letter of March 12, 1890, the decision of the local office was affirmed. An appeal from your judgment now brings the case before me.

The contention of the plaintiff is that your office erred in sustaining said dismissal, because

said stipulation entitled the plaintiff to thirty days continuance from November 22 1889, to-wit, to December 22, 1889, in place of thirty days from November 2, 1889, being the day said stipulation reached the local office by mail.

The stipulation is not dated, but it reached the local office and was filed on October 30, 1889.

The continuance was granted, according to the precise terms of the stipulation, "thirty days from Nov. 2, 1889," and the statement in the assignment of error above cited, that the continuance was granted thirty days from "the day said stipulation reached the land office by mail," is a gross error. Both the attorneys for the plaintiff knew of the date to which the hearing was continued. One of them was a resident of Garden City. Neither of them saw fit to appear on the day set for the hearing. It was a fair presumption on the part of the local officers that the plaintiff had no ground for his contest, and the disposition made of the case was a just one. No excuse or reason for the plaintiff's default is pretended. The appeal from the local office was based upon technical irregularities. It was held in *Smith v. Johnson*, (9 L. D. 255), that a party would not be permitted to question the regularity of a continuance procured at his own instance.

The appeal to this Department is based upon an irregularity that does not exist. Both appeals seem frivolous and intended for delay.

Your judgment is affirmed.

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

## PATRICK TRACEY.

A pre-emption entry allowed in violation of the provisions of section 2260 R. S., may be confirmed under the proviso to section 7, act of March 3, 1891, where no contest or protest is initiated against the same, and adverse proceedings are not begun by the government within two years after the issuance of final receipt.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, September 30, 1891.*

Patrick Tracey, on July 1, 1887, filed pre-emption declaratory statement for the NW.  $\frac{1}{4}$  of Sec. 10, T. 18 N., R. 10 N., Grand Island land district, Nebraska.

He made final proof upon the same and received final certificate on January 10, 1888.

Your office, by decision of February 11, 1891, held the entry for cancellation, on the ground that he removed to said tract from land of his own.

The entryman, on July 11, 1891, appealed from your decision, contending that he did not in fact remove from land of his own.

The question thus brought in issue need not be examined into or discussed, in view of the act of March 3, 1891. Inasmuch as no contest or adverse proceeding has been initiated by any person to secure the cancellation or defeat the consummation of the entry, and as the proceedings which resulted in the judgment herein appealed from were not instituted by the government within two years after the issuance of the receiver's receipt upon final entry, the entryman is entitled to a patent under the proviso to Sec. 7 of the said act, and the instructions of May 8, 1891 (12 L. D., 450).

Your decision holding the entry for cancellation is therefore set aside, and patent will issue.

## PRACTICE—APPEAL—INTERVENOR—AMENDED SURVEY.

## HIRAM BROWN ET AL.

On appeal from the rejection of an application to enter, the applicant is not required to serve notice upon other applicants for the same tract, where the question is solely between each applicant and the government.

An application to be heard as an intervenor will not be granted in the absence of a due disclosure of interest as required by rule 102 of practice.

Where a new plat of survey is made necessary by the relinquishment of a claim excluded therefrom, and, prior thereto, an entry is erroneously allowed in accordance with the original survey, and patent issues thereon, the Department is without jurisdiction to issue for the benefit of a transferee an amended or new patent to include the additional acreage shown by the new survey.

The additional lands embraced in such resurvey are not open to filing or entry until the plat of such survey is made and filed.

*First Assistant Secretary Ohandler to the Commissioner of the General Land Office, October 6, 1891.*

I have considered the cases of Hiram Brown and J. C. Clinton involving a portion of lots 1 and 2, section 17, T. 8 N., R. 9 W., Oregon City, Oregon, from the decision of your office, dated April 28, 1890, rejecting Brown's application to amend his patented entry and Clinton's application to enter the land in question.

It appears that the first survey of said township, was approved December 30, 1856, and showed two lots (1 and 2) in section 17, containing 47.10 acres.

Before the above survey was made J. M. Shivley filed donation claim No. 38, for a part of the land in section 17, and Henry S. Aiken, also filed donation claim No. 42, for another portion of said section 17, embracing the two lots above referred to. May 15, 1856, the claims of Shivley and Aiken were surveyed and platted and on August 25, 1863, said plat was approved.

August 24, 1857, Aiken relinquished his donation claim to the United States and subsequently, the surveyor-general replatted the land embraced in the relinquished claim of Aiken, designating the fractional portion in section 17, as lots 1, 2 and 3, containing respectively 34.30; 26.80 and 6.50 acres. Said plat, however, for some unknown cause was not approved until January 8, 1870.

In the meantime, soon after the relinquishment of Aiken, Malcolm Douglas filed a pre-emption declaratory statement for lots 1 and 2, and made proof thereon October 16, 1858; giving the area in accordance with the original plat of survey. Hiram Brown is the present owner of the land entered by Douglas, and it appears that the plat approved January 8, 1870, shows lots 1 and 2, as containing fourteen acres more land than by the original plat of 1856, therefore Brown filed petition in your office under date of December 20, 1889, asking that patent issued to Malcolm Douglas be amended or canceled, and a new patent be issued to cover the area given by the plat of 1870.

On December 4, 1889, one J. C. Clinton made application to the local office to file a pre-emption declaratory statement, for the fourteen acres in question, but the same was rejected, and the party appealed to your office.

Under date of April 28, 1890, your office embraced the two cases in one decision, rejecting the petition of Brown, and affirming the action of the local officers in rejecting the application of Clinton.

Both these parties have appealed, and counsel in behalf of Clinton has filed motion to dismiss the appeal of Brown on the ground, that "Brown wholly failed to serve said Clinton or his attorneys with notice of his said appeal."

In answering the above motion, counsel for Brown also files motion to dismiss the appeal and declaratory statement application of Clinton,

making the counter charge that Clinton made application for the land and also protested against the claim of Brown without any notice whatever to said Brown.

The tract of fourteen acres in question is government land and both parties have applied to enter the same.

Brown filed petition in your office, to have the patent that had been issued to Douglas, as above stated, canceled and a new patent issued embracing the land in controversy, and Clinton made application at the local office to file a pre-emption declaratory statement for the same land. It is, therefore, simply a question of two applicants for the same tract. There was no hearing ordered, or held, or any contest between these parties, and hence Brown was in nowise bound to give notice to Clinton of any action he had taken to secure the land and *vice versa* Clinton was not required to give notice to Brown.

Rule 86, cited by counsel, requires that notice of appeal should be served on the appellee or his counsel. There was no appellee in this case, therefore the rule does not apply. It was a question between each applicant and the government.

In the case of Charles A. Parker (11 L. D., 375), cited by counsel for Clinton, the entry of Parker was held for cancellation by reason of the claim of Whitehurst. Parker appealed but gave no notice to Whitehurst; appeal dismissed for that reason. In the case at bar no such condition of things existed, and therefore the Parker case has no bearing on the case.

With this view of the question the motions of both Brown and Clinton, are denied.

January 12, 1891, since this case was submitted to this Department, your office transmitted a letter received from Sidney Dell, attorney of Astoria, Oregon, alleging that Henry S. Aiken, who made donation No. 42, above referred to, did not relinquish or in other words, that what purports to be his relinquishment of his donation, cannot be proven, that Aiken is dead; that Skinner the witness to Aiken's signature and the register of the local office at that time, are also dead; that proof will be presented to the local officers by the son and only heir of said Aiken, showing that the said Aiken had complied with the law as to residence and cultivation before decease, and therefore his title was complete.

For the above and other reasons Mr. Dell, as attorney for the heir of Aiken asks a stay of proceedings in this Department in relation to the fourteen acres until such proof can be made and submitted.

A stranger to the record is not entitled to be heard as an intervenor, without first disclosing *under oath* the nature of his interest. *United States v. Scott Rhea* (8 L. D., 578).

A general statement even under oath, by the intervenor's attorney, that said intervenor is the present owner of the land cannot be ac-

cepted as a satisfactory compliance with rule 102 of Rules of Practice. Elmer E. Bush (9 L. D., 628).

The request of Sidney Dell, is therefore denied.

The question now remaining to be determined is, whether Brown is entitled to the right of relinquishing the outstanding patent and have a new one issued to embrace the fourteen acres in question, and if not, then whether Clinton by virtue of his alleged settlement thereon, as a pre-emptor, is entitled to entry.

Fractional section 17, forms a part of the peninsula lying between the Columbia river on the north and Young's river and bay on the south, and said lots 1 and 2, front on Young's river and are in the SE.  $\frac{1}{4}$  of said section made fractional by the meander line of said bay and river.

By the original survey of 1856, the east line of section 17, from the north boundary to Young's river is given as 72.50 chains, and as the north line of said lots in said survey was distant from the north line of the section 60 chains, it follows, that the east line of lot 1, was only 12.50 chains in length.

The plat approved August 25, 1863, giving the limits and boundaries of the donation claims in section 17, shows that the Shivley claim extended south from the north boundary of the section, 57 chains, or in other words, it lacked 3 chains of extending as far south as the north boundary of lots 1 and 2, according to the survey of 1856.

In the survey of the Henry S. Aiken donation, however, the south line of the Shivley claim was also the north line of the Aiken claim, hence not only did the Aiken claim cover lots 1 and 2, but it also covered the strip of 3 chains wide, between the north boundary of said lots and the south boundary of the Shivley claim.

The survey of the donation claims of Shivley and Aiken practically extinguished the survey of 1856, so far as the land embraced by said claims is concerned, and therefore when Aiken relinquished his claim, the surveyor-general replatted the land embraced thereby in section 17, into lots 1, 2 and 3, protracting the former north and south lines of said lots 3 chains farther north and closing the same on the south boundary of the Shivley claim, as a common boundary; thus enlarging lots 1 and 2, fourteen acres.

The pre-emption entry of Douglas was made subsequent to the relinquishment of Aiken, and before the surveyor-general replatted the land, and therefore, the local officers, probably under the impression, that the survey of 1856 was restored by said relinquishment, erroneously allowed said entry under the old plat, giving the acres as contained therein.

The plat of 1856 was superseded by that of 1863, and when Aiken's claim was relinquished, no entry of the land should have been allowed until the land embraced by said claim had been properly platted.

In view, however, of the fact that a patent has issued for lots 1 and 2, by the survey of 1856, this Department has no further jurisdiction in the premises, and the patent must stand, as issued for 47.10 acres.

The fourteen acres lying between the lands patented to Douglas and the Shivley claim, are *prima facie* government lands yet as the matter now stands it is not subject to entry by reason of being included in lots 1 and 2, by the latest official plat, therefore it will be necessary before said tract can be entered, that the survey of said lots 1 and 2, be replatted so as to indicate on said plat, the exact land covered by the Douglas patent, and also to show and designate the tract of fourteen acres as another lot in the section.

For the above reasons the application of Brown, as also that of Clinton, must be rejected, without, however, any prejudice to the settlement rights of Clinton for the land in question.

Your office decision is therefore affirmed.

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REPAYMENT—DESERT ENTRY.

EDWARD F. STAHL.

Repayment of purchase money paid on a desert entry can not be allowed where the entry made with full knowledge of all facts, fails through the entryman's alleged inability to secure the water necessary for reclamation.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 12, 1891.*

The appeal of Edward F. Stahl from your decision of August 12, 1890, denying his application for repayment of purchase money paid upon desert land entry for NE.  $\frac{1}{4}$  of Sec. 20 and NW.  $\frac{1}{4}$  of Sec. 21, T. 29 N., R. 68 W., Cheyenne, Wyoming, land district, has been considered.

The tract was entered by Stahl December 26, 1882, under the desert land act of March 3, 1877, and his affidavit as well as those of the witnesses, are in form as prescribed by the regulations. September 10, 1885, your office directed the local officers to receive the application of subsequent entrymen, and a hearing was ordered to determine the validity of Stahl's entry and the character of the land. At this hearing Stahl made default and it was adjudged that his entry be forfeited. July 5, 1890, he made application for repayment of purchase money, accompanied by an affidavit of same date, simply stating that he made the entry in good faith, and had lost his duplicate receipt. July 30, he made another affidavit in which he avers:

That he made personal examination of the land . . . . . previous to filing the same; that said land was desert in character, at the time of making such entry; that after making said entry he found the water in the stream he intended to make use of to reclaim said land, to have been appropriated by other parties, so that there was an insufficient supply to honestly reclaim said land, in view of which facts when contest was entered it was useless to respond to said contest.

It will be observed that there is no allegation in either of the affidavits that would bring this application within the purview of the act of Congress, June 16, 1880 (21 Stat., 287). Neither is there any showing of good faith or vigilance on the part of Stahle, to comply with the law. He says he found the water he intended to use had been appropriated. But he does not say *when* he ascertained this fact. He did not execute a "proper relinquishment of all claims to said land" when he learned it. In his affidavit for entry he gives his occupation as a surveyor, and says he is acquainted with the land by travelling over it, therefore it is fair to presume that he had full knowledge of all facts necessary to reclaim this land, and if he had exercised due diligence he could have secured the water. W. S. Jackson (10 L. D., 12).

Your decision is, therefore, affirmed.

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*Overruled as far as in conflict,  
42 L. D. 321*

CERTIORARI—PRICE OF COAL LAND.

EDWARD B. LARGENT ET AL.

The writ of certiorari will not be granted where the right of appeal is lost through failure to assert the same within the prescribed period.

The price of coal land is to be determined by the distance of the land from a completed railroad at the date of the entry, and not at the date of the application.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
October 13, 1891.*

I have considered the application of Edward B. Largent and George C. Swallow, assignees of Haviland B. Strong, for a writ of certiorari, directing your office to transmit to the Department the record in the case of their application for re-payment of an alleged excess of \$10 per acre, paid by Haviland B. Strong, on his coal land entry of the N.  $\frac{1}{2}$  NW.  $\frac{1}{4}$  of Sec. 13, T. 19 N., R. 4 E., Helena, Montana.

The application before me shows that on June 29, 1888, Strong made coal land entry for the tract in question, alleging settlement July 22, 1886; plat of survey was filed December 23, 1882.

On the day his entry was made, he paid for the tract at the rate of \$20 per acre, and received final certificate, No. 52, therefor.

It is now alleged, that on the 1st day of October, 1887, Strong offered proof that there was no completed railroad within fifteen miles of said tract, and at the same time tendered the amount of purchase money necessary to pay for the land at \$10 per acre, but was prevented from making entry by one George Bagnell, who had filed a protest against the allowance of his entry, and this protest had effect to delay the entry, until by the construction of a railroad within fifteen miles of the tract, the price was raised to \$20 per acre.

The extra ten dollars per acre was paid by Strong under protest, and his assignees soon after filed an application for re-payment for the alleged excess.

This application was denied by your office on May 5, 1890.

On March 25, 1891, an appeal from your decision of May 5, 1890, was transmitted to your office by the register of the local land office, together with a statement that all parties in interest had been duly notified of the decision of May 5, 1890.

On April 9, 1891, you decided that no appeal would lie from the decision of May 5, 1890, because not taken within the period allowed by the rules of practice. The right of appeal was therefore denied.

The statement is found in said decision that the appeal was not asked for within the time allowed by the rules, but it nowhere appears when notice of the decision from which an appeal is asked, was served upon the parties asking for the appeal.

I have examined the record in your office, and find not only no proof of any service, but not even a statement of the date of any such service.

It is difficult to see how you determined that the appeal was not asked for in time under such circumstances.

It is a well settled rule that the service of notice must affirmatively appear. *Parker v. Castle*, on review (4 L. D., 84); *Milne v. Dowling* (4 L. D., 378); *Churchill v. Seely et al.* (4 L. D., 589); *English v. Noteboom* (7 L. D., 335); *Pierpoint v. Stalder* (8 L. D., 595).

It not appearing in said decision, nor from the record in the case, when the notice was served, I am unable to determine whether the appeal was taken in time or not.

In the decision complained of, however, it is decided that the appeal was not tendered in time, service of notice of this decision is admitted in the application before me and the fact not denied that the appeal was not tendered in time under the rules. There is no contention in said application that applicants did not receive notice of the decision of May 5, 1890, and that the appeal was tendered in time.

In fact it tacitly admits that the appeal was not taken in time, but makes a plea to the effect that the matter is between them and the government, and that if the appeal had been allowed no harm to any one else could result from it.

The applicants ask the Department to use its supervisory authority and order the record to be brought before it, because such an act would be harmless.

But such an order should not be made unless a right has been wrongfully denied to them, and such denial will result in their injury.

It is a well settled rule that the writ of certiorari will not be granted where the right of appeal is lost through failure to assert the same within the prescribed period. *Thompson v. Shultis* (12 L. D., 62); *Nichols v. Gillette* (12 L. D., 388).

No showing is made that any good reason existed why the appeal should not have been taken in time, and for this reason the application might be denied. Besides the petitioners have failed to show that your office decision of May 5, 1890, is erroneous, or that substantial justice has not been done in the case.

I have examined your decision complained of and think that it is supported by the law and the evidence. The filing of the protest against the entry of Strong was a risk that must be assumed by all who apply to enter the public land. The fact that in this particular case it had the effect to postpone the entry until after a railroad was completed within fifteen miles of the tract, which under the law doubled the price of the land, is only incidental, and the government can not be properly held chargeable for the delay occasioned by Mr. Bagnell's protest. It is quite probably true, as the law presumes, that the construction of the road within fifteen miles of the entry materially enhanced the value of the land to a sum which would justify the entryman in paying the \$20 per acre therefor.

The law is explicit in its declaration, that if at the date the entry of coal land is made there is a completed railroad within fifteen miles of the land, the price to be paid for the land is \$20 per acre and the fact that at the date an applicant for entry offers to make an entry, no railroad is completed within fifteen miles, and consequently the price of the land is only \$10 per acre can have nothing to do with fixing the price at the date of the actual entry. The law only provides what the price shall be at the date of entry and payment, irrespective of the preference right of entry. See circular of July 31, 1882 (1 L. D., 687).

After examining all the questions involved in this application, I am unable to conclude that the case is one which, as it stands, would justify interposition under and by virtue of the supervisory authority existing in this Department.

The application is therefore denied.

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#### HOMESTEAD ENTRY—TOWNSITE SELECTION IN OKLAHOMA.

##### NORMAN TOWNSITE *v.* BLAKENEY.

Land claimed and selected as a townsite, and with improvements thereon for the purposes of trade, business, and residence, is not open to homestead entry.

*Secretary Noble to the Commissioner of the General Land Office, October 13, 1891.*

I have considered the motion by the defendant, for a review of departmental decision of July 8, 1891, in the case of the townsite of Norman *v.* Robert Q. Blakeney, involving title to the E  $\frac{1}{2}$  of SW  $\frac{1}{4}$  of Sec. 29, T. 9 N., R. 2 W., Oklahoma City, Oklahoma.

A number of reasons are assigned in the motion for review why the decision of July 8, 1891, should be recalled and not adhered to, however, after considering each, and after arguments of counsel have been submitted, it appears to me that the only serious contention on the part of Blakeney is that at the time of the filing of his application to enter the tract, it was unappropriated government land and as such, was

subject to entry under the homestead law, and being such the departmental decision, holding substantially that the tract was appropriated by its selection as a townsite before his application was filed, was erroneous.

It appears that on April 22, 1889, an application was made by one Clark to enter the tract in question, together with other land, aggregating three hundred and twenty acres, as a townsite.

On August 6, 1889, it was held by your office that this application was not made by the proper officer, nor in other respects according to the law, therefore it was held to be "not admissible as the foundation of an entry." However, for the purpose of ascertaining whether or not the tract had been selected as a townsite, your office directed a hearing to ascertain when the tract was first selected and occupied as a townsite.

On November 6, 1889, Blakeney applied to make a homestead entry on the E  $\frac{1}{2}$  of the quarter section in question, which was rejected.

The trial directed by letter of your office of August 6, 1889, had not been had at the date of Blakeney's application, accordingly he was cited by your office to appear at this hearing.

The trial was held on June 10, 1890. It was shown by the evidence submitted at this trial that at the time of making his application, Blakeney knew that the west half of said section was claimed and occupied by the people of Norman as a townsite; he also knew that a map had been made of said town, including the east half of said quarter, and the evidence shows that some of the east half thereof had been surveyed and laid off into streets and alleys, and that at the date of his application, the material for a number of houses had been placed on these lots, quite a number of them had been staked off and some had been partially fenced, all of this improvement and preparation for improvement was unmistakable evidence that the townspeople claimed the tract as a part of the townsite of Norman.

Each sub-division of the SE  $\frac{1}{4}$  of Sec. 30, and each subdivision of the W  $\frac{1}{2}$  of the SW  $\frac{1}{4}$  of Sec. 29, were at that time used by said town for the purpose of trade, business and residence, and it is estimated that eight hundred people resided there. There can be no doubt but that these people, who had long before this time, organized a municipal government, controlled and exercised authority over both of these quarter sections, and that they claim both as a townsite. Their claim was notorious, and understood by all at the time of Blakeney's application, they had selected both of the quarter sections as a townsite. Could they under the law then in force select the whole of these tracts? I think they could.

Section 2388 of the Revised Statutes, which was in force in Oklahoma in 1889, provides among other things referring to townsites, as follows: "and the entry or declaratory statement shall include only such land as is actually occupied by the town" etc. This was the identical language of the act of May 23, 1844, (5 Stat., 657).

In discussing the proper construction to be placed on the last named act, the Hon. Caleb Cushing, Attorney General of the United States, said that:—

It is obvious that, in municipal settlement, as well as agricultural, there must be space of time between the commencement and the consummation of occupation. There will be a moment when the equitable right of the agricultural settler is fixed, although he have as yet done nothing more in the way of improving than to cut a tree, or drive a stake into the earth. And it may be long before he improves each one of all his quarter-quarter sections. So, in principle, it is in the case of settlement for a town. We must deal with such things according to their nature. Towns do not spring into existence consummate and complete. Nor do they commence with eight houses, systematically distributed, each in the centre of a forty-acre lot. And in the case of a town settlement of three hundred and twenty acres, as well as that of a farm site of one hundred and sixty acres, all which can be lawfully requisite to communicate to the occupants the right of pre-emption to the block of land, including every one of its quarter-quarter sections—is improvement, or indication of the improvement, of the entire block—acts of possession or use regarding it, consonant with the nature of the thing. That, in a farm, will be the erection of a house and outhouses, cultivation, and use of pasturage or woodland: in a town, it will be erecting houses or shops, platting out the land, grading or opening streets, and the like signs and marks of occupation or special destination.

(Opinions of Attorneys General, Vol. 7, page 733).

The townsite claimants in this case had selected the eighty acres in question as a part of their townsite before Blakeney applied to make an entry on the same, their selection was evidenced at the time by the fact of the survey of the parts thereof, platting the whole thereof, and generally controlling said tract and exercising jurisdiction thereover, besides many of the lots had been located by citizens of the town, and some of them had been improved, while on others buildings were in process of erection.

At the time of the hearing, on June 10, following the date of Blakeney's application, there were about twenty-five houses on the eighty acres in question, and more than a hundred people resided therein.

This fact is important only in so far as it shows the completion of improvements then begun or in contemplation.

There exists no reason for disturbing the departmental decision of July 8, 1891. Said motion is accordingly denied.

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#### TIMBER CULTURE CONTEST—APPLICATION TO ENTER.

##### BLUDWORTH *v.* AUGUSTINE ET AL.

An application to enter filed with the initiation of a timber culture contest takes effect as of the date when filed, on the cancellation of the entry under attack, and excludes intervening adverse claims.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 14, 1891.*

I have considered the case of J. M. Bludworth *v.* J. L. Saunders and Adam Augustine *v.* the same, which also involves a controversy be-

tween said Bludworth and said Augustine as to their preference right of entry for the NE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  and S.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of Sec. 24, T. 14 S., R. 4 W., S. B. M., Los Angeles land district, California.

From the record before me I learn that Saunders made timber culture entry for the tract on the 23d day of May, 1881. On the first of November, 1886, Bludworth filed affidavit of contest against said entry, upon which notice issued, and upon failure to make personal service, service by publication was authorized, and a hearing set for March 30, 1887. On the 21st of March of that year, Bludworth filed an affidavit making a case for the taking of the testimony by deposition, under rule 23. The local officers overlooked this application, and Bludworth failing to appear on the day set for hearing, the contest was dismissed. No notice of this action was given him, and when he incidentally learned of the fact, and the attention of the local officers was called to the situation they set aside the order of dismissal as erroneous. This action was taken by them on the 20th of October, 1887, and was followed by a hearing which took place on the 15th of November, resulting in a decision by the register and receiver on the 14th of December, 1887, in which they recommend the entry of Saunders for cancellation.

Before the dismissal of Bludworth's contest was set aside, Augustine initiated contest against the entry of Saunders, and a hearing was allowed upon his complaint, notwithstanding the local officers had already recommended the cancellation of the entry upon Bludworth's contest.

When Bludworth filed his affidavit of contest, on the first of November, 1886, he also made application to enter the land. Augustine did not make application to enter at the time he filed affidavit of contest, on the 13th of September, 1887, his affidavit accompanying his application to enter being verified on the 23d of May, 1889, which was suspended by the local officers "awaiting prior rights of J. M. Bludworth."

On the 22d of March, 1889, your office directed that the entry of Saunders be canceled, and on the 6th of June following, Bludworth made homestead entry for the land, in pursuance of his original application. On the 8th of said June, the local officers rejected the application of Augustine to make timber culture entry for the land on the ground that it was already covered by the homestead entry of Bludworth. From this decision, he appealed to your office, where the judgment of the local officers was affirmed, on the 26th of September, 1889, and on the 23d of May, 1890, you denied his motion for a review of that decision. An appeal from those decisions brings the case to this Department for consideration.

It appears that J. L. Saunders, the original entryman, left California in March, 1883, for Arizona, where he had mining interests in the vicinity of Phoenix, in that state. Previous to his leaving California, he was visited by his father, who informed him that a fortune of \$20,000

had been left him (the son) by a relative recently deceased in an eastern State, and that the property needed the immediate attention of the son. The father returned east in February, 1883, the arrangement between father and son being that the latter should go to Arizona, and look after his mining interests there, and come from there east to look after the fortune just bequeathed him. The newspapers of Phoenix announced his arrival in that city, in March, 1883, and his departure therefrom for his mine. Soon after the papers announced that the dead body of a man had been found near Phoenix, the description of which tallied exactly with that of J. L. Saunders, even to the loss of the second finger on his right hand and the partial mutilation of the other fingers of the same hand. These facts, together with the fact that he has never been seen or heard of since, and has never appeared to claim the property left him, satisfied his father and other friends that the body found near Phoenix was that of J. L. Saunders, and that he has been dead since the spring of 1883.

In addition to this, all letters and notices, whether registered or otherwise, sent from the land office at Los Angeles, or from other places, relating to these contests, directed to him at Phoenix, were returned to the senders, being uncalled for.

If it be true that Saunders died prior to the initiation of either of the contests against his entry, the contestants secured nothing by their contests, as their notices were issued to him, and not to his heirs or representatives. Augustine admitted that at the time he instituted his contest he "understood" Saunders was dead. Bludworth had no such understanding, when his contest was initiated, but the evidence upon this branch of the case, tends to establish the fact that Saunders died in the early part of 1883. From this evidence, I have no reasonable doubt as to his death.

With Saunders dead and his entry canceled, the land was open to settlement and entry, and Bludworth's application to enter, filed on the first of November, 1886, attached as of the date when it was filed. *Lamb v. Sherman* (13 L. D., 289).

A legal application to enter is, while pending equivalent to an actual entry, so far as the applicant's rights are concerned, and withdraws the land embraced therein from any other disposition, until final action thereon. *Pfaff v. Williams et al.* (4 L. D., 455).

Bludworth's application to enter, if suspended with his contest, was restored when such suspension was set aside, which was more than a year and a half before Augustine filed any application to make entry for the land.

In any event, therefore, it seems to me, that as between Bludworth and Augustine, the legal rights, and the equities of the case, are largely in favor of the former, and were I to reject the evidence submitted by him in support of his contest, because his affidavit asking that the testimony be taken by deposition was made before a notary public, and

not before the register or receiver, as I am asked to do by Augustine's counsel, I would also be obliged to reject that of Augustine for the same reason, both affidavits having been made before a notary public, and the evidence in both cases having been taken before the same officer. With all the evidence taken at both trials out of the case, I should still find in favor of Bludworth, on account of the priority of his application to enter.

Whatever confusion has been created in the case, has been occasioned by the oversight or neglect of the local officers, and as neither party has been deprived of any substantial right in consequence thereof, no wrongs are presented for remedy. When the land became open to entry, by the cancellation of the entry of Saunders, the application of Bludworth to make entry therefor was found upon file in the local office, and he was allowed to enter the same. This necessitated the rejection of the application of Augustine. The decisions appealed from are affirmed.

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HOMESTEAD ENTRY--OKLAHOMA TOWNSITE.

WALKER *v.* LEXINGTON TOWNSITE.

Land occupied as a townsite, and embraced within an application for such purpose, is not subject to homestead entry.

Under an application to enter three hundred and twenty acres in Oklahoma as a townsite, in accordance with the act of March 2, 1839, the right of entry is not limited to the acreage actually occupied for the purposes of trade, business, and residence. The same rule as to occupancy is also applicable to townsite entries perfected under the act of May 14, 1890.

The fact that some of the townsite settlers may have violated the terms of the statute, and the proclamation of the President opening the lands to entry, does not necessarily deprive the remainder of their right to perfect a townsite entry under the act of May 14, 1890.

*Secretary Noble to the Commissioner of the General Land Office, October 15, 1891.*

I have considered the appeal of Townsite Trustees, Board No. 4, from your decision of July 15, 1891, sustaining the local officers in their action allowing the homestead application of William H. Walker, for the SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of section 6, and NW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of section 7, T. 6 N., R. 1 W., Oklahoma City, Oklahoma.

On May 15, 1889, the local officers at Guthrie, transmitted the application of Amos Green *et al.*, containing more than three hundred signatures, for the townsite of Lexington. Said application was for three hundred and twenty acres, including the eighty acres in controversy in the case under consideration.

On June 30, 1890, William H. Walker, made application to enter the land above described as a homestead. This was rejected by the local officers on account of the prior townsite application.

On appeal by Walker, alleging that the tract in dispute had never been used for the purpose of trade and business, a hearing was ordered and took place, and upon the testimony submitted, the local officers found that the tracts had not been used for the purposes of trade and business, and held that Walker should be allowed to make homestead entry for the same, and your office affirmed their decision.

Appeal has been taken by the board of townsite trustees, who intervened and were made parties to the case.

There is little or no serious controversy as to the material facts in this case.

The tracts of land in question, together with other tracts, aggregating three hundred and twenty acres, were surveyed and platted into blocks, streets etc., for the purposes of a townsite immediately after April 22, 1889, and trade and business were carried on, and residences were established in said town. The improvements on the land in dispute were but slight, streets, alleys, etc., were surveyed, some grading was done on the principal street, a culvert was built to improve the street, and a ditch was dug to drain the land. A house was built on one forty acres which remained there for a time, and was occupied by the owner, a lot holder, or by his tenant. Certificates for lots were issued and sold and the proceeds were used to improve the streets etc., on the tracts in dispute.

You held that Walker should be allowed to enter the land in dispute as a homestead, for the reason that it was not actually occupied for townsite purposes.

The townsite application was filed under the provision of the act of Congress providing for the settlement of Oklahoma Territory, which authorized the Secretary of the Interior to permit townsite entries for a tract of land not exceeding three hundred and twenty acres, under section 2387 and 2388 of the Revised Statutes, which point out the manner in which to obtain title to lands actually occupied by the town for the use and benefit of the occupants thereof, and this application was duly filed and transmitted to your office for action thereon, and proceedings to obtain title are now being carried on as required by law.

It does not appear in evidence what the exact number of inhabitants was at the date of the townsite application, but from the number of signatures attached to the same, the number must have been one hundred or over; the evidence shows that at the time Walker made his homestead application, the actual number was about one hundred and eighty-four.

Section 2389 of the Revised Statutes provides that one hundred inhabitants may enter three hundred and twenty acres, hence at the time Walker made his homestead application, the townsite application was supported by the number of inhabitants required by the statutes, and the regulations of this Department issued thereunder. (5 L. D., 265.)

The first important question to be determined is, was the land in dispute actually settled and occupied as a town at the date of Walker's homestead application? It is clear from the evidence that it was not occupied by places of business, nor by residences, and that but slight improvements had been placed thereon; but it was a portion of the quantity of land that might be lawfully entered and appropriated by the inhabitants of the town, it had been surveyed into streets, alleys, etc., which had been somewhat improved by the municipal authorities with money raised from the sale of certificates for lots on said tracts, thus there had been municipal occupation of the land, and such occupation was in conformity with law.

I am of the opinion that this occupation of the land by the town was sufficient to exclude it from homestead entry, and was notice to Walker that said land was reserved for townsite purposes.

Sections 2387 and 2388 and 2389 of the Revised Statutes embody the provisions of the act of March 2, 1867 (14 Stat., 541). In the act of May 23, 1844 (5 Stat., 657), providing for townsite entries upon the public lands, the words of limitation are almost identical with those used in the section of the Revised Statutes above cited, the words are, "and that the entry shall include only such land as is actually occupied by the town, etc."

My predecessor, Secretary McClelland submitted to the Attorney-General, Hon. Caleb Cushing, for his opinion thereon, the following question:

Do the words in the act of 23d May, 1844, "and that the entry shall include only such land as is actually occupied by the town," restrict the entry to those quarter-quarter sections, or forty acre subdivisions, alone on which houses have been erected as part of said town, or do they mean, only, that the entry shall not embrace any land not shown by the survey on the ground or the plat of the town, to be occupied thereby, and not to exceed three hundred and twenty acres, which is to be taken by legal subdivisions, according to the public survey, and to what species of "legal subdivisions" is reference made in said act of 1844?

In his opinion Mr. Cushing said:

The second question is of the construction of the act of 1844, supplemental to that of 1841; and as the construction of the elder derives aid from the language of the later one, so does that of the latter from the former. The question is divisible into sub-divisions.

I. Does the phrase "that the entry (for a town-site) shall include only such land as is actually occupied by the town," restrict the entry to those quarter quarter-sections, or forty acre subdivisions alone, on which houses have been erected as part of said town?

II. What is the meaning of the phrase in the act "legal subdivisions of the public lands," in "conformity" with which the entry must be made?

I put the two acts together, and find that they provide for a system of pre-emptions for, among other things, agricultural occupation, commercial or mechanical occupation, and municipal occupation.

In regard to agricultural occupation, the laws provide that, in certain cases and conditions, one person may pre-empt one hundred and sixty acres, and that in regard to municipal occupation a plurality of persons may, in certain cases and conditions,

pre-empt three hundred and twenty acres. In the latter contingency, there is no special privilege as to quantity, but a disability rather; for two persons together may pre-empt three hundred and twenty acres by agricultural occupation, and afterwards convert the land into a town site, and four persons together might in the same way secure six hundred and forty acres, to be converted ultimately into the site of a town; while the same four persons, selecting land for a town site, can take only three hundred and twenty acres. In both forms the parties enter at the minimum price of the public lands. The chief advantage, which the pre-emptors for municipal purposes enjoy, is, that they have by statute a preference over agricultural pre-emption. In all other respects material to the present inquiry, we may assume, for the argument's sake at least, that the two classes stand on a footing of equality, as respects either the conflicting interests of third persons, or the rights of the government.

Now the rights of an agricultural pre-emptor we understand. He is entitled, if he shall "make settlement in person on the public lands," and "shall inhabit and improve the same, and shall erect a dwelling thereon," to enter, "by legal subdivisions any number of acres not exceeding one hundred and sixty, or a quarter section of land, to include the residence of such claimant." (Act of 1841, s. 10.) And of two settlers on "the same quarter-section of land," the earlier one is to have the preference. (Sec. 11.)

Now, was it ever imagined that such claimant must personally inhabit every quarter-quarter-section of his claim? That he must have under cultivation every quarter-quarter-section? And that, if he failed to do this, any such quarter of his quarter-section might be pre-empted by a later occupant?

There is no pretension that such is the condition of the ordinary pre-emptor, and that he is thus held to inhabit, under penalty of having it seized by another pre-emptor, or entered in course by any public or private purchaser. He is to provide, according to the regulations of the Land Office or otherwise, *indicia*, by which the limits of his claim shall be known,—he must perform acts of possession or intended ownership on the land, as notice to others;—and that suffices to secure his rights under the statute. It is not necessary for him to cultivate every separate quarter of his quarter-section; it is not necessary for him even to enclose each; it only needs that in good faith he take possession, with intention of occupation and settlement, and proceed in good faith to occupy and settle, in such time, and in such manner, as belong to the nature of agricultural occupation and settlement.

Why should there be a different rule in regard to occupants for municipal pre-emption? The latter is, by the very tenor of the law, the preferred object. Why should those interested in it be subject to special disabilities of competing occupancy? I cannot conceive.

It is obvious that, in municipal settlement, as well as agricultural, there must be space of time between the commencement and the consummation of occupation. There will be a moment, when the equitable right of the agricultural settler is fixed, although he have as yet done nothing more in the way of inhabiting or improving than to cut a tree, or drive a stake into the earth. And it may be long before he improves each one of all his quarter-quarter-sections. So, in principle, it is in the case of settlement for a town. We must deal with such things according to their nature. Towns do not spring into existence consummate and complete. Nor do they commence with eight houses, systematically distributed, each in the centre of a forty-acre lot. And in the case of a town settlement of three hundred and twenty acres, as well as that of a farm site of one hundred and sixty acres, all which can be lawfully requisite to communicate to the occupants the right of pre-emption to the block of land, including every one of its quarter-quarter-sections,—is improvement, or indication of the improvement, of the entire block,—acts of possession or use regarding it, consonant with the nature of the thing. That, in a farm, will be the erection of a house and outhouses, cultivation, and use of pasturage or woodland; in a town, it will be

erecting houses or shops, platting out the land, grading or opening streets, and the like signs and marks of occupation or special destination.

\* \* \* \* \*

In the statement of the case prepared in your office, it is averred that numerous precedents exist in the Land Office, not only of the allowance of town pre-emptions as the voluntary selection of individuals, but also of the application to such pre-emption claims of the ordinary construction of the word "occupation" habitually applied to agricultural pre-emption claims. That is to say, it had been the practice of the government, not to consider municipal occupation "circumscribed by the forty-acre subdivision actually built upon; . . . but that such occupation was (sufficiently) evinced, either by an actual survey, upon the ground, of said town into streets, alleys, and blocks, or the publication of a plat of the same evidencing the connection therewith of the public surveys, so as to give notice to others of the extent of the town site:"—all this, within the extreme limits, of course, of the three hundred and twenty acres prescribed by the statute.

I think the practice of the Land Office in this respect, as thus reported, is lawful and proper: it being understood, of course, that thus the acts of alleged selection, possession, and occupation are performed in perfect good faith.

(7 Opinions Attorneys General, 738).

In the case of the townsite of *Concordia v. Linney* (3 C. L. O., 50), an entry made under the provisions of the act of March 2, 1867, Secretary Chandler said:

The fact that people do not actually reside upon each quarter-quarter-section or fractional legal subdivisions, in the view I take of the law, does not affect their rights to the quantity of land which the law permits them to enter for the purposes of a town site. The quantity of land is to be determined by the number of occupants, not by the location of their residences upon it.

In the case of *Keith v. Townsite of Grand Junction* (3 L. D., 431), Secretary Teller held that the rule by which the validity of a settlement is determined applies as well to town-site settlers as to claimants under the homestead and pre-emption law.

The views expressed by these eminent authorities seem to me to be just and correct. Under the settlement laws a very slight improvement, or a trivial act, is regarded as an act of settlement, provided the same is followed up in good faith as the law contemplates. I see nothing in the law, nor in reason, nor in justice, that contemplates that the entire surface of the area legally embraced in a townsite, must at the date of application or immediately thereafter, be covered by buildings devoted to the purposes of trade and business, or to residences of the inhabitants. The provision of the law which permits one hundred people to select three hundred and twenty acres for a townsite precludes such an assumption. Congress evidently intended to allow a sufficient quantity of land to be included in a townsite to permit of the growth and enlargement of the same. In the case under consideration the settlement was of a character to indicate good faith, acts of settlement and improvement were made upon the tracts in controversy, the town has continued to improve and to increase in size, places of business have been established and the tendency of the town is towards the land in dispute; all this seems to be in the way of accomplishing the object contemplated

by the law—the building up of a town for the benefit of the inhabitants of a country recently opened for settlement.

The proper officers of the government are prosecuting the claim of the town to this land under the act of May 14, 1890 (26 Stat., 109), and I see nothing in said act which would justify a change in the rulings which have governed this Department in administering the acts heretofore cited; the words of limitation in said act are similar to those in the Revised Statutes, they are;

so much of the public lands . . . . . as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business . . . . . may be entered as town sites.

At the time Walker made his homestead application for the land in question, it was occupied for townsite purposes, as contemplated by law.

It is alleged that certain parties interested in the townsite, proceeded in an illegal manner in the location of the same, that the land was examined prior to April 22, 1889, and a petition for the townsite signed prior to that date, etc. Evidence on this point was not introduced as it was not allowed by the local officers. But if we admit that some of the inhabitants proceeded in an illegal manner, it is not alleged that all did, neither does it follow that those who conformed to the requirements of the law, are not to be protected in their rights. The act of May 14, 1890, provides that those parties who entered the Territory prior to the time designated in the proclamation of the President, can obtain no rights to any portion of the townsite, and in determining the claims of applicants, each case will rest upon its merits.

Your decision is reversed, and the application of Walker rejected.

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#### SETTLEMENT RIGHTS IN OKLAHOMA—TOWNSITE.

##### OKLAHOMA CITY TOWNSITE *v.* THORNTON ET AL.

No person who entered within the limits of Oklahoma Territory prior to the time for the opening of the lands therein to settlement, and remained therein up to and after the hour fixed for said opening, and who took advantage of his presence to enter upon and occupy land, shall be permitted to obtain title to the same, even though he was lawfully within the limits of said Territory prior to the hour of opening.

*Secretary Noble to the Commissioner of the General Land Office, October 16, 1891.*

I have considered the appeals of George E. Thornton and Edward A. De Tar, homestead claimants and applicants, from your decision of June 8, 1891, awarding the NE.  $\frac{1}{4}$  of Sec. 4, T. 11 N., R. 3 W., Oklahoma City, Oklahoma, to the townsite of Oklahoma City.

The local officers awarded the land to the townsite, and your office, in a decision which recites the facts at length, affirmed their decision.

There is no important controversy in relation to the material facts that must control the decision in this case. It is shown that a townsite settlement of a greater or less extent, was made on the tract in dispute on the afternoon of April 22, 1889; that the tract has been occupied for townsite purposes since; that at the time of trial, in December, 1890, and January, 1891, a large number of people were living on said tract, and the same was covered with valuable improvements.

It is shown that George E. Thornton had occupied the tract in controversy since August 1, 1888; that he had a house and some other improvements thereon prior to the passage of the act opening the Oklahoma lands to settlement, and prior to April 22, 1889, at which date he was residing on the land, engaged in the occupation of occasionally hauling government freight from the railroad station to Fort Reno, and also acting as a deputy United States marshal.

He states that one minute after 12 o'clock noon, on April 22, 1889, he asserted a homestead claim to this quarter section in dispute, by driving stakes and posting notices thereon of his claim.

It is shown that Edward A. De Tar entered the Territory of Oklahoma on April 16, 1889, as a "grader" on the railroad track; that shortly before noon work was suspended and was not resumed that day; that about three o'clock in the afternoon he did some plowing on the tract in dispute, and asserted a claim to the same as a homestead.

It will thus be seen that Thornton was the first occupant of the land, and if he was a qualified claimant, it must be awarded to him; if he is not a qualified claimant, the controversy is between the townsite settlers and De Tar, hence the important question to be settled is that of the legal qualifications of Thornton and De Tar as homestead claimants.

It must be admitted that both of these parties had entered the Territory of Oklahoma, by permission of the proper authorities, prior to 12 o'clock noon, on April 22, 1889, the hour fixed, under the statute, for the opening of these lands for settlement, by proclamation of the President.

The act under which they claim provided that

until said lands are opened for settlement by proclamation of the President, no person shall be permitted to enter upon and occupy the same, and no person violating this provision shall ever be permitted to enter any of said lands or acquire any right thereto.

Thornton had entered upon and occupied this land prior to the date fixed by law. His counsel claim that he was within the limits of the territory lawfully, and that his presence on the land, prior to the hour fixed for the opening of the same to settlement, was no bar to asserting a lawful claim to the tract in question, subsequent to the hour fixed in the proclamation of the President. In support of this contention various decisions of the supreme court are cited. Counsel state that in the case of *Platt v. Union Pacific Railroad Company* (99 U. S., 48), the court

say, "In construing a statute aid may be derived from attention to the state of things as it appeared to the legislature when the statute was enacted." I fail to find in the case the language imputed to the court.

The reporter, however, used the language in his statement of the decision by the court. The rule is a just one, and applying it to the case at bar, we may ask what was the state of things as it appeared to Congress, when the act of March 2, 1889, was passed. It must be assumed that Congress had an intelligent understanding of the condition of affairs as they existed at that time in the territory that was to be opened to the public for settlement, a territory that was understood to contain valuable agricultural lands, the possession of which was eagerly sought and desired by tens of thousands of American citizens, who had been excluded therefrom for a long series of years. Congress was aware of the fact that a greater or less number of persons were within the limits of the territory at the date of the passage of the act, and that they would be there at the time fixed for the opening of the lands for settlement, officers and soldiers, marshals and deputies, those engaged in hauling government freight, and those engaged in the building of, and in the operation of, railroads, and others in various occupations, yet with this knowledge before it, Congress said that no person shall be permitted to "enter upon and occupy the land" prior to the time fixed for the opening of the same to settlement, not to settlement by the favored few who were thus upon, or in sight of, or within easy reach of the lands, but to settlement by the public at large, from any and all parts of the country. Knowing the fact of the presence of these people within the limits of the territory, Congress made no exception in their favor, but in plain language placed them upon an equality with all others who were seeking homes in that country, they were given no greater rights than those possessed by the people who were debarred from entering the territory until a certain hour. When these persons, situated as they were, took advantage of their nearness to the lands and did enter upon and occupy the same in advance of those who entered the territory from the border, they did appropriate to themselves greater privileges than those possessed by the public at large, and violated both the letter and the spirit of the act, and withdrew themselves from the protection extended by the law to those who had complied with the requirements of that law.

Counsel, seemingly in recognition of the fact that their client is within the prohibition imposed by the act in question, seek a more liberal construction of the same, and in support of that proposition cite the decision in the case of the *United States v. Kirby* (7 Wallace, 482), in which the court say:

All laws should receive a sensible construction. General terms should be so limited in their application as not to lead to injustice, oppression or an absurd consequence. It will always, therefore, be presumed that the legislature intended exceptions to its language which would avoid results of this character. The reason of the law in such cases should prevail over its letter.

The question thus arises should an exception to the language of the act be presumed in order to give the same a "sensible construction," and should the general terms of the same be limited in their application so as "not to lead to injustice, oppression, or an absurd consequence."

The construction put upon the act in question by the Department, is, that no person who entered within the limits of the territory prior to the time for the opening of the lands to settlement and remained therein up to and after the hour fixed for said opening, and who took advantage of that presence to enter upon and occupy land, shall be permitted to obtain title to the same, even though he was lawfully within the limits of the territory prior to the hour of opening.

As yet no good or sufficient reason has been assigned, why this is not a sensible and just construction.

To limit the general terms of the act as suggested by counsel, so as to allow persons lawfully within the limits of the territory to take advantage of that presence to enter upon and occupy land in advance of those who remained outside until the hour of opening, would, in my opinion lead to injustice and an absurd consequence. Such a construction would, in effect, amount to this, that such persons, including deputy marshals, train-men, railroad laborers, etc., might have taken possession of the desirable portions of the lands, and if in sufficient numbers, might have taken all the desirable lands, before the public at large could have reached the same.

No argument is necessary to show that such a construction of the act would work injustice to those for whose benefit the act was passed, viz., the people at large and not a privileged class. In a word, such a construction would cause the act to operate as a delusion and a mockery to those who had obeyed its precepts and remained outside the limits of the territory, until the hour fixed for entering the same had arrived.

No injustice is done to those persons who were within the limits of the territory by the construction put upon the act by the Department.

They had ample notice of the conditions under which they could assert a claim to land, and they could easily have qualified themselves by removing from the limits of the reservation. If they chose to surrender their rights and privileges of entering land in exchange for the salary and emoluments of the positions held by them, they are not in a position to complain of injustice or oppression.

In my opinion Thornton is disqualified from entering the land for the reasons given, but in addition to this, he states that he asserted a claim to the tract in dispute one minute after 12 o'clock noon, on April 22, 1889, by driving stakes thereon. The preparations to thus assert a claim were made upon the land while the same was in a state of reservation, and his entire action in the premises, amounts to a confession that he took advantage of his presence on the land prior to the hour of opening, to anticipate the settlement of any other person thereon. This action would disqualify him, even if he was not disqualified by reason

of his presence in the territory prior to the hour fixed for the opening of the lands to settlement.

Counsel refer to a letter dated April 12, 1889, written by the Commissioner of the General Land Office, and addressed to Hon. J. J. Ingalls, U. S. Senate. This letter has been so fully considered heretofore in other decisions and has so little to do with the decisive facts of this case, it is not deemed necessary here again to discuss it.

For the reasons heretofore given, I am of the opinion that a party who, although he may have been lawfully within the limits of the territory prior to the hour of opening, took advantage of that presence to anticipate others in a settlement upon lands, is disqualified from obtaining title under the act, but I do not intend to assert that a lawful presence within the limits of the territory prior to the passage of the act opening the lands to settlement, or prior to the hour fixed for said opening, would of itself, disqualify an applicant, provided he had placed himself upon an equality with others seeking to make entries, at the hour the lands were open to settlement, and thus qualified himself to assert a claim under the statute.

Another point made by counsel is, that to deny Thornton, and those similarly situated, the right to enter lands, is to deny them the right to acquire property and that such a "prohibition is against common right and must be strictly construed and confined within the exact limits of the statute." In my opinion the prohibition is clearly defined in the statute which provides that no person who entered upon and occupied land prior to the time fixed should obtain title to the same. The prohibition is as clear as that contained in the late pre-emption law, which provided that no person who was the owner of three hundred and twenty acres of land in any state or territory, could obtain land under that law. The power of Congress to thus deny to certain persons the right to acquire property in the public lands of the United States, has been repeatedly recognized by the highest judicial tribunals.

There is some dispute as to the facts in relation to the settlement by the townsite claimants and by De Tar on the tract in question, but I think the evidence shows that a portion at least, if not all, of said quarter section was occupied for townsite purposes before De Tar made his settlement, and that he made his settlement with this knowledge, but aside from this consideration, the claim of De Tar must be rejected for the reason that he was disqualified by reason of his presence within the limits of the territory prior to the hour of the opening of the lands to settlement, and while he may have been permitted to enter the territory as a laborer on the railroad, his presence there was entirely voluntary, and he took advantage of that presence to make entry upon the land, and he falls within the prohibition created by the statute, and is debarred from asserting a claim to the tract. It is not necessary to speculate as to what his right may have been had he placed himself within the limits of the statute.

Your decision is affirmed.

## COAL LAND ENTRY—PREFERENCE RIGHT.

## WATKINS ET AL. v. GARNER.

In determining whether an applicant for the preference right to purchase coal land has manifested "continued good faith," the degree and condition in life of the applicant may be properly taken into consideration.

*Secretary Noble to the Commissioner of the General Land Office, October 16, 1891.*

On February 10, 1888, Neal D. Garner filed coal declaratory statement, (No. 618), on N  $\frac{1}{2}$  of SE  $\frac{1}{4}$ , and N  $\frac{1}{2}$  of SW  $\frac{1}{4}$  of Sec. 5., Tp. 30 S., R. 65 W., at Pueblo, Colorado, alleging possession January 20, 1888. He made application to purchase March 20, 1889, and \$3200 were tendered, on his behalf.

On August 9, 1888, Samuel W. Watkins filed coal declaratory statement, (No. 1334), alleging possession June 11, 1888, of N  $\frac{1}{2}$  of SE  $\frac{1}{4}$  and SE  $\frac{1}{4}$  of SE  $\frac{1}{4}$  of Sec. 5. and NW  $\frac{1}{4}$  of SW  $\frac{1}{4}$  of Sec. 4., in same township.

On January 30, 1889, Henry Ailland filed coal declaratory statement, (No. 1660), alleging possession December 8, 1888, on N  $\frac{1}{2}$  of SE  $\frac{1}{4}$  of Sec. 6, and N  $\frac{1}{2}$  of SW  $\frac{1}{4}$  of Sec. 5, same township.

George W. Vogel was appointed the agent of Watkins, August 6, 1888, which was the date of his declaratory statement and Vogel was also appointed the agent of Ailland on January 28, 1889, the date of his declaratory statement. On April 27, 1889, protest was filed by Watkins, and on June 7, 1889, protest was filed by Ailland, against Garner's application, both having the same attorneys.

The local officers ordered a hearing on July 25, 1889, when the parties appeared and testimony was begun. The hearing was continued for several days. On February 26, 1890, the local officers gave judgment in favor of the preference right of Neal D. Garner. An appeal was taken and their judgment was affirmed by your decision of June 10, 1890. An appeal now brings the case before me.

It will be seen by the foregoing recital, that said Watkins contested the east half, and Ailland the west half of the land covered by the declaratory statement of Garner.

These contests arise under the provisions of the coal land law, which is contained in the act of March 3, 1873 (17 Stat., 607), and re-enacted in sections 2347 to 2352 of the Revised Statutes.

Section 2347 authorizes any person duly qualified to enter "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 such individual person," and any association of persons severally qualified may enter three hundred and twenty acres, upon making the required payment.

Section 2348 provides that:—

Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference right of entry, under the preceding section, of the mines so opened and improved.

Section 2351 provides that

priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference right to purchase.

In this case Garner claims a "preference right" of entry under the foregoing provisions of law, while Watkins and Ailland contend that he is not entitled to such preference right for the reason that he has not complied with the law.

The evidence is voluminous and conflicting. The declaratory statements of the parties have been filed in the local office, and are transmitted with the papers, and are therefore matters of record, and admit of no dispute. These statements are sworn to by the parties, and show that Garner filed six months before Watkins, and nearly a year before Ailland, and it is admitted that Watkins and Ailland knew of Garner's prior filing.

Garner's statement was filed February 10, 1888, alleging that he came into possession of said tract on January 20, 1888 and had since remained in possession continuously, and that he had then expended in labor and improvements on said land, the sum of \$45.—that he had exposed a vein of coal by digging into the hill, six feet, said opening being eight feet wide and six feet high, and located on the NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of said section.

In this statement he was corroborated by other witnesses on the hearing, so that the evidence is satisfactory that he had "priority of possession and improvement, followed by proper filing," and to this extent that he had complied with the law. But it is contended that he did not show that "continued good faith," which is necessary to establish his preference right.

He testified that from February 6, 1888, till he offered to prove up, he either worked himself on the tract, or hired others to work for him, that he expended \$400, in labor and improvements, that he opened several drifts on each half of the land, exposing valuable veins of coal, and that he had done all his means and ability would justify, that he had a farm about twenty-four miles distant, and had to earn, by work on his farm, the means to carry on the improvements on the land in question. In this testimony he is corroborated by his other witnesses.

The burden of proof was upon the protestants to show that Garner failed to comply with the law. In the opinion of the local officers, the protestants did not show this, and you concurred in that opinion. Garner's "continued good faith" has thus been established by the concurring opinions of the local officers and yourself. It is a question of fact, and it has been held that "when the findings of the local officers

have been concurred in by your office, as in this case, they are accepted by the Department, unless clearly wrong.”

*Darragh v. Holdman*, (11 L. D. 409).

But it is contended by the plaintiffs that these findings are clearly wrong. That though claimant's possession and improvements were perhaps sufficient, if considered by themselves, in the absence of adverse claimants, but they are not sufficient in the presence of adverse claimants who show more valuable improvements and more uninterrupted possession.

It was held in the case of the State of Alabama, (6 L. D., 493-501), that

under sections 2347 to 2352 of the Revised Statutes, coal lands are subject to pre-emption and entry precisely the same as agricultural lands, except as to price and limit as to the amounts which may be entered.

In the case of *Helen E. Dement* (8 L. D., 639), it is said—

The Department has held that no fixed rule can be established which shall govern in every case that may arise relative to the good faith of the applicant. It is right and proper to take into consideration “the degree and condition in life of the entryman” in determining whether the improvements show good faith.

This principle is applicable to entries under the coal land law, or else only the man of ample means can enter coal lands. This is not the policy of the government. These lands are sold at a low price that men of moderate means may purchase them.

In *United States v. Trinidad Coal Co.*, (137 U. S., 157-169) it is said,

The right to enter such lands is given only to persons above the age of twenty-one years who are citizens of the United States, or have declared their intention to become such, and to associations of persons, severally so qualified; and each person of the former class is permitted to enter not exceeding one hundred and sixty acres, while “associations of persons”, severally qualified as above, may enter not exceeding three hundred and twenty acres. See 2347. The object of these restrictions as to quantity was, manifestly, to prevent monopolies in these coal lands.

But the contention of the plaintiffs, if carried into practice, would tend to promote monopolies.

The “continued good faith” of Garner is an independent fact in the case, and when established, is sufficient to prove his preference right, and therefore to justify the decisions in his favor.

Your judgment is affirmed.

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#### RULE REGARDING ENTRIES CONFIRMED BY ACT OF MARCH 3, 1891.\*

##### *Circular.*

All contest cases in which entries are confirmed by the act of March 3, 1891, will be examined on motion when it appears that a copy of the motion has been served on the opposing counsel.

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\*See 12 L. D., 308.

Parties will be allowed five days from service within which to file objections to the motion if served in the city of Washington, D. C., and fifteen days when served elsewhere.

Approved April 21, 1891.

GEO. CHANDLER,  
*Acting Secretary.*

T. H. CARTER,  
*Commissioner.*

FINAL PROOF—ADVERSE CLAIMANT.

SPENCER *v.* BRODT.

Final proof submitted during the pendency of an appeal by an adverse claimant for the land is irregular, and cannot be considered.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 17, 1891.*

I have considered the case of J. C. Spencer *v.* Henry J. Brodt, upon the appeal of the former from your decision of May 1, 1890, approving the final proof of the latter for the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 1, T. 102 N., R. 31 W., Marshall, Minnesota, (formerly Worthington) land district, and denying a hearing to appellant on his protest against said proof.

On the 1st of July, 1878, Spencer received a permit from the Southern Minnesota Railway Company to enter upon and improve the NE.  $\frac{1}{4}$  of the section above mentioned, which included the land in controversy. He occupied the entire quarter section, and cultivated a large portion of it, under an agreement with the railway company for its purchase, up to the time that Brodt made homestead entry for the part of the quarter section in question, which was on the 26th of April, 1883. At that time Spencer duly informed Brodt that he claimed the land and of his arrangements with the railway company to obtain title thereto. Brodt did not occupy the land until the fall of 1884, when he built a small house and moved upon it with his family, under protest from Spencer, who had continued to crop the land up to that time, and up to the time final proof was offered.

Spencer was advised by the local officers, that so long as he remained in possession of the land, and cultivated and improved the same, he was secure in his rights as against any other entryman, and relying upon this information, and his arrangement with the railway company, he made no application to make entry for the land until after Brodt had done so. In July, 1885, thinking that the railway company would perhaps lose the land, Spencer applied to the local office to contest Brodt's right to make entry for it, and for a hearing to determine his own rights in the matter.

This application was denied, and upon appeal to your office that decision was affirmed by you on the 24th of November, 1888. An appeal was taken from your decision to this Department, and during the pen-

dency thereof, Brodt gave notice of his intention to make final proof, which he proceeded to do on the 25th of November, 1889, Spencer protesting against the acceptance of the same, alleging that Brodt's settlement upon the land was not made within six months after his entry, as required by the regulations of the General Land Office, and that his entry was illegal for the reason that his affidavit was made before the clerk of the county court where he resided, and not before the register or receiver, the case being one in which he had not established a residence and made improvements, and no member of his family was actually residing on the land which he desired to enter. His affidavit having falsely alleged settlement, when no settlement existed, Spencer claimed the same was void, and that consequently no application for the land had ever been made by Brodt. The local officers overruled his protest, and on the 2d of December, 1889, issued final certificate and receipt to Brodt. From that decision an appeal was taken to your office, where the same was affirmed by you on the 1st of May, 1890.

When the case was before this Department upon appeal from your decision of November 24, 1888, the question was simply whether you had or had not erred in refusing Spencer's application for a hearing to determine his rights in the land. In the decision of this Department upon that appeal, made on the 11th of April, 1890, it was stated that "if the allegations set up in Spencer's application for a hearing were taken as true, they would avail him nothing," and for the reasons therein stated, your decision denying the hearing applied for was affirmed. While that appeal was pending here, you transmitted the appeal of Spencer to your office, from the decision of the register and receiver, overruling his protest against the final proof of Brodt's homestead entry on said land, "to be considered with the other papers relating to the case." That appeal (and the papers in the case) was returned to your office, for your decision thereon, and it is an appeal from your decision rendered on the 1st of May, 1890, which again brings the case before me.

That local officers are without authority to accept final proof for land involved in a case pending on appeal, is a rule too well settled to need the citation of authorities to support it. Such action is prohibited by Rule 53 of Practice, and expressly held to be unauthorized and irregular by the decisions in *Lehman v. Snow* (11 L. D., 539); *Hasket v. Cannon et al.*, 449; *Etnier v. Zook*, 452; and *Wills v. Bachman*, 256, of the same volume, as well as in numerous cases in other and earlier volumes of departmental decisions.

Final proof in this case having been made during the pendency of an appeal, cannot be considered and the case must be returned to the local office for new proof, after proper publication. When it is offered any person may protest against the acceptance thereof, and the questions presented will be properly disposed of at that time.

The decision appealed from is therefore set aside, and you will return the case to the local office for new final proof.

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

UNITED STATES *v.* MCTEE ET AL.

A transferee, claiming the confirmation of an entry under section 7, act of March 3, 1891, does not occupy the status of a "*bona fide* purchaser" under said section if he was aware, prior to purchase, of the entryman's non-compliance with the requirements of the law.

A judgment of the General Land Office, holding an entry for cancellation on the report of a special agent, rendered prior to the expiration of two years from the date of final entry, defeats confirmation under the proviso to said section.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 17, 1891.*

May 12, 1884, Frank J. McTee filed his pre-emption declaratory statement for the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , Sec. 13, T. 31 N., R. 52 W., Chadron, Nebraska, alleging settlement May 1, of the same year. July 15, 1885, he made cash entry for the same.

February 4, 1887 (less than two years thereafter), the entry was held for cancellation by your office, on report of Special Agent Carr.

Notice of this action was mailed to him by registered letter, addressed to his last known place of residence (Robinson, Nebraska), which was returned to the local office as uncalled for.

July 14, 1887, the entry was canceled, he not having applied for a hearing to re-instate the entry.

Some time subsequent to date of cancellation of entry (exact time not appearing) Sanford A. West filed his declaratory statement for the NW.  $\frac{1}{4}$  of said section, which embraced the north half of McTee's entry, and a short time after this filing of West (exact date not appearing) James Wilson filed for the tract embraced in McTee's entry. He, however, is not insisting upon his rights (if he had any), he being a witness in support of McTee's entry.

February 15, 1888, subsequent to all the foregoing proceedings, James English, claiming to be a *bona fide* purchaser of the land after entry, applied for a hearing to show cause why the entry of McTee should be re-instated. His application was granted by letter of your office of March 3, 1888, and the hearing, with notice to West, was had May 8, 1888.

West, in the meantime, had published notice to submit proof on his filing, March 13, 1888, and by your said letter ordering a hearing the local officers were instructed to decline to receive the same (should it be offered), until the rights of English had been investigated.

On such hearing the local officers found that McTee had complied with all the requirements of law, and that his settlement, improvements, etc., were prior in point of time to those of West.

From this action the United States and West appealed to your office, and, by letter of April 7, 1890, you reversed the action of the register

and receiver, and found that McTee had not complied with the law as to residence, cultivation, and improvements; that the entry was made for speculative purposes, and that English at the time of the purchase was "well aware that the law had not been complied with," and declined to re-instate the entry.

English and McTee duly appealed, and pending said appeal, to wit, June 27, 1891, Messrs. Copp and Luckett, their attorneys, filed a motion to confirm the entry under section 7 of the confirmatory act of March 3, 1891.

An examination of the evidence satisfies me that your judgment is right as to the default of McTee in residence, cultivation, and improvements.

In my judgment the evidence also shows that English, the purchaser, was all along cognizant of the defaults on the part of the entryman. McTee was his nephew, and had made his home with him prior to his alleged settlement, and, I think, the conclusion can be fairly drawn from the evidence that his actual home was there during the time he claimed to reside on the land in dispute.

English lived within a half a mile of the land in controversy. West had resided upon, improved, and cultivated it ever since 1884, having settled thereon in August of that year, of which fact English admits he was cognizant.

Without deciding whether or not such settlement, occupancy, and claim by West (in the absence of a filing of record prior to McTee's entry) can be regarded as an adverse claim under the provisions of section 7 of said act, it is shown that English must have known of the defaults of McTee, and so knowing he can not be regarded as a *bona fide* purchaser within the meaning of said section.

As to the second ground in the motion, that "more than two years have elapsed since the final certificate issued, and there is no contest pending against the same," it is sufficient to refer to the circular of the date of May 8, 1891 (12 L. D., 450), where it is held that "proceedings initiated by the government" within two years of date of entry takes the case out of the statute (see last clause on page 452).

Under instructions issued by the Secretary July 1, 1891 (13 L. D., page 1), it is held that

the word "proceedings," as used herein and in the circular of May 8, 1891 (12 L. D., 450), will be construed as including any action, order or judgment had or made in your office canceling an entry, holding it for cancellation, or which requires something more to be done by the entryman to duly complete and perfect his entry, and without which the entry would necessarily be canceled.

In the case at bar McTee's entry was made July 15, 1885, and held for cancellation February 4, 1887, on report of special agent, which was less than two years after entry.

The judgment of your office declining to re-instate the entry is therefore affirmed.

## INDIAN LANDS—PATENT.

## KAW-KAW-CHEESE.

A patent, issued upon allotment or selection of land by an Indian, precludes the further exercise of departmental jurisdiction in the matter of determining the rightful ownership of the land covered thereby.

*Secretary Noble to the Commissioner of Indian Affairs, October 17, 1891.*

On April 13, 1891, you sent to this Department a letter from Kaw-Kaw-Cheese, a Chippewa Indian of Michigan, relative to his right to the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 20, T. 15 N., R. 5 W., Isabella Co., Mich. You also set forth the circumstances connected with the same and asked for an early decision in order that the office may be enabled to take definite action in many inquiries made respecting a similar condition of affairs as to other tracts of land of members of said band of Indians.

On reference of the case to the Assistant Attorney General for this Department he finds that the Department is without jurisdiction to determine who is the rightful owner of the tract in question, that the question of ownership is judicial and must be determined by the courts. The opinion which is herewith sent you fully sets forth his reasons for the same. You will therefore advise Mr. Kaw-kaw-Cheese that his right to said land must be determined by the proper judicial tribunal.

## OPINION.

*Assistant Attorney General Shields to the Secretary of the Interior, October 17, 1891.*

I have the honor to acknowledge the receipt, by reference, from First Assistant Secretary Chandler, for an opinion on the question therein, of a communication from the Acting Commissioner of Indian Affairs relative to the adjustment of title to land on the Isabella Indian Reservation, where patents have been canceled and the lands subsequently allotted and patented to other Indians.

In said communication, it is stated, that patents were issued to certain allottees of the Saginaw, Swan Creek and Black River band of Chippewa Indians, under the provisions of the treaties of August 2, 1855, (11 Stat., 633), and October 18, 1864, proclaimed August 16, 1866 (14 Stat., 657), and on May 27, 1871, said patents were forwarded to the United States Indian agent for delivery to the parties entitled thereto: that subsequently the agent returned forty-eight of said patents for cancellation, because the grantees were not entitled to the same, and the same were canceled, pursuant to the order of the Secretary of the Interior dated November 21, 1877, in order that the land might be subject to selection by other Indians on said reservation.

It is further stated that one of said canceled patents was issued in the name of Kaw-Kaw-Cheese, covering the E $\frac{1}{2}$  of the N.W $\frac{1}{4}$  of section 20, T. 15 N., R. 5 W., Isabella county, Michigan, and afterwards said tract was selected for Now-wo-ge-she-go-quay-che-me-gis, but the selection was recalled and no patent issued thereon; that on September 25, 1885, said tract was reported by Agent Allen, as selected for two members of said tribe of Indians, of the class designated as "not so competent," and on December 16, 1885, patents were issued thereon and sent to the agent for delivery to the parties duly entitled to the same: that the first allottee alleges that he was instructed by Special Agent E. B. Reynolds to take possession of the land, improve and cultivate the same: that other parties have occupied said land claiming to have selected the same, and have contracted to sell it to one John C. Leaton, who has also bought the same under a state tax sale, and is engaged in cutting all of the timber therefrom: that said Kaw-Kaw-Cheese desires to know if he can get the patent for said land, and if not, whether it will be safe for him to improve and build a house and barn on the same.

The Acting Commissioner is of the opinion that the issue of the last named patents was not authorized and the same are "null and void," but submits for the decision of the Department, the question

as to who is the rightful owner of the aforesaid E $\frac{1}{2}$  of the NW $\frac{1}{4}$  of section 20, T. 15. R. 5? If Kaw-Kaw-Cheese, then what patent shall be given him? The original patent on file in the General Land Office with the word "canceled" written across it . . . . or an exemplified copy of the record of said patent without said cancellation?

It appears from an examination of said treaties that the United States agreed that certain members of said band of Indians should have the right to select a certain quantity of land upon the Isabella reservation, and the Indian agent was required to make out lists of the Indians entitled to selection and divide the same in two classes, namely, "competent" and "those not so competent:" that the former should comprise those capable of managing their own affairs, and the latter should contain the names of those who were uneducated and unable to prudently manage their own affairs: that the "competents" were entitled to patents in fee simple from the United States for the lands selected by them, and the patents issued to "those not so competent," should "contain a provision that the land shall never be sold or alienated to any person or persons whomsoever, without the consent of the Secretary of the Interior for the time being."

Upon the record before me it is manifest that the Department is without jurisdiction to determine "who is the rightful owner" of said tract. The title has gone out from the United States, either to Kaw-Kaw-Cheese under the first patent, or to the subsequent patentees, and, hence, the question of ownership is judicial and must be determined by the courts.

In the case of John P. S. Voght, (9 L. D., 114), the question of the issuance of a patent for land covered by an existing out-standing patent,

was elaborately considered, and the authorities carefully reviewed. It was then held that

the officers of the land department act within the general scope of their authority in issuing patents for lands that were prior thereto a part of the public domain, though in particular instances their action may be unwarranted: (that) the issuance of a patent for land which was a part of the public domain, or the fee to which was in the United States prima facie passes the title, whether such patent is valid, or a void instrument without authority, and precludes the further exercise of departmental jurisdiction over the land until such patent is vacated by judicial action: (that) an applicant for land covered by an outstanding patent, should initiate his claim thereto by proceedings looking toward the vacation of said patent.

The same ruling is applicable to patents issued upon allotments or selections of lands, by Indians, as was held in my opinion dated March 7, 1890. (Vol. 4, p. 328).

If it be true, as was found by the Department, that Kaw-Kaw-Cheese was not competent to take under said first patent then he would doubtless fail in a suit for the cancellation of the second patents. On the other hand, if he was duly entitled to the land, he could demand and would receive an exemplified copy of the record for the purpose of establishing his title before the proper judicial tribunal. In any event, the holders of the second patent, or their assignee, would have no right under the provisions of the treaty to denude the land of timber for the purposes of sale without the consent of the Secretary of the Interior, and if such be the case, proceedings should be instituted to restrain the offending parties.

I am therefore of the opinion, and so advise you, that the Commissioner of Indian Affairs should be directed to answer Mr. Kaw-Kaw-Cheese, that his right to said land must be determined by the proper judicial tribunal and the Department will not undertake to adjudicate his rights in the premises; that, if he so desires, an exemplified copy of the record of the canceled patent will be forwarded to him upon payment of the necessary fees, and the question of the ownership of said tract must be determined by the courts.

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CASH ENTRIES OF ODD NUMBERED SECTIONS WITHIN THE LIMITS OF  
THE ONTONAGON AND BRULE R. R. GRANT.

INSTRUCTIONS.\*

*Commissioner Groff to the register and receiver, Marquette, Michigan,  
December 30, 1889.*

There are on file in this office a large number of cash entries covering odd numbered sections of land in the former limits of the Ontonagon and Brule River R. R. in your district.

By decision of Jan'y. 6, 1888, in the case of Wakefield v. Cutter et al.

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\* Not heretofore reported.

(6 L. D., 451), the Hon. Secretary of the Interior held that such entries were illegal.

By act approved March 2, 1889 (25 Stat., 1008) Congress forfeited said grant opposite the uncompleted portion of the road, and by the 3rd section thereof enacted :

That in all cases when any of the lands forfeited by the first section of this act, or when any lands relinquished to or for any cause resumed by the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior, under color of the public land laws, where the consideration received therefor is still retained by the government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby confirmed: *Provided, however,* That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such said cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales, or entries of lands, or any tract in any such State selection, upon which there were bona fide pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

It thus appears that said cash entries are confirmed, provided that where the original purchasers are the present owners the Hon. Secretary of the Interior shall be satisfied that they purchased without fraud and in the belief that they were obtaining valid title from the United States, and further provided that nothing in said act shall be construed to confirm sales upon which there were *bona fide* pre-emption or homestead claims upon May 1st, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States.

In order that said cash entries may be disposed of, I deem it expedient to formulate instructions as to the requirements necessary for carrying into effect the provisions of said act so far as it relates to such cash entries.

You will, therefore, upon application for action on his entry by any person asserting that his cash entry (or that through which he claims) was confirmed by said act, require such applicant, where he is the original purchaser and present owner, to file an affidavit setting forth that fact, also, that there was no fraud in any way connected with the allowance of the entry, that at the time of such purchase it was made in good faith, and in the belief that he was obtaining valid title from the United States, and that to the best of his knowledge and belief that he was obtaining valid title from the United States, and that to the best of his knowledge and belief there were no *bona fide* homestead or pre-emption claim arising, or asserted by actual occupation of the land under color of the laws of the United States, existing on May 1, 1888. Where the present owner is *not* the original purchaser, he should file an affidavit setting forth the date of his purchase, and that to the

best of his knowledge and belief there were no *bona fide* homestead or pre-emption claims arising or asserted by actual occupation of the land under color of the laws of the United States, existing on May 1, 1888.

The affidavits should *fully* describe the entries, giving numbers, date of same, and tracts covered thereby.

When such affidavits shall have been filed, you will publish at the expense of the applicant a notice to the following effect :

Notice is hereby given that \_\_\_\_\_ who made cash entry No. \_\_\_\_\_, covering the \_\_\_\_\_ and who claims that his entry was confirmed by the act of Mch. 2, 1889, has filed in this (your) office the evidence of good faith required by the Secretary of the Interior in accordance with said act.

If there were any *bona fide* homestead or preemption claims to said tract on May 1, 1888, arising or asserted by actual occupation of the land under color of the laws of the United States, then such claimant, or claimants, are hereby notified to appear at this (your) office and offer evidence in support of their claims on or before \_\_\_\_\_.

\_\_\_\_\_  
Register.

\_\_\_\_\_  
Receiver.

The date set within which settlers should file their evidence should not be less than thirty days from date of first publication of notice.

The notice shall be published once each week, for four successive weeks, the first of which publications shall be at least thirty days before transmission to the papers to this office.

More than one entry by the same person may be embraced in a single notice, but in no case should a single advertisement contain the notice of two different *entrymen*, and when the papers are submitted each case (i. e., entry) should have filed with it evidence of publication and posting.

In any case of conflict between cash entrymen and any other claimant, proceedings shall be had at the local land office under existing rules and regulations as to contests; and the party or person claiming adversely to the cash entryman shall be deemed the contestant.

After the conclusion of the proceedings in the local land office, in the transmission of the paper to this office, you will forward all the papers that have been filed relative to any entry or tract, *transmitting the papers relative to each case in a separate letter.*

Approved by

JNO W. NOBLE,

*Secretary,*

January 3, 1890.

## RESERVATION OF PUBLIC LANDS—EXECUTIVE AUTHORITY.

## TERRITORY OF ALASKA.\*

There is no specific statutory authority empowering the President to reserve public lands; but the right of the executive to place such lands in reservation, as the exigencies of the public service may require, or in aid of a proposed statute is recognized and maintained in the courts.

The reservation of public lands from disposition may be effected either by proclamation or executive order.

*Assistant Attorney-General Shields to the Secretary of the Interior, June 17, 1890.*

I am in receipt by reference from you of a request by the President that he be informed under what "statute" it is proposed to make certain reservations in Alaska pursuant to a recommendation made in a letter of the governor thereof, dated April 2, 1890, and of your inquiry as to the proper method to be pursued in making such reservation, and in reply have the honor to submit the following:

The lands of Alaska are part of the public domain and as such are subject to the supervision of the President as other public lands. There is no statute giving general authority to the President to reserve lands. But the right of the President to put public lands in reservation so that all questions in reference to them might be properly considered, or as the exigencies of the public service demanded, or to aid in the execution of a proposed statute, has always been maintained by the courts. Withdrawals were made for the Dubuque and Pacific, and the Burlington and Missouri River railroad grants, on May 10, 1856, though the act was not passed until the 15th of that month. So in many other cases.

In the matter of the withdrawal for the Southern Pacific railroad grant, which the Secretary of the Interior had made, upon a line which the company had no authority to adopt, and the validity of which was challenged by certain settlers, Attorney-General Devens said (16 Op., 80):

Even if it be conceded that the acts of the Secretaries, in this respect, were erroneous in law, the consequence does not follow which is contended for on behalf of the adverse claimants to the land. They were in fact withdrawn by competent authority, and were thus placed in a state of reservation. It must often happen, from the nature of the transactions connected with the public lands and the legislation affecting them, that the Secretary of the Interior is uncertain whether or not lands should be withdrawn, or whether a greater or less amount should be withdrawn, in order to protect grants, or comply with other legislation of the United States; and it is often found that such withdrawals in the end have been unnecessary. But he has the authority

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\* This opinion was adopted by Mr. Secretary Noble, and referred to by him in a letter dated June 19, 1890, addressed to the President, recommending the reservation of certain lands in Alaska, and in accordance with which an order of reservation was made by the President June 21, 1890.

to put them into a state of reservation, so that all questions in reference to them may be properly considered; and when thus reserved, it is not in the power of a party to acquire rights by treating such reservation as of no effect.

In *Grisar v. McDowell* (6 Wall., 363, p. 380), the plaintiff claimed title to a tract from the city of San Francisco, the defendant claimed possession as an officer of the United States, on the ground that the tract had been reserved by the President for military purposes. The court said:

On the other hand, if the lands were at the time a part of the public domain, as they must be considered to be, because they have been excluded from the lands confirmed to the city in satisfaction of the claim, it is of no consequence to the plaintiff whether or not the President possessed sufficient authority to make the reservations in question. It is enough that the title had not passed to the plaintiff but remained in the United States. But further than this: from an early period in the history of the government it has been the practice of the President to order, from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale, and set apart for public uses.

The authority of the President in this respect is recognized in numerous acts of Congress. Thus, in the pre-emption act of May 29, 1830, it is provided that the right of pre-emption contemplated by the act shall not 'extend to any land which is reserved from sale by act of Congress or *by order* of the President, or which may have been appropriated for any purpose whatever.' Again, in the pre-emption act of September 4, 1841, 'lands included in any reservation by any treaty, law or proclamation of the President of the United States, or reserved for salines or for other purposes,' are exempted from entry under the act.

Of a withdrawal made as an incident to an act of Congress the court in *Wolsey v. Chapman* (101 U. S., 755, p. 768), said:

The proper executive department of the government had determined that, because of doubts about the extent and operation of that act, nothing should be done to impair the rights of the State above the Raccoon Fork until the differences were settled, either by Congress or judicial decision. For that purpose an authoritative order was issued, directing the local land officers to withhold all the disputed lands from sale. This withdrew the lands from private entry, and as we held in *Riley v. Wells*, was sufficient to defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal.

To a like effect is the case of *Walcott v. Des Moines Co.*, (5 Wall., 681).

The public land laws have not all as yet been extended over Alaska.

By act of May 17, 1884 (23 Stat., 24), a civil government for Alaska was provided, the territory was created a land district, and the appointment of a register and a receiver (ex officio) provided for. These officers are now in service. This act extended the mining laws over the territory, and provided that the land occupied as missionary stations to the extent of six hundred and forty acres at any one station, should be continued in such occupancy until action by Congress, and further that Indians or other persons in said district, "shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them, but the terms under which such persons may acquire title to

such lands is reserved for future legislation by Congress." Subject to these two latter provisions the power of the President in the premises seems ample. It is a necessary incident to the operations of the government in the west, and has been exercised by the President perhaps an hundred times.

There is pending before Congress a bill (H. R. 3873), for the extension of the general land laws of the United States over the Territory of Alaska, which also provides that the lands occupied by religious societies as missionary stations shall be confined to such societies to the extent of six hundred and forty acres each.

The public necessity for the proposed action seems urgent as the extension of the land laws over the territory might lead to serious complications, in the absence of such action by the Executive.

The ordinary method of creating a military reservation is as follows: The commanding officer of a military department recommends the establishment of a reservation with certain boundaries. The Secretary of War refers the papers to the Interior Department to know whether any objection exists; if none is known, it is so reported, and the President declares the reservation by a simple indorsement on the recommendation. The papers are then sent to the Land Office for annotation upon the proper records.

The ordinary method of making an Indian reservation is much the same, the recommendation coming from the Indian Office. The indorsement of President Buchanan, for instance, on the recommendation for the Fond du Lac reservation, was: "Let the tracts be withdrawn, as requested by the Secretary of the Interior."

On May 6, 1889, President Harrison withdrew from sale and settlement certain lands in California for the Mission Indians, by executive order.

In other cases of the withdrawal of public lands the proclamation has been used.

The line between the use of these two methods is not well marked. Perhaps the only distinction is that the proclamation is more formal. Certainly it does not depend on the amount involved or the nature of the reservation. In this case the executive order would be a competent method, as is evidenced by the constant practice in similar cases.

The governor recommends that lots 1, 2, 3, 7, and 8, in block 7, Juneau, and all of block "C" in said town be set aside for garrison purposes; that lots 7 and 8 in block 9, as per plat of G. C. Hanus, Juneau, be reserved for courthouse and jail purposes, and that a certain unnumbered block on the north side of Douglass City be reserved for like purposes. As it also appears these tracts are in possession of settlers, these recommendations should not be approved, as the act above quoted provides that such settlers shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them. To put these lands into reservation would in my opinion infringe on the

privilege which such settlers enjoy under this statute. Furthermore it is stated by the commissioners that the land above selected for garrison purposes has been decided to be in reservation for naval purposes by the United States district court for the district of Alaska. If this be true, it furnishes an additional reason for disapproving the recommendation of the governor. He also recommends that certain tracts in Sitka be reserved for a marine or military barracks on condition that the United States shall erect certain buildings thereon within a certain time. This reservation I suggest should be made without condition. The reservation for a military cemetery, as recommended by the governor, it is stated, is "claimed" for the Presbyterian Board of Home Missions. The nature of the claim is not stated. However, as Congress has provided in said act of May 17, 1884, *supra*, that land in said Territory *occupied* as a missionary station shall be continued in such occupancy, to the extent of one hundred and sixty acres for each such station, until further action by Congress, I am of opinion this reservation should be declared subject to the rights of said Board of Home Missions.

I see no reason why the remaining reservations recommended by the governor should not be made.

Accordingly I herewith submit a draft of an executive order based on the views herein expressed, following the description given by the commission's reports forwarded by the governor, although some of these descriptions seem to be vague and uncertain.

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PRACTICE—NOTICE—HEARING—SECTION 7, ACT OF MARCH 3, 1891.

ARTHUR GENTZLER ET AL.

Notice of a hearing must be issued by the local officers. The authority to issue such notice can not be delegated to another.

A notice of a hearing must state the time and place therefor, and describe the land involved; a notice that is defective in these particulars confers no jurisdiction upon the local office.

Where final certificate has issued, proceedings for the purpose of canceling the entry can only be had upon the order of the General Land Office.

The pendency of a motion for review protects the rights of the applicant as against intervening adverse claims.

A transferee who invokes the confirmatory provisions of section 7, act of March 3, 1891, must furnish the requisite proof of sale.

*Secretary Noble to the Commissioner of the General Land Office, March 27, 1891.*

I have considered the motion by A. L. Tomblin, assignee, for review of departmental decision of September 20, 1890, canceling the cash entry of Arthur Gentzler for the SE.  $\frac{1}{4}$  of Sec. 21, T. 7, R. 33, Oberlin, Kansas.

The facts in the case are as follows: Your office found the final proof of Gentzler upon which his cash entry was allowed, unsatisfactory, and by your letter of December 24, 1888, the local officers were instructed to "require new proof without publication showing compliance with legal requirements."

On February 11, 1889, the entryman, together with H. E. Weld and Campbell, who assert that they are attorneys for Tomblin, assignee, appeared before the probate judge of Thomas county to submit proof; at the same time Grant L. Lovitt appeared and protested against said proof and asked to be allowed to cross-examine the witnesses, and to submit evidence why said proof should not be allowed. The testimony of the entryman and his witnesses was taken, but on objection the protestant was not allowed to cross-examine the witnesses or to introduce evidence of his own in opposition to the proof.

The proof submitted shows a compliance with the law in matter of cultivation and improvement of the land, and a continuous residence thereon for a period of six months prior to date of final proof.

Upon learning the facts in relation to the refusal to receive the testimony of the protestant, the receiver issued the following order addressed to the probate judge of Thomas county, Kansas:

SIR. I return you herewith final proof of Arthur Gentzler with the information and instruction that you will receive and accept the protest against said proof, filed by Grant L. Lovitt. That you set a day for hearing of said proof . . . . and that you will notify both Mr. Gentzler and Mr. Lovitt or their attorneys of your action, and that upon the day set for hearing you proceed as follows:

Then follows directions as to the taking of evidence.

On receipt of these instructions the probate judge issued the following order:

COLBY, *March 10, 1889.*

H. E. WELD and CAMPBELL,

Notice has been received at this office from the receiver of the Oberlin land office that the proof of Arthur Gentzler of the SE.  $\frac{1}{4}$  of Sec. 21, T. 7 S., R. 33 W., will be heard and made again and you will notify all parties concerned in said proof that they will appear at my office in Colby on the 15th day of April, 1889, at 10 o'clock, A. M.

JOSEPH E. LESH,

*Probate Judge, of Thomas Co., Kansas.*

The officer certified that a copy of the notice was served on the above named parties but neither the date of service, nor the manner of service is given. A similar notice was given to the attorney for the protestant, and in obedience to the same the protestant appeared and submitted evidence which tended to impeach the good faith of the claimant and to show non-compliance with the law on his part. The entryman did not appear at this hearing. On the evidence then submitted, departmental decision, of which review is asked, was rendered.

With the motion for review, the entryman filed an affidavit in which he states that upon the rehearing he was beyond the limits of said county and was not notified to appear and did not have any opportunity to examine the witnesses or to make any statement himself.

The proceedings above referred to were irregular and without force or effect. Notice of a hearing must be issued by the local officers. This duty can not be delegated to another. Rule 8 of the Rules of Practice, requires that the notice must state the time and place of hearing, and that it must describe the land involved. If we admit that the notice of the hearing was issued by the receiver to be served by the probate judge, it was defective in these vital particulars, and the local officers acquired no jurisdiction in the case, and could confer none on the probate judge, and the proceedings before him were irregular and of no binding force.

In addition to this, however, final certificate having issued, any proceedings for the purpose of obtaining a cancellation of that certificate can only be had upon order from your office. See decision of this date in the case of Edward Brotherton *et al.*, 12 L. D., 305.

On December 8, 1890, you transmitted to this Department a letter written by O. T. Reed and E. A. Lyons of Norton, Kansas, in which it is stated that Reed is the present owner of the land in question having purchased the same of Tomblin in July, 1887, and that he has mortgaged the land to Lyons for \$500, a part of the purchase money, and that they have had no opportunity to be heard in the case. They further state that upon receipt of the notice of cancellation of the cash entry at the local office, the son of the receiver was allowed to make homestead entry for the tract in question.

I find from the records of your office that notice of the cancellation of the cash entry was sent September 30, 1890, and that on October 13, 1890, Geo. B. McGonigal made homestead entry for the tract in question, and that J. B. McGonigal is the present receiver of said land office. The protestant Lovitt, who had also made application to contest the cash entry, thus appears to have dropped out of the case.

The motion for review was filed within the time required by the rules of practice, and any and all rights possessed by the entryman and his transferee were thus preserved, and the entry of McGonigal, which at least is not free from suspicion, can not defeat those rights, but the entry of Gentzler must be considered as intact and uncanceled until the motion for review is finally disposed of. Tomblin, the transferee, makes affidavit that he purchased the land in good faith after final proof was made, the date of the alleged purchase is not given, but the record indicates that it was prior to March 1, 1888. There is no adverse claim which originated prior to the date of the entry, and if the purchase was made as alleged, the entry is confirmed by the 7th section of the act of March 3, 1891 (26 Stat., 1095). The applicant should be required to furnish a certified copy of the deed of transfer or an abstract of the records of the county showing such transfer and if the evidence shows the purchase to have been made prior to March 1, 1888, and in good faith, patent should issue for the land, and departmental decision of September 20, 1890, is modified accordingly.

## PRE-EMPTION SETTLEMENT—CLAIM OF HEIRS.

HOBSON *v.* HOLLOWAY ET AL.

A settlement and filing on land withdrawn for the benefit of a railroad grant confer no rights under the pre-emption law; and where the settler dies prior to the restoration of the land to the public domain there is no interest to descend to the heirs.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 19, 1891.*

I have considered the case of *J. W. Hobson v. Sarah E. Holloway*, for the heirs of James B. Linebaugh, deceased, upon the appeal of the former from your decision, dismissing his protest against the final proof of the latter, and holding for cancellation his timber culture entry for the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 1, T. 10 N., R. 34 W., M. D. M., San Francisco land district, California, "so far as it conflicts with defendant's filing."

On the 1st of August, 1874, James B. Linebaugh filed his pre-emption declaratory statement for the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of section 1, and the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 2, T. 10 N., R. 34 W., at the San Francisco land district, alleging settlement on the 18th of September, 1873. At the time of his settlement and filing, section 1 was withdrawn from settlement under the pre-emption law, and reserved for the Atlantic and Pacific Railroad Company. Linebaugh, with his family, continued to reside upon and cultivate the land for which he made filing, until the 19th of June, 1876, when he died, leaving a widow and three children.

In October of that year, Sarah E. Linebaugh, his widow, sought to make final proof for the land, in behalf of herself and children, as the heirs of James B. Linebaugh, but was not allowed to do so by the local officers, for the reason that the land in section 1 was not a part of the public domain at the time of settlement or at the time final proof was offered. At the suggestion of the local officers the widow filed pre-emption declaratory statement at that time, for the one hundred and twenty acres in section 2, covered by the filing of her husband, which was transmuted to homestead entry on the 20th of June, 1881, and for which she received patent on the 10th of February, 1882.

The widow continued to reside upon and cultivate the entire tract for which her husband had filed, from the time of his death until September, 1879, when she leased it for one year to Thomas Hensley. When that lease expired, she leased the tract to Hobson, the plaintiff in this case, for one year. In the lease between these parties, the land in section 1 was not described, being as it is claimed, inadvertently omitted. Hobson went into possession of the whole tract and cultivated the one hundred and sixty acres, but declined to pay rent for more than one hundred and twenty acres, until he was threatened with a law suit,

when he paid for forty acres more, insisting, however, that it was not for the forty acres in section 1, but that he made the payment to avoid a law suit. At the end of his lease, he surrendered possession of the one hundred and twenty acres, but refused to give up the forty acre tract in section 1.

Section 1 was restored to the public domain by order of this Department, on the 24th of May, 1886, and on the 26th of that month Margaret A. Logan filed pre-emption declaratory statement for the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of said section, which included forty acres embraced in the original filing of James B. Linebaugh and which is the land in controversy in this suit.

On the 10th of July, 1886, Sarah E. Holloway, formerly Sarah E. Linebaugh, the widow of James B. Linebaugh, offered to give notice of her intention to make final proof for the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of section 1, but the local officers refused to allow her to give such notice, on the ground that the time allowed for such proof had expired, and also that Mrs. Logan had filed on the land, and further that the land in section 2, covered by the filing of the deceased James B. Linebaugh had already been patented to his widow.

Mrs. Logan having relinquished her filing previous to October 18, 1886, Hobson, the plaintiff, made timber culture entry on that day for the land embraced in her filing.

An appeal was taken by Mrs. Holloway from the decision of the local officers refusing to allow her to give notice of her intention to make final proof, and on the 22d of December, 1886, your office directed that such publication be made. At the time set for the presentation of such final proof, Hobson protested against the acceptance of the same. A hearing followed, at which both parties submitted evidence, and on the 2d of December, 1887, the register and receiver rendered their decision, in which they expressed the opinion that

the claimant is entitled to make final proof and payment for said land for the benefit of the heirs of James B. Linebaugh, deceased, and we recommend that the timber culture filing of the contestant, Hobson, be held for cancellation.

An appeal was taken from that judgment to your office, where the same was affirmed on the 11th of June, 1890, and a further appeal brings the case to this Department for consideration.

The land in controversy in this case is the forty acres comprising the south-west quarter of the south-west quarter of section one, in the township and range already mentioned, and the question for me to determine is as to what interest Linebaugh had in that land at the time of his death, as it is clear that his heirs can take no greater interest than he then had.

Among the lands which are not subject to the rights of pre-emption, as provided by section 2258 of the Revised Statutes, are "lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose."

At the time Linebaugh made settlement and filing for the land described in his pre-emption declaratory statement, the whole of section 1 was reserved, and not subject to the rights of pre-emption, and remained so up to the time of his death, and for nearly ten years after that event. It follows, therefore, that during his life-time his settlement never attached to the land in question, and at his death he had no interest therein to descend to his heirs.

These lands were withdrawn from the reservation of the Atlantic and Pacific Railroad Company, by Secretary Lamar, by decision dated March 23, 1886 (4 L. D., 458), and the grant was forfeited and the lands restored to the public domain by act of July 6, 1886 (24 Stat., 123).

The record of the case does not show that the pre-emption filing of Linebaugh was ever formally canceled of record in the local office, but the widow and children had ceased to reside upon the land in question many years prior to its withdrawal from the reservation and restoration to the public domain, hence no rights were ever initiated by them, and the land was open for settlement and filing when Hobson made timber culture entry for the same.

My conclusion therefore is, that as Linebaugh had no interest in the land at the time of his death to descend to his heirs, and as they initiated no right therein prior to the entry of Hobson, that the decision appealed from must be, and hereby is, reversed, the final proof is rejected, and Hobson's timber culture entry will be allowed to remain intact.

#### SCHOOL LAND—SETTLEMENT CLAIM.

#### REVENAUGH *v.* STATE OF WASHINGTON.

A purchaser, after survey, of a prior settler's possessory right and improvements does not acquire any right as against the school grant.

*Secretary Noble to the Commissioner of the General Land Office, October 20, 1891.*

On February 28, 1889, Isaiah Revenaugh submitted final proof upon the SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of SW.  $\frac{1}{2}$ , Sec. 16, T. 21 N., R. 37 E., Spokane Falls, Washington.

The same was rejected by the register,

for the reason that the land involved is part of a school section, and the records of this office show that the present entryman claimed the SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 16, and the NE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$ , S.  $\frac{1}{2}$  NW.  $\frac{1}{4}$ , Sec. 21, T. 21 N., R. 37 E., W. M., by virtue of D. S., 998, filed October 17, 1875, alleging settlement thereon October 1, 1871; and that the township was surveyed September 18, 24, 1874, and approved plat, filed April 10, 1875, showing that, at date of survey and filing of plat, the entryman did not claim the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  and SW.  $\frac{1}{4}$  NE.  $\frac{1}{4}$  of said section 16. His homestead entry for the tracts last named having been erroneously allowed on December 1, 1883.

From that judgment he appealed, and on May 28, 1889, you affirmed the register's action, and he further prosecutes his appeal to this Department, alleging the following grounds of error :

1. In finding that appellant had not settled upon the land prior to survey.

2. In holding that (in Washington Territory) only the settler who settled upon the land prior to survey is competent to defeat the right of the State to the land.

The facts disclosed by the record are as follows :

The approved plat of the township was filed in the local office April 10, 1875.

In June, 1875, one Henry White filed a pre-emption declaratory statement for the W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , the NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of said Sec. 16, alleging settlement thereon November 9, 1870.

On October 17, 1875, Revenaugh, the appellant, filed a declaratory statement for the SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of said Sec. 16, and one hundred and twenty acres adjoining in Sec. 21. He appears to have continuously resided on the land in Sec. 16 since the year 1873. According to his own sworn statement, he bought White's improvements in the year 1876, and went into possession of the land embraced in White's filing. Subsequently, he appears to have relinquished his filing, made on October 17, 1875, and on December 1, 1883, he made homestead entry of the land first above described, upon which he offered final proof, as above shown.

It is shown that he was living on Sec. 16 at the time the township plat was filed (April 10, 1875), but it is equally clear, from his own statements, that White was living upon and claiming the land embraced in his pre-emption claim in Sec. 16 until 1876; so that, when the township plat was filed, appellant was neither residing upon nor claiming any part of Sec. 16, except the SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of that section.

In the case of Thomas F. Talbot (8 L. D., 495), it is said :

The purchase of a prior settler's improvements does not transfer any right which the prior settler may have had by virtue of his settlement.

And the doctrine is well settled in this Department that a purchaser after survey of the possessory right and improvements of one who settled on school land prior to survey, does not carry with it any right to the land as against the grant. John Johansen, 5 L. D., 408. And this rule applies with equal force to reservations of school land made for Washington in its territorial condition. Thomas F. Talbot, *supra*.

In the case at bar, the settlement having been made upon school lands, after the approved plat of the township was filed in the local office, and claimant having thus been charged with full notice of the identical lands reserved from settlement and entry, the Department is powerless to relieve him.

The decision appealed from is therefore affirmed.

## SECOND HOMESTEAD ENTRY—ACT OF MARCH 2, 1889.

ASHWELL *v.* HONEY.

A second homestead entry of the same tract may be made by the entryman, under section 2, act of March 2, 1889, where he fails, through non-compliance with law, to secure title under the first.

*Secretary Noble to the Commissioner of the General Land Office, October 20, 1891.*

Albert Honey has filed a motion for review of departmental decision of August 4, 1891, 13 L. D., 121, holding for cancellation his homestead entry for the SE.  $\frac{1}{4}$  of Sec. 26, T. 3 N., R. 35 W., McCook land district, Nebraska.

The motion does not allege any error in said decision; but the grounds upon which review is asked are the following:

(1). The contestant having withdrawn, the case is between the government and the entryman; and principles of equity, as well as a technical construction of law can certainly be considered in passing upon the rights of claimant.

(2). With the case are affidavits and sworn testimony which, if considered, will show affirmatively that the claimant has made of the tract a continuous and *bona fide* home, having been married soon after the trial of the contest, built a frame addition to his house, made other valuable and lasting improvements, and made strict compliance with the law in every respect, and is living there to-day.

The fact of Ashwell's withdrawal of his contest, and waiver of all rights in the premises, "because of the full compliance with the law, and the good faith shown by the claimant Honey since the hearing in said contest," and the accompanying affidavits showing that Honey had resided upon and improved the tract since the hearing, were set forth and fully considered in the decision appealed from, and it was held that,

The government is not precluded by a contestant's withdrawal from considering the evidence in the case with the view of ascertaining and adjudicating the right of the entryman as between himself and the government. . . . If it be a fact that since the hearing, the claimant has resided upon and improved the tract, this does not give the entryman any additional right, as his entry must be weighed in the balance of the law as it stood at the time of the initiation of contest.

The third ground upon which review is asked is that,

In just such a case, from the same locality (Agnes M. Melville, decided by Hon. John W. Noble, Secretary, December 28, 1889), the same circumstances exactly arose, and the decision referred to modified a former decision canceling the entry in question and allowed the same to remain intact, giving the claimant an opportunity to submit proof within the lifetime of the entry.

By a careful perusal of the two decisions, important differences will be found between the two cases. In the case of Honey, said departmental decision states, "It satisfactorily appears that he had been dodging the service of notice and concealing himself from the officers until he could go back to his entry." No such proceeding is shown on the part of Miss Melville. In the Melville case it was said that the

proof as to residence is very meager, and, considered by itself, would seem to indicate bad faith on the part of the claimant. The finding in the case at bar is much stronger than this, and unqualified in its expressions:

The evidence . . . shows an entire lack of good faith on the part of the applicant, and fully sustains the allegations of contest.

One of the allegations of the contest was,

That the said Albert Honey has only visited the land, and taken a bed with him, and taken it away with him when he went away, and never resided thereon; and his home and place of business is at Trenton, Nebraska.

Nothing of this kind was shown in the case of Miss Melville; and while it appeared that she was absent a considerable portion of the time, teaching school and working at different places, it was not shown that she had a home elsewhere than on the land. In short, while Miss Melville's good faith was only questioned, and she was properly given the benefit of the doubt, in Honey's case it was clear and unquestionable that he was acting in bad faith, deliberately evading the requirements of the law.

No reason appears for disturbing the departmental decision heretofore rendered, and the motion is accordingly overruled.

In view, however, of the affidavits on file in the record alleging improvements made and residence maintained since the hearing, and of the fact that there is now no adverse claimant to the land, I see no reason why the claimant may not enter the tract under the second section of the act of March 2, 1889 (25 Stat., 1854; John Halblieb, 13 L. D., 217) provided he is not now the proprietor of more than one hundred and sixty acres of land elsewhere (see Sec. 2289 R. S., as amended by the act of March 3, 1891, 26 Stat., 1098).

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#### PRACTICE—DISMISSAL OF APPEAL—RELINQUISHMENT.

##### CARTER *v.* GRIFFITH.

The withdrawal of a contestant, or the dismissal of his appeal, does not preclude the government from considering the evidence in the case with a view to ascertaining whether the entryman has complied with the law.

The relinquishment of a contested entry does not necessarily defeat the contest, for if the contestant can show that the cancellation of the entry was the result of the filing of his affidavit of contest he is entitled to a preference right of entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 23, 1891.*

I have considered the case of Johial Carter *v.* William Griffith involving the validity of the latter's entry under the timber culture law for the NW.  $\frac{1}{4}$ , Sec. 25, T. 4 S., R. 26 W., Oberlin land district, Kansas.

December 15, 1883, William Price made entry of said tract under the timber-culture law. A contest was initiated against said entry by

Charles T. Stansbury and upon the evidence offered the local officers dismissed the contest.

The contestant appealed and the appeal was dismissed by you on October 19, 1889, on the motion of the defendant, and the local officers advised that the case would be considered on its merits, when reached in the regular order of business.

On January 23, 1890, Johial Carter filed an affidavit to contest the same entry, and before any action was taken thereon, Price relinquished his entry and the same was canceled May 10, 1890. On the same day William Griffith was allowed to make a timber culture entry of the land.

On May 14, 1890, subsequent to the relinquishment of Price and the entry of Griffith, Carter filed an application to enter the land in question under the timber culture law, which was rejected by the local officers on account of Griffith's prior entry.

Carter appealed and contended that the local officers erred in allowing the Griffith entry while his contest was pending; furthermore that when Stansbury's appeal was dismissed by you his rights as a preferred contestant attached.

You under date of July 16, 1890, affirmed the decision below on the ground that in dismissing the appeal of Stansbury the office still reserved the right to examine the case on its merits; that before such action was taken, Price relinquished his entry and thus by operation of law Carter's contest was abated.

The rights of Stansbury, the first contestant, were unquestionably concluded when he failed to appeal from your judgment in dismissing his appeal, and Price by his relinquishment has also concluded all his rights in the premises.

Thus the question is brought down as to which of the two, Griffith or Carter, has the better right to the land in controversy.

When Stansbury's appeal was dismissed, you advised the local officers that the contest against the Price entry, would be decided on its merits. This left the case between the original entryman and the government.

In all cases of this kind this Department holds that the government is a party in interest, and the withdrawal of a contestant or the dismissal of an appeal does not preclude the government from considering the evidence in any case with a view of ascertaining whether the party has complied with the law. *Taylor v. Huffman* (5 L. D., 40); *Overton v. Hoskins* (7 L. D., 394); *Cappelli v. Walsh* (12 L. D., 334). Therefore the dismissing of the appeal of Stansbury, which, in effect, sustained the defendant, did not preclude the government from making use of the evidence furnished by him against the entry.

However, as Carter's affidavit of contest was accepted during the pendency of the prior suit, it was subject to the final disposition thereof. *Joseph A. Bullen* (8 L. D., 301); *George F. Stearns* (8 L. D., 573); *Conly v. Price* (9 L. D., 490).

It appears, however, that before the government had taken any action on the merits of the case, the entryman Price relinquished his entry and Griffith, under the act of May 14, 1880, was allowed to enter the land.

Carter contends that the local officers exceeded their authority in allowing Griffith to enter the land while his affidavit of contest was pending. This, however, does not affect the case, as Griffith's entry is subject to any superior right Carter may have possessed by virtue of his application to contest.

In your decision of July 16, 1890, above referred to, it was held that "the cancellation of Price's entry left nothing for Carter to contest and by operation of law, his case was abated." This is clearly in error. The relinquishment of a contested entry does not necessarily defeat the contest, but on the contrary, if the contestant can show that the cancellation of the entry was the result of the filing of his affidavit of contest, then the contestant would be entitled to a preference right. *Sorenson v. Becker* (8 L. D., 357); *Dayton v. Hause et al.* (9 L. D., 193); *Comar v. Wendling* (12 L. D., 25).

The law favors contests and rewards the contestant. *Webb v. Loughrey* (9 L. D., 440.)

Carter has never had his day in court; he was prevented from presenting testimony in support of his charges pending the government consideration of the former contest, and when the entry was relinquished, your office decided that his case was abated.

After a careful review of the record, and in view of the fact that Carter substantially claims that the relinquishment of Price was the result of the initiation of his contest, I deem it but just that he be allowed to present proof in support of his claim, therefore you will direct that a hearing be had in the case with due notice to all parties in interest.

Your office decision is, therefore, modified accordingly.

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#### HOMESTEAD ENTRY—COMMUTATION.

##### FRANK J. LIPINSKI.

The commutation of a homestead entry is an entry under the homestead law, and not a pre-emption entry, and consequently a bar to the further exercise of the homestead right.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 23, 1891.*

Frank J. Lipinski has appealed from your decision of May 5, 1890, rejecting his application, made February 27, 1890, to enter under the homestead law the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and lots 2, 3, and 4, of Sec. 5, and lots 2 and 3 of Sec. 8, T. 122, R. 55, South Dakota.

It appears from the record that he had, on July 19, 1880, made homestead entry of one hundred and sixty acres, for which he received patent on June 30, 1884.

In his appeal he contends that—

Having made a homestead entry, and commuted the same by paying \$1.25 per acre for it, he had virtually pre-empted the same; and having paid the government price therefor, he had not derived any benefit from the homestead law.

This contention can not be sustained. The uniform practice of the land department in all its branches has been to treat a commuted homestead entry as an entry under the homestead law, and not under the pre-emption law. See James Brittin (4 L. D., 441); Nathan T. Jennings (8 L. D., 53). The appellant in this case, having "heretofore perfected title" to one hundred and sixty acres of land "of which he had made entry under the homestead law" (25 Stat., 854), is held to have exhausted his homestead right, and can not be allowed to make another homestead entry.

Your decision is affirmed.

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#### RAILROAD GRANTS—CONFLICTING CLAIMS—INDEMNITY.

#### ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO. v. HASTINGS AND DAKOTA RY. CO.

The St. Paul, Minneapolis and Manitoba Ry. Co. is estopped from asserting any claim under the map of definite location filed December 5, 1857, for lands west of range 38 west, as such portion of said location was rejected by the Department, and the company acquiescing in such action, subsequently filed other maps which were duly accepted and recognized in the adjustment of the grant, and under which additional lands were secured.

The lands embraced herein, falling within the granted limits of the Hastings and Dakota road, and within the indemnity limits of the Manitoba company, were free from the claim of the latter company at the date when the former filed its map of definite location, and therefore inured to that company under its grant.

Under departmental regulations indemnity selections can not be recognized in the absence of due specification of the losses on which such selections are based.

A specification of losses on the line of the St. Vincent extension can not be accepted as the basis for selections on the main line of the St. Paul, Minneapolis and Manitoba Company.

As the indemnity withdrawals for these companies have been revoked, and no valid selections for the lands herein are pending, said lands are accordingly held subject to entry by the first legal applicant, or to selection by the company first presenting due application therefor.

*Secretary Noble to the Commissioner of the General Land Office, October 23, 1891.*

This case involves about 67,000 acres of land within the conflicting limits of the grants made by the acts of March 3, 1857 (11 Stat., 195), and March 3, 1865 (13 Stat., 526), for the St. Paul, Minneapolis and

Manitoba Railway Company, and July 4, 1866 (14 Stat., 87), for the Hastings and Dakota Railway Company. These lands are within the Marshall land district, Minnesota. They are all within the "indemnity" limits of the grant for the Manitoba Railway Company, the withdrawal for which was made August 14, 1868, but lie partly within both the "granted" and "indemnity" limits of the grant for the Hastings and Dakota Railway Company.

The right of the latter company, to lands within its granted limits, is held to have attached June 26, 1867, and the order of withdrawal including the indemnity lands was made April 22, 1868.

For convenience in disposing of this matter, I have divided the lands into two classes:

"A." Those within the "granted" limits of the Hastings and Dakota Railway Company's grant, and also within the "indemnity" limits of the Manitoba company's grant.

"B." Those within the "indemnity" limits of the grants for both roads.

On February 19, 1880, the Manitoba company applied to select *all* of these lands, which application was forwarded to your office for instructions, (1) as to whether the company was required to designate the lands in place in lieu of which the selections were claimed, and (2) as to whether the lists were regular in form.

It does not appear that any action was ever taken upon this list by your office, and, on May 26, 1883, the Hastings and Dakota Railway Company made application for the same lands divided into two lists, separating the granted and indemnity lands.

These applications were rejected by the local officers, for the reasons:

(1) That there is nothing to show that the Hastings and Dakota Railway Company is entitled to the lands, and

(2) That the lands are within the limits of the grant to the St. Paul, Minneapolis and Manitoba Railway Company, and withdrawn for the benefit of that company.

From such rejection the company appealed.

On October 16, 1883, the Manitoba company again applied for these lands, and the local officers approved their selections, which are now of record.

In the adjustment of these grants it became necessary to determine the respective rights of the companies, within such conflicting limits, under their claims made for the lands herein involved, and, by your office decision of September 11, 1889, the lands embraced in class "A" were awarded to the Hastings and Dakota Railway Company, and those embraced in class "B" were awarded to the Manitoba Company. Both companies appeal from said decision, in so far as award is made to the other company.

## CLASS A.

The claim of the Manitoba company to the lands in class "A" is based upon the following grounds:

1. That the line of its road was definitely fixed December 5, 1857.

2. That, as the line of its road was definitely fixed and the map thereof was on file in the office of the Secretary of the Interior, at the time of the passage of the act of March 3, 1865, all the odd sections within twenty miles of such line were immediately withdrawn, and appropriated for its benefit by force of said act.

3. That this withdrawal or reservation reserved and excepted the lands from the operation of the grant to the Hastings and Dakota Company.

To a proper understanding of the first claim, upon which the others are based, a brief recitation of the facts relative to such claimed location is necessary.

By the act of March 3, 1857 (*supra*), Congress made a grant to the State of Minnesota, among others, to aid in the construction of a railroad "from Stillwater, by way of Saint Paul and Saint Anthony, to a point between the foot of Big Stone Lake and the mouth of Sioux Wood River."

On December 5, 1857, the Minnesota and Pacific Railroad Company (predecessor in interest of the Manitoba company) filed in your office a map showing the line of its road as definitely fixed from Stillwater by way of St. Paul and St. Anthony, to Breckenridge, on the Sioux Wood River. This latter point was the western terminus of the road as established by the legislature of Minnesota, in conferring the grant upon the company.

At the time of the filing of this map, the western limit of the public surveys in Minnesota was range 38 W., and to this point the location was accepted, but this Department declined to accept the location west of said range 38 W., for the reason that the lands traversed by the line were unsurveyed.

Objection was also made upon the ground that the line showed too great a deviation from a direct line between the termini, but upon the representations of the company as to the character of the country, this objection was withdrawn, and the refusal based upon first ground mentioned, viz, that the line traversed unsurveyed lands.

All the lands in this controversy lie west of range 38 W.

After the passage of the act of March 3, 1865 (*supra*), enlarging the grant made by the act of 1857, the company sought to secure the withdrawal of the lands, pursuant to the provisions of said act, and by your office letter of June 10, 1865, the withdrawal was ordered, to the extent of twenty miles on the east side of the location of December 1857, as far west as the west line of range 38 W.

This was the condition of affairs at the date of the grant for the Hastings and Dakota Railway Company, as well as the date of the acceptance of its map of definite location.

The public surveys having progressed to the west line of range 41 W., the Manitoba company, in its communication of April 16, 1868, called the attention of your office to such surveys and to the fact that the line of road as located was shown upon the official plats of surveys, and requested that proper steps be taken to enable the company to have its grant adjusted. Upon this request your office advised the company that, if it would accept the line laid down upon the plats of survey, as its line of definite location, an immediate withdrawal, to the extent of the public surveys, would be ordered.

Thereupon, to wit: August 5, 1868, the company filed a map showing, in connection with the public surveys, the line of its road from range 38 W., to the west line of range 41 W., and on May 10, 1869, another map was filed, showing the line from the last mentioned point to Breckenridge, to which point the surveys had been extended in the meantime. These maps were accepted, and withdrawals duly made of the lands within the limits adjusted to the line shown thereon, the withdrawal embracing the lands in question having been ordered August 14, 1868, as before stated. The location shown upon these maps is practically the same as that shown upon the map filed in December 1857, except that the western terminus of the road is extended six miles north of that shown upon the map filed in 1857.

It is the present contention of the company that acceptance on the part of this Department of the map of definite location is unnecessary, and that, as in the present case, the company's rights attached as of the date of December 5, 1857.

The seventh section of the act of March 3, 1865 (*supra*), provides:

That as soon as the governor of said State of Minnesota shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads and branches, then it shall be the duty of said Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

Having located its entire line prior to the passage of said act, it is urged that, in effect, the statute withdrew or reserved the lands for twenty miles in width on each side of said location, which reservation served to defeat the grant for the Hastings and Dakota Company.

#### FINALITY OF THE LOCATION OF DECEMBER 1857.

That this Department has jurisdiction to supervise the location of land grant railroads has been unquestioned since the earliest land grant, and the necessity for such supervision is apparent, in order to protect the interests of the government.

As against and in answer to the present contention of the company, I quote from its brief in the case of said company against Ransom Phelps (pages 21 to 24):

It is claimed by the defendant that the westerly terminus of the definite location of the line of road in question is not at Breckenridge, but is at a point some six miles further south; and that, therefore, even if our construction of the grant be correct, the lands in question do not fall within it. . . .

The original map of definite location filed in 1857 was not accepted by the Secretary of the Interior so far as the public lands had not been surveyed; only about one-half of the line was accepted by him as having been definitely located. This map, therefore, settled nothing as to the westerly terminus of the line, but subsequently, after the public surveys had extended throughout the country penetrated by the line, another map was filed showing the definite location of the entire line to Breckenridge, and its connection with or relation to the lines of the public surveys, and that map was received and accepted by the Secretary as the line of definite location of the road, *and is the only map ever so accepted of the westerly portion of the line.* O. Rec., 70. See, also, maps on file.

As to the effect of such filing and *acceptance* it is sufficient to cite the case of *Van Wyck v. Knevals*, 106 U. S., 360, 366, where it is said:

"The route must be considered as definitely fixed when it has ceased to be the subject of change at the volition of the company. 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 ground 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."

The first map filed does not show the town or village of Breckenridge at all. See the map on file.

This action of the Secretary was not only in accordance with the uniform practice of the department in like cases, but so obviously legal and proper that we refer to only one decision to the point, and quote from that but a single passage. The case referred to arose under the grant to the state of Wisconsin in aid of the St. Paul and Fond du Lac Railroad, wherein the commissioner had accepted a map of the line extending through both surveyed and unsurveyed lands, and the Secretary in his decision, addressed to the commissioners, says of his action:

"When you accepted the map, December 3, 1857, the townships through which the proposed road is to pass had been surveyed only as far north as the north line of township thirty. Your acceptance can be regarded as the date of the vestiture of the title to the odd-numbered sections thereby determined to lie within the granting limits of the line of location from near the west end of Lake Shawano in section 29 of township 27, range 16, to the north line of township 30 north of range 15 east; but the acceptance must be regarded as merely preliminary for that part of the proposed line of road which extended through lands unsurveyed, and townships not subdivided. The marking on a general map of the region of country, the line of a preliminary survey of route through an unsurveyed region, can show only the relation of the proposed route to great natural objects, which may or may not be properly laid down on the map. Nothing is there by 'definitely fixed.'"

\* \* \* \* \*

It will be necessary for the state, after the public surveys are made, to cause to be prepared and filed in your office, . . . . maps showing the connection of that part of their route with the lines of the public surveys, which, when accepted by you as correct, may be regarded as determining and definitely fixing that part of the route, and the limits thereto conjoined within which lands are granted in place, and reserved to the United States to be sold at the enhanced price. 1 Lester's Land Laws, pp. 537-8.

Upon the law as it is thus settled, there would seem to be no doubt that the line was definitely located to terminate at Breckenridge, and that the lands in question are, therefore, within the primary limits of the grant.

It will be noticed that in the Phelps case the land involved fell north of the terminus as established by the location of 1857, which location was repudiated by the company west of range 38 W., and the

subsequent location relied on, to support the company's claim to the same.

The supreme court (137 U. S., 528), after reciting the facts relative to the several locations, held the company's title to the land to be complete, thus recognizing the location of 1869, as the definite location. Under this decision the Manitoba company is held to be invested with title to a large body of lands (to which it had theretofore been held by this Department that said company had no title), the greater part of which has been disposed of by the United States as public lands. The United States was privy to both parties to the suit, and as such is bound by the judgment.

The company put the question of the finality of the first location in question, and by relying upon the action of this Department secured a judgment in its favor, as before set forth, and is therefore now estopped from questioning the correctness of such action.

This question, as to the right of the company under the location of 1857 west of range 38 W., has before been decided by this Department *Mattson v. St. Paul, Minneapolis and Manitoba Railway Company*, 5 L. D., 356), and in that case it was held, referring to the rejection of said location as traversing unsurveyed lands,

this being the ruling of the Department when said map was filed, and the company having acted upon that ruling and afterwards filed another map of definite location, should now be held to abide by its own action.

In conclusion, I might state that the grant for the company has been practically adjusted, recognizing the rights of the company as attaching as of the dates of the locations as accepted, without regard to the rejected location of 1857. I must, therefore, adhere to the former rulings of this Department, refusing to recognize any rights in the company under the location of 1857, west of range 38 W., and for the reasons before stated, I am of the opinion that the company is estopped from claiming any right under such location.

It is therefore unnecessary to consider the second and third grounds on which the Manitoba company's claim to lands in class "A" is based, and I affirm your decision holding that they were free from claim at the date of the definite location of the Hastings and Dakota Railway Company, and therefore inured to that company under its grant.

#### Class B.

As to this class of lands—viz: Those within the indemnity limits common to both grants—your office opinion holds,

I am of the opinion that either company is entitled to the right of selection, and that priority of right to the land is secured by that company which first presents its application to select the same, without regard to the dates of the grants, definite location of the lines, or withdrawal of lands,

and the following cases are relied upon in support thereof. *Ryan v. Railroad*, 99 U. S., 386; *Kansas Pacific R. R. Co. v. Atchison*, Topeka

and Santa Fe R. R. Co., 112 U. S., 414; St. Paul and Sioux City Ry. Co. v. Winona and St. Peters Ry. Co., 112 U. S., 720; Winona and St. Peters Ry. Co. v. Barney, 113 U. S., 618; Barney v. Winona and St. Peters R. R. Co., 117 U. S., 228.

You therefore award these lands to the Manitoba company under its selection of February 19, 1880, and sustain the rejection of the selection by the Hastings and Dakota company.

In the acts making the grants claimed by both of these companies provision is made for the withdrawal of the lands as soon as maps shall be filed designating the routes of the roads.

The fifth section of the act of July 4, 1866, provides:

That as soon as the governor of said State shall file or cause to be filed with the Secretary of the Interior maps designating the routes of said roads, then it shall be the duty of the Secretary of the Interior to withdraw from market the lands embraced within the provisions of this act.

The withdrawal directed by said section has been held to include both granted and indemnity limits. H. R. Ex. Doc., 246, 1st Sess., 50th Congress.

It will be remembered that the definite location and withdrawal on account of the grant for the Hastings and Dakota Railway company, west of range 38 W., was prior to the withdrawal for the Manitoba company, hence, under the contention by the Manitoba company in support of its claim to the lands in class "A," it would be held that at the date of the Manitoba company's selection in 1880, the lands were not subject thereto, having been reserved under the withdrawal for the Hastings and Dakota company.

With my views as to the validity of the selections heretofore made, and in view of the forfeiture act of September 29, 1890 (26 Stat., 496), the fourth section of which repeals the section referred to in the acts making the grants for these companies, in so far as said sections require the Secretary of the Interior to reserve lands within the indemnity limits of such grants, I deem it unnecessary to pass upon the question as to the effect of such withdrawal, while in existence, upon the respective right of the parties to make indemnity selection of the lands within their common limits.

In the circular of November 7, 1879, to registers and receivers, relative to the adjustment of land grants, under the heading "indemnity selections for railroads," is the following:

In the adjustment of all grants it consequently becomes necessary to know for what lands lost in place the indemnity selections are made, and with the view to that end you will require the companies to designate the specific tracts for which the lands selected are claimed.

These instructions have never been revoked, and were consequently in force at the dates of the several selections made by these companies.

The selection of February 19, 1880, by the Manitoba company, was not accompanied by a designation of losses, and for this reason should have been rejected.

The selection of May 26, 1883, by the Hastings and Dakota Railway Company, was also unaccompanied by a designation of losses, and should have been rejected for this reason.

The selections of October 16, 1883, by the Manitoba company, were accompanied by a designation of losses, and were approved by the local officers and permitted to go of record. The losses specified at the date of selection are along the main line, but since the matter now under consideration has been pending before this Department, the company has filed a new list of losses as a basis for the selections heretofore made.

In support of the change it is stated,

as the adjustment of the grant will probably show that the losses originally designated have been satisfied, it becomes necessary, under the regulations of the Department, for the railway company to redesignate the losses in place.

From this it is presumed that the company concedes that the certifications heretofore made along the "main line" fully satisfy all losses along such line, and as a consequence there was no sufficient basis assigned in the selections of October 16, 1883.

The lands now specified as lost are, however, along a different line from that along which the indemnity selections lie—to wit: the line to St. Vincent, known as the St. Vincent Extension.

The grant for the St. Vincent Extension was made by the act of March 3, 1871 (16 Stats., 588), and in considering the question as to the plan to be followed in the adjustment of the grants for the Manitoba Company, it was held by this Department, June 10, 1891 (13 L. D., 349), and again upon review, October 1, 1891 (13 L. D., 353), that the grant for the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba Railway is a new grant, made by act of Congress, subsequent in date to those by which the original grant was made for the "main line," and it therefore follows that the grant for said extension should not be adjusted in connection with the other grants as an entirety. The earlier grants must be adjusted separately from the later, which will preclude the right of indemnity selection by the older grants along the line of the younger, and *vice versa*.

Under these decisions, the designations upon which the selection of October 16, 1883, are now based can not be recognized, and in rejecting the designations the selections, being unsupported, must be canceled.

The orders of withdrawal of indemnity lands for these companies having been revoked (12 L. D., 541), and there being no valid selection of the lands by either company, you will hold the same subject to entry by the first legal applicant, or to selection by the company first presenting application therefor, in the manner prescribed by the regulations governing such selections.

## PRIVATE CLAIM—SECTION 7, ACT OF JULY 23, 1866.

THROCKMORTON *v.* WORMMOUTH.

The right of purchase under section 7, act of July 23, 1866, extends only to a purchaser who buys relying in good faith upon the boundaries of the private claim as generally accepted, and which afterwards are found to be incorrect, and affords no protection to one who buys knowing, or, with good reason to believe, that the land so purchased is not included within the grant.

*Acting Secretary Chandler to the Commissioner of the General Land Office, October 7, 24, 1891.*

I have examined the record in the contest of S. R. Throckmorton against Ebenezer Wormouth, involving the right to lot 3, Sec. 28, and lots 2 and 3, and the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 29, T. 1 N., R. 6 W., San Francisco, California.

The land is claimed by Wormouth under his homestead entry, made May 20, 1881.

Throckmorton's claim is based on a purchase from the heirs and assigns of Juan Read, the grantee under a Mexican grant, known as the Rancho Corte de Madera del Presidio, which was confirmed by the board of United States land Commissioners, June 13, 1854.

The description in said confirmation was by metes and bounds, as follows:

The land of which confirmation is hereby made is the same on which said Juan Read resided in his lifetime; is known by the name of Corte de Madera del Presidio, is situated in Marin county and bounded as follows, to wit: Commencing from the solar which faces west, at a point at the slope and foot of the hills which lie in that direction and on the edge of the forest of redwoods, called Corte de Madera del Presidio, and running from thence in a northwardly direction four thousand, five hundred varas to an arroyo called Holom, where is another forest of redwoods, called Corte de Madera de San Pablo; thence by the waters of said arroyo and the Bay of San Francisco ten thousand varas to the Point Taburon, said point serving as a mark and limit; thence running along the borders of said bay and continuing in a westwardly direction along the shore of the bay formed by Point Caballos and Point Taburon, four thousand, seven hundred varas to the north of the cañada and the point of the "Sausal," which is near the Estero lying east of the house on said premises, which was occupied by said Juan Read in November, 1835; and thence continuing the measurement from east to west along the last line eight hundred varas to the place of beginning; containing one square league of land be the same more or less: being the same land described in the testimonial of juridical possession on file in this case, as having been measured to said Juan Read under a grant of the same to him.

This claim was surveyed in 1858 by United States Deputy Surveyor R. C. Mathewson. This survey was of quantity, and made to approximate one square league and contained 4,460.24 acres.

August 12, 1865, the heirs of Juan Read (original grantee from the Mexican government) conveyed to one James C. Bolton, a lawyer, of New York city, "All the undivided one-half part of all the Rancho Corte de Madera del Presidio . . . which is not included in the survey of the said rancho, which was made under instructions from

the U. S. surveyor general for the State of California, by R. C. Mathewson." Subsequent to the sale of this undivided and undetermined interest—to wit: in November and December, 1873, and June, 1874—a resurvey was made by direction of this Department, which was accepted by your office, and patent issued for the land therein described, February 25, 1885.

The last survey, upon which patent issued, described the grant by metes and bounds, and was intended to conform to the description contained in the original grant by the Mexican government. This survey contained 7,854.12 acres, or 3393.88 acres in excess of the Mathewson survey.

It was a one-half interest in this excess that was conveyed to Bolton, and the consideration therefor was his "professional services" in procuring a new survey and patent for all the land thus shown to be embraced in the grant.

June 19, 1866, Throckmorton, through several transfers from Bolton, procured title to an undivided half of Bolton's interest, or an undivided one-fourth interest in that part of the rancho not included in the Mathewson survey.

January 19, 1875, the heirs of Read and their transferees conveyed to Throckmorton, by metes and bounds, the land in controversy, containing between seventy-three and seventy-four acres. This land is not included in the grant to Read as last surveyed, nor can I find from the record that it was included in the Mathewson survey. Throckmorton claims the right to purchase it under the 7th section of the act of July 23, 1866 (14 Stat., 218).

That section 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 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.

It can not, I think, be seriously contended that the interest acquired by Bolton to the undivided "half part" of the land, in excess of the Mathewson survey that should be acquired by a new survey, is such an interest as would entitle him or his transferee, Throckmorton, to purchase under said act. His rights, if he has any, must depend upon his purchase of January 19, 1875, in which he purchased by metes and bounds, from the heirs and assigns of Juan Read, the land in controversy, which joins the Rancho Corte de Madera del Presidio on the west.

At the date of this purchase, the new survey had already been made, and was awaiting approval by this Department, which fact must have been known to Throckmorton, for he had long before acquired title, through Bolton, to an undivided one-fourth interest in the excess that

should be procured by the new survey. That survey did not embrace the land in controversy, but formed a part of the eastern boundary thereof; in other words, the land claimed by Wormouth and Throckmorton is immediately west of the western boundary of the rancho, as established by the last survey, which said western boundary, according to the best evidence I can get from the record, is the same as that established by Mathewson. In order that he may be entitled to purchase under said section 7, it must appear that he was a purchaser *in good faith*—that is: as I construe it, he must have believed that the lands so by him purchased were within the limits of the grant, as originally defined, where, as in this case, the granted land is described by metes and bounds. If, on a proper survey by the government, the land so purchased should be found to be outside the limits of the grant, he would be entitled to purchase under said section, because he had originally purchased and paid for the land in the honest belief that his grantors had the right to convey.

I find nothing in the evidence to convince me that this land was ever occupied, cultivated, or improved by Read, his heirs, or assigns, prior to the purchase by Throckmorton. The only evidence of any occupation prior to 1872, other than Wormouth's, is the testimony of Throckmorton himself and his renter, that as far back as 1857 there was a fence along the southwestern boundary of the land in dispute. Who built the fence, or for what purpose, is not shown in evidence. It may have been to mark the northern boundary of the Rancho Saucelito, which joins this on the south, or it may have been placed there by some one designing to claim the land from the government, or for many other purposes. The evidence is entirely insufficient to show that Read or his heirs or assigns placed it there either to improve or mark the boundary of their claim.

It is true that in 1872, prior to his purchase, Throckmorton enclosed the land with a fence, and has been grazing the same ever since, except about fourteen acres included in Wormouth's house lot. He claims that this was done in pursuance of an amicable partition, setting apart his interest, the deed to which was made by the several grantees to one McCeney, and by him conveyed to Throckmorton, January 19, 1875.

It is shown in evidence that, at the time Throckmorton commenced to enclose this land (1872), he was notified by Wormouth (who was then residing on the land) of his claim thereto.

The evidence on the part of Wormouth shows that he has made his home on the land ever since 1859, and that at that time and ever since the land was understood in the neighborhood to be government land, and was never supposed to be included in the grant to Read.

The evidence shows beyond the shadow of a doubt that at the several dates at which Throckmorton's interests attached, the boundaries to this grant were in dispute, and that he purchased with full knowledge of the unsettled condition of the boundaries. His first purchase of an

undivided half of Bolton's interest was made on speculation, and depended for its value on a change in the boundaries as established by the Mathewson survey. His purchase in 1875 of the land in controversy was made before these boundaries had been finally established and with full knowledge of that fact, as well as the claim of Wornouth.

Section 7 of the act referred to was not, in my judgment, intended for the protection of such a purchaser, but applies only to a purchaser who buys relying upon the boundaries as generally accepted and supposed to be the correct ones, and which afterward by the final survey are found to be incorrect, whereby his land is shown to be outside the grant, and affords no protection to one who buys knowing that the boundaries are in dispute, and that a new survey has already been ordered to determine the true boundaries. Such a purchaser must abide the result of the survey, and can not and should not be allowed to claim the right to purchase land under said act that has for more than twenty years been occupied, claimed, and improved by a settler and claimant under the government land laws. But, aside from the speculative character of this purchase, an examination of the record history of this grant satisfies me that Throckmorton is without a plausible pretext to be considered an innocent and unsuspecting purchaser.

The grant, as shown by the *expediente*, was described by metes and bounds, and was in no sense of the word a float to be located somewhere within defined exterior boundaries.

In the petition of Juan Read, to the General of the Territory of Upper California, the land is described as "*El Corte de Madera del Presidio* to the *Punta del Tiburon*, as shown by the sketch or plan which your Excellency has in your possession." In the grant itself it is described as, "Known by the name of *Corte de Madera del Presidio* as far as *la Punta del Tiburon*, bounded by the Mission of San Rafael and the Port of San Francisco, the proper measures and examinations being *previously* made as required by laws and regulations."

In the measurement made by the *alcalde*, when juridical possession was given to the grantee, the grant is described as starting from a

forest called *Corte de Madera del Presidio*, a little brook with a willow thicket, and the remains of a rancheria called "*Anamus*," thence continuing the examination and view of said lands they (the witnesses) led me *north* to another arroyo and forest of redwood trees, called also *Corte de Madera de San Pablo*, and they said it was the boundary with the pueblo of San Rafael; and thence continuing the examination south as far as point *Tiburon*, which they said was the limit in that direction, we continued to the west to the point *Estero*, which empties in the bight formed by said point *Tiburon* and point *Caballos* on the south, and which ends at the entrance of said cañada, where is situated the house of the owner of said lands, Don Juan Read, the arroyo, willow thicket, and forest of redwood trees, named *Corte de Madera del Presidio*, aforesaid, which they said was the last boundary of the said lands pertaining to the rancho referred to of *Corte de Madera* of *Senor Read*.

The description in the confirmation heretofore given starts from the same point, the "forest of redwoods called Corte de Madera del Presidio, running thence in a *northwardly* direction four thousand five hundred varas to an arroyo," etc. Thus, it will be seen that in the *expediente*, the grant itself, the measurement in the juridical possession and in the decree of confirmation by the United States Commissioners, the land is definitely described as fixed and determined.

In all the measurements and surveys, including the Mathewson and the last approved survey, the starting point was identical, and was on the western boundary of the grant, thence invariably either north (as in the juridical measurement), or northwardly (as in the confirmation description) to an arroyo (stream) called Hulon, thus showing that the western boundary of the grant from the starting point to the Hulon was a straight line, and so could not have followed the meanderings of the arroyo Corte de Madera del Presidio, along which the ancient fence was situated, as claimed by Throckmorton.

These measurements and surveys, except the last one, were of record when Throckmorton's rights attached, and I can not find that the western boundary was ever in dispute, certainly the land in question was never included in any measurement or survey from which it was excluded by a subsequent one, which was finally approved.

I find that the land in question has always been public land, and has never been regarded by disinterested people as being included in the grant to Read, and that Throckmorton, when he purchased the land in controversy, either knew or had good reason to believe that the land was not included in said grant, and that he was therefore not a *bona fide* purchaser within the meaning of the act of July 23, 1866 (14 Stat., 218).

The decision of your office, denying his application to purchase under said act, is accordingly affirmed.

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CANCELLATION—RE-INSTATEMENT—SECTION 7, ACT OF MARCH 3, 1891.

WILEY *v.* PATTERSON.

A petition for the re-instatement of a canceled entry must be denied where no errors are assigned as against the judgment of cancellation.

Where a judgment of cancellation has become final the entry, in the absence of re-instatement, can not be confirmed under section 7, act of March 3, 1891, nor does said section provide for the re-instatement of canceled entries.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 24, 1891.*

On March 27, 1882, Mary J. Patterson, who has since married and whose name is now Mary J. Allen, made homestead entry for the SE.  $\frac{1}{4}$  of section 15, T. 7 S., R. 18 W. Kirwin, Kansas, and on June 28, 1886, submitted commutation proof, paid for the tract and received a receiver's receipt therefor.

On April 27, 1887, William H. Wiley instituted a contest against said entry, alleging abandonment for more than six months prior to making proof. On the trial which followed, the register and receiver found in favor of the contestant and recommended the cancellation of the entry, and on appeal, your office, under date of July 12th, 1889, affirmed the action of the local officers and held the entry for cancellation.

An appeal was taken from your judgment to this Department, where, on February 28th, 1891, it was affirmed and the entry directed to be canceled; acting under this order you canceled said entry on March 10, 1891.

The entrywoman has now applied to have her entry re-instated and patented under the provisions of section 7, of the act of March 3, 1891, (26 Stat., 1095).

Said application consists of a brief statement of the facts as given above, and charges that Wiley instituted the contest against her entry for speculative purposes, and that although more than thirty days have elapsed since he received notice of the cancellation thereof, he has not applied to enter the tract himself, but has sought to sell the right to make entry to another.

It appears from the record that since March 10, 1891, Ella M. Patterson has made a homestead entry for the tract in question, and it nowhere appears that she has been served with notice of the present application, however, it must be denied on other grounds for the petition before me does not state facts sufficient, even to create a suspicion that the judgment canceling her entry is erroneous; no charge is made that said judgment is wrong or that the decision of your office affirmed by it, was erroneous.

An entry will not be re-instated unless facts are established or errors of law discovered showing that the cancellation of the entry was wrongful.

Section 7 of the act cited, does not provide for the re-instatement of entries which had been canceled, or which, after the passage of the act might be canceled, and the mere fact that an entry would have been confirmed by the act, if it had not been canceled, can have no weight in considering whether or not an entry should be re-instated.

Where a judgment of cancellation has become final, no confirmation can take place until the entry canceled has been again placed where it was before the judgment was rendered, until that is done said section can have no application. James Ross, (12 L. D. 446).

The petition before me is denied, because no errors are assigned as having been made by the Department in the judgment canceling the entry. It seems to have been properly canceled, as the result of the trial had on the contest of Wiley, and the fact that he did not see fit to take advantage of the preference right conferred upon him by law, to enter the tract, does not even tend to show that the entrywoman complied with the law or that the judgment of cancellation was wrongful.

## RAILROAD RIGHT OF WAY—SCHOOL LANDS.

## STATE OF NORTH DAKOTA.

No provision is made by law for indemnifying the State in cases where school sections are crossed by railroads claiming the right of way either under the act of March 3, 1875, or by special act of Congress. If such roads are not entitled to the right of way over said sections recourse must be had by the State, or its purchasers, against the companies in the courts.

*Acting Secretary Chandler to the Attorney-General of North Dakota,  
October 26, 1891.*

I am in receipt of your communication of the 23d ultimo, inquiring as to how the State of North Dakota is to be indemnified for lands in school sections that are covered by right of way of the various railroad companies.

The act of March 3, 1875 (18 Stat., 482), grants the right of way through the public lands to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by Congress, which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and due proofs of its organization under the same.

The approval of the maps of the road by the Secretary of the Interior, as provided for by the 3d section of said act, merely indicates that the company has complied with the terms of the act, so far as to entitle it to the benefits thereof, and that the line of road between the terminal points is such as was authorized by the act. It does not pretend to decide which of the tracts traversed by the road are public lands within the meaning of the act, or which are private lands or possessory claims, controlled by the 3d section of the act. It approves the right of way as designated by the map, subject to all existing valid rights. If the line of road should cross any military, park, or Indian reservation, or other land specially reserved from sale, the approval of the Secretary would be withheld, unless such right of way was provided for by treaty stipulation, or by act of Congress. But I am not aware that the approval of the Secretary has been withheld where the line of the road crosses school sections, but, on the contrary, the maps of the company showing that the line of road crosses school sections have always been approved, it being considered that school sections are generally reserved, and that they do not come within the terms "other lands specially reserved from sale," which refer to the reservation of a specific tract of land within designated boundaries.

No provision is made by law for indemnifying the State in cases where the school section is crossed by railroads, claiming the right of way either under the act of March 3, 1875, or by a special grant from Congress, but, if the roads are not entitled to the right of way over

such sections, recourse must be had by the State or its purchasers against the company in the courts.

Under the act of March 3, 1875, the right of way may be granted over unsurveyed lands, and the line of road may be designated by actual construction before survey. If the company has filed its articles of incorporation and due proofs of organization, it is entitled to build its road, but within twelve months after the filing of the township plat of survey of the lands crossed by the road, the company must file a map showing the line of said road over the public surveys, in order that it may be noted on the plats of the land office. If proper in all other respects, these maps are approved, notwithstanding they cross school sections, and doubtless in many instances the road was actually constructed before the number of the section was indicated by survey.

When the right of way is claimed under a special act, it must be controlled by the terms of the act, but what has been said of the act of March 3, 1875, will, generally, apply to special acts of Congress. As a general rule, the right of way is granted over the public lands, providing for the condemnation of private lands and possessory claims.

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#### APPLICATION FOR SURVEY—DEPARTMENTAL REGULATIONS.

R. T. SMITH ET AL.

An application for survey under section 2401 of the Revised Statutes will not be entertained if not made in accordance with departmental regulations.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 26, 1891.*

The appeal of R. T. Smith and six others, from the action of your office, dated July 26th, 1889, in rejecting their application to have surveyed certain lands between the Indian River and the Atlantic Ocean, described as the "peninsula" and lying in T. 29 S., R. 38 E., Florida, has been considered.

The record shows that appellants made application to your office by petition, March 30, 1889, to have this land surveyed. The material allegations of the petition are that the petitioners are "interested as settlers, land owners, homesteaders and parties having interests in lands in what is known as the peninsula," describing its location. "That said lands in said township, so far as can be ascertained have never been surveyed, nor can any field notes be found." "That there is on file at Gainesville in the U. S. land office a diagram or plat purporting to be a plat of said lands, but which is in fact so indefinite, incorrect and uncertain that no true boundaries or lines can be ascertained therefrom, and said diagram or plat does not embrace or include, now nor did it at the time of the filing thereof include all the lands in said peninsula," but as ascertained by local surveys, there is a consid-

erable portion of land not mapped, that is susceptible of cultivation, some of which has been settled upon and improved, but for which, under the circumstances, no title can be obtained; that the lands are not tide lands or swamp lands. The petition concludes as follows:

Wherefore in order that the true lines and boundaries may be determined, the title of the owners of said lands perfected and that titles can be obtained by settlers thereon as provided by law, and to prevent confusion in the entering and disposal of said lands hereafter, and for the purposes of justice to all parties interested, your petitioners pray that a government survey of said lands be ordered, and for such other action as will speedily accomplish the purposes set forth, and your petitioners will ever pray, etc.

Your petitioners stand ready to furnish all such other information as may be within their power to do.

The petition is signed by two persons as "settlers" and five others as "land owners." The petition is not verified.

By your office letter of July 26, 1889, you reject this application, whereupon applicants appeal.

I deem it unnecessary to go into all the details of this controversy, or to notice the specification of errors complained of by appellants, as this petition is not either in form or substance, in compliance with the law or the rules of this Department. It is stated by counsel for appellants that this application is made under section 2401 (R. S., 440). Your office circular, approved June 24, 1885, (3 L. D., 599) contains full and explicit instructions as to how to proceed under the said section. It will be observed that this petition does not contain the necessary allegation to bring this application within the rules prescribed. Hence, I do not feel justified in entertaining the same.

Your action is affirmed.

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#### SCHOOL LAND—SETTLEMENT PRIOR TO SURVEY.

##### ANDREW TOSTENSON.

The exclusion of a tract included within a pre-emption filing for an excessive acreage, based on a settlement on school lands prior to survey, relieves the excluded tract from the settler's claim, and leaves it subject to the school grant, and the relinquishment of said tract by the State would give it no claim for indemnity.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
October 27, 1891.*

I have considered the appeal by Andrew Tostenson from your office decision of February 14, 1890, holding for cancellation his commuted homestead entry made October 27, 1887, for the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , Sec. 16, T. 131 N., R. 41 W., St. Cloud land district, Minnesota, for the reason that said tract became the property of the State under the school grant, immediately upon survey.

It appears that the plat of survey of this township was approved November 21, 1869.

On December 1, 1870, one Andrew Tostenson filed declaratory statement No. 326, for the "N.  $\frac{1}{2}$ " of the SW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , and lot 4 of said section 16, alleging settlement August 15, 1867.

He made proof thereon and cash entry No. 1707 issued July 22, 1874, (eliminating the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , the tract in question), upon which patent issued.

Said cash entry included 151.50 acres; hence, the filing was largely in excess of one hundred and sixty, the entire tract covered thereby embracing 191.50 acres.

On October 27, 1887, Tostenson made homestead entry No. 8762, for the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , upon which he made commutation proof and cash entry No. 3212 issued October 22, 1888. In the proof upon this entry he alleges settlement in June, 1886.

Your office decision held that Tostenson's occupation under his filing did not extend to the tract he now claims, and that no right could be initiated to the land after survey by settlement and cultivation.

Accompanying Tostenson's appeal is a deed of relinquishment, executed by the governor of Minnesota, to the United States, of this tract, under the authority, as stated therein, vested in him by section 2 of the act of the Legislature of Minnesota, approved February 24, 1881, being chapter 154 of the General Laws of 1881. Said section provides:

If in the adjustment of the State swamp land grant and other grants of land made by the United States to the State of Minnesota, it shall appear that the United States has reserved, sold or otherwise disposed of any tract or tracts claimed by or inuring to the State under either of said grants, then it shall be lawful for, and the governor, if he shall deem it for the best interests of the State, may relinquish the claim of the State to any or all of such lands, to the end that new selections in lieu thereof may be made, or that indemnity may be secured in lands, or otherwise, for the lands so lost.

In the relinquishment, it is stated—

It appears from the official plat on file in the land commissioner's office of the State of Minnesota, that the above tract was cultivated prior to the United States government survey, completed November 21st, 1869.

If this tract was occupied and improved by a qualified pre-emptor prior to survey, he would undoubtedly be entitled to prove up the same as though it were any other land not reserved for school purposes, but it clearly appears that no such claim existed.

It was embraced in the pre-emption filing by Tostenson, which included lands largely in excess of that to which he was entitled to claim under the law, and when election was made of that to which he would assert claim, the tract excluded was free from all claim, and the right of the State attached to the same as though never included in the pre-emption claim of Tostenson. This being so, the relinquishment of the State's claim would not give it the right to select another tract in lieu thereof.

The act of the legislature, under which the governor relinquishes claim to the land, would seem to restrict his right of relinquishment to

cases where indemnity would be available, but without questioning the power of the governor to relinquish, as it appears that the land passed to the State under the school grant, this Department is powerless to grant a right of entry to Tostenson, and I therefore sustain your decision and direct the cancellation of his entry.

Tostenson must look to the State for title.

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APPLICATION TO CONTEST—SECTION 7, ACT OF MARCH 3, 1891.

HENRY C. NELSON.

An application to contest which has not been allowed, and which under the rulings of the Department can not be allowed, and which confers no rights upon the applicant, can not be considered a "protest" or "contest" against the validity of an entry that will prevent its confirmation under the proviso to section 7, act of March 3, 1891.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 28, 1891.*

Henry C. Nelson, on July 18, 1882, made commuted homestead cash entry of the NE.  $\frac{1}{4}$  of section 11, T. 62 N., R. 13 W., Duluth land district, Minnesota.

Special Agent Webster Eaton, in pursuance of general instructions, but without any specific orders (so far as the records of your office disclose) to investigate this particular tract, on April 27, 1885, reported that said entry was fraudulent, in that said Nelson had never resided upon or cultivated the tract as required by law.

On May 9, 1885, your office held the entry for cancellation.

Nelson appealed from your office to the Department, which, on May 5, 1887, returned the papers with the direction that, as an opportunity for a hearing had not been afforded the entryman, he should be notified that sixty days would be allowed him in which to apply for such hearing.

Hearing was had September 18, 1888; and on October 12, ensuing, the local officers rendered joint decision against the entryman. On appeal your office April 22, 1890, affirmed the decision of the local officers. Thereupon the entryman appealed to the Department.

The proceedings which resulted in the judgment thus appealed from not having been instituted by the government within two years from the issuance of the receiver's receipt upon final entry, the entryman would be entitled to a patent under the proviso to section 7 of the act of March 3, 1891 (26 Stat., 1095)—in case there was, at the date of said act, "no pending contest or protest against the validity of such entry."

By letter of July 27, 1891, you transmit the application of one Louis Lecuyer, endorsed with the notation that it was filed in the local office December 23, 1890, and setting forth that from the appearance of said land he is convinced that "no improvements of a permanent character were

ever made on said land, no habitation ever erected thereon, and no part of said land was ever cultivated or placed in a state of cultivation by said Henry C. Nelson," and asking that a hearing be ordered, to the end that he may be allowed to prove the allegations herein made, with a view to the cancellation of said entry, and that the preference right of entry on said land be awarded to him.

It will be seen that the above charges are in substance the same which the government had been investigating for more than five years preceding.

This *application* to contest was not a "contest." Such application to contest, even when followed by the taking of testimony (in the absence of due order therefor by your office), has been held to confer no right upon the party thus attempting to intervene, that would prevent confirmation under the 7th section of the act of March 3, 1891, where there was a transferee (Edward Brotherton *et al.*, 12 L. D., 305). In the case at bar there is no transferee; but the application to contest, based upon the same charges which the government was investigating, would not have been allowed by the government, and the applicant acquired no rights thereby. (Joseph A. Bullen, 8 L. D., 301; George F. Stearns, *ib.*, 573; Drury *v.* Shetterly, 9 L. D., 211; Conly *v.* Price, *ib.*, 490; Arthur B. Cornish, *ib.*, 569; Canning *v.* Fail, 10 L. D., 657; Charles G. Alexander, 11 L. D., 507.)

Such a mere application to contest, which had not been allowed by your office or the Department, which it would be contrary to the rules and precedents of the land department to allow, and which conferred no rights upon the applicant, could not be considered a "contest or protest against the validity of the entry," such as would prevent its confirmation under the proviso to the 7th section of the act of March 3, 1891. (Cappelli *v.* Walsh, 12 L. D., 334.)

Your decision is therefore reversed, and patent will issue to the entryman for the tract in controversy.

#### TIMBER CULTURE CONTEST—JUDGMENT OF CANCELLATION.

##### ABBOTT *v.* WILLARD.

A timber culture contestant who alleges and proves a substantial failure on the part of the entryman to comply with any of the statutory requirements, is entitled to a judgment of cancellation as against the entire entry.

The case of Linderman *v.* Wait overruled.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 28, 1891.*

I have considered the case of Frank A. Abbott *v.* Frank H. Willard, involving NE.  $\frac{1}{4}$  Sec. 14, T. 27 N., R. 48 W., Chadron, Nebraska. On September 23, 1884, Willard made timber culture entry for said land.

February 21, 1888, Abbott filed an affidavit of contest against said entry alleging that Willard "has not cultivated the second five acres

as the law directs, within the time required by law nor cured the defect to this date."

Thereupon the register and receiver summoned the parties to appear at the local office on June 5, 1888, and directed that the testimony be taken on May 31, 1888, before a notary public at Hemingford.

On the day last named, Abbott appeared in person and by counsel, and Willard by counsel before said notary and submitted testimony. The deposition of Willard taken before a commissioner at Marshalltown, Iowa, May 25, 1888, was also filed in the case. Upon the evidence thus adduced the local officers rendered their joint opinion that the land "has been cultivated and improved as required by law."

Abbott appealed, whereupon your office by decision dated May 6, 1890, reversed the ruling below and held Willard's entry for cancellation.

From this decision he appeals here.

It appears that five acres of the tract were broken in 1885; that in 1886 said five acres were "back-set" and five additional acres broken, and that in June, 1887, the five acres first broken were "backset, dragged, marked off and planted to tree seeds." These acts were performed by men employed by the claimant, Willard, who lived in Iowa and constituted all that was done in pursuit of the pending entry. He says that he paid \$25, to one Roland to attend to planting the "first" five acres to tree seeds and to cultivate the "second" five acres, during 1887, the third year of his entry and files a canceled draft to show such payment.

The evidence, however, shows that said second five acres were not cultivated in 1887. Testimony tending to show that such cultivation was unadvisable by reason of drought during said year was submitted for claimant. This, however, is not satisfactorily established.

In his appeal here he asks in the event of his default not being "excused by the circumstances," that he be permitted to relinquish the N.  $\frac{1}{2}$  of said quarter section "on which he had been in default of work," and that his entry be allowed for the S.  $\frac{1}{2}$  thereof, on which work had been done according to law." The same request was made in his said appeal to your office. It is urged that such disposition of the case would be in accordance with the decision in the case of *Linderman v. Wait* (6 L. D., 689).

In that case the entry embraced eighty acres; said entry was contested during its fifth year and failure to cultivate and to keep in a healthy growing condition the trees planted during its fourth year, was conclusively shown. The claimant's good faith appearing, the Department allowed her to retain the forty upon which she had cultivated two and a half acres to trees and to relinquish the remainder.

Section one, of the timber culture act of June 14, 1878 (20 Stat., 113), provides that a qualified person who

shall plant, protect, and keep in a healthy, growing condition for eight years ten acres of timber, on any quarter-section of any of the public lands of the United States,

or five acres on any legal subdivision of eighty acres, or two and one-half acres on any legal subdivision of forty acres or less, shall be entitled to a patent for the whole of said quarter-section, or of such legal subdivision of eighty or forty acres, or fractional subdivision of less than forty acres, as the case may be.

In the case cited, the Department held in effect that said provision was not a "positive statutory enactment" which necessarily required a contested timber culture entry to be treated as an entirety and declared forfeited as a whole for the contestant's sole benefit.

In reaching this conclusion other provisions of the same act were, I think, overlooked. The section referred to designates the matters to be proved in support of the initial filing or entry as a prerequisite to the issue of final certificate. Section two of said act, however, prescribes the conditions under which such initial filing or entry is allowed or, in other words, makes the terms of contract between the government and the applicant for the benefits of the timber culture law. By said last section, such applicant is required to specify the amount of land he seeks to enter and, make an affidavit that he intends *inter alia* "to fully comply with the provisions of this said act."

Now these provisions require the person who, like the present claimant, has initiated a timber culture claim for a whole quarter section

to break or plow five acres covered thereby the first year, five acres the second year, and to cultivate to crop or otherwise the five acres broken or plowed the first year; the third year he or she shall cultivate to crop or otherwise the five acres broken the second year, and to plant in timber, seeds, or cuttings the five acres first broken or plowed, and to cultivate and put in crop or otherwise the remaining five acres, and the fourth year to plant in timber, seeds, or cuttings the remaining five acres.

By section three of the same act, a failure by the claimant "at any time after the filing of said affidavit and prior to the issuing of patent . . . . to comply with any of the requirements of this act," renders the tract applied for subject to homestead or timber culture entry by another.

In addition to this, section two of the act of May 14, 1880 (21 Stat., 140), provides that

where any person has contested, paid the land-office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land-office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

In the case at bar the contestant's specific charge of failure to cultivate the second five acres as the law directs is sustained by the evidence.

Such cultivation is one of "the requirements of this act" and part of the claimant's engagement. When, therefore, his default thereof was established, the penalty named in section three, *supra*, became effective and his entire claim open to entry as specified. And the contestant having charged and proved this default is entitled to a judgment of cancellation and the consequent preference right to enter the land claimed.

Nor do I consider the decision in said case of *Linderman v. Wait* to accord with the attitude of the Department toward the pending question. In the case of *Vargason v. McClellan* (6 L. D., 829), the Department distinguished the case of *Linderman v. Wait*, and held that where the default was "such as to require the entry to be canceled in whole or in part, it would be such also as to deny the exercise of the power of amendment." And it has been frequently held that where the number of acres cultivated or trees planted is slightly less than that specified in the statute and good faith is apparent, such shortage will be excused. *Griffin v. Forsyth* (13 L. D., 254), and cases cited.

In these and similar cases the Department in the exercise of its discretion, treated the claimant's shortcoming as excusable by reason of manifest good faith.

In the case of *Linderman v. Wait*, however, the claimant's good faith was permitted (notwithstanding the contestant's right) to satisfy his admitted breach of statutory requirement.

In the recent case of *Griffin v. Forsyth*, *supra*, the Department considered its construction of the timber culture act as heretofore outlined in connection with the decision in the said case of *Linderman v. Wait*, and after calling attention to the fact that the latter has never been followed, said "the rule as here stated has since been adhered to."

Furthermore, in the case of *Linderman v. Wait*, the two and half acres (half the number required for the original entry), planted were so situated that the proportionate part of the entry allowed to Wait, could be described as a legal subdivision. If, however, the doctrine that partial planting will entitle the timber culture claimant to *pro rate* his claim is to prevail, a case can easily be imagined where the ground planted is so located as to make it impossible to so describe such proportionate part and to thus properly make an amended entry therefor.

For the reasons stated the rule announced in the case of *Linderman v. Wait* is in my opinion, contrary to statutory enactment and also impracticable, and the decision therein is accordingly hereby overruled.

The claimant's said application to amend will be denied, and his entry canceled. The judgment appealed from is affirmed.

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APPEAL—SUSPENDED SURVEY—SECTION 7, ACT OF MARCH 3, 1891.

ADOLPHUS HARMON.

A decision of the Commissioner of the General Land Office denying a motion to confirm an entry under section 7, act of March 3, 1891, of land embraced within a suspended survey is not final in its effect, nor will an appeal lie therefrom.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, October 28, 1891.*

On October 31, 1883, Adolphus Harmon made pre-emption cash entry and received a final receipt and certificate for the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , NE.  $\frac{1}{4}$

SW.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  section 1, T. 11 N., R. 1 E., Humboldt, California.

On February 15, 1886, your office suspended further disposal of the lands in the township in which this tract is situated, because the survey thereof had been reported by a special agent of your office as being fraudulent.

On June 29, 1891, Harmon filed a motion in your office to confirm said entry under the proviso to section 7, of the act of March 3, 1891 (26 Stat., 1095).

On September 9th, 1891, said motion was denied by you, whereupon the entryman appealed to this Department.

The township plat was not suspended until February 15, 1886, more than two years after the entry was made. At that time, the description of the land conformed to the approved township survey.

The suspension of the plat which has had the effect to delay action in this case, was not a proceeding against the entry, but was in the interest of the public and for the protection of the entryman, as well as for the protection of all the settlers in said township, and the order suspending the disposal of lands, until you could investigate the charge made against the correctness and validity of the survey, was, it would seem, a wise use of your discretion.

I think you were justified in refusing to render judgment confirming and passing the entry to patent during the suspension of said plat. Your judgment was neither final nor adverse to the interests of the entryman from which an appeal will lie. The merits of his case have not been passed upon and can not be considered during this suspension.

The motion in this case is accordingly overruled and the appeal from your order of September 9, 1891, denying the motion for confirmation and patent, is dismissed.

It does not follow, however, that the entry in question may not at some future time and after the suspension of the plat is removed, be confirmed and patented under the act cited.

You are instructed to proceed, without delay, to investigate the charges made against the correctness of said survey, with a view to determine whether it should be approved, or a re-survey ordered.

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#### RAILROAD GRANT—FORFEITURE—ACT OF MARCH 3, 1889.

#### ONTONAGON AND BRULE RIVER R. R. CO.

The rule heretofore laid upon this company to show cause why an order of forfeiture should not be declared for failure to construct the last eight miles of the section of twenty miles which had been certified as constructed, is dissolved, the answer of the company thereto showing satisfactorily that said section of road was properly constructed, and the certification thereto duly warranted by the facts.

A railroad company that is the real beneficiary, and party interested, under a grant to a State to aid in the construction of railroads, is entitled to be heard before the Department in matters pertaining to the adjustment of the grant.

The company having actually constructed twenty miles of its road is entitled under the express terms of the act of forfeiture (March 2, 1889) to the amount of lands earned under the terms of the granting act by the construction of that proportion of the full length of the entire road, provided that quantity of land can be found within the limits prescribed by the act of forfeiture.

The determination in this case that said company is entitled to the amount of land measured by the length of constructed road without regard to whether said road was in operation, will not control in cases arising under the general forfeiture act.

The claim of the company that it is entitled to one hundred and twenty sections of land for the location of its entire line in addition to that quantity earned by actual construction, cannot be recognized either under the provisions of the grant or the act of forfeiture, nor does the ruling of the supreme court in the case of Railroad Land Co. v. Courtright, justify a conclusion favorable to the company in this respect.

The act of June 3, 1856, granting lands for this line of road also provided for a similar grant to another line, and where the granted limits of the two roads overlap, each company takes an undivided moiety of the lands granted.

By the express terms of section 4 of the act of forfeiture said act in no way enlarges or increases the quantity of lands originally granted.

The grant herein is one of "place" and not of "quantity," and the amount of land to which the company is entitled, is the number of acres included in the odd sections within the six mile granted limits coterminous with constructed road, and without the granted limits of the road from Marquette to Ontonagon, and a moiety of the odd numbered sections found within the common granted limits of the two roads coterminous with the constructed portion of the Ontonagon and Brule River company's road, and for the moiety of lands lost the company is not entitled to indemnity.

Under the forfeiture act the line of constructed road furnishes the measure of the grant, and the basis of the terminal lines which must be drawn at right angles to said basis.

Under the provisions of section 4 of the act of forfeiture this company is not entitled to select as indemnity any lands formerly embraced within the granted limits of the Marquette Houghton and Ontonagon road; such lands not having been subject to selection under the original grant are not made so by said act of forfeiture.

In the selection of indemnity the company is not restricted to limits coterminous with the constructed road, but may go beyond the same within the indemnity limits of the original grant to make up deficiencies.

*Secretary Noble to the Commissioner of the General Land Office, October 31, 1891.*

On August 2, 1889, you transmitted a report, made by Walter P. Jones, a clerk of your office, as to the construction and condition of the Ontonagon and Brule River Railroad, and recommended that the company be called upon to show cause why the grant of lands opposite to and coterminous with the last mile of constructed road as claimed by the company should not be declared forfeited for failure to build said mile of road, in compliance with the terms of the granting act.

Upon consideration of the matter in this Department, it was con-

cluded that the reasons urged for such action were applicable to the last eight miles of the section of twenty miles of constructed road, and you were instructed to call upon the company to show cause, within sixty days, why the grant opposite to and coterminous with the last eight miles of said section should not be declared forfeited (9 L. D., 227). By letter of March 20, 1890, you transmitted the reply of the company to said rule, expressing therein your views on the matter and also as to the proper course to be followed in making an adjustment of the grant to said company under the act of March 2, 1889 (25 Stat., 1008). Upon the questions thus presented, the company and also parties claiming adversely to it have been heard at great length by way of both written and oral argument.

In answer to the rule to show cause, the company filed a number of affidavits, among them one by the engineer under whose direction the road was constructed, the vice president of the road and others claiming to be familiar with railroad work, and all of whom were present when this section of road was examined by the governor of the State of Michigan with a view to its acceptance and the certification of its construction.

These affidavits establish quite clearly the fact that twenty miles of road were constructed in a substantial manner, and were, at the date of the examination by the governor of the State, in good condition for actual, practical use. The governor's certificate was therefore fully justified by the condition of the road at the date of his examination. The road was, perhaps, never actually operated farther than Rockland, a distance of twelve miles from the initial point, and the remainder of the section of twenty miles was neglected and allowed to fall into disuse. This is sought to be explained and excused by the statement that at about the time of the completion of said section of road, it was concluded that the route selected was impracticable and would have to be abandoned in favor of some other route, but about that time the question of the forfeiture of the grant under consideration was brought up in Congress, and that for these reasons no further work on the road was attempted. There was no traffic or patronage for the road beyond the village of Rockland, and hence trains were not run beyond that point. It may be remarked that the portion of the road in question was being repaired at the time of the examination by Mr. Jones of your office, and that it has since been completely reconstructed and now forms a part of the line of said company's road, in actual operation.

In view of the facts thus presented, I am inclined to hold that the section of twenty miles of road was properly constructed and certified to and that the rule heretofore entered against said company to show cause having been fully answered, should be dissolved, and it is so ordered. Under this disposition of the matter, it has become unnecessary to consider the question presented by the company, and considered at some length by you, as to the effect to be given the governor's certificate.

Inasmuch as you have submitted a plan of adjustment of this grant, and the company has filed its petition asking that its grant be adjusted upon the plan therein set forth, and since the questions thus presented have been fully argued, it seems proper to give the matter consideration at this time. For a proper presentation and understanding of this subject, a short review of the history of this grant and the proceedings thereunder seems to be demanded. By the act of June 3, 1856 (11 Stat., 21), there was granted to the State of Michigan to aid in the construction of certain railroads between points named therein "every alternate section of land designated by odd numbers; for six sections in width on each side of each of said roads;" indemnity being provided for tracts sold or to which the right of preëmption should have attached when the line of any road was definitely fixed. By section 4 of this act, the disposition of the lands thus granted was provided for as follows:

*And be it further enacted*, That the lands hereby granted to said State shall be disposed of by said State only in manner following, that is to say: That a quantity of land not exceeding one hundred and twenty sections for each of said roads, and included within a continuous length of twenty miles of each of said roads, may be sold; and when the governor of said State shall certify to the Secretary of the Interior that any twenty continuous miles of any of said roads is completed, then another quantity of land hereby granted, not to exceed one hundred and twenty sections for each of said roads having twenty continuous miles completed as aforesaid, and included within a continuous length of twenty miles of each of such roads may be sold; and so from time to time until said roads are completed; and if any of said roads is not completed within ten years no further sales shall be made, and the lands unsold shall revert to the United States.

By act approved February 14, 1857 (Laws of 1857, p. 346) the legislature of the State of Michigan accepted said grant with all its restrictions and conditions, and conferred the lands falling within the various lines mentioned in the granting act, upon various companies, those pertaining to the line from Ontonagon to the Wisconsin State line, the one brought in question here being conferred upon the Ontonagon and State Line Railroad Company. On November 27, 1857, this company or its successor by consolidation, filed a map of definite location of its route, which was accepted by your office. On December 12, 1861, the lands supposed to fall within the limits of this line of road were certified to the State of Michigan. There were three lists: (1) Lands not in conflict with any other grant; (2) lands within the overlapping limits of the Ontonagon and State Line and the Marquette and State Line companies, inuring to those companies jointly; (3) lands within the overlapping limits of the Ontonagon and State Line and the Marquette and Ontonagon companies for their joint benefit. Afterwards, on January 1, 1868, the Chicago and Northwestern Railway Company, the successor of the Ontonagon and State Line Company, released to the State of Michigan all its interest in the lands embraced in lists 2 and 3, *supra*, and on May 1 of that year, the governor of said State, under authority of a joint resolution of the legislature, dated February 27,

1867, relinquished to the United States all interest of the State to those lands. On June 17, 1870, the Chicago and Northwestern Company relinquished its claim to the clear lands certified for the benefit of the Ontonagon and State Line Company (list 1, *supra*) and on August 14, following, the governor relinquished to the United States said lands. These actions on the part of said company and of the governor of the State of Michigan were afterwards claimed in behalf of the State to have been without authority or sanction of law, and therefore of no effect, and this claim was apparently thought tenable by your office. (See Reports of Commissioner Williamson to Secretary Schurz, March 11, 1878, and January 5, 1881.) On September 17, 1880, the Board of Control of Railroad Lands of the State of Michigan, an institution created by the act of the legislature accepting the grant of 1856, declared the grant to the Ontonagon and State Line Railroad Company forfeited to the State of Michigan, and at the same time, designated the Ontonagon and Brule River Railroad Company, which had petitioned therefor, "as the proper and competent party to receive said grant of lands" and did then "release to and confer upon" said company "all and every the right, title and interest which now remains in the said State of Michigan to the said lands, be the same more or less" for the construction of said line of road "under the general regulations and restrictions of said act of the legislature of the State of Michigan, passed February 14th, 1857, and such other and further conditions as may be imposed by the legislature of Michigan." The said company, on September 28, 1880, by formal resolution of its board of directors, accepted said grant "under the regulations, restrictions, and conditions stated in said action and resolutions of said Board of Control." On June 7, 1881, the legislature of Michigan passed an act to confirm the action of the Board of Control, and by said act, prescribed certain regulations and restrictions whereby the said company was required to begin the construction of its road at the village of Ontonagon, to build twenty miles of its road by August 1, 1882, and to complete its road by December 1, 1886. It was further provided that whenever and as often as said company should complete and put in running order any section or sections of twenty miles of its road and that fact should be certified by the governor, it should be entitled to select the amount of one hundred and twenty sections of land included within any twenty continuous miles of said road as originally located, and upon such selection, the equitable title to such lands should rest in the company to which was added the following :

But said company shall not be allowed to convey, mortgage, or otherwise incur burden said lands until the same shall have been patented to it by the State; and the same shall not be patented until the whole line of said road shall have been fully completed and accepted by the Governor.

The governor of the State, under date of February 24, 1882, certified to the completion of a section of twenty miles of this road running

south from the northern terminus at Ontonagon. The company thereupon selected one hundred and twenty sections of land at the southern end of the grant.

This was the status of the grant at the date of the passage of the act of March 2, 1889 (25 Stat., 1008), declaring forfeited the grants made by the act of June 3, 1856.

On June 15, 1889, the legislature of the State of Michigan passed a joint resolution, reciting the granting act of 1856 and the act of forfeiture, and authorizing and empowering the governor of said State "to relinquish and surrender to the United States all the lands heretofore certified to this State under the act to aid in the construction of said roads which are opposite to and coterminous with the uncompleted portions of the said roads," excepting therefrom such lands as had been patented by the State to the Marquette, Houghton and Ontonagon Railroad Company, and by said company, conveyed to the Michigan Land and Iron Company. The governor, in accordance with the authority granted him by said joint resolution, executed an instrument purporting to reconvey to the United States the lands included within the terms of said resolution.

The provisions of said act of March 2, 1889 (25 Stat., 1008), so far as it seems necessary to quote therefrom at this time, are as follows:

That there is hereby forfeited to the United States, and the United States hereby resumes the title thereto all lands heretofore granted to the State of Michigan by virtue of an act entitled "An act making a grant of alternate sections of the public lands to the State of Michigan, to aid in the construction of certain railroads in said State and for other purposes," which took effect June third, eighteen hundred and fifty six, which are opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which said lands were granted or applied, and all such lands are hereby declared to be a part of the public domain.

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Sec. 2. That nothing in this act shall be construed as forfeiting any lands that have been heretofore earned by the location and construction of any portion of any railroad hereinbefore mentioned under any act of Congress making a grant of public lands in the State of Michigan, *Provided*: That such lands lie opposite such constructed road, or if indemnity lands are provided in such grants the same shall be selected from the public lands within such indemnity limits lying nearest to such constructed road:

The Ontonagon and Brule River Railroad Company has asked for an adjustment of the grant of 1856 so far as it is interested, claiming that by the construction of twenty miles of road it became and is entitled under said grant to receive two hundred and forty sections of land, that is, one hundred and twenty sections were earned by the survey and location of the road, and another one hundred and twenty sections were earned by the construction of the twenty miles. And it presents its further claims under the forfeiture act, in the following language:

Your petitioner shows that under the provisions of said act of March 2, 1889, it is entitled from the date of said act, as by way of new grant; (a) first to a moiety of all lands in its place limits within the first twenty miles of completed road not disposed

of by the United States at date of definite location; (b) for any deficiency then appearing in its full quantity of two hundred and forty sections, to indemnity lands commencing at Ontonagon and running south for quantity; (c) to have and receive such lands from the date of the act of March 2, 1889, by statutory designation and selection; (d) that as to pre-emption and homestead claims, within the territory thus by statute set aside to satisfy petitioner's grant, such claims are invalid as against the statutory railroad selection for the company unless established by actual occupancy on or before the 1st day of May, 1888.

Your office, after considering the matter, concluded that said company is not entitled to anything "as by way of new grant" under the act of 1889, and that whatever lands it may be entitled to are such as were earned under the act of 1856 by the construction of the road; that this grant was one of "place" and not one of "quantity," and hence no specified amount was granted; that to the extent, the granted limits of this road and those of the road from Marquette to Ontonagon overlapped the grant was of a moiety to each road, and that neither has any claim for indemnity on account of the moiety granted to the other, summing the matter up as follows:

The amount earned by the construction would therefore be the vacant odd sections within the six miles granted limits coterminous with constructed road and without the limits of the grant for the road extending from Marquette to Ontonagon, and indemnity for such of the sections as had been disposed of within such clear limit also an amount equal to one half of the odd numbered sections within the common granted limits of the two roads.

Upon the question of indemnity, it was said:

As to selection of such indemnity, the right to any specific tract will be considered when lists are presented in due form, but I might add that the condition of the tract at the date of selection will determine the fact as to whether such tract is subject to selection.

It is first contended on the part of certain parties who are asserting a claim to some of the lands within the limits of the original grant by virtue of settlement thereon, and who have been heard in opposition to the claims of the railroad company, that the Ontonagon and Brule River Railroad Company has no such relation to the lands affected by the acts of 1856 and 1889 that it can be heard as a claimant before this Department. This contention can not be allowed. The company is the real beneficiary and party in interest, and should be heard in support of its claims. This course has been heretofore followed in adjusting grants made to the different States, and will not now be departed from.

It having been concluded that this company actually constructed twenty miles of its road, it is by the express provisions of the act declaring a forfeiture, entitled to the amount of lands earned under the terms of the granting act, by the construction of that proportion of the full length of its entire road, provided that quantity can be found within the limits prescribed by the forfeiting act. It should be noted in this connection that the act of March 2, 1889, *supra* differs in the wording of the forfeiting clause from the act of September 29, 1890 (26

Stat., 496), commonly designated as the "general forfeiture act." The former act declares forfeited all lands "opposite to and coterminous with the uncompleted portion of any railroad," while the latter act declares forfeited all lands "opposite to and coterminous with the portion of any such railroad not now completed and in operation." Even applying this latter act, the company would still be entitled to land for twenty miles of road because it had that much completed and in operation at the date of said act. The determination in this case that the company is entitled to the amount of land pertaining to the length of constructed road, without regard to whether said road was in operation, will not control in cases arising under the general forfeiture act.

In support of the claim of the company "that by reason of the location of the entire line and the construction of twenty miles of road two hundred and forty sections of land have been earned," the case of *Railroad Land Company v. Courtright* (21 Wall., 310) is cited, and, in fact, this case furnishes the sole basis and foundation of the argument advanced in support of that claim. It is strenuously insisted, not only that the decision in that case supports the claim made here, but that Congress, in framing this act of forfeiture, had in mind that decision construing an act using the same language as is found in the act making the grant which is now declared forfeited, and by the use of the words "earned by location" meant to indicate the land which the court had said might be sold before any road was constructed.

The facts in that case were different from those presented in the case now under consideration. In that case, the grant to the State, which contained a provision as to the disposition of the lands, in the same words as are found in section 4, quoted above, of the granting act, now under consideration, was conferred upon the railroad company upon the condition that a certain portion of road should be built within three years, and that the road should be completed within a specified time. The company located its line of road, and caused a considerable amount of work to be done thereon. Courtright, one of the contractors who did grading on the road, received in payment therefor construction bonds and land scrip of the company which he afterwards surrendered in consideration of the conveyance to him of the land in controversy, that is, he bought said land. The State afterwards declared a forfeiture of the grant, for failure on the part of the company to build the road, and conferred it upon another company. The question presented was as to whether Courtright took a good title to the land. Counsel for the railroad company here quote from the opinion in that case, as follows:

It is true that it was the sole object of the grant to aid in the construction of the railroad, and for that purpose the sale of the land was only allowed as the road was completed in divisions, *except* as to one hundred and twenty sections.

The evident intention of Congress in making this exception was to furnish aid for such preliminary work as would be required before the construction of any part of the road. No conditions, therefore, of any kind were imposed upon the State in the disposition of this quantity, Congress relying upon the good faith of the State to see that its proceeds were applied for the purpose contemplated by the act.

Nor was there any restriction upon the State as to the place where the one hundred and twenty sections should be selected along the line of the road, except that they should be included within a continuous length of twenty miles on each side. They might be selected from lands adjoining the eastern end of the road, or along the western end, or along the central portion thereof.

The court went on to say, however, that the act of Congress was a grant to the State *in praesenti*; that the act of the State was a grant *in praesenti* to the railroad company; that the conditions as to the completion of the road were conditions subsequent, and concluded as follows:

The terms, in which the right is reserved by the act of the State to resume the lands granted, imply what the previous language of the act declares, that a present transfer was made, and not one dependent upon conditions to be previously performed. The right is by them restricted to such lands as at the time of resumption had not been previously disposed of. The resumption, therefore of the grant by the failure of the first company to complete the road did not impair the title to the lands, which the act of Congress authorized to be sold in advance of such completion, and which were sold by that company.

In the case we are now considering, no lands have been sold by the company, and in this very material point, it differs from the case presented to the supreme court. Not only was there no sale here, but one of the restrictions or conditions imposed upon said company by the legislature of the State was that "said company shall not be allowed to convey, mortgage, or otherwise incumber said lands until the same shall have been patented to it by the State."

It was not said in the Courtright case that any land was earned by location, but the contrary was intimated when it was said that Congress relied upon the good faith of the State to see that the proceeds of any sale made previous to construction "were applied for the purposes contemplated by the act," that is, to see that the work, necessary to be done to earn the amount of land so sold, was done. I think it must be concluded then that the Courtright case does not, as claimed, hold that land was earned by the location of the line of road. but that it does hold that while Congress, in these grants, authorized the sale of land in advance of construction, yet that only such land as had been actually sold was taken out of the operation of an act declaring a forfeiture of the grant. This was the conclusion reached by this Department when preparing instruction in the matter of the forfeiture of the grant to Alabama. Tennessee and Coosa R. R. Co. (12 L. D., 254). The Courtright case is not applicable here to the extent claimed by the railroad company, and in so far as it is applicable, does not sustain the proposition in support of which it is cited.

It is further urged that the declaration in the second section of the forfeiture act "that nothing in this act shall be construed as forfeiting any lands that have been heretofore earned by the location and construction of any portion of any railroad," etc. clearly indicates that Congress contemplated that some lands were earned by "location" and

others by "construction," and that those earned by location could be none other than those tracts which might, under the terms of the granting act, be sold prior to construction. To give the act the effect thus claimed for it would require a forced and unnatural reading of the words used, and would virtually nullify the proviso to this section "that said lands lie opposite such constructed road." A similar question came up in the case of the Tennessee and Coosa R. R. Co., *supra*, and in the opinion rendered therein, after quoting the language of the supreme court in the Courtright case as to the intention of Congress in allowing the sale of land in advance of construction, it was said :

But it was also intended that these one hundred and twenty sections should be in full satisfaction of the grant for the first twenty miles of the road completed, whether the lands were or were not coterminous therewith. As to that part of the road, no other or further grant was made.

The position taken by this Department is substantially the same as taken by you in this case when you say "After the passage of the act of forfeiture, the grant assumed a new terminus, and was as a consequence proportionally reduced." This construction is the natural one, carries into operation all the provisions of the act and places it in harmony with other acts of the same nature, while that contended for in behalf of the company requires a forced reading of the words used, virtually renders inoperative a part of the provisions of the act, and constitutes it an exception to the usual action by Congress in similar cases. The contention of the company that it is entitled to one hundred and twenty sections of land as earned by the location of its line of road, and to another one hundred and twenty sections as earned by the construction of twenty miles of its road, can not be sustained.

The amount of land said company is entitled to is the amount it would have been entitled to if the original grant had been for a road from Ontonagon to the point at which construction stopped, that is, for a road twenty miles in length. If this were the only road provided for in the granting act, it would then be entitled to an amount of land equal to the amount contained in the odd numbered sections found within the granted limits. We find, however, that the act of 1856 provided for another road running to Ontonagon and overlapping in its granted limits the limits of the company now here. That in so far as the granted limits of these two roads overlap, each company took an undivided moiety of the lands granted is a proposition too well settled to require more than a statement of it here. *St. Paul and Sioux City R. R. Co. v. Winona and St. Peter R. R. Co.*, (112 U. S., 720); *Sioux City and St. Paul R. R. Co. v. Chicago, Milwaukee and St. Paul Ry. Co.* (117 U. S., 406); *Sioux City and St. Paul R. R. Co. v. Chicago, Milwaukee and St. Paul Ry. Co.*, (6 L. D., 54); *Chicago, St. Paul, Minneapolis and Omaha Ry. Co.* (11 L. D., 607).

Counsel for the railroad company complain that their position as to the effect of the act of 1889 was misapprehended, both by your

office and by opposing counsel, when it was assumed that they claimed by virtue of that act "a new grant of something not originally included in the grant to the State and not excepted from forfeitures," and deny that such is their position. They proceed at once, however, to point out several particulars in which, as they claim, said act of 1889 operated as a new grant. It is claimed, that inasmuch as said act forfeited the lands within the limits of the Marquette, Houghton and Ontonagon road, and at the same time, commanded the Ontonagon and Brule River company to take its indemnity lands nearest its constructed road, thus necessarily compelling the last named company to take, in part satisfaction of its grant, lands formerly appertaining to the Marquette, Houghton and Ontonagon road, and consequently effecting a setting apart of those lands for the use of said Ontonagon and Brule River company, it was to this extent a new grant. Or as summarized by counsel:

In other words, Congress by one and the same act declared forfeited all such common limits appertaining to the Marquette, Houghton and Ontonagon grant and conferred the same upon the Ontonagon and Brule Company in compulsory satisfaction of our earned quantity excepted from forfeiture.

If it be intended by this to say that the grant of 1856 was in any way enlarged or increased in quantity by the act of 1889, such contention can not be sustained. While counsel deny that they are "claiming a new grant of something not originally granted to the State and not excepted from forfeiture," they certainly do claim that their road was to receive some benefit under the act of 1889 other and greater than that conferred by the granting act of 1856. That it was intended, however, by this forfeiture act, to enlarge, or increase the quantity of land to which any particular beneficiary mentioned in the granting act was entitled thereunder is directly contradicted by the provisions of section 4 of the act of 1889, which reads as follows:

That no lands declared forfeited to the United States by this act shall inure to the benefit of any State or corporation to which lands may have been granted by Congress except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such grant, or to waive or release in any way any right of the United States now existing to have any other lands granted by them, as recited in the first section, forfeited for any failure, past or future, to comply with the conditions of the grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure, by virtue of the forfeiture hereby declared, to the benefit of the completed line.

It is further said in this connection by counsel for the company:

The case of *St. Paul and Sioux City R. R. Co. v. Winona and St. Peter R. R. Co.* 112 U. S., 720 did not involve a similar state of facts. In the case at bar there is but *one grant and one road*, the lands to be apportioned by the State through its Board of Control.

I can not agree to this. It seems to me to be just such a case in so far, at least, as to the quantity of lands granted, as was before the

court in the case cited. The respective lines of these two roads have, from the date of the granting act, been treated as separate and distinct lines by the government, the State and the companies themselves.

I must conclude then that the amount of land to which the company is entitled is the number of acres included in the odd sections within the six miles granted limits coterminous with constructed road and without the granted limits of the road from Marquette to Ontonagon and a moiety of the odd numbered sections found within the common granted limits of the two roads coterminous with constructed portion of the Ontonagon and Brule River company's road. This is the measure of the grant as to quantity.

Immediately following the claim made for all the lands in the overlapping limits of the two roads, counsel say :

If, however, it should be held that we are not entitled to all the place lands in the common or overlapping limits, and are only entitled to the moiety awarded us by the Commissioner, still for the moiety so lost we are entitled to indemnity. *United States v. Sioux City and St. P. R. R. Co.* 43 Fed. Rep., 617.

Counsel submit this proposition and authority without argument or comment of any kind, as if it were conclusive. This doctrine laid down by Justice Shiras of the circuit court is not the rule that has been heretofore followed by this Department as laid down in numerous decisions from among which I would cite, *Sioux City and St. Paul R. R. Co. v. Chicago, Milwaukee and St. Paul Ry. Co.* (6 L. D., 54); *Missouri, Kansas and Texas Ry. Co.* (11 L. D., 130).

The rule thus announced and followed was adopted after a careful consideration of the question, and is, in my opinion, the logical sequence of the rulings of the supreme court in those cases cited hereinbefore where it was held that two roads claiming under one and the same grant take each an undivided moiety of lands in the overlapping granted limits. If each company has an undivided moiety of these lands, it would be impossible to say that any particular tract was so lost by either company as to form a basis for an indemnity selection. Under these circumstances, I must decline to adopt the views expressed by Justice Shiras, and this grant will be adjusted under the rule laid down in the case of *Sioux City and St. Paul R. R. Co. v. Chicago, Milwaukee and St. Paul Ry. Co.* (6 L. D., 54.)

The quantity of land to which said company is entitled having been determined, it becomes necessary to determine where such lands are to be taken, that is, the locus of the lands excepted from the forfeiture by the second section of the act of March 2, 1889.

That act first declared forfeited all lands granted by the act of 1856, opposite to and coterminous with the uncompleted portion of any railroad, to aid in the construction of which they were granted or applied, and in section 2, declared that nothing in the act should be construed as forfeiting any lands that had been theretofore earned by the location and construction of any portion of any road, "Provided: that such lands lie opposite such constructed road."

The language used in section 2 constitutes a declaration of what is necessarily implied from the reading of section 1, and the full import of both sections, so far as they affect the line of road, is that lands within the limits of that part of the grant of 1856 pertaining to the line from Ontonagon to the Wisconsin State line, as fixed by the map of definite location, which are coterminous with and opposite to the unconstructed portion of said road are forfeited, and that those lands within the same limits coterminous with and opposite to the constructed portion of road are saved and excepted from the forfeiture. It should be borne in mind in the consideration of this act that the excepting clause is simply a corollary of the forfeiting clause, and that the two taken together embrace all the land in any way affected by said act. It seems clear then, from the statement alone, of the provisions of said act, that so far at least as lands in the "granted" limits are concerned, none can be taken beyond the point to which we have concluded said road was completed. Nothing is urged against the soundness of this proposition, and it is therefore unnecessary to dwell longer upon it.

In summarizing the claims of the company, it is said that it is entitled as follows:

Sixth. In case we are limited, as to both place and indemnity, to lands opposite constructed road, then to a recertification of the terminal line so that the same shall be run at right angles to the first twenty mile section of the located land.

There is no map among the papers before me showing the terminal line determined upon in your office. It seems, from your report, that the constructed line of road deviated, to some extent, towards the eastern end thereof, from the line fixed by the map of definite location, but to what extent, I am not able to determine. The only manner in which it may be ascertained what lands lie opposite the constructed portion of the road is by drawing a line through the terminal point of construction. The line of constructed road here furnishes the measure for the grant and the basis for the determination of the terminal lines, which lines must be drawn at right angles to the basis, thus provided, for the adjustment of the grant. Michigan Land and Iron Co. (12 L. D., 214); Gulf and Ship Island R. R. Co. (12 L. D., 269).

The terminal lines adopted by your office were, as I understand, fixed in accordance with this rule, but if they were not, such a change therein as may be necessary to make them accord therewith should be made. The plan of adjustment presented by you is, as I understand it, in accord with the conclusions reached herein.

The only question left to be considered is as to what lands are to be taken as indemnity and the mode of their selection, which question was not considered in your office, but which is presented and discussed at length on the part of the company. The quantity of lands to which the company is entitled as indemnity is, of course, to be determined by the amount which shall be found to have been lost from the place or granted lands. It is claimed by the company that the forfeiture of the

grant pertaining to the Marquette, Houghton and Ontonagon road left the land in the indemnity belt of the grant for the Ontonagon and Brule River road entirely free from any question ever presented by any conflict between the two roads. This proposition is, in my opinion, a sound one, especially in view of the fact that the action of the State, through its government, in relinquishing and reconveying to the United States all its claim to lands in that portion of the grant pertaining to the Marquette, Houghton and Ontonagon road, disposed of all questions that could possibly have arisen as to the effect of the forfeiture act to re-invest the United States with the title to said lands. They would therefore seem to be subject to selection by the Ontonagon and Brule River Company as indemnity, were it not for the provision contained in section 4 of the forfeiture act

that no lands declared forfeited to the United States by this act shall inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided for.

Prior to the forfeiture, these lands, being within the primary limits of the grant for the Marquette, Houghton and Ontonagon Railroad, and not excepted from such grant, could not have been selected by the Brule Company as indemnity, and if such selection is now permitted, it must be by reason of the forfeiture act.

This is specially provided against by Congress, the evident purpose being to forever remove from railroad claim and restore to the public domain, free and unincumbered, all lands forfeited by said act. To hold that these lands are available to the Brule Company under the forfeiture act, would be to hold, in effect, that said act is a new grant.

It has been urged that the expression, or limitation, "except as herein otherwise provided for," referred especially to these lands, and was intended to remove them from the provisions of the 4th section, so that they might be taken by the Brule Company as indemnity.

In the first place, I am unable to find any other language in the act to harmonize with this construction, and to accept such construction, the 4th section referred to must be held to create the right, and also to except it from the plain provisions against such right. I might also state that, unless this provision in the 4th section of the act was intended to *bar* any claim to these lands as indemnity, I am at a loss to understand to what lands it referred; hence, under the construction contended for by the company, provision was made against the right of selecting forfeited lands as indemnity, and by the exception the bar was removed, a *reductio ad absurdum*.

I have already held that the granted lands opposite an unconstructed road can not be taken by that road, and it would be unreasonable to suppose that Congress provided against the company in whose granted limits they were, and yet permitted another road to take the same lands as indemnity. I am therefore of the opinion that no lands within the primary, or granted, limits of any of the grants made by the act of June

3, 1856 (*supra*), to the State of Michigan, and opposite unconstructed road, can be selected as indemnity on account of the constructed portion of said roads.

The further claim of the company as to indemnity land may be gathered from the following quotation from a brief filed herein, viz:

So far as this indemnity, to make up the quantity earned by location and construction over and above the quantity found in place, is concerned, there is no restriction whatever to lands opposite constructed road. But the entire body selected must be so taken in compact form that no tract therein shall be farther from the constructed road than any other vacant tract *subject to selection*.

To adopt this rule would be to say that this company may take indemnity along the whole line of the road as originally located, even to the Wisconsin line, if enough free land subject to selection be not found nearer the completed portion of the road. This construction is, it is claimed, justified by the words of the act requiring that selections shall be made "from the public lands within such indemnity limits lying nearest to such constructed road," and that by the adoption of the mode of selection suggested the forfeiture would "both in letter and spirit be literally complied with."

It is urged on the other hand that the construction contended for by the company is forced and untenable, that the moment the lands within the six miles limits were forfeited, "that moment the adjacent indemnity limits were obliterated," that the effect of the provision regarding indemnity is to require the company to first take the tier of odd numbered sections adjacent to the unforfeited granted limits and then the next tier, and so on until its quota is filled, or the unappropriated lands in those limits are exhausted, that the acts of 1856 and 1889 must be read together, and when so read, it must be concluded that sixty miles of the grant made by the earlier act were wiped out by the later act, which, in effect, fixed a new terminus for the grant at the end of constructed road.

There is no doubt but that this act of forfeiture should be read and construed in connection with the granting act. The original granting act allowed indemnity to be selected, in alternate sections, from the lands of the United States, *nearest* to the tiers of sections granted, and to construe the language just referred to in the forfeiture act to have the same meaning, would be, in effect, to nullify the latter expression—i. e., that found in the forfeiture act. As the two acts are to be construed as in *pari materia*, there can be no question but that the restrictive conditions found in the original act, relative to the selection of indemnity lands, would have applied after the forfeiture act, unless there was something expressed in the forfeiture act repugnant to, or inconsistent with the enforcement of such conditions.

I find nothing of the sort, and am therefore of the opinion that the language referred to in the forfeiture act was intended for the purpose claimed by the company, and not as a legislative declaration of what

the original act clearly required. I can find nothing inconsistent with this position in the holding that, after the forfeiture, the grant assumed a new terminus, for such holding affects merely the measure of the grant, the quantity earned by construction.

It has been urged that when the granted limits were obliterated, the indemnity limits were also wiped out. With this I agree, and had it not have been for this special provision, as to the indemnity right, i. e., had there been no legislative declaration on the subject, I should have held that the indemnity privilege is restricted to limits coterminous with *granted* limits, and the *whole* with constructed road.

Congress might have restricted the company to lands coterminous with constructed road, within both granted and indemnity limits, and yet it was within its power to permit the privilege of selection to extend beyond such construction.

This opinion is in harmony with my holding in the matter of the application of the forfeiture declared by the act of September 29, 1890 (*supra*), to the grant for the Gulf and Ship Island Railroad Company (12 L. D., 269). In that case the indemnity privilege was restricted to lands "nearest to and *opposite*" to that part of the line of the road which may be constructed at the date of selection. In the present case, the absence of the word "*opposite*" is particularly significant.

It is my opinion that the exception before referred to, in the first provision of the 4th section of the forfeiture act (discussed just prior hereto), had reference to this right, granted by the second section, to select indemnity lands within the indemnity limits opposite unconstructed road.

By the first section of the forfeiture act, the government resumed title to *all* lands opposite to and coterminous with the unconstructed portion of this road. The second section permitted the company to go beyond constructed road, within the indemnity limits of the original grant, to make up deficiencies opposite constructed road. The fourth section provided against any of the forfeited lands inuring under any grant to a State or corporation, except as provided for in the second section.

It is believed that all questions that will arise in the adjustment of this company's grant have been considered herein. You will proceed, at your earliest convenience, to adjust said grant in accordance with the views herein set forth.

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PRACTICE—APPEAL—CERTIORARI.

FRARY *v.* FRARY ET AL.

A decision denying an application for a hearing is final in its character, and the right of appeal therefrom is not dependent upon an express declaration in said decision that such right will be recognized.

The writ of certiorari will not be granted where the right to be heard on appeal is lost through the laches of the applicant.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
November 2, 1891.*

This petition is filed by the Edinburg American Investment Company of Edinburg, Scotland, complaining of the action of your office in refusing to transmit to the Department, the record in the above stated case, with their appeal filed, January 22, 1891, and praying that an order may issue directing that the record in said case be certified to the Department.

From the petition and exhibits filed therewith, it appears that Mark Frary made homestead entry of the SE.  $\frac{1}{4}$ , section 4, T. 115 N., R. 55 W., Watertown, South Dakota, November 11, 1882, and received final certificate for the same, October 9, 1884.

On April 3, 1888, a hearing was ordered by your office upon the contest filed against said entry by Geo. W. Frary, a brother of claimant.

On the trial of said contest, the local officers recommended the cancellation of the entry, and forwarded the papers to your office. While the case was pending before you the Edinburg American Investment Company, filed a motion asking to be allowed to intervene in said case, alleging that Mark Frary, on December 12, 1884, executed a mortgage to said company, to secure a loan made for the purpose of enabling him to prove up on said land, and that said company had no knowledge of the contest. It also alleged that the contest was brought collusively for the purpose of attempting to defraud the mortgagee, and asked an opportunity to prove compliance with the law by the homestead claimant.

On September 25, 1890, you approved the action of the local officers; canceled the entry and denied the application of the company for a hearing, upon the ground that there was nothing in their application that could be urged as a basis therefor.

Two days after the rendering of said decision, the attorneys for the mortgagees addressed a communication to you stating that,

On September 25, 1890, your office refused the hearing without giving us our right of appeal, and summarily canceled the entry.

We beg to submit to you that the property rights of citizens cannot be thus arbitrarily disposed of. The hearing should have been allowed, and certainly our right to take the case to the Secretary by appeal or on certiorari cannot be denied.

We respectfully request that the letter to the register and receiver of September 25, be recalled, and that the order of cancellation be suspended pending a review of said decision or the final determination of the case on appeal to the Secretary of the Interior.

On January 5, 1891, you replied to this communication, stating that if a notice for reconsideration of the decision of September 25, 1890, had been filed in time and served upon the opposite party, it would have had the effect of staying proceedings pending its consideration, which counsel had not done, but merely asked that the order of cancellation be suspended, pending a review of the decision or final determination

of the case, that, if the mortgagee was "entitled to the right of appeal, (which has not been formally determined) you can lose nothing by a denial thereof, by this office, since you can obtain relief on certiorari, as you could have done on appeal, if it had been allowed".

On January 22, 1891, the mortgagees filed an appeal from your decision of September 25, 1890, which you on May 23, 1891, declined to transmit, for the reason that the time had expired before the appeal was filed, and said mortgagees had therefore no right of appeal.

The facts set forth in this petition, fail to show any error in your action in refusing to transmit the appeal.

The decision of September 25, 1890, was a final disposition of the application for a hearing, and the right of appeal, was not dependent upon an express declaration of your office to that effect. There was no necessity for notifying the mortgagee that it had the right of appeal and the failure to so notify the company, cannot be construed to be a denial of that right. The right commenced from the date of service of notice of the decision, and the company was bound to file its appeal within the time prescribed by the rules.

The letter of counsel for the company of September 27, 1890, requesting that the cancellation of the entry be suspended pending a review of the decision, or the final determination of the same on appeal had no effect to stop the running of the limitation of time within which the company was bound to move for a review of the decision before you, or to appeal to the Department.

The rules of practice had the effect to suspend the execution of your decision for that period and hence there was no necessity to take any action upon said letter. Nor was your letter of January 5, 1891, intended as a decision of any matter or question arising in the case.

No motion for review was filed in this case, and no appeal was filed, until nearly four months after the rendering of the decision complained of. It was too late and you committed no error in refusing to transmit it.

Whatever rights the petitioner might have had, have been barred by its own laches in not pursuing the remedies pointed out by the rules, within the time required.

The motion is denied.

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#### SETTLEMENT RIGHTS—PRE-EMPTION DECLARATORY STATEMENT.

##### SHEARER *v.* RHONE.

The erection of a "claim stake" with the description thereon of the land claimed is not such act of settlement in itself as will authorize the filing of a pre-emption declaratory statement.

A filing made prior to settlement is cured by subsequent settlement in the absence of any intervening right.

The notice given by settlement and improvement extends only to the technical quarter section on which they are located.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 2, 1891.*

I have considered the case of *Elbert W. Shearer v. John A. Rhone*, on appeal by the former from your decision of April 2, 1890, dismissing his protest against the final proof of the latter, and accepting the proof for S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , Sec. 8, and NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , Sec. 17, T. 9 S., R. 97 W., 6 P. M., Gunnison Colorado, land district.

On December 28, 1886, Rhone filed his declaratory statement for this land and the NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec. 18, and on March 29, 1887, Shearer filed for the SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of said section 8, and NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , Sec. 17, same township and range.

On October 6, 1887, Rhone gave notice of his intention to offer final proof on November 12, following, and Shearer, who was specially notified, appeared and protested against the same, alleging that Rhone had not complied with the pre-emption laws in the matter of settlement, residence, etc. A hearing was had and upon the testimony taken the local officers found in favor of the protestant and rejected the final proof of Rhone for the tracts in conflict, from which he appealed, and you, upon consideration of the case, reversed said ruling and accepted said proof.

The testimony is quite voluminous and much of it irrelevant, but it shows that Rhone was an unmarried man who went to Colorado to work for "The Rhone Creek Toll Road" company, of which his brother was president. This road was some forty miles in length and passed through section 18, and touched the land in controversy. He superintended the construction of the road, at a salary of \$50 per month and board.

On December 17, 1886, he went on the land and put up a "settlement or claim stake" at the NE. corner of section 18, and posted on it a notice of the land he claimed, and employed one Atkinson and a colored man to do some work on the land. They hauled some fence posts and piled them up near this stake, afterward they hauled some logs for a house to be built on the west side of the NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of 18. Early in January following they hauled some posts and laid them along the line between sections 18 and 17, and between 7 and 8, and sometime in February some posts were taken to the line on the north side of the SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 8. In the latter part of December he had his men begin to build a house on the NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of section 18; it was completed early in January, and on the 8th day of January he took his blankets and slept over night in the house. He had a cottonwood bunk put up in it. The next day he took his blanket and went away. He says he commenced the foundation of a house about December 22, but he considers what his hired men did was done by himself.

Dr. De Beque, who is his main witness, does not remember of seeing him there "personally" but says he was having the work done, and

Rhone in fact does not appear to have made any settlement, except by other persons, aside from putting up his "claim stake," until January 8, and then he only went there to sleep and go away, again; he lived in a tent on the toll road.

Shearer, sometime in the fall of 1886, employed George Carlon, his nephew and one Hackaboy to locate some land for him and build him a house. He could not then leave his home. They located, (as far as one can locate for another) on the W.  $\frac{1}{2}$  and SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of section 8, and NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of Sec. 17, and built a house on the NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 8. This house was partially completed and they were working on it when Rhone put up his "claim stake." Carlon gave it out that he was taking the land for himself but this was evidently to prevent others from entering until his uncle could get there.

Shearer had sent a tent and some household goods to the land and on December 28, he arrived there and on the 9th he pitched the tent on section 8, and began living there, helping to finish his house, and on the 1st of January he moved into it. His wife's health was such, and their baby was so young on January 1st, that she and it could not be taken to this house, but Shearer lived on the land improving it until sometime in March when his wife came, and they have continued to reside there. He dug a well, made a cellar under his house, put up two corrals and in the spring did some breaking.

It appears that this land is arid and required irrigation. Rhone had purchased of one Achison, for \$15, his interest in a ditch claim, which he and one Dr. De Beque had surveyed, together with such claim as Achison had on the land in section 18. This ditch when constructed would carry water to the NE.  $\frac{1}{4}$  of 18, and the NW.  $\frac{1}{4}$  of 17, and Rhone says he could get water onto the SW.  $\frac{1}{4}$  of 8, from it, but there had been only about a half a day's work done on the ditch.

Shearer had secured an interest in another ditch to carry water to section 8, and he says he had expended in labor and money about \$130 upon it.

In the spring of 1887, Rhone had a small parcel cleared along the river in section 17, and planted a small patch of potatoes and he and his hired man put up some posts and wired poles to them, and put some brush in other places. These were placed across the paths where the cattle were in the habit of going to the river, but they went over the land and destroyed his potatoes. He also sowed some turnip seed on a small patch of ground near this point. This was the extent of his cultivation. Shearer being unable to secure water in time for a crop in 1887, rented land that was irrigated and cropped it but he lived on his land during the time.

All the improvements of Shearer were confined to section 8, and those of Rhone were confined to sections 18 and 17, and it does not appear that Shearer knew in fact that Rhone claimed any land in section 8, although he had a filing of record, until the latter part of February

when he came to survey the land and included the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of this section.

In case of *Thompson v. Jacobson* (2 L. D., 620), it was said:

The erection of a board with a statement of his claim was not an act of settlement, but indicative merely of a future intent to settle on and claim the tract. This does not satisfy the requirements of the pre-emption law, that actual settlement must precede a filing in order to the validity of the filing,

and it was held that the filing being made prior to settlement was invalid and did not operate to exhaust his pre-emption right. "The filing was inoperative for all purposes."

A full consideration of all the testimony in the case at bar shows that Rhone's filing was made prior to his settlement. That afterwards he made settlement upon the NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of section 18, and also upon the NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of section 17, and this was made before the filing of Shearer and before he had made any pretence of settlement on section 17. The settlement subsequent to the filing, there being no intervening rights, cured the defect as to these two tracts. See *Brassfield v. Eshom* (6 L. D., 722).

The rights of each party as against the other, were simply settlement rights, as Rhone had filed prior to actual settlement and Shearer did not file upon any land until March 29, 1887, at which time Rhone had cured the defect in his filing as to the tracts in 17 and 18.

In *Pooler v. Johnston* (13 L. D., 134), it was held that notice given by settlement and improvement extends only to the technical quarter section upon which they are located.

The act of settlement consists of some substantial and visible improvement having the character of permanency, with intent to appropriate the land under the law. See *United States v. Atterbery et al.* (8 L. D., 173).

Applying these rules to both parties, we find Rhone made his filing on the tracts in 17 and 18 good by settlement, before Shearer filed for NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of 17, as his settlement was confined to section 8, and as Rhone did not settle on section 8, except by a "claim stake" at SW. corner, until after Shearer had settled, and in fact then only by having a hired man lay a few fence posts along the line, which can not be called a settlement, the rights of the parties are readily determined, and giving each credit for good faith and honesty in his intentions, we must decide the case upon what each did in compliance with law.

The final proof of Rhone will therefore be accepted for NE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of 18 and NW.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  of 17, and rejected as to S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of section eight.

Your decision will be modified accordingly.

SOLDIERS ADDITIONAL HOMESTEAD—SECTION 7, ACT OF MARCH 3,  
1891.

MEE v. HUGHART.

A soldiers' homestead entry, made under a power of attorney, on a certificate of additional right, is a nullity if at the time of such entry the soldier is not living. An entry that is a nullity under the law as it existed prior to the act of March 3, 1891, is not susceptible of confirmation under the proviso to section 7, of said act.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 2, 1891.*

On July 15, 1889, soldier's additional entry (No. 1437), for the S  $\frac{1}{2}$  of NE  $\frac{1}{4}$  and NE  $\frac{1}{4}$  of SE  $\frac{1}{4}$ , Sec 35, Tp. 63 N., R. 13 W., was made at the Duluth land office, Minnesota, in the name of Simeon W. T. Hughart.

His right to an additional homestead entry of not exceeding one hundred and twenty acres, as provided in section 2306 of the Revised Statutes, had been certified on August 28, 1880, by the Commissioner of the General Land Office, pursuant to the instructions contained in the circular of May 17, 1877 (1 C. L. L., 478).

On March 11, 1880, Hughart had subscribed and made oath to an affidavit for an additional homestead, and special affidavit as to military service before A. W. Kimball, clerk of the district court for Mower county, Minnesota, and the latter affidavit was duly corroborated by that of two other persons on the same date. Upon these affidavits the said entry was allowed in Hughart's name, at the local office on July 15, 1889, or more than nine years after the date of said affidavits.

On April 18, 1890, Edward W. Mee filed in the local office his contest affidavit alleging, among other things "upon information of a most positive character,"

That the entry of Hughart was invalid, void, and of no effect, for the reason that at the date thereof, and for a long time prior thereto, said Hughart was dead, and that the entry made in his name was therefore, without authority of law.

This affidavit was corroborated by that of two other persons, made upon information and belief.

These affidavits were transmitted to you by the local officers, by their letter of April 18, 1890.

On May 24, 1890, said Mee filed in the local office the certificate dated May 10, 1890, of the clerk of the district court of Freeborn county, Minnesota, that Simeon W. T. Hughart died December 28, 1887, at the age of 51 years, as appeared on record on Register of Deaths, in Book B, page 14, in the office of said clerk.

This certificate was accompanied by the affidavit dated May 9, 1890, of A. C. Wedge, M. D., that he was a regular physician in good standing and had been in regular practice in the city of Albert Lea, in said

Freeborn county, for several years, and that during the month of December, 1887, he attended said Hughart professionally for paralysis, and that after an illness of two or three days, the said Hughart died at said Albert Lea, on December 28, 1887, leaving a widow, who afterwards married, and one minor child, Ova L. Hughart. Said certificate and affidavit were transmitted by the local officers to you by their letter of June 4, 1890, and were sufficient to overcome the presumption, "that a person once shown to be in life is presumed thus to continue until the contrary be shown."

In the decision contained in your office letter of June 30, 1890, you denied the application to contest, holding that—

The allegation in this case, that the soldier was dead before the entry was made would not affect the status of the entry, as the right to make the same was certified to prior to February 13, 1883. Lars Winqvist (4 L. D., 323).

An appeal has been taken to this Department.

Inasmuch as the certificate of the Commissioner referred to, only certified that Hughart was entitled to an additional homestead entry on August 28, 1880, it is difficult to see how that certificate can be so construed as to authorize such an entry after the death of Hughart, which occurred more than seven years thereafter.

The right to such additional entry was conferred by the statute, (Sec. 2306, Revised Statutes), and the certificate was only evidence of that right so conferred, purporting in express terms to be based upon said statutory provision, and speaking only as of the date when it was issued. 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 section 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, subject to all the provisions as to settlement and improvements therein contained.

This provision settles the question that if Hughart was dead, when the entry was made in his name, his death did affect the status of such entry. At that date an entry could only have been made by Hughart's minor child, by a duly appointed guardian, in order to secure the benefit conferred by the statute. An entry made in the name of a dead man is a nullity.

In said contest affidavit it is alleged—

That said entry was made by one Louis Stegmiller, acting as substitute for one A. H. Tuttle, assuming to act as the attorney in fact of said Hughart, under authority and by virtue of a power of attorney from said Hughart, executed on the 7th day of September, 1880.

If Hughart was in life at the date of said entry, it might be held valid under the third paragraph of the circular of May 17, 1877 (1 C. L. L., 478), which authorized "entries to be made by the agents or attorneys of the party originally entitled to the entry," provided the claim

was certified to, as in this case. But in the case of *Galt v. Galloway*, 4 Pet. 332, 344, it was held that—

No principle is better settled than that the powers of an agent cease on the death of his principal. If an act of agency be done subsequent to the decease of the principal, though his death be unknown to the agent, the act is void. See also *Story on Agency*, Par. 488.

The case of *Lars Wingvist* (4 L. D., 323), cited in your opinion, is in entire harmony with the foregoing views. It is held that

The right of additional homestead given to the soldier can only be exercised 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. Hence, as this life and condition of life must exist to enable the party applying for the right to acquire it, I can see no violation of any rule of law requiring proof of it.

And it was decided that the certificate in that case should contain the additional words, "if shown to be still living at date of application to enter in his name," but that this decision did not apply to cases where the additional right had been certified to prior to February 13, 1883. The point decided related to the language of the certificate.

As this entry was made July 15, 1889, there has now been "the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry," and it may be contended that the entryman is entitled to a patent under the proviso contained in the 7th section of the act of March 3, 1891 (26 Stat., 1095).

There is "no pending contest or protest against the validity of such entry," regularly initiated, according to the construction put upon this provision by this Department. *Henry C. Nelson* (13 L. D., 458). The application to contest has as yet been denied, and "after the lapse of two years, the government can not begin proceedings to set aside the action of the register and receiver in allowing an entry." *Instructions* (13 L. D., 1).

It is also said in these "instructions," that it was not the intention of the act "to confirm entries made without authority of law and which could not have been allowed under the law as it existed at the passage of the act of 1891."

The question then arises, is this an entry that could have been allowed under the law, at the date when it was in fact allowed? Was it such an entry as the law recognized? If not it is not confirmed by said seventh section. The answer to this question has already been given. The entry was a nullity, and was as if no such entry had ever been made, if at that time the entryman was dead. It was an entry in name and upon the books of the local office, but not in fact or in law. If the entry was made by the agent or attorney of *Hughart*, as alleged, his death revoked the agency.

The doctrine seems to be a natural deduction or presumption of the actual intention of the parties. But it has this additional reason to support it, that, as the act must, if done at all, be done in the name of the principal, it is impossible, that it can properly be done, since a dead man can do no act; and we have already seen that

every authority, executed for another person pre-supposes that the party could, at the time, by his personal execution of it, have made the act valid. (Story on Agency par. 488.)

This question is fully discussed in the case of *Hunt v. Roumanier's Admrs.*, 8 Wheat, 174, by Chief Justice Marshall, who says, *inter alia*, "We think it well-settled that a power of attorney, though irrevocable, during the life of the party, becomes extinct by his death."

Congress did not intend by said 7th section, to repeal section 2307, of the Revised Statutes, which gives to Hugharts minor child, upon his death, the benefit given to him, when not realized by him during his life.

The entry, if made after Hughart's death, was not an entry, as that term is used in said seventh section, and was not confirmed or affected thereby.

I am of the opinion that the application to contest the entry in this case, on account of the alleged prior death of the entryman, should have been granted, and if upon investigation it should be proved that the said entry made in the name of Hughart, was in fact made after his death, the same should be canceled as null and void.

Your judgment is accordingly reversed.

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NOTICE OF CANCELLATION—PREFERENCE RIGHT.

WILLIAMS *v.* DORRIS.

An application to purchase under section 2, act of June 15, 1880, made after the initiation of a contest against the original entry, should be suspended until final disposition of the contest.

A notice issued by the register of the local office informing the contestant of the successful termination of the contest, but at the same time stating that the entry would not be canceled by said office on account of the entryman having purchased the land under the act of June 15, 1880, is not the notice of cancellation required by section 2, act of May 14, 1880, and the failure of the contestant to make application to enter within thirty days thereafter will not defeat his preference right.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 2, 1891.*

On November 21, 1876, William A. Dorris made homestead entry upon the NE.  $\frac{1}{4}$  of Sec. 24, T. 16, R. 2 E., San Francisco, California.

On the contest of Samuel A. Williams, your office, on July 30, 1883, held the entry for cancellation, and, on appeal, the Department on May 27, 1884, affirmed that judgment, the grounds therefor being, that Dorris never established a new residence on the homestead tract, and that neither this pretended residence on or slight cultivation of the latter tract were in such good faith as entitles his homestead entry to affirmation.

On June 3, 1884, your office canceled the entry, and on the same day instructed the local officers to note the cancellation upon their records,

and notify the parties in interest. These instructions, accompanied by a copy of the departmental decision, reached the local office on June 11th of the same year, but, four days prior to the receipt thereof and on June 7th, Dorris was permitted to purchase the land under the 2d section of the act of June 15, 1880 (21 Stat., 237).

It appears that plaintiff's attorney had requested the register of the local office to inform him promptly of the departmental decision, in order that his client might make timely application to enter the land. On June 14, 1884, the register informed the attorney that instructions had been received to cancel the entry, but saying "we declined and still do decline to cancel the homestead," because Dorris had paid for the land, as above set forth.

On July 24, 1884, Williams filed his appeal from this action, which was transmitted to your office, November 4, 1887.

By your letter "H" of September 27, 1888, you directed the suspension of Dorris' cash entry, pending Williams' application to enter the land, and instructed the local officers to note the cancellation of Dorris' homestead entry on their records as of June 3, 1884.

On March 8, 1889, Williams made homestead entry of the land, and, on April 8th thereafter, Dorris filed his appeal from the action of the local officers allowing the same, and on the 19th of the same month his attorney filed a motion for the cancellation of Williams' homestead entry.

On May 22, 1890, you decided that Williams' entry "should be confirmed and the defendant's held for cancellation for conflict therewith." From that judgment Dorris again appeals, and assigns the following grounds of error:

1. In not holding that the cash entry of Dorris (No. 10,136, made June 7, 1884, under the 2d section of the act of June 15, 1880,) was, under the rulings then in force, a legal appropriation of the land and defeated the preference right claimed by Williams under the act of May 14, 1880.

2. In holding that after receiving information from the register that the Commissioner had canceled Dorris' entry, Williams was not required to tender his application within thirty days, and to appeal in case the register refused the same, in order to preserve his right.

3. In refusing to cancel the homestead entry of Williams.

4. Because said decision is in other respects contrary to the facts and law.

It is well settled in this Department, since the decision was rendered in the case of *Freise v. Hobson* (4 L. D., 580), that an application to purchase under the 2d section of the act of June 15, 1880 (*supra*), made after the initiation of a contest against the original entry, should be suspended until the final disposition of the contest. *Roberts v. Mahl*, 6 L. D., 446; *Arnold v. Hildreth*, 7 L. D., 500; *Jones v. De Haan*, 11 L. D., 261.

The controlling question in this case is, whether the contestant was

notified of the cancellation of the entry in the method designated by the second section of the act of May 14, 1880 (21 Stat., 140). That section gives thirty days from the date of such notice in which the successful contestant may make entry of the land, and it is insisted that the contestant failed to make his application to enter within the prescribed limit. Nearly five years elapsed between the date of the departmental decision directing the cancellation of the entry and the date of contestant's application to enter the land. This time was consumed in the proceedings incident to the appeal of the contestant from the action of the local officers in allowing the homestead entryman to make cash entry, as above set forth. The contestant was promptly informed of the action of the Department directing the cancellation of the entry; but he was also informed at the same time that the homestead entry would not be canceled, because the entryman had paid for the land.

While this condition existed, it was useless for the contestant to make an application, only to have it refused. He was informed in advance by the very officers, having jurisdiction to accept or reject his application, that they "declined and still do decline" to cancel the homestead entry.

The 2d section of the act of May 14, 1880 (*supra*), provides that:

In all cases where any person has contested, paid the land office fees, and procured the cancellation of any pre-emption, homestead, or timber-culture entry, he shall be notified by the register of the land office . . . . of such cancellation.

The contestant was notified of the judgment of cancellation, but, in place also of being advised, as he should have been, that the entry was duly canceled in pursuance of the judgment and that he would have thirty days to make entry of the land, he was told that his rights as a successful contestant had been defeated by the defendant's cash entry, and that the homestead entry would not be canceled. The notice, which he did receive, was not a notice of cancellation, and he was therefore not in laches in failing to apply and make entry within the thirty days from its receipt.

After a careful consideration of the whole record, I find no sufficient grounds for disturbing the judgment appealed from, and the same is affirmed.

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

WEYHER v. SMITH.

A certificate by an officer that a certain instrument is recorded in his office, unaccompanied by a copy of said instrument, is not the best evidence of the terms and conditions of said instrument, and cannot be considered as legal evidence upon which final action may be taken.

Where a pending contest fails for the want of sufficient evidence to establish the alleged invalidity of the entry, and more than two years have elapsed since the allowance of said entry, it is confirmed by the proviso to section 7, act of March 3, 1891.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 2, 1891.*

I have considered the case of William H. Weyher *v.* Benjamin F. Smith, upon the appeal of the latter from your decision holding for cancellation his pre-emption cash entry for lots 1 and 2, Sec. 24, T. 24 S., R. 33 W., Garden City land district, Kansas.

From the record in the case, I learn that Smith, having prior to the 10th day of December, 1885, complied with the requirements of the pre-emption law, on that day purchased from the register at the land office in Garden City, the land above described, paying therefor the sum of two dollars and fifty cents per acre, and received from him a final certificate, and from the receiver, a receipt in full.

On the 15th of February, 1887, Wayher filed affidavit of contest, alleging that said entry was fraudulent as Smith at that time was the owner and proprietor of more than three hundred and twenty acres of land in the State of Kansas and United States of America.

The hearing which followed resulted in a decision by the register and receiver, holding that the entry was illegal and should be canceled, and upon appeal to your office that decision was affirmed on the 17th of March, 1890. An appeal from your judgment brings the case to this Department.

In his pre-emption affidavit, made on the 12th of October, 1885, which forms part of his pre-emption proof, Smith swears that he has never had the benefit of any right under section 2259 of the Revised Statutes of the United States, and that he was not the owner of three hundred and twenty acres of land in any State or Territory of the United States, together with other statements required to be made.

At the trial, certain certificates were offered and received in evidence, notwithstanding the objections and exceptions of the counsel for Smith, which are attached to the record as exhibits in the case. The first of these certificates is signed by John J. Munger, register of deeds of Finney county, Kansas, and is marked exhibit "A," and reads as follows:

I, John J. Munger, register of deeds of Finney county, in the state of Kansas, certify that there is on record in my office a final receipt granted to Benjamin F. Smith by United States land office under the signature of A. J. Hoisington as receiver, dated at Garden City, Kas., Nov. 28th 1884, and was filed for record on Dec. 15th 1886, and calls for the SW.  $\frac{1}{4}$ -10-24 S., 33 W., containing one hundred and sixty acres, and that the records of my office show that no transfer has ever been made from said Benjamin F. Smith to any person by deed, mortgage or any other instrument of writing showing a transfer of title on this above described property, and that said Benjamin F. Smith has been since its date and is at this present date the sole owner of said premises, as shown by the records of this office. In testimony whereof I have hereto set my hand this June 20th, 1887.

A. H. Burtis, clerk of Finney county, makes a certificate which is marked exhibit "B", and which is as follows:

Our books show N. C. Jones purchased lots 1, 2, 3 and 4 in Sec. 16-24-33, containing 174 50-100 acres, for a total sum of \$523.50. This purchase of school land shows of record to have been made by the said N. C. Jones on Oct. 29th, A. D., 1881, was

assigned to Benjamin F. Smith on the 22d day of July, A. D., 1882. The appraised valuation of the above described land was the same as the purchase price (\$3.00) per acre. I certify the above to be a correct statement according to the records of my office. This June 20th, A. D., 1887.

Exhibit "C" was a statement from the treasurer of Finney county, that Smith had paid the taxes on certain lands in that county for the year 1886. In addition, there was set forth as exhibit "F" what purported to be a copy of an agreement between the Atchison, Topeka and Santa Fe Railroad Company and Smith for the sale by the company and the purchase by Smith of certain lands belonging to that company. The correctness of this agreement is certified to by a notary public of that county, who does not seem to have any official connection with the company or with any public office.

The counsel for Smith objected to all these exhibits, and protested against their being made a part of the record, and being considered by the register and receiver in making up their judgment, for the reason that they were not the best evidence in the case, and did not have even the force and effect of *ex parte* affidavits, and that title to land could not be proved in that way and by such evidence. Aside from these exhibits, the plaintiff submitted but little evidence, and when he rested the defendant's attorney moved to "dismiss the case for the reason that plaintiff has utterly failed to prove his allegation, and has nowhere shown that defendant was not qualified to make this cash entry on the 10th of December, 1885." The motion was overruled, and the defendant excepted.

In the case of Mark L. Campbell (4 L. D., 228) it was held that "*ex parte* affidavits cannot be considered as legal evidence, upon which final action may be taken." The best evidence to establish title to land is the deed of conveyance; next comes the record of such deed, and following that an authenticated copy of the record. A certificate by an officer that a certain instrument is recorded in his office, but does not give a copy of the instrument, is not the best evidence of the terms and conditions of such instrument, and is not a proper basis for a judgment in a case, and as was said in the decision cited, "cannot be considered as legal evidence upon which final action may be taken."

In the case of the St. Paul, Minneapolis and Manitoba Railroad Company v. Morrison (4 L. D., 509) it was said:

It is a general and well established rule governing in the production of evidence, that the best evidence of which the case in its nature is susceptible must be produced. Under this general rule it is held that "A title by deed must be proved by the production of the deed itself, if it is within the power of the party; for this is the best evidence of which the case is susceptible; and its non-production would raise a presumption that it contained some matter of apparent defeasance." (1 Greenleaf's Evidence, Sec. 32.) This would also be termed *primary* evidence; the general rule in relation to which is that "Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is, in general, admitted," (ib., 34); Ord v. McKee (5 Cal., 515).

The same case states the rule applicable to certificates given by persons in official stations as follows:

And in regard to certificates given by persons in official station, the general rule is: A certificate that a certain fact appears of record is not sufficient. The officer must certify a transcript of the entire record relating to the matter. That is, "if the person was bound to record the fact, then the proper evidence is a copy of the record duly authenticated." (Greenleaf, Secs. 435-493-513.)

Applying these rules to the case at bar, it is apparent that the plaintiff did not establish his case by the best evidence which could be produced, and that the defendant's objection to the introduction of the certificates and exhibits which go to make up the plaintiff's case was well taken, and that his motion to dismiss should not have been overruled.

Without the certificates, the plaintiff did not establish the allegations of his affidavit of contest. His witness, Holmes, testified that the railroad company gave possession of the land to persons with whom they had contracts, and required such persons to pay the taxes, but the *title* to the land remained in the company until the terms of the contract were complied with. The witness, Haues, who described himself as an abstract agent, testified as to the number of acres contained in the several tracts described in the certificates marked as exhibits in the case, and had it been established that Smith was the owner and proprietor of those lands, his testimony would have been important in showing that they aggregated more than three hundred and twenty acres.

According to the testimony of Smith, at the time he made final proof for the land in question he held a final certificate for a homestead of one hundred and sixty acres, and had an inceptive right to certain railroad and school lands, but whether he would ever become the owner of such lands depended upon future acts to be performed by him.

The plaintiff established no facts in the case which would render secondary evidence competent in support of the allegations of his affidavit of contest, and having failed to establish those allegations by "the best evidence of which the case in its nature was susceptible," his contest should have been and hereby is dismissed.

While the evidence produced upon the trial did not enable Weyher to succeed in his contest, facts sufficient were brought out to have warranted the government in instituting an investigation to ascertain whether or not a fraud had been perpetrated against it, had not the proviso to section seven of the act entitled "An act to repeal timber-culture laws and for other purposes," approved March 3, 1891 (26 Stat., 1095), established the right of Smith to a patent conveying to him the land by him entered, more than two years having elapsed since the date of the issuance to him of the receiver's receipt upon the final entry. It follows, therefore, that the entry is confirmed by the proviso cited, and that the decision appealed from must be and hereby is reversed.

## SPECULATIVE CONTEST—PREFERENCE RIGHT OF ENTRY.

BUTMAN *v.* BARRISTER.

A contestant who is in possession of a relinquishment, but for purposes of delay and speculation brings a contest against the relinquished entry on the ground of relinquishment and abandonment, and subsequently files said relinquishment, acquires no preference right on the cancellation of the entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 2, 1891.*

On October 10, 1885, E. H. Percy made homestead entry of the SE  $\frac{1}{4}$  of Sec. 18, T. 9 N., R. 40 W., North Platte, Nebraska.

On December 17, 1886, Asa Butman filed his affidavit of contest against the entry, alleging that Percy "has wholly abandoned said tract; that he has relinquished said land to the United States government, and that he has not improved said land and has not resided upon the same."

On June 6, 1887, he filed the entryman's relinquishment, and on same day the entry was canceled and the contest was dismissed, and he was notified that he would have his preference right of entry for thirty days.

On March 9, 1887, Erastus Barrister with his family settled on the land, and on the 22d day of June of that year, he made homestead entry thereon.

On June 30, 1887, Butman filed his declaratory statement for the land, claiming his preference right, and on same day he asked that Barrister be cited to appear before the local officers and show cause why his entry should not be canceled.

Both parties made valuable improvements on the land—those of Butman being valued at four hundred dollars, and those of Barrister, at eleven hundred dollars.

On August 11, 1887, both parties appeared, hearing was had and the register and receiver decided in favor of Barrister.

On appeal, you, on March 26, 1890, reversed that judgment, holding Barrister's entry subject to Butman's prior right. This appeal presents the following grounds of error:

1. In holding that Butman's contest was prosecuted to a successful termination in good faith in the face of the evidence that Butman had Percy's relinquishment of the prior entry in his possession when contest was begun.

2. In awarding Butman a preference right when Butman's own testimony showed that the relinquishment was in his possession when contest was instituted.

3. In not deciding that Butman's contest was fraudulent and only brought to keep the land covered up for a time and not for the purpose of procuring the cancellation of Percy's entry, which Butman could have done the day he instituted his contest by filing Percy's relinquishment which he then had possession of.

4. In not holding that Butman came within the inhibition of the pre-emption act.

The sole inquiry is whether Butman was entitled to a preference right of thirty days from the cancellation of Percy's entry.

When the case was first called for trial, Butman announced that he relied solely upon the records of the local office, and refused to testify when called as a witness for Barrister.

It will be observed that he filed his contest against Percy's entry December 17, 1886; notice was first issued fixing the hearing for March 1, 1887; the hearing was continued on Butman's affidavit to April 9, 1887, and again continued on affidavit to June 7, 1887, June 6, being the day the relinquishment was filed.

The affidavit which he made for continuance on March 1, states that, "In trying to get personal service upon the claimant, he (affiant) run the time so short that it was impossible for him (affiant) to advertise as required by law."

What his alleged reasons for the other continuance were, the record fails to disclose—the affidavits having been lost.

But if his purpose was to procure the cancellation, and obtain a preference right of entry (and that may be conceded) there was another and more substantial reason for the continuance

Butman had made homestead entry for the SW.  $\frac{1}{4}$ , Sec. 14, T. 12 N., R. 35 W., North Platte land district upon which he made final proof April 20, 1887. Had the hearing been on March 1, as first fixed, it would have been impossible for him to have filed on the land within the thirty days, without abandoning his original homestead. And after he did make final proof and obtain his final receipt on his homestead entry, he was forced to dispose of the land to avoid the inhibition contained in the second clause of section 2260 of the Revised Statutes, which prohibits a person from quitting or abandoning his residence on his own land to reside on the public land in the same State or Territory.

It required some time to accomplish all this, and that was the real cause of the continuances, as above set forth.

But he did accomplish it in a little less than six months from the time the contest was filed. On June 6, 1887, he found a purchaser for his homestead, in the person of his daughter, Nellie Rebecca, aged nineteen years, to whom he deeded his land for the consideration of sixteen hundred dollars, and on the same day, (not waiting for the day set for hearing, which was the next), he filed Percy's relinquishment, and on the 13th day of that month, he made settlement on the land in contest.

R. H. Langford, who was a corroborating witness for Butman in the latter's contest against Percy's entry, was sworn as a witness for Barrister.

From his testimony, it appears that when Percy first learned that he could not reside on the land, he made out his relinquishment thereto, and it was given to Langford to "dispose of," and he sold it to Butman for twenty-five dollars. The sale was undoubtedly negotiated prior to the filing of the contest (December 17, 1886). Langford went with But-

man to the local office, and immediately after the contest was filed, he delivered the relinquishment to Butman and received the twenty-five dollars in payment therefor.

The contest affidavit stating that Percy had relinquished his entry was strictly true, but the fact of his (Butman's) possession of the same was perhaps unknown to the local officers; he retained the same in his possession, however, for nearly six months to enable him to prove up on and to dispose of his homestead, in the meantime continuing his contest to gain time.

The first section of the act of May 14, 1880 (21 Stat., 140) provides that:

When a pre-emption, homestead or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on part of the Commissioner of the General Land Office.

When a relinquishment is filed in the local office, the entry should at once be canceled, and the land thereafter held open to settlement. *Sears v. Almy* (6 L. D., 1). And an application to enter accompanied by a relinquishment is immediately effective on the filing of the relinquishment. *Dodge v. Lohnes* (11 L. D., 352).

Butman appears to have understood these rules, and when he did file the relinquishment, Percy's entry was canceled without other evidence.

In *Neilson v. Shaw* (5 L. D., 358) it was held that where "it (the contest) was commenced not for the purpose of canceling the entry, but rather to keep the entry of record, and enable the contestant to speculate on the contest," the contest may be attacked for fraud.

And it was held in the case of *Eva Brown* (3 L. D., 150) that a relinquishment in the hands of a purchaser can not become the basis of a contest by such purchaser.

The second section of the act of May 14, 1880 (*supra*) provides that

In all cases where any person has contested, paid the land office fees and procured the cancellation of any pre-emption, homestead or timber-culture entry, he shall be notified by the register of the land office of the district in which such land is situated of such cancellation, and shall be allowed thirty days from date of such notice to enter said lands.

But in all cases where such preference right is given, it must appear that the cancellation was the result either directly, or indirectly, of the contest. When the relinquishment is filed pending the contest, it is presumed generally that it is done as a result of the contest.

The cancellation of Percy's entry was, however, not the result of Butman's contest which was made solely for delay, or to prevent some other person from contesting. This is evidenced by the fact that at the time it was brought, he had under his control an instrument which made the contest unnecessary. The law favors contests, and rewards the contestant; but it will not uphold and reward the conduct of one who

brings a sham contest solely for delay and to defeat the legal rights of others. At the time Barrister made his homestead entry, the land was a part of the public domain, free from any claim, and subject to entry and had been so since the date of the filing of the Percy relinquishment and the cancellation of his entry and the thirty day preference right accorded Butman by you was without warrant of law.

The rights of Barrister having attached to the land by virtue of his entry prior to the time that Butman made his pre-emption filing, it must be held that the former has the better right to the land. For these reasons your decision is reversed and the declaratory statement of Butman will be canceled.

It appears that Barrister submitted final proof upon his homestead entry on July 19, 1889. Since the case was then pending on appeal, its submission was contrary to the provisions of Rule 53 of practice, which declares that:

The local office will thereafter take no further action affecting the disposal of the land in contest until instructed by the Commissioner.

Barrister should be notified to make new advertisement and new proof. *Iddings v. Burns* (on review, 8 L. D., 559).

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PRACTICE—APPEAL FROM THE LOCAL OFFICE.

DIPPERT *v.* BERGER.

Where the conclusion reached by the local officers is not in accordance with their finding of facts, it is the duty of the Commissioner of the General Land Office to correct the errors found therein, even though no appeal is taken from the action of the office below.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 2, 1891.*

I have considered the appeal of Josiah Berger from your decision rejecting his final proof for lot 4, of section 30, T. 31, R. 52 W., Chadron, Nebraska, and awarding the land to Albert Dippert.

Your decision correctly stated the evidence and your conclusions are in accordance with the law and the rulings.

The finding of facts by the register and receiver was the same as yours, viz., that Dippert, the protestant and homestead claimant, made the prior settlement on the land in dispute, that he improved and resided on the same and relinquished his pre-emption filing and made homestead entry for the tract for the purpose of returning to Iowa for his family; that his temporary absence was necessary and was not an abandonment of his residence.

On this finding of facts, without assigning any reason for their decision, the local officers rejected the claim of Dippert to the land and awarded the same to Berger. The record clearly shows that Dippert

did not intend to abandon his rights under his pre-emption settlement when he changed his filing to a homestead entry. His manner of doing this may have been irregular, but his intention is clear and it can not be held that he abandoned the rights he had acquired by prior settlement.

Counsel for Berger contends that owing to the failure of Dippert to appeal from the decision of the local officers, it became final as to his rights, and his claim to the land must be rejected.

This proposition can not be successfully maintained.

Section 453, Revised Statutes, provides :

The Commissioner of the General Land Office shall perform, under the direction of the Secretary of the Interior, all executive duties appertaining to the surveying and sale of the public lands of the United States, or in any wise respecting such public lands.

and it has been uniformly held that,

The Commissioner of the General Land Office exercises a general superintendence over the subordinate officers of his department, and is clothed with liberal powers of control, to be exercised for the purposes of justice, and to prevent the consequences of inadvertence, irregularity, mistake, and fraud, in the important and extensive operations of that officer for the disposal of the public domain. *Bell v. Hearne* (19 How., 262).

In the leading case of *Barnard's Heirs v. Ashley's Heirs* (18 How., 43), the supreme court held that this enlarged power of supervision and control given to the Commissioner of the General Land Office by the act of 1836 (at that time) under the direction of the President of the United States extended to the consideration of matters judicial in character, and that the judgment of the register and receiver was not conclusive upon questions of fact and of law arising after the passage of that act. This construction has been uniformly followed since that time, both in the courts and in this Department, and is too well settled to require further comment. *Stephen Sweayze* (5 L. D., 570).

The conclusions reached by the local officers did not do justice to the protestant even according to their finding of facts, hence it was the duty of your office to correct the same. The duty of thus correcting the decisions of the local officers has been fully recognized in the rules of practice which are established to promote the orderly transaction of business before the Land Department.

Thus in rule 48, of the rules of practice, it was provided that the decision of the local officers should not become final in the absence of appeal "where the decision is contrary to existing laws and regulations," and the action of your office was in accordance with the rule.

Your decision is affirmed.

## CIRCULAR—DELIVERY OF PATENT.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., September 14, 1891.

## REGISTERS AND RECEIVERS U. S. LAND OFFICES :

GENTLEMEN: Numerous instances have come to my knowledge of persons seeking to collect fees from owners of lands as compensation for securing such land-owners patents which have been regularly issued by the United States and transmitted to the local land offices for delivery.

When the government issues a patent for land, it undertakes to deliver the instrument to the proper person without charge—all fees chargeable being collected at the time the entry is made.

Persons engaged in collecting fees usually ascertain from the county recorder's office the particular tracts of land for which patents have not been recorded, and then, by tracing down the title, ascertain the present ownership of the land. The owner is then advised that he claims land for which no patent appears of record, but that the same can be secured upon the payment of \$10 or other stipulated fee, and by forwarding an affidavit of the ownership of the land and a power of attorney to deal with the United States in the transaction.

In every case where such paper is presented you will ascertain the post-office address of the owner of the land and notify him *direct* that his patent is on file in your office (if such be a fact) and will be transmitted without charge, upon receipt of an affidavit of the ownership of the land. And you will, in every instance, refuse to deliver patents to any person acting as an agent or attorney in fact, when you know or have reason to believe that such agent or attorney in fact is, as a matter of speculation, attempting to take advantage of the credulity of the person or persons represented.

Very respectfully,

THOS. H. CARTER,  
*Commissioner.*

## APPLICATION TO ENTER—SEGREGATION.

GOODALE *v.* OLNEY (ON REVIEW).

The rule that "an application to enter is equivalent to an actual entry so far as the rights of the applicant are concerned, and while pending withdraws the land from any other disposition," includes only cases in which the application is improperly refused, and does not apply where the land is not subject to entry and no right of the applicant is denied.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
November 3, 1891.

This motion is filed by Frank D. Goodale asking that the decision of the Department of April 3, 1891 (12 L. D., 324) affirming the decision

of your office in refusing to order a hearing in the above stated case be reconsidered and revoked.

The following facts are shown by said decision :

On July 31, 1885, Olney applied to make homestead entry of the E.  $\frac{1}{2}$ , SE.  $\frac{1}{4}$ , Sec. 13, T. 33 S., R. 63 W., Pueblo, Colorado, together with adjoining land. His application was rejected by the local officers for the reason that the tract applied for was embraced in the derivative claim of Thomas Leitensdorfer under the Vigil, St. Vrain grant. From this action, Olney appealed, and on May 6, 1887 you reversed the action of the local officers, and Olney made entry for the tract May 28, 1887.

On August 31, 1888, Goodale applied to contest the entry of Olney as to the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of said section 18, alleging that he came into possession of the land on or about the 15th of February, 1886 and had resided there since May, 1886, and had improved it to the extent of twelve hundred dollars, and that Olney had never resided upon the tract before May, 1887. Upon this application, your office, on August 17, 1889, ordered a hearing, but on September 30, following, said order of August 17 was revoked and the hearing was refused. From this decision Goodale appealed. On April 3, 1891, the Department approved said decision upon the ground that Olney's application to enter the tract offered July 1, 1885, was regular and legal, and was pending in May, 1886, when Goodale began his residence upon the land, and that although Olney was not permitted to enter the tract until May, 1887, his application was equivalent to an actual entry, so far as his rights were concerned and withdrew the land embraced therein from any other disposition until final action thereon.

Goodale asks for a review of this decision assigning error in not considering the fact that fraud was practiced by Olney in obtaining the acceptance of his homestead application upon a false affidavit accompanying said application, alleging residence upon and improvement of the land at the date of his application; that the land being within the limits of the derivative claim of Leitensdorfer under the Vigil and St. Vrain grant was not subject to homestead entry until May 19, 1888, when said reservation was formally vacated, and the land embraced therein opened to entry; that no application made prior to that time could secure any right except in favor of an actual settler residing thereon at the date of said application, and that as between conflicting settlers at the date of the restoration of said reservation to the public domain, priorities of settlement and occupation should govern.

The rule announced in the decision sought to be reviewed that "An application to enter is equivalent to an actual entry so far as the rights of the applicant are concerned and while pending withdraws the land from any other disposition until final action therein" has reference solely to cases in which the application was improperly refused, and does not apply where the land was not subject to entry and no right of the applicant is denied.

In the case of *Pfaff v. Williams* (4 L. D., 455) and in all other cases where the rule has been followed, the rejection of the application was a denial of a right. The appeal of the applicant therefrom merely preserved that right against any other disposition of the land until it could be determined. The rule as laid down in *Pfaff v. Williams supra* is that a legal application to enter is, while pending, equivalent to actual entry *so far as applicant's rights are concerned*, and its effect is to withdraw the land embraced therein from any other disposition until such time as it may be finally acted upon.

See also *Maria C. Arter* (7 L. D., 136); *Hughey v. Dougherty* (9 L. D., 29); *Peterson v. Ward* (ib., 92).

In the case of *Hughey v. Dougherty supra*, the Department referring to the rule in *Pfaff v. Williams* said it

was made concerning land subject to entry and upon the right of an applicant possessing the necessary qualifications. It protects the applicant whose application was improperly rejected from the intervention of any subsequent claim until his rights are formally passed upon.

So in the case of *McKenzie v. Richards* (13 L. D., 71), the Department, in referring to said rule, said :

*McKenzie's* application was, while pending, equivalent to actual entry, *so far as the applicant's rights were concerned*, but it was not intended by said decision to hold that *McKenzie's* rights to the land were superior to the claim of *Richards*, merely by virtue of his application, irrespective of whether said application had been properly or improperly rejected. While that application was pending on appeal, it preserved the rights of the applicant against any further disposition of the land, until such rights could be determined, and *Richards* could therefore acquire no right by her entry, so far as it affected the rights of *McKenzie*; but said entry was subject to whatever rights he had, which must depend, however, not upon his application for the land, but whether his application was rightly rejected by the local officers.

It will be seen from an examination of these cases that the mere application to enter land covered by a homestead entry or other reservation does not of itself withdraw the land or in any manner affect its status for the reason, land so reserved is already segregated, nor is it the equivalent of an entry. It is only the equivalent of an entry "so far as applicant's *rights* are concerned," and it has merely the effect "to withdraw the land from other disposition" that the right of the applicant may be protected, but such right is dependent upon his showing that the land was subject to entry at the date of his application.

In this motion it is alleged that at the date of *Olney's* application the land was not subject to entry, being embraced in the reservation on account of the *Vigil* and *St. Vrain* grant, and that *Olney* had no superior right to others, unless he was then an actual settler on the tract; that the settlement could not ripen into a legal right until the removal of the reservation which was not formally opened to entry until May 19, 1888; that in order to establish his priority over all other applicant's he filed an affidavit alleging possession and occupancy of said tract for years prior to the date thereof, and that he had placed valuable improvements on the land.

Goodale asked that he be allowed to contest the entry of Olney alleging that the facts stated in the affidavit are untrue and that a hearing be ordered to allow him an opportunity of showing that the entry of Olney was allowed by means of false and fraudulent statements.

At the date of Olney's application to enter, the land was not subject to entry and he could have acquired no right by virtue of his application to enter that could have reserved the land from other disposition when it became subject to entry, unless he was then a settler on the land, having priority over all others. His right would rest, however, upon the settlement and not upon his application.

The act of February 25, 1869 (15 Stat., 275) protected the claims of all actual settlers within the limits of the located claim of Vigil and St. Vrain other than those claiming to derive titles from the grantees, and although the land was not subject to entry at any time prior to May 19, 1888, yet when the land became subject to entry, the Department, in determining the priority of claims, could take into consideration a settlement made after the act of February 25, 1869, and prior to the restoration of the land to the public domain.

Goodale alleges that he was the prior settler on the tract, and offered to contest the entry of Olney upon the ground that it was allowed upon false and fraudulent statements, and in violation of his rights.

I am of the opinion that the hearing should have been ordered that Goodale may have the opportunity of showing that he is the prior settler as alleged in his contest.

A motion has been filed by Olney to dismiss the motion for review, upon the ground that it was not filed within thirty days from notice of the decision. Rule 87 is a general rule applying in all cases where service is allowed to be made through the mails, and as this motion was filed within the ten days allowed for transmission through the mails, it was within the time required by the rules.

He also moves to strike from the files the affidavits of Goodale, Shryock, and others, for the reason that they were not served upon him or his attorneys.

In the view taken of this case, it was not necessary to consider said affidavits, and, hence, no further action upon this motion is necessary.

The decision of the Department of April 3, 1891, is revoked, and your decision of September 30, 1889, is reversed and a hearing ordered, after notice to all parties.

## RES JUDICATA—APPLICATION TO ENTER.

## MAGGIE LAIRD.

The doctrine of *res judicata* is not applicable where the decision is rendered upon an incomplete record.

An application to enter land covered by the existing entry of another confers no right upon the applicant; and if rejected, and appeal taken from such action, it is not a pending application that will attach on the cancellation of the previous entry, as the appeal does not operate to save or create rights not secured by the application itself.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 3, 1891.*

On February 6, 1886, J. B. Haggin, as transferee, made cash entry under the act of June 15, 1880, (21 Stat., 237), for the NE $\frac{1}{4}$  of SW $\frac{1}{4}$  and W $\frac{1}{2}$  of SE $\frac{1}{4}$ , Sec. 20, T. 27 S., R. 25 E., Visalia, California.

His entry was canceled on February 1, 1888, by the Department.

On January 17, 1888, while the tract was still covered by Haggin's entry, one Charles H. Gallagher applied to make a timber-culture entry for said tract, his application was rejected for conflict with Haggin's entry; upon appeal your office affirmed the action of the local land officers.

He appealed from the ruling of your office to this Department, where on April 23, 1889, the entry of Haggin having been canceled, the tract was awarded to Gallagher, as the first legal applicant.

It appears that on February 20, 1888, nineteen days after the cancellation of Haggin's entry, and thirty-three days after Gallagher's application for a timber-culture entry, one Maggie Laird, who has since married a man by the name of Wareham, applied for and was allowed to make a homestead entry for the same tract, and on November 8, 1888, made cash entry, and received a final receipt therefor.

On December 17, 1888, following the tract was sold and transferred to J. B. Haggin, and on January 20, 1890, the entrywoman and Haggin, transferee, filed a motion supported by the affidavit of Laird, stating that she never received any notice of the application of Gallagher for said land or of the existence of any claim on his part, or that there existed any proceedings on his part in the Land Department looking to an entry on said tract, nor did she ever receive any notice of the departmental decision of April 23, 1889, and asking that the timber-culture entry of Gallagher be held for cancellation because made at a time when the land was covered by an existing cash entry, or that a hearing be ordered.

The departmental decision of April 23, 1889, wherein the tract in question was awarded to Gallagher, might be considered as *res judicata*, and might and would settle this case were it not for the fact of the filing of the petition of Laird and her transferee, Haggin; this petition

is practically a motion for review of the decision of April 23, 1889, and discloses the fact that it was filed as soon as Laird heard of the decision of April 23d.

It also shows that she had made a homestead entry on the tract on February 20, 1888, and that she had improved the same, resided thereon, and on November 8, 1888, made cash entry and received a final receipt therefor; all this had taken place before the decision of April 23d was made awarding the tract to Gallagher, so that at the date of said decision, and at the date of his entry, the tract was included in the cash entry of Laird.

Said decision cannot be considered as *res judicata* as applied to the rights of Gallagher thereunder, for it was made upon an incomplete record and disposed of a tract which had previously been disposed of to Laird.

These facts were not before the Department when the decision of April 23, 1889, was made. When these new facts, which existed then and exist now, are brought to the attention of the Department, a different face is given to the whole proceeding. As to the authority of the Department to review or re-review its own decisions on the suggestion of new facts, see *Wenie et al. v. Frost* (6 L. D., 175); *Frost et al. v. Wenie* (9 L. D., 588).

While Laird and Haggin were not parties to the record, they are interested in the subject matter, and the motion filed by them was filed promptly when knowledge reached them that the tract had been awarded to Gallagher in a proceeding, the existence of which they had hitherto not known of.

It is a well-settled doctrine that no entry will be allowed while there is an existing entry of record for the same land. *Henry Cliff* (3 L. D., 216). *Witherspoon v. Duncan* (4 Wall., 210), and when a tract has once been sold by the United States and the purchase money paid, the tract is not again subject to entry. *Simmons v. Wagner* (101 U. S., 260).

While a legal application to enter is, while pending, equivalent to actual entry, so far as applicants rights are concerned, yet if the application to enter is illegal, it is not equivalent to a entry; so it was with the Gallagher application. It was made for a tract already segregated, as much so as if the tract had not belonged to the United States at all or had been reserved. It could not segregate a tract already segregated. If his application had been allowed when tendered, such entry would have been illegal because on land not subject to entry.

In view of the fact that the departmental decision of April 23, 1889, was made on an incomplete record and the tract then in question had before that time been sold by the United States, I think said decision should be set aside and held for naught. The same is accordingly ordered.

From an examination of the facts concerning the existing entries of Laird and Gallagher, it is apparent that neither could be confirmed under

the 7th section of the act of March 3, 1891, (26 Stat., 1095) because of the existence of the other.

On February 1, 1888, the cash entry of Haggin was canceled, before this date, Gallagher, Laird or no one else could legally make an entry, because the tract was by reason of Haggin's entry segregated from the public domain. After the cancellation of the entry, the party first applying should be accorded an entry.

At the time Gallagher's application was made, he could gain nothing by it because the tract was not subject to entry and if his rights to make an entry on the tract are to be held paramount, it must be upon the theory, not of his prior application, but because he is a prior applicant after the cancellation of Haggin's entry.

Gallagher's application to enter filed January 17, 1888, was not a pending application such as would attach to the land immediately upon the cancellation of the entry.

The application was wrongful, and was rejected; an appeal from that rejection could not save nor create any rights not secured by the application itself. His application made during the time the tract was covered by the entry of Haggin, could not give him an advantage over another who applied for the tract the moment it was restored to the public domain.

The way pointed out in which to attack the validity of an entry is not by filing an application to enter and appealing from the rejection thereof, but by a contest.

It is not now necessary to discuss the question as to whether Haggin's entry was void or not, it was during its existence a complete segregation to the tract from all further disposal. So long as a homestead entry, valid upon its face remains a subsisting entry of record whose legality has been passed upon by the land authorities, and their action remains unreversed, it is such an appropriation of the tract as segregates it from the public domain, (*Hastings and Dakota Railroad Company v. Whitney*, 132 U. S., 357), and if the application of Gallagher had reached the Department before said entry was canceled, it would have been the duty of the Department to have finally rejected it. The question for determination is, which of these entrymen was first to apply for the tract after Haggin's entry had been canceled?

On February 20, 1888, Maggie Laird applied, and was allowed to make a homestead entry on said tract.

On April 23, 1889, when Gallagher's application reached the Department, the entry of Haggin had been canceled, the Department not being advised of the entry of Laird, awarded the tract to Gallagher, and on May 16, 1889, he was allowed to make said entry, his application should have been held to date from that day and by reason of the existence of Laird's entry, should have been rejected.

In the case of *Richards v. McKenzie*, (12 L. D., 47), the facts stated are similar to those in the case at bar. On April 16, 1888, about half

past eight o'clock, a. m., one Douglass made homestead entry of a tract of land.

At 9 o'clock a. m., on the same day, McKenzie applied to make homestead entry; but his application was refused, because of the prior entry of Douglass.

From this action of the local officers McKenzie appealed to your office, where on June 25, 1888, the action of the register and receiver was sustained.

Thereupon McKenzie appealed to the Department, and while this appeal was pending, Douglass relinquished his entry and the same was canceled; on the same day Douglass relinquished his entry, Richards made a homestead entry of the tract. Douglass' relinquishment was transmitted to your office, which transmitted it to the Department, and on January 3, 1890, the papers in the McKenzie application were returned to your office with direction that he be allowed to enter the land; accordingly the local officers allowed said entry, but notified your office that Richards had an entry thereon, dated October 15, 1888, and asked further instructions.

On April 18, 1890, you wrote to the register and receiver, as follows:

I do not find anything in the records to show that the Hon. Secretary was advised of said Richards' entry, consequently the McKenzie entry was allowed without in any manner considering her rights; therefore . . . . McKenzie did not acquire any preference right of entry by virtue of his application to enter said land, and the proceedings as indicated in the foregoing; therefore he should now be called upon to show cause within sixty days why his entry should not be held for cancellation, and the entry of Richards' be allowed to stand as being the first legal entry for said tract after the same was subject to entry.

McKenzie again appealed to the Department, and under date of January 13, 1891, a decision was made holding that the allowance of Richards' entry during the pendency of McKenzie's appeal, was irregular, and you were directed to call upon Richards to show cause within sixty days from notice, why her entry should not be canceled, and that of McKenzie permitted to stand. Richards then filed a motion for a review, and upon July 22, 1891, it was denied (13 L. D., 71), but in explanation of said denial, it is stated:

It is apparent that counsel for Mrs. Richards has misapprehended the effect of the decision of January 13, 1891. The Department in said decision merely held that McKenzie's application was, while pending, equivalent to actual entry, so far as the applicant's rights were concerned," but it was not intended by said decision to hold that McKenzie's rights to the land were superior to the claim of Richards, merely by virtue of his application, irrespective of whether said application had been properly or improperly rejected.

Considering the decision of the McKenzie case and the review thereof, it is apparent that the Department did not intend to hold that McKenzie's application to entry would defeat the entry of Richards "irrespective of whether said application had been properly or improperly rejected."

One of the questions to be determined by the hearing ordered in that case, was whether McKenzie's application was or was not properly rejected.

There is certainly nothing in the decisions of the McKenzie case to establish a rule that would require the entry of Laird to be subject to the entry of Gallagher when it has been determined by the local officers and your office that his application was wrongful, and therefore properly rejected. If properly rejected, it created no rights in the applicant as against the subsequent entry of Laird. A hearing is unnecessary to determine that the application was properly rejected, for since all the facts are before me, I have no difficulty in determining, and do hereby find that said application was properly rejected by you.

No rights were gained by the application of Gallagher as against Laird. Patrick Kelly, (11 L. D., 326).

I therefore conclude that Laird was the first legal applicant for the tract in question after it was freed from the entry of Haggin; Gallagher's entry should be canceled and a patent should issue to Laird, provided always, that she has complied with the law in other respects.

Your office decision is accordingly reversed.

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MOTION FOR REVIEW—APPLICATION TO ENTER.

ARY *v.* IDDINGS (ON REVIEW).

A motion for review will not be granted where no new question is presented for the consideration of the Department.

The preliminary affidavit accompanying an application to enter should bear a date approximate to the allowance of the entry.

*Acting Secretary Chandler to the Commissioner of the General Land Office November 3, 1891.*

This is a motion by the attorney for John A. Ary asking for a review of the departmental decision dated March 18, 1891 (12 L. D., 252), in the case entitled as above involving the SW.  $\frac{1}{4}$  of Sec. 29, T. 25 S., R. 17 W., Larned, Kansas, land district.

The grounds of said motion are three in number; the first two are in effect that Iddings never made a tender or deposit of the fees and commissions as required by law, and the third is that no one should be deprived of his rights of property without due process of law.

An examination of this controversy from its inception in this department, will show that these matters have been duly considered and passed upon. Iddings *v.* Burns (8 L. D., 224), same case on review, page 559, Ary *v.* Iddings, *supra*.

There being no new question presented by the motion, it will be overruled. Pike *v.* Atkinson (12 L. D., 226).

So long a time having elapsed since Iddings made his application to enter the tract in controversy, you will notify the local officers to require him to appear before them in person within sixty days from date of the receipt of the notice and make affidavit as to his qualifications to make homestead entry. You will also cause notice of this order to be served on the contestant, and his entry will not be formally canceled until Iddings has complied with this order.

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APPEAL—MOTION TO DISMISS—ORDER OF JANUARY 17, 1891.

MCKINLEY *v.* WALSH.

After the allowance of an appeal the General Land Office is without jurisdiction to pass on a motion to dismiss the same.

A protestant against pre-emption final proof who desires to clear the record in order that he may enter the land, has such an interest as entitles him to be heard on appeal.

A motion to dismiss filed under the order of January 17, 1891, will not be considered where it involves the consideration of the whole record in the case.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 3, 1891.*

On March 9th 1889, Thomas J. Walsh filed a pre-emption declaratory statement for the lots 3 and 4, and S $\frac{1}{2}$  NW $\frac{1}{4}$ , Sec. 4., T. 61 N., R. 15 W., Duluth, Minnesota, and on July 31, 1889, gave due notice by advertisement of his intention to make final proof before the local land office, on September 15th 1889.

Proof was made on the day named, and on the same day, one John McKinley, filed an affidavit of protest, charging in substance that Walsh never established residence on the land, and that he had filed upon the same in the interest of the Minnesota Iron Company.

The affidavit was based on information and belief, and is not corroborated.

On October 14, 1889, evidence was introduced by McKinley, to prove the charges made by him, and John W. Smith, proof witness, and claimant Walsh were cross-examined.

On November 5, 1889, the register and receiver, after considering the evidence submitted, allowed claimant's proof and dismissed the protest.

On December 3, 1889, the attorneys for protestant filed an appeal from the finding of the local officers to your office, where on November 4, 1890, the finding of the register and receiver was affirmed and McKinley notified of his right of appeal, thereupon he appealed from your decision to this department.

After it had been allowed, and on February 11, 1891, claimant filed a motion in your office to dismiss the appeal taken from said decision for

the reason that "the said John McKinley is a protestant against his final proof, and that only, and therefore under the rulings of the Department, not entitled to the right of appeal."

On March 20, 1891, this motion was considered by you and in your opinion you say,

that the right of appeal from the decision of the local land office, as well the right of appeal from the decision of this office, rendered November 4, 1890, was apparently erroneously allowed, in each instance,

but you concluded as follows :

However, inasmuch as this office in its decision before referred to, allowed the right of appeal, this office, under the decision rendered in the case of *Wallace v. Boyce*, Copp's Public Land Laws, series 1890, vol. 1, p. 269, cannot withdraw that privilege, (1 L. D. 26)

The motion is consequently denied.

On August 3, 1891, the motion to dismiss the appeal was renewed in this Department and is now before me for consideration.

After the appeal of McKinley was allowed from your decision of November 4, 1890, your office had no jurisdiction to pass upon the motion made by Walsh to dismiss the appeal.

The appeal moved the case to the Department which only is authorized to pass upon the sufficiency of an appeal to it.

You acts in passing upon and overruling it, were, therefore without authority of law. *Henry v. Stanton et al.* (12 L. D., 390).

The order of January 17, 1891 (12 L. D., 64), under which the motion to dismiss is made, provides among other things that "no question will be considered in any case that involves an examination of the testimony."

This is a motion made to dismiss the appeal of McKinley, for the reason that it was erroneously allowed, he being only a protestant, and therefore not entitled to the right of appeal under the rules of practice.

It has been held by the department that one who initiates proceedings against an entry as a protestant, objector, or friend of the government, may in the course of subsequent proceedings, by complying with the rules and regulations for such cases made and provided by the Department, become a contestant *Martin v. Barker* (6 L. D., 763), and while it is true that McKinley did not make application to enter the land at the time he filed his protest, yet it is equally true that he did subsequently thereto, on account of which he claims an interest in the land.

Counsel, in support of his motion, cites the cases of *McGarrahan v. Boston Mine*, S. M. D., p. 330; *Boston Hydraulic M'g Co. v. Eagle Copper Mine*, S. M. D., 320; *Bodie Tunnel v. Bechtel M'g Co.*, 1 L. D., 584; *McGarrahan v. New Idria M'g Co.*, 3 L. D., 422; *Bright et al. v. Elkhorn Co.*, 8 L. D., 122, where it is held in mining cases that a protestant, who stands solely "in the relation of *amicus curiæ*, and who

alleges no interest in the result of the application for patent, is not entitled to the right of appeal."

I think there is a distinction to be made between protestants in mineral cases and those in agricultural entries. In mineral controversies the protestant is driven to the courts on the facts to settle his contest, while in agricultural he settles them before the Department. But without passing upon that question in this case, it is the claim of McKinley that the object of his protest is to clear the record of Walsh's filing so that he may make entry for the land and that he has such an interest therein as entitled him to the right of appeal.

It is apparent therefore, that in order to ascertain all the facts bearing upon the questions involved in the motion it would be necessary to examine the whole record in the case.

The department has decided that a motion to dismiss under the order in question will not be entertained if it raises a question that calls for an examination of the whole record. *Johns v. Judge et al.*, 13 L. D., 173.

The motion is denied, but this denial will not prevent adjudication thereon when the case is reached in its regular order.

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#### SECOND TIMBER CULTURE ENTRY—ACT OF MARCH 13, 1874.

##### INGALLS *v.* LEWTON.

Under the timber culture act of March 13, 1874, a second, or additional, entry of eighty acres of non-adjacent land may be made, where the two entries taken together do not exceed one hundred and sixty acres, and the first entry is for less than forty acres.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 5, 1891.*

On August 18, 1877, Newton M. Lewton made timber-culture entry No. 1391 of the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 2, T. 10 N., R. 12 W., Grand Island, Nebraska.

On September 21, 1887, Charles M. Ingalls filed his affidavit of contest against the entry, alleging that Lewton was not qualified to make the same, for the reason that he had previously made timber culture entry No. 924 for lot 2 in T. 9 N., R. 12 W., in said district, and that he held the same at the time he made said entry No. 1391; that the two tracts are ten miles apart, and that the law does not permit two such entries by one and the same person.

At the hearing, which was set for November 1, 1887, the following stipulation, as to the facts in the case, was prepared, agreed to, and signed by counsel for the respective parties:

That the said Newton M. Lewton is the identical person who, on January 23, 1875, made timber culture entry No. 924 upon lot 2, in T. 9 N., R. 12 W., at Grand Island,

Nebraska, containing 33.30 acres, and who, on August 18, 1877, made timber culture 1391 for N.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 2, T. 10 N., R. 12 W., at Grand Island, Nebraska, containing eighty acres—said entries being upon tracts of land situated in different sections and about ten miles apart, the second entry being made as additional to the first.

Upon this agreed state of facts, the register and receiver recommended the entry for cancellation, and on appeal you, by your decision of January 23, 1890, affirmed that judgment. Claimant brings this appeal.

It will be noticed that claimant made both his entries under the act of March 13, 1874 (18 Stat., 21). The proviso to the first section of that act is as follows:

That not more than one-quarter of any section shall be thus granted, and that no person shall make more than one entry under the provisions of this act, unless fractional subdivisions of less than forty acres are entered, which, in the aggregate, shall not exceed one quarter section.

Under the act of June 14, 1878 (20 Stat., 113), no one was allowed to make more than one entry, and all acts inconsistent with it were repealed, but an exception was made as to entries made under the former acts by permitting parties

to complete the same upon full compliance with the provisions of this act; that is, they shall at the time of making their final proof have had under cultivation, as required by this act, an amount of timber sufficient to make then umber of acres required by this act.

It is thus seen that the act of 1878 did not annul a second entry made under the provisions of the act of 1874.

The sole inquiry is, whether one who made entry of a quantity of land of less than forty acres under the act of 1874 (*supra*) was entitled to make a second entry of eighty acres under the same act.

The instructions under the act of 1874, issued to registers and receivers by Commissioner Williamson, under date April 6, 1874 (1 C. L. O., 26), contains the following:

That the privilege of making more than one entry thereunder is confined to such parties as shall enter in each and every instance a fractional subdivision of less than forty acres, and that the aggregate area of such entries shall not exceed one hundred and sixty acres.

On a careful consideration of the proviso above quoted, I think he was entitled to make the second entry of eighty acres, since the two entries combined do not exceed one hundred and sixty acres, and the first entry was less than forty acres.

The decision appealed from is therefore reversed, and the contest dismissed.

## INDIAN LANDS—CONVEYANCE—DEPARTMENTAL APPROVAL.

## GEORGE BIG KNIFE.\*

In view of the long established practice of the Indian Office and this Department to not withhold approval of an Indian deed on the sole ground of the death of the grantor after execution of the conveyance and prior to its presentation for approval, the rule in such matter should not be changed in the absence of statutory direction.

The decision in the case of Mary Fish, 10 L. D., 606, is modified in accordance with the above.

*Assistant Attorney General Shields to the Secretary of the Interior, July 11, 1891.*

I have the honor to acknowledge the receipt, by reference from the Honorable First Assistant Secretary, of a communication from the Honorable Commissioner of Indian Affairs, recommending the approval of a deed from George Big Knife, a Shawnee Indian, to John Conners, purporting to convey the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 20, T. 11 S., R. 25 E., 6th principal meridian, in Wyandotte county, State of Kansas.

By said reference my opinion is asked as to whether said deed can now be approved by the Secretary of the Interior so as to confirm and approve the title to said land.

It is stated in said communication that said tract is a part of the land, one hundred and seventy-two acres, allotted to Nancy Whitefeather, a Shawnee Indian, under the treaty of May 10, 1854 (10 Stat., 1053), made with the Shawnee bands of Indians, and for which patent was issued to her under the provisions of section eleven of the act of Congress, approved March 3, 1859 (11 Stat., 430); that the reservee sold only eighty acres of the land patented to her and the balance was disposed of by the chiefs for her heirs, Elizabeth Longtail and George Washington, who were minors; that on January 28, 1870, said heirs, through the chiefs, sold said SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 20, containing forty acres, to George Big Knife, a Shawnee Indian, for the sum of two hundred dollars, and the deed for the same was approved by the Secretary of the Interior on April 18, 1870; that it has been "the tacit ruling" of the Department for years that, until the Indian title is extinguished, every conveyance by an Indian or his representatives must be approved by the Secretary of the Interior, in order to convey a clear title to the land described in the deed; that on March 9, 1889, one A. S. Devenney forwarded to the Commissioner of Indian Affairs a deed, dated February 1, 1889, from Nancy Big Knife White (and her husband, Thomas White),

\* This opinion was adopted by Mr. Acting Secretary Chandler July 15, 1891, as shown by the approval of the deed from George Bigknife to John Conners; and following the same rule, the deed from Mary Fish to Sarah Cohen, was also approved, October 16, 1891.

sole heir of George Big Knife, purporting to convey to John Allen said SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 20, for the sum of twenty-six hundred dollars; that said deed was submitted to the Department on March 30, 1889, by the Indian Office, with a recommendation that the same be approved, so far as it conveyed the right, title and interest of the grantor in and to said tract; that on April 11, 1889, said deed was returned and the Commissioner was directed to secure further and more satisfactory proof as to the value of the land "to the present owner and holder," as the tract was situated close to Kansas City, Missouri, and to report the same to the Department "as early as possible;" that pursuant to said direction a special agent examined said tract and reported, on June 28, 1889, that the same was then laid out as a town-site, near a depot called Argentine, a few miles from Kansas City, and had upon it many houses and homes principally built by laboring people; that the value of the whole tract was \$9,800, or about \$245 per acre; that in the meantime the Indian Office received another deed, dated July 9, 1889, from Nancy Big Knife White (and Thomas White, her husband), sole heir of George Big Knife, purporting to convey the same land to George W. Briant, of Jackson county, Missouri, the consideration being the sum of \$4,000, said deed having been acknowledged the same day before the agent of the Quapaw Agency; that on August 3, 1889, said deed to Allen was returned, with the information of the value placed upon said tract by the agent of the Indian Office, and on September 26, 1889, the agent of Mr. Briant was advised that no action could be taken on the deed to him until the Indian Office was advised as to what action Mr. Allen proposed to take to complete his purchase of said tract; that subsequently, at his request, Mr. Briant's deed and certificate of deposit of the purchase money were returned to him; that nothing further had been heard from Mr. Allen, and it was presumed that he had abandoned any further effort at completing his purchase.

It is further stated in said report that on October 16, 1889, one Frank Maltby advised the Indian Office that said tract was worth \$60,000, but limited his valuation to \$20,000; that "Mr. White, the grantor, filed a protest against the approval of the Allen deed, after executing it," and that from information received by the Commissioner said White now proposes to sell said land to other parties, as soon as he can gain possession of said deeds to Allen and Briant.

It is also stated that, on June 28, 1890, John Conners, by his attorney, filed in the Indian Office an original deed, dated September 12, 1870, purporting to convey said tract to the said John Conners for the sum of \$200; that said deed had two witnesses and was acknowledged before a notary public in and for said county; that said deed was not acknowledged before an Indian Agent, nor submitted to the Indian Office for approval, but it would have passed a clear title to said land had the owners thereof and the parties thereto been white persons;

that said deed was duly recorded in the office of the Register of Deeds for said county, and was accompanied by an affidavit of one of the witnesses thereto, alleging that the consideration in said deed was adequate; that the grantor was competent and intelligent, and that he saw the money paid to the said grantor; that the reason said deed was not presented to the Indian Office for approval was because it was generally believed in that county that a second approval was not necessary, because the patent stipulated that the land should not be sold or conveyed by the patentee or his other heirs without the consent of the Secretary of the Interior; that the heirs to this land sold the same to said Big Knife, who, although a Shawnee Indian, bought the land in good faith, just as any white man would do, and paid a fair price for the same at the time of said purchase.

The Honorable Commissioner further states that, the only ground for objection to the approval of the deed to Mr. Connors is the recent opinion of this office, dated May 24, 1890 (10 L. D., 606), in the case of the deed from Mary Fish, widow of Charles Fish, a Shawnee reservee, purporting to convey to Sarah Cohen a certain tract of land, wherein the question was considered whether said deed could then "be approved by the Secretary so as to give validity thereto, and cause it to operate as a conveyance of the land, in view of the fact that since the execution of said deed Mary Fish has died, leaving heirs surviving her," and it was said:

If there is no power in the Indian owner to convey without the approval of the Secretary, then the deed from Mary Fish to Sarah Cohen conveyed no legal title, and the title remaining in her at the time of her death was by operation of law immediately cast upon her heirs. The subsequent approval of the Secretary could not operate to divest that title.

It is further stated in said report, relative to the practice of the Department, that

it has heretofore been held that the Secretary of the Interior could not refuse to sanction a sale, because of the death of the grantor, if satisfied that the sale was in all respects fair and reasonable, and would approve the same, the grantor being alive.

No decision of the Indian Office or of the Department is cited by the Commissioner in support of the above statement. But my attention having been called more particularly to the practice of the Indian Office and the Department, I have caused a further and more extended examination to be made, from which it appears that it has been the practice from almost the beginning to approve deeds made by Indians substantially in accordance with the regulations, even though the grantors have died prior to the presentation of the deeds to the Department for approval, and that fact was known to the Department at the time the approvals were made.

In the case of the deed of Therese Schindler, of Michilemackinac, "a Pottawatomie woman, in the county of Michilemack and Territory of Michigan," to Elizabeth T. Baird, of land granted under the treaty

of August 29, 1821 (7 Stat., 218), the record shows that said deed was made on the 29th day of August, 1835; that the grantor had been dead long prior to the presentation of the deed for approval, and that the original deed was approved by President Grant on May 31, 1876, although the express stipulation of the treaty was that:

The tracts of land herein stipulated to be granted, shall never be leased or conveyed by the grantees or their heirs to any persons whatever, without the permission of the President of the United States. And such tracts shall be located after the said cession is surveyed, and in conformity with such surveys as near as may be, and in such manner as the President may direct. (*Vide* Records Ind. Office, Mis. Deeds, p. 335.)

In the case of the deed of William Donaldson, a Shawnee reservee, to his wife, Rachel Donaldson, through deeds first to one Bonnafield, and then from Bonnafield and wife to Rachel Donaldson, all of the deeds were approved by the Department on January 15, 1886, although it appeared that both William and Rachel Donaldson died in 1875.

(See Comr's letter, dated February 14, 1887.)

The practice of the Department, relative to the approval of Indian deeds, as above set forth, appears to be in accordance with the rulings of the Department of Justice. On March 29, 1834, Attorney General Butler considered the question whether the President of the United States could properly give his consent and approval to the conveyance by will to one General Tipton, made by La Gros and Waises-Kea, his daughter, Miami Indians, of four sections of land reserved to them by the treaty of October, 23, 1826 (7 Stat., 300). By the third article of said treaty it was provided that:—

There shall be granted to each of the persons named in the schedule hereunto annexed, and to their heirs, the tracts of land therein designated; but the land so granted shall never be conveyed without the consent of the President of the United States.

It appeared that the elder Indian died before the ratification of the treaty, and the daughter, his only surviving child, died in September, 1827, after the ratification of said treaty; that said daughter left no child, and so far as was known there were no brothers or sisters or any relatives of the father who claimed any of the lands reserved for him in said treaty. It also appeared that General Tipton had been for many years in possession of said land, asserting an equitable lien thereon; that in 1832 he applied to the President to cause said land to be sold, but his application was refused, for the reason that the President had no authority under said treaty, except to approve a conveyance; that the General was advised to cause administration with the will annexed to be obtained in Indiana, in order that the land might be sold, and his equitable lien satisfied; that if said lands were sold under the order of the Indiana court, and the court approved the conveyance, the President would also approve it. No action was taken by General Tipton under this advice, but he applied to the President to approve said will, "with a view to secure to himself a valid title to the

premises." The Attorney General, after expressing doubts whether any of the Indians under said treaty had the power to devise their reservation by will, and stating that such power must be determined by the laws of Indiana, says:—

The object of these grants was to provide for the support of these particular Indians and their descendants, but, as this benevolent object would have been defeated by permitting them to dispose of their property at pleasure, they are prohibited from doing so. Under the treaty, they must be considered in a state of pupillage; they have no capacity to make deeds or wills, except so far as such capacity has been given them by treaty. No express authority is given to make a conveyance, but, by necessary implication, the Indians are empowered to do so, with the consent of the President.

The Attorney General further says :

This question I find has been twice presented to the Executive, under treaties similar to that now under consideration. Under the treaty made in October, 1826 (7 Stat., 295), with the Pottawatomies, Abraham Burnett became entitled to several sections, subject to the like restraint of alienation, with La Gros. Burnett died in 1827, leaving a will, which was proved according to the laws of Indiana, and on an authenticated copy being presented to President Adams, on the 26th day of December, 1828, he endorsed his approbation thereon in the following words: "The conveyance by this will is approved.

The Attorney General further states that early in the administration of President Jackson, his Secretary of War held that a devise was not a conveyance within the terms of the Chicago treaty of August 29, 1821 (7 Stat., 218), which ruling, he presumed, had been uniformly followed by President Jackson in his administration, and he concludes that,

after bestowing no little reflection on the subject, I have been led to the conclusion that, even if the Executive should approve the will as a conveyance within the treaty, his consent thereto would not decide the question whether such conveyance was authorized by the treaty, nor be conclusive upon the rights of any party ;

that the questions of the Indian's right, with the President's approval, to convey by will, whether his will had been fairly made and was in due form, and what is its effect, must be subject to the decision of the judicial tribunals of Indiana, and

that the President has the power, in case he thinks proper to exercise it, to approve the conveyance by will, alleged to have been made by the Indians, La Gros and his daughter, subject to all legal questions in respect to the capacity and right to make conveyances by will and to the execution, validity and effect of those instruments, (and he recommended, after abundant caution,) that the consent, if given, be expressly declared to have been given subject to those questions and without prejudice to the rights of the heirs at law. (2d Op., p. 631-6.)

See also Sales of Choctaw Reservations (3 Op., 517) ; Attorney General Cushing upon the power of the President to approve a second deed (6 Op., 711) ; Opinion of Attorney General Devens upon the approval of an Indian deed (16 Op., 310 and 326).

From the foregoing it may be concluded, I think, that it has been the long established practice of the Indian Office and this Department to approve Indian deeds, where the transaction was fair in all respects,

and that the fact that the grantor has died after the execution of the conveyance and prior to the presentation of the same to the Executive Department for approval has not of itself been considered an obstacle to prevent the proper officer from approving said deed. This long established practice ought not to be now changed, except for cogent and conclusive reasons.

In the case of *McKeen v. Delaney's Lessee* (5 Cranch, 22), the United States supreme court, through Mr. Chief Justice Marshall, said :

In construing the statutes of a State, on which land titles depend, infinite mischief would ensue, should this court observe a different rule from that which has been long established in the State.

In *Edwards v. Darby* (12 Wheaton, 206), the same court said :

In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect.

See also *Atkins v. Disintegrating Co.* (18 Wall., 272, 301); *Smythe v. Fiske* (23 Wall., 374, 382); *United States v. Moore* (95 U. S., 760, 763); *United States v. Pugh* (99 U. S., 265); *Brown v. United States* (113 U. S., 568, 571), wherein it is said that

these authorities justify us in adhering to the construction of the law under consideration, adopted by the executive department of the government, and are conclusive against the contention of the appellant.

To the same effect is the case of *The Laura* (114 U. S., p. 411-416), quoting from the *Lithographic Co. v. Sarony* (111 U. S., 53, 57), in which the court, passing upon the constitutionality of certain statutory provisions reproduced from some of the earliest statutes, said :

The construction placed upon the constitution by the first act of 1790 and the act of 1802, by the men who were cotemporary with its formation, many of whom were members of the convention which framed it, is, of itself, entitled to great weight; and when it is remembered that the rights thus established have not been disputed during a period of nearly a century it is conclusive.

Also *Hastings and Dakota Ry. Company v. Whitney* (132 U. S., p. 357-366).

Such being the weight given by the United States supreme court to the long established practice and cotemporary construction of the executive department, in my judgment, the practice should be followed until changed by legislation, and that my said former opinion in the *Mary Fish* case should be modified in so far as it expresses the view that the Secretary of the Interior has no power to approve an Indian deed, where the grantor had died, leaving heirs surviving, prior to the presentation of the deed to him for approval, "so as to give validity thereto and cause it to operate as a conveyance of the land."

The practice of the Department, relative to the approval of Indian deeds, where the grantor had died leaving surviving heirs prior to the presentation of the deed for approval, was not stated by the Commissioner of Indian Affairs in his report upon the *Fish* case, nor was it considered by me in my said opinion. While I am now, upon a farther

investigation of the whole question, clearly of the opinion that the practice of the Department should not now be changed, yet, if the question were an original one, to be considered apart from the practice of the Department, I am free to say that I should still incline to the opinion heretofore expressed in the Mary Fish case.

I am of the opinion, and so advise you, that, in view of the practice of the Department, there does not appear to be any sufficient reason why said recommendation of the Commissioner of Indian Affairs should not be concurred in, and the said deed from George Big Knife, purporting to convey to John Connors the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  of Sec. 20, T. 11 S., R. 25 E., should not be approved by you.

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PRE-EMPTION ENTRY—MINERAL LAND.

TINKHAM *v.* McCAFFREY.

A contestant, who alleges the mineral character of land that is *prima facie* agricultural, must show affirmatively the existence of mineral in sufficient quantity to make the land more valuable for mining than agricultural purposes.

Where a pre-emption entry is attacked on the ground that it covers mineral land, it is not a sufficient defense to show that the mineral character of the land was not known to the entryman at the date of the entry, if it appears that it was thus known by others at such time, and that the ore was then exposed in such a manner, and to such an extent, that a person of ordinary intelligence who had been upon the tract could not be ignorant of the existence of the mineral deposit.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 2, 1891.*

On the 21st of April, 1887, John T. McCaffrey made final proof under the pre-emption law, for lots 5 and 6, and the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Sec. 21, T. 35 N., R. 7 E., Seattle, Washington.

At that time, he made the usual non-mineral affidavit, and himself and witnesses testified that the land was not valuable for coal, iron, stone, or minerals of any kind, so far as they knew, or had reason to believe, and by paying the sum of one hundred and fifty-four dollars and sixty-two cents, he received from the register and receiver final certificate and receipt for the land.

On the 30th of November, 1888, Tinkham made affidavit that he was well acquainted with the land, and that it was not chiefly valuable for agricultural purposes, but that said land contained solid, uncovered veins or masses of iron ore of great extent and value, and he asked that he be granted a hearing, and given an opportunity to prove his allegations.

A hearing was directed by you on the 16th of May, 1889, which took place on the 4th of October of that year, resulting in a decision by the register and receiver on the 28th of April, 1890, in which they expressed the opinion that the pre-emption cash entry made by McCaffrey should

be canceled as to the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$  of said section, by reason of mineral being thereon, and the balance of the entry should remain intact.

Upon appeal to your office, the decision of the register and receiver was modified by your decision of August 29, 1890, in which you limited the cancellation on account of mineral deposits, to the S $\frac{1}{2}$  of the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$  of said section, and allowed McCaffrey's entry to remain intact for the balance of the tract. An appeal by McCaffrey from your decisions, brings the case to this Department for consideration.

The character of the land for which he made entry was *prima facie* agricultural, and the burden of proof to show its mineral character is therefore upon Tinkham, and he must show by satisfactory evidence that the mineral which he alleges the land contains, exists in sufficient quantity to make it more valuable for mining than for agricultural purposes. *Savage et al. v. Boynton* (12 L. D., 612).

The mineral character of that portion of the land for which you hold said entry for cancellation, was established by a very great preponderance of the evidence upon the trial, and by the same evidence it was shown to be too rough, rocky and broken to be of much value for agricultural purposes. In fact, McCaffrey and his witnesses only claimed that this portion of the tract could be used for pasture and that it was valuable for that purpose.

The evidence of Tinkham and his witnesses, several of whom were mining experts, showed that the quantity of iron ore which the land contained was very extensive, while the assay certificates demonstrated that it was of very superior quality. It also appeared as a fact that mineral can be secured from said land in paying quantities. This meets the requirements of the law. *Royal K. Placer* (13 L. D., 86).

The testimony of McCaffrey and his witnesses was directed not so much to disproving the mineral character of the land, as to establishing the fact that such character was not known to him at the time he made his entry, and received final certificate therefor. Upon that question the evidence was somewhat conflicting, but the fact was established that the ore was exposed in such a manner and to such an extent, that a person of ordinary intelligence, who had been upon the tract, could not be ignorant of the existence of vast quantities upon that portion of the land which you held as subject to disposal under the mining laws. In addition to this, Tinkham testified to a conversation with McCaffrey, wherein he sought to purchase the property, in which the latter stated that he had known of the existence of iron ore upon the land for two or three years, and that he would not sell the tract for less than twenty-five thousand dollars. McCaffrey denied having made the admission as to his knowledge in reference to the ore, but admitted having had the conversation in regard to selling the land to Tinkham, and that the price named by him was as stated. Witnesses for the plaintiff testified that it had been for several years a matter of common neighborhood notoriety that these ledges of iron ore existed on the

land, while the witnesses for the defendant had not heard of their existence, nor heard this neighborhood talk. McCaffrey said he had not been upon this particular part of his tract but twice prior to making final proof, and would not know iron ore if he saw it. He also testified that he had not been told that those ledges were iron ore until after he made his proof.

While the evidence upon this point does not establish the fact that McCaffrey knew of the mineral character of the land at the date of his entry, it shows that at that time it was known to others that mineral existed thereon, which complies with the law as enunciated in the case of Harnish v. Wallace (13 L. D., 103).

From all the evidence in the case, it is clear that the S $\frac{1}{2}$  of the SW $\frac{1}{4}$  of the NW $\frac{1}{4}$  of the land for which McCaffrey made entry, contains large deposits of iron ore of commercial value, and that it is more valuable for mining than for agricultural purposes. The decision appealed from is therefore affirmed.

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**SOLDIERS' ADDITIONAL HOMESTEAD—CONTIGUITY OF TRACTS.**

WESLEY PRINGLE. *Overruled*  
29 L. D. '599

Non-contiguous tracts may not be embraced within a soldiers' additional homestead entry.

Where an application to make soldiers additional entry includes non-contiguous tracts the applicant may be permitted to elect which of the tracts he will take in full satisfaction of his right.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 5, 1891.*

This record presents the appeal of Wesley Pringle, by William Jamson, his attorney in fact, from your decision of February 21, 1890, affirming the action of the local office rejecting his application to make soldiers' additional entry for 5.65 acres particularly described as lot 1, Sec. 20, and lot 1, Sec. 28, T. 14 N., R. 9 W., Vancouver, Washington.

It appears that said application was based upon your office certificate dated July 20, 1882, to the effect that "Pringle was entitled under section 2306 Revised Statutes, to 6.48 acres; that it was presented at the local office November 21, 1889, by said attorney in fact; that it was same day, in pursuance of your office circular, dated December 26, 1888 (15 C. L. O., 221), rejected for the reason that said tracts were non-contiguous, and that on appeal your office, by its said decision, affirmed the action below.

Sections 2304 Revised Statutes, gives to qualified soldiers and sailors the right, on compliance with the homestead law, "as hereinafter modified," to enter "a quantity of public lands not exceeding one hundred and sixty acres or one-quarter section to be taken in compact form."

Section 2306, *supra*, provides that every person entitled under the provisions of sections twenty-three hundred and four, 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.

It thus appears that a soldiers' original homestead entry is required to be for land "to be located in a body," (section 2289 Revised Statutes), or in other words "to be taken in compact form," (section 2304, *supra*).

Such original entry forming the basis for that contemplated by section 2306, *supra*, it follows, I think, in the absence of any provision to the contrary, that the latter must be of the same character as the former. Contiguity of land being essential to the validity of said original entry, it is consequently, essential to that of the said additional entry.

If therefore the applicant be permitted to enter the non-contiguous tracts named in his application such entry would be in contravention of statutory provisions. This conclusion renders it unnecessary to discuss the other matters presented by the pending appeal. It appears, however, that the applicant is entitled to enter, in accordance with the provisions of section 2306, *supra*, an amount of land (in compact form) greater than that contained in either of the tracts here in question. He should therefore I think, be given the opportunity of exercising such right to the extent of one of said tracts. The applicant will accordingly be allowed thirty days from notice hereof to elect which of the tracts named he will embrace in additional entry, the same to be in full satisfaction of his right under section 2306, *supra*. See general circular issued January 1, 1889, pages 27 and 28.

In the event of the applicant's failure to exercise the privilege herein accorded, his present application will stand rejected.

The decision appealed from is so modified.

The appeals transmitted by your office letters of February 6, 1891, of Levi M. Reber and Charles R. Crimble, from the rejection at the local office, by reason of the pendency of the Pringle application, of their applications to enter said tracts respectively, are, with accompanying papers returned with the record transmitted for appropriate action by your office.

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#### HOMESTEAD ENTRY—APPEAL—NOTICE.

##### WOOD *v.* BICK.

A homestead entry of a technical quarter section is legal though the area embraced therein may exceed one hundred and sixty acres.

A decision dismissing a petition for re-instatement of an entry and a rehearing thereon is a final adjudication from which an appeal will properly lie.

Service of notice on the attorney of the opposite party on application for certiorari is not necessary, where due service is made upon the party himself.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November 6, 1891.*

This petition is filed by Horace J. Wood complaining of the refusal to transmit his appeal from your decision of June 4, 1891 in the case of Horace J. Wood *v.* Amelia A. Bick, involving the S  $\frac{1}{2}$  NE  $\frac{1}{4}$  and lot 1, Sec. 5, T. 112, R. 67, Huron, South Dakota, and praying that an order may issue directing that the record in said case be certified to the Department.

The entire NE  $\frac{1}{4}$  of said section 5, containing 230.14 acres, was formerly embraced in the homestead entry of Martin L. Hursh, and final proof and cash entry was made therefor by Naomi Hursh, his widow, September 7, 1883. Mrs. Hursh was notified to appear and make her entry approximate to one hundred and sixty acres, and upon failing to respond to said notice, the entry was canceled June 4, 1886.

On August 6, 1886, Amelia A. Bick made timber culture entry for lot 1 and the S  $\frac{1}{2}$  of the NE  $\frac{1}{4}$  of said Sec. 5, the legal subdivision of the north half of said quarter section being designated as lots 1 and 2.

On July 9, 1887, Horace J. Wood made homestead entry of lot 2 of said quarter-section.

On August 8, 1887, Lewis C. Kemp filed affidavit of contest against the entry of Bick, charging failure to break five acres the first year, which was submitted to the local officers upon an agreed statement of facts, who dismissed the contest for the reason that she was prevented from doing the required breaking by Horace J. Wood.

On October 12, 1887, the day fixed for hearing upon the contest of Kemp, Wood who had also filed a contest against Bick's entry and which was held subject to the contest of Kemp, filed in the local office a petition for review of the decisions of your office canceling the entry of Hursh, asking that the contest of Kemp be abated, and that Hursh's entry be re-instated except as to lot number two, for which he had made homestead entry. With said petition he filed his own affidavit stating that he had purchased the land covered by Hursh's entry December 11, 1883, and had resided thereon ever since, which was corroborated by the affidavit of Naomi Hursh to the effect that she had sold the land to Hursh, and that she had never received notice of the cancellation of her entry.

On April 29, 1888, your office ordered a hearing between all the parties upon this petition, and the local officers issued notice to all parties fixing December 10, 1888 as the day for trial. The notice for Bick was sent to J. B. Henyan, attorney, and was receipted for by one Randolph. At the hearing, Wood appeared by counsel. Kemp and Mrs. Hursh made default, and Bick appeared by counsel for the sole purpose of moving to dismiss the case, for the reason that she had not been notified of the hearing.

The motion was overruled, and upon the testimony submitted, the

local officers recommended that Bick's entry be canceled, and that Hursh's entry be re-instated except, as to lot 2 covered by Wood's homestead entry. From this decision, Bick by her counsel, appealed.

Upon this appeal, you, on June 4, 1891, held that no service of the petition having been made upon Bick, the local officers were without jurisdiction, and the petition as to Bick should have been dismissed. (2) That it would be useless to remand the case for a hearing because, from an examination of the record, Wood, upon his own showing, has no claim whatever for relief. (3) That the hearing was ordered under a misapprehension of the facts that the parties had not been served with notice of Wood's application; and (4) That Wood having made homestead entry of lot 2, he is estopped from claiming the relief sought in his application, even if it be true that neither he nor his grantor had notice of the cancellation of the entry.

You therefore directed that the petition be dismissed; that the contest of Kemp be also dismissed, and "Wood having failed to set out a cause of action in his application for relief, and hearing upon the same having been denied and the application dismissed, for the reason stated, no appeal will lie from this decision."

The foregoing is an abstract of the material facts set forth in the judgment complained of, as appears from a copy of the same exhibited with the petition for certiorari.

You held that Bick was not served with notice for the reason that the notice was sent to Henyan and receipted for by Randolph, it not appearing that Randolph was the clerk or agent of Henyan, or that either Randolph or Henyan had any authority to receive said notice for Bick. It appears however, that the local officers mailed the notice to Henyan as attorney for Bick, he appearing as the attorney of record in the case of *Kemp v. Bick*. Exhibited with the application is a letter from I. B. Henyan to J. H. Baldwin, attorney for Wood, dated August 15, 1887, in which he says: "I will accept service of any papers you may wish to serve on Bick." Also an affidavit by S. M. West who swears—

that I know of my own knowledge that said Henyan was the attorney of Bick, that he so represented himself to me and offered to accept service of papers to be served on Bick. That said Henyan had his office in the same room with one Randolph in Huron South Dakota, and when Randolph was out of town he authorized Henyan to get said Randolph's mail and sign all registered mail cards. That when said Henyan was out of town he authorized said Randolph to get his, Henyan's mail, and sign all registered mail matter. That was the custom between them. That the notices of the hearing was sent to Henyan as attorney for Bick, and were receipted for by Randolph, for said Henyan.

In the copy of your decision, exhibited with this petition, it is stated that "the hearing in this case should have been dismissed unless Wood, in a reasonable time, had applied for new notices to be served on the parties." But the local officers were satisfied that the notices had been properly served, and directed the parties to proceed to trial. Wood

was, therefore, not called upon to make any further service. If you were not satisfied that the parties had been properly served, an opportunity should have been afforded the petitioner to perfect service. Wood was entitled to a hearing upon the allegations contained in his petition. No reason is shown in said decision, why the entry of Mrs. Hursh should have been canceled, and the cancellation of that entry solely upon the ground that it contained more than one hundred and sixty acres was error. It appears that the north half of this quarter section of land is designated as lots 1 and 2, and contains about seventy-five acres each, but these lots and the south half of the section form a technical quarter section, and the entry of Hursh of that quarter section, although it contained more than one hundred and sixty acres was legal and proper and should not have been canceled. William C. Elson (6 L. D., 797). This entry was commuted September 7, 1883, and final certificate issued. Wood alleged that he purchased the land from the widow of Hursh December 11, 1883, for the sum of \$1800, has resided upon it ever since, and made valuable improvements thereon, and that the first information he had of the cancellation of the entry was about the first of July, 1887, when he also learned that Amelia A. Bick had made timber culture entry of the tract. He also filed the affidavit of Naomi Hursh that she had no notice of the cancellation of the entry, and there is nothing in your decision showing that these alleged facts were impeached by any testimony offered at the hearing.

On August 18, 1887, he contested the entry of Bick, and filed this petition to review your judgment October 12. Furthermore, he alleges that the entry of Bick was made in the interest of Henyan, and is being used by him for the purpose of extorting money; that the contest of Kemp was initiated by Kemp at the request of Henyan, and that when the contest was dismissed by the local officers, Henyan filed the appeal for Kemp and accepted service of said appeal for Bick. If these facts are true, Wood was entitled to have the entry of Hursh re-instated and the entry of Bick canceled, and his rights in this respect were not impaired from the fact that, in order to save the entire quarter section, he made homestead entry of lot 2 after he learned of the cancellation of Hursh's entry, upon the ground that it was in excess of the amount allowed by law. But, independently of this, your decision dismissing his petition was a final adjustment of his rights from which he was entitled to an appeal to the department as to whether his application presented a sufficient cause of action and for relief.

It does not appear that Wood filed an appeal from said decision, but you held that he was not entitled to the right of appeal, for the reason that having failed to set out a sufficient cause of action, a hearing was denied, and the application dismissed. You will therefore notify Wood of right to appeal, and if the same is filed within thirty days from notice of this decision, you will transmit the same, with the record in this case, for consideration.

A motion has been filed by Bick to dismiss this petition, for the reason that it was not served on I. B. Henyan, counsel for Bick, but, in response to said motion, counsel for Wood files the return postal card, signed by A. A. Bick, the defendant. It was not necessary that it should be served on counsel, if it was served on defendant.

OSAGE ENTRY—PROCEEDINGS BY THE GOVERNMENT—CONFIRMATION.

COLONIAL MORTGAGE CO. v. KNIGHT ET AL.

An applicant under the provisions of section 2, act of May 28, 1880, who submits the requisite proof and pays one fourth of the purchase price, is entitled to "enter" the land embraced in his application; and the "entry" thus authorized segregates the land from the public domain, subject to forfeiture if the subsequent payments are not made.

An order suspending a previous judgment of cancellation is notice to subsequent applicants that the land embraced therein is not subject to appropriation.

The Commissioner of the General Land Office may properly direct the investigation of an entry by a special agent, without recognizing an adverse claimant as a party to such proceeding, where the question at issue is solely between the entryman and the government.

An entry is not confirmed under the body of section 7, act of March 3, 1891, where the mortgage is not made until after March 1, 1888, nor under the proviso, where it is held for cancellation by the Commissioner within two years from the date of final entry.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November 7, 1891.*

On July 31, 1884, John G. Knight filed pre-emption declaratory statement, (No. 4704), for SE:  $\frac{1}{4}$ , Sec. 23, T. 34 S., R. 13 W., at Larned, Kansas, alleging settlement on April 28, 1884. This land is a part of the Osage Indian trust and diminished reserve lands, subject to disposal under the act of May 28, 1880, (21 Stat., 143).

The act required final proof of settlement and qualifications, and payment of not less than one-fourth of the purchase price, within six months from date of filing.

On November 7, 1884, Knight made his final proof before a notary public, and on November 13, 1884, the same was approved at the local office, and he made his first payment of \$50 or one-fourth of the purchase price of the land. On November 7, 1885, he made his second annual payment of \$50 and on November 13, 1886, the third. The fourth and final payment was made March 21, 1890, having been delayed by the action of the Commissioner.

When Knight made said proof of his settlement and qualifications, the second section of the act of May 28, 1880, allowed him to "enter" said land upon the payment of one-fourth of the purchase price. The language of said section is that:

Such settlers shall make due application to the register, with proof of settlement and qualifications as aforesaid; and, upon payment of not less than one-fourth the purchase price shall be permitted to *enter* not exceeding one quarter section each, the balance to be paid in three equal installments.

When therefore, Knight, on November 13, 1884, made such proof and paid the sum of \$50 he "entered" said land, and it was thereby segregated from the other public lands of the United States, and appropriated to him, subject to forfeiture if any one of the subsequent payments should not be made, as provided by section one of said act.

By your office letter of April 1, 1887, the local officers were notified that, on the report of special agent Clark S. Rowe, the said entry was held for cancellation. On June 23, 1887, by your letter of that date, the local officers were advised that said entry was canceled.

On May 16, 1888, on affidavits of Knight's good faith, and that he had received no notice of the cancellation of his entry, your office suspended the order of cancellation, and directed a hearing on the report of said special agent.

On November 13, 1889, you directed special agent, John Yost, "to thoroughly investigate the case . . . and report the facts developed," and suspended the order for a hearing. January 8, 1890, on favorable report of said agent Yost, you rescinded the order canceling the entry, and held the same intact.

August 24, 1888, Francis N. Seckel, filed declaratory statement for said tract, alleging settlement August 13, 1888, and made final proof and cash entry, January 4, 1889. On May 28, 1889, Seckel and wife mortgaged the land in good faith to the Colonial and United States Mortgage Company, (limited), for the sum of \$1,000, which mortgage was duly recorded on the next day, in the office of the register of deeds for Barber county.

On March 4, 1890, you held Seckel's entry for cancellation, as in conflict with Knight's entry, which had been re-instated January 8, 1890. Seckel appealed to this Department, and your judgment was affirmed here, June 19, 1891.

Application for review is now made by said company, as mortgagee of said Seckel, on the following grounds:

1. The said mortgage company claim to have acquired an interest in the land from Seckel after the final certificate had been issued to him.
2. That it was error to open up the Knight case, when it had been shown by the local officers that he had had notice that his entry had been canceled, and had failed to appeal.
3. It was error to direct special agent Yost to investigate the character of Knight's settlement instead of ordering a hearing between the parties.
4. That said company was an innocent purchaser, without notice of any defect in Seckel's title, and it was error to re-instate Knight's entry without giving the company an opportunity to show Knight's fraud, and to cancel Seckel's entry without notice to said company.
5. That Seckel's entry is confirmed by the 7th section of the act of March 3, 1891, (26 Stat., 1095), and should be passed to patent.

Said company furthermore asks for a hearing that it may prove the fraud alleged on the part of said Knight.

When Seckel filed his declaratory statement on August 24, 1888, although Knight's entry had been canceled on the books of the local office by reason of the order of June 28, 1887, yet by the order of May 16, 1888, the order of cancellation had been suspended, and therefore was in-operative.

This order of suspension should also have appeared upon the records of the local office, and doubtless did, so that it would become evident upon an examination at the local office that Knight's entry was still upon the land, and that a hearing had been ordered to test its validity.

Under these circumstances, Seckel's filing and subsequent entry should not have been allowed as there cannot be two entries on the same land at the same time. Henry Cliff, (3 L. D., 216), *Geer v. Farrington*, (4 L. D., 410), *Russell v. Gerold*, (10 L. D., 18), *Melvin P. Yates*, (11 L. D., 556).

The Commissioner had full power to cancel Seckel's entry, *Gates v. Scott*, (13 L. D., 383).

The order of suspension was notice to Seckel that he had no right to file upon the land, and that his filing was illegally received, and he is chargeable with knowledge of the law, and therefore of the illegality of his entry.

The Commissioner had full power and jurisdiction to pass upon the validity of Knight's settlement, and to issue the orders of which complaint is made.

The officers of the land department are specially designated by law, to receive, consider, and pass upon proofs presented with respect to settlements upon the public lands, with a view to secure rights of pre-emption. *Shepley v. Cowan*, (91 U. S., 330-340); *Smith v. Custer*, (8 L. D., 269).

When Knight submitted proof that he had never received notice of the order canceling his entry, it was but equitable to give him an opportunity to be heard, and as the question was between the government and himself, it was within the power of the Commissioner, for his own information, to order the investigation to be made by the special agent, Yost, without recognizing Seckel as a party to such investigation. *United States v. Johnson*, (5 L. D., 442).

The only question to be investigated was, whether Knight was an actual settler with the qualifications of a pre-emptor, under the second section of the act of May 28, 1880. (21 Stats., 143); *United States v. Woodbury*, (5 L. D., 305); *Dusenberry v. Wall*, (12 L. D., 12).

An appropriate mode of investigating this question, was to send an agent to the locality, and ascertain the facts upon the spot, and when he decided in favor of Knight, and this decision was accepted by the Commissioner, and the order was issued, holding the entry intact, the question was settled.

As Seckel had acquired no right to the land by his entry, he could convey none to the said mortgagee.

The contention that Seckel's entry is confirmed by the seventh section of the said act of March 3, 1891, cannot be sustained. This entry does not come under the body of said section because the mortgage was not made until May 23, 1889, nor under the proviso, because within "two years from the date of the issuance of the receiver's receipt upon the final entry" it was held for cancellation by the Commissioner. Instructions, 13 L. D., 3.

There is no occasion for further investigation of Knight's settlement as that has already been adjudicated. The motion is denied.

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

TYNDALL *v.* PRUDDEN.

A contestant, who wholly fails to establish any of his allegations against the entry, cannot insist upon a forfeiture because of some default not charged, and where the rights of third parties are not involved the government in such case will not insist upon such forfeiture, unless bad faith on the part of the entryman is clearly apparent.

Where a pending contest fails and is dismissed, leaving the issue as between the entryman and the government, the entry may be confirmed under the proviso to section 7, act of March 3, 1891, if otherwise subject to such disposition.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November 7, 1891.*

I have considered the case of William C. Tyndall *v.* Arthur E. Prudden, involving the latter's homestead entry No. 2053, made July 19, 1883, and commuted to cash entry No. 7084, July 21, 1884, covering the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 28 and the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 21, T. 59 N., R. 18 W., Duluth land district, Minnesota, on appeal by Prudden from your decision of April 14, 1890, holding his entry for cancellation.

Upon an application by Tyndall to contest said entry, alleging in effect that Prudden never resided upon and improved said tract, and that the testimony upon which his cash entry was based was false, hearing was directed by your office letter of July 9, 1887, and duly had, both parties being represented.

Upon the testimony adduced, the local officers found that "the contest affidavit is not sustained in any point," and thereupon recommended that the entry be not canceled.

In your decision you find that

the testimony offered by plaintiff relates only to the appearance of said tract since the latter part of 1886, upwards of two years after each entry. None of his witnesses appear to have been on said tract prior to that time, and their knowledge of defendant's residence is based only upon their examination of the improvements. . . .

. . . The fact that defendant was not living on said tract two years after his cash entry is not of itself such a circumstance to my mind as would cast a suspicion upon his residence prior to final proof,

But

taking the testimony of this hearing in connection with the admission of defendant in his final proof on file in the case, I am satisfied that he did not in good faith establish a bona fide residence on said tract.

Your opinion then goes on to detail the absences recited in the final proof, and held that "such proof as this certainly would be refused by this office when reached in its regular order," upon which you reverse the decision of the local office and hold the entry for cancellation.

It is a well established rule that the burden of proof is upon the contestant, and that the charge must be established by a due preponderance of the testimony to warrant cancellation of the entry. A contestant, who has wholly failed to prove a single allegation made by him, can not insist upon a forfeiture, because of some default not charged in his affidavit of contest, and where the rights of a third party are not involved, the government does not usually insist on such a forfeiture, unless bad faith is clearly shown on the part of the entryman.

In the present case both you, and the local officers found that the contestant had wholly failed to sustain the charge made against Prudden's entry, and I think the record fully warrants such finding and therefore dismiss his contest.

Having disposed of that, the matter of the sufficiency of the final proof is one between Prudden and the government.

The honesty of the defendant is clearly shown by the frankness with which he details each absence from the land, from date of settlement to the offer of final proof, and as a reason for which he swears that each time he came to Duluth, a distance of ninety miles, for provisions.

I should be unable to find bad faith from this testimony, and were it not for the proviso to the 7th section of the act of Congress approved March 3, 1891 (26 Stat., 1095), would direct that the party be required to offer new proof showing full compliance with law.

The contest having been disposed of, I am of the opinion that the entry is confirmed by said section, which reads:

That after the lapse of two years from the date of the issuance of the receiver's receipt, upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of said entry, the entryman shall be entitled to a patent.

The object of this proviso is plain. It was, as between the government and the entryman, all defects are cured and confirmed "after the lapse of two years from the date of the issuance of the receiver's receipt upon final entry;" but this confirmation shall not interfere with the rights of pending "contests" or "protests."

The pending contest having been dismissed, I direct that patent issue upon Prudden's entry.

## OMAHA LANDS—PUBLIC SALE.

NICK FRITZ.

Omaha lands sold at public sale, and then relinquished, can only be resold after new advertisement and re-offering.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
November 10, 1891.*

I have examined your decision of April 25, 1890, from which Nick Fritz, after an unsuccessful motion for review, has appealed to this Department.

The case involves the right to the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 9, T. 25 N., R. 6 E., and the SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , of the same section, township, and range, Neligh, Nebraska.

Fritz claims the same under separate declaratory statements, filed December 28, 1889, the date of sale of forfeited and "heretofore unsold lands on the Omaha Indian Reservation," under the provisions of the act of May 15, 1889 (25 Stat., 150). At such sale Fritz was the highest bidder for said tracts, and they were sold to him—the tract first described at forty-three dollars and fifty cents per acre, and the latter at sixteen dollars per acre. On the same day he was permitted to relinquish his first purchase, and the same tracts were again offered, and he became the purchaser of both tracts at seven and twenty-five one hundredths dollars per acre. He thereupon filed his declaratory statements for said tracts, under the provisions of instructions from your office of November 19, and December 26, 1889.

By your said decision you canceled his said declaratory statements for these tracts of land, holding that he acquired no rights by his second purchase; that after his first purchase and relinquishment, the land became public land, and could only be resold in pursuance of another advertisement and re-offer.

The instructions of your office as to sale of these Omaha forfeited lands make no provision for a resale of these lands, as was done in this case, and your action was right.

The filings of Fritz will be canceled, and the said tracts will be listed as forfeited lands, subject to resale under directions of your office.

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OSAGE ENTRY—CONFIRMATION UNDER SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* BUSH. *Overruled*  
*18 L. R. 441*

In determining whether an Osage entry is susceptible of confirmation under the proviso to section 7, act of March 3, 1891, the lapse of time, within such action may be defeated, must be computed from the date of the issuance of the receiver's receipt on the last payment and when the final certificate is executed and delivered by the register.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 11, 1891.*

Charles V. Bush has appealed from your decision of June 21, 1890, holding for cancellation his Osage cash entry for the SE.  $\frac{1}{4}$  of Sec. 3, T. 28 S., R. 8 E., Topeka, Kansas.

His proof was made before Warren W. Leaming, notary public for Butler county, Kansas, November 3, 1884. November 5, 1884, the proof and first payment (\$50) were accepted by the local officers. His second payment (\$50) was made November 12, 1885. His third and last payment (\$100) was made December 14, 1886, at which date final certificate was issued to him.

June 20, 1888, his entry was held for cancellation, on report of a special agent.

October 6, 1888, on his application, your office ordered a hearing to show cause why his entry should be re-instated, which was had December 4, 1889, and the local officers recommended that it be canceled. On appeal you affirmed their judgment and Bush has appealed to this Department.

An examination of the evidence clearly sustains your opinion as to the bad faith of the entryman, and the only question to be considered is, whether the entry should be confirmed under the act of March 3, 1891 (26 Stat., 1095). The treaty and law under which the title to this land is to be acquired, requires that the land shall be sold for cash for the benefit of the Indians. In providing for its disposition, Congress required that it should be sold to actual settlers, having the qualifications of pre-emptors on public lands, at one dollar and a quarter per acre under such rules and regulations as the Secretary of the Interior shall prescribe, and in prescribing the manner in which it should be purchased, he required substantially that the same rules should apply to the purchaser as are followed by the pre-emptor.

The particular act under which the entryman purchased this land is that of May 28, 1880 (21 Stat., 143), sections 1 and 2 of which read as follows:

That all actual settlers under existing laws upon the Osage Indian trust and diminished reserve lands in Kansas (any failure to comply with such existing laws notwithstanding) shall be allowed sixty days after a day to be fixed by public notice by advertisement in two newspapers in each of the proper land districts, which day shall not be later than ninety days after the passage of this act, within which to make proof of their claims, and to pay one-fourth the purchase price thereof, and the said parties shall pay the balance of said purchase price in three equal annual installments thereafter.

*Provided,* That nothing herein contained shall be construed to prevent an earlier payment of the whole or any installment of said purchase money as aforesaid.

And if default be made by any settler in the payment of any portion or installment at the time it becomes due under the foregoing provisions, his entire claim, and any money he may have paid thereon, shall be forfeited and the land shall, after proper notice, be offered for sale according to the terms hereinafter prescribed, unless before the day fixed for such offering, the whole amount of purchase money

shall be paid by said claimant, so as to entitle him to receive his patent for the tract embracing his claim.

Sec. 2. That all the said Indian lands remaining unsold and unappropriated and not embraced in the claims provided for in section one of this act, shall be subject to disposal to actual settlers only, having the qualifications of pre-emptors on the public lands. Such settlers shall make due application to the register with proof of settlement and qualifications as aforesaid: And, upon payment of not less than one-fourth the purchase price shall be permitted to enter not exceeding one quarter section each, the balance to be paid in three equal installments, with like penalties, liabilities and restrictions as to default and forfeiture as provided in section one of this act.

It will be observed from the wording of these sections that the equitable title does not attach upon the entry so as to entitle the entryman to a patent. He is only given such right upon full payment. It is then, and not until then, that the equitable title passes from the government. The land is subject to forfeiture and resale for a failure to meet any one of the deferred payments. Under your instructions, I understand the practice has been for the settler to make proof that he is an actual settler and has the necessary improvements upon the land, and pay the first installment of fifty dollars for which the receiver gives him a receipt, and one for each subsequent payment, until the last one is made, when the final certificate is issued to him, reciting that he has made payment in full, and upon the presentation thereof to the Commissioner of the General Land Office the entryman shall be entitled to a patent for the land so settled upon.

The proviso of section 7 of said act of March 3d, reads :

That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor.

By circular of May 8, 1891, 12 L. D., 450, among other things, it is provided that a government proceeding which has been initiated against an entry within two years from the date of the issuance of the receiver's receipt upon final entry will prevent a confirmation under said act.

In this case the proof was submitted in support of the right to purchase and first payment made November 5, 1884. The last payment and the final certificate issued December 14, 1886, and the entry held for cancellation June 20, 1888, and within two years *after the final certificate issued*, hence the question necessary to be determined in adjusting the rights of Mr. Bush is, Does the term, "the receiver's receipt upon final entry," referred to in said section, mean the receipt given by the receiver when the proof and first payment are made, or shall it be held to apply to his receipt issued upon the last payment and when the *final certificate* is executed and delivered by the register?

I do not suppose that Congress had this sort of a purchase in mind when it passed this act, as it only mentions in said section four well

known classes of entries, viz: pre-emption, homestead, desert land and timber culture, in all of which the *final proof* is supposed to be submitted upon such compliance with the law as will entitle the entryman to a patent for the land, hence the terms of the act specifically apply to these classes of entries, but inasmuch as the department has held that "Osage entries" come within the terms of the act as pre-emption entries (*United States v. Harp*, 13 L. D., 58), the intent of Congress as so applied thereto must be determined by the general wording of the act and when we ascertain that the spirit, scope, design and intent thereof is to direct that a patent shall issue to the entryman after the lapse of two years after he has fully complied with all the terms of the particular act under which he makes his entry, unless a protest contest, or proceeding is lodged against the same looking to a cancellation thereof, I think we will have no difficulty in determining the proper status of this case.

The entryman had at least three years within which to perfect his title to this tract after he submitted his proof and as it is termed, "entered" this land. During this time no forfeiture could be declared if he had complied with the law and met his annual payments, yet if he failed to make the third and last, three years after "entry," the "entire claim and the money he may have paid thereon shall be forfeited and the land shall, after proper notice, be offered for sale," etc.

The entry is not complete until final payment is made. The submitting of proof is only a preliminary step in making the entry and no right is acquired thereby unless followed up by the partial payments required by the statute. It is by the final payment that the entryman reaps the full fruition of his entry and not until then. Therefore, can it with consistency be held that this so-called entry can be confirmed one year before the final payment is due, unless a contest, protest, or proceeding is instituted against the same to secure its cancellation? Suppose the entryman up to the third payment has fully complied with the law, then what ground is there for either of these proceedings within two years after "entry?"

There being none, it is absurd, to my mind, to say that his entry shall be confirmed and the government defrauded of the last payment. The right to a forfeiture and a confirmation can not exist at the same time for the same tract. There is no evident intent on the part of Congress as expressed in the proviso of said section to repeal the act of May 28, 1880, hence it must be construed so as to give full force and effect to both enactments. This can be done by holding that the true intent and meaning of the first mentioned act is to require the expiration of two years after the issuance of the final receipt before he shall escape an investigation of the facts surrounding his entry, either by an individual or the government. To my mind it is very clear that Congress so intended. It must in reason be conceded that this remedial legislation is to quiet and repose the equitable title of an entryman in

this class of cases two years after he has done all that is required of him by the law under which he is seeking to acquire title to his land and has the register's final certificate therefor. This lapse of time shall be conclusive evidence that he has complied with the law and entitles him to the legal title to the land by requiring the issuance of patent, hence I must hold that the fair construction of this act means that two years must elapse after the entryman has done all that the law requires him to do before he is exempt from investigation and that the term, "final entry" as used therein, means such an entry as primarily, at the time it is made, entitles him to a patent. The final certificate and receipt are the only *prima facie* evidence of this.

Applying these principles to this case, your judgment holding this entry for cancellation was rendered within two years after the entryman had completed his entry, and final certificate issued and the judgment appealed from being supported by the evidence must be affirmed and the entry must be canceled. It is so ordered.

The decision in this case of August 20, 1891, is hereby recalled and revoked.

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MILITARY RESERVATION—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* SMITH.

The act of July 5, 1884, restricted the right of entry on lands within the old Fort Lyon military reservation to persons who had made filing or entry prior to the passage of said act, and made all other lands therein subject to disposal only at public sale in accordance with said act; and the status of said lands remained unchanged until the act of October 1, 1890, which directed their disposition under the homestead law only

An entry made without authority of law, and which could not have been allowed under the law as it existed prior to the passage of the act of March 3, 1891, is not within the confirmatory operation of the proviso to section 7 of said act.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 11, 1891.*

I have considered the appeal in the case of the United States *v.* J. H. B. Smith from the decision of your office dated August 29, 1891, involving the validity of the latter's entry under the pre-emption law, for E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , and SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , Sec. 32, T. 22 S., R. 47 W., Lamar land district, Colorado.

It appears that said claimant filed a pre-emption declaratory statement for the above tracts November 20, 1887, and made proof before the local office July 11, 1889. In due course of official business the entry was reported to your office and on examination was found to lie within the limits of the old Fort Lyon military reservation, and therefore on July 13, 1891, the entry was held for cancellation. Messrs. Baldwin and Baldwin of this city appeared for the claimant and filed

a motion for review of your decision. Under date of August 6, 1891, you denied the motion with the usual right of appeal, and on August 4, 1891, the claimant by his attorneys moved that the entry be approved for patenting under the seventh section of the act approved March 3, 1891 (26 Stat., 1095).

August 29, 1891, you overruled said motion on the ground that the case in question did not fall within the provisions of said act, whereupon Messrs. Crippen, Lawrence and Co., mortgagees, by their attorneys, Baldwin and Baldwin, appealed from your action in holding said entry for cancellation and in refusing to approve the same for patent under the act above referred to.

It appears that under date of August 8, 1863, by executive order, several thousand acres of land in Colorado, were set apart for the Fort Lyon military reservation. Subsequently the reservation was abandoned and in 1874, the land embraced therein was surveyed and treated as public land.

The act of July 5, 1884, (23 Stat., 103), providing for the disposal of abandoned and useless military reservations contains the following proviso, relative to land within the old Fort Lyon military reservation:

That all patents heretofore issued, and approved State selections, covering any lands within the old Fort Lyon military reservation in the State of Colorado, declared by executive order of August 8, 1863, are hereby confirmed; and the rights of all entrymen and settlers on said reservation to acquire title under the homestead, pre-emption, or timber culture laws are hereby recognized and affirmed to the extent they would have attached had public lands been settled upon or entered; and such portions of said reservation as shall not have been entered or settled upon as aforesaid shall be disposed of by the Secretary of the Interior under the provisions of this act, including lands that may be abandoned by settlers or entrymen.

The act in question further provides that all of the lands within said reservation not claimed by the settlers shall be appraised and sold to the highest bidder.

It does not appear, however, that any steps have ever been taken to appraise and dispose of said lands in accordance with said act; but October 1, 1890, Congress passed an act (26 Stat., 561), providing,

That the lands embraced in the former military reservation known as Fort Lyon and the former military reservation known as old Fort Lyon, in the State of Colorado, shall from and after the passage of this act, be subject to disposal, to actual settlers thereon, as lands held at the minimum price, according to the provisions of the homestead laws only.

It is apparent from the language of the proviso, in the act of 1884, above quoted, that the right of pre-emption, homestead or timber culture entry within said reservation was confined solely to persons who had made filing or entry prior to the passage of said act; and furthermore, that all lands that had not been so entered and settled upon were subject to disposal only at public sale in accordance with the provisions of said act. There was no limit specified in the act within which these lands should be appraised and sold and hence the same remained in

full force and effect until superseded by the act of October 1, 1890, (*supra*) which provided for the disposal of the lands under the homestead law only.

Thus it will be seen that at the date in 1887, when Smith initiated his pre-emption, not only were the lands not subject to such entry but Congress had specifically directed that said lands should be disposed of in another manner, therefore the entry of Smith is illegal and should not have been allowed.

Counsel for entryman, however, claims substantially that notwithstanding said illegality, the entry having been permitted and final certificate issued over two years prior to your action in holding said entry for cancellation, that the case falls within the provisions of the seventh section of act March 3, 1891 (*supra*), and therefore the entry is confirmed.

The main question at issue in the case at bar therefore, is whether the entry of Smith, clearly illegal in its inception, is one confirmed by said act of 1891, and should be patented.

I am clearly of the opinion that the case does not come within the intentment of said act.

Under the head of Instructions (13 L. D., 1), the Department has already construed the intent of said act of 1891, and laid down the rule that it was not the intention of said act to confirm entries made without authority of law, which could not have been allowed under the law as it existed at the passage of said act.

The entry in question, as heretofore shown, could not have been allowed under any existing law, and therefore does not fall within the provisions of said confirmatory act.

Your judgment in the case is therefore affirmed.

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#### RAILROAD GRANT—INDEMNITY—CONFLICTING SELECTIONS.

#### HASTINGS AND DAKOTA RY. CO. *v.* ST. PAUL, MINNEAPOLIS AND MANITOBA RY. CO.

The right acquired by an indemnity selection is dependent upon the status of the land at date of selection.

Land included within a *prima facie* valid indemnity selection is not subject to selection by another company, and an application therefor should be rejected, and not held to await the determination of the rights asserted under the prior selection.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
November 11, 1891.

The tract in dispute is the S.  $\frac{1}{2}$  of Sec. 19. T. 117 N., R. 33 W., Marshall land district, Minnesota, and is within the indemnity limits common to the grants, conferred by the State of Minnesota upon the St. Paul, Minneapolis and Manitoba Railway Company (main line) and the Hastings and Dakota Railroad Company.

Selection of this tract was made November 14, 1866, on account of the first mentioned grant, but there was no specification of a loss as a basis therefor, the same being in accordance with the practice then existing.

On June 7, 1886, the Manitoba Company applied to select this land, and specified a tract within the granted limits, lost to the grant, as a basis for such selection.

This selection was rejected by the local officers, for the reason that the loss was prior to the grant, and therefore would not support an indemnity selection, from which an appeal was taken.

It is apparent that this second selection was intended merely to satisfy the requirement of the circulars of November 7, 1879, and August 4, 1885, 4 L. D., 90.

On July 28, 1886, the Hastings and Dakota Railroad Company applied to select the same land, its selection being accompanied by a specification of a loss within its granted limits as a basis for the selection.

This application was rejected by the local officers, on account of the pendency of the Manitoba Company's appeal; thereupon the Hastings and Dakota Railroad Company also appealed, urging that the Manitoba Company "have had more land certified to them within the indemnity limits of their grant than had been lost within the granted limits of said grant."

Your decision of December 6, 1888, reversed the action of the local officers in rejecting the selection by the Manitoba Company, presented June 7, 1886, and directed its allowance, as of that date, upon the payment of the required fees, but sustained their action in rejecting the application by the Hastings and Dakota Railroad Company, as to the tract in question.

The attorneys for the respective companies were duly advised of your action, and the Hastings and Dakota Railroad Company of its right of appeal.

Said company filed an appeal, out of time, which your office refused to receive, but, upon its petition for certiorari, in which it was alleged that the question at issue is a general one, involving a principle which will govern all the lands to which these companies have conflicting claims, and the adverse party having waived all objections to said appeal that might be urged by reason of said appeal not being filed in time, you were directed, by departmental communication of December 7, 1889, to "transmit the record in said case to the Department that errors alleged in said appeal may be considered."

It is urged in the appeal, that having determined by your decision of December 6, 1888, that the Manitoba Company has priority of right by reason of prior selection, you should thereupon have suspended the selection by the Hastings and Dakota Railroad Company, pending the determination of the right of the Manitoba Company to said tract.

You having found that the basis given by the Manitoba Company is such a loss as would support an indemnity selection, the validity of its selection is established, unless, upon an adjustment of that grant, it is found that such loss has already been satisfied.

Before an adjustment can be arrived at much time must elapse, and the government is asked to await such determination, and, in the event that the Manitoba Company is found not to be entitled to the same, that the Hastings and Dakota Railroad Company be then given the preference under its selection, presented and rejected as before set forth. This would be contrary to all practice, and could only be granted upon the supposition that a selection is a continuing right, and will attach at any time whenever the land may become subject thereto, without regard to its condition at the date of its presentation.

It is a well established principle that the right acquired by an indemnity selection is dependent upon the status of the lands *at the date of selection*. Missouri, Kansas and Texas R'y Co. v. Beal, 10 L. D., 504.

In the present case, at the time application was presented by the Hastings and Dakota Railroad Company, the land was embraced in a prior selection by another company, valid on its face, which constituted a sufficient ground for its rejection.

The rejection of this application does not prevent the company selecting the land, at any time when it may be properly subject thereto.

Having determined that its selection heretofore made was properly rejected, no rights can be acquired thereby, and your action was proper.

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

SHEPHERD v. EKDAHL.

The confirmation of an entry under section 7, act of March 3, 1891, is not defeated by want of good faith on the part of the entryman and his immediate transferee, where the land subsequently and prior to March 1, 1888, is sold to a bona fide purchaser for a valuable consideration, and no adverse claim originating prior to entry exists; nor does the pendency of a contest defeat such confirmation.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 11, 1891.*

On October 18, 1884, Charles A. Ekdahl made pre-emption cash entry for ~~the~~ N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 20, and the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 21, T. 24 S., R. 10 W., Wichita land district, Kansas.

On October 29, 1884, following, he sold and transferred by warranty deed to Thomas J. Anderson. On July 14, 1885, Anderson and wife transferred the same to E. V. Thompson, Sr., E. V. Thompson, Jr., J. H. Thompson, and A. Glazbrook. Subsequently, in the year 1888, the said parties, who had composed The Thompson Cattle Company, dis-

solved, and the property in question was transferred to J. H. Thompson, who now owns it.

On February 9, 1887, James M. Shepherd initiated a contest against said entry, charging that it was fraudulently made, and that the entryman had failed to comply with the law. He further alleged that the entry was made for and in the interest of one Thomas J. Anderson, to whom he deeded the land soon after making final proof.

A trial was had on these charges before the register and receiver, and a finding rendered in favor of contestant. An appeal was taken by Anderson, transferee, from this finding to your office. While it was still pending, J. H. Thompson, alleging ownership of the land, applied to intervene and asked for a rehearing.

On January 18, 1890, a rehearing was ordered by you. A trial followed before the local officers, and a finding rendered against contestant, who appealed to your office.

On May 11, 1891, the appeal was considered by you, the contest dismissed, and the entry held intact. Contestant has brought the case here on appeal, and Thompson has filed a motion, asking that the contest be dismissed and a patent issued on the entry in question, under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095).

Your decision appealed from was made after the passage of said act, and held that the evidence in the case showed that the entry was made by Ekdahl in the interest of Anderson, and that so far as they were concerned, it was a fraud against the United States, but that the purchase of Thompson *et al.*, from Anderson, and the subsequent purchase of J. H. Thompson from his partners were made in good faith and for a valuable consideration.

It appears from the record that the purchase from Anderson was made prior to March 1, 1888; in fact, all the purchases of this tract were made after final entry and before that date, except the deed made to J. H. Thompson of the undivided interests of his partners, in the partition of all their lands, the particular date of which deed is not given.

No adverse claim, originating prior to final entry, exists, and the transfers, except the one to Anderson, are shown to have been made for valuable considerations and to *bona fide* purchasers.

The entry should be confirmed by the 7th section of the act in question, without any reference to the alleged rights of contestant. *Axford v. Shanks*, 12 L. D., 250; same, on review, 13 L. D., 292.

You will call on the present holder to furnish proof as required by the letter of instructions of May 8, 1891 (12 L. D., 450). After receiving this proof, you will adjudicate the case in the light of the instructions and the act cited.

Your decision is accordingly modified.

## PRE-EMPTION—MARRIED WOMAN—HEAD OF A FAMILY.

## THERESA LANDRY.

A married woman is entitled to make pre-emption entry as the head of a family where it appears that the husband is wholly helpless through an incurable malady, and that both he and the children are actually dependent upon her for support.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 12, 1891.*

The record in the appeal of Theresa Landry from your decision of April 15, 1890, holding for cancellation her pre-emption cash entry for the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 9, T. 3 S., R. 31 E., La Grande, Oregon, shows the following facts:

She submitted her final proof December 11, 1885, made payment and received final certificate December 28 of the same year. She was at the time a married woman. Her family consisted of three children and an invalid husband. In her final proof she says:

My said husband has never to my knowledge filed or entered any land under the pre-emption law, and that I am informed by him and verily believe that no such entry or filing has ever been made by him.

Both her proof witnesses, in addition to the usual testimony, state that they are well acquainted with Frank Landry, husband of claimant, and that he is entirely helpless and unable in any way to support or assist in the support of his family.

On the 17th of December, 1885, subsequent to final proof and before the issuance of final certificate, two physicians and the county judge subscribed to the following affidavit:

We, T. J. Lucy, F. W. Vincent and J. M. Pruett, each being duly sworn, say, each for himself and of his own personal knowledge, that we are acquainted with Frank Landry, who is the husband of the claimant, Theresa Landry; that we and each of us has been personally acquainted with him for four years last past, and know him to be entirely helpless and wholly unable to aid or assist in the support of his family, and further that he has for the past four years been a helpless invalid, and in our opinion must ever remain such.

F. W. VINCENT, M. D.

T. J. LUCY, Co. Judge.

J. M. PRUETT, M. D.

July 20, 1889, upon an inspection of her final proof, her final certificate was suspended, and you directed the claimant to be notified that she would "be allowed sixty days within which to furnish any evidence she may have to offer, to show that although married, she is the actual head of the family."

No report having come from the local officers, December 23, 1889, you again called their attention to the matter, and requested immediate action thereon.

March 19, 1890, the local officers reported that, though the claimant had been notified of the requirement of your office, she had taken no

action thereon, and, by letter of April 15, 1890 you directed that she be notified that her entry was held for cancellation, and that sixty days would be allowed her in which to appeal from your said action.

I do not find from the record that she was ever notified of this last action of your office, but, on August 9, 1890, she appealed from your said action, holding her entry for cancellation, and with her appeal filed her own affidavit and that of two more witnesses, showing the helpless condition of her husband (unable to walk, stand, or feed himself), and that he and her three children are entirely dependent upon her for support, and that she is, and ever since her settlement on the land has been, the actual head of the family.

She excuses herself for not sooner complying with your directions as to further proof, by showing that she was not able, at an earlier date, to procure the money with which to employ an attorney to attend to the matter.

The only question to be considered is, do the facts above set forth constitute her the head of a family as contemplated by Section 2259 of the Revised Statutes?

That statute provides that, "every person being the head of a family, or widow, or single person over the age of twenty-one years," is authorized to enter one hundred and sixty acres of land, etc.

It is evident from this, that the statute contemplates that persons other than the husband or widow may be the head of a family.

This Department, in many decisions too numerous to need citation, has held that, where the husband has deserted his wife and left his family dependent upon her support, she thereby becomes the head of the family, and entitled to all the privileges, in respect to the public lands, that pertain to a single person. These rulings are based upon the principle, that she, through no fault of her own, has been deprived of the support and protection of her husband (the common law head of the family), and thereby the duties that pertain to the head of the family of necessity devolve upon her.

These reasons apply with equal force to the case at bar, where it is shown that, through no fault of her own, nor that of her husband, she has been compelled to care for and support, not only her children, but her helpless husband as well.

In some aspects, her condition is worse than that of a deserted wife, for the latter by the laws of nearly all the States may free herself from the bonds of matrimony, and become entitled to all the privileges of a single person and be exempted from supporting her husband, while no such relief is offered to her who finds herself deprived of a husband's support and protection through his helplessness resulting from sickness, thereby increasing her burdens and taxing her energies and resources to care for him in his feeble condition.

One definition of the head of a family, given by Bouvier is: "One who provides for a family."

While the decisions of the courts of last resort are not uniform on what constitutes the head of a family, I think the prevailing rule is in harmony with this definition of Bouvier. Under this rule, the head of a family need not be a husband or father. The son (unmarried) who supports his brothers and sisters, or his infirm father or mother, is in contemplation of law the head of a family. The criterion is, has he a family dependent upon him for support.

In the case at bar, the claimant is shown to come clearly within the rule. Her husband is not only helpless, but his malady (rheumatism) is shown to be incurable, which unfits him for life for the performance of the duties of the head of his family. His wife, in the exercise of the noblest attributes of wife and mother, has taken his place at the head of the household, and has become his ministering angel in affliction. She has shown compliance with the law as to residence and improvements, and her entry will be passed to patent.

The decision of your office is accordingly reversed.

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ENTRY—INSANE PERSON—PRIORITY—RELINQUISHMENT.

LIKENS *v.* CONNELLY ET AL.

An entry made by a person who has previously been adjudged insane is void *ab initio*.

On presentation of a relinquishment in due form the local office is warranted in canceling the entry, in the absence of information that the instrument was executed by one of unsound mind.

On a question of priority as between a relinquishment and an application to contest, the judgment of the register at the time will not be set aside except on a clear showing that it was wrong.

A relinquishment is not in aid of a contest unless it is filed as the result of the suit.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
November 12, 1891.

I have considered the case of Calvin T. Likens *v.* Edward Connelly and Bernard Connelly on appeal by the former from your decision of June 26, 1890 dismissing his contest against the homestead entry of Bernard Connelly for the N.  $\frac{1}{2}$ , NW.  $\frac{1}{4}$ , Sec. 8, and E.  $\frac{1}{2}$ , SW.  $\frac{1}{4}$ , Sec. 5, T. 37 N., R. 3 E., Seattle, Washington, land district.

On March 14, 1884, Bernard Connelly made homestead entry for this land, and on March 19, 1888, he executed a relinquishment therefor, and on the 23d of same month Edward Connelly made the necessary affidavits and application to make homestead entry therefor, and mailed the same at Whatcom, W. T., together with the relinquishment to the land office at Seattle.

On the 27th of same month, one Newlin, attorney for Likens, handed to the register an affidavit of contest by Likens against the entry of Bernard. Nothing was done with this paper on that day.

On the 28th of same month, the clerk in the office, on opening the mail found the relinquishment and application to enter, and was placing the homestead entry of Edward Connelly on record, when his attention was called by the register to the contest affidavit of Likens. Thereupon, it appearing that the homestead application had laid in the office several days in the unopened mail, it was decided to complete the record of it, and to reject the contest affidavit. The application was noted as "rec'd by mail March 26, '88 from C. Donovan, Whatcom, W. T.," and the contest affidavit was indorsed, "presented March 27, 1888, and refused because the entry therein described has been relinquished and homestead entry made for said land. John Y. Ostrander, Register."

From this action, Likens appealed. The affidavit of contest is lost, but it is conceded that it alleged bad faith in Bernard Connelly in making the entry; that he was an idiot incapable of making entry, and had wholly failed to comply with the homestead law.

Accompanying the appeal, Likens transmitted certain affidavits which are not before me, but it is conceded that they set forth that Edward Connelly was the father of Bernard; that he had been instrumental in having the entry made, and had also procured the relinquishment; that he knew the infirmity of his son; that the relinquishment was void, by reason of the entryman's insanity, and that Edward Connelly's entry was therefore fraudulent and invalid.

Your office, on July 31, 1888, ordered a hearing upon the matter, and directed a full investigation and especially as to the mental condition of Bernard Connelly. This hearing was held, and the local officers found that Likens should have been allowed to contest the entry of Bernard, and that the entry of Edward Connelly should be canceled, and they so recommended. Thereupon, he appealed to your office, and on June 26, 1890, you reversed said action, dismissed the contest and allowed the entry to remain intact, from which action Likens appealed to the Department. The testimony shows that Bernard Connelly was feeble minded and growing worse as he grew to manhood. He was, in 1882, by the probate court of Pierce county, Washington Territory, upon proceedings duly held, adjudged insane, and committed to the insane asylum at Steilacoom to be kept until discharged by law. It does not appear that any guardian was appointed for his person or estate. He was then a minor, and his father as his natural guardian acted as his "next friend."

In March, 1882, Bernard was allowed to go home, the entry showing that he was "discharged improved." The superintendent of the asylum says he was "congenitally defective;" that "he would properly be classed as an imbecile." The testimony shows clearly that he never had mental capacity to make an entry, or to comply in any way with the laws relating to homesteads. He was never restored, in law or in fact, and was returned to the asylum and remained until 1887 when he was permitted to go home with his father. He has since died. His entry

made after he had been adjudged insane, was absolutely void *ab initio*. See *Dexter v. Hall* (15 Wall., 9).

Counsel insist that the relinquishment was void. It is sufficient to say it was in due form and without information *aliunde* the officers were warranted in placing it on record and canceling the entry. The entry being void *ab initio* will not be re-instated simply that it may be again stricken from the record, as courts are not presumed to do vain or idle things. The land was open to entry as soon as the cancellation was made.

As to the question of priority between the affidavit of contest of Likens and the application of Edward Connelly, the testimony is conflicting.

It appears by the testimony of Mr. Gregory, clerk in the land office, that in the spring of 1888, the work of the office was very heavy and large mails coming in were laid aside from day to day to be "worked" as the force could do the work of the office, and this "bunched" mail was piled together so that what came one day could not be told from that received on any other day. They had a rule that the mails in the office in the morning when they opened the office should have precedence of the business presented at the counter during the day. On the 28th of March while he was putting the homestead entry of Edward Connelly on record, the register called his attention to the affidavit of contest which had been handed him on the previous day, and asked his best recollection as to the receipt of the homestead application. He says:

I told him that it might have come into the office as far back as the 26th. It might have been the 25, 26, 27 or 28th, and after talking the matter over we determined to note the receipt of the homestead application as of the 26th. . . . Mr. Ostrander then rejected the contest affidavit.

He further says that by due course of mail, it would have arrived on the 26th, if mailed at Whatcom on the 23d. If it arrived by Sunday's mail (the 25th) it would come into the office Monday morning—did not get mails on Sunday. Gregory says on the morning of the 28th, he opened a large amount of "bunched" mail, sorting it and placing homestead applications in one pile, pre-emptions in another, and miscellaneous business in a third, the envelopes being thrown in a waste basket.

After opening the mail, he began putting on record the homesteads and was at work on this Connelly entry, as stated, the envelopes being thrown in a common pile. They could not tell about the mailing of the application, but it was dated on the 23d of March. This is substantially all the evidence we have as to the time when the application to enter, and the relinquishment were placed in the office. There is some testimony about the arrival of the mails, but it is conflicting and does not prove anything definite or certain.

Taking the evidence as we have it, on the question of priority, I am not prepared to say that the relinquishment and application were not in the office awaiting action at the time the contest affidavit was presented. This was the judgment of the register at the time, and this governed his action, which will not be set aside without a clear showing that it was wrong. This has not been made. Counsel for Likens do not claim that the contest induced the relinquishment, but, on the contrary, they assert that Edward Connelly induced or commanded his idiot son to make a homestead entry upon the land to hold the same until he should be in position to make entry for it himself. That he had an adjoining pre-emption and wanted this land held until he could make final proof on that and then homestead this tract in controversy. They denounce this as a "rank fraud." The claim that the father used the son as a mere tool to keep persons from settling on the land, and that when he got ready to make the homestead entry he induced him to relinquish, defeats the claim of preference right of Likens, on the ground that it induced the relinquishment as it admits that the contest had nothing to do with it.

There is no evidence that Connelly had any intimation of the contest. Likens is a land attorney who came there, saw the land, went away, prepared the affidavit of contest and had it presented at the office at Seattle. There is nothing tending to show that he intimated to any one his intention, and as appears by the testimony, the application of Connelly and the relinquishment of his son were then, if not in the office, in the mail on their way to it.

In *Webb v. Loughrey* (9 L. D., 440) the question of preference right acquired by contest was quite fully discussed, and it was said:

From a review of these decisions it appears . . . that when a relinquishment is filed pending contest the preference right of the contestant will depend on his ability to sustain the charge as laid by him; that such relinquishment is presumed to be the result of the contest, but that such presumption may be rebutted.

In the case at bar, the presumption is clearly rebutted. The preponderance of the evidence shows that the relinquishment was made at the instance of the father on the 19th of March. That application to enter was made on the 23d, and mailed from Whatcom to Seattle, and that by due course of mail, it reached there and should have been acted upon before the affidavit of contest was presented.

Much has been said by counsel about the want of notice to Bernard Connelly, but counsel for Likens deem it unimportant, and they say his entry was absolutely void. The entry having been void from the beginning and having been canceled, the record was cleared of it. Bernard had no interest in the case.

Taking the whole case I do not find that you erred in disallowing the contest and allowing Edward Connelly's entry to remain intact. Your decision is therefore affirmed.

## ACT OF JUNE 15, 1880—CONFIRMATION OF ENTRY.

MATHER *v.* BROWN ET AL. (ON REVIEW).

The right of purchase under section 2, act of June 15, 1880, can not be exercised by one who has sold the land embraced within his original entry.

The payment or tender of the purchase money is an essential part of the transaction in cash entries of public lands.

A cash entry under the act of June 15, 1880, is not susceptible of confirmation under section 7, act of March 3, 1891, where the land is transferred prior to final entry.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November 12, 1891.*

I have considered the motion for review of the decision of the Department in the case of *D. C. Mather v. Mary Brown* (12 L. D., 393) filed by R. O. Kindig, transferee, alleging error (1) In holding that "the land was alienated prior to proof under act of June 15, 1880, by Brown, and (2) In not confirming Mary Brown's entry of the NW.  $\frac{1}{4}$  of Sec. 15, T. 1, R. 31, Oberlin, Kansas, under section 7, act of March 3, 1891 (26 Stat., 1095).

The record shows that said Brown made homestead entry of said tract in October 28, 1879, and on April 17, 1886, she made application to purchase the land under the provision of section 2 of the act of June 15, 1880 (21 Stat., 237), which was rejected by the local officers, because the party presenting said application, namely, R. O. Kindig, stated that the entryman had conveyed said land to him by deed which was of record; that on May 18, 1886, a special agent of your office filed a statement that the records of Rawlins county, Kansas, showed that said Brown had conveyed said land by warranty deed to one Keys *et al.*, on January 7, 1885; that on May 1, 1886, said Mather filed his affidavit of contest against said entry alleging abandonment, upon which the local office ordered a hearing, and upon the evidence submitted, recommended the cancellation of said entry, from which action no appeal was filed; that on April 28, 1888, your office reversed the action of the local office, dismissed said contest for the reason that no hearing should have been ordered while said appeal was pending, and directed that the claimant be notified that she would be allowed to purchase said land under the provisions of said act of June 15, 1880, which was accordingly done on August 9, and cash certificate issued same year; that on appeal, the Department reversed the decision of your office on the ground that the right of purchase under said section could not be exercised by an entryman who has sold the land embraced within the original entry. It is insisted by the transferee that said Brown made final proof under said act of 1880 before said transfer before a notary public, and had done all that the law required. But this assertion is not sustained by the record, for it is not pretended that the purchase money for the land was

either paid or tendered by the entryman prior to said transfer, and the application of entryman to purchase was presented by the transferee. Kindig, who swears in his affidavit attached to said motion that he purchased said land on January 20, 1885, and, at that time, he had the final proof papers of said Brown made on January 7, 1885, before I. N. George, a notary public, which he presented to the register of said office, and was told by him "The proof was all right, and upon the payment of \$186 the final receipt would be issued."

The payment or tender of the purchase money is an essential part of the transaction in cash entries of the public lands. The rejection of said proof by the receiver was, therefore, correct, and there was no error in the ruling of the Department that the right of purchase under said act cannot be exercised by one who has sold the land embraced in his original entry. Nor can the entry be held to be confirmed under said act of March 3, 1891, for the reason that the transfer was prior to final entry, and the contest of Mather was pending at the date of said act (12 L. D., 450-522); *Coon v. Simmons* (12 L. D., 459).

The motion must be, and it is hereby denied.

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#### PRACTICE—NOTICE OF CONTEST.

##### FARRIER v. FALK.

Service of notice in contest proceedings cannot be legally made by registered letter, and notice thus served confers no jurisdiction upon the local office.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 13, 1891.*

On September 15, 1888, Charles M. Falk made timber-culture entry No. 13,167 for the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 10, T. 12 S., R. 36 W., Wa Keeney, Kansas.

On September 16, 1889, Francis M. Farrier filed his affidavit of contest against the entry, charging failure to break or cultivate the land "during the year last past, and said failure still exists and said land is badly grown to weeds."

On the same day, notice was duly issued fixing November 15, 1889, as the day of hearing before the register and receiver. Upon that day contestant appeared and submitted evidence, claimant making default, and the register and receiver recommended the entry for cancellation.

On December 2, thereafter, claimant filed his motion to dismiss the contest and set aside the judgment of forfeiture (not a motion for a rehearing, as you have it), upon the ground that he had never been served with notice of the contest. This motion was overruled, and claimant appealed.

On March 1, 1890, you affirmed the action of the register and receiver, and claimant again appeals.

He has contended from the first that he was not legally served with notice, and that is the sole question to be determined and the only point raised by this appeal.

The evidence of service consists of contestant's affidavit, sworn to on the return day, stating that he served the notice of contest by "mailing to the last known post-office address of contestee, Charles M. Falk, by registered letter . . . . a true copy of said notice . . . . thirty days prior to the day set for hearing." Claimant does not deny receiving the letter containing the notice, and the return registry receipt bears his signature, which shows the letter was received in Essex, Iowa—claimant's post-office address fifty-three days before the hearing.

This was the only service. Contestant insists it was a sufficient compliance with law, and claimant contends that he was not legally served and was therefore not in default in failing to appear on the day of hearing.

It appears that notice was published for thirty days before the return day, but no affidavit was filed as a basis therefor, as required by Rule 11 of Practice, nor does it appear that contestant filed any proof of publication on the day of trial, or in any manner relied on that service, but, on the contrary, depended alone upon the service of the notice in the registered letter, and the proof thereof, as shown by the registry receipt.

The Rules of Practice have, in effect, the force of a statute. In all cases of contest, it is not enough that the entryman has knowledge that a contest has been filed. The Rules of Practice prescribe the manner in which that knowledge must reach the entryman.

#### Personal service of this notice

shall be made in all cases when possible, if the party to be served is a resident in the State or Territory in which the land is situated, and shall consist in the delivery of a copy of the notice to each person to be served. (Rule 9.)

In the case at bar, the entryman was not served by publication.

The only other service recognized is personal service, and proof thereof by Rule 15

shall be the written acknowledgment of the person served, or the affidavit of the person who served the notice attached thereto, stating time, place, and manner of service.

"There is no provision for service by registered letter." *Driscoll v. Johnson*, 11 L. D., 604.

It follows, therefore, that although the entryman may have received notice of the contest sent in a registered letter, yet the law making no provision for such service, he was not bound to take notice thereof, and, failing to do so, he was not in default.

It follows that the local officers had no jurisdiction of the person of the defendant, and that the entry was wrongfully held for cancellation.

For the reasons above given, the decision appealed from must be, and it is hereby, reversed, and the case remanded for proceedings *de novo* upon Farrier's affidavit of contest.

## HOMESTEAD ENTRY—MARRIED WOMAN—RELINQUISHMENT.

HANSON *v.* EARL.

A single woman who makes a homestead entry and then marries loses no rights under the homestead law by her marriage; and in the subsequent relinquishment of such entry the husband is not required to join.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
November 13, 1891.

It appears from the record in this case, that on June 24, 1882, John Earl filed pre-emption declaratory statement on NW  $\frac{1}{4}$ , Sec. 5, T. 107, R. 56 W., at Mitchell, Dakota, alleging settlement May 23, 1882. That one Carrie E. Walker made homestead entry of this tract, May 7, 1884, at the time being a protestant against the final proof of defendant, which he submitted June 2, 1884, and that prior to a hearing on said protest she married the defendant who then withdrew his final proof, and that on June 30, 1886, the homestead entry of Carrie E. Earl, nee Walker, was canceled upon her relinquishment.

On May 3, 1887, the defendant gave notice of his intention to make final proof on his pre-emption filing, on June 14 1887, when he appeared with his witnesses and submitted final proof. Hans J. Hanson also appeared and filed protest affidavit against the allowance of said proof, alleging homestead entry, July 1, 1886. The defendant also charged that his wife's relinquishment was not free and voluntary, but induced by fraud and duress by others, but failed to establish said charge by evidence.

Upon a hearing, the local officers decided in favor of plaintiff, which decision was concurred in by your office, and on appeal was affirmed by this Department. A motion for review is now made by defendant. The assignment of errors contains seven specifications, all substantially embraced in the first, which is as follows:

The Hon. Secretary erred in holding that the decision of the Hon. Commissioner in said case, dated July 5, 1889, properly stated the facts and the law, applicable thereto, while the evidence in said case shows that defendant and his wife, Carrie E. Earl, nee Walker, were residing on said land as husband and wife, as their homestead, when this defendant's wife, Carrie E. Earl, relinquished or pretended to relinquish her homestead entry, No. 26,726 covering said tract, without this defendant's signing and concurring in the execution of such relinquishment, while the instructions of the Department require that a relinquishment be signed and executed agreeably to the requirements of the law concerning transfers of real estate of the state or territory where the land to be relinquished lies.

A relinquishment of a homestead entry is authorized by the first section of the act of May 14, 1880 (21 Stat., 140), which provides—

That when a pre-emption, homestead, or timber culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

The defendant's wife, at and before the date of her marriage, was "a homestead claimant" within the purview of this statute, and as such she then had the right to "file a written relinquishment of her claim." She did not forfeit this right by her marriage. The common law disabilities arising from the coverture of married women have no application to such an entry or to its relinquishment, neither have the laws of the Territory of Dakota relating to the transfers of real estate. The sixth section of the enabling act of March 2, 1861 (12 Stat., 239), providing a temporary government for that Territory, enacts that "No law shall be passed interfering with the primary disposal of the soil." The question of the validity of the said relinquishment must be determined by the said act of Congress as it has been construed.

In the case of Maria Good (5 L. D., 196), it was held by this Department that "The fact of the marriage of the claimant in this case, after she made her entry, cannot of itself work a forfeiture of any right which she may have acquired by virtue of said entry." See also the cases of Eda M. Carnochan, (1 L. D., 38); Herman L. Phelps, (Ibid, 84); Alice M. Gardner, (7 L. D., 470).

The only requirement of the law is that the relinquishment shall be "written" and filed "in the local land office," whereupon, by the mandatory provision of said first section, "the land covered by such claim shall be held as open to settlement and entry without further action." It was not necessary for the defendant to join with his wife in the signing and execution of said relinquishment in order to constitute it a valid instrument, and it was properly received and filed at the local office. Rebecca J. Delong (7 C. L. O., 38). The allegation that on June 30, 1886, the instructions of this Department required relinquishments to be signed and executed agreeably to the requirements of the local law governing the transfers of real estate is incorrect. Such instructions were contained in the circular issued by the Commissioner May 25, 1880 (7 C. L. O., 52) and in circular of the General Land Office issued October 1, 1880 (p. 16), but they were omitted from the circular issued March 1, 1884 (pp. 7, 17) and have not since been in force. Joseph Hurd (2 L. D., 316); Mitchell v. Robinson (3 L. D., 546). Furthermore, it has been held by this Department that "No rule formulated for the administration of the law will be permitted in its operation to defeat a statutory right." Hoyt v. Sullivan (2 L. D., 283.) It may be a hardship for the defendant to lose his improvements upon this land, but he took the risk of such loss when he married his wife, and the law can not prevent it. Dodge v. Lohnes (11 L. D., 352). The motion is denied.

## APPLICATION FOR THE RETURN OF SCRIP—PRIVATE CASH ENTRY.

## GRIGGS AND McCORMACK.

An application for permission to surrender a patent issued on a scrip location, and for the return of the scrip, with the right to pay cash for the land, on the ground that the acreage called for by said scrip, and as shown by the public survey, is not actually found in place, must be denied, as the land in question was never subject to private cash entry, and for the further reason that the act of March 2, 1889, precludes the allowance of such relief.

The government is not justified in accepting a reconveyance of the title and returning the scrip, in the absence of a satisfactory showing that the land is in the same condition with respect to its value as when purchased.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November 14, 1891.*

I have considered the petition filed by Alexander Griggs and Michael L. McCormack, asking a reconsideration of departmental decision of August 15, 1888, rejecting their application to be permitted to surrender the patent issued to them 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 land district, located with Red Lake and Pembina half breed scrip, No. 246, to have said scrip returned to them and to be allowed to pay cash for the land actually in their possession.

On February 16, 1874, said scrip was located upon the land above described as containing 152.35 acres, and on April 10, 1875, patent was issued therefor in the name of Augustine St. Germain to whom said scrip was issued. In June 1883, Griggs and McCormack alleging that they had become the owners of said land in 1875, and that upon a survey made they could find but sixty acres instead of one hundred and fifty-two and that there was an error in the original survey asked that they be allowed to reconvey said land to the United States and to pay the regular price in cash for the actual number of acres in said tracts and that the scrip be surrendered to them. Your office refused to grant their petition and on appeal to this Department it was said in the decision rendered July 2, 1884: (46 L. and R., 99).

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 can not 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 can not 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.

In February 1885, these parties filed satisfactory proof of their ownership of the land and stated that they could not obtain relief from their grantors. Your office holding that the decision of Secretary Teller left for determination the question whether there was authority to grant the relief asked, decided that the land having been disposed of according to law and patent having issued for the quantity shown by the survey to be contained in said lots, there was no authority to take back the patent and dispose of the land anew; and further that in any event there was no authority of law to allow an entry of the land for cash without a previous proclamation and offering at public sale. Upon appeal to this Department it was held that it had not been shown 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, and it was said in the decision—

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 in the local office.

and the decision of your office denying the application was affirmed.

The applicants have now filed the affidavits of three different parties who claim to have been well acquainted with the channel and banks of the Red River of the North during the period from 1872 to 1880, two of them having been steamboat pilots and the third having lived in the neighborhood of this land. They say positively that said river did not, during that period change its banks, where it forms the eastern boundary of the township in which this land is situated, and speak particularly as to this section 25, either by the wearing or washing away of its banks by "cut off" or otherwise, and that by reason of the character of the soil the banks of said river are not given to washing and changing. The witness who had lived in the neighborhood since 1872 added:

That the line of said river along the said eastern boundary of said section is now the same that it was at the time of his first acquaintance with said river and the land now in place is the same as it was at the time of his first acquaintance with said land along said eastern boundary of said section 25, Tp. 155, R. 51.

It is now asked that their application be again considered. Whether this showing is sufficient to justify the conclusion that the quantity of land paid for by these parties was not in existence at the date of their purchase it is not, in my view of the case, necessary now to decide. I know of no authority for granting the relief asked for, that is, the return of the scrip and the acceptance of payment for the exact number of acres of land in cash. This land was never offered at public sale and therefore was never subject to private cash entry. Since the passage of the act of March 2, 1889 (25 Stat., 851), no land outside the State of Missouri may be disposed of by way of private cash entry. This precludes the allowance of the relief asked for.

It may be contended then that the government ought to accept a reconveyance of the title to this land and deliver up the scrip received in payment therefor. This would not be justified or done in the absence of a satisfactory showing that the land is in the same condition as when purchased. It is well known that the land in the vicinity of these tracts is rendered valuable chiefly because of the timber growing thereon. If these parties have by stripping the land of its chief value put it beyond their power to offer a reconveyance of the thing purchased in the same condition they received it, they can not have the relief sought for. Upon the facts presented the petition must be denied.

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FINAL PROOF—DEFECTIVE PUBLICATION—OFFICER.

ROBERT HAY.

Where the publication of notice is made, and the final proof submitted outside of the county in which the land is situated, but good faith is manifest, the proof submitted may be accepted after new publication and proof of no protest.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 17, 1891.*

I have considered the appeal of Robert Hay from your decision of June 14, 1890, holding that he must make new publication of intention to offer final proof upon his homestead entry for the NW.  $\frac{1}{2}$ , Sec. 24, T. 132 N., R. 62 W., Fargo, North Dakota land district, for the reason that the notice was given in a paper published in La Moure county and the proof made before an officer of said county, although the land is situated in Dickey county of said State of South Dakota.

The circular of the General Land Office, January 1, 1889 (page 15), provides that final proof may be made before the judge, or, in his absence, before the clerk of a court of record in the county and State, district or Territory in which the land is situated. This question was fully discussed in case of Edward Bowker (11 L. D., 361) in connection with the act of May 26, 1890, and it was said that it appears to have been the constant policy of the law to require claimants under these laws to go before an officer of the county within which the land lies. The entry of Hay was made April 14, 1883, and final proof was not made until April 19, 1890, being over seven years from date of entry, but some affidavits are offered to show that the delay was occasioned by the sickness of the entryman. The good faith of the entryman is manifest. His final proof was accepted by the local officers, and there being no protest or adverse claim against the entry or proof, upon new publication being made and proof of non-protest, the case will be referred to the board of equitable adjudication for consideration under the appropriate rule. See circular (10 L. D., 503). Your decision is affirmed.

HEENAN *v.* STOVALL.

Motion for a rehearing in the case above entitled, wherein decision was rendered by the Department April 22, 1891, 12 L. D., 382, denied by Secretary Noble, November 17, 1891.

## DESERT ENTRY—CONFIRMATION—SECTION 7, ACT OF MARCH 3, 1891.

UNITED STATES *v.* CHILD.

An order of the General Land Office directing a special agent to investigate an entry, and the favorable report of such agent thereon within two years from date of the final certificate is not such proceeding as will defeat confirmation under the proviso to section 7, act of March 3, 1891.

An informal charge of fraud against an entry by one who alleges no interest in the land, and serves no notice of the complaint upon the entryman, is not such a "protest" as will defeat confirmation under said proviso.

An application to contest which has not been allowed, and on which a hearing could not be properly ordered, is not a "contest" within the meaning of said proviso.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 14, 1891.*

I have considered the appeal of E. N. Child, heir at law of William B. Child, deceased, for himself and on behalf of the other heirs, from your office decision dated November 12, 1889, holding for cancellation the desert land entry made by William B. Child for the  $W\frac{1}{2}$  of  $SW\frac{1}{4}$ , and the  $SW\frac{1}{4}$ ,  $NW\frac{1}{4}$  of Sec. 21, T. 1 N., R. 1 W., Salt Lake City, Utah.

The record shows that Child made desert land entry for the tract above described on November 17, 1880, and submitted final proof thereon April 26, 1884, which was approved by the register and receiver and a final receipt issued. On August 6, 1886, your office held the entry for cancellation.

On the petition of the heirs for a hearing, it was ordered, and held on February 17, 1888. At this hearing the government was represented by Special Agent George K. Bradford, and the claimant was present and represented by counsel. After considering the testimony submitted, the register and receiver found in favor of the validity of the entry. On November 12, 1889, your office considered the evidence submitted at said hearing, reversed the finding of the local land officers, and held the entry for cancellation. An appeal has been taken to this Department.

It will be noticed that final proof was made and approved, and a final certificate issued on April 26, 1884, and the entry was not held for cancellation until August 6, 1886.

If no proceedings were instituted by the government against said entry within two years from the date thereof, and if no protest or contest on the part of any individual was pending at the passage of the

act of March 3, 1891 (26 Stat., 1095), the proviso to the seventh section thereof provides for the issuance of a patent on the entry in question.

Were any proceedings instituted by the government within two years from the date of the final certificate?

It is shown that on March 16, 1884, Charles Gillmor wrote and forwarded a letter to your office, complaining that the entry in question was fraudulent, and asked that the matter be investigated by a special agent. Accordingly, on August 12, 1884, the whole matter was referred to Special Agent Sanford for investigation and report, but no report was ever made by him.

Again, on May 26, 1885, after Child had made final entry on the tract, by letter of that date, Gillmor called attention to this entry, reiterated his charges against its validity, and stating that the proof upon which it was allowed was fraudulent, and asked that a special agent of your office be directed to investigate and ascertain the truthfulness of the charges made. Thereupon, your office ordered Special Agent Evans to investigate said entry.

On November 28, 1885, after investigating the same, he reported that Child has worked in good faith, . . . his works prior to his final proof were ample according to law, and the ditches are in good shape for future improvements. His work was done prior to my first visit June 30, 1885 . . . The entry was made for the use and benefit of the claimant and his heirs.

In answer to the question "Was the fraud willful?" (answer) None. And he recommended "that he (meaning Child) be allowed his rights."

It was not charged in this report that Child had not complied with the law, on the contrary, the report was favorable to the entry. In the present case there was nothing on file in your office at the expiration of two years from the date of the final entry to warrant action adverse to the entry.

The report of agent Evans, filed in your office prior to the expiration of two years after final entry, was not sufficient upon which to cancel the entry for it was evidence that the entryman had in good faith complied with the law.

Your action in holding the entry for cancellation on August 6, 1886, instead of being based on the agent's report was evidently based on information received in some manner by your office that claimant and his proof witnesses had been indicted by the grand jury for perjury in connection with said final proof. This information was not contained in agent Evans' report, but seems to have been received by your office during an investigation of the validity of the desert land entry of George W. Lufkin for land adjoining the tract in question.

Even if this information was received by your office before the expiration of two years from the date of final entry in this case it was not the initiation of a proceeding against the entry by an individual or by the government.

In the letter of instructions, signed July 1, 1891, the word proceedings is

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

The order of your office, directing Special Agent Evans to investigate this entry, was not an "action, order, or judgment had or made in your office, canceling an entry, holding it for cancellation," nor did it "require anything more to be done by the entryman to complete his entry." The order to the special agent, and his report after investigation, in this case cannot be held to be such an institution of proceedings within two years from the date of the final certificate as will prevent the confirmation of the entry under the proviso to section seven of the act of March 3, 1891, *supra*. (See instructions dated July 1, 1891 (13 L. D., 1).

On June 10, 1891, an affidavit was filed by Charles Gillmor, claiming that he was a protestant in this case, but an examination of the record fails to show that he is a protestant. It is shown that at two different times he has written letters to the Department complaining that the entry was fraudulent. He claims no prior right to the land himself, and neither of these informal letters were filed in the local land office, and no copy or notice of either was ever served on the opposite party or his attorney. Besides, a hearing was had after the report of the special agent was made at which Gillmor appeared as a witness for the government and was paid by the special agent for his services in assisting the government in such trial. He made no pretense of any interest in the matter, other than as a prosecuting witness, and this trial was held long after his informal letters to the Department.

It is also shown in Gillmor's affidavit, that

On March 29, 1888, Israel Spitz filed a formal contest against the entry now in question, which contest was duly received by the local officers, and, by receiver's letter of July 8, 1889, transmitted for the action of the Commissioner of the General Land Office. No action has yet been taken on said contest, as affiant is informed and believes.

On investigation, it is seen that the alleged contest, above mentioned, was not a contest at all, but a mere application to contest.

The Department has decided that an application to contest is not a contest in the sense in which that word is used in the seventh section of the act of March 3, 1891. Henry C. Nelson (13 L. D., 458).

Besides, the government had begun an investigation relative to the validity of this entry long before Spitz applied to contest and was prosecuting the same at the time his application was tendered. His offer to contest was not accepted and acted upon by the local land officers nor your office, doubtless for the reason that the charges against the validity of the entry contained therein were substantially the same as those made by report of special agents, then being investigated by the gov-

ernment. This was a good reason for not ordering a hearing on the charge, or assuming jurisdiction thereof. *McAllister v. Arnold* (12 L. D., 520); *State of Oregon* (13 L. D., 259).

By letter of instructions of May 8, 1891 (12 L. D., 450), the word contest and protest are defined as follows:

The word 'contest,' as here used, shall be construed to be any adverse proceeding initiated under the Rules of Practice by a claimant for the purpose of securing the cancellation, or defeating the consummation of an entry on the ground of fraud, a failure to comply with the law, or a prior claim, with the intent to secure title in the contestant, or any proceeding by any person, under the provisions of the act of May 14, 1880.

And the word 'protest,' as here used, shall be interpreted as meaning any proceeding by any person who, under the Rules of Practice, seeks to defeat an entry on the ground that the entryman is guilty of fraud, either actual or constructive, in connection therewith, or has failed to comply with the law or rules of the Department, governing the same, or that there was, at the time he claims that his rights attached, a claimant for the tract desired to be entered, having prior rights or superior equities thereto.

Measured by these letters of instructions and the cases cited, it will be seen that there were no contests or protests pending against said entry at the date of the passage of the act above cited, and no such proceedings as are contemplated in said act were initiated within two years from the date of the final certificate, by the government. It follows that in this case the proviso to section 7 of the act under consideration provides for the issuance of a patent on the entry in question.

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

ROBERTS *v.* TOBIAS ET AL.

An entry that is fraudulent in its inception, and is transferred and mortgaged by the transferee prior to March 1, 1888, is not confirmed by section 7, act of March 3, 1891, where at the date of said mortgage the entry is under attack, as shown by the records of the local office, on the charge of having been made in the interest of the transferee, and such allegation is duly established by the evidence submitted.

A mortgagee who files no notice of his interest in the local office cannot call in question the validity of proceedings against the entry.

*Secretary Noble to the Commissioner of the General Land Office, November 16, 1891.*

I have considered the motion for review of departmental decision dated February 25, 1891 (unreported), in the case of *F. M. Roberts v. Samuel Tobias, Hezekiah Hale and James H. Tallman*, transferee and mortgagee, involving the NW  $\frac{1}{4}$  of Sec. 27, T. 34 S., R. 9 W., Wichita, Kansas, and requesting that patent issue under the provisions of section 7 of the act of Congress approved March 3, 1891 (26 Stat., 1095-98).

The grounds of error alleged are (1) In not reversing the action of

your office and directing patent to issue upon the facts of record under the provisions of said section 7.

It is alleged that said Tobias filed his pre-emption declaratory statement No. 25,199 for said land on July 14, 1883, upon which he made final proof on November 24, 1883; that on March 29, 1884, said Hale purchased said land for a valuable consideration and in good faith; that James H. Tallman made a loan on said property in good faith, and that the contest was not made against said entry until November 28, 1885, which was more than two years after the issuance of the final certificate upon said final proof; that the seventh section of said act "covers this case exactly, and the transferee and also the bona fide mortgage should be protected."

The record shows that said Tobias made Osage cash entry No. 16,958 of said tract on April 5, 1884. On November 28, 1885, said Roberts applied to be allowed to contest said entry because it was fraudulent and made in the interest of said Hale. His application was allowed and a hearing duly ordered and set for March 17, 1886. On the last named date said Hale by his attorney, filed an affidavit in the local office alleging that he had bought said land in good faith and without knowledge of any fraud on the part of the entryman, and asked to be allowed to intervene and introduce evidence in his own behalf. This request was granted, but no action being taken by said Hale the case was decided in favor of the contestant on January 12, 1887.

On July 1st 1886, after the initiation of said contest said Hale mortgaged said tract to said James H. Tallman. After the decision of the local office upon said contest in favor of the contestant, said Hale made a second motion to have the case re-opened, and that he be allowed to introduce evidence in his own defense. This motion was granted and a new hearing was set for February 22, 1887, at which said parties appeared and submitted testimony, and upon the evidence offered, the local officers again decided in favor of the contestant.

On appeal your office found that—

The proof shows by a great preponderance that this entry was fraudulent and made in the interest of Hale; and that evidence is almost entirely wanting of an *actual bona fide* settlement by the claimant at the time he made the filing, or at any other time,

and said entry was held for cancellation. This decision was affirmed by the Department on February 25, 1891, as aforesaid.

The decision of the Department when rendered, was correct upon the record as then presented, and there was no error in not directing patent to issue under the provisions of said act of March 3, 1891, for it was not in existence at the date of said decision.

The sole question arises whether upon the record as now presented, the 7th section of said act of March 3, 1891, confirms an entry fraudulent in its inception, transferred and mortgaged by the transferee prior to March 1, 1888, when at the date of said mortgage the entry is

being attacked upon the records of the local office as fraudulent and made in the interest of the transferee, which allegations are satisfactorily proven, resulting in the cancellation of the entry as above set forth.

Said section has been the subject of very careful consideration by the Department, and instructions have been formulated for the guidance of the chiefs of divisions in your office. (12 L. D., 450.)

The only provision of said section applicable to the case at bar is the one stating that—

All entries made under the pre-emption, homestead, desert land, or timber culture laws, in which final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March 1888, and after final entry to bona fide purchasers, or incumbrancers, for a valuable consideration, shall, unless upon an investigation by a government agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance.

In said instructions (p. 452) it was stated that—

A bona fide purchaser or incumbrancer within the meaning of said section is one who, relying in good faith upon the receiver's final receipt, has, by way of purchase or incumbrance acquired an equitable interest in the land, and being, at the date of such purchase or incumbrance, without actual notice of fraud or violation of the law on the part of the entryman. If the proof should show that the entry was procured by the entryman through fraud, but fails to show any participation in such fraud, or actual notice thereof, by the purchaser or incumbrancer, the case will pass to patent, notwithstanding the fraud on the part of the entryman.

The mortgagee did not file any notice of his interest in the local office, and, hence, was not entitled to any notice of the cancellation of said entry. *American Investment Co.*, 5 L. D., 603; *Van Brunt v. Hammon et al.*, 9 L. D. 561; *John J. Dean*, 10 L. D., 446; *Otto Soldan*, 11 L. D., 194; *Robinson v. Knowles*, 12 L. D., 462.

The mortgagee is bound to know the status of the land at the date of his mortgage. Although a final certificate may have been issued at the date of the mortgage, yet, if the entry had, in fact, been canceled at that date it would not be confirmed.

In the case of *Robert L. Garlich's* (12 L. D., 469-471), the Department said—

Garlich's was bound in law to know the status of this land, and the condition of the title, or rather the want of title. The most ordinary diligence would have ascertained its defects. He could not be considered an innocent purchaser, if he had claimed to be such.

The same ruling must be held to be applicable to an incumbrancer. He is bound to know the status of the land at the date of the sale or mortgage. If the final proof has not been made and the certificate has not issued, or, if having been issued it is duly canceled on the records of the local office, can the vendee or mortgagee shut his eyes, pay out or loan his money on the faith of the certificate issued perhaps many years before, when the entry has already been canceled, and claim to be an innocent

purchaser? I think not. The law never intended that a man should wilfully shut his eyes to the condition of the land as shown by the record, at the very time the purchase or loan was made.

In the case of *Brush v. Ware* (15 Peters, 93-111) the supreme court in answer to the claim of the respondent that he was a bona fide purchaser for a valuable consideration without notice, said—

The question is not whether the defendant, in fact saw any of the muniments of title, but whether he was not bound to see them. It will not do for a purchaser to close his eyes to facts—facts which were open to his investigation by the exercise of that diligence which the law imposes. Such purchases are not protected. . . . . No principle is better established than that a purchaser must look to every part of the title which is essential to its validity.

In the case of *Mullan v. United States* (118 U. S., 271-277) the supreme court said—

if *Mullan* and *Avery* were ignorant of the fact (character of the land) when they acquired their respective interests in the property, it was because they wilfully shut their eyes to what was going on around them, and purposely kept themselves in ignorance of notorious facts.

If, as the Department held in *Robinson v. Knowles* (12 L. D 462), a transferee who has not filed a notice of his claim in the local land office, can not question the validity of the proceedings against an entry, then *Tallman* has no standing in this case.

Since, it clearly appears that said entry was fraudulent and made in the interest of the transferee; that fraud has been found on the part of the transferee prior to March 1, 1888 that said mortgagee filed no notice with the local officers of his mortgage, and at the date of said mortgage said contest was pending against said entry, of which, the mortgagee was bound to take notice, it must be held that said entry does not come within the provisions of said section 7, and is not confirmed thereby.

Upon a careful consideration of the whole record I am of the opinion, and so decide, that said motion must be and it is hereby denied.

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#### RAILROAD LANDS—ADJUSTMENT—ACT OF MARCH 3, 1887.

##### ST. LOUIS, IRON MOUNTAIN AND SOUTHERN R. R. Co.

The act of March 3, 1887, is mandatory in character, and calls for judicial proceedings for the recovery of title, when the record shows that land has been erroneously certified or patented on account of a railroad grant, and such grant is unadjusted.

The right to bring a suit in the name of the United States exists only when the government has an interest in the remedy sought by reason of its interest in the land, or fraud has been practiced upon the government and operates to its prejudice, or it is under obligation to an individual to make his title good by setting aside the fraudulent patent, or duty to the public requires such action.

An expired pre-emption filing of record at the date when the grant becomes effective does not warrant proceedings for the recovery of title under said act, where no right is asserted under said filing.

Demand for reconveyance under said act should not include lands that are also embraced within entries that have passed to patent. In such cases the parties may be left to an assertion of their rights in the courts.

*Secretary Noble to the Commissioner of the General Land Office, November 16, 1891.*

With your office letter of August 18, 1888, was forwarded an adjustment of the grant made by the acts of February 9, 1853 (10 Stat., 155), and July 26, 1866 (14 Stat., 338), to the State of Arkansas, to aid in the construction of the Cairo and Fulton Railroad now the St. Louis, Iron Mountain and Southern Railroad.

This adjustment shows that charging the company with all lands heretofore certified or patented on its account, leaves the grant yet deficit more than six hundred thousand acres.

Upon this adjustment, it appears, however, that certain lands have been erroneously certified on account of this grant.

These erroneous certifications have been divided into four classes as follows:

B

Those tracts embraced in entries made prior to the time the company's rights attached under its grant, and which are still of record uncanceled.

C

Those tracts covered by pre-emption filings which were of record uncanceled at the date of the definite location of the road.

D

Those tracts which were embraced in entries of record at the date of the definite location of the road, but which have since been canceled.

E

Those tracts forming parts of sections not of the number prescribed in the acts making the grant.

A rule has been served upon the company to show cause why these lands should not be reconveyed to the United States in accordance with the provisions of the act of Congress approved March 3, 1887 (24 Stat., 556), to which response has been made by its land commissioner suggesting certain errors in the lists as originally prepared, which errors you state in your letter of transmittal have been corrected.

As to the lands embraced in lists B, D and E, there can be no question but that under the decisions of the supreme court the certification or patenting of the same was erroneous.

Kansas Pac. Ry. Co. *v.* Dunmeyer (113 U. S., 629); Hastings and Dakota Ry. Co. *v.* John D. Whitney (113 U. S., 357).

In regard to the lands embraced in list "C", you report that they are all offered lands, and that the filings, excepting those of Louisa Boone and James Allen, had expired by limitation of law prior to the time the company's right attached, and as to the filing by Boone, there is some question upon this point, the record of the case being incomplete, there being no date of settlement alleged.

On the expiration of the statutory period fixed for making proof and payment under a pre-emption filing, without such proof and payment having been made, the presumption arises that any claim that had attached under said filing has been abandoned, and no longer exists. Northern Pacific R. R. Co. *v.* Stovenour (10 L. D., 645).

No one appears to be asserting claim under these filings, and with the exception of the filing by Allen, the rule should be dismissed.

As to the tract embraced in the filing by Allen (which filing was a subsisting claim at the date of the definite location of the road), the certification on account of the grant was erroneous. Randall *v.* St. Paul and Sioux City R. R. Co. (10 L. D., 54).

The act of March 3, 1887 (*supra*), is mandatory in character, and calls for judicial proceedings for the recovery of title, when the record shows that land has been erroneously certified or patented on account of a railroad grant, and such grant is unadjusted. Winona and St. Peter R. R. Co. (9 L. D., 649).

You will therefore demand of the company a reconveyance of the lands embraced in lists B, D and E, and the tract included in the pre-emption filing by James Allen, embraced in list "C", and at the expiration of ninety days from the date of such demand, you will make due report to this Department of the action of the company in the premises.

I might add, however, that any tracts covered by entries upon which patents have also issued, should be eliminated from the demand. In such cases, i. e., where two patents are outstanding, the parties should be left to their remedies before the courts.

The right to bring a suit in the name of the United States exists only when the government has an interest in the remedy sought by reason of its interests in the land, or fraud has been practiced on the government and operates to its prejudice, or it is under obligation to some individual to make his title good by setting aside the fraudulent patent, or the duty to the public requires such action. United States *v.* San Jacinto Iron Co. (125 U. S., 273).

The demand should be served either personally, or by registered letter, upon the officers of the company, or some one holding sufficient authority to receive and acknowledge service of such demand. Union Pacific Ry. Co. (12 L. D., 210).

In this connection, I would state that if there are any lists or selec-

tions by this company, pending in your office, unacted upon, that the same should be disposed of at the earliest opportunity, and that clear lists should be prepared for my approval of those tracts, which, in your judgment, can be properly approved at this time, and as any tracts which can not now be approved, the reasons therefor should appear.

PRACTICE—REVIEW—OKLAHOMA LANDS—HOMESTEAD ENTRY.

GUTHRIE TOWNSITE *v.* PAINE ET AL. (ON REVIEW.)

On application for rehearing *ex parte* affidavits may be properly considered where they present newly discovered evidence.

Facts not testified to at the hearing, but known to the applicant and in his possession at such time can not be considered as newly discovered evidence on application for review and rehearing. *See 12 L. D. 233*

In cases of conflicting evidence where fair minds may reasonably differ as to the conclusion that should be drawn therefrom, a review will not be granted.

A motion for review on the ground that the decision is not sustained by the evidence, will not be allowed, unless it is affirmatively shown that the decision in question is clearly wrong, and against the palpable preponderance of the evidence.

Land selected and occupied as a townsite is not subject to agricultural entry.

Want of good faith on the part of a homestead applicant is sufficient to defeat the application.

A settler on Oklahoma land can not evade the prohibitory effect of the statute, with respect to entering said Territory, through the assistance of one who enters the same prior to the time fixed therefor.

*Secretary Noble to the Commissioner of the General Land Office, November 17, 1891.*

I have before me four motions for review of the departmental decision of June 22, 1891, in the case of the Townsite of East Guthrie, North Guthrie and Capitol Hill *v.* Veeder B. Paine and other agricultural claimants, involving the E.  $\frac{1}{2}$  of Sec. 8, the W.  $\frac{1}{2}$  of Sec. 4, and Sec. 9, T. 16 N., R. 2 W., Guthrie, Oklahoma (12 L. D., 653).

One of the motions is made by Veeder B. Paine, involving the SW.  $\frac{1}{4}$  of Sec. 9, one by Xenophon Fitzgerald, involving the NW.  $\frac{1}{4}$  of said section; one by Charles H. Eberlie, involving the NE.  $\frac{1}{4}$  of said section, and one by Francis M. Karber, involving the SE.  $\frac{1}{4}$  of said section 9.

In consideration of these motions, I will first examine the motions of Karber and Eberlie, which present practically the same questions. As to Eberlie's claim he admits that he entered Oklahoma on the 3d day of June, 1889, at which time the land he applied to enter, was occupied by townsite claimants for townsite purposes.

As to Karber's claim, it appears that he entered Oklahoma after 12 o'clock noon, on the 22d day of April, 1889, and about 3 o'clock in the afternoon of said day, he first made his claim to the SE.  $\frac{1}{4}$  of said section 9, and before and at the time he made his claim, there were many people on said land staking lots and doing such other acts as would

show their settlement on the land, and he admits that at the time he first went on the tract claimed by him, that he saw those people on it, and he could not have misunderstood their acts and conduct as indicating that they were townsite claimants for the tract.

The evidence clearly shows that both Eberlie and Karber settled upon the land, claimed by them respectively, after it had been selected and occupied as a townsite by the townsite claimants.

Under these circumstances and the well established facts proven at the trial, and the further consideration, that no new question or evidence is presented in either of these motions, it follows that said motions must be denied. Chas. W. McKallor (9 L. D., 580); Fort Brooke Military Reservation (3 L. D., 556).

This brings me to the consideration of the questions involved in the motions of Veeder B. Paine and Xenophon Fitzgerald, which were orally argued together.

The first ground of error assigned in Paine's motion is :

That the decision of the Hon. Secretary is not sustained by sufficient evidence and is contrary to the evidence adduced in said case.

In support of this ground, eleven different specifications of alleged errors are set out, in which extensive references to the evidence in the case are made. There is also filed an affidavit of Paine, and the certificate of the county clerk, relative to the assessed value of the improvements on the W.  $\frac{1}{2}$  of said section 9; also the affidavits of three persons relative to the character of the land in question, and the good character of Mr. Paine.

Counsel for townsite claimants has filed a motion to strike said affidavits from the files, for the reason that the taking of testimony in the case was closed more than a year ago, and also, because the same were secretly procured, are entirely ex parte, and could be shown to be false in all material respects. The motion to strike out will be overruled, for the reason that under the rules of practice, in a motion for review and rehearing, such affidavits may properly be considered in cases where they present newly discovered evidence.

While the motion of Paine does not in distinct terms claim that the facts set up in said affidavits constitute newly discovered evidence, yet the only effect of considering them at all on review, would be to treat that portion of them wherein alleged new facts are stated, as new evidence. In order to entitle him to a review, he is required to bring his case within the rules and principles relating to new trials in the courts. *Mansfield v. Northern Pacific R. R. Co.* (3 L. D., 537). Rule of practice 78.

All the facts detailed in said affidavits were in Paine's possession at the time of the trial, and in so far as they cover facts already in evidence, they are merely cumulative, and as such they are not sufficient to warrant a review. Wherein they cover facts not already testified to but known to him and in his possession at the time of trial, they

can not now be considered as, in any sense, newly discovered evidence. *Bishop v. Porter* (3 L. D., 103).

In Hilliard on New Trials, page 495, it is said :

As already intimated, a new trial will not be awarded on the ground of newly discovered testimony, when it appears that the testimony was or ought to have been known to the party before the trial, and no sufficient excuse is shown for not procuring it. There must have been no delay ; and the proof of diligence must be clear. It is said : "This rule is one of great practical importance, and binding upon the court. It is necessary to secure to litigant parties the termination of their legal controversies. Every facility is to be granted to the parties to present their cases fully at the hearing. This is their day in court ; this the time to exhibit all their proofs. If they lie by, through over confidence in their own strength, or in a mistaken belief in the weakness of their adversary, and the result is against them, they must abide the consequences.

The Department held in the case of *Cline v. Daul* (11 L. D., 565), that an allegation of additional evidence, not newly discovered, if made for the first time on review comes too late to justify a rehearing. It was further said in that case :

Should this motion be granted on the grounds here presented, it would encourage the trial of cases by piecemeal, and allow a party to keep back a portion of his evidence for an emergency—a course which would be unjust to the opposing party, and a practice not tolerated in courts of law.

Paine fails to show any sufficient reason for not producing the evidence of all the facts within his knowledge at the trial, still giving him the benefit of claiming some of these facts as new evidence, he is clearly not entitled to a review based upon them under the rules announced by the courts and uniformly followed by the Department.

The several specifications under the first ground of Paine's motion, amount to the claim that the departmental decision of June 22, 1891, was erroneous and wrong in every respect as to the conclusion reached upon the evidence in the case.

In view of the great importance of the case, and the magnitude of the interests involved, I have carefully and patiently re-examined the evidence, and if by it I had discovered any sufficient error in the decision rendered, either upon the facts or the law, I agree with counsel representing the motion, that then it would be my duty to rectify, modify, correct, and if necessary set aside said decision in order to do justice between the parties. On the other hand, it is equally my duty to uphold and stand by such decisions as, in my judgment, correctly decide the rights of parties litigant.

Among the authorities cited by counsel for the motion, and claimed by them to support it, is the case of the *Townsite of Kingfisher v. Wood et al.* (11 L. D., 330). One of the questions involved in that case was whether an actual settlement, followed by residence and improvements, conferred a right of homestead that attached from date of settlement, and whether such right was or was not impaired by the subsequent occupation of the land by townsite settlers on the day of such settle-

ment. It was held that the right of the homestead settler attached from the date of settlement, and that such right was not impaired by the subsequent occupation of the land by townsite settlers; but this holding was intended, and can only be understood, as applying to such homestead settlements, as were made in good faith for homestead purposes; in that case upon this point, the good faith of all parties concerned was assumed and the simple question determined was whether the prior settlement of a homesteader should be held to be paramount to the subsequent settlement of townsite claimants.

Another question involved in that case, however, was whether a settlement which was not made in good faith for homestead purposes, but with a view to speculation, confers any rights under the homestead law, and it was accordingly held that such a settlement for such purposes, *does not* confer any rights under said law. It is quite apparent that the Wood case, in so far as it has any bearing upon the case at bar, tends strongly to support the decision sought to be reviewed, rather than conflict with it in any respect. The good faith of Paine, in making his entry for homestead purposes, is found to be wanting, and it was upon this finding, as well as the fact that he received assistance by and through the acts of persons who entered the territory before the time fixed by law and the President's proclamation, and thus gained an advantage over his fellow claimants, that the decision complained of was based. In other words, that the change of horses on the way from the border to the land in controversy, the carrying of Paine's camping outfit, and the axe, which was used by him in making his settlement, and a part of his clothing, on the buckboard which was taken into the territory about 8 o'clock in the morning of the day fixed for opening the territory—four hours before the time fixed for settlers to lawfully enter said territory—amount to the same on principle as if he had provided for and used a relay of horses in reaching the land in question.

It is argued that Paine did not, as a matter of fact, own said buckboard; that he *could* have made his settlement without the use of the axe, as well as with it; that the change of horses on the route did not result to his benefit. However plausible these arguments may appear, they do not in my opinion, meet the case. It is not sufficient to say that Paine *might* have reached the land in question without the assistance rendered; that he might have made settlement without using the implements sent in advance. The question is not what Paine might have done, but it is what *did* he do, if anything, to gain an unjust advantage over others? The fact that he did exchange horses on the way; the fact that he did use the axe, which was carried on the buckboard, in making his alleged settlement; the fact that the buckboard carried a part of his clothing; the fact that this buckboard and camping outfit, were to be turned over to him by the owners; and all the facts and circumstances tend to show that Paine not only *intended* and

planned to make use of them to his own advantage, and to the disadvantage of his fellows, but *did* so use them. It is also argued that Paine had to contend with the iron horse—railroad locomotive—in making the race for the land. Conceding this to be true, it does not furnish any excuse of justification for his illegally planning to take an undue advantage of his fellows starting from the same point he saw proper to make the start from, and actually taking the advantage of them as shown by the evidence.

Furthermore, it was a race of his own choosing, because he had ample time after the President's proclamation opening the territory, and before the time set for entering it for the purpose of settlement upon the public lands, to have traveled to the place where the railroad entered the territory and there entered upon the same train which carried hundreds of other settlers.

While it may be true that Paine had the right to avail himself of any advantage he might be able to command by reason of having a fast horse, provided he had only used that horse in reaching the land, yet he could not evade the prohibitory operation of the statute by and through the assistance of other persons, who to his knowledge had entered said territory before 12 o'clock noon, on April 22, 1889, prepared to assist him by furnishing a horse comparatively fresh, on which to complete his race to the land in question.

It was held in the case of *Blanchard v. White et al.* (13 L. D., 66), that the disqualification imposed by said statute, extends to an applicant to enter land, who remained outside of said territory until noon of April 22, 1889, but sought to evade the prohibitory operation of the statute through the assistance of another, whom he had before employed to enter said territory for such purpose. The assistance in that case consisted in having relays of horses stationed along the route to aid the party in reaching a given point in the quickest possible time. In this case Paine accepted the same kind of assistance as was rendered in that case. The only difference seems to be, in that case the assistance was arranged for in advance; in this case the evidence does not directly show a pre-arranged plan so to do, but the circumstances justify that conclusion. Among these is the fact that when Paine came in sight of his friend, who was with him in the morning, and who had entered the territory in advance on horseback, he was dismounted, standing by his horse and about the time Paine came up he noticed that Paine's saddle girth was broken and suggested a change of horses.

In the case of *Grigsby v. Smith* (9 L. D., 98), cited by counsel for the motion there was no dispute as to the material facts in the case. Grigsby, who was a qualified pre-emptor, had settled on the land August 1, 1884, and continued to reside thereon with his family, until he made final proof, at which time he had resided upon the land continuously for a period of six months. After making his proof he moved away from the land, and also moved his buildings and placed them upon another tract

of land. It was found that he acted in good faith and had complied with the law, while residing upon the land and up to date of final proof, but his claim was rejected by the local officers because he removed his improvements off the land *after* final proof. The land involved in that case was a part of the Osage Indian trust and diminished reserve lands, and the case was disposed of under the laws relating to the disposition of those lands to wit, the act of May 28, 1880 (21 Stat., 143), which act had received a departmental construction in the case of the United States *v. Woodbury et al.* (5 L. D., 303), and the conclusion there reached, that under said act of May 28, 1880, "the only qualification and conditions required to authorize an entry upon the Osage Indian trust and diminished reserve lands, is that the claimant must be an actual settler on the land at the date of the entry, and must have the qualifications of a pre-emptor."

It clearly appears in the Grigsby case, *supra*, that he (Grigsby) was an actual settler upon the land at the date of his entry; that he was a qualified pre-emptor, and had acted in good faith and complied with the law. A decision adverse to him was reviewed and set aside by the Department and the rule announced that:

If it be shown, however, that the decision is clearly and decidedly against the weight of evidence, and that substantial justice has not been done, this Department should not hesitate to correct the error. This case comes clearly within this rule.

The material facts in the Grigsby case and the case at bar are not similar. In that case there was no dispute upon the facts. In this case, there was contradictory evidence on both sides of the controversy, either upon the facts as testified to by the witnesses, or by the surrounding circumstances, touching every material issue involved. The applicants have not shown that the decision complained of is clearly and decidedly against the weight of evidence, or that substantial justice had not been done and hence have not brought this case within the rule as announced in the Grigsby case.

By the rule announced in the Grigsby case, the Department did not intend to change or modify the well settled and oft repeated holding, that in cases of conflicting evidence where fair minds may differ, as to the conclusion to be drawn therefrom, a review will not be granted. *Richards v. Davis* (1 L. D., 111); *Long v. Knotts* (5 L. D., 150); *Neilson v. Shaw*, (ib. 387); *Seitz v. Wallace* (6 L. D., 299); *Mary Campbell* (8 L. D., 331); *Campbell v. Ricker* (9 L. D., 55); *Chas. W. McKallor* (ib., 580); *Mulligan v. Hansen* (10 L. D., 311); *Pike v. Atkinson* (12 L. D., 226); and *Holloway's Heirs v. Lewis* (13 L. D., 265).

One of the elements on which the decision in the case under consideration is based, was the fact that Paine, as an intelligent man, knew that near this land there was located a land office, and that the location of the town there, was an assured fact, and from his knowledge of the great number of people who were rushing to said point for the express purpose of occupying it for trade, commerce, and upbuilding a

city, there could have been no uncertainty in his mind as to its immediate occupation for these purposes, and that from all the surrounding facts and circumstances, he must have sought said lands, not for a home, nor for agricultural purposes, but with a view to speculate in a townsite.

In the motion complaint is made of this conclusion, and it is averred that there is no direct evidence of his seeking it for speculative purposes. In this I think counsel are in error. There is direct evidence of Mr. Paine's whereabouts, what he did, his actions and conduct, which, when considered in the light of the circumstances, as developed on the trial, justified the conclusion that he did not and could not have intended to take the land for a homestead, and, necessarily, the inference arises that he made it for speculative purposes, as stated in the decision. If the application to enter was not made in good faith for a homestead, as the law requires, then this of itself was sufficient to defeat it. The conclusion having been reached that he did not make his application in good faith, for homestead purposes, it would seem to be unnecessary to seek out and specify what other particular purpose he had in view in making it; in other words, whenever it was stamped with the characteristics of bad faith, his right to make it was at an end, no matter what his object or purpose in making it was.

While upon this point I may as well dispose of another claim made in argument for Paine, that is, that he could not have believed there would be a townsite located at Guthrie to exceed three hundred and twenty acres of land, as that was the statutory limit for townsites at the time of his application.

In my judgment the quantity of land which might be entered for townsite purposes, cannot affect the intent or motive which actuated Mr. Paine in making his settlement. His object was to locate upon the particular tract which he believed would be required for townsite purposes, and it makes no difference as to the number of acres that was to be taken. It was a part thereof that he wanted, was determined to have, and which he is now seeking to hold. It must be clear to an unprejudiced mind when viewing his conduct, that he was making all this haste to locate, not upon a homestead but upon a townsite, and subsequent events show that he did not err in his judgment. This is probably due to the fact that he had been acquainted with the land and its surroundings for some time previous to its being opened to settlement.

When this case was originally under consideration by the Department, the evidence, which is very voluminous, was carefully considered in all its aspects, and bearings upon every material point involved and every circumstance that tended in any way to throw any light upon the subject of the controversy, was weighed in connection with the facts testified to by the witnesses, and the entire record most thoroughly examined in order to arrive at a proper and just conclusion. That decision was based upon the whole of the evidence and record in the case,

and in order to justify a review thereof upon the ground that it is not sustained by sufficient evidence, and is contrary to the evidence introduced upon the trial, it is incumbent upon the party alleging it to be erroneous, to show affirmatively, that it is clearly wrong and against the palpable preponderance of the evidence. *Dayton v. Dayton* (8 L. D., 248); *Croghan Graves* (9 L. D., 463).

The showing made by Paine in support of the several grounds of his motion, in my judgment, clearly fails to bring his case within the spirit or letter of these rules.

The motion of Xenophon Fitzgerald for review embodies seven specifications of alleged errors in the decision sought to be reviewed, all of which relate to the findings of facts. The incidents connected with the trip of Paine from the border to the land in question did not occur in Fitzgerald's case but it is unquestionably true that he possessed the same knowledge as Paine, that the tract claimed by him would be used for townsite purposes, and that his application was made with the same purpose in view as Paine's, and the discussion herein upon Paine's motion on this point applies with equal force to that of Fitzgerald. The decision complained of in his case found as a deduction from the evidence that :

His acts in connection with his so called settlement on the afternoon of April 22, show that he was not seeking a home on the public domain in accordance with the principles of the homestead law, but rather that he was seeking a tract for the purpose of speculating on the needs and necessities of those who had a few moments after his arrival occupied not only the NW.  $\frac{1}{4}$  of section 9, but the surrounding lands for townsite purposes.

The evidence in part from which this conclusion was drawn is set out in the decision and need not be here repeated. From a careful re-examination of the evidence, I am satisfied that it sustains the conclusion reached in the opinion. His statements that the NW.  $\frac{1}{4}$  Sec. 9, was worthless for farming purposes; that he had taken the NE.  $\frac{1}{4}$  of Sec. 8, as a homestead and had some horses on it at that time; that he made claim to the SW.  $\frac{1}{4}$  of Sec. 4, and also made claim to other lands, some under the homestead law, and some as a horse ranch; all of these conflicting statements and claims made at or near the same time; these facts when considered in connection with his knowledge of the fact that the location of a city upon the land in question was an assured fact, that the same must be necessarily used and occupied for the purpose of trade and commerce, and the upbuilding of a city, irresistibly lead to the conclusion that Fitzgerald did not make his entry in good faith for homestead purposes. In other words, that the facts and circumstances as disclosed by the evidence, show that he intended his entry, if allowed, for other than homestead purposes which is sufficient to defeat it. The law imperatively requires every homestead entry to be made with the intention of making it a home, for agricultural purposes, to the exclusion of one elsewhere. A homestead

entry made for *any other* purpose is illegal and ought not be allowed to stand.

Finally, as to the motions of Paine and Fitzgerald, the alleged errors in each of them relates entirely to facts; no new question of law or fact is suggested by either of them, and under the well established rules of the Department the motions must be denied upon this reason. *Pike v. Atkinson* (12 L. D., 226); *James Ross* (12 L. D., 416); *Reeves v. Emblen* (11 L. D., 480); *Spicer v. Northern Pacific R. R. Co.* (11 L. D., 349); *Neff v. Cowhick* (8 L. D., 111):

It follows from the foregoing views and authorities that the motions of Paine, Fitzgerald, Eberlie and Karber must be and they are hereby denied.

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UNIVERSITY SELECTION—ACT OF MARCH 3, 1871—STATE AGENT.

ROBINSON ET AL. v. UNIVERSITY OF CALIFORNIA.

An application for survey filed on behalf of the State under the act of March 3, 1871, wherein the land is described by township and range is not materially defective because the county in which the land is situate is erroneously named therein.

An application of the State for a survey, as provided in said act, initiates a right to the land included therein that is protected as against subsequent settlement claims.

The authority of one acting for the State under said act, sufficiently appears where his acts are recognized by the Land Department, and accepted and ratified by the State.

*Secretary Noble to the Commissioner of the General Land Office, November 18, 1891.*

On June 14, 1890, your office affirmed the action of the local officers, recommending that lots 1, 2, 3, and 4, E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$ , Sec. 34, T. 7 N., R. 29 W., S. B. M., San Francisco, California, be awarded to the University of California, and that the adverse pre-emption filing and homestead entry of James Robinson and William Wyman be rejected, so far as they conflict with the claim of said University.

From this decision said Robinson and Wyman appealed, alleging the following grounds of error:

First: That the application of said University to locate said lands was invalid, and shows it to have been for lands in San Bernardino county, of the State of California, and in effect the application was for land as described not in the said State.

Second: That said land has not been surveyed or had not at the time of the settlement of the claimants was made.

Third: It does not appear that J. Ham Harris was the agent for the said University, or that he had any authority to act for the University.

Fourth: The evidence shows that the claimants were at the dates of their respective settlements qualified pre-emptors, and entitled to locate said lands, and entered thereon in good faith and without any notice of the pretended claim of the University of the State of California.

Fifth: That the evidence shows that it was no fault of the claimants that their applications were not offered sooner to file on said land, but was the result of either ignorance or intended deception of the register of the local land office.

The University of California claims said tracts under the act of March 3, 1871 (16 Stat., 581), amendatory of the acts of June 6, 1868 (15 Stat., 68), and July 2, 1862 (12 Stat., 503), which provides:

that where lands sought to be selected for the agricultural college are unsurveyed, the proper authorities of the State shall file a statement to that effect with the register of the United States land office, describing the land by township and range, and shall make application to the United States surveyor general for a survey of the same, the expenses of the survey for field work to be paid by the State, provided there be no appropriation by Congress for that purpose.

It then provides that for thirty days after the filing of the township plat, the lands so surveyed shall be held exclusively for location for the agricultural college, and within said thirty days the proper State authorities shall make application at the land office for the lands sought to be located:

Provided, any rights under the pre-emption or homestead laws, acquired prior to the filing of the required statement with the United States register, shall not be impaired or affected by this act.

The State filed an application to have this land surveyed in 1884, describing it by "township and range," as required by the act, and the mere fact that the county in which the land is situate was erroneously named is immaterial.

The land was surveyed upon the application of the State, filed 1884, but the township plat was not filed in the local office until May 4, 1887, and two days thereafter the State, through its agent, filed application to select the land.

It is immaterial whether the land was or was not surveyed at the time of appellants' settlement. The State's claim was initiated by its application to have the land surveyed, and at that time the appellants had not settled upon the land, and therefore had acquired no rights under the homestead or pre-emption laws.

J. Ham Harris, the person who made this selection, was recognized by your office as the duly authorized agent of the State, and the appellants have offered nothing in support of their allegation that he had no authority to act for the University. Besides, his acts appear to have been accepted and ratified by the State in this behalf.

I find no error in your decision, and it is therefore affirmed.

## RAILROAD GRANT—DOUBLE MINIMUM LAND.

C. W. ALDRACH ET AL.

Though the language in the grant of March 3, 1833, defining the limit of said grant, and that measuring the limit within which the even sections are increased in price, differs in terms, the effect thereof is to fix but one limit and increase the price of even sections included therein.

A diagram showing the limits of a railroad grant, prepared concurrent with the filing of the map of definite location, and upon which the withdrawal is ordered, is recognized for the determination of the rights of individuals and the company, and will not be disturbed after such withdrawal has stood unquestioned for a long term of years and rights have vested thereunder.

To authorize repayment of alleged double minimum excess under the last clause of section 2, act of June 16, 1880, it must be shown that the land is not within the limits of a railroad grant.

*Acting Secretary Chandler to the Commissioner of the General Land Office, November 20, 1891.*

This is a motion filed in behalf of C. W. Aldrach, Isaac Clayton, C. H. Babbitt, William Brown, and Henry Booth, for the review of departmental decisions, dated July 18, 1889 (not reported), denying applications made for repayment of the double-minimum excess paid on cash entries numbered 4472, 5529, 8348, and 2252, made at the Garden City and Larned land offices, in the State of Kansas.

The lands covered by said entries are within the ten miles granted limits of the grant made by the act of Congress, approved March 3 1863 (12 Stat., 772), as shown upon the diagrams on file and in use in your office, and for this reason the applications were denied. Said grant was, by the State, conferred upon the Atchison, Topeka and Santa Fe R. R. Company.

The grounds alleged for review are as follows:

1st. Said decision is based upon misapprehensions of fact, and erroneously denies to said parties relief extended by the act of June 16, 1880.

2nd. By the omission from the quotation made from said statute of the word 'afterwards' the full force of the statute is not shown.

3rd. It erroneously treats the lands embraced in said entries as subject to the same rules and conditions applied to lands actually granted.

The argument in support of the motion seeks to show that the provision in the act making the grant, and that providing for the disposal of the sections and parts of sections remaining to the United States, establish different limits, or, as stated in the argument, "separate standards of measurement for ascertaining the lands granted and those to be increased in price;" further, that the act fixes the limits of the grant, and as there is nothing in the act authorizing the Secretary of the Interior, or other officer of the United States, to prepare maps or diagrams, that any such diagrams are mere conveniences, and are subject to cor-

rection whenever found to be inaccurate prior to the adjustment of the grant.

As to the first position, I have but to say that while the language measuring the limit of the grant, and that measuring the limit within which the even sections are increased in price, is different, it is apparent that but one limit is to be established.

The language making the grant is "every alternate section of land, designated by odd numbers, for ten sections in width on each side," while that increasing in price is, "that the sections and parts of sections of land which by said grant shall remain to the United States, within ten miles of said road and branches, shall not be sold for less than the double-minimum price of the public lands."

In the case of the *United States v. Missouri Kansas and Texas Railway Company et al.* (not yet reported), decided by the U. S. supreme court October 19, 1891, the question as to the effect of the reservation made by the increase in price of those even sections in the act under consideration was before the court, and in referring to such sections it was stated :

As the natural result of the construction of the road aided would be an increase in the market value of the reserved sections remaining to the United States, within the place limits of the Leavenworth road, those sections were not left to be disposed of under the general laws relating to the public domain. . . . It follows that the Missouri Kansas and Texas Railroad Company was not entitled, in virtue of the act of 1866, to have indemnity lands from the *even* numbered sections within the *place* limits of the Leavenworth road.

It will be seen that the court recognized the reservation or increase in price of the even sections to be those within the place, or granted, limits.

Upon the second proposition there can be no question but that the act making the grant fixes the limits, by describing the grant; but it becomes the duty of this Department to ascertain what is actually included within the grant, and the limits are thus necessarily established.

For the purpose above stated, and for the information of the public, diagrams showing the limits as established are prepared concurrent with the filing of the maps of the location of the road, upon which withdrawals are ordered. These are recognized for the determination of the rights, both of individuals and the companies, and, for the reasons set forth in the matter of the adjustment of the grant for the Missouri, Kansas and Texas Railway Company (11 L. D., 130), they will not be disturbed.

It but remains to determine whether the act of June 16, 1880 (21 Stat., 287), authorizes repayments in these cases.

The 2d section of that act 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, or to the heirs or assigns.

To authorize repayment under this act it must first be held that the land is not within the limits of a railroad grant. This fact has not been established and your records show to the contrary; hence, there was no error in the opinions of July 18, 1889, and the motion is denied.

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PRACTICE—APPEAL—SECTION 7, ACT OF MARCH 3, 1891.

CRAWFORD ET AL. v. DICKINSON ET AL.

An appeal must be dismissed if notice thereof, with a copy of the specification of errors, is not served upon the opposite party.

Section 7, act of March 3, 1891, does not provide for the re-instatement and confirmation of a canceled entry.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
November 20, 1891.*

On September 18, 1883, John T. Dickinson made desert land entry number 775 for the W  $\frac{1}{2}$ , Sec. 35, T 10, N., R. 7 E., Salt Lake City, Utah.

On May 2, 1884, he made final proof thereon and received a final certificate therefor, number 222.

On May 5, 1884, following, he sold and transferred the land embraced in said entry to William Crawford, and on May 30, 1885, Harry Booth and Edwin S. Crocker became the owners of said land by purchase from Crawford.

On February 24, 1887, the entryman was called upon by your office to submit additional proof, showing more particularly his ownership of water sufficient to permanently irrigate the tract.

Again, on January 31, 1890, you directed the local land officers

to inform the entryman that he must furnish an abstract of title showing that he has a legal right to a permanent supply of water sufficient and available to continue the irrigation, and to make perpetual reclamation of all the land covered by his entry, adding that "the examiner has discovered no other objection to this entry."

On May 29, 1890, following, the register of the land office advised you that the entryman had been duly notified by registered letter of the requirement made by you to furnish additional evidence, and that he had made no response thereto.

On June 7, 1890, after receiving this report, you canceled said entry, stating that it "was for expiration of the statutory period."

On November 29, 1890, about five months after said entry was canceled, Booth and Crocker, as transferees, applied for re-instatement of said entry alleging that on or about September 15, 1890, when they first learned of said cancellation, they investigated the facts of record and found them to be substantially as above stated. They also filed an affidavit of Dickinson, admitting that he had received notice of said cancellation, but as he had no interest in the land had paid no atten-

tion to it. They also file an abstract of title showing the water right of Dickinson and the transfer thereof by successive conveyances to them, also additional affidavit showing that the land had been thoroughly irrigated each year since 1883, and that valuable crops had been annually harvested therefrom, and that they had valuable improvements on said tract.

After the entry in question had been noted on the records as canceled and, on July 22, 1890, George B. Crawford made homestead entry for the W  $\frac{1}{2}$  NW  $\frac{1}{4}$  and W  $\frac{1}{2}$  SW  $\frac{1}{4}$  of Sec. 35, T. 10 N., R 7 E., and William L. Smock made homestead entry for E  $\frac{1}{2}$  NW  $\frac{1}{4}$  and E  $\frac{1}{2}$  SW  $\frac{1}{4}$ , same section, under date of August 1, 1890. These two entries embrace all the land covered by the canceled entry of Dickinson.

On December 12, 1890, you, having all these facts before you, directed the register and receiver to notify said homestead entrymen within sixty days to show cause why their entries should not be canceled, with a view to the re-instatement of said desert land entry.

On February 14, 1891, the local land officers transmitted papers in the respective homestead cases named above, by which it appears that on the affidavits of said entrymen, and in accordance with their requests to that effect, the register and receiver had ordered a hearing in each of said cases, for May 7, 1891.

On April 7, 1891, these papers, consisting of the affidavits of Smock and Crawford, upon which hearings had been ordered by the local land officers, were considered by you in connection with the application of Booth and Crocker for re-instatement of the entry of Dickinson, and it was held that the register and receiver had not been instructed to order hearings in said cases, hence the same was revoked and the affidavits of Smock and Crawford, setting forth reasons why their respective entries should not be canceled, were considered and said entries were held for cancellation. In the order therefor, it is said,—“It would seem that the canceled entry should be, as the petitioner prays, re-instated;” as the entry was “erroneously canceled.”

On June 10, 1891, Smock and Crawford, and on May 27, 1891, Booth and Crocker, filed papers purporting to be appeals from said decision. No notice was served on either party by the other in taking these appeals, and for this reason they are both defective.

On October 16, 1891, the transferees under the Dickinson entry filed a motion in this Department, asking re-instatement and confirmation of said entry under the provisions of section 7 of the act of March 3, 1891 (26 Stat., 1095), notice of which was served upon the parties adversely interested therein.

This motion must be denied because the entry of Dickinson has not yet been re-instated and, consequently, is not in existence and was not on March 3, 1891, when said act was approved. Said act does not provide that an entry shall be re-instated and confirmed, but that on certain conditions existing entries are confirmed, and the Department has

held that if the cancellation of an entry had become final before its passage there can be no confirmation,—James Ross (12 L. D., 446).

In this case your decision of April 7, 1891, does not re-instate the entry of Dickinson, but does hold for cancellation the entries of Smock and Crawford, and expresses the opinion that "it would seem that the canceled entry should be, as the petitioner prays, re-instated."

The appeals taken from said decision must be and are hereby dismissed, because no notice thereof and no copy of the specification of errors assigned has ever been served on the opposite party by either of the appellants, as required by the rules of practice.

The motion of Booth and Crocker to have the case disposed of under the 7th section of the act of March 3, 1891, *supra*, is hereby denied. It does not follow, however, that the entry in question may not at some future time be confirmed and patented under the act cited, if the entry of Dickinson shall be restored and re-instated. Until such time the act can have no application to it—Adolphus Harmon, (13 L. D., 462).

The appeals both being dismissed, the record is returned to your office for appropriate action.

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SECOND HOMESTEAD ENTRY—TRANSMUTATION—FILING.

HEITT *v.* DUNBAR.

A pre-emptor whose claim is pending at the passage of the act of March 2, 1889, is entitled to transmute the same to a homestead entry, though he may have previously perfected title under the homestead law.

If there is no adverse claimant for the land, it is immaterial how long the pre-emptor may reside thereon prior to filing his declaratory statement.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 20, 1891.*

I have examined the appeal of Stewart M. Heitt from your decision of June 30, 1890, denying application to contest Levi Dunbar's homestead entry for SE.  $\frac{1}{4}$ , Sec. 21, T. 8 N., R. 27 W., McCook land district, Nebraska.

It appears that on March 16, 1878, Dunbar made a homestead entry described as SW.  $\frac{1}{4}$ , Sec. 11, T. 4 N., R. 19 W., Nebraska; made proof January 14, 1884, and on January 20, 1885, patent issued to said Dunbar thereon.

April 28, 1884, subsequent to making proof on the SW.  $\frac{1}{4}$  above described, he made entry of the first described tract under the timber-culture laws; and on June 21, 1887, he relinquished his entry and filed pre-emption declaratory statement for the same tract; furthermore, on January 24, 1890, appeared at the local office and changed his pre-emption filing to a homestead entry, as provided by act of Congress approved March 2, 1889 (25 Stat., 854).

June 30, 1890, Stewart M. Heitt filed with the local officers a corroborated affidavit alleging therein, *inter alia*, that Dunbar in making his pre-emption filing alleges settlement on the land August 1, 1886, when "in fact said Dunbar made settlement on said land about June 1, 1885," furthermore that the change of Dunbar's pre-emption to a homestead entry, he having already had the benefit of the homestead law, was "in violation of the provisions of the laws of the United States," and asks to be allowed a hearing to prove said allegations.

The local officers, under date of June 13, 1890, transmitted said charges to your office for instructions, stating that they were undecided as to whether the charges were sufficient to order a hearing.

Under date of June 30, 1890, you denied the application to contest on the ground that the charges were not sufficient to warrant an investigation. From this judgment Heitt appeals, and alleges an error, substantially as follows: Error in holding that the pre-emption filing of Dunbar was sufficient to base a homestead under the act of March 2, 1889 (*supra*), and that the entryman, had any valid right which could be transmitted under said act, also in interpreting said act to provide for and allow an entryman to make a second homestead.

It is provided by section two of the act above referred to

That all pre-emption settlers upon the public lands whose claims have been initiated prior to the passage of this act may change such entries to homestead entries and proceed to perfect their titles to their respective claims, under the homestead law, notwithstanding they may have heretofore had the benefit of such law.

The right of transmutation of a pre-emption filing into a homestead entry is created and made a part of the homestead law (2289 Revised Statutes), but such right could not be claimed by a party who had already exhausted his homestead right by a former homestead entry.

This in many cases became a hardship and Congress recognizing that fact, passed the above section, which virtually confers upon pre-emption claimants whose claims were pending at the date of the act, the right of a second homestead entry.

The case at bar appears to be an entry of this character and clearly falls within the provisions or said section.

The appellant further contends that Dunbar had no legal right to transmute his pre-emption to a homestead, for the reason that he alleged settlement on the land August 1, 1886, whereas in fact he made settlement June 1, 1885.

Where there are no adverse interests or claimants for the land and the matter is solely a question between the pre-emptor and the government, it is immaterial how long the party resides upon his claim, before making his pre-emption filing.

The filing of a declaratory statement is not made a condition precedent to the exercise of the pre-emptive right, but is merely a protection against subsequent settlers. *Ellen Barker* (4 L. D., 514); *Melissa J. Cunningham* (8 L. D., 433).

Your decision is affirmed.

## HOMESTEAD ENTRY—INDIAN OCCUPANCY.

TOM AND LOUIS *v.* McCARTY.

Land used and occupied by Indians is not subject to entry by others.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 20, 1891.*

The land in controversy is the E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  Sec. 21, and E.  $\frac{1}{2}$  of NW.  $\frac{1}{4}$  Sec. 28, T. 7 N., R. 3 E., H. M., Humboldt, California, land district.

The record shows that McCarty made homestead entry for said tract June 12, 1889. On October 14, 1889, at the instance of Captain William E. Dougherty, U. S. A., and acting Indian agent, affidavits of contest were filed, alleging that Tom, and Louis his son, had lived on and cultivated said land for nineteen years. A hearing was had before the local officers, at which both parties appeared, on December 5, 1889, and as a result thereof, the register held that the said homestead entry should be canceled, while the receiver held that it should remain intact. On appeal by the Indians you by letter of May 17, 1890, held the homestead entry for cancellation, whereupon McCarty prosecutes this appeal. The specifications of errors are six in number, the first three and the sixth are to the effect that your decision is against the law and the evidence; the fourth, that the land department is without jurisdiction to try the case because no affidavit had been filed upon which to base a contest; the fifth that the Indians had never made any application for said land.

The testimony shows that Indian Tom and his wife and son Louis, have occupied this land for twenty years; that they have three small houses on it and nearly two acres fenced and in cultivation, and have raised vegetables thereon for fifteen years; that they have fruit-bearing trees, and that they have not been dependent on the Hoopa, or any other reservation for their support. McCarty tried to drive them off the land, after he made his entry. They applied to Captain Dougherty for protection and he caused affidavits to be made and filed instituting this contest, and assisted them in every way he could in the protection of their rights. In this he did right. *Mission Indians v. Walsh* (12 L. D., 516).

By circular letter October 26, 1887 (6 L. D., 341), the Department directed that "lands occupied by Indian inhabitants in any part of the public land, states and territories," were not subject to entry. Therefore McCarty should not have been permitted to make his entry and you will cause the same to be canceled.

Your decision is affirmed.

## PRE-EMPTION—MARRIED WOMAN—HEAD OF FAMILY.

WILLARD *v.* HASHMAN.

A married woman who voluntarily, and without good cause, leaves the home of her husband to reside elsewhere, even though she take the children with her, is not the "head of a family," nor as such qualified to make pre-emption entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 20, 1891.*

I have considered the case of F. M. Willard *v.* Cora L. Hashman, upon the appeal of the former, from your decision holding for cancellation his pre-emption filing for the NW.  $\frac{1}{4}$  of Sec. 21, T. 25, R. 49, Chadron land district, Nebraska.

Hashman filed her pre-emption declaratory statement for the land in question on the 18th of May, 1887, alleging settlement on the 4th of April of that year. Willard filed his pre-emption declaratory statement for the same land on the 11th of May, 1887, alleging settlement on the 9th of that month.

After giving due notice by publication, Hashman presented final proof on the 26th of May, 1888, at which time Willard protested against the acceptance of the same, alleging that he was an adverse claimant for the land, and that Hashman was not a qualified pre-emptor, for the reason that she was the lawful wife of one Calvin L. Hashman, who was still living, and from whom she had never been divorced.

A hearing followed, at the conclusion of which the register and receiver rendered their decision, holding that Hashman was a qualified pre-emptor, that her final proof should be accepted, and the pre-emption filing of Willard should be canceled. Upon an appeal to your office from that decision, the judgment of the register and receiver was affirmed by you on the 2d of April, 1890, and a further appeal by Willard brings the case to this Department.

To be entitled to make pre-emption filing for public land, a person must be either the head of a family, a widow, or single person over twenty-one years of age, and must possess the qualifications of citizenship required by section 2259 of the Revised Statutes. The claimant in this case was not twenty-one years of age, neither was she a widow. To be qualified, then, as a pre-emptor, she must be the head of a family.

Upon this question the facts are, that at the time of her filing she was eighteen years of age, and the mother of three children. From the time of her marriage, which took place in November, 1883, until the 24th of February, 1887, she lived with her husband upon a tract of government land entered or filed upon by the husband. Upon the date last stated, her husband and herself signed an agreement of separation, by the terms of which the husband was to take his team, grain and farm implements, and leave the wife the children and the land. The claimant's father agreed to pay the husband \$25 in cash, but failed to do so.

The husband executed no relinquishment of the land, but he took the property stated, and left the premises. In about a week he returned, and finding his family absent from the house, took possession of it, and put a new lock on the door to prevent his wife from getting admission, and again left the premises. His wife returned, got into the house through a window, removed the furniture and provisions from the house, and on the 4th of April following, made settlement upon the land in question, where she resided up to the time that she presented her final proof. Her children resided with her, until the 12th of April, 1888, when they were taken by their father. At the time of making final proof, however, one of the children was living with claimant. The husband, in the meantime, continued to reside upon the land for which he made filing before the separation, and frequently visited his wife and children upon her claim, until he took the children away.

In reference to their separation he testified that it was simply agreed that they should separate. "It was not stated how long we were to stay separate. I never had any understanding with her that we would live together again." On cross-examination, in answer to the question: "Did you state, about the time of your separation, to a number of parties, that you would never live with her again?" he answered, "I said I would never bring her home to live there, because her folks would separate us again." He further testified,

I have had considerable trouble with her folks; never with her to amount to anything. We have been friendly since we separated; since then I have met her in many places, and had conversation with her; I have been to her house as many as a dozen times; sometimes I would stay an hour or two, sometimes longer; we have cohabited as husband and wife since she has lived on this place; I ate supper there the night before Christmas; went there about dusk and stayed until along in the night; have never stayed all night with her on the claim; the last time I spoke to her was April 26, at my place; the last time before that was April 12, when she gave me the children; we had no quarrel; I told her I had heard things I did not like, and was going to get a divorce; up to that time the trouble had been with her parents, and not with her; the separation was not of my own free will; her folks said they would cut me inch by inch if I did not leave; I intended to come back again; when I visited her on her claim I took the children some things to eat and to wear.

After the husband had testified the wife was sworn, and stated that she had not lived with her husband since the 24th of February, 1887. "We have never since then had anything to do with each other as wife and husband." She also testified that he had been to her place but a few times since the separation; that he was there the night before Christmas and brought the children a pair of shoes apiece, some candy, and a calico dress for the little girl; that when she left his house she took her clothes, and furniture and bedding, and three sacks of flour, and three sacks of potatoes, and that he had furnished her no provisions since that time; that she was present when her husband took the children away from her claim.

The priority of the settlement of Mrs. Hashman upon the land in question, over that of Willard, is not disputed, and the sufficiency of her residence, improvements and cultivation thereon is not questioned.

The only question in the case, therefore, as before stated, is as to whether she was or was not "the head of a family" at the time of her filing. In reference to that question, I think it a correct legal proposition to say, that where the husband and father is of sound mind, not convicted of crime, nor restrained of his liberty, that the law recognizes him as the head of the family. In such a case, should the wife voluntarily leave the home of the husband and father, and establish for herself a home elsewhere, even though she take their children with her, she does not become the head of the family.

Applying this rule to the case at bar, and it is clear that Cora L. Hashman, at the time of her settlement, her filing, and her final proof, was not a qualified pre-emptor. She was not a deserted wife, as whatever desertion there was in the case was contributed by herself. She voluntarily left the home where she and her husband had resided, and where he continued to reside, and when she did so, without good cause or provocation, he was released from his obligation to support her.

To hold that a wife may leave the home of her husband and make settlement upon public land, and acquire title thereto, would be a dangerous precedent to establish, and one which would result in much fraud against the government.

I conclude, therefore, that Cora L. Hashman, at the time of her filing for the land in question, did not possess the qualifications of a pre-emptor, as required by section 2259 of the Revised Statutes, and that the decision appealed from must be, and hereby is reversed.

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

PETERSON *v.* CAMERON ET AL.

Failure to comply with the law on the part of the entryman, or want of good faith on his part, and that of his immediate transferee, will not defeat confirmation under section 7, act of March 3, 1891, for the protection of a subsequent bona fide incumbrance, executed after final entry and prior to March 1, 1888.

A trust company holding a mortgage deed, executed to secure the payment of bonds, may properly, for the protection of the bond holders, invoke the confirmatory provisions of said section.

*Acting Secretary Chandler to the Commissioner of the General Land Office,*  
November 21, 1891.

On March 30, 1881, Archibald Cameron filed a pre-emption declaratory statement for the N  $\frac{1}{2}$  NW  $\frac{1}{4}$  Sec. 26, and S  $\frac{1}{2}$  SW  $\frac{1}{4}$  Sec. 23, T. 59 N., R. 15 W., Duluth, Minnesota, and on September 20, 1881, he submitted final proof and located land warrant No. 99,227 under the military bounty land act of March 3, 1855, in payment therefor, and a receipt and final certificate were issued to him.

On December 23, 1887, Emilie Peterson initiated a contest against said entry and a trial was had on September 27, 1888, at which con-

testant appeared by attorney, the C. N. Nelson Lumber Company also appeared by its attorney.

After considering the evidence submitted, on June 7, 1889, the register and receiver found in favor of contestant and recommended that said entry be canceled. Said lumber company appealed from said finding to your office and on April 4, 1891, filed a motion, accompanied by an affidavit of C. N. Nelson, president of said company, stating that the company purchased the tract from the entryman, for a valuable consideration, after final entry and before March 1, 1888, and asking that patent issue thereon in accordance with the provisions of section 7 of the act of March 3, 1891, (26 Stat., 1095).

On June 3, 1891, contestant filed in your office affidavits tending to show that the entry in question was made in the interest of said lumber company, and protested against confirmation.

On August 27, 1891, said case was considered by you and it was held that,

While the showing made by the affidavits filed in opposition to the motion to pass this case to patent by reason of the said purchase made by the lumber company, would seem to indicate sufficient grounds to warrant an investigation on account of bad faith on the part of said lumber company and collusion between it and the entryman, yet, in view of the fact that this entry must pass to patent in the interest of the Boston Safe Deposit and Trust Company, an incumbrancer in good faith, as will hereinafter be seen, it is immaterial whether or not said lumber company acted in bad faith in becoming the purchaser of said tract.

The affidavit of Frederick M. Stone, president of said Boston Safe Deposit and Trust Company, and the application of said company for confirmation under the act above cited show substantially: that on March 21, 1885, which was after final entry, and before March 1, 1888, said C. N. Nelson Lumber Company executed a trust deed and mortgage to the Boston Safe Deposit and Trust Company covering all its lands amounting to about 200,000 acres, including the tract in question. It appears that said lumber company was desirous of funding its indebtedness and retiring its preferred stock, to do which it determined to execute negotiable coupon bonds in the denomination of one thousand dollars each, and to an amount not exceeding in the aggregate the sum of one million two hundred thousand dollars.

To secure the payment of these bonds, principal and interest, the trust deed and mortgage in question was executed. The bonds are made payable to the trust company, and are to be paid by the lumber company as they mature. The trustee is the agent of the bond-holders to secure the payment of whose bonds they hold the trust deed.

It is shown by the affidavit filed on the part of the trust company on July 17, 1891, in support of its motion for confirmation, that there was then in the sinking fund provided for in the mortgage trust deed the sum of \$23,588.74, and that the indebtedness of the lumber company was at that date as evidenced by outstanding bonds, secured by said trust deed, \$331,411.26 over and above the amount in said sinking fund.

Contestant filed a motion in your office asking that the petition for confirmation be denied, contending that the Boston Safe Deposit and Trust Company is a naked trustee without beneficial interest, and is not a transferee or incumbrancer within the intent and meaning of the 7th section of the act of March 3, 1891, *supra*, and that it is not shown that the security of the trust deed, as to this tract, is essential to the protection of said trust company, or of the holders of any of the bonds purported to be secured by such trust deed. These are the chief objections urged by contestant why the entry should not be confirmed.

You decided that the entry must be confirmed and passed to patent, accordingly the contest of Peterson was dismissed. She has appealed from said judgment to this Department.

I think your judgment is correct.

It is true the entryman is shown to have failed to establish his residence on the tract and to have made the entry in the interest of the lumber company, and if the interest of said company alone was at stake no confirmation could take place, as provided in section 7 of the act cited, because said company is not shown to have been a bona fide purchaser.

The section, however, provides for confirmation where the tract covered by an entry has been incumbered after final entry and before March 1, 1888, if the incumbrance is bona fide and in the hands of a bona fide mortgagee. The Boston Safe Deposit and Trust Company is a corporation under the laws of the State of Massachusetts, empowered to act for others in business. The mortgage deed held by it in this case, executed after final entry and before March 1, 1888, is held in trust for the holders of the bonds of the lumber company. The bond-holders have purchased said bonds on the strength of the security offered, which was a trust-deed for the real estate in question, together with other property described in said instrument. They may be said to have parted with their money because of the issuance of the final receipt by the receiver of the land office; certain it is, that the bonds would not have been purchased except for the reliance by the purchasers in the genuineness of the title of the tracts covered by said trust-deed. They are the real owners of the said instrument, and they alone are entitled to the benefits to be derived from it. It is the duty of the trust company to protect the rights of the bond-holders, and its application for confirmation is made for their protection. It represents the bond-holders in all proceedings affecting the mortgage security,—*Lewis v. Baird*, (3 McLean 56).

The duty of such trustee to defend the title, at law or in equity, in case a suit is brought against it, is unquestioned, *Williams v. Gibbes*, 20 How., 535.

And it may bring suit to enforce the security without uniting as parties those for whose benefit the suit is prosecuted, *Chicago & G. W. R. R. Land Company v. Peck*, 112 Ills. 408; *Carey v. Brown*, 92 U. S.,

171; *Kerrison v. Stewart*, 93 U. S., 155; *Jones on Corporate Bonds and Mortgages*, Secs. 288 and 289.

In this case the tract was incumbered after final entry and prior to March 1, 1888. No adverse claim exists which originated prior to final entry, and the evidence in the record shows the incumbrance to have been bona fide, and that it is held by a bona fide holder. The lien has never been discharged or satisfied.

The contest of Peterson is dismissed, and your judgment affirmed. You will issue a patent for the tract covered by said entry.

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VIRGINIA MILITARY LAND WARRANT—PATENT.

L. E. SCOVIL.

Section 3, act of May 27, 1880, extends the time for the survey of warrant locations in the Virginia military district of Ohio, where the entry was made prior to January 1, 1852, and provides for the issuance of patent thereon, and rights acquired by compliance with said statute are not divested by the act of August 7, 1882.

*Secretary Noble to the Commissioner of the General Land Office, November 23, 1891.*

On March 5, 1881, Sam Kendrick, as attorney for L. E. Scovil, filed an application for the issuance of patent for one hundred and eight acres of land in the Virginia military district, Ohio, located August 14, 1812, in the name of John Steed, as the amount remaining due on Virginia military land warrant, No. 4917, for 666 $\frac{2}{3}$  acres, issued to John Steed for services as Captain of the continental line, in the war of the revolution. It appears that L. E. Scovil claims title to said location under mesne conveyances from John Steed, the warrantee.

This warrant was satisfied to the extent of 558 $\frac{2}{3}$  acres of land, which had been previously located and surveyed, and patent issued therefor. The location or entry of the remaining one hundred and eight acres due upon said warrant was surveyed on March 1, 1881, by the surveyor of the Virginia military district, Ohio, who certified that warrant No. 4917, on which said survey of one hundred and eight acres is made, is on file in his office and has not been satisfied, and that the entry on which the survey is founded was made August 14, 1812.

You rejected the application for patent, upon the ground that there is no authority of law under which such patent can be issued. From this decision the applicant appealed, in due time, which was transmitted to the Department with your letter of October 20, 1890.

In the cession of the northwestern territory to the United States by the State of Virginia, a reservation was made of certain lands between the Little Miami and Sciota rivers, for the purpose of satisfying the deficiency in warrants issued by the State of Virginia to the officers and soldiers of the continental troops. This reservation, as held by the

supreme court, in the case of *Jackson v. Clark* (1 Peters, 628), was not of the whole tract of country between said rivers, but only so much of it as might be necessary to make up the deficiency required to satisfy said warrants, and, under the cession, the United States had the right to prescribe the time within which Virginia military warrants might be located, and to annex conditions to the extension of the time.

The act of March 23, 1804 (2 Stat., 274), required the holders of said warrants to complete their locations within three years from the passage of said act, but the act of March 2, 1807 (2 Stat., 424), extended the time to three years for making locations and five years for returning surveys. The time was further extended by various acts of Congress, passed from time to time, when the act of February 18, 1871 (16 Stat., 416), was passed, providing :

That the lands remaining unsurveyed and unsold in the Virginia military district in the State of Ohio be, and the same are hereby, ceded to the State of Ohio, upon the conditions following, to wit : Any person who, at the time of the passage of this act, is a bona-fide settler on any portion of said land may hold not exceeding one hundred and sixty acres so by him occupied by his pre-empting the same in such manner as the legislature of the State of Ohio may direct.

The act of May 27, 1880 (21 Stat., 142), construed and defined the act of February 18, 1871, declaring that it

had no reference to lands which were included in any survey or entry within said district founded upon military warrant or warrants upon continental establishment, and the true intent and meaning of said act was to cede to the State of Ohio only such lands as were unappropriated, and not included in any survey or entry within said district, which survey or entry was founded upon military warrant or warrants upon continental establishment.

The 2d section of this act declared valid all legal surveys returned to the land office on or before March 3, 1857, on entries made on or before January 1, 1852.

At the time of the passage of said act, the survey of this location had not been made, and therefore did not come within the provisions of said section, but the entry had been made prior to January 1, 1852, and as to such entries the time was extended for making and returning of the surveys by the 3d section of the act, which is as follows :

That the officers and soldiers of the Virginia line on continental establishment, their heirs or assigns, entitled to bounty lands, which have, on or before January first, eighteen hundred and fifty-two, been entered within the tract reserved by Virginia, between the Little Miami and Sciota Rivers, for satisfying the legal bounties to her officers and soldiers upon continental establishment, shall be allowed three years from and after the passage of this act to make and return their surveys for record to the office of the principal surveyors of said district, and may file their plats and certificates, warrants, or certified copies of warrants, at the General Land Office, and receive patents for the same.

The 4th section of the act provides :

This act shall not in any way affect or interfere with the title to any lands sold for a valuable consideration by the Ohio Agricultural and Mechanical College, grantee, under the act of February 15th, eighteen hundred and seventy-one.

Under the provisions of this section, the survey of this entry, as before stated, was made, March 1, 1881, and returned to the General Land Office, March 5, 1881, and application for patent was then filed.

No action appears to have been taken upon this application until January 13, 1887, when your office declined to recommend the issuance of patent, for the reason that the act of August 7, 1882 (22 Stat., 348), confirmed all existing titles to lands in the Virginia military district, Ohio, and repealed so much of the act of May 27, 1880, as conflicted therewith; that the provisions of section 3 of said act of 1880, authorizing the issuance of patents, was abrogated and the jurisdiction of the land department of the United States over such lands and titles was finally and absolutely extinguished.

The 1st section of said act is as follows :

That any person in the actual open possession of any tract of land in the Virginia military district of the State of Ohio, under claim and color of title made in good faith based upon or deducible from entry of any tract of land within said district founded upon military warrant upon continental establishment, and a record of which entry was duly made in the office of the principal surveyor of the Virginia military district, either before or since its removal to Chillicothe, Ohio, prior to January first, eighteen hundred and fifty-two, such possession having continued for twenty years last past, under a claim of title on the part of said party either as entryman, or of his or her grantors, or of parties by or under whom such party claims by purchase or inheritance, and they by title based upon or deducible from such entry by tax-sale or otherwise, shall be deemed and held to be the legal owner of such land so included in said entry, to the extent and according to the purport of said entry or of his or her paper titles based thereon or deducible therefrom.

The 2d section of the act repeals so much of the acts of 1871 and 1880 as are in conflict therewith.

The 3d section of the act of May 27, 1880, merely extended the time for surveying the land entered with Virginia military land warrants prior to January 1, 1852, and for returning said surveys to the General Land Office, and also provided for the issuance of patents therefor. But such patent does not operate to defeat the title to any lands sold by the Ohio Agricultural and Mechanical College, grantee, under the act of February 18, 1871, for the reason that the 4th section of the act of May 27, 1880, "must be held to have the legal operation and effect of confirming and ratifying previous titles made by the Ohio Agricultural and Mechanical College, under the act of February 18, 1871." *Coan v. Flagg*, 123 U. S., 128. It was not intended by this to require the government to investigate the question of titles before issuing patents, but merely to determine that the applicant had complied with the provisions of said section and was entitled to a patent for the land covered by his entry, subject, however, to any adverse claim or title derived from the grantee under the act of February 18, 1871.

After the survey upon this entry had been made and returned to the General Land Office within the time limited by the act of 1880, the act of August 7, 1882 (*supra*), was passed, the purpose of which was to quiet the title of all persons claiming lands in the Virginia military district, who had been in actual and open possession thereof for twenty years under claim and color of

title made in good faith, based upon or deducible from any entry founded upon a military warrant upon continental establishment, recorded in the office of the principal surveyor within the district prior to January 1, 1852. *Coan v. Flag, supra.*

While the act declared that settlement and possession, under an entry duly made prior to January 1, 1852, should constitute legal ownership, without requiring a survey to be made and returned, which was the equivalent of patent, it was not intended to divest a right to patent that had already vested by compliance with the act of May 27, 1880, when the act of August 7, 1882, was passed.

This question was considered in the case of *Jeremiah Hall*, 1 L. D., 11, which came before the Department upon the appeal of Hall from the decision of the Commissioner refusing to issue patent upon his application, made May 12, 1880, as attorney for Samuel Ruggles, for a tract of land in the Virginia military district, in Ohio. In that case the survey was made in 1823, but was not returned to the General Land Office prior to March 3, 1857. The Commissioner refused to issue patent for said tract, upon the ground that the second section of the act of May 27, 1880, only declared valid all legal surveys made and returned to the General Land Office prior to March 3, 1857, on entries made prior to January 1, 1852, and that the only authority for the issuance of patents was comprised in the third section of the act, which

authorizes patents to be issued in certain clearly defined cases; namely, where the warrant was entered on or before January 1, 1852, and the survey had not been made and returned to the General Land Office at the date of the passage of the act, but should after that date be made and recorded in the office of the principal surveyor of the Virginia military district and returned to the office of the Commissioner of the General Land Office together with the original or certified copies of the warrants,

within three years from the passage of said act. The decision of the Commissioner was affirmed by the Department on appeal.

While it is true that all controversies in respect to titles claimed under the grant of February 18, 1871, or under military warrants, entries, or surveys in the Virginia military district of Ohio, must be settled by the courts, it is nevertheless the duty of the Department to issue the evidence of title in the form of patent to all persons who were so entitled, under the act of May 27, 1880, by having complied with the terms of said act.

The decision of your office is reversed, and the papers are returned, with direction that you examine the title of L. E. Scovil, the petitioner, and, if it appear that he is the proper representative of John Steed, the warrantee, and presents a full and perfect conveyance of all right, title, and interest of said warrantee in this entry, you will issue patent upon the application for the land located, in the name of the legal representative of John Steed, the original warrantee.

## SHALLOW LAKES—APPLICATION FOR SURVEY.

JOHN P. HOEL.

An application for the survey of land covered by a non-navigable lake must be denied, where it appears that said lake has been meandered and the adjacent land disposed of by the government, as the land covered by such lake belongs to the adjoining proprietors and not to the United States.

The case of James Popple *et al.*, 12 L. D., 433, overruled.

*Secretary Noble to the Commissioner of the General Land Office, November 23, 1891.*

I have considered the appeal of John P. Hoel from your decision of April 2, 1890, denying his application for the survey and entry of certain lands, situated in Sec. 25, T. 6 N., R. 5 E., and Sec. 30, T. 6 N., R. 6 E., Rapid City, South Dakota.

It appears from the affidavit of the applicant that the lands in question are embraced within the meanders of a lake situate in said townships; that the lands surrounding the lake are designated by lots; that during the wet season standing water, from six inches to a foot in depth, covers about fifty acres of the land, and in the dry weather the waters disappear; that the lake has a natural outlet and can be easily drained by ditching; that the largest part of the land, as known in the land office as "lake," is never covered with water at any time; that the meandered portion of the lake covers about one hundred and forty-five acres.

The plats of the official survey of said townships (approved December 20, 1879, and February 10, 1880,) show that at dates of survey a lake existed in the W.  $\frac{1}{2}$  of Sec. 30, in T. 6 N., R. 6 E., and the E.  $\frac{1}{2}$  of Sec. 25, T. 6 N., R. 5 E. The lands surrounding the lake are designated by lots. Immediately contiguous to and surrounding this lake are six of these lots. Two of them are in Sec. 25—the first one being a portion of the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and consisting of 34.30 acres, upon which George N. Cole made homestead entry, October 19, 1887. The second lot, in Sec. 25, consists of 32.42 acres, and is covered by the declaratory statement of John P. Hoel (claimant), made November 10, 1888. There are four of these lots in said Sec. 30—the first three of which, embracing, respectively, 8.45, 20.90, and 38.46 acres, are covered by the timber culture entry of Charles W. Oakes, made February 11, 1890, and the fourth lot consisting of 34.24 acres is embraced in pre-emption cash entry, made by William H. Shaw, March 3, 1885.

It thus appears that all the lots surrounding the lake are claimed by parties seeking title thereto under the land laws of the United States,

In the case of James Popple *et al.*, 12 L. D., 433, it was decided that a survey may be allowed of land formerly covered by the waters of a shallow meandered lake that is subsequently drained by artificial means, and thus rendered valuable for agricultural purposes. In that

case seven applicants asked for the survey of those parcels of land falling within the meandered lines of Crab Lake; situated in what would be the general subdivisions of sections 7, 8, 9, 10, 11, 18, in T. 22 N., R. 30 E., and sections 12 and 13 in same township, and range 29 W., Olympia, Washington Territory. It was shown that the applicants by the expenditure of large sums of money and great labor had reclaimed a large part of the lake; that they had fenced a large part of it and rendered it valuable for meadow purposes. The lake is about five miles long and has a general average breadth of a half a mile and covers about 1,600 acres. The public survey of the adjacent lands extends up to the lake, and subdivisions were made and marked lots 1, 2, etc. At the time of the application for the survey of the lake, the contiguous lots were covered in most cases by filings and timber culture entries, except where they fell in an odd section, and those were claimed by the Northern Pacific Railroad Company. The question in that case was, as to the ownership of the land within the meandered lines of the lake, and the Department decided (April 29, 1891,) that it belonged to the United States, and accordingly directed its survey and disposal under the homestead laws.

The case at bar is in all essential particulars the same as the Popple case (*supra*), and that case would be followed, the survey ordered; and the entry allowed, but for a recent decision of the supreme court of the United States in the case of *Hardin v. Jordan* (140 U. S., 371), decided May 11, 1891. That was an action of ejectment brought by Gertrude H. Hardin to recover possession of certain fractional sections of land lying on the west and south sides of a small lake, situate about a dozen miles south of Chicago, Illinois, and two or three miles from Lake Michigan; also to recover the land under water in front of said fractional sections and land from which the water retires at low water. The lake is two or three miles in length, and the main question was whether the title of the riparian owner on such lake extends to the *center of the lake* or stops at the waters' edge. The court below (Judges Blodgett and Gresham) decided that plaintiff's title only extended to low water mark, and to that extent gave judgment for the plaintiff, but as to all the land under permanent water gave judgment for the defendant. The field notes describe the meander line of the fractional sections as being "along the margin of the lake." The lake never became entirely dry, nor was any considerable portion of it ever fit for cultivation. The evidence showed it to be "a non navigable fresh water lake or pond," and the patent recited the grant of the lands to be according to the official plat of the survey of said lands. The supreme court reversed the action of the circuit court, saying:

It has never been held that the lands under water in front of such grants are reserved to the United States, or that they can be afterwards granted out to other persons to the injury of the original grantees.

It further says :

The meander lines run along or near the margin of such waters are run for the purpose of ascertaining the exact quantity of the upland to be charged for, and not for the purpose of limiting the title of the grantee to such meander lines.

The opinion re-asserts the well established doctrine that grants of the government for lands bordering on tide water extend to high water mark, and that title to the shore and lands under water in front of lands so granted inures to the State within which they are situated.

The same rule has been extended to our great navigable lakes, and in some States to the great rivers. But it follows from said decision that non-navigable inland lakes and ponds, where the public survey shows the same meandered, and the fact appears that the contiguous lands or lots have been disposed of by the government, that the land covered by such lakes and within the meandered lines does not belong to the government, but to the adjoining proprietors, under the common law right of riparian ownership. The government has no jurisdiction over such lands, and, therefore, no power to dispose of them.

Your said decision, denying Hoel's application for the survey of said lands, must be and it is hereby affirmed. The case of James Popple *et al.* (*supra*) is hereby overruled.

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RELINQUISHMENT—PENDING APPEAL—RULE 53 OF PRACTICE.

HERTZOG *v.* DEMMER.

A relinquishment filed during the appeal of an adverse applicant leaves the land open to the first legal application, subject to the final disposition of the pending appeal.

In such a case the disposition of land released under relinquishment must be controlled by the act of May 14, 1880, and not by the provisions of Rule 53 of Practice.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 23, 1891.*

On March 13, 1884, Matthias Demmer filed declaratory statement for the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 12, T. 2 S., R. 31 W., Oberlin, Kansas; and on December 1, 1884, Theresia Unger made timber-culture entry for the same tract. In February, 1885, Demmer applied to make homestead entry thereon, alleging prior settlement. His application was rejected, because of the existence of the timber culture entry; whereupon, without filing a formal complaint, he asked for a hearing that he might establish his right to the land. The hearing was had, and upon the testimony then submitted the register and receiver found that he had "failed to establish a residence on the land within a year from the date of his filing;" and were of the opinion that he should not be allowed to make a homestead entry, because of his pretended settle-

ment, recommended that his declaratory statement be canceled, and the timber-culture entry of Miss Unger be allowed to stand. From this action Demmer appealed, and on May 25, 1886, your office expressed the opinion that Demmer had "failed to perform the first act towards establishing a claim to the land," held his declaratory statement for cancellation and approved the rejection of his application to make homestead entry. From this action Demmer appealed to this Department. On October 4, 1887, Miss Unger executed and filed in the local office a relinquishment of her timber-culture entry on said tract, which being forwarded here, Acting Secretary Muldrow, on November 30, 1887, returned the papers in the case for such action as might be deemed proper by your office, in view of the relinquishment. By letter of February 3, 1888, the local officers were informed of the return of the papers by the Secretary, that the entry of Miss Unger had been canceled upon your records, and "the case closed as to the contest." It was further said—

Demmer's right to make homestead entry upon said tract will be considered, should he appeal from our action holding his declaratory statement for cancellation, his appeal having been considered by the Hon. Secretary only so far as is in contest with the timber-culture entry of Unger.

On being notified, by letter of February 15, 1888, of the above conclusion, Demmer filed an appeal "from the decision of the Honorable Commissioner of the General Land Office to the Honorable Secretary of the Interior, in which said decision by Hon. Commissioner's letter 'G' of February 3, 1888, holds declaratory statement . . . for cancellation," and asked that he be allowed to make his homestead entry for said land.

Considering this appeal, on March 3, 1890, this Department said that inasmuch as the entry of Miss Unger had been relinquished, no good reason was seen why Demmer, as first legal applicant, should not be allowed to make homestead entry of the tract; his rights, however, to date from his settlement upon the land.

In pursuance of this decision, Demmer, on April 1, 1890, applied again to make homestead entry of the tract, and again his application was rejected by the register and receiver, because said tract was segregated by the timber-culture entry of Gregor Hertzog, made October 4, 1887, the same day that Miss Unger, whom Hertzog married, relinquished her entry. From this rejection Demmer again appealed, and on April 29, 1890, you held Hertzog's entry for cancellation, and Demmer's application in abeyance awaiting final action on said cancellation. The case is here now on the appeal of Hertzog.

This long and detailed statement is necessary in order to show Demmer claimed originally that, as pre-emptor, he had, by virtue of a prior settlement thereon, a better right to the land in question than Miss Unger, under her timber-culture entry; and that his first application to make homestead entry was based upon that alleged prior settlement.

To show that settlement he asked for the hearing, which being ordered by the local officers, thus became virtually a contest to secure the cancellation of the entry of Miss Unger. *Graves v. Keith*, 3 L. D., 309. In this contest, the register and receiver, the Commissioner of the General Land Office, and this Department all decided that Demmer never made any settlement upon the tract, acquired no rights whatever under his pre-emption declaratory statement, which was ordered to be canceled, and his homestead application, based upon the alleged settlement and prior right, was rejected, and "the case closed as to the contest."

After the contest was thus closed adversely to the claims and pretensions of Demmer, you advised him to appeal again to this Department to be permitted to make homestead entry of the tract, now that the right thereto had been relinquished by Miss Unger. He did so appeal; the Department entertained that appeal, and treated his application to make homestead entry as "an original transaction:" "his rights" under which, it is expressly declared, "will commence from date of his actual settlement upon said land." As it had been decided that he had, prior thereto, made no settlement upon the tract, it is obvious that the right accorded him was to take effect *in futuro*, and not because of anything done by him in the past. Therefore, the contention that his former application was treated, or must now be treated, as a pending application which reserved the land as against all subsequent applicants, is made untenable by the plain language used in the departmental decision.

At the time the decision of March 3, 1890, was made, the Department did not know that Hertzog made entry of the tract two years and a half before. The fact was not mentioned anywhere by the local officers or by you in any of the papers sent here in connection with the case, and was only incidentally referred to in one of the arguments of counsel. Such an important record fact should have been officially and formally communicated to this Department, when the relinquishment was transmitted. No evidence of so important a fact, as the existence of an intervening claim, being here, it was said in the decision that no reason was seen why Demmer "as the first legal applicant" should not be allowed to make entry.

It is obvious that in this respect the former decision of this Department was rendered upon an incomplete record, and therefore is not to be regarded as *res judicata*, even if there were not other reasons for excepting it from that rule. *Maggie Laird*, 13 L. D., 502.

The defect in the record being supplied, the case will now be decided upon the facts disclosed.

Upon the relinquishment of Miss Unger being filed at the local office, the land covered by her claim became *ipso facto* open to settlement and entry. Act of May 14, 1880, 21 Stat., 140. Being thus open to entry, that of Hertzog, as the first legal applicant, was properly received and

recorded. No. 53 of the Rules and Practice does not apply to such a case, because it is to that extent in conflict with the act of Congress. But because of the pending appeal of Demmer that entry was made subject to any rights he might be adjudged to have in the premises. The Department having determined that he had no prior rights to Unger, he certainly acquired none as against Hertzog, by his first homestead application, which was held to have been properly rejected. See cases of *Goodale v. Olney*, on review, 13 L. D., 498, and *Maggie Laird*, *supra*.

Entertaining these views, the departmental decision of March 5, 1890, is modified, in accordance therewith, your decision holding Hertzog's entry for cancellation is reversed, and that entry will remain intact.

#### CONFLICTING CLAIMS—HOMESTEAD AND PRE-EMPTION.

##### BAXTER *v.* CRILLY (ON REVIEW).

Where the right to file a pre-emption declaratory statement is accorded as against a prior homestead entry, such action does not require the cancellation of said entry, but it may remain of record subject to the right of the pre-emptor.

*Secretary Noble to the Commissioner of the General Land Office, November 24, 1891.*

I have considered the application by Crilly, for a review of departmental decision of June 24, 1891 (12 L. D., 684), in the case of *Alfred R. Baxter v. Henry Crilly*, involving the NE.  $\frac{1}{4}$  of Sec. 20, T. 25 N., R. 47 W., Chadron, Nebraska.

The first ground of error is—

In holding that the register in rejecting the application to file the pre-emption declaratory statement, did not advise the applicant of his rights in the premises as required by rule 66 of the Rules of Practice, and that the contestant's said claim was not forfeited by his failure to prosecute the same within the period prescribed by the statute, although an adverse claim to the land had been initiated.

This appears to be a technical objection without practical force.

The facts are that Baxter on July 5, 1886, forwarded to the local officers his application to file a declaratory statement. This was returned to him on July 7, 1886, by the register with the statement that the land in question was covered by the homestead entry of Crilly, and that under the ruling of the Land Department then in force, local officers were not permitted to enter filings over homesteads by virtue of alleged prior settlement, but that a hearing might be had and the question of prior and superior right determined. Baxter did not file his affidavit asking for a hearing until December 22, 1886. It can not be held that this delay in the hearing operated as a forfeiture of his right, and as a hearing was the only remedy he was told that he possessed, his failure to appeal within the time prescribed by the rules of practice, can not be held to operate against him.

The third and fourth specifications of error are, in effect, that the decision is not in accordance with the evidence; but it is not specified wherein the error exists, and it is a well-established principle that a general allegation of error is not sufficient ground upon which to base a review.

The second ground of error is—

While properly deciding that the contestant could not maintain his claim of priority of right without showing his qualifications as a pre-emptor at the date he initiated his claim, and that he failed to make such showing at the trial, it was an error to remand the case with directions to allow the contestant to come in and establish his qualifications by *ex parte* affidavits after he had utterly failed to prove these essential facts at the hearing.

The decision in question closed as follows:

I therefore remand the case, with directions that you require Baxter to file supplemental proof, duly corroborated, that he was a qualified pre-emptor at date of his settlement on the land. You will allow him thirty days from date of notice of this decision to comply with this requirement. In the meantime Crilly's entry will remain suspended.

There is nothing in this record that was not before the Department in the original case, and the Department then thought that Baxter should be given an opportunity to submit evidence as to his legal qualifications as a pre-emptor. It was not contemplated, however, that this evidence should be furnished *ex parte*, although the language justified that inference, but that it should be furnished with notice to the opposing claimant, who, of course, should have the opportunity to rebut the same.

As Baxter's application is to file a declaratory statement only, such action on his part will not necessitate a cancellation of Crilly's homestead entry, but the same should be allowed to remain intact, subject to the right of Baxter to make final entry for the land, upon showing compliance with the law. The application for review is denied, further than is indicated by the above explanation and modification.

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#### FRAUDULENT ENTRY—NOTICE—HEIRS OF PRE-EMPTOR.

##### CASSADY'S HEIRS *v.* LOGSDON.

An entry can not be allowed to stand of record where it is procured through fraud and misrepresentation as against the heirs of a deceased adverse claimant.

Notice of a decision to the attorney of record is notice to the party he represents, but not to the heirs of such party.

The heirs of a deceased pre-emptor are entitled to a reasonable period within which to take action as against an adverse claim.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 24, 1891.*

The land involved in this appeal is the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 11, T. 10 N., R. 37 E., Walla Walla, Washington, land district.

The record shows that William Cassady made application to file pre-emption declaratory statement for said tract March 3, 1885, alleging settlement November 6, 1883. As nearly as can be ascertained from the record, it appears that Logsdon also made application to file a pre-emption declaratory statement on said land, but presumably at a later date. A hearing was had before the local officers to determine which of these two claimants had the superior right to file on the land in controversy and the local officers, on or about the 21st of September, 1886, by a joint decision decided in favor of Cassady, whereupon Logsdon appealed to your office, and on October 15, 1888, the decision appealed from was affirmed. Notices of your decision were mailed to the attorneys of record of the respective parties immediately on its receipt at the local office. In the meantime, on February 4, 1888, William Cassady died, intestate, leaving Charles Cassady who lived in Clackamas Co., Oregon, John W. Cassady who lived in Pittsburg, Penna., and Martha J. Kenny, who resided at Astoria, Oregon, as his only heirs at law.

On April 22, 1889, Logsdon made additional homestead entry under section five of act of March 2, 1889 (25 Stat., 854), of said tract. The only papers found in the files in connection with this entry are the application and the receivers' final receipt. He also filed in the local office on the same day a relinquishment of his right of appeal from the decision of your office of October 15, 1888. The necessity of this formal waiver of right of appeal is hardly apparent when it is shown by the record that he had notice of the decision by registered letter of November 10, 1888, and his attorneys of record acknowledged receipt of service of the same December 17, 1888.

It is shown by the evidence that Logsdon made an application for a homestead entry under section 2289 (Revised Statutes, 419), for the tract on December 16, 1888, when he filed an affidavit announcing the death of Wm. Cassady, and an affidavit by two witnesses corroborative of this fact and they also swear to the best of their knowledge and belief that Cassady left no heirs. This application was evidently abandoned and he made additional homestead entry as above stated.

On the 5th day of July, 1889, Charles W. Cassady filed an affidavit in the local office, alleging that he, and the others mentioned above were the heirs at law of the said Wm. Cassady; that Wm. Cassady had resided upon said land since November, 1883, was in possession of the same at the time of his death, and that the same was then in contest; that the contest was decided in favor of the deceased and Logsdon had not appealed from the decision; that Logsdon had filed on the land in fraud of the rights of the heirs; that the affidavits of the persons averring that Wm. Cassady left no heirs was known to the witnesses and Logsdon to be false at the time; that the entry of Logsdon was void, unlawful and a fraud, and praying that his entry may be canceled and the petitioner be allowed to make final proof for the heirs of Wm. Cassady.

By your direction, on September 11, 1890, hearing was had before the local officers, and on the 25th day of October, 1889, they jointly held that the entry of Logsdon should stand. The heirs thereupon appealed, and on June 30, 1890, you reversed their judgment and held Logsdon's homestead entry for cancellation.

He appealed from this judgment and claims that you erred in holding that the case of *Cassady v. Logsdon* had not been fully closed at the time Logsdon entered the land; in holding that the heirs had not lost and forfeited all right by neglect to appear and claim the land; in holding that the heirs had not been notified of the decision in the former case; in holding Logsdon had any knowledge of the existence of heirs of Wm. Cassady at the time he entered the land; in holding Saunders the notary was known to Logsdon to have been Wm. Cassady's attorney; in holding that Logsdon knew that Saunders had any knowledge of the existence of heirs of Wm. Cassady, and in holding that Logsdon had not acted in good faith or that he had any reason to believe that there were any heirs of Cassady, until long after he had made his entry.

It appears that Logsdon was a settler on this land in 1883, when the same was claimed by the Northern Pacific Railroad Company as being within the indemnity limits of its grant; that on March 17, 1883, he sold to one Hardman all his rights to whatever improvements he had thereon for \$302.00. The right of the railroad company was rejected and the tract became subject to entry, and on November 5, 1883, Hardman sold and transferred the same to Wm. Cassady who built a house and established his residence thereon and resided there till the day of his death, February 4, 1888. It seems that Logsdon afterwards contested the right of Cassady to file on said land, and the contest was decided against him by your decision of October 15, 1888, over eight months after the death of Cassady. He testified that he made application to include the land in his homestead about the 15th or 16th of December, 1888. One L. R. Saunders, the notary who took the affidavit of witnesses to the effect that Wm. Cassady was dead and to the best of their knowledge and belief had left no heirs surviving, was one of the attorneys of record for Wm. Cassady in the first contest, and he swears at this hearing that he received notice from the local officers of the result of the contest, and that he is under the impression that he mailed the same to Charles W. Cassady. A letter written by him to Charles W. Cassady, dated February 28, 1888, is produced in evidence in which he says: "I have been requested to write to you in regard to the affairs of your father, Wm. Cassady, deceased," and in this letter he speaks of the contest over the land; of an incumbrance there was on it, and advised him "as I (he) attended to all your father's business during his lifetime" to accept a proposition made by the creditor, assuring him it was all the land was worth. This witness was asked if he did not know when the witnesses were swearing that Cas-

sady died without heirs that such an affidavit was false. He answered as follows:

I did not, but in answering that way I would have to make an explanation. That affidavit was handed to me by Mr. Logsdon saying that he wanted to get two witnesses to swear to it and that he would go out and see if he could find them. He said he thought Mr. Shoemaker and Mr. Wright were in town and that he could get them. While he was gone I read the affidavit and saw that it was absolute as regards Cassady not having any heirs. Mr. Shoemaker came in and said that Mr. Logsdon had sent him up there and wanted to know what was wanted of him. I told him of the affidavit and read it to him. He said he did not know whether he could sign that affidavit in that shape or not as it required him to swear positively that there were no heirs for he had heard it rumored and talked that there were heirs somewhere. I told him I had heard the same and that I as an officer could not qualify him to an affidavit but that he swear to the best of his knowledge and belief. I added to that affidavit a clause which to my best judgment would not cause him to swear positively to anything that he did not know and when Mr. Wright came in the matter was all talked over with him before he signed the affidavit and we endeavored to get up such an instrument that would not be prejudicial to the heirs or to the person swearing or to myself as an officer.

It is shown by other witnesses that it was common neighborhood talk that there were heirs who were going to claim this land and that Logsdon himself knew of this talk and on one occasion at least participated in it. In fact he does not deny that he had this knowledge, but evades answering the question directly, by saying he knew nothing definitely about it. The conclusion is fairly reached that Logsdon caused the local officers to accept his additional homestead entry by fraud and misrepresentation and therefore it should not be allowed to stand as against the heirs of Wm. Cassady.

It is claimed by counsel for appellant that the heirs were not diligent in asserting their rights and therefore their claim should not be considered. It is conceded that whatever right the heirs have is conferred by section 2269 Revised Statutes, which reads:

Where a party entitled to claim the benefits of the pre-emption laws dies before consummating his claim, by filing in due time all the papers essential to the establishment of the same, it shall be competent for the executor or administrator of the estate of such party, or one of his heirs to file the necessary papers to complete the same; but the entry in such cases shall be made in favor of the heirs of the deceased pre-emptor, and a patent thereon shall cause the title to inure to such heirs, as if their names had been specially mentioned.

It is conclusively shown that neither of the attorneys of record for Wm. Cassady ever notified the heirs of the decision in the case of Logsdon v. Cassady, notwithstanding Saunders knew the address and had corresponded with Charles W. and John W. Cassady. The tenor of his letter to Charles W., of February 28, 1888, was such as would naturally lull the heirs to inactivity in asserting their rights as they were assured the land would not pay the debts of their parent. The evidence is quite unsatisfactory as to when they first became acquainted with their rights in their father's estate, but it appears that Charles was at the land office in June, 1889, and on July 5th, instituted this proceeding.

It is claimed that notice to the attorneys of record of the decision of your office should be construed as notice to the heirs. While it has been repeatedly held in our departmental decisions that notice to the attorney of record is equivalent to notice to the party, yet this rule should not obtain as to heirs. The relationship of attorney and client ceases at the death of either party and should not be extended by implication to the heirs. The heirs knew of the existence of the contest shortly after the death of their father. They had a right to let the matter rest in *statu quo* until that contest was decided. Under that decision they were given the right to perfect the title initiated by their father. The losing party, Logsdon, however, had the privilege of an appeal within sixty days from date of receipt of notice from the local office notifying him of the decision, and the heirs would not have been permitted to perfect their title until the expiration of that time even if they had been notified of it. It seems from the record that Logsdon received notice of the decision November 10, 1888, but instead of taking an appeal, he, on December 16, 1888, within the time allowed therefor made a homestead entry of the land. The heirs could take no steps to protect their interests until the expiration of sixty days after November 10, which would have brought the time to January 9, 1889, and within six months thereafter they instituted this contest. Under the peculiar circumstances of this case I hold that they are in time. Your decision is therefore affirmed, and you will direct the local officers to notify the heirs that on presentation of proper proof of their heirship to the estate of Wm. Cassidy, deceased, within ninety days from receipt of this decision, they will be allowed to make final proof on said land in the name of all the heirs.

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JUDGMENT OF CANCELLATION—APPEAL—APPLICATION.

PERROTT *v.* CONNICK.

A judgment of cancellation takes effect as of the date rendered, and the land released thereby from appropriation becomes subject to entry as of such date without regard to the time when such judgment is noted of record in the local office.

The time within which an applicant may appeal from the rejection of his application is limited by the notice of such action, and not by the action itself.

An application to purchase under the act of June 3, 1878, is not abandoned by a second application of the same party for the land in question.

The validity of an appeal from the local office will not be considered by the Department, where the case is submitted on its merits to the General Land Office, without objection to its jurisdiction.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 24, 1891.*

On the 22nd of December, 1883, one John W. Setchel made pre-emption cash entry for the W  $\frac{1}{2}$  of the SE  $\frac{1}{4}$ , and the E  $\frac{1}{2}$  of the SW  $\frac{1}{4}$  of Sec. 14, T. 4 N., R. 2 E., at Humboldt land district, California, which

was held for cancellation on the 4th of December, 1886, by your office upon the report of a special agent.

Upon the application of the entryman, a hearing was had upon such report, which resulted in the entry being again held for cancellation by your office on the 12th of September, 1888. An appeal from that judgment was taken to this Department, and on the 23rd of November, 1889, said judgment was affirmed.

On the 25th of November, 1889, William Perrott made application to purchase said land, under the provisions of the act of June 3, 1878, (20 Stat., 89). The local officers, not then being advised of the judgment of this Department, affirming your decision of cancellation in the case of the entry of Setchel, rejected his application to purchase on account of such pending entry, and stated to him that it was rejected for that reason.

The decision of this Department was not received at the local office until the 19th day of December, 1889, and on that day Perrott made a second application to enter the land under the same act, which was rejected by the register, on the ground that John S. Connick had filed his application for the land on the 16th of that month. He admits due service of notice of the rejection of his first application on the 27th of December, 1889, and of the rejection of his second application on the 30th of that month. On the 23rd of January, 1890, he filed appeals to your office, from both said judgments of rejection.

On the 28th of June, 1890, you rendered a decision in the case, holding that the local officers erred in rejecting his application made on the 25th of November, 1889, which should have been received and held by them to await the final judgment of the Department on the validity of said Setchel's cash entry. You therefore reversed the decision of the local office, and awarded the prior right to the land to Perrott, without considering his appeal from the decision rejecting his second application to make entry therefor. An appeal from your judgment brings the case to this Department.

The position of the appellant is that the statement of the local officers to Perrott, on the 25th of November, 1889, when he filed his application to make entry for the land, that such application could not be allowed on account of the existing entry of Setchel, was "notice" of the rejection of his application, and by failure to appeal from such decision, within thirty days, he lost all rights under said application. This does not seem to have been the understanding of the local officers on the subject, as on the 27th of December, 1889, they served notice upon him of their rejection of his application, "upon the ground that the tract applied for is covered by cash entry No. 5,951, which is *prima facie* valid."

The appellant also insists that by filing a second application to make entry for the land on the 19th of December, 1889, he abandoned his former application, and waived whatever rights such application gave him.

This is urged by way of argument, his notice of appeal containing only three specifications of error, as follows :

1. Said decision is contrary to law.
2. Said decision is contrary to the evidence.
3. Said decision is contrary to the established rules and regulations of the General Land Office for the sale and disposal of public lands.

In explanation of the last specification he states that your decision is contrary to the rules, practice and regulations of the General Land Office, because "it allows an application to purchase land which was, at the time the application was made, the property of another, no part of the public domain, and not subject to entry as government land." This statement saves the appeal from dismissal under rule 88 of practice, and in substance states that on the 25th of November, 1889, when Perrott applied to make entry for the land, it was the property of Setchel, and was not a part of the public domain.

The rule of this Department is, that after a decision by your office, holding an entry for cancellation, an application to enter may be received during the time allowed for appeal from such decision, but should not be made of record until the rights of the former entryman are finally determined. Henry Gauger, (10 L. D., 221). In the case at bar these rights were finally determined on the 23rd of November, 1889, when this Department affirmed your decision, holding Setchel's entry for cancellation, and by that judgment the land in question became subject to entry as government land. That judgment took effect when it was rendered. The minuting of the fact that such judgment had been rendered upon the record book in the local office, was the mere ministerial act of the officer charged with the duty, and formed no part of the judgment, and neither established nor limited any rights.

I do not deem it necessary to consume any time in establishing the proposition, that it was not the *action* of the register and receiver in rejecting his application of November 25, 1889, but the *notice* of that action, which limited Perrott's time to appeal therefrom. His appeal having been taken within the time allowed therefor, after such notice, it was properly before you for consideration and decision.

That he did not abandon his first application to purchase the land by making a second one, is a well recognized doctrine in this Department. It was reiterated in the case of *Motherway v. Parks* (13 L. D., 56), where it was held that "the legal operation of a pending application to enter is not affected by a second application of the same party." In the case of *Farrell v. McDonnell* (13 L. D., 105), the same rule was stated, when it was said, "A supplemental affidavit of contest does not constitute an abandonment of the prior charge, or waive rights secured thereunder."

Under the rule of this Department, that its judgments take effect as of the date they are rendered, Perrott was the first to make application to purchase the land, his application having been filed two days

after the land was restored to the public domain, by the decision of November 23, 1889. Should the doctrine contended for by the appellant, that judgments are not effective until minuted upon the record book in the local office, prevail, he would not be benefited by such holding, as Perrott was the first to make application after such entry was made, both events having taken place on the 19th of December, 1889, while since that date the appellant has made no application for the land whatever.

It is now urged that the appeal of Perrott from the decision of the local officers to your office, was irregular, in that it did not affirmatively appear that notice of such appeal was served upon the appellee. It is too late to raise that objection at this time. That question should have been raised and disposed of when the case was before you. In the case of *Vann v. Wood* (11 L. D., 630), it was held that "the validity of the appeal from the local office will not be considered by the Department, where the case is submitted on its merits to the General Land Office, and without objection to its jurisdiction."

From a careful consideration of the whole case, I think your decision of June 28, 1890, was correct, and it is therefore affirmed.

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HOMESTEAD ENTRY—MARRIED WOMAN.

JENNIE ROUTH. *Act 35 10425*

A single woman who applies to make homestead entry through an officer authorized to take the preliminary affidavit therein, and then marries prior to the time when such application is received at the local office is not qualified to make said entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 24, 1891.*

I have examined the record in the appeal of Jennie E. Routh, *nee* Jennie E. Fine, from your decision of December 23, 1889, holding for cancellation her homestead entry (transmuted), for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , Sec. 18, T. 9 N., R. 45 E., Walla Walla, Washington, because at the date her application to enter was received in due course of mail at the local office, she was a married woman, and was thereby disqualified for making homestead entry.

Counsel for claimant insist, though not in *haec verba*, that having made her affidavit before an officer authorized by law to take it, and paid the entry fees to the same officer, she, in contemplation of law, had thereby made an entry, and her marriage the next day could not defeat the same, although it may appear (as it does in this case) that her application, affidavit, and fees could not, in due course of transmission, reach the hands of the local officers until after her marriage.

In *Lydia Steele*, 1 L. D., 460, it was held in a pre-emption entry that

"the entry of a married woman, where all the necessary acts, including publication of notice of intention to make proof, have been performed prior to marriage, should be submitted to the board for (equitable) confirmation," under sections 2450 to 2457 of the Revised Statutes.

To the same effect are *Melissa J. Cunningham*, 8 L. D. 433, *Mary E. Funk*, 9 L. D., 215, *Emma McClurg*, 10 L. D., 629.

In *Gilbert v. Spearing*, 4 L. D., 463, the affidavit in a homestead entry was made before the clerk of a court on June 4, which was, with the application and fees, transmitted to the local land office, and placed upon record June 15, but it did not appear when these papers reached the local office, and a hearing was ordered to ascertain that fact. In that case Secretary Lamar says: "When the homestead application, affidavit and legal fees are properly placed in the hands of the legal officers, and the land applied for is properly subject to entry, from that moment, the right of entry is complete, and in contemplation of law the land is entered." (Middle of page 466.) The question was, had this been done prior to June 15, 1880, date of the passage of the act allowing a homestead entryman to make cash payment, etc. The case does not hold that when the affidavit is made and the entry fees paid to an officer other than a land officer, the entry is made in contemplation of law. On the contrary, the whole context of the case is to the effect that the entry can only be regarded as made at the date when such affidavit application and payment reach the hands of the local officers.

The statute allowing the affidavit to be made before an officer other than a land officer (section 2294 R. S.) does not authorize such officer to accept the application or payment of fees. That section only provides that he may make the affidavit required by section 2290 before such officer, which he (the applicant) may transmit, "with the fee and commissions, to the register and receiver," thus avoiding the necessity of being personally present at the local office when he makes his entry. Of course, he may entrust such transmission to the officer before whom he makes his affidavit, but he thereby only makes such officer his agent for that purpose, and any negligence or default in forwarding the application and payment on his part would be attributable to the applicant.

Miss Jennie E. Fine, when she made the affidavit provided for in section 2294, was a qualified entryman, but before she made her entry—that is: before her application did or could reach the hands of the local officers—she had become disqualified to enter the land by reason of her marriage.

In all the cases above cited, in which the proof was accepted after marriage, the claimant had complied with the law as to residence, improvements, etc., before the disability attached. It only remained for her to prove such compliance. In the case at bar, she was disqualified at the date of the initiation of her claim.

Her homestead entry can not be sustained.

The decision appealed from is affirmed.

## PRACTICE--APPEAL--RAILROAD GRANT--MINERAL LAND.

## CENTRAL PACIFIC R. R. CO.

The government has ample authority to rectify errors occurring in the judgment of the local office without the formality of an appeal therefrom, where proceedings have been directed before said office, and there is no adverse claimant for the land.

The burden of proof is upon the company to show the agricultural character of land that is returned as mineral by the surveyor general.

*Secretary Noble to the Commissioner of the General Land Office, November 25, 1891.*

I have considered the appeal of the Central Pacific Railroad Company from the decision of your office of May 1, 1890, holding for cancellation its selection of certain lands heretofore made, and included in list No. 5, in the Sacramento land district, California.

List No. 5 was filed on April 7, 1884, for portions of townships 10, 11, 12 and 13, north, of range 11 east, and township 13 north, of range 13, east. All of the tracts in question lie in odd-numbered sections and within the limits of the grant to the Central Pacific Railroad Company under act of July 1, 1862, (12 Stat., 489) as amended by act of July 2, 1864 (13 Stat., 356), and were returned as mineral in character by the surveyor-general of California, at the date of his official survey thereof.

It appears that after list 5 of selections was made the company furnished certain evidence that the lands were non-mineral in character, this evidence, however, was not deemed satisfactory by your office, and on June 15, 1889, by letter of that date, the railroad company was allowed sixty days in which to apply for a hearing, after due notice to all parties in interest, to show the non-mineral character of the lands embraced in said list. Upon the application of said company a hearing was had on September 24, 1889, and the record thereof was transmitted to your office March 4, 1890. It appears that on the day of the trial certain mineral claimants, claiming portions of the land included in said list, appeared by counsel and in person. The railroad company appeared by its attorney and entered a disclaimer as to all of the tracts embraced in said list which were claimed by the mineral claimants, and confessed that said tracts were mineral in character. Upon the entry of such disclaimer, all the mineral contestants abandoned said contest, except Robert Noble, who thereafter committed default. The railroad company thereupon filed affidavits covering nearly all of the land embraced in said list, not disclaimed by it, tending to show that said lands are non mineral.

It appears that at a former hearing which was held before E. L. Crawford, a notary public, on the application of the railroad company, said company refused to furnish any evidence. Thereupon the mineral

claimants presented certain affidavits showing that nearly all of said lands were mineral in character. By your letter of June 15, 1889, the local officers were directed to consider this evidence in connection with the evidence to be submitted at the trial on September 24, 1889.

On January 16, 1890, after considering the evidence submitted at both the hearings, the register and receiver found that all the tracts disclaimed by the company, described, were mineral in character, and that list 5 should be canceled as to them; also that certain lands in said list, not covered by the company's affidavits, were mineral lands, and said list should be canceled as to them. They further found that the remainder of the tracts included in said list are non-mineral in character, and they recommended that patent be issued therefor to said company.

No appeal was taken from their finding; but the record was transmitted to your office, where, on May 1, 1890, the finding of the local land officers was affirmed and the list held for cancellation as to the disclaimed tracts and the tracts not covered by the affidavits submitted by the attorney for the railroad company on September 24, 1889. The residue of the lands embraced in said list were declared by the register and receiver to be agricultural in character.

With the exception of the following described tracts said list was held for cancellation by your office:

S $\frac{1}{2}$ of lot 5 of SW $\frac{1}{4}$ of Sec. 7, .....	T. 10 N., R. 11 E.;
S $\frac{1}{2}$ of Sec. 5; SE $\frac{1}{2}$ and fractional SW $\frac{1}{2}$ of Sec. 7; fractional Sec. 19; N $\frac{1}{2}$ NE $\frac{1}{2}$ , N $\frac{1}{2}$ NW $\frac{1}{2}$ and SW $\frac{1}{2}$ Sec. 27; N $\frac{1}{2}$ NE $\frac{1}{2}$ and NE $\frac{1}{2}$ NW $\frac{1}{2}$ Sec. 29, .....	T. 11 N., R. 11 E.;
Lots 1 and 2 Sec. 3; fractional NW $\frac{1}{2}$ Sec. 7; SE $\frac{1}{2}$ Sec. 25; N $\frac{1}{2}$ and SW $\frac{1}{2}$ Sec. 27; E $\frac{1}{2}$ Sec. 35, .....	T. 12 N., R. 11 E.;
All of fractional section 1; fractional SW $\frac{1}{2}$ Sec. 5; E $\frac{1}{2}$ NE $\frac{1}{2}$ and E $\frac{1}{2}$ SE $\frac{1}{2}$ Sec. 7; W $\frac{1}{2}$ SE $\frac{1}{2}$ Sec. 9; E $\frac{1}{2}$ and E $\frac{1}{2}$ SW $\frac{1}{2}$ Sec. 17, N $\frac{1}{2}$ and SW $\frac{1}{2}$ Sec. 25, and W $\frac{1}{2}$ NW $\frac{1}{2}$ Sec. 27, .....	T. 13 N., R. 11 E.;
All of fractional Sec. 1; all of Sec. 11; lots 1, 2, 3 and 4 of NE $\frac{1}{2}$ , NW $\frac{1}{2}$ N $\frac{1}{2}$ SW $\frac{1}{2}$ and N $\frac{1}{2}$ SE $\frac{1}{2}$ of Sec. 13, .....	T. 13 N., R. 12 E.

The railroad company has appealed from your ruling to this Department, and has assigned errors as follows:

1st. Under the Rules of Practice in the Department the Commissioner had no authority to change the action of the local officers. Their decision was final. (Rules Nos. 48 and 49.)

2d. That the proofs upon which these officers acted were regularly and fairly taken, and fully sustained their decision. The Commissioner has erred in overruling them as to the lands now on appeal, by treating as evidence affidavits irregularly introduced in the case, but which were nevertheless examined and considered by the register and receiver.

3d. That the prior proceedings in this case strengthen the present case of the company, and it is not properly amenable to the unfavorable coloring which is erroneously given it in the Commissioner's decision.

As shown by the record, all the testimony considered by the local officers was ex parte in character; contestants never claimed any inter-

est in the greater portion of the lands included in list 5, and, as to the tracts claimed by them, the railroad company confessed that they were mineral lands and disclaimed any interest in them. By this diplomatic movement, it secured itself against the possibility of an appeal being taken if it secured a favorable judgment from the register and receiver; and, at the same time, by conceding what was insisted upon by those having an interest in a small proportion of this land, it was enabled to make a formal showing of proof that the larger portion thereof was non-mineral without the danger of cross-examination of its witnesses.

While this course can not be held to have been irregular under the first exception to Rule 48, still it had a tendency to and did prevent a full investigation of the character of the tracts, as contemplated by the order for a hearing contained in your letter of June 15, 1889.

After those persons interested in a small part of this land have abandoned the contest, the railroad company proceeded to file formal affidavits tending to show in a general way that the lands, though they had been mined, do not now contain minerals in paying quantities. It now produces the finding of the local officers and contends; under Rule 48, that your office had no authority to reverse their action, as, in the absence of an appeal, their finding as to the facts became final. In this case, no appeal from the finding of the register and receiver was taken, because the finding was in favor of the railroad company, and of course it would not appeal; and by its concession to the few mineral claimants who alleged the mineral character of the lands and who asserted claims to small portions thereof, all adverse claimants disappeared.

The government is a party in interest in all such cases, but it has never been its practice to appeal in such cases, for it has abundant power to rectify all wrongs without going through the process of an appeal from the local officers. The last rule of the Rules of Practice provides that:

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

I am of the opinion that Rule 48 has no application to a case like this. The rule is found in the Rules of Practice, under the head of the chapter denominated "Appeals," and would seem only to be applicable to contest cases and ex parte cases where the finding of the local officers is adverse to the applicant. There seems to be no reason for holding that this rule applies to cases like the one at bar, where no appeal by the government is necessary or required by the Rules of Practice.

The cases of *Lindgren v. Boo* (7 L. D., 98), and *McSherry v. Gildea* (5 L. D., 585), cited by the attorney for the railroad company, were both actual contests, and upon a finding against one of the parties, and no appeal taken, of course said rule applies and the finding of facts will be taken as conclusive and will not be disturbed by your office unless the case falls under one of the four exceptions to said rule. The sole

reason for holding as final the facts found by the local land officers, is that inasmuch as the party against whom the finding is made has taken no appeal, he is held to have acquiesced in said finding.

In the case of the Central Pacific Railroad Company (8 L. D., 30), cited by counsel, the main question passed upon by the Department was not as to the effect of the finding of the register and receiver, and Rule 48 is not even referred to. The question necessary for decision and the points actually decided there were as to what effect the company's failure to list the lands before the hearing would have on its rights. The Department held that said failure will not defeat the effect of such a hearing, but that the listing might be required *nunc pro tunc*. Even if the provisions of Rule 48 be held to apply in a case like the one at bar, this Department, under its supervisory authority, may inquire into the correctness of the finding of the local officers. *Lee v. Johnson*, 116 U. S., 48.

In this case all the tracts included in list No. 5 were returned by the surveyor-general as mineral. The burden of proof is therefore upon the company to show that said tracts are non-mineral. This, in my judgment, the evidence fails to do. I concur in the judgment of your office that all of the lands embraced in said list are shown to be mineral in character, except those tracts described on page four of this decision which were held by you to be agricultural lands. As to them the testimony in the record is unsatisfactory. Having been reported as mineral, they must be held to be such until shown by a preponderance of evidence to be otherwise. Such evidence is not found in the record. The testimony introduced by the railroad company is insufficient, in my judgment, to warrant a finding that said tracts are agricultural in character. You are accordingly directed to order a hearing to be had before the local land officers, after due notice to all parties concerned of the time and place thereof, to ascertain the true character of said tracts, and it is suggested that a special agent of your office be directed to prepare for this hearing by ascertaining before-hand where and who the necessary witnesses are who know the real character of the tracts, and to be present and have the necessary witnesses present and represent the government generally at said hearing. After considering the evidence submitted, the register and receiver will render an opinion thereon, after which the whole record will be transmitted to your office for re-adjudication.

Your judgment is accordingly modified.

## RESERVATION—HOMESTEAD ENTRY—FORT RENO.

HENRY C. LINN.

There is no statute giving the President general authority to establish reservations of land for any purpose, but the right of the President to reserve land for public uses has always been recognized by the courts.

Land reserved by executive order for military purposes is not subject to homestead entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 25, 1891.*

I have examined the appeal of Henry C. Linn from your decision of July 18, 1890, involving the validity of his homestead entry for the SW.  $\frac{1}{4}$ , Sec. 34, T. 12 N., R. 3 W., Guthrie land district, Oklahoma Territory.

It appears that on April 11, 1889, the Secretary of War addressed a letter to the Secretary of the Interior asking the temporary reservation of the above described tract for the use of Fort Reno, Oklahoma Territory.

Under date of April 15, 1889, in accordance with instructions from this Department, you advised the local officers of the temporary reservation of said tract for military purposes, and on April 20, 1889, said reservation was made permanent by executive order.

May 16, 1889, appellant made application to enter the land in question as a homestead, the local officers, however, rejected the same for conflict with the above military reservation. The claimant appealed and you affirmed the decision below on the same ground. Claimant again appeals.

The appellant claims that the President has no power or authority to reserve lands for any purpose, after they have been thrown open to settlement by proclamation in accordance with law; that the executive order above mentioned was made without authority of law and in violation of the rights of claimant; that said order was not promulgated or made by the President or received by the local officers until after the rejection of his application, and that said land was reserved solely by a letter from you to the local officers, based upon a request from the Secretary of War to this Department.

There is no statute giving the President general authority to establish reservations of land for any purpose, but the right of the President to make reservations for public uses has always been maintained by the courts. *George Herring* (11 L. D., 60).

In the case of *Grisar v. McDowell* (6 Wall., 363, 381), the supreme court said that

from an early period in the history of the government it has been the practice of the President to order from time to time, as the exigencies of the public service require, parcels of land belonging to the United States to be reserved from sale and set apart for public uses.

The tract in question having been reserved for a specific purpose by competent authority and the local officers so advised through the proper channel, it was not in the power of the appellant to acquire any rights thereto subsequent to said withdrawal, by virtue of his application to make entry under the homestead law.

With this view of the case the application of this appellant was very properly rejected, and therefore your decision is affirmed and the papers in the case herewith returned.

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ALASKA—NON-MINERAL LAND—ENTRY—SURVEY.

CLINTON GURNEE.

The right of any person, association, or corporation to enter non-mineral land in Alaska for purposes of trade or manufactures, is limited to one entry of not exceeding one hundred and sixty acres of contiguous land lying as nearly as practicable in square form.

In the survey of Alaskan lands in isolated localities, the authorized deputy surveyor may administer the requisite oaths to chainmen, assistants, and such other persons as he may have occasion to examine about corners, boundaries, etc.

*Secretary Noble to Mr. Clinton Gurnee, San Francisco, Cal., November 25, 1891.*

Your communication under date of August 29, 1891, in reference to surveys and purchase of lands in Alaska, was submitted to the Commissioner of the General Land Office for his consideration and recommendation in the premises. I herewith enclose you a copy of his report of October 28, 1891. His conclusions and recommendations are concurred in by me, and are hereby adopted as the rules to govern in such cases.

*Commissioner Carter to the Secretary of the Interior, October 28, 1891.*

I have the honor to acknowledge the receipt of Department letter, dated October 3, 1891, enclosing for report and recommendation a letter from Mr. Clinton Gurnee, of San Francisco, dated August 29, 1891, relative to the circular approved June 3, 1891 (12 L. D., 583), prescribing regulations as to the mode of survey and entry of non-mineral lands in Alaska, and asking if certain modifications may not be made in said regulations.

Mr. Gurnee inquires :

1st.—Whether any company can apply for an official survey for different tracts on which it has improvements connected with the business, in the aggregate not exceeding one hundred and sixty acres ?

2nd.—Whether the authorized deputy surveyor on the ground can administer the preliminary and final oaths to the chainmen and other assistants, and to such other persons as he may have occasion to ex-

amine about corners, boundaries, date of construction, actual occupation, etc.

With regard to the inquiry as to whether the right exists in any one person, association, or corporation, to make two or more entries not exceeding one hundred and sixty acres in the aggregate, for the purpose of trade or manufactures, I am of the opinion that it was the legislative intent to restrict the person, association, or corporation to *one* entry of *contiguous* land, not exceeding the specified area. I am led to this view by the fact that the right of entry afforded by all the general land laws, is restricted as above stated, which, in connection with the language used in authorizing these entries in Alaska, to the effect that a party "may purchase not exceeding one hundred and sixty acres to be taken as near as practicable *in square form*" (not in square forms), provided that in case more than one party "shall claim the same tract" (not tracts), the party having the prior claim "shall be entitled to purchase the same; but the entry" (not entries) of no party shall include improvements made by another prior to March 3, 1891, I therefore recommend that Mr. Gurnee be advised that this question was carefully considered in all its phases when the instructions of June 3, 1891, were framed, and that the right of any person, association, or corporation to enter non-mineral land in Alaska for purposes of trade or manufactures, is limited to one entry of not exceeding one hundred and sixty acres of contiguous land lying as near as practicable in square form.

In the matter of the administering of oaths by the deputy to his assistants, and to such persons as he may have occasion to examine in regard to corner boundaries of claims, date of construction of improvements, actual occupation, etc., the subject of Mr. Gurnee's second inquiry, I would state that the manual of surveying instructions, dated December 2, 1889 (legalized by the act of Congress approved October 1, 1890, 26 Stat., page 650), while stating (page 46) that it is preferable that all oaths—both preliminary and final—of assistants should be taken before some officer duly authorized to administer oaths, other than the deputy surveyor, authorizes the deputy surveyor in cases where great delay, expense, or inconvenience would result from a strict compliance with the rule, to administer the necessary oaths to his assistants, but in each case where this is done he must submit a full written report to the surveyor general of the circumstances of the case.

This provision of the manual, may in my opinion, be made applicable to the service in Alaska, where surveys will be required in isolated localities with which communication is irregular, and where great delay and expense would attend the taking of the required oath before an officer duly authorized to administer the same, inasmuch as assistants would usually be engaged on the ground by the deputy.

The same necessity exists for allowing the deputy surveyor to administer oaths to such persons as he may have occasion to examine in re-

gard to corners, boundaries, and other facts relating to claims which it may be necessary for him to obtain in order that a proper survey and report may be made, and I think, in view of the peculiar situation in Alaska that such a course should be permitted.

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 ADDITIONAL ENTRY—APPROXIMATION.

ABRAM A. STILL.

An additional entry of a contiguous sub-division under section 5, act of March 2, 1889, is not defeated by excessive acreage, if the amount covered by both entries approximates one hundred and sixty acres as nearly as may be without abandoning the improvements or destroying the contiguity of the tracts entered.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 27, 1891.*

I have considered the appeal of Abram A. Still from your decision of July 17, 1890, in which you approve the action of the local officers in their rejection of his application for additional homestead entry for lot 5, of Sec. 19, T. 26 S., R. 17 E., M. D. M., Visalia land district, California.

The record shows that Still made homestead entry, September 4, 1885, of S.  $\frac{1}{2}$  of lot 1, S.  $\frac{1}{2}$  of lot 2, and lots 3 and 4, of section 19, said township and range; that ever since he has lived upon and improved the same in good faith; that by order of your office of May 6, 1886, requiring him "to relinquish one of the legal subdivisions embraced in his entry, with a view to approximating the area as nearly as possible to one hundred and sixty acres," he relinquished lot 3, which was subsequently appropriated by another. The S.  $\frac{1}{2}$  of lot 1, and the S.  $\frac{1}{2}$  of lot 2 contains each forty acres, while lot 3 has 51.01 and lot 4, 51.03 acres, making a total of 182.04 acres. He, therefore, now has under homestead entry 131.03 acres.

Applicant now seeks an additional homestead entry for lot 5, in said section, which lies contiguous to and immediately south of lot 4. The local officers rejected his application "for the reason that the excess above one hundred and sixty acres is greater than would be the deficiency, if a legal subdivision was excluded," and on appeal your office sustained their decision, whereupon applicant prosecutes this appeal.

The question presented is whether Still will be permitted to make his additional homestead entry of this lot containing 51.05 acres, which would make his total entry 182.08 acres. It is conceded that he possesses the necessary qualifications, and the lot sought to be entered lies "contiguous to the original entry." There is no valid reason why Still should have abandoned the lot he did. (James Hanna, 12 L. D., 356). But through ignorance of his rights in the matter and by order

of your office he did so. The three legal subdivisions he now holds are on a line east and west. His house, barn, etc., are on the most easterly forty. This he could not abandon. To have abandoned the other forty, lying between the easterly one and lot 4, would have separated the tracts he is trying to enter. Section five, of the act of March 2, 1889 (25 Stat., 854), provides:

That any homestead settler who has heretofore entered less than one-quarter section may enter other and additional land lying contiguous to the original entry, which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, etc.

It seems to me that the ruling in William C. Elson (6 L. D., 797), wherein is exhaustively discussed what construction should be placed upon similar language used in other statutes, is conclusive of this case. The language used in the pre-emption statute (R. S., Sec. 2259) : is that every person qualified may enter "by legal sub-divisions, any number of acres not exceeding one hundred and sixty, or a quarter section." In the homestead act (R. S., Sec. 2289), it provides: "Shall be entitled to enter one quarter section or less . . . . in conformity to the legal subdivisions of the public lands." In passing upon this question, on page 798, Secretary Vilas says :

In both laws, it seems to me that it was the purpose of Congress to deal not so much with the acreage as with the subdivisions of the public lands as surveyed . . . The grants of the United States are not by quantity but by description, and it is a familiar rule, that a call of quantity in a grant, must yield to description, and the act of Congress is to be regarded as a grant as to each tract, in a certain sense. These acts were designed to be construed with liberality and fairness to the settlers on the borders of our civilization, who were its advance-guard in subjugating the wilderness.

Applying this doctrine to the statute under consideration, it is apparent that the applicant in this case, is entitled to enter the legal subdivision even although his total entry may exceed one hundred and sixty acres.

Again, this case comes directly within the rule announced in Henry P. Sayles (2 L. D., 88). The settler now has 131.03 acres; add to that 51.05, the acreage of lot 5, and he has a total of 182.08, an excess of 22.08 acres. He now lacks 28.97 acres of having one hundred and sixty. In other words, the excess over one hundred and sixty acres would be less than the deficiency which now exists. We have seen that it would be impossible for him to abandon either of the forty acre sub-divisions, without forsaking his improvements in the one instance, or destroying the continuity of his land, in the other.

Therefore your decision is reversed, and you will direct the local officers to receive Still's application for said lot 5.

## FINAL PROOF—NOTICE—FRAUDULENT ENTRY.

## SAN LORENZO v. RIES ET AL.

Final proof not taken at the place designated in the notice is in effect taken without notice, and void.

An entry procured through false and fraudulent testimony must be canceled.

*Secretary Noble to the Commissioner of the General Land Office, November 28, 1891.*

I have considered the separate appeals of Pedro Ries, Guadalupe Gonzales, and James B. Woods from your decision of March 12, 1890, holding for cancellation their several entries, as follows: homestead entry of Pedro Ries for the NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , Sec. 19, T. 17 S., R. 10 W., Las Cruces, New Mexico, made July 11, 1879; homestead entry of Guadalupe Gonzales for the SE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of said Sec. 19, made July 11, 1879; and pre-emption cash entry of James B. Woods for the SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$  of Sec. 24, T. 17 S., R. 11 W., and lot 4, Sec. 19, T. 17 S., R. 10 W., Las Cruces, New Mexico, made June 2, 1879, under declaratory statement filed September 3, 1877, alleging settlement February 15, 1875.

Hearings were ordered in these cases upon the complaint of the "Commissioners of the Town of San Lorenzo," charging that said entries were fraudulent and void at inception, and that the final proofs thereon were false.

You found that said charges were sustained by the testimony, and the entries were held for cancellation.

From this decision the defendants severally appealed, the material errors alleged in each appeal being substantially to the effect that you erred in finding that said tracts were actually used and occupied for the purposes of trade and business at the date of entry; in finding that the proofs were not made at the time and place designated as required by law; and in not finding that William L. Thompson, the intervenor, was a purchaser in good faith, after final entry, and therefore not affected by irregularities not appearing on the face of the record.

The material facts found by you, upon which these entries were held for cancellation, are that said entries were allowed upon false and fraudulent testimony, which purported to be taken at the local land office at La Mesilla, while in fact it was taken at the house of William L. Thompson, about one hundred miles from said office; that parts of the tracts in controversy were actually occupied for the purposes of trade and business at the time said entries were made, and that they were made in the interest and for the benefit of William L. Thompson, who appears as intervenor in said cases and claims to be the owner of said land by purchase.

The facts as set forth in your decision are sufficiently sustained by the testimony to warrant the cancellation of these entries.

There can be no question that part of the tracts embraced therein have been occupied for the purposes of trade and business since 1871. But, independently of this, the testimony of Ries and Gonzales shows beyond all question that they did not enter this land for the purpose of making it a home, and that they did not comply with the law in regard to cultivating and improving the tracts.

Taking into consideration all the circumstances surrounding these entries, the connection of Thompson therewith, the false and fraudulent character of the proofs, and the interest taken by Woods and Thompson in having the final proof made—all of which were taken at the house of William L. Thompson, and who became the owner of the land shortly after entry—strongly indicate that the entries were made in his interest and for his benefit.

Besides, the notice of intention to make proof was given by the register as follows :

LAND OFFICE LA MESILLA, N. MEX.,

*July 18, 1879.*

Notice is hereby given that the following named settlers have filed notice of intention to make proof in support of their homestead claims and secure final entry thereof on the expiration of thirty days from this notice, claimants and witnesses all residing at Upper Mimbres, New Mexico.

Then follow the names of claimants and witnesses, Ries, Gonzales, and Thompson appearing among the claimants, and Vincente Hidalgo appearing among the witnesses for each of said claimants, and who also appeared as one of the final proof witnesses for Woods, Ries being the other witness. This notice contemplated that said proofs should be taken at the local office, and the public was not notified to appear at any other place. Instead of taking the proofs at the local office, they were all taken at the house of Thompson, who claims all of these tracts as a purchaser from said entryman after final certificate, the land embraced in the Ries entry having been purchased from Woods, who purchased it from Ries within a few days after entry.

It was held by the Commissioner in the case of *Leon v. Grijalva*, 3 L. D., 362, which was affirmed by the Department (5 L. D., 96), that proofs taken without authority and without notice are fraudulent and void. The final proof in the case cited was taken at the same time and place and under the same notice as the case of Ries and Gonzales, and the ruling in that case must control the case at bar. The public had no notice of the taking of such proofs, and it is the same as if no proof had been made.

While no single ground urged against the validity of these entries, if considered alone, may be sufficient to warrant their cancellation, yet, when they are all considered together with reference to the fraudulent testimony given by the original entrymen when the final proofs were made, the manner, time, and place of taking such testimony and the relationship of the parties, the mind is fairly led to the conclusion that they were alleged upon false and fraudulent testimony, and that if they

were not made in the interest and for the benefit of Thompson, he must have been cognizant of their fraudulent character, and can not therefore claim to be an innocent purchaser without notice.

Your decision is affirmed.

ADDITIONAL HOMESTEAD ENTRY—FEE—ACT OF MARCH 2, 1889.

JAMES L. MOON.

An additional entry under section 5 of the act of March 2, 1889, calls for a fee of ten dollars if the amount of land embraced therein exceeds eighty acres.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 27, 1891.*

This is an appeal by James L. Moon, from your decision of October 22, 1890, affirming the action of the local office rejecting his offer of \$5, and demanding \$10, as the fee required by section 2290 Revised Statutes, in the matter of his application to enter under section 5, of the act of March 2, 1889, (25 Stat., 854), the W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , Sec. 36, T. 2 S., R. 3 E., Huntsville, Alabama.

On August 6, 1888, as I am advised by your office, Moon made original homestead entry for an adjoining tract, to wit, the W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 1, T. 3 S., R. 3 E., in said land district. This entry contains 80.18 acres. He paid therefor, as stated on appeal to your office, seven dollars, that is, five as fee and two as commission. The tract named in his pending application contains 81.60 acres. Said application was presented August 12, 1890, and rejected at the local office for the reason that the amount, tendered therewith by Moon, in payment of fee, commission and excess, was insufficient. The amount so tendered was \$9.23, that is, fee \$5, commission \$2, and excess \$2.23.

The local office demanded \$14.23, that is, a fee of \$10, instead of \$5, as offered.

In affirming this ruling, you held said additional entry to be "a separate and distinct entry of so much additional land as would aggregate one hundred and sixty acres with the payment of the legal fees, commissions and excess."

Section 2290, Revised Statutes, provides that after complying with the prescribed conditions a qualified person shall "on payment of five dollars, when the entry is of not more than eighty acres and on payment of ten dollars, when the entry is for more than eighty acres" be permitted to enter the amount of land specified.

Section five, of the act of 1889, *supra*, provides

That any homestead settler who has heretofore entered less than one-quarter section of land may enter other and additional land lying contiguous to the original entry, which shall not, with the land first entered and occupied, exceed in the aggre-

gate one hundred and sixty acres without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry, when the additional entry is made, then the patent shall issue without further proof.

It is urged on appeal that if such additional entry be treated as separate and distinct from the original, the charge for excess is inconsistent.

I cannot agree with this view of the case. At the time of his original entry Moon was entitled to enter a full quarter section of vacant public land. Section 2289 Revised Statutes. He elected, however, to enter but 80.18 acres.

When he sought to avail himself of the right given by the act of 1889, *supra*, he, of course, applied to make an entry, which, although for additional and contiguous land, was separate from his original. The entry thus applied for being for more than eighty acres, it, of course, required a fee of ten dollars. Section 2290, *supra*. If, however such application be allowed, Moon will have entered an entire quarter section, which is the maximum allowed by the homestead law. Had his original entry embraced said quarter section, his liability for the excess therein over one hundred and sixty acres could not be questioned. That he acquired the same, notwithstanding his first choice of the lesser quantity through the privilege of another entry under the act of 1889, *supra*, should not relieve him of said liability. To hold otherwise, would be to give him such excess as a gratuity and to create for a party acquiring one hundred and sixty acres by aid of the act of 1889, *supra*, an advantage not therein contemplated, over the party entering a quarter section under the homestead act of 1862 (12 Stat., 392). Section 2289, *supra*.

The decision appealed from is affirmed.

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PRACTICE—MOTION FOR REVIEW—ATTORNEY.

TYLER *v.* EMDE. (ON REVIEW.)

An objection to the appearance of an attorney on the ground that he is disqualified under section 190 R. S., comes too late when raised for the first time on motion for review.

A motion for review on the ground that the decision is against the weight of evidence will not be allowed where the evidence is such that fair minds might differ as to the conclusions that should be drawn therefrom.

*Secretary Noble to the Commissioner of the General Land Office, November 28, 1891.*

In the case of Malvina McD. Tyler *v.* Fred H. Emde, involving the latter's pre-emption filing for the NE.  $\frac{1}{4}$  of Sec. 33, T. 23 S., R. 13 W., Larned, Kansas, two motions for review of departmental decision of January 28, 1891 (12 L. D., 94), have been filed in behalf of the de-

fendant, one being forwarded through the local land office by C. A. Morris, of Larned, Kansas, and the other being presented by C. W. Holcomb, of Washington, D. C.

These motions cover almost the same ground and will not be referred to separately but will be considered and spoken of as one motion. The allegations in support of this motion are in substance as follows:

That none of the plaintiff's testimony should be considered because she was represented by an attorney not qualified to practice in such cases;

That the local officers did not hear any of the witnesses testify and it was therefore error to give to their findings the force that was accorded them;

That the decision was against the preponderance of the testimony properly submitted;

That the computation by which it was determined that Mrs. Tyler's filing of March 20, 1886, was within three months after the date, December 19, 1885, fixed as the time of her settlement.

The objection to the appearance of Henry Booth, as attorney for the plaintiff, on the ground that he was disqualified under section 190, Revised Statutes, was not presented to your office nor to this Department when the case was being considered on appeal. This is such an objection as should have been presented both to your office on appeal from the decision of the local officers and to this Department upon the appeal here. This was the course pursued in the case cited in support of this motion, that is, *Sharritt v. Wood* (11 L. D., 25). That course not having been pursued here it is too late to urge it now on motion for review. *Kelley v. Moran* (9 L. D., 581).

The second objection mentioned above does not reach a conclusive or material point in the case. It is clear from the recitation of facts established by the evidence in the case that the finding of facts by the local officers and approved in your office, must have been acquiesced in without regard to whether the local officers heard the witnesses testify.

In support of the allegation that the decision is against the preponderance of evidence properly in the case, the same ground is again gone over that was traversed before the local officers before your office and before this Department. Notwithstanding this the whole case has been again carefully examined. The evidence is contradictory and unsatisfactory but I do not find that the decision complained of is so manifestly against the preponderance of the evidence proper to be considered as to justify the revocation of said decision. The most that can be said is that fair minds might differ as to the conclusions to be drawn therefrom. Under these circumstances a motion for review based upon the allegation that the decision is against the weight of evidence will not be allowed. *United States v. Atterbery et al.* (10 L. D., 36).

It would seem that the computation by which it was concluded that Mrs. Tyler made her entry within three months from the date of her

settlement was wrong. Her settlement being on December 19, her entry should have been made on March 19, in order to bring it within the period of three months. December 20, being counted as the first day of said period March 20, could not be included therein. But it was said that by this computation Mrs. Tyler was protected "without reference to the conspiracy," thus intimating that even if she had not filed in time she would still have been protected, if such default had been occasioned by the conspiracy found to have been entered into by Emde and others. This was simply to repeat the familiar maxim that one will not be allowed to profit by his own wrong. It has been found that Emde, Tyler and others conspired to prevent Mrs. Tyler from asserting within the time limited by statute any claim she might have had to this land. It is clearly shown that these efforts were successful. Mrs. Tyler states that she did not know the true character of the transaction between her husband and Emde until after March 15, 1886, and in this statement she is not only not contradicted by any witness but is corroborated by circumstances in the case. Emde was largely responsible for this state of affairs by reason of his false statements and his assent to Tyler's false statements as to the character of the transaction between them. This was the whole end and aim of the conspiracy, if any existed, and to hold Emde's claim superior to that of Mrs. Tyler would be to give him all the advantage and benefit he sought to reap through the means of the alleged conspiracy. This it was held in the former decision he should not be allowed to do and I find no good reason for a different conclusion now. The decision complained of is modified as herein indicated, but the conclusion that the decision of your office should be affirmed is adhered to.

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RAILROAD GRANT—WITHDRAWAL—PRE-EMPTION FILING.

NORTHERN PAC. R. R. CO. ET AL. v. FLETT.

A subsisting unexpired pre-emption filing excepts the land covered thereby from the operation of the withdrawal on general route, and the pre-emptor's compliance with law, under such filing, is a question the company is not entitled to raise in aid of the grant.

When the statutory life of a filing has expired, without proof and payment having been made thereunder, the presumption arises that all claims under said filing are abandoned, but this presumption is not conclusive.

The initiation and maintenance of a homestead claim is necessarily during the period thereof an abandonment of a previous unperfected claim held by the settler under the pre-emption law.

*Secretary Noble to the Commissioner of the General Land Office, November 28, 1891.*

This case comes before the Department upon the separate appeals of the Northern Pacific Railroad Company, James De Lacey, and John Algyer, from the decision of your office of December 5, 1889, rejecting

their several claims to the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , and the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 21, T. 20 N., R. 3 E., Seattle, Washington, and allowing John Flett to make entry of said tract upon the final proof submitted under his declaratory statement, filed April 9, 1869.

The tract in controversy is within the primary limits of the grant to the Northern Pacific Railroad Company—main line—as definitely located May 14, 1874, and was embraced in the limits of the withdrawal upon filing of map of general route, August 13, 1870. It is also within the limits of the amended map of general route of the branch line, filed June 11, 1879, and within the limits of said branch line as definitely located, March 26, 1884.

The railroad company claims that at the date when its rights attached, the land was public land, not reserved, sold, granted, or otherwise appropriated, and free from pre-emption or other claims or rights, and therefore inured to said company under its grant.

John Flett claims the right to enter said tract under his pre-emption declaratory statement, filed April 9, 1869, upon which he submitted proof September 7, 1887.

John Algyer claims under his application to file declaratory statement for said tract in 1883, which was rejected, and from which he appealed.

James De Lacey claims under his application, made in 1886, to enter the tract under the homestead law, which was rejected, and from which he appealed, and also filed protest against the allowance of the proof submitted by Flett under his pre-emption claim.

The rights of the several claimants to this tract were considered by your office at the same time, and disposed of by your said decision of December 5, 1889.

As the claims of Algyer and De Lacey were initiated subsequent to the date of withdrawal on general route and of definite location, they insist that the claim of Flett, subsisting at those dates, excepted the land from the operation of the grant, and that while said claim was sufficient to defeat the right of the company under its grant, the abandonment of the land by Flett after the date when the right of the road attached, and his failure to comply with the settlement laws, subjected the land to entry under the general land laws by any other applicant who had complied with the law, and it did not inure to the railroad company under its grant.

Therefore the primary question to be determined is, whether at the date when the right of the company attached there was such a claim to the tract as excepted it from the operation of the grant.

It appears from the record that on April 9, 1869, John Flett filed pre-emption declaratory statement for the tract in controversy, which was a subsisting, unexpired filing of record on August 14, 1870, when the map of general route was filed, and which of itself served to except the tract from the operation of the withdrawal.

The record shows that Flett made settlement upon the land early in February, 1869, and actually resided upon it, with his family, until November, 1869, when he left it, and moved to other land, upon which he was residing on March 30, 1887, as shown by his answers to interrogatories propounded to him and submitted on the hearing ordered upon the application of Alger to enter this land. What land this was is not definitely shown by the record, but considering all the evidence therein, taken upon the several hearings, it may fairly be inferred that it was lot 3, in Sec. 30, T. 20 N., R. 5 E., W. M., of which he made homestead entry on February 20, 1874, and made proof and received final certificate therefor June 9, 1880, as shown by the records of your office.

It is contended that Flett did not move from the land in controversy until the fall of 1870, and that he cultivated the land in 1871, after the date of the filing of map of general route.

While I am satisfied that the evidence of Flett, offered on the hearing ordered upon the application of Alger, shows that he left the land in 1869, yet it may be conceded that he did not leave the land until 1871, because whether he did or did not would not in any manner affect the question as to whether the land was excepted from the withdrawal on general route, inasmuch as the filing of itself, being a *prima facie* valid pre-emption filing of record at said date, served to except the land covered thereby from the operation of said withdrawal, and whether the pre-emptor under such filing inhabited and improved the land and performed other duties under the pre-emption law, are questions that can not be raised by the company in aid of the grant. Northern Pacific Railroad Company *v.* Stovenour, 10 L. D., 645.

But, when the statutory period has expired without proof and payment having been made, no presumption arises of the actual existence or continuance of the claim of the pre-emptor under such filing, and, if such a claim is alleged, it must be shown that the pre-emptor had not abandoned the land, and that his right or claim to the land was still existing. Hence, on May 14, 1874, when the road was definitely located, the filing of Flett had expired, and proof and payment not having been made, the presumption arose that whatever claim had previously attached to the land, under or by reason of such filing, had been abandoned and no longer in fact existed. Northern Pacific Railroad Company *v.* Stovenour, *supra*.

Has this presumption been rebutted by the proof offered on any of the several hearings in this case? Flett states that he left the land in 1869, intending to return to it, but that he never resided on it after 1869; that in September, 1870, he went to the local officers and told them that he had come to prove up on his claim, and they told him it was railroad land, and he had lost it. It does not appear that he actually offered to make proof, or that he was deterred from making proof, but he appears to have acted upon the advice of the local officers that he

was not entitled to submit proof under his filing. Whatever action was taken by the local officers was acquiesced in by Flett, because no appeal was taken therefrom.

Considering the effect of his conduct after the refusal of the local officers to allow him to make proof upon his pre-emption claim, it is contended by counsel that he was under no necessity to apply to the Commissioner of the General Land Office for a reversal thereof, and that nothing occurred thereafter, by his absence from the land or otherwise, to defeat the equity which he had acquired by his readiness to prove up and make payment, coupled with the register's refusal to allow it, citing in support thereof the case of *Morrison v. Stalnaker*, 104 U. S., 213.

In the case cited, it appears that the pre-emption settler offered proof and payment, which was refused by the local officers, upon the ground that by law the proof was not made within twelve months from settlement, from which refusal no appeal was taken, and the court simply held that he was entitled to eighteen months from the time limited for filing his declaratory statement within which to make proof and payment. The case cited does not support the proposition contended for by counsel, but, admitting that Flett lost no rights by reason of the refusal of the local officers to allow him to submit proof upon his said claim up to February 20, 1874, it is certain that from that date he actually abandoned all claim to the land and surrendered all rights under his pre-emption filing, by entering on that day, under the homestead law, another tract of land, for which he made final proof and received final certificate, June 9, 1880.

In the final proof upon his homestead claim, Flett's witnesses testified that they had known of his being upon the land eleven years, and that he had actually resided on the land, with his family, since June, 1874.

In answer to interrogatories propounded to him in the hearing ordered upon Algyer's application, he states that he lived on the land in controversy from April 7, 1869, until November 20th of that year; that no one was residing on the land in 1873, nor in 1879, nor in 1884; and that for fourteen years no one contended for the place. He further states:

It is a fact that I never lived on this land after the spring of 1870, nor did I cultivate this land after the spring of 1871. I did not live upon, occupy, or cultivate this land in May, 1874, nor was I improving this land in 1874.

I think the testimony shows beyond all question that Flett had abandoned the land on May 14, 1874, when the road was definitely located, and at that time he was cultivating and improving the tract embraced in his homestead entry, made prior to said date of definite location.

The initiation and consummation of the homestead entry was necessarily under the law, during the period of such consummation, a relinquishment of the pre-emption claim. *Neilson v. Northern Pacific Railroad Company*, 9 L. D., 402.

Considering that his homestead entry was equivalent to a relinquishment of his pre-emption filing, and was of itself an act of abandonment of the land covered by such filing, I do not deem it necessary to consider the other points argued by counsel—to wit, that Flett was disqualified from making a pre-emption entry by reason of his having previously received patent for three hundred and twenty acres under the Oregon donation act.

The record shows that he had no right or claim to the land when the right of the road attached, and the proof submitted under his pre-emption filing should have been rejected.

The tract being free from claim at date of definite location of the road, it follows that the claims of Algyer and DeLacey should both be rejected.

The decision of your office is reversed.

#### HOMESTEAD ENTRY—DESERTED WIFE.

##### SCOTT v. PINNEY.

A deserted wife as the head of a family is entitled to make homestead entry, and the subsequent return of the husband will not defeat the right to perfect the same, where the application is made in good faith during the period of desertion, and in the belief of the husband's death.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, November 28, 1891.*

The land involved in this appeal is the NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  of Sec. 3, T. 1 S., R. 10 W., S. B. M., Los Angeles, California, land district.

The record shows that Pinney made homestead entry of the land in controversy February 9, 1887. On March 15, 1887, Scott made application for a homestead entry on the same land, averring that she was a widow over twenty-one years of age and the head of a family; that she actually settled upon and improved the land about February 1, 1883, and had continued to reside upon the same to date. On March 18, 1887, she filed an affidavit of contest against the Pinney entry, alleging the facts recited above as contained in her application, and detailing at length her improvements and the efforts she had made to perfect her title. A hearing was had before the local officers, and on appeal to your office it was held, June 1, 1889, that Scott's application to enter be allowed, and Pinney's homestead entry be held for cancellation. On July 17, 1889, Pinney filed a motion for a rehearing on the ground of newly discovered evidence, as follows:

While Pinney contestant acquiesces in the ruling of your office, yet in the light of newly discovered evidence contestant now asks for a rehearing, on the following grounds, viz:—1. That the entry of Scott was fraudulent in its inception, she being a married woman at the time of said entry and not a legally qualified entryman under the homestead laws, as proof and corroborated affidavits herewith enclosed will show, and contestant now asks to prove his allegations before the local office.

By your letter of August 15, 1889, the case was remanded "for a hearing for the purpose of ascertaining the qualifications of said Scott at the time she made the said entry." On November 9, 1889, a hearing was had in pursuance of this order, before the local officers, and on February 14, 1890, they decided that—

It is evident that she (plaintiff) being a married woman was not authorized to make homestead entry and was not a qualified homesteader.

The plaintiff appealed to your office, and by letter of July 22, 1890 you reversed the ruling of the local officers, whereupon the defendant prosecutes this appeal, alleging as error practically that your decision is against the law and the evidence.

In passing on this question you say :

In view of the facts and circumstances of this particular case, I hold that inasmuch as plaintiff's application to enter as a widow, was made in good faith at a time when she honestly believed she was a widow, and since this office had already held (letter "H" June 1, 1889), that the land was subject to entry and that she has the better right to the same, by reason of her prior settlement, residence, and improvements, and since it conclusively appears, from the record, that she was a deserted wife, at the time she offered her application, her entry, which was allowed to be made of record, by said letter "H" of June 1, 1889, will not be disturbed, notwithstanding the fact that her husband returned subsequent to her application to enter, and is now living with her.

The evidence in this case discloses the fact that the contestant was married to Jephtha Scott in 1869; that in 1871 her husband deserted her; that about two months after he left she saw him for about twenty minutes, but never again did she see or hear from him until early in 1888. In 1881 one of her neighbors read to her from a newspaper a notice of the death of J. Scott, caused by being run over by a freight wagon in Arizona. From some circumstances detailed in the testimony she had good reason to believe that this J. Scott was her husband. At the time of her marriage she was a widow with five small children. By this last marriage she had two more, so that at the time her husband deserted her she had to care for and support seven helpless children. About the first of February, 1883, she settled upon the land in controversy, and by her own hands and with the assistance of her children she erected a small house, corn-crib and hen house; cleared of brush and cactus from six to ten acres of the ground; had an irrigating ditch and reservoir of sufficient capacity to water the ground, and, at the time the defendant made his homestead entry, had a fruit-bearing orchard of eighty trees, consisting of apple, apricot and fig. All her witnesses place the value of her improvements at the time of the hearing at \$1,000. She resided upon the land continuously during all these years entirely dependent on her own labor and that of her children for her support.

There is not the slightest intimation in the evidence to show that Mrs. Scott did not honestly believe herself to be a widow during all this time.

She attempted to make a homestead entry of the land March 26, 1883, but says she was informed that the land was not then subject to entry, but as soon as it was decided they would let her know and she could perfect her entry. She seems to have done everything in good faith to save her rights, and felt perfectly secure until the defendant came forward with the relinquishment of the Southern Pacific Railroad Company and attempted to get possession. It therefore follows that there was no fraud on the part of Scott's entry in its inception.

In the case of Maria Good (5 L. D., 196), it is said:

it seems clear that when once legal qualification to make homestead entry is established, and the land applied for is subject to such entry, then the only remaining questions for the land department to consider are those relative to residence, cultivation and alienation.

There can be no question about the legal qualification of Mrs. Scott at the time she made her application. While as a matter of fact she was not a widow, as she supposed, yet it is true that she was a deserted wife, and the head of a family, and as such was a qualified homesteader. *Kamanski v. Riggs* (9 L. D., 186). The relinquishment by the railroad company of its claim upon this land made it subject to disposal by the government, if it were not otherwise subject to such disposition.

The only remaining question to be determined is, whether or not the appearance of her husband at this late date disqualified her from perfecting her title initiated when she was a qualified pre-emptor. I can see no reason why the rule announced in the case of Maria Good (*supra*) should not be applied to this case, especially in the absence of any fraud or collusion between the husband and wife. It has been repeatedly held in our departmental decisions that wives, who have become such subsequent to their homestead entries if they comply with the law in the matter of residence, may make final proof and secure the title. If this contestant, who is over fifty years old, who has struggled for so many years to improve her land and support her family, now decides, in her declining years to receive the father of her children and again take up the marital relation, and live with her re-united family in the home her industry has prepared, I do not believe she should be held to have forfeited her claim to this land.

Your judgment is therefore affirmed.

## BACA FLOAT NO. 3 (ON REVIEW.)

A statutory provision directing the surveyor-general to survey and locate a selection made under the act of June 21, 1860 does not warrant the conclusion that the surveyor-general's action in such matter is not subject to the supervisory direction of the Commissioner of the General Land Office, and the Secretary of the Interior.

When the Territory of New Mexico was divided, and that portion included in the limits of Arizona was created a separate surveying district, the duties theretofore devolving upon the surveyor-general of New Mexico, in relation to lands within the new district, fell upon the surveyor-general of that district.

*Secretary Noble to the Commissioner of the General Land Office, November 28, 1891.*

I have considered the motion for review of departmental decision of June 24, 1891 (12 L. D., 676), in the matter of the application for a survey of the lands selected in satisfaction of Baca Float, No. 3.

This motion presents no new question but goes over the same ground that was necessarily gone over in the consideration of the appeal upon which the former decision was rendered. It is urged that under the provisions of the act of June 21, 1860 (12 Stat., 72), confirming, this claim no officer except the surveyor-general of New Mexico, has any function in this matter and that his duties are merely ministerial and perfunctory. The Secretary of the Interior is charged with the supervision of public business relating to the public lands (Revised Statutes, section 441), and the Commissioner of the General Land Office is charged with the performance, under the direction of the Secretary of the Interior, of "all executive duties appertaining to the surveying and sale of the public lands of the United States or in anywise respecting such public lands, and, also such as relate to private claims of land." It is true that Congress has the power to impose upon some other officer the duties thus prescribed by these sections as pertaining to the office of Secretary of the Interior, and Commissioner of the General Land Office, but in the absence of express provisions to that effect no intention to relieve said officers of any duties within the purview of said sections, will be presumed. It must, in the case now under consideration, devolve upon some officer to determine whether the lands selected are of the character prescribed by the said act of June 21, 1860, and I find nothing to indicate any intention to substitute, for the officer charged generally with the performance of such duties, some one else. The mere fact that it is declared the duty of the surveyor-general of New Mexico to survey and locate the lands selected does not justify the conclusion that the Secretary of the Interior and Commissioner of the General Land Office were "carefully eliminated from the transaction" or even that the said surveyor-general's acts in the premises were not subject to the supervisory direction of the Commissioner of the General Land

Office and the Secretary of the Interior. The objection to the jurisdiction can not be sustained.

In support of the objection to that part of the decision which directs a hearing to be had before the surveyor-general of Arizona, it is urged (1) That the surveyor-general of Arizona has no authority in the premises, the surveyor-general of "New Mexico" being commanded by the act of Congress to make the survey, (2) That a survey is necessary to any intelligent inquiry as to the character of the lands in said selection and (3) That none of the persons named by the Commissioner as desiring an early settlement of the question, is a proper party to the case.

The first grounds of objection can not, I think, be seriously urged. When the Territory of New Mexico was divided and that portion included in the limits of Arizona was created a separate surveying district, the duties theretofore devolving upon the surveyor-general of New Mexico, in relation to lands within such new district fell upon the surveyor-general of that district. This proposition is so plain that it seems unnecessary to discuss it further. The objection that an intelligent inquiry as to the character of the lands selected can not be prosecuted without a survey and marking of the out-boundaries is met and obviated by the direction to the surveyor-general contained in the Commissioner's order for a hearing in the following words:

If for the purpose of such hearing and in order to clearly ascertain the exact location of alleged mines with reference to the boundaries of said location it shall seem to you advisable or necessary to survey the out-boundaries of said claim, or any part thereof, you will suspend the hearing above provided for and notify the said Robinson and other grant claimants that they may make a deposit of the funds necessary to pay for such survey and for the office work necessary thereon, after you shall have made an estimate of the same. You will then cause the same to be made in the same manner as surveys of private claims are made, etc.

The third specific objection made to this part of said departmental decision can not be sustained. This hearing is to determine whether the land selected by the grant claimants is of the character contemplated by the act under which it was selected and to the end that such investigation shall be full and complete, all parties asserting a claim to the land should be given an opportunity to be heard. This is all that has been done and I find no good reason for modifying the instructions in that particular.

Objection is made to assumptions of fact made in said decision, the following being quoted as one, "There seems to be no question that the land embraced in this location is mineral land." This sentence taken alone might be open to the objection that it prejudices the very question for the determination of which a hearing is ordered. Taking the whole decision, however, it is plain that it was intended to say that such a *prima facie* case had been made as justified further investigation, and it will be thus construed.

Objection is made to the statement that the burden of proof to show that said lands are non-mineral in character, is upon the claimants

under said grant, but this objection can not in my opinion be sustained. The act of Congress authorized the selection of lands of a certain character and when the claimants presented a selection thereunder it certainly devolved upon them to affirmatively show the lands were of the character prescribed. By presenting a selection under said law the claimants affirmed its non-mineral character and they must stand ready to support such allegation. I do not find that the instructions given are inconsistent with the laws of evidence and do not therefore find any necessity for modifying the decision complained of in that respect. It is said that the inference is inevitable from the language of both the Commissioner and the Secretary, and therefore tantamount to an instruction that if any mineral land shall be found within the boundaries of the selection made then the whole selection must be rejected. This assertion is directly denied by the following quoted from said departmental decision:

If upon the hearing the proof should show that the land embraced in the location is mineral, the mineral land should be segregated from the non-mineral land by survey, and the grant claimants will be entitled to such part of said location as may be shown to be non-mineral.

It is further argued in support of this motion that only those lands known at the date of the selection to be mineral lands should be segregated from the tract thus selected, and, that the discovery of minerals, in any part of said lands, made after the date of selection can not affect the right and title of these claimants to said lands. The decision rendered in your office limited the inquiry to the two dates, that of selection in 1863, and of the amendment of such selection in 1866. While it is not said in so many words in the departmental decision that such instructions were in error, yet it was in effect so said. The following language was used:

The act of June 21, 1860, authorized the heirs of Baca "to select instead of the land claimed by them an equal quantity of vacant land *not mineral*," and the burden of proof is upon the claimants under said grant to show that the lands so selected or located are non-mineral lands, as no title to mineral lands can vest in them under said act and the Department may at any time before the title passes from the government require the claimant to show that the land is not mineral, although the character of the land may not have been known to claimants at the date of selection or location.

This can be construed only to mean that the inquiry should extend to the present known character of the land as well as to its character as known at the date of selection. This holding is in entire accord with the principle announced in the case of *Central Pacific R. R. Co. v. Valentine* (11 L. D., 238). It was there said:

No date is fixed in the grant at which the mineral character of the lands must be known, in order to bring them within the exception. If in fact mineral, they are within the exception, according to the plain terms thereof, whether their mineral character is known at the time of definite location or approval of survey, or not.

It is contended that the language in the acts making the grant to the railroad company is so different from that employed in the act now under consideration, that the rule laid down in the Valentine case, admitted to be right there, can not be applied here.

The excepting clause in the act of July 1, 1862 (12 Stat., 489), is in these words: "Provided that all mineral lands shall be excepted from the operation of this act."

The act of July 2, 1864 (13 Stat., 356), contains the following:

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

The act now under consideration provides that the beneficiaries thereunder may "select instead of the land claimed by them an equal quantity of vacant land, not mineral.

The evident intention in all these acts was to prevent the title to mineral lands from passing thereunder, and to express that intention the language in the act last mentioned is just as clear as that used in the others. The language used in the act under consideration, should be given the same prohibitive force as is accorded the other acts above mentioned. If this be true, and I do not think it can be successfully controverted, it follows that the reasoning in the Valentine case applies with equal force in the case now under consideration, and that the rule there laid down should be followed here. That rule was followed in the decision complained of and hence there is no reason to modify it as to that point.

It is further urged in this connection, in support of this motion, that under the act now being considered all jurisdiction or authority in the premises, was taken away from the Department of the Interior, and that, in that particular, said act differs from those making the grant to the railroad company, and therefore that a different rule should obtain in this case. This question as to the jurisdiction of this Department has been discussed hereinbefore and I do not find it necessary to enlarge upon what was then said.

After carefully considering the questions presented by this motion for review in connection with the arguments both oral and written, presented by the attorney for the claimants, under said grant, I have found no sufficient reason for a conclusion different from that arrived at in the decision complained of, and said motion is therefore denied.

## ZUNI RESERVATION—EXECUTIVE AUTHORITY—SURVEY.

WILLIAM F. TUCKER ET AL.

Under the treaty of Guadalupe Hidalgo, and the provisions of the Constitution, the President is authorized to protect the Zuni Indians in their property by setting apart as a reservation the lands occupied by them for their continued use and occupancy.

An executive order setting apart and establishing a reservation has the effect of law and is binding upon all departments of the government, and upon every citizen of the United States; and the executive will in such matter can not be defeated through a failure of the surveyor to properly locate the boundaries of the reservation.

In the execution of a survey courses and distances must yield to natural monuments named in the description of the land.

Lands embraced within a reservation created by executive order are excluded from entry under the public land laws.

*Secretary Noble to the Commissioner of the General Land Office, November 28, 1891.*

The record in this case shows that the following entries were made at the local land office in Santa Fe, New Mexico.

On December 26, 1882, William F. Tucker, Jr., made desert land entry, (No. 54), for Sec. 8., T. 12 N., R. 16 W.

On the same day Orrin B. Stout made desert land entry, (No. 53), for Sec. 18., in same township and range.

On January 18, 1883, Henry W. Lawton made desert land entry, (No. 62), for Sec. 24., T. 12 N., R. 17 W.

On January 27, 1883, said Tucker made homestead entry, (No. 1675), for S $\frac{1}{2}$  of NE $\frac{1}{4}$  and N $\frac{1}{2}$  of SE $\frac{1}{4}$ , Sec. 34., T. 12 N. R. 17 W.

On the same day, said Lawton made soldier's homestead entry, (No. 1678), for SW $\frac{1}{4}$  of same section.

On August 16, 1883, said Lawton filed application to make final proof to establish his claim to the land covered by his homestead entry, before the local officers, on October 20, 1883, which was rejected by the local officers August 30, 1883, because the said land was included within the limits of the Zuni Reservation, as established by the executive order of May 1883. (Ind. Office Report, 1886, 353).

On September 27, 1883, said Lawton filed an appeal to your office, alleging among other things—as follows:

This entry was made under the law permitting soldiers of the war of the rebellion to count their services to the government during that period as residence, and under this law, (having served four years and five months), I had only seven months to make good. Being still in public service, I could not reside upon the land in person, but at once made arrangements for improvements, employed an agent, purchased materials, and otherwise went to great expense and trouble to complete my title according to law.

This appeal was transmitted to your office by the local officers, by letter dated September 28, 1883.

By your office letter of September 19, 1885, to Secretary Lamar, it was reported that—"No action has been taken on this appeal because of a direction given by your predecessor, October 8, 1883, that nothing be done in the case until further orders" and it was recommended that proper steps be then taken to dispose of the foregoing entries.

On November 10, 1885, this Department, by letter of that date, instructed and directed your office, to "take the proper steps to dispose of those entries in accordance with law and the facts in the case."

On November 19, 1885, your office, by letter of that date instructed the local officers, that all of said entries "are hereby held for cancellation, for being within the Zuni Reservation, in New Mexico, and therefore illegal."

On January 14, 1886, said claimants jointly appealed from that decision, to this Department.

The errors alleged are substantially embraced in the two following propositions—to-wit:—

*First*:—That the order creating the Zuni Reservation, was issued without lawful authority and void—and, therefore, the said supposed reservation cannot in any way conflict with the entries in question.

*Second*:—That if said reservation was created by competent authority, the land embraced in the said entries is not within the boundaries thereof; and that the Commissioner of the General Land Office erred in his decision of November 19, 1885, holding said entries for cancellation, as being within said reservation.

The executive order creating the Zuni Reservation is as follows :

EXECUTIVE MANSION, *March 16, 1877.*

It is hereby ordered that the following described tract of country in the Territory of New Mexico, viz: Beginning at the one hundred and thirty-sixth milestone on the western boundary-line of the Territory of New Mexico, and running thence north 61 45' east thirty-one miles and eight-tenths of a mile to the crest of the mountain a short distance above Nutrias spring; thence due south 12 miles to a point in the hills a short distance south east of the Ojo Pescada; thence south 61 45' west to the one hundred and forty-eighth milestone on the western boundary-line of said Territory; thence north with said boundary-line to the place of beginning be and the same hereby is withdrawn from sale and set apart as a reservation for the use and occupancy of the Zuni Pueblo Indians.

R. B. HAYES.

In your office letter of September 19, 1885, above cited, it is said,

At the date of this order the lands were unsurveyed. A territorial map of New Mexico represented the Nutria springs as located some three miles south of the true location as afterwards found by the township surveys. A pencil line protracted upon the territorial map from the 136th mile post on the western boundary of New Mexico, to the point erroneously designated as Nutria springs, brought the northern line of the reservation apparently below the tracts which were afterwards surveyed as sections 8 and 18, T. 12., R. 16., and sections 24 and 34, T. 12, R. 17., thus making it appear that said sections and others along the river Nutria, and embracing the cultivated lands and irrigating ditches of the Zunis were excluded from the reservation intended to embrace them.

Under these circumstances it was supposed that an amendatory order was necessary, accordingly upon recommendation the following executive order was issued:—

EXECUTIVE MANSION, *May 1, 1883.*

Whereas it is found that certain descriptions as to boundaries given in an executive order issued March 16, 1877, setting apart a reservation in the Territory of New Mexico for the Zuni Pueblo Indians, are not stated with sufficient definiteness to include within said reservation all the lands specified in and intended to be covered by said executive order, especially the Nutria springs and the Ojo Pescada, said executive order is hereby so amended that the description of the tract of land thereby set apart for the purposes therein named shall read as follows:

Beginning at the one hundred and thirty-sixth mile post on the west boundary line of the Territory of New Mexico, thence in a direct line to the southwest corner on township 11 north, range 18 west; thence east and north following section lines, so as to include sections 1, 12, 13, 14, 22, 23, 24, 25, 26, 27, 28, 32, 33, 34, 35 and 36, in said township; thence from the northeast corner of said township on the range line between ranges 17 and 18 west, to the third correction line north; thence east on said correction line to the nearest section line in range 16, from whence a line due south would include the Zuni settlements in the region of Nutria and Nutria springs and the Pescado springs; thence south following section lines to the township line between townships 9 and 10 north, range 16 west; thence west on said township line to the range line between ranges 16 and 17 west; thence in a direct line to the one hundred and forty-eighth mile post on the western boundary line of said Territory; thence north along said boundary line to place of beginning.

CHESTER A. ARTHUR.

It is contended that these orders were inoperative because the President had no power or authority to issue them, by reason of the fact that these Indians are citizens of the United States.

It is unnecessary to decide whether the Zunis are full citizens or not, as in my opinion, the validity of the executive orders does not depend upon the citizenship of the Indians who inhabit the reservation, but upon other and different considerations.

In the case of *Grisar v. McDowell* (6 Wall., 363–391) the supreme court say,

From an early period in the history of the government, it has been the practice of the President to order from time to time, as the exigencies of the public service required, parcels of land belonging to the United States to be reserved from sale and set apart for public use.

In *Chouteau v. Molony*, (16 How., 237) it is said, "The Indians within the Spanish Dominions, whether christianized or not, were considered in a state of tutelage." And in the case of *United States v. Cook* (19 Wall., 593) it is said—"The right of the Indians to their occupancy is as sacred as that of the United States to the fee, but it is only a right of occupancy."

The sixth article of the constitution provides that all treaties shall be the supreme law of the land. By the 9th article of the treaty of *Guadalupe Hidalgo* (9 Stat., 929), the Mexicans in the ceded territory were to be "maintained and protected in the free enjoyment of their

liberty and property." In *Doe v. Wilson* (23 How., 457) it is decided that "The Indian title is property." The President is under the constitutional obligation to "take care that the laws be faithfully executed." He had authority, therefore, to "maintain and protect" the Zuni Indians in the enjoyment of their property in these lands that had been occupied by them, by setting said lands apart as a reservation for their continued use and occupancy, whether they were citizens or not, and wholly irrespective of that question. It is enough that they were Mexicans at the date of the treaty, with a right to the occupancy of the soil. If they were also in their former state of tutelage, the executive act of protection is all the more to be approved.

The establishment of reservations by the executive mandate has been recognized as an appropriate exercise of power by both of the other two departments of government.

By the pre-emption act of May 29, 1830, (4 Stat. 420), it was enacted—"Nor shall the right of pre-emption, contemplated by this act extend to any land, which is reserved from sale by act of Congress, or by order of the President, or which may have been appropriated, for any purpose whatever." Thus clearly is recognized the right of the President to "order" lands to be reserved from sale, and the same recognition is now upon the statute book, Rev. Stat. Sec. 2258, and this authority has frequently been recognized in the acts of Congress. *George Herriott* (10 L. D. 513).

It is a question for the political department of the government to decide, and when decided the courts will follow the action of the executive. *United States v. Holliday*, 3 Wall., 419.

In the opinion of Attorney General Brewster, Vol. 17, of Opinions, p. 258, the question of this power of the President is fully discussed, and after a review of the acts of Congress and decisions of the courts on the subject, it is said:

A reservation from the public lands therefore for Indian occupation, may well be regarded as a measure in the public interest and as for a public use. Congress has in numerous acts of legislation recognized it as such. These statutes need not be particularly referred to; they are scattered through the statute book; indeed the annual Indian bill is full of such recognitions. See also, the case of *Ira O. Hanchett*, (12 L. D. 437

It is evident from this review that the President had the power to establish this reservation for the use and occupancy of the Zuni Indians. The fact that they have certain rights of citizenship, secured by treaty, and are mild and peaceable, was well-known to the President, when the measure was under consideration. It is to be presumed that all such considerations were duly weighed. At all events the President was the judge of the expediency and propriety of the measure, and when in the exercise of the discretion vested in him, he judged it expedient to adopt it, that was an end of the matter. The question

was then *res judicata*. President Hayes in fact established the Zuni reservation by his executive order, and President Arthur enlarged it by a second order. These orders are cited, and have the force of law, and are binding upon all the departments of the government, and upon every citizen of the United States.

It is contended in the second place that, if this reservation has been legally established, the claimants in this case have not made their entries upon the lands embraced within the limits of either of the two executive orders above mentioned.

In 1885, President Arthur issued a further order modifying the one already issued by him, as follows:

EXECUTIVE MANSION, *March 3, 1885.*

It is hereby ordered that the executive order dated May 1, 1883, explaining, defining, and extending the boundaries of the Zuni Indian Reservation, in the Territory of New Mexico, be, and the same is hereby, amended so as to except and exclude from the addition made to said reservation by the said executive order of May 1, 1883, any and all lands which were at the date of said order settled upon and occupied in good faith under the public-land laws of the United States.

(HESTER A. ARTHUR.

If the lands in dispute are without the limits of the reservation established by the said executive order of March 16, 1877, then they were public lands and subject to entry at the date of these entries, otherwise not.

To determine this question, it is necessary to ascertain the limits of the "said reservation," as originally ordered March 16, 1877. As that reservation was actually laid out by the surveyor these lands were not included within its limits. But it is evident that the surveyor could not defeat the executive will and the object of the order by making an erroneous survey, whether the error was occasioned by blunder or by purpose. The government is not concluded by the action of the surveyor if that action was not warranted by a just interpretation of the executive order. This makes it necessary to give a construction to that order in order to determine the proper limits of said reservation. (See 109 U. S., 329).

In the case of *Davis v. Rainsford*, 17. Mass. 207-210, Wilde J. says:

Whenever, in the description of land conveyed by deed, known monuments are referred to as boundaries, they must govern; although neither courses, nor distances, nor the computed contents, correspond with such boundaries. This has been long regarded as one of the fundamental rules in the construction of deeds.

In *Tyler on Boundaries*, 119, the rule is laid down as follows:

Thus, course and distance shall yield to natural and ascertained objects, as a river, a stream, a spring or a marked tree. Indeed, it seems to be a universal rule that course and distance must yield to natural, visible and ascertained objects.

And this rule is based upon "the legal presumption, that all grants and conveyances are made with reference to an actual view of the premises by the parties thereto."

The same writer says on page 121,

Again, it is a cardinal rule in the construction of conveyances of land, as well as of contracts, that the intention of the parties is to be inquired into, and, if not forbidden by law, is to be effectuated. And a deed will always be expounded so as to give effect to the intent of the parties.

On page 232, it is said—

The court will take into consideration the situation of the parties, the state of the country, and of the thing granted at the time, in order to ascertain the intent of the parties.

On page 284, the rule is given—"Parcel or no parcel of the property conveyed, is always a question of evidence."

In the case of *Shoemaker v. Davis*, 44 Barb. 463, the court say, p. 466,

When the parties had one object well defined viz: 'the Shawangunk hills,' and located the line upon the top of those hills, and upon the highest part of the rocks as they range, we are not at liberty to conjecture that they intended to establish the boundary upon a lower elevation, upon the side of the said hills.

Applying the foregoing principles to the facts of this case the problem is not difficult of solution.

It is apparent from the language of the order of March 16, 1877, that it was the intent to include the Nutrias spring. The line was to run "to the crest of the mountain a short distance above Nutrias spring." But the surveyor rejected this natural monument and run the line by the course and distance mentioned, which excluded the Nutrias spring and ran the line below it. The Nutrias spring was a well-defined natural object, which it was his duty to include in the reservation, and "the crest of the mountain a short distance above Nutrias spring" was another well-defined object which it was his duty to locate. That is certain which can be made certain. The "crest of the mountain" is a natural monument easily ascertained.

It appears that the order in question, was issued on the recommendation of the Commissioner of Indian Affairs for the express purpose of including the Nutrias spring, "Ojo Pescada" and "Ojo Caliente," and "many small patches of land on the river." (Ex. Doc. No. 11, 2d. Sess. 48th Cong. p. 6).

The entries in question are all on the Nutrias river, and the one embracing section 8, includes the Nutrias spring itself.

Indian Agent Thomas, in his letter of April 12, 1883, says that this spring and the Nutria farms have been cultivated by these Indians "from time immemorial," and "are necessary to their support." (Ex. Doc. Ibid. p. 5). It was the humane intent of the executive order to include these lands in the reservation, that these Indians might cultivate them in the future as in the past. This intent can be carried out by running the line, (as marked upon the map), from the 136th mile stone mentioned, in a direct line "to the crest of the mountain a short distance above Nutrias spring," and thence "to a point in the hills a short distance south-east of the Ojo Pescada," so as to include both the

Nutrias spring and the Ojo Pescada within the limits of the reservation.

In the order of May 1, 1883, it is stated that the boundaries in the order of March 16, 1877, "are not stated with sufficient definiteness to include within said reservation all the lands specified." And it is contended that this is an authoritative determination that these lands in dispute were not included in the first order. But it is apparent that the reference is to the reservation as it was in fact surveyed, and not as it legally ought to have been. How the lines should run is a question of law, how they were run is a question of fact, and the order refers to the fact and is not an attempt to judicially adjudge the legal question. The careful wording of the order of March 3, 1835, shows an evident intent not to pre-judge that question.

The Commissioner of the Land Office by his letter to the local officers, of December 7, 1882, in speaking of this reservation said,

When said townships are surveyed the reservation may be found to embrace more of the land than that mentioned, and if any desert land entries are found to have been located within the reservation they will be held for cancellation.

This was notice to all parties, and prior to any entries. Those who saw fit to enter on these lands took the risk of their being found to be located within the reservation by a legal and proper survey. Every man is presumed to know the law, and these claimants must be presumed to have known that the lands in dispute were within the legal boundaries of the Zuni Reservation.

Two of these claimants make affidavit that their occupation is that of army officers, and one of them alleges that "being still in the public service I could not reside upon the land in person." The question whether army officers can enter public lands has not been discussed by the counsel in this case. It was decided in the case of Dr. Charles B. White, U. S. A., (2 C. L. L., 18), that

the provisions of the act of June 8, 1872, are for the benefit of soldiers, sailors, and officers, who served in the United States army or navy, during the late war, and were honorably discharged, and not for the benefit of those who remained and still remain in the regular service, as such service would seem incompatible with the actual *bona fide* residence on the land required by the homestead law.

See also the case of Joseph M. Adair, (10 L. D., 642).

Section 2305, of the Revised Statutes provides that

No patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements.

Personal residence on the land for one year is a statute requirement.

Your judgment is affirmed.

KEOGLE *v.* GRIFFITH.

Motion for review of departmental decision rendered July 1, 1891, 13 L. D., 7, denied by Secretary Noble, December 1, 1891.

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## APPLICATION FOR CERTIORARI—DEPARTMENTAL DECISIONS—AMENDMENT.

HOOVER *v.* LAWTON.

The rule requiring a copy of the Commissioner's decision to accompany an application for certiorari is not included in the Rules of Practice, but has been uniformly observed in the decisions of the Department.

The decisions of the Department, equally with the Rules of Practice, are binding upon litigants and impart judicial notice, and cannot be avoided upon the plea of ignorance.

The failure to supply a copy of the Commissioner's decision with an application for certiorari can not be cured, under the technical rules of practice that obtain in the courts of law, by filing such copy after the application is dismissed. The Department, however, in the exercise of its supervisory power, may waive the technical objection and consider the application as if regularly presented.

*Secretary Noble to the Commissioner of the General Land Office, December 1, 1891.*

I have examined the motion for a review of departmental decision of May 21, 1891, denying the application of John T. Hoover, for an order directing your office to forward to this Department the record in the case of said Hoover against William J. Lawton, involving the SW.  $\frac{1}{4}$ , Sec. 33, T. 101, R. 70, Chamberlain, South Dakota.

The record shows that a hearing was had before the local officers at Chamberlain, South Dakota, January 22, 1890, and, on July 10 of the same year, the register and receiver found in favor of Lawton and recommended that Hoover's contest be dismissed.

Hoover appealed, but failed to serve notice on Lawton within the required time, he having served such notice of appeal upon one Clarke S. Rowe, who had been attorney for Lawton, but whose services had been dispensed with prior to the decision of the local officers, of which fact both Hoover and his attorney had been duly notified before and at the time of the filing of his appeal from their decision.

These facts were transmitted to your office with the appeal of Hoover, and, on January 2, 1891, on motion of Lawton, you dismissed the appeal of Hoover, because the same was not served upon the defendant, Lawton, or his attorney, and suspended further action for twenty days to allow Hoover to apply to this Department for an order, under rules 83 and 84 (Rules of Practice), directing the Commissioner to certify said proceedings to the Secretary, etc.

Hoover duly applied for such order, and, on May 21, 1891 (see decision of that date not reported), this Department denied his said applica-

tion, because the same was not accompanied by the decision of your office complained of. He now moves to review said decision, because—

1st. There is no law or rule of the Department requiring him to furnish the Secretary with a copy of the Commissioner's letter.

2d. Because in this case there should be accorded to Hoover a hearing on the merits.

While it is true that the rule requiring a copy of the Commissioner's decision to accompany an application for a certiorari is not set out in the Rules of Practice, yet by repeated decisions of this Department this is required. *Smith v. Howe*, 9 L. D., 648; *Johnson v. Bishop*, 2 L. D., 67; *John Waldoek*, 4 L. D., 31; *L. W. Bunnell*, 5 L. D., 588; *P. O. Satrum*, 8 L. D., 485.

The decisions of this Department, equally with the Rules of Practice, are binding upon litigants, and impart judicial notice, and can not be avoided upon the plea of ignorance.

Since filing his application for review and subsequent to the motion of counsel for claimant to dismiss the same, Hoover has filed a petition "to amend his application for certiorari, which was denied by the Department," by supplying a copy of the Commissioner's decision, and accompanies his petition with such copy.

Under the technical rules of practice that obtain in courts of law, the omission to file this copy in the first instance can not be cured by filing the same after the application has been dismissed for failure to file such copy with the motion for certiorari. This Department, however, in the exercise of its supervisory power, when it is shown that injustice would otherwise be done, may properly, I think, waive this technical rule of law, and consider the application as if regularly presented.

The case before me has been so considered, and I find no good reason for sustaining the motion for review.

The Commissioner's decision shows that Hoover failed to serve notice of his appeal from the decision of the local officers either upon Lawton or his counsel, but served the same upon one Rowe, although Hoover and his attorney at the time of filing the appeal were notified by the local officers that Rowe was no longer attorney for Lawton.

The motion for review is therefore without merit, and is denied.

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

## ST. PAUL AND PACIFIC R. R. CO.

An expired pre-emption filing is no bar to an indemnity selection, and a certification resting on such selection is not an erroneous adjudication that calls for proceedings under the act of March 3, 1887.

*Secretary Noble to the Commissioner of the General Land Office, December 1, 1891.*

With your letter of March 27, 1888, was forwarded, for instructions, a list of lands certified to the State of Minnesota on account of the grant for the St. Paul and Pacific Railroad Company, and within the indemnity limits of said grant, respecting the propriety of instituting proceedings under the act of March 3, 1887 (24 Stat., 556), to restore the title to said lands in the United States.

From said letter it appeared that said tracts "were covered by uncanceled filings at the date the company made selection thereof, and said filings are still of record intact."

The information contained in said letter being insufficient to enable this Department to arrive at a correct conclusion in the premises, you were directed, by letter of May 21, 1891, to furnish the desired information.

This list is returned with your letter of October 8, 1891, from which it appears that all of the tracts were offered on October 15, 1860, and August 15, 1864; that selection was made on account of the grant December 22, 1869, and that the certifications were made June 5, 1871.

The pre-emption filings covering these tracts were all made more than one year prior to the date of selection; hence, at said date, they were expired filings and no bar to the company's selection. *Allers v. Northern Pacific R. R. Co.*, 9 L. D., 452. This is not in conflict with the ruling in the matter of the grant for the Little Rock & Memphis Railroad (11 L. D., 595), wherein it was held that, before the approval of lands covered by expired filings, notice should be given the pre-emptors to assert their rights, if any they have in the premises.

Your letter of March 27, 1888, states "there is no claim at this time made by any person for these lands."

I am unable to find any error in the certifications referred to, and can therefore see no reason for the institution of proceedings for the recovery of the lands.

## RELINQUISHMENT—DESERT LAND ENTRY.

JONATHAN K. COX.

When a relinquishment is filed, and the entry canceled, the land covered thereby is open to entry by the original entryman, if he is duly qualified, the same as by any other applicant.

A party executing a relinquishment can not direct who shall receive the benefit thereof, but the naming therein of an intended beneficiary does not invalidate the relinquishment.

The relinquishment of a desert land entry may be properly regarded as falling within the provisions of section 1, act of May 14, 1880.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 1, 1891.*

Jonathan K. Cox has appealed from your decision of September 6, 1890, holding for cancellation his timber-culture entry No. 2,558, made February 7, 1889, for the E  $\frac{1}{2}$  of the NW  $\frac{1}{4}$ , and the E  $\frac{1}{2}$  of the SW  $\frac{1}{4}$  of Sec. 34, T. 30 S., R. 28 E., M. D. M., Visalia land district, California.

The ground of your decision is that said entry was "in conflict with the prior desert entry, No. 319, June 20, 1877, by Jonathan Cox, embracing the same land."

The appellant, under the impression that your objection to his timber-culture entry is based upon the fact that it was made in the name of "Jonathan K. Cox," while his desert land entry was made and relinquished under the name of "Jonathan Cox," has filed with his appeal an affidavit, which appears to prove the identity of the two, and to explain satisfactorily the cause of the apparent discrepancy.

This question, however, appears to me to be a matter of no importance. When a relinquishment is filed, and the entry is canceled, the land covered thereby is open to entry by the person who made the former entry and executed the relinquishment, provided he be a qualified entryman, the same as by any other party.

The law applicable to the case at bar is the following,—Section 1, Act of May 14, 1880, (21 Stat., 140):

That when a pre-emption, homestead, or timber-culture claimant shall file a written relinquishment of his claim in the local land office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office.

The relinquishment was executed July 14, 1877, purporting to be in favor of "A. C. Maude and J. S. Britain," for a pecuniary consideration. A party relinquishing cannot direct who shall receive the benefit of his relinquishment; the law provides that the first qualified applicant shall be allowed to enter the tract: but the naming therein of any person or persons to whose benefit the person executing the relinquishment desires it to inure, while surplusage and of no effect, does not render the instrument invalid. Cox secured the possession of this re-

linquishment,—it is to be presumed by proper means, as no fraud or bad faith is intimated, and since one of the persons for whose benefit it was avowedly executed, A. C. Maude, was the notary public before whom the entryman executed a *second* relinquishment—on February 5, 1889.

The only point remaining, regarding which it would seem there could be any question, is as to whether the relinquishment of a desert-land entry should be regarded as coming within the provisions of section 1 of the act of May 14, 1880, quoted *supra*.

The Department has frequently so ruled and decided. See Circular of June 27, 1887, subdivision 15 (5 L. D., 708–712):

When relinquishments of desert-land entries are filed in the local office, the entries will be canceled by the register and receiver in the same manner as in homestead, pre-emption, and timber-culture cases, under the first section of the act of May 14, 1880 (21 Stat., 140).

That upon such relinquishment and cancellation the tracts covered by the entries so canceled should at once be held as open to settlement and entry follows as a matter of course, as the Department has frequently held. See cases of *Frazer v. Ringgold* (3 L. D., 69); *Sears v. Almy* (6 L. D., 1); *Mary Stanton* (7 L. D., 227); *Zelia J. Fuller*—very similar to the case at bar—(8 L. D., 371); *Yates v. Glafcke* (10 L. D., 673); *Belliveaux v. Morrison* (8 L. D., 605).

Your decision is reversed.

#### HOMESTEAD ENTRY—RELINQUISHMENT.

##### DOORLEY *v.* HOLLINGSWORTH.

The relinquishment of a homestead entry, executed during the sickness of the entryman, at a time when he could not go upon the land, and subsequently returned to him and retained in his possession, does not call for cancellation of the entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 1, 1891.*

The land involved in this appeal is lots 1 and 2, and S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  of Sec. 6, T. 29 S., R. 32 W., Garden City, Kansas, land district.

The record shows that Isaiah Hollingsworth made homestead entry for the land June 15, 1885. On December 9, 1886, William F. Doorley filed affidavit of contest, alleging,

That the said Isaiah Hollingsworth has sold his relinquishment to said tract for a valuable consideration and delivered the same to a third party. That the said relinquishment has been brought to the U. S. land office, an attempt made to file on said land which was only prevented by a contest on said tract. That the same was fraudulent of inception and made for the purpose of sale. ]

After several continuances hearing was finally had before the local officers August 10, 1887, and as a result thereof they jointly held that the entry should remain intact and the contest be dismissed. Contest-

ant appealed, and you, by letter of April 2, 1890, affirmed their decision, whereupon contestant prosecutes this appeal. The errors assigned simply amount to the charge that your decision is against the evidence and the law.

The evidence shows that the claimant made and delivered to one Spayde a relinquishment of his homestead entry at a time when he was sick and unable to get to his land; that Spayde could not use the relinquishment and immediately sent it back to the claimant, and it has remained in his possession ever since. The claimant has lived continuously on his claim since June, 1886, has all his effects there and has improved it.

The fact that he executed a relinquishment when in sickness and distress, and the same has never been put upon record is not of itself sufficient to warrant the cancellation of his entry. *Bailey v. Olson* (2 L. D., 40).

There was no attempt by the contestant to show any fraud on the part of the claimant except in connection with the relinquishment. It is admitted that since his residence on the land he has placed improvements thereon to the value of \$400, and it is shown that he has, in good faith, complied with all the requirements of the law.

Your judgment is therefore affirmed.

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#### SCHOOL LANDS—TOWNSITE—RESERVATION.

##### OKLAHOMA TERRITORY.

The Department has no authority to sanction the use or occupancy of land for a townsite that has been reserved by statutory provision for school purposes.

*Secretary Noble to Hon. S. W. Peel, Washington D. C., December 1, 1891.*

Your letter of November 16, 1891, enclosing a petition bearing many names asking that section 16, T. 6 N., R. 5 E., in County "B", Oklahoma Territory be leased for the purposes of a town, or that the occupancy thereof for that purpose be allowed "pending relief from Congress" has been received.

This section is a part of the land acquired from the Citizen Band of Pottawatomie Indians under an agreement entered into with them on June 25, 1890, and ratified by act of Congress of March 3, 1891, (26 Stat., 989-1016). It is provided in that agreement as follows:

Nor shall said sections sixteen and thirty-six be subject to homestead entry but shall be kept and used for school purposes; nor shall any lands set apart for any use of the United States, or for school, school farm or religious purposes, be subject to homestead entry—but shall be held by the United States for such purposes so long as the United States shall see fit to use them.

This is in effect the same provisions as is found in the act of March 2, 1889 (25 Stat., 980-1005), providing for the purchase of lands from

the Seminole Indians and also in the act of May 2, 1890 (26 Stat., 81-89), to provide a temporary government for the Territory of Oklahoma.

Section 38 of the act of March 3, 1891, *supra*, reads as follows:

No provision for settlement on or sale of the lands in the various agreements hereinafore mentioned shall apply to sections sixteen and thirty-six thereon, which lands in the States are hereby granted to the State in which they are situated, for the support of the common schools of such State, under the limitations prescribed by law, and such sections in the Territories of the United States are reserved from occupancy, entry, or sale under any land law of the United States; but this provision shall not apply to mineral land which may be disposed of under the laws applicable thereto.

This land being by legislative provision "reserved from occupancy, entry, or sale, under any land law of the United States" this Department has no authority to sanction the use of it as a townsite or to take any step looking towards the appropriation of it under the townsite or any other law, and the prayer of the petition must be refused.

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

UNITED STATES *v.* MALLET ET AL.

The proviso to section 7, act of March 3, 1891, can not apply in a case where there has been a transfer and the entry can not be confirmed on account of a finding of fraud on the part of transferee.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 1, 1891.*

I have considered the appeal of the transferee, Daniel Heenan, from the decision of your office dated April 7, 1890, affirming the recommendation of the local officers at Grand Island, Nebraska, that pre-emption cash entry No. 1690, dated December 27, 1882, of the SW $\frac{1}{4}$  of the NE $\frac{1}{4}$ , the SE $\frac{1}{4}$  of the NW $\frac{1}{4}$  and the N $\frac{1}{2}$  of the SW $\frac{1}{4}$  of Sec. 18, T. 14, R. 20 W., should be canceled.

The record shows that a special agent of your office reported that on March 27, 1888, said entry was made in the interest of said transferee and that the claimant, Mallett, never established residence on the tract. Upon the application of said Heenan a hearing was had on February 18, 1889, at which the defendant, Mallett, testified that he "filed on the land at Heenan's request," and that said Heenan "gave him to understand that he would furnish the money to prove up." The local officers recommended that said entry be canceled, and your office, on appeal, found that "Not only does it show the entry to have been made in the interest of said Heenan, but he appears to have wholly failed to comply with the law in the matter of residence on the land."

The transferee alleges in his said appeal that (1) "said decision is contrary to law." (2) Said decision is not sustained by the evidence. These specifications of error are quite defective, and the appeal might

be dismissed for that reason. The record, however, shows that upon an investigation by a government agent, reported on March 27, 1888, "fraud on the part of the transferee has been found" and upon the application of the transferee, a hearing was had, at which said report was confirmed, and their finding being approved by your office, said entry was held for cancellation. Such being the case, the entry cannot be confirmed under the seventh section of the act of March 3, 1891 (26 Stat., 1095) for the reason that it appears that "fraud on the part of purchaser has been found" prior to said act, and hence under the express provision thereof, the entry is excepted out of its confirmatory provisions.

In the case of Samuel M. Mitchell *et al.* (13 L. D., 55), it is said in the syllabus:

An entry that is susceptible of confirmation, in the interest of the transferee, under Sec. 7, act of March 3, 1891, and is also within the confirmatory provisions of the proviso to said section, should be adjudicated under said proviso.

In the body of the decision, it is not stated that the entry could be confirmed in the interest of the transferee, but it is stated "that the case comes within the terms of the proviso of said section 7, without reference to the interest of the transferees."

To the same effect is the ruling in the case of *United States v. Harp* (id., 58). In the case of *Axford v. Shanks* (on review, id., 292-293) it is said:

The entries referred to in the proviso to section seven of the act in question are of a different character, viz: those in which no innocent purchasers were interested, and *only* such entries are confirmed as are specially described therein.

The entry in question can not be confirmed under said section seven, because fraud has been found on the part of the transferee, and the proviso of said section can not apply in a case where there has been a transfer, and the entry can not be confirmed on account of the finding of fraud on the part of the transferee.

The decision of your office must be and it is hereby affirmed.

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#### PUBLIC SURVEY—MAXIMUM RATES.

##### INSTRUCTIONS.

Special maximum rates will not be allowed for the survey of lands except on satisfactory showing that such payment is necessary.

*Acting Secretary* *Chandler to the Commissioner of the General Land Office, December 3, 1891.*

I am in receipt of your letter of November 6, 1891, transmitting the petition of fifteen settlers in township 3 N., R. 9 W. W. M., Oregon, praying for the survey of the lands. You state,

The lands are described in the petition as agricultural, timber and grazing in character, and by the surveyor general as mountainous, heavily timbered, covered

with dense undergrowth, and exceptionally difficult to survey, . . . . In view of the character of the lands as described, the United States surveyor-general asks to be authorized to award a contract for the survey of said township at the special maximum rates of mileage under the usual restriction as to their allowance.

You therefore request to be authorized to instruct the surveyor-general to contract for the survey of said township at rates of mileage not to exceed the minimum (\$9, \$7, and \$5,) and the special maximum rates (\$25, \$23 and \$20,) as allowed by the appropriation act of March 3, 1891, the latter rates to apply only where the lines of survey shall pass over lands that are mountainous, heavily timbered, or covered with dense undergrowth and exceptionally difficult to survey.

In his report the surveyor-general says :

This fractional township is reported as being very mountainous, heavily timbered, covered with dense undergrowth and otherwise difficult to survey,

and he asks to be authorized to award a contract for the survey of the township, and that special maximum rates be allowed where the lines pass over lands warranting such rate.

The act of March 3, 1891, making an appropriation for the survey of public lands (26 Stat., 971), allowing payment of special maximum rates, did not contemplate the payment of the highest rate mentioned, except in cases where the same was necessary in order to obtain a survey of the lands. Before rates in excess of intermediate rates can be allowed the same must be approved by the head of this Department, and before taking such action, I desire to be reasonably satisfied that such payment is necessary.

When townships are to be surveyed in which the ground is of the character specified in the statute, it is the duty of the surveyor-general to invite the various deputy surveyors to submit estimates of the cost of the work, and that officer should also, as far as is reasonably practicable, inform himself as to the character of the work to be done. All of which information, together with a full report and recommendation of the surveyor-general, should be submitted to you for your consideration, and the same should be submitted to this Department with your report and recommendation thereon.

In the case now under consideration, I am not satisfied from the evidence before me, that the increased rates should be paid, and the matter is herewith returned for such action as has been above indicated.

All surveyors-general should be notified of what is required in cases of this character.

BOWMAN *v.* DAVIS.

Motion for review of departmental decision rendered herein April 27, 1891, 12 L. D., 415, granted by Secretary Noble, December 4, 1891, and a rehearing directed.

## PROCEEDINGS ON FINAL PROOF—PRIORITY OF CLAIM.

SIMPSON *v.* BROCKMAN.

During the pendency of final proof, submitted under Osage filing, the land covered thereby is not open to the filing of another; and by such filing no rights are acquired as against the prior claimant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 4, 1891.*

I have considered the appeal by W. W. Simpson from your decision of May 28, 1890, holding for cancellation his Osage declaratory statement No. 6727, for lot 9, Sec. 3, T. 27 S., R. 24 W., Garden City land district, Kansas.

E. T. Brockman filed Osage declaratory statement No. 5106, for lots 1, 2, 8 and 9 of said section 3, on July 21, alleging settlement May 29, 1886.

In a contest between Brockman and one O. H. Simpson involving lots 1, 2, and 8 of said section, your decision of August 14, 1889, found in favor of Simpson. Both parties had theretofore offered final proof, which was by said decision returned, and it was held "upon Simpson's making entry, Brockman's D. S. will be canceled in so far as it conflicts with that of Simpson. If, however, Simpson should fail to make entry, Brockman's D. S. will remain intact." Notice of such decision appears to have been sent by registered letter to the attorneys for both parties on August 24, 1889.

On September 10, 1889, O. H. Simpson made entry of lots 1, 2, and 8, as per receipt No. 12,162, and on November 15, 1889, Brockman made entry of lot 9, as per receipt No. 12,262.

Subsequent to the entry by O. H. Simpson, and prior to Brockman's entry—to wit: on September 18, 1889,—W. W. Simpson filed Osage declaratory statement No. 6727, for lot 9, the tract under consideration, alleging settlement the 14th of same month, and on December 2nd following he offered final proof, which was rejected by the local officers on account of the prior entry by Brockman.

Upon appeal, it was urged by Simpson that, under your letter of August 14, 1889, Brockman was allowed a reasonable time within which to complete his entry by making payment, and that under the rulings of this Department thirty days are considered a reasonable time; hence, his (Simpson's) right attached by virtue of settlement and filing prior to the entry by Brockman.

Your opinion holds that "the only question raised by the appeal is, did Brockman forfeit his right to enter the land by not making payment until November 15, 1889, when he was notified of his right to do so, on August 24, 1889."

Without determining this question, you proceed to a consideration of the proof tendered by Simpson, and find that the same is not sufficient to justify the allowance of an entry, and in the presence of an adverse claim, that his filing must be canceled.

In the appeal from your decision the following grounds of error are alleged, viz:

1st. The Hon. Commissioner erred in rejecting Simpson's proof and in allowing Brockman's entry to stand.

2nd. He erred in not permitting Simpson to offer new proof, if the one submitted was unsatisfactory.

3rd. He erred in not ordering a full hearing, as to Brockman's laches and as to Simpson's compliance with the law.

4th. He erred in applying the law and rules governing the entry of ordinary public land under the pre-emption law to the proof of Simpson—this being Osage Indian trust land.

In the first place, the effect of your decision of August 14, 1889, was to suspend action upon Brockman's proof, to allow O. H. Simpson to make entry upon his proof covering lots 1, 2, and 8.

Had Simpson failed to make entry, Brockman's proof, for the entire tract claimed by him, might have been accepted, but upon the completion of Simpson's entry Brockman's filing was to be canceled as to the tracts in conflict.

Simpson made entry, and Brockman should have been advised of that fact and notified that his proof would be accepted as to lot 9, the tract in dispute.

In the case of L. J. Capps (8 L. D., 406), it was held that the published notice of an application to make pre-emption cash entry, so far reserves the land covered by such application as to prevent its being properly entered by another pending the consideration of said application.

In the present case, Brockman had made proof, which was pending at the date of the settlement and filing of W. W. Simpson; hence, said filing was improperly allowed and no rights can be claimed thereunder as against Brockman.

I therefore affirm your decision, and direct that Simpson's filing be canceled.

*Revised 27 L. R. 683*  
 PRIVATE CLAIM—CONFIRMATION—SURVEY—PATENT.

LAS VEGAS. (15 L. R. 58)

The Las Vegas grant was not a grant in fee to the applicants, or the town of Las Vegas, within the described boundaries, but a concession of separate tracts to settlers and occupants, and the act of June 21, 1860, confirms the title to lands thus assigned and occupied within the prescribed boundaries of the original grant, whether within the town of Las Vegas or outside of the same.

The confirmation of said grant was made direct to the town of Las Vegas not only as the most convenient form of confirmation and issuing patent thereon, but also for the reason that said town, acting in the interest and for the benefit of its people, was the proper party to ask for and receive from Congress the relief sought.

A resurvey of this grant should be made so as to include only the lands allotted or assigned to settlers, under the terms of the original concession, at the time the territory of New Mexico became subject to the laws of the United States, and a patent should issue on such survey to the town of Las Vegas for the benefit of the proper parties.

The lands not included in such resurvey should be surveyed as public lands and opened to disposition under the general land laws.

The legal status of the town of Las Vegas, and its competency to take title as a confirmee, having been recognized by Congress will not be questioned by the Department.

*Secretary Noble to the Commissioner of the General Land Office, December 5, 1891.*

By section 3 of the act of June 21, 1860 (12 Stat., 71), it was enacted :

That the private land claims in the Territory of New Mexico, as recommended for confirmation by said surveyor-general in his reports and abstract marked exhibit A, as communicated to Congress by the Secretary of the Interior in his letter dated the third of February, eighteen hundred and sixty, and numbered from twenty to thirty-eight, both inclusive, be, and the same are hereby, confirmed, etc.

No. 20 is described in exhibit A as claimed by the "Town of Las Vegas and Thomas Baca *et al.*" It was surveyed as the "Las Vegas grant" and the plat thereof approved by the surveyor-general December 8, 1860. As thus surveyed, it contains an area of 496,446.96 acres. No patent has been issued therefor.

On March 22, 1887, Mr. Julian, then surveyor-general of New Mexico, called the attention of your office to said survey, expressing the opinion that said grant should not legitimately embrace more than twenty thousand acres, which estimate was subsequently reduced to six thousand; and he urged that a resurvey of the same be ordered. After some correspondence, on November 5, 1887, a resurvey was directed to be made, in accordance with the views of Mr. Julian, and he was directed to use \$1,000 of the appropriation for the survey of private land claims in New Mexico. In February, 1888, the surveyor-general reported that the above sum was nearly exhausted, and suggested the propriety of asking for a special appropriation from Congress of \$6,000,

the amount estimated as necessary to complete the work. Thereupon, your predecessor, on April 4, 1888, transmitted the correspondence to this Department for consideration and instructions.

On February 1, 1890, Edward F. Hobart, the successor of Mr. Julian as surveyor-general of New Mexico, in a letter to your office, reviewed the recommendation and action of his predecessor, expressed disapproval of the same, and recommended that patent be issued to the town of Las Vegas on the present survey.

On March 1, 1890, one P. Millhiser "for petitioners and cl'm'ts under orig. grantees," filed in your office a protest against the proposed survey, and asked that a patent for said lands be issued to the grantees named in the original grant. This application of Millhiser was sent here by letter of March 6.

On March 18, 1890, the board of county commissioners of San Miguel county, New Mexico, as agents for the citizens of the entire town of Las Vegas and those residing on the grant around the town, filed in this department an application for the issue of a patent for said grant to the town of Las Vegas, to be delivered to said board as custodian in accordance with the request of the people in town meeting assembled.

On March 24, 1890, the Commercial Club of Las Vegas filed here a petition earnestly urging that patent for said grant be issued according to the confirmation act of Congress, and be placed in the hands of the proper custodians.

In regular order, the first matter to be determined is whether the re-survey should be further prosecuted, as recommended by the former surveyor-general, and approved by your predecessor. A conclusion arrived at on this important subject will incidentally determine most of the other questions in the case, inasmuch as it is alleged that in making the former survey, the officers entirely misapprehended the character and extent of the grant. A consideration of these matters, therefore, is necessary.

By the act of June 21, 1860, *supra*, Congress confirmed the grant "as recommended for confirmation," by the surveyor-general "in his reports and abstract marked exhibit A." The exhibit referred to, in the column for designating the number of the claims, has the numerals "20." In the column for the names of claimants, in line with the figures 20, appear the words "Town of Las Vegas and Thos. Baca et als." Then follows the list of papers sent up, nine in number, the last being the "Report." Exhibit A thus only shows that claim was made for grant 20 by the town of Las Vegas and the Baca claimants. (See p. 2 H. Ex. Doc. No. 14, 1st sess. 36th Cong.) We must, therefore, turn to the report to find what the surveyor-general "recommended for confirmation." This report, as found in the same executive document (p. 42 et s.) is too long for insertion entire herein, though it must be largely quoted from.

It first deals with the claim of the Baca heirs, and finds that claim

for the described land to be "a good and valid one," absolute, with no condition attached to it, and that it was made by the Mexican authorities to Luis Maria Cabeza de Baca, and his seventeen male children, in the year 1821, and afterwards confirmed to the children by the proper authorities in 1825. The surveyor-general, however, declined to determine whether the Baca claim was superior to the other. But Congress determined the matter in the affirmative, as will be seen by reference to Senate Reports of Committees (No. 228), 36th Congress, 1st Session. This report states that the grant to Baca and his sons "was in fee and is a genuine and valid title;" that the claimants under that title are willing to waive "their older title" and to enter an equal quantity of land elsewhere in the Territory. It was urged that the proposal be accepted, and to carry out this purpose section 6 as now found in the act of June 21, 1860, *supra*, was reported. Congress accepted the recommendation and passed the act as before stated. This eliminates the Baca claim entirely from the case, except so far as it may be, perhaps, necessary to refer to it incidentally in discussing the other claim, which alone is now to be dealt with.

As to this claim, the report of the surveyor-general, on page 44, says:

The claim of Las Vegas is based on the following proceedings:

On the 20th day of March, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and José Antonio Casaos, for themselves and twenty-five others, petitioned the corporation of El Bado for a tract of land for cultivation and pasture situated in the county of El Bado and bounded as follows: On the north by the Sapello river, on the south by the boundary of the grant of Don Antonio Ortiz, on the east by the Aguage de la Llegua, and on the west by the boundary of the town of El Bado.

On the same day the corporation of El Bado transmitted the petition to the territorial deputation with the recommendation that the petition be granted.

On the 23d of March of the same year the grant was made by the territorial deputation with the boundaries asked for, with the further provision that persons who owned no lauds were to be allowed the same privilege of settling upon the grant as those who petitioned for it.

On the 24th of the same month and year Francisco Sarracino, the acting governor or political chief, directed the constitutional justice of El Bado to place the parties in possession, which was done on the 6th day of April of the same year.

At this point of the report a discussion is entered upon as to whether it is the duty of the surveyor-general to determine which of the grants has the superior title, and concluding that this duty does not devolve upon him, he closes his report by saying:

It is firmly believed that the land embraced in either of the two grants is lawfully separated from the public domain and entirely beyond the disposal of the general government, and that in the absence of the one the other would be a good and valid grant; but as this office has no power to decide between conflicting parties, they are referred to the proper tribunals of the country for the adjudication of their respective claims, and the case is hereby respectfully referred to Congress through the proper channel for its action in the premises.

The Senate Committee, on page 3 of its report before referred to, was of the opinion that the surveyor-general "recommended the confirmation of both these titles, leaving to the respective claimants the right

of adjudicating their conflicting claims in the courts." In this entire recommendation neither the committee nor Congress concurred. But having disposed of the Baca claim otherwise, Congress confirmed the claim of the town of Las Vegas "as recommended;" that is, confirmed its title to whatever lands were included in the grant referred to.

The surveyor-general does not state in his report what this title is, but leaves it to be implied. Its nature and character are not specified. In relation to the Baca grant, on page 45, he says "no condition was attached, the grant was an absolute one." But in relation to the Vegas grant he uses different language. He says:

The grant made to Juan de Dios Maese and others is not contested on the ground of any want of formality in the proceedings, but, as far as the documentary evidence shows, is made in strict conformity with the laws and usages of the country at the time.

Inasmuch, as under "the laws and usages of the country at the time," different kinds of grants were allowable, the above quoted statement does not throw much light upon the nature of the title by which the lands within the Las Vegas grant were held, whilst it is made very plain that the Baca title was an absolute fee simple. In this view the Senate committee concurs, saying of the latter: "This grant was in fee and is a genuine and valid grant;" whilst of the claim of the town of Las Vegas it says:

This town claims under a grant made on the 25th of March, 1835, to Juan de Dios Maese, and twenty-seven others, by the territorial deputation, on a petition which represented the land to be *public lands*, and the petitioners were put in possession. The land has been divided out, and several hundred families are located on it.

This statement of the committee does not afford much assistance in the immediate inquiry. The surveyor-general also says that he believes "land embraced" in the grant "is lawfully separated from the public domain and entirely beyond the disposal of the general government." But this hardly helps, as the same thing could be said properly of any other grant recommended for confirmation.

The case is then in this condition: Congress confirms the grant "as recommended" by the surveyor-general; that officer recommends that whatever title was granted by the Mexican authorities be confirmed. Therefore, the confirmation of Congress was of the grant as made by Mexico to Maese and his associates, no more and no less.

What, then, is the character and extent of that grant? The brief statement in this respect found in the surveyor's report, hereinbefore quoted, does not furnish the answer to these questions, so that the papers transmitted by that officer to Congress, and upon which he based his recommendation, must be examined more at length.

From these papers (and their translation, as found in executive document No. 14, *supra*, having been acted upon by Congress, will be accepted by this Department), it appears that on March 30, 1835, Juan de Dios Maese, Miguel Archuleta, Manuel Duran, and Jose Antonio

Casaos, "for themselves and in the name of twenty-five men," presented a petition to the corporation of San Miguel Del Bado, wherein it was stated that having registered a vacant piece of land known as Las Vegas (the Meadows) on the Gallinas river, the same was solicited—

for the purpose of planting a moderate crop, to have also the necessary land for pasture and watering-places, and having the following boundaries: On the north the Sapello river, on the south the boundary of the grant made to Don Antonio Ortiz, on the east the Aguage de la Zegua, and on the west the boundary of the grant to San Miguel Del Bado:

possession was to be received "in the name of the federation," on such conditions as might be established and would tend to "the advancement of agriculture and the well-being of several families without occupation," who were interested. (p. 27, *ibid.*)

This petition was referred to the territorial deputation, which, on March 23, 1835, resolved as follows:

The land contained within the boundaries expressed in this petition is granted not only to the petitioners and the residents of El Bado, but also generally to all who may be destitute of lands to cultivate, provided "that the grant to these lands is made on condition that the pasture and watering-places are free to all."

This resolution was ordered to be forwarded to the political chief, who was directed to cause the same to be carried into execution. This officer, F. Sarracino, in transmitting the action of the territorial deputation to his subordinate officer, the constitutional justice, who was to deliver possession, advised him to consider—

that the grants are to be made according to the means of each one of the petitioners, in order that they may not leave any land which may be given to them without cultivation.

It was also suggested that a site for a town, to be built by the settlers, should be selected, and such other steps taken as might promote their security. (p. 29 *ibid.*)

The constitutional justice, Jose Jesus Ullibarri, certifies that on April 6, 1835, he proceeded to the town of Nuestra Senora de los Dolores de las Vegas, presumably the selected site for the proposed town, for the purpose of distributing the lands to the twenty-five individuals mentioned in the petition, or any others without lands or occupations, who might present themselves. He says he measured the lands and made the distribution "according to that portion of the colonization law which refers to grants of the public lands," the directions of the territorial deputation, and the decree of the political chief. Each individual received a piece of land according to his means, with the understanding that none should remain uncultivated; no one should sell his lands until title was acquired as prescribed by law to all colonists; and the water and pastures were to be free to all. A list of thirty-one names accompanies this certificate, containing the names of the parties for whom the lands were set aside, and the quantity thereof, within as well

as without the new town. (p. 31, *ib.*) On June 11, 1841, another list was returned, showing the distributions, made to one hundred and eighteen other parties. On November 20, 1846, another distribution was made to twenty-nine other parties. Subsequently a further distribution was made to six parties of tracts formerly assigned but which had not been cultivated according to agreement. In these lists appear the names of three of the four original petitioners for the grant, to whom allotments were made as follows: to Juan de Dios Maese 250 varas, Manuel Duran 175 varas, and Miguel Archuleta 1,067 varas.

From the before-recited matters, taken from the record, I am satisfied that the grant in question was not a grant in fee simple of the lands within the described boundaries to Maese and his associates. Indeed, so far as the record discloses, no such claim or pretension was ever set up until of late years, when the same was presented by Mr. Millhiser, in behalf of himself and others, who claim to have derived title from the original petitioners.

Evidently such a grant was not contemplated by the territorial deputation when it declared that the land was granted "not only to the petitioners and residents of El Bado, but generally to all who may be destitute of lands to cultivate." Evidently it was not understood that such a grant had been made when the acting governor, Sarracino, instructed his subordinate that the grant was to each according to his means, and that no more land was to be allotted than each could cultivate. The constitutional justice did not understand it to be such a grant when from time to time he distributed portions of the land to such as made application to him, and placed them in possession of their allotments, to the number of nearly two hundred. And it may be safely assumed that the original petitioners did not regard it as a grant to themselves alone, inasmuch as three of the four named accepted allotments from the constitutional justice, and, if the others did not accept allotments likewise, they made no protest or objection to, what, if Mr. Millhiser's theory be correct, they must have regarded as the unwarranted action of the officer in assuming to divide up and deliver possession of land to which the government had granted them exclusively a fee simple title. And it is shown by the report of Special Agent Rice, of August 24, 1889, that after the allotments were made to settlers, the Mexican authorities made four other grants, more or less extensive, outside of the allotted lands, but inside of the exterior boundaries of the Las Vegas grant. The surveyor-general did not regard it as a grant to the parties originally named, because, so far as he recommended its confirmation, it was to the town of Las Vegas. And finally Congress, the controlling power in the matter, confirmed the grant to that town, which unquestionably would not have been done if it had been thought that the fee simple title had been passed under the grant to the petitioners. The contemporaneous and long-continued construction by the officers of the law is entitled to have much weight, whilst the action of Congress is conclusive.

In addition to these matters, there has been a judicial judgment passed upon the claim of Millhiser, which, though not conclusive in the premises, is highly persuasive as far as it goes.

On August 20, 1887, Millhiser *et al.* trading as the Las Vegas Land and Cattle Company, filed a bill in the district court of San Miguel county, New Mexico, against Padilla *et al.* wherein the title of the original petitioners for the grant, now set up before this Department, was made the basis for asking the district court to perpetually enjoin the defendants from maintaining an inclosure upon, or otherwise interfering with, the complainant's full enjoyment of the lands within the Las Vegas grant, in which they claimed an undivided ownership by virtue of mesne conveyances from some of the alleged original grantees or their legal representatives. It is not necessary to go into further details regarding that case, as they are fully shown in the pamphlet copies thereof and the proceedings therein found in this record. It is sufficient to say here that the question of the Millhiser title was fairly presented and fully passed upon by the court, adversely to his claims, as will be seen by the following extract from the opinion of the court, as delivered by Chief-Justice Long :

It is clear to my mind from the record that the government of Mexico, in making this grant, desired and intended to populate her public lands; that she intended to give in fee to each settler on the Las Vegas grant all the land he could cultivate, which after actual cultivation for a period of years would become his to do with as he should choose; that tracts of land were by the constituted authorities to be from time to time distributed to other settlers as they might make application, and that each subsequent distributee held under the original grant and under his possession and allotment. It is not proven that the petitioners were men of large capital intending at their own expense to colonize families and settle and maintain them on the grant. They were evidently poor persons and of but moderate means, seeking homes for themselves and families as a means of subsistence, and desiring the settlement of other persons near them, as a means of building up the town of Las Vegas for a protection against the hostile Indians. Each new settler constituted one more arm of strength for protection, an additional aid for the upbuilding of the settlement and new town, and naturally was welcomed for the aid he gave to the common cause. In my opinion the thought of exclusive ownership of the whole grant by the petitioners was never entertained during the jurisdiction of the Mexican government, but, to the contrary, the decree of the provincial deputation, the distribution under official authority of different tracts to separate individuals for ten years after the date of the grant, the acts and qualified possession of the settlers, all show the land unoccupied to be held for the benefit of all who might come, destitute of land, to make settlement.

Entertaining these views, the court made a decree that the complainants be forever barred and prohibited from disturbing the defendants in the quiet enjoyment of the lands in controversy, or from instituting any suit against them in that behalf. It does not appear that any appeal was taken from said decree which is stated by the judge to have been accepted by the complainants as a condition on which they were permitted to have this bill dismissed.

In a brief filed here on October 16, 1890, Mr. Millhiser indulges in a

criticism more personal, in its animadversions upon the judge who delivered the opinion in said case, than logical in its arguments against the correctness of his judgment. It is stated, however, in said brief that there was an earlier case decided in the same court, wherein the validity of the title which Millhiser represents was upheld, and a copy of the record in the case referred to is filed.

An examination of that record shows that, on March 15, 1873, a bill was filed, in the district court of San Miguel county, New Mexico, by Miguel Romero y Baca and others, who claimed to be heirs, or legal representatives of the original grantees and owners of the Las Vegas grant. The bill sets forth, in substance, that at a public meeting held in the court house of the town of Las Vegas, May Hayes, and two associates, were appointed commissioners to partition and divide up the said grant among themselves and others, not being of the number of the original grantees, their heirs or assigns; and that the said commissioners proceeded to, and did, partition and divide out to persons, desiring the same parcels of the vacant and uncultivated portions of said grant, and have declared their intention to continue making such divisions and allotments; which action, it is alleged, will be to the irreparable injury of complainants; and an injunction is prayed restraining said parties from proceeding further to divide said lands or taking possession of those so divided.

An answer was filed by Hayes and his associates wherein, briefly stated, they admit that they were acting as commissioners as stated, that the grant was confirmed to the town of Las Vegas, and in pursuance of the provisions of the same and by authority of the people of town, they proceeded to distribute the vacant lands to inhabitants of the town who were destitute of lands, and that in so doing they acted in good faith and were carrying out the letter and spirit of the grant. The answer admits that complainants have a legal interest in said grant, but deny that they have been authorized to act in the premises in behalf of any considerable number of the owners of said grant.

On the bill and answer, and after argument, on March 14, 1874, the opinion of the court was filed, which is as follows:

This cause coming on to be heard upon the bill of complaint filed herein, and upon the answer and amended answer of the defendants, upon reading said bill, answer and amended answer, and after hearing Mr. Catron of counsel for the complainants, and Mr. Houghton for the defendants, and due deliberation being thereupon had, the court finds and determines that the said defendants, May Hayes, Juan Romero and Miguel Garcia y Chaves, had no legal right or authority to concede or donate, to any person, or persons whomsöever, or to any incorporation, any of the unoccupied lands comprised within the limits of The Las Vegas grant, described and set forth in the pleadings, and that their assumption of such right and authority in the manner stated in the pleadings, tends to the prejudice and injury of the rights and interests of the complainants in said grant.

Whereupon it was decreed that the said parties be perpetually enjoined from proceeding further to partition and concede said lands or any part thereof.

It is obvious from the foregoing statement, which I think a fair one of the contents of the record, that the judgment of the court was correct in holding that the alleged commissioners had no proper right or authority to divide and distribute the lands as they were doing, and, inasmuch as it was conceded by the answer, that complainants had "a legal interest in the lands of said grant", the court might, with propriety, hold that, the illegal assumption of authority, "tends" to the prejudice of complainants, and prohibit further action in that respect. But the court does not decide or pretend to decide what are the rights, or the title, of the complainants in and to the lands within the Las Vegas grant.

But even if the decision went to the extent claimed by Mr. Millhiser, it would not affect the judgment I have formed in the premises, inasmuch as it is the reasoning by which Chief Justice Long arrives at his conclusions, which is persuasive to my mind; whilst in the record of the earlier case, referred to by Mr. Millhiser, there is only the bill, answer and order of the court granting the injunction, as above given.

I am therefore of the opinion that the matters, hereinbefore set forth, are sufficient to justify the rejection of the Millhiser claim for patent.

Having arrived at the conclusion that the grant as made to Maese and his associates was not an absolute grant of the land within the described limits, I can not see how the confirmation of the same grant to the town of Las Vegas, in the absence of some positive expression to that effect, can be construed to give to that town any larger estate than was originally granted. This grant is totally unlike those in *Tameling v. United States Freehold Co.*, (93 U. S., 644), and the Maxwell grant case in 121 U. S., 325. Juridical possession had been delivered to the grantees in both of those cases by the Mexican authorities, and the surveyor-general recommended their confirmation as absolute grants, and as such they were confirmed. Here, there has been no juridical possession of the entire tract to any one, only of small portions to certain parties. The surveyor-general has not found the grant to be an absolute one to the town, and did not recommend its confirmation as such. And it would seem that in the absence of some clear legislation to that effect it would be a dangerous construction of language to hold that all the lands within the described limits of the grant were confirmed absolutely to the town of Las Vegas. If the confirmation was in fee simple to the town of all the land within the bounds, it would necessarily include those lands occupied by Mexican and other settlers, who hold no evidence of title under the confirmed grant, as well as those lands which being unoccupied belonged to the United States. It is not believed that Congress proposed to enact such injustice. Indeed, the report of the Senate Committee, p. 4, *supra*, expressly disclaims such purpose, for, after stating that the land is occupied by some several hundred families it says that it is the duty of Congress—

to legislate in such a manner as to prevent, if possible, so disastrous a result as the plunging of an entire settlement into litigation at the imminent hazard of being turned out of their homes. etc.

Nor should we transfer by doubtful implication so large a body of public land to a supposed confirmer. The rule is well-settled that in case of doubtful construction, it must be solved in favor of the government. In this case, I do not feel myself justified, by anything I can find in the act of Congress or the papers, in acquiescing in the claim of the town of Las Vegas, which asserts that Congress confirmed to that town, the absolute fee simple title to all the lands within said grant.

The papers in the case show that the entire tract embraced within the boundaries as described in the grant papers constitutes an area of nearly 500,000 acres, of which amount about 6,000 was taken up and occupied by settlers at the time the Territory of New Mexico came under the control of the United States government and its laws.

My opinion is that Congress intended to confirm the titles of these settlers and occupants to the lands thus assigned and occupied by them within the town of Las Vegas, or outside of it, within the prescribed boundaries of the grant, as originally made; and the confirmation was made direct to the town, not only as the most convenient form of making said confirmation and issuing patent thereon, but because the town of Las Vegas, acting in the interests and for the benefit of its people, was the proper party to ask for and receive from Congress the relief sought.

The setting apart of this large body of public land for those who, being destitute of land might obtain a portion thereof on application, if a grant or contract at all, on the part of the Mexican government, was at most a grant *in futuro*, dependent upon the performance of conditions precedent; as a contract it was executory in its nature, and consequently, so far as the conditions were unperformed, or the contract was unexecuted, when the United States acquired the territory in which the land lay, its laws superseded those of Mexico, and thereafter, though private rights would be respected, the unassigned lands could only be acquired in accordance with the provisions of our land laws, not those of Mexico.

Entertaining these views, a resurvey should be made so as to include only the lands which had been allotted or assigned to settlers, under the terms of the original concession, at the time that the territory of New Mexico became subject to the laws of the United States; and a patent for said lands should be issued on said survey to the town of Las Vegas, so that the proper parties in interest could perfect their titles to their lands. The public surveys should be extended over the residue of said lands and the same thrown open under the general land laws.

The conclusion as to patent arrived at herein seems somewhat to conflict with the views of my predecessor in the Anton Chico case, reported in 1 L. D., 287 (Rev. Ed). I have not the entire record in that case before me, and the opinion does not disclose the facts sufficiently to enable me to determine whether they are identical in the two cases. But even if they are the same, I believe it to be my plain duty to cause

the patent to issue in the name of the congressional confirnee—the town of Las Vegas, rather than to other parties not named as confirnees.

As to the point that the town of Las Vegas, not having been incorporated, is a legal non-entity, to which no title would pass under the patent, it may be replied that, if this be true, as matter of fact and law, the consequences would be more far-reaching; for Congress, in its wisdom, confirmed the grant, as shown, to the said town, and if there be no such town in existence which can take, there simply has been no confirmation of the grant and no body is as yet entitled to a patent. But I do not understand this to be the law of this case.

Under the Mexican system, originally the people were required for self protection and other reasons to live in towns whilst cultivating outlying land; and the general laws of that country gave to such towns or pueblos four square leagues of land for the use of the inhabitants thereof, and occasionally, by special concession, as in the present instance, grants of larger area were made for the same purpose. None of these towns were ever incorporated, in the sense in which we use the terms, so far as my research has gone. They were aggregations of people who lived together for mutual protection, and under the laws and customs of that country had officers for the administration of their municipal affairs; but there was no actual charter, no act of incorporation conferred by the superior power of the State, only the implication, arising from the recognition of the existence of such towns, with authority to guide their town affairs.

This was the condition of things when New Mexico was acquired by the United States, and the legal status of these towns and their capacity to take as confirnees of grants of public lands have been recognized in too many instances by Congress and the Executive Departments through too long a period of time to be now seriously questioned.

In the case under consideration, the town of Las Vegas was not in existence at the time the original grant was asked for by Maese and his associates. One of the purposes for which the concession was made was to establish that town, and it was established after the manner and under the laws of Mexico, and has had an actual existence ever since. Congress recognized its legal and actual existence, ignored the original petitioners for the grant and confirmed it to the town; and to that extent made a change in the trustee. In view of all this, it is too late now to say that Las Vegas has no legal existence. If a corporate capacity be necessary to enable the town to take under the grant, every presumption must be that it has the necessary corporate capacity, and the law so implies. (Dillon on Municipal Corporations, par. 21 and 22.) At all events, the town having an actual existence, this Department will not now challenge its capacity to take what Congress clearly intended to give. If error be committed in following this course, that error can be redressed in the proper judicial tribunal. In the absence

of a judicial construction otherwise, the executive must follow the act of Congress as read and understood.

As to the question asked relative to the declaration in the grant making the "pasture and watering-places free to all," I do not think the Department is properly called upon to answer it, as the judicial tribunals of the country are the proper ones to which those holding lands under the grant should appeal for protection against the invasion of their rights, if they have any, and not to this Department in the administration of the land laws.

CROW CREEK AND WINNEBAGO RESERVATION—ACT OF MARCH 2, 1889.

GEORGE PRITCHARD.

The purpose of section 23, act of March 2, 1889, is to give to all persons, who in good faith made settlement between the dates specified on the Crow reservation, with intent to enter the same, a preference right to re-enter upon their claims, and procure title thereto under the homestead or pre-emption laws.

Residence on said land after April 17, 1885, and prior to the President's proclamation under the act of March 2, 1889, is a trespass, and credit therefor cannot be allowed under an entry authorized by said act.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 5, 1891.*

George Pritchard has appealed from the decision of your office of September 15, 1890, affirming the action of the register and receiver in rejecting his final proof for lots 1 and 2 and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 2, T. 104 N., R. 71 W., Chamberlain, South Dakota.

He filed his declaratory statement April 9, 1890, and said proof was submitted May 24th of that year.

The proof shows that he settled on the land February 28, 1885, and that he has continuously occupied the same, with his family, since that date, having improvements valued at \$1,000. You rejected his proof, because prematurely made.

This appeal presents the following grounds of error :

1. Erroneous construction of section 23 of the act of Congress, approved March 2, 1889.
2. Because it ignores section 2263 of the Revised Statutes of the United States, and the land laws of the United States, which are referred to in said section 23.
3. Because it requires this claimant to reside upon his land ten years from the date he made legal settlement thereon.

This appeal involves the construction of section 23 of the act of March 2, 1889 (25 Stat., 888), which is as follows :

That all persons who, between the twenty-seventh day of February, eighteen hundred and eighty-five, and the seventeenth day of April, eighteen hundred and eighty-five, in good faith, entered upon or made settlements with intent to enter the same

under the homestead or pre-emption laws of the United States upon any part of the Great Sioux reservation lying east of the Missouri River, and known as the Crow Creek and Winnebago reservation, which, by the President's proclamation of date February twenty-seventh, eighteen hundred and eighty-five, was declared to be open to settlement, and not included in the new reservation established by section six of this act, and who, being otherwise legally entitled to make such entries, located or attempted to locate thereon homestead, pre-emption, or town site claims, by actual settlement and improvement of any portion of such lands, shall, for a period of ninety days after the proclamation of the President required to be made by this act, have a right to re-enter upon said claims and procure title thereto under the homestead or pre-emption laws of the United States, and complete the same as required therein, and their said claims shall, for such time, have a preference over later entries; and when they shall have in other respects shown themselves entitled and shall have complied with the law regulating such entries, and, as to homesteads, with the special provisions of this act, they shall be entitled to have said lands, and patents therefor shall be issued as in like cases: *Provided*, That pre-emption claimants shall reside on their lands the same length of time before procuring title as homestead claimants under this act. The price to be paid for town-site entries shall be such as is required by law in other cases, and shall be paid into the general fund provided for by this act.

It will be noticed that claimant settled upon the land February 28, 1885, the day after the land was opened for settlement, by proclamation of the President. His settlement was therefore made at a time when he had a legal right to make it.

By proclamation of April 17, 1885, the reservation again attached, and so continued, until after the passage of the act of March 2, 1889 (*supra*).

Mere occupancy and improvement of the public lands, with a view to pre-emption, do not confer upon the settlers any right in the land so occupied as *against the United States*, or impair in any respect the power of Congress to dispose of the land in any way it may deem proper. *Frisbie v. Whitney*, 9 Wall., 187. And the land so settled upon and occupied, before entry thereof, may be set apart and reserved by the President. 1 L. D., 33.

Although claimant's settlement, as made, upon February 28, 1885, was authorized, yet, after the reservation of April 17, 1885, he was no longer entitled to the possession of the land, and by retaining possession thereof he became a trespasser and was subject to removal. *Rees v. Churchill*, 1 L. D., 450.

The purpose of the act above quoted was to give a preference right for ninety days to all persons who, in good faith, had made settlement between February 27, 1885, and April 17, 1885, on a part of the Sioux Reservation, therein described, with intent to enter the same under the homestead or pre-emption laws, and who located or attempted to locate claims thereon "to re-enter upon said claims and procure title thereto under the homestead or pre-emption laws of the United States, and complete the same as required therein." This section also requires pre-emption claimants to reside on their lands the same length of time as homestead claimants.

The clause "shall have a right to re-enter upon said claims" presupposes what the proclamation of April 17, 1885, intended—namely: that such settlers had vacated the lands.

The proviso to said section—viz: "That pre-emption claimants shall reside on their lands the same length of time before procuring title as homestead claimants under this act"—contemplates residence *in futuro*, except that the term "complete," in the body of the section, may be construed to mean that the future residence there required, when added to the period of residence between February 27, 1885, and April 17, of that year, shall be at least five years.

The statute does not require a residence of ten years; but claimant's residence, after April 17, 1885, and before the President's proclamation, made in pursuance of the act of March 2, 1889 (*supra*), although not interfered with, was a trespass, and he is therefore not entitled to claim that the same was made in pursuance of law.

Finding no error in the decision appealed from, the same is affirmed.

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PRACTICE—DEPOSIT—SECURITY FOR COSTS.

AMASA D. KITTELL.

On the filing of a contest the local office may properly require the deposit of a reasonable sum as security for costs.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 5, 1891.*

I am in receipt of your letter of November 29, 1890, transmitting the appeal of Amasa D. Kittell from your decision of September 3, 1890, affirming the action of the local officers in rejecting his application to contest the timber-culture entry of Jerome M. Guisinger for the NE.  $\frac{1}{4}$  of Sec. 8, T. 1 N., R. 65 W., Denver, Colorado, land district.

It appears that when the affidavit of contest was presented at the office at Denver, the local officers demanded a deposit of \$5.00 on costs.

The grounds of appeal are:

1st. Error in holding that a fee of \$5 is required to be paid in at the time of the filing of an affidavit of contest.

2nd. Error in holding that there is any law or authority to collect a fee other than the fee required to be paid for the taking of testimony.

Circular "A" of May 14, 1890, directed to registers and receivers of United States land offices, fixed the rates of fees for taking testimony, issuing notices, making docket entries, etc., and it said, "and with each contest you will require a deposit of a sufficient amount, as security for the payment, when duly ascertained and payable, of the fees authorized by law to be collected therein."

The circular provided for the return of the deposit in certain cases, or any excess of the amount deposited over the fees authorized by law.

The five dollars demanded in the case at bar was not a "fee of \$5.00," to be paid as a fee or charge, but a mere deposit as security for costs, and the amount required was not unreasonable. Not having been deposited the officers did right in rejecting the application to contest the entry.

Your decision is affirmed.

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RIGHT OF WAY—RESERVOIR SITE—UNSURVEYED LAND.

SANTA CRUZ WATER STORAGE COMPANY.

The act of March 3, 1891, does not authorize the approval of maps showing the location of canals, ditches or reservoirs on unsurveyed land.

*Secretary Noble to the Commissioner of the General Land Office October 3, 1891.*

On the 25th day of July, 1891, the Department referred to your office for consideration, a letter from C. H. Fitzgerald of Tucson, Arizona, transmitting articles of incorporation and map of the Santa Cruz Water Storage Company, filed under the act of March 3, 1891 (26 Stat., 1095).

Your office found that said papers were not drawn in conformity to the rules and regulations and returned the same for correction.

By letter of September 7, 1891, you state that the papers have been refiled and you submit them and recommend that said papers and diagram be received and placed on file.

The papers submitted by you consist of the articles and amended articles of incorporation of said company; a copy of the territorial law under which the company was organized, certified to by the secretary of the Territory, by E. B. Kirkland, assistant secretary; the affidavit of the chief engineer who made the survey for the company; a certificate of the president of the company, that the person who subscribed the affidavit was duly authorized to make the survey; a list of the officers, signed by the president under the corporate seal of the company; an official statement under the seal of the company signed by the secretary, that the organization of the company has been completed, and that it is authorized to proceed with the construction of its work; and a diagram showing a site selected for reservoir purposes. The diagram shows that the land required for a reservoir site is situated in the E.  $\frac{1}{2}$  of Sec. 36, T. 23 S., R. 14 E., unsurveyed, and Sec. 31, and the W.  $\frac{1}{2}$  of Sec. 32, T. 23 S., R. 15 E., and the NE.  $\frac{1}{4}$ , Sec. 1, T. 24 S., R. 14 E., and sections 6 and 7, and the W.  $\frac{1}{2}$  Sec. 5, and the N.  $\frac{1}{2}$ , Sec. 18, T. 24 S., R. 15 E., all unsurveyed land, Gila and Salt River Meridian, Pima county, Arizona.

It appears that the greater portion of the reservoir is located on the Calabasas and Buena Vista grants. The map, or diagram, and papers are filed under the provisions of sections 18 to 21, inclusive, of the act of March 3, 1891 (26 Stat., 1095), relating to the right of way through

the public lands. These sections are similar in their provisions to the act of March 3, 1875 (18 Stat., 482).

Section 19 of the act of 1891 provides:

That any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

This section contains the only provisions authorizing the approval, by the Secretary of the Interior, of the maps of such companies as may desire the benefits of sections 18 to 21 of the act. The authority thus given only extends to cases where the canal, ditch, or reservoir, is located upon surveyed lands. In other words, I find no authority for approving maps located upon unsurveyed lands.

The map and papers submitted are, accordingly, herewith returned without my approval.

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SUSPENDED SURVEY—ACT OF MARCH 3, 1891.

ADOLPHUS HARMON.

The act of March 3, 1891, provides for the survey of heavily timbered and mountainous land, and for the examination of public surveys in order to test the accuracy of the work in the field, and to prevent payment for fraudulent and imperfect surveys.

*Secretary Noble to the Commissioner of the General Land Office, December 7, 1891.*

On October 28, 1891, the Department dismissed the appeal of Adolphus Harmon from the decision of your office, refusing to pass upon his application for confirmation under the act of March 3, 1891, (26 Stat., 1095) on his pre-emption entry for the W  $\frac{1}{2}$  SW  $\frac{1}{4}$  NE  $\frac{1}{4}$  SW  $\frac{1}{4}$  and SE  $\frac{1}{4}$  NW  $\frac{1}{4}$  Sec. 1, T. 11 N., R. 1 E., Humboldt, Cal., (13 L. D., 462).

You had refused to pass this land to patent because the plat of the township in which it is found had been suspended in 1886 on account of an incorrect and alleged fraudulent survey, and said suspension had not been removed.

In dismissing the appeal the Department instructed you "to proceed without delay to investigate the charges made against the correctness of said survey, with a view to determine whether it should be approved, or a re-survey ordered."

I am now in receipt of your letter of November 11, 1891, stating that owing . . . . to the express terms of the appropriation acts since October 2, 1888, which provide that the surveys shall be confined to lands adapted to agriculture and lines of reservations, and the fact, as shown by the field notes of the examination made by the special agent, that the lands are valuable for timber, no action has been taken in the matter of authorizing the resurveys, in view of the lack of appropriation.

It is also stated therein that—

applications for the resurvey of a number of suspended townships situate north and east of the Humboldt Meridian, California, wherein the lands are admitted to be valuable chiefly for timber and not adapted to agriculture, have been pending in this office for several months, and no decisive action taken thereon owing to the lack of appropriation as stated.

In conclusion you state that

Being of the opinion that under existing law the resurvey of township 11 north, range 1 east, H. M. California, cannot now be authorized for stated reasons, further instructions relative to directions contained in departmental letter of October 28, 1891, are requested.

In answer to your communication I have to state that the appropriation act of March 3, 1891, (26 Stat., 908-971) seems to have provided means for use of your office to have surveys made of lands heavily timbered and mountainous, and also a certain sum of money was expressly provided to be expended for the examination of public surveys in the several surveying districts in order to test the accuracy of work in the field, and to prevent payment for fraudulent and imperfect surveys returned by deputy surveyors, and for examinations of surveys heretofore made and reported to be defective or fraudulent.

That section of the appropriation act providing for surveying the public lands is as follows:

For surveys and resurveys of public lands, four hundred thousand dollars, at rates not exceeding nine dollars per linear mile for standard and meander lines, seven dollars for township, and five dollars for section lines: *Provided*, That in expending this appropriation preference shall be given in favor of surveying townships occupied, in whole or in part, by actual settlers and of lands granted to the States by the act approved February twenty-second, eighteen hundred and eighty-nine, and the acts approved July third and July tenth, eighteen hundred and ninety, and other surveys shall be confined to lands adapted to agriculture and lines of reservations, except that the Commissioner of the General Land Office may allow, for the survey of lands heavily timbered, mountainous, or covered with dense undergrowth, rates not exceeding thirteen dollars per linear mile for standard and meander lines, eleven dollars for township, and seven dollars for section lines, and if in cases of exceptional difficulties in the surveys, the work can not be contracted for at these rates, compensation for surveys and resurveys may be made by the said Commissioner with the approval of the Secretary of the Interior, at rates not exceeding eighteen dollars per linear mile for standard and meander lines, fifteen dollars for township, and twelve dollars for section lines: *Provided* further, That in the States of Washington and Oregon there may be allowed, with the approval of the Secretary of the Interior, for the survey of lands heavily timbered, mountainous, or covered with dense undergrowth, rates not exceeding twenty-five dollars per linear mile for standard and meander lines, twenty-three dollars for township, and twenty dol-

lars for section lines; and said rates, in contracts hereafter made, shall apply to the unexpended balances assigned to said States of the appropriation for the current fiscal year. And of the sum hereby appropriated, not exceeding forty thousand dollars may be expended for the examination of public surveys in the several surveying districts in order to test the accuracy of work in the field, and to prevent payment for fraudulent and imperfect surveys returned by deputy surveyors and for examinations of surveys heretofore made and reported to be defective or fraudulent; and inspecting mineral deposits, coal fields, and timber districts, and for making such other surveys or examinations as may be required for identification of lands for purposes of evidence in any suit or proceeding in behalf of the United States, and out of the sum herein appropriated for surveying the public lands the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, may assign a sum sufficient to complete the survey of the Public Land Strip—otherwise known as No Man's Land—and the boundary line between said Public Land Strip and Texas, and between Texas and New Mexico, established under act of June fifth, eighteen hundred and fifty-eight, is hereby confirmed.

If in your judgment sufficient evidence is at hand upon which you can decide that the survey of township eleven, now suspended, is incorrect, and that the field work is inaccurate, you will proceed without delay to have a resurvey thereof made if the appropriation therefor has not been exhausted. But if sufficient data is not at hand you will, as directed by departmental letter of October 28, 1891, proceed to investigate the charges made against the correctness of said survey, with a view to determine whether it should be removed from suspension and approved, or a resurvey ordered.

The instructions given in reference to township eleven are also applicable to all other townships, the surveys of which are under suspension in your office.

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EVIDENCE—FINAL PROOF—PRE-EMPTION.

FOLTZ *v.* SOLIDAY.

Final proof can not be considered as part of the testimony in a case arising under a protest against the acceptance of said proof.

In the absence of due compliance with the requirements of the pre-emption law, the right of purchase thereunder is defeated by an intervening adverse right.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 7, 1891.*

The appeal of Frederick A. Soliday from your decision of June 7, 1890, in the case of John Foltz *v.* Frederick A. Soliday, involving the validity of the latter's pre-emption claim for the SW.  $\frac{1}{4}$ , Sec. 14, T. 11 S., R. 20 W., WaKeeney land district, Kansas, has been considered.

The record in this case shows that Soliday filed a pre-emption declaratory statement for the above land July 23, 1885, alleging settlement on the 20th day of that month, and on March 2, 1886, John Foltz made homestead entry covering the same tract.

September 25, 1886, the pre-emptor, Soliday, made proof before the local office and at the same time appeared John Foltz, the homesteader

and entered protest against the allowance of said proof, and as both parties were present they proceeded at once to a trial of the case. Under date of April 16, 1887, the district officers decided in favor of the protestant, and the pre-emption proof was therefore rejected. Soliday appealed and under date of June 7, 1890, you affirmed the judgment below, whereupon Soliday again appealed.

It appears from the report of the register in transmitting this case to your office, that by some means the pre-emption proof of Soliday and the protest of Foltz have been lost and could not be found. In passing upon the appeal of Soliday you decided, that as all parties were present, sworn and examined and cross-examined, touching the matters in dispute, at the time of the hearing, that the case should be decided on its merits.

In appealing from your decision the appellant assigns the following errors:

1st, To consider and adjudicate appellant's claim to said land without considering his final proof testimony and other evidence submitted with said proof in support of his claim.

2nd, That appellant should not suffer on account of the mistakes or carelessness of the local officers in losing his final proof.

3rd, To hold said pre-emption declaratory statement for cancellation in the absence of positive and conclusive evidence of bad faith, and non-compliance with law during the lifetime of said filing.

The final proof made by the appellant, alleged to have been lost, was in the nature of "*ex parte*" affidavits, and in my opinion could not be considered as a part of the testimony in the contest, therefore the fact that it is now missing from the record does not affect the result in this case; furthermore the testimony submitted was taken at the time said proof was presented when all the parties in interest with their witnesses were present, and sworn, examined and cross-examined in relation to the question at issue, and the local officers with a full knowledge of the character of said proof decided against the pre-emptor upon the testimony submitted in the contest.

This view of the matter disposes of the first, and second assignments of error, and leaves for consideration the question of settlement and cultivation.

The record shows that Soliday, at the time he made filing for the land in question and up to the date of contest, was employed by Pruyne and Johnson, who owned a large sheep ranch near the said tract; that he made some few repairs in the house, part dugout and part stone, that was on the land when he made his filing; that he occupied it while herding sheep in that vicinity the firm furnishing his provisions; that he had a few articles of furniture therein and after the flock of sheep were removed to other pasturage, he returned to his claim occasionally, three or four times a month, and slept in the house at night.

It appears that this constituted about all the acts of settlement performed by him prior to the entry of Foltz for the same land, but subse-

quently he put a window in the house, plowed some ten acres of old land and sowed some rye and cane seed besides breaking about one and a half acres, at the same time he continued his visits to the land but spent more of his time on the claim than he had theretofore.

The good faith of Foltz is shown from the fact that he went on the land April 23, 1886, only for a few days after his entry was made, built himself a comfortable frame house, broke some twelve acres of land, planted the same in corn and has made actual and continued residence thereon ever since.

From the fact that Soliday made a filing for the land while he was in the employ of Pruyne and Johnson, using the land for grazing sheep belonging to said firm, and also failing to establish a permanent residence thereon or make any valuable improvements until after the land had been entered by Foltz, and in view of all the facts and circumstances as developed by the evidence, I am satisfied that Foltz has proven his better right to the land in controversy.

Your decision is therefore affirmed.

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RAILROAD WITHDRAWAL—DESERT ENTRY—HOMESTEAD—TOWNSITE.

BOND'S HEIRS ET AL. v. DEMING TOWNSITE.

An order of the Land Department withdrawing lands from "pre-emption or homestead entry or sale" for the benefit of the Texas Pacific grant effectually precludes appropriation of such lands under the desert land law, though entries thereunder are not specified in the excepting clause of the grant, nor in the order of withdrawal.

The withdrawal thus made reserved the land covered thereby from disposal, even though it was not finally disposed of as contemplated in the grant, but restored to the public domain by a subsequent act of Congress.

An entry can not be confirmed under the act of June 22, 1874, if it has not been relieved from conflict with the railroad grant in the manner prescribed by said act.

A desert land entry is not within the confirmatory provisions of section 3, act of April 21, 1876.

A pre-emption claim can not be legally maintained by one who is using the land for the purposes of trade only.

Land occupied for the purposes of trade and business is not subject to soldiers' additional homestead entry.

An application under section 21, act of March 3, 1871, to purchase land for station purposes, unacted upon at the time of the forfeiture of the grant made by said act, can not be allowed.

Public land settled upon and occupied as a townsite should be entered under the townsite laws for the proper protection of all interests concerned.

*Secretary Noble to the Commissioner of the General Land Office, December 8, 1891.*

The S.  $\frac{1}{2}$  of Sec. 27, T. 23 S., R. 9 W., Las Cruces, New Mexico, is within the limits of the grant to the Texas Pacific Railroad Company, made by act of Congress approved March 3, 1871 (16 Stat., 573).

The map of general route provided for in section twelve of said act was filed in September, 1871, and on December 4, 1871, the withdrawal provided for by the act took effect.

The township plat of survey was filed in the local office October 12, 1881.

On March 22, 1881, William Bond filed a desert land declaratory statement for a tract of unsurveyed land, which upon adjustment to the lines of the government survey, was found to embrace the S.  $\frac{1}{2}$  of Sec. 27, T. 23 S., R. 9 W., the tract in dispute.

By act of Congress approved February 23, 1885, the grant to the Texas Pacific Railroad Company was declared forfeited and the lands withdrawn were restored to entry. Upon said restoration H. H. Kidder filed a pre-emption declaratory statement for the E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of said section 27, alleging settlement December 22, 1882, and the following soldiers' additional homestead entries were made, No. 885 (F. C., 825), Carrel Dobbins for SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ ; No. 886 (F. C., 326) Andrew Knudson for S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  and NW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ .

No. 887 (F. C., 327) Oscar Jons for NE.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$ , of SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , all in said section 27.

The Grant County Townsite Company filed an application for forty-eight and sixty-three hundredths acres of said land, as an amendment to lands previously applied for.

In view of these conflicting claims, your office, on December 10, 1885, ordered a hearing in the case. After the hearing, at which all parties appeared and submitted evidence, the local officers rendered a decision on April 27, 1887, rejecting the claims of Bond, Kidder, and the Grant County Townsite Company, and in favor of the additional homestead claimants.

Appeals were taken by the other parties in interest. After said appeals had been filed, the probate judge of Grant county upon the petition of the settlers who are occupying the land for town and business purposes, applied on May 28, 1890, to enter all the land in question as the townsite of Deming in trust for the several use and benefit of the occupants thereof according to their respective interests. Your office, by decision of December 8, 1890, rejected the claims of Bond, Kidder, and the additional homestead claimants, and held that the applications of the probate judge of Grant county should be allowed.

Appeals have been taken by the heirs of William Bond, deceased, Kidder, and the additional homestead claimants.

The first claim to be considered is that of the heirs of William Bond, deceased.

Section twelve of the act of March 3, 1871, making a grant to the Texas Pacific Railroad Company, provided that upon filing a map of general route to the road, the Secretary of the Interior, should cause the lands within forty miles on each side of said route within the Territory "to be withdrawn from pre-emption, private entry, and sale."

This order was issued by the Land Department and took effect December 4, 1871. The order of withdrawal followed the words of the statute. The local officers were instructed "to withdraw from pre-emption or homestead entry or sale, all the odd numbered sections of land falling within its limits." The tract in controversy was within the limits of this withdrawal.

It is contended that this land was not withdrawn from desert land entry, for the reason, that entries of that character, were not specified in the granting act, or in the order of withdrawal. The claim of Bond was initiated under the act of March 3, 1877 (19 Stats., 377), which is entitled "An act to provide for the sale of desert lands in certain states and territories." This act provided for the disposal of a certain portion of the public domain by sale, instead of by settlement, as provided by the homestead and pre-emption laws. The entries possess none of the characteristics of settlement entries, as to residence and settlement, and all the acts of improvement may be done by an agent, instead of by the claimant in person. Congress has been careful to note the marked distinction which exists between claims initiated under the settlement laws and those initiated under the laws providing for the sale of the public domain. Thus in the act providing for the sale of desert land six hundred and forty acres may be purchased by one party, and under "An act for the sale of timber lands," an association of persons may purchase, not to exceed one hundred and sixty acres, and neither act contains any of those provisions contained in the acts under which homes are obtained upon the public domain.

We thus find that not only under the plain intent and spirit of the granting act, but under its letter, and under the intent and letter of the order of withdrawal, the land was withdrawn and was not subject to appropriation by Bond under the desert land act.

The supreme court held in the case of *Wolsey v. Chapman* (101 U. S., 755), "that a withdrawal of land from private entry will defeat a settlement for the purpose of pre-emption while the order was in force, notwithstanding it was afterwards found that the law, by reason of which this action was taken, did not contemplate such a withdrawal."

The withdrawal, made in accordance with the provisions of the act of March 3, 1871, reserved the land from disposal, even though it was not finally disposed of as contemplated by said act, but was restored to the mass of the public domain by a subsequent act, and no claim by Bond could be initiated to said land.

It is contended that the entry of Bond is confirmed by the act of June 22, 1874 (18 Stat., 194), which provides:

That in the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the pre-emption or homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands

so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted.

The entry of Bond possesses none of the elements necessary to a confirmation under this act. It was not made under the provisions of either of the laws specified in the act, but if we should admit that the act might be construed to embrace desert land entries, in the present instance there has never been any decision as to the time the right of the railroad company attached to this tract of land, and it may be a question if the right of the company ever attached to the same, as the company never filed a map of definite location of its road by which the tracts granted might be identified, neither has the company ever relinquished its claim to said land or selected other land in lieu thereof, and the entry has not been relieved from conflict in the manner prescribed by the statute.

It is true that the act is a remedial one, and should have a liberal construction, but an entry must, at least possess some of the requisites prescribed by the statute in order to come within its terms, and these the entry in question, as before stated, fails to possess.

Again, it is alleged, that the entry of Bond is confirmed under the third section of the act of April 21, 1876 (19 Stat., 35). The first section of said act provides :

That all pre-emption and homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which such lands are situated, or after their restoration to market by order of the General Land-Office, and where the pre-emption and homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto.

The third section 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 claim to a patent therefor.

Counsel contend that desert land entries should be embraced in the provisions of this statute. But I have grave doubt as to the correctness of this contention. The intent and spirit of the act, as well as its words, seem to be too clear to admit of doubt as to the intention of Congress. The intention was to protect settlement claims. The equities which attach to those who are seeking homes on the public domain, do not attach to those who are seeking merely to purchase land; in the one

case the home of the actual settler is to be protected, in the other instance, from the very nature of the case, the claim seeking protection is one which was initiated by purchase and not by settlement, and under the ruling of the Department, claims of this character are not confirmed by the act in question. *McClure v. Northern Pacific Railroad Company* (9 L. D., 155); *Offutt v. Northern Pacific Railroad Company* (9 L. D., 407).

The entry of Bond was not made prior to the date of the receipt of notice of withdrawal at the local land office. It was not made after the expiration of the grant, and it was made in direct violation of the rules and instructions of the land department, issued in 1871, when the land was withdrawn from sale, and those issued on April 8, 1880, when the local officers were instructed that lands withdrawn for the Texas Pacific grant were not subject to disposal by the Government, whether desert or not.

Believing the entry of Bond to be illegal for the reason given, I do not deem it necessary to discuss the question of his good or bad faith in making said entry.

So far as the claim of H. H. Kidder is concerned, the evidence shows that he ceased to reside upon said land long prior to the date of its restoration to market, and that he is using the same for the purpose of trade only, hence his filing is illegal and his claim under the pre-emption law is also illegal.

At the time the soldiers' additional homestead entries were allowed the land in question was occupied for the purpose of trade and business and not for agriculture, hence it was not subject to entry under the homestead law, and said entries are invalid.

The Rio Grande Mexico and Pacific Railroad Company in the fall of 1882, applied to purchase forty acres for station purposes under section twenty one of the act of March 3, 1871. This application has never been granted by the land department. If, at the time the application was presented, any reason existed why it should be granted, it has now ceased to exist. By act of February 28, 1885, the land granted by act of March 3, 1871, was restored to the mass of the public domain, and none of the conditions which existed after the date of the passage of the granting act and prior to the date of the forfeiture act, are now in force, and in my opinion, to allow the application would be in violation of the plain intent and spirit of the act, if not of its letter.

Counsel for the heirs of Bond and for Kidder contend that your decision allowing the land to be entered under the townsite law, was erroneous, as the parties to the townsite application were not parties to the original hearing in 1886, and it is contended that the only action that could be taken upon the evidence filed by them was to order a new hearing in the case.

Under conditions which usually arise in contested cases, this position would be correctly taken. In the case under consideration however,

the evidence taken at the hearing, is sufficient to determine the rights of all the parties claiming adversely to the townsite applicants.

For the reasons heretofore stated, the claims of Bond, Kidder the homestead entryman, and the railroad company, must be rejected, and the question is one between the townsite claimants and the government.

The evidence shows that upon the land in dispute, improvements, aggregating in value hundreds of thousands of dollars, are located, most of these no doubt belong to the railroad companies, although other parties own improvements of greater or less value. The tract is not subject to entry under the agricultural laws, but is settled upon and occupied as a townsite. Under section 2387 Revised Statutes, the right of all these parties may be protected by entering the land as townsite, and I know of no other way in which they can be protected. After a careful consideration of the whole case, I am of the opinion, that your decision is in accordance with the law, and with the facts, and the same is affirmed.

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TIMBER CULTURE CONTEST—NOTICE OF CANCELLATION—APPLICATION TO ENTER.

SMITH *v.* FITTS.

A successful contestant who fails to exercise his preferred right within the statutory period will not be heard, in the presence of an intervening entry, to plead that notice of cancellation was not received by him, where such notice is sent to the address as given by his attorney.

Under the circular regulations of August 18, 1887, the application to enter filed with a contest, stands rejected without further action on the part of the local office, if the contestant fails to exercise his preferred right of entry within thirty days from notice of cancellation.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 12, 1891.*

This appeal is filed by Henry B. Smith, complaining of your decision of February 17, 1890, sustaining the action of the local office in rejecting his application to make timber culture entry of the NW.  $\frac{1}{4}$  of Sec. 35, T. 17 S., R. 31 W., Wa Keeney, Kansas, alleging the following specific grounds of error:

First: Error in holding that the successful contest of appellant against the prior timber culture entryman and the filing of his application to enter at the time of instituting contest as provided by the 3rd section of the timber culture act of June 14, 1878, did not vest such a right and constitute appellant such an adverse claimant to the land as to bar entry by a third party in the absence of notice and the forfeiture of appellant's right to the land by due process of law.

Second. Error in holding that appellant was not entitled to thirty days within which to make entry after receiving notice of the cancellation of the prior entry, and in holding that the cases cited in the appeal from the local office are not applicable to this case.

The following facts are shown by the record :

The tract in controversy was formerly covered by the timber culture entry of Amos L. Witter, against which a contest was filed by Henry B. Smith, September 29, 1885, who, at the same time, filed his application to make timber culture entry of the tract.

On August 25, 1887, your office canceled the entry of Witter upon the contest of Smith, returned the application filed by Smith to make timber culture entry of the tract, and instructed the local officers to notify him of his preference right of entry.

In compliance with said instructions, the register, on September 6, 1887, sent the following notice, by registered letter, addressed to Henry B. Smith, Dighton, Kansas :

You are hereby notified that timber culture entry No. 3480 by Amos J. Witter, for the NW.  $\frac{1}{4}$  of Sec. 35, in T. 17 S., R. 31 W., of the 6th Principal Meridian, was cancelled on the records of this office at 9 o'clock, A. M., this day on evidence of abandonment.

Under the provisions of the act of Congress approved May 14th, 1880, you—as contestant in said case—will be allowed thirty days from the receipt of this notice within which to make entry for the tract of land above described.

This letter was returned to the local office uncalled for, and on October 31, 1887, Angeline O. Fitts was allowed to make timber culture entry of the tract.

December 18, 1888, Smith presented to the local office another application to enter said tract under the timber culture law, which was rejected because said tract was covered by timber culture entry of Angeline Fitts.

From this action, Smith appealed to this office, alleging that he had never received notice of the cancellation of the entry of Witter, until the latter part of November, 1888; that when he filed the contest and application to enter, he gave to his attorneys his correct post-office address, which is Fellsburg, Edwards county, Kansas, but, being unable to read or write, he is unable to know whether or not his correct address was endorsed on the papers.

You affirmed the decision of the local officers, and held that Smith was duly notified of the cancellation of the entry of Witter and of his preference right of entry by registered letter, addressed to him at Dighton, Kansas, the post-office address given on his contest papers, and having failed to exercise his preference right of entry within the time allowed by law, he

should not be allowed to plead the carelessness of his agents in preparing the papers and his own indifference in waiting fifteen months before making any effort or inquiry to ascertain his rights, to prejudice the rights, or to defeat the claim of Fitts, who made her entry in good faith upon land which the records of the office showed to be open for entry.

The appeal of Smith from this decision presents two questions :

(1) Whether Smith is chargeable with having received notice of the cancellation of Witter's entry by the letter addressed to Dighton, Kan-

sas, the post-office address given by his counsel on his contest papers; and

(2) Whether the filing of his application to enter at the time of instituting his contest vested in him such a right as an adverse claimant to the land as to bar an entry by a third party, until such application has been formally rejected, and the applicant notified thereof, although he failed to perfect his application within thirty days after notice of the cancellation of the contested entry.

If Smith had not received notice of the cancellation of the Witter entry, and if the failure to receive such notice was not due to his own fault or negligence, the entry of Fitts would be subject to his right of entry, because the statute gives the contestant a preference right of entry for thirty days after notice of the cancellation of the contested entry, and this right can not be defeated by the allowance of another entry, although made in good faith upon land which the records of the land office showed to be open for entry.

But I am of the opinion that Smith was properly chargeable with notice of the cancellation of the entry of Witter by the letter addressed to him at Dighton, Kansas, although he did not receive it, and although the mistake in giving the wrong address was due to the negligence of his attorney, unless it be shown that the attorneys practiced a fraud upon him in giving a different address upon the entry papers from that given to them. The client is chargeable with all acts resulting from the mere negligence of the attorneys, and such acts can not be relieved against when it will interfere with or impair the rights of innocent third parties. In this case the entry of Mrs. Fitts was allowed after the expiration of the thirty days in which Smith was entitled to exercise his preference right, and had been in existence fifteen months before he applied to perfect his entry. Her entry was made in good faith upon land subject to entry, as shown by the records of the land office, without notice of any defect of service upon Smith, and he will not be permitted to plead failure of notice due solely to the negligence of his attorneys. *John P. Drake*, 11 L. D., 574.

But, independently of this, Smith claims the prior right to make entry of the land by virtue of the application filed with his contest, which he contends vested in him such rights and constituted such an adverse claim to the land as to bar the entry of a third person, in the absence of forfeiture of his right to the land by due process of law. His claim is substantially that the application to enter, which was pending at the date of the cancellation of Witter's entry, was equivalent to actual entry and had the effect to withdraw the land from other disposition until it was finally acted upon, basing it upon the doctrine announced in *Pfaff v. Williams*, 4 L. D., 455, that

a legal application to enter is, while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and its effect is to withdraw the land embraced therein from any other disposition until such time as it may be finally acted upon.

On August 18, 1887, after the decision of *Pfaff v. Williams*, *supra*, was rendered, the following circular to registers and receivers was issued by the General Land Office:

In view of the decision of the Hon. Secretary of the Interior, in the case of *Pfaff v. Williams*, 4 L. D., 455, wherein it is held that a legal application to enter is, while pending, equivalent to actual entry, so far as the applicant's rights are concerned, and withdraws the land embraced therein from any other disposition, until final action thereon, I have to direct, in all cases where applications to enter (filed by contestants upon initiation of contest) are returned, upon the cancellation of the entry contested, that the contestant be notified of the cancellation of the entry, and advised that he will be allowed thirty days within which to enter the tract upon the application filed, upon his showing his present qualifications, and in the event of his failure so to do, his application will stand rejected without further action upon your part, and the tract held subject to entry by the first legal applicant.

It appears that this was the practice in force at the date of the cancellation of Witter's entry, and Smith was accordingly notified that he would be allowed thirty days within which to make entry of the land, and upon his failure to make entry his application stood rejected, without further action on the part of the local officers, and the land became subject to entry by the next legal applicant.

When the decision of September 2, 1891, was rendered, the attention of the Department was not called to the unpublished circular of August 18, 1887, which had never been before the Department for action, and, as the application of Smith under said circular had been disposed of in accordance therewith, when the entry of Fitts was allowed, your decision rejecting the application of Henry B. Smith was therefore proper.

The decision of September 2, 1891, which was recalled by letter of September 23, 1891, is hereby revoked and set aside, and your decision of February 17, 1890, rejecting the application of Henry B. Smith is affirmed.

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CERTIORARI—NOTICE—APPEAL—CONFIRMATION—SCRIP.

CYR ET AL. *v.* FOGARTY.

Under the established departmental procedure, notice of an application for certiorari should be served upon the opposite party, though the Rules of Practice do not in express terms provide therefor.

The right of appeal will not be accorded to one who is not a party in interest.

The forfeiture act of March 2, 1889, does not confirm entries of land included within the actual adverse occupation of a bona fide pre-emptor on May 1, 1888.

A location of Sioux half breed scrip by one acting in his own interest, and not for the benefit of the half breed, is in violation of the law under which the scrip issued.

*Secretary Noble to the Commissioner of the General Land Office, December 15, 1891.*

Louis D. Cyr and Eliza Blake have each severally applied to this Department for an order directing you to certify to this Department the proceedings in the separate cases of Louis D. Cyr and Eliza Blake

against Patrick D. Fogarty, involving the rights and interests of the said several parties in and to the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 1, T. 42 N., R. 35 W., Marquette, Michigan.

This land is within the original grant of June 3, 1856 (11 Stat., 21), in aid of the Marquette and State Line Railroad, which was afterwards surrendered under a joint resolution of Congress, July 5, 1862 (12 Stat., 620), authorizing a change of route for said road.

After such surrender—to wit: on June 22, 1878—Cyr was allowed by the local officers to locate said land, together with the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of the same section under supreme court scrip No. “0” 37.

November 11, 1884, Fogarty applied to file his pre-emption declaratory statement for the same land and his application was refused by the local officers, because the land had been segregated by Cyr’s location aforesaid.

Fogarty appealed from the rejection of his application, and, pending said appeal, to wit: on October 18, 1887, Eliza Blake, through an attorney in fact, applied to locate the same with Sioux half-breed scrip No. 416 A, and her application was also denied, for the same reason (Cyr’s location). Blake also appealed.

May 29, 1890, this Department in passing upon the several appeals of Fogarty and Blake, held that Cyr’s location was improperly allowed, because, as held in the case of *Wakefield v. Cutter et al.*, 6 L. D., 451, this surrendered land could only be located by supreme court scrip, after it had been re-offered for public sale, which had not been done since its surrender by the railroad, and directed the cancellation of Cyr’s location, and allowed the application of Blake to locate the same subject to Fogarty’s superior right, acquired by his application to file for the land, November 17, 1884. (See said decision, 10 L. D., 616.)

In pursuance of said decision, the applications of Fogarty and Blake were admitted to record, and on October 7, 1890, Fogarty offered to submit final pre-emption proof, at which time Cyr appeared, attended by counsel, and protested against the acceptance of Fogarty’s proof, “on the ground (as appears from copy of the Commissioner’s letter) that he (Cyr) is the original entryman of the land in question, having entered the same June 22, 1878, with supreme court scrip No. “0” 37, and entitled to the property.” He also alleged that Fogarty had not made a valid pre-emption filing and settlement, that there was a well-defined “iron location” on the land of great value, and that the land was therefore not subject to pre-emption filing, and that his filing was not made in good faith, but for the purpose of speculation. Blake also protested against the allowance of Fogarty’s proof, for similar reasons.

The local officers refused to consider the rights or claim of Cyr to the land, because the matter of his location had been finally determined against him by the decision of the Secretary in the case of *Cyr et al. v. Fogarty*, 10 L. D. 616.

They also found that Blake had sold her Sioux half-breed scrip to

Cyr, who was the real party in interest; that the act of Congress authorizing the issue of said scrip provided that no transfer or conveyance of said scrip should be valid, and that therefore it could not be located by a purchaser. They therefore recommended the cancellation of the location made in the name of Eliza Blake, and approved the proof of Fogarty.

Blake and Cyr separately appealed from the action of the local officers, Cyr alleging as error the approval of Fogarty's proof—

1. Because said Louis D. Cyr, on June 22, 1878, entered said land with supreme court scrip No. 037, and the decision of the Secretary, in the case of Cyr et al. v. Fogarty, on account of which you excluded the rights of Cyr from consideration in this case, was based upon the law as laid down by the Department previous to the act of March 2, 1889; the Department did not take into consideration said act as was done in the case of Brady v. Ross, where it ruled that under the 3d section a contest should be had to determine who was entitled to the land, the cash entryman or the pre-emption claimant.

2. Because, under said act of March 2, 1889, Fogarty should not have been allowed to make final proof, but his rights should have been adjudicated thereunder, upon a contest duly instituted by Fogarty against Cyr's supreme court scrip location.

3. Because the said land had been improved and was not therefore subject to pre-emption filing.

4. Because from the evidence it appears that Fogarty's filing was not made in good faith, but for the purpose of speculation, and to procure an iron mine, which fact is inconsistent with the claim of having entered the said land as a pre-emption in good faith.

5. And the said Wm. H. Selden and Louis Stegmiller allege that they are innocent purchasers for a valuable consideration from Louis D. Cyr of an interest in said land, and that, in excluding the rights of said Cyr from consideration they have had no opportunity to be heard in the said case.

Blake, by her attorney in fact, alleged error—

1. Because the said Eliza Blake, by her attorney in fact, entered the said land with Sioux half breed scrip (No. 416 A), July 1, 1890, subject to Fogarty's filing, and the evidence shows that Fogarty's pre-emption was not made in good faith, but for the purpose of speculation—to procure an iron mine—which fact is inconsistent with having entered the said land as a home.

2. In holding that the appointment of an attorney in fact for the location of this scrip was a mere subterfuge, and in holding that Eliza Blake has sold and assigned her interest, right and title under said scrip, as there was no evidence in said case upon which to base any such decision; but the said appellant alleges that said scrip was located by Dan H. Ball, as attorney, by virtue of a power of attorney from said Eliza Blake to so locate said scrip; and that said power of attorney was given under the regulations of the Department allowing entries to be made by the agent or attorney, and therefore alleges that the said entry of said land by the said scrip can not now be impeached for that reason.

On receipt of the record in these appeals by your office, counsel for Fogarty filed in your office (date of filing not appearing) a motion to dismiss the same, on the following grounds:

1. All matters involved in the hearing on the protest of these parties have been fully determined and adjudicated in the decision of the Secretary, 10 L. D., 616.

2. The appeal of said Blake should be dismissed because it is freely admitted by the parties in interest that she is not a party to this action, and that the scrip (Sioux

half breed 416 A), issued in her name, which was located on the land in controversy, was and is owned by Cyr and others, and was located in their interest and not in Blake's interest.

3. The appeal of said Cyr should be dismissed because his location of supreme court scrip was canceled by order of the Secretary in the decision cited, and he can have no interest as an adverse claimant against this defendant, either by reason of his said location or by reason of said Sioux half breed scrip for his benefit.

4. The said Cyr's location having been canceled outright, by the Secretary's order, and said Blake's location having been allowed subject to Fogarty's rights, by virtue of the Secretary's said decision, said parties can not be heard to set up any priority of interest, and consequently appear as protestants simply, and therefore have no right of appeal.

April 27, 1891, by your office letter of that date (a copy of which is before me), you sustained this motion and dismissed the appeals—that of Cyr, upon the ground that he had no rights in the premises, his location having been canceled by the Secretary's decision (*supra*); and that of Blake, because the evidence introduced at the hearing of the several protests shows conclusively that she had no interest in the question at issue, she having transferred her scrip to Cyr, who was then the owner and holder thereof contrary to the statute, etc.

You, also, in your said decision denied them the right of appeal therefrom, but allowed them twenty days from notice thereof to apply to the Secretary for an order directing your office to send up the record for investigation and adjudication here.

These applications are now before me for consideration.

William H. Selden and Louis Stegmiller join in the application of Cyr, claiming to be interested parties through a purchase of an interest in Cyr's entry or location. All parties are represented by counsel, and elaborate arguments have been filed on both sides.

Fogarty's counsel insist that the applications should be dismissed, because no notice of the same has ever been served upon him or his counsel, and because a copy of the Commissioner's decision did not accompany the applications, and because Cyr and his co-petitioners have no rights in the premises, because of the decision of the Secretary (10 L. D., 616), canceling his location, which judgment has become final through failure to move to review the same.

As to the claim of Blake, they say that it clearly appears from the Commissioner's decision that Cyr, and not Blake, is the interested party in the Sioux scrip location, and that no right of location can accrue to a purchaser of such scrip.

On the part of counsel for Cyr, it is admitted that no notice of the application was served on Fogarty, or his attorney, but they say such notice is not required by the Rules of Practice in this Department, nor by the rules that generally obtain in courts of record. They say further that Cyr is not precluded from asserting his rights by the decision of the Secretary in the Cyr-Fogarty case referred to, because in said decision the act of Congress of March 2, 1889 (25 Stat., 1008), was not considered, and, therefore, his rights under said statute were not ad-

judicated in said decision, and he is not thereby estopped from asserting them.

While the Rules of Practice adopted by this Department do not in terms provide for serving the opposite party with notice of an application for certiorari, it has been the regular practice to require such notice. See *Peterson v. Fort*, 11 L. D., 346; *Seay v. Lynn*, Press copy book, 223, page 48; *Haule v. Parsons et al.*, id., page 49.

Although counsel for applicant have made a very able and ingenious argument against the requirement of notice in such cases, I am not convinced that any good purpose will be subserved by relaxing the rule so long concurred in. However, as all the facts in this case are before me, and elaborate arguments on the merits have been filed by counsel on both sides, I have considered the case as if it was regularly here; but it must be understood that the consideration of this case shall not be regarded as furnishing a precedent for dispensing with notice, and it is only considered for the purpose of putting an end to further unnecessary and unprofitable litigation in the matter.

The rule requiring a copy of the Commissioner's decision to accompany the application was made for the convenience of this Department. A copy of the same has been filed with the papers and is now before me, and I do not think that justice would be promoted by refusing to investigate the case, because the said copy was not sooner supplied.

Do the facts stated therein show that the applicants are entitled to the relief asked for? In passing upon this question, the applications must be considered separately, for the grounds for denial of appeal, as stated in your decision, are not identical.

You hold that Cyr has no rights by reason of the decision in the case of *Cyr v. Fogarty*, heretofore cited, by which his claim was finally adjudicated; while you hold as to Blake that the evidence taken at the hearing of the protest (some of which is quoted in your said decision) shows that she is not a party in interest, and so is not entitled to appeal.

Cyr claims the land under an act of Congress providing for the forfeiture of "lands granted to the State of Michigan to aid in the construction of a railroad from Marquette to Ontonagon in said State" (25 Stat., 1008), the 3d section of which provides:

That in all cases when any of the land forfeited by the first section of this act, or when any lands relinquished to, or for any cause resumed by, the United States from grants for railroad purposes, heretofore made to the State of Michigan, have heretofore been disposed of by the proper officers of the United States or under State selections in Michigan confirmed by the Secretary of the Interior, under color of the public-land laws, where the consideration received therefor is still retained by the government, the right and title of all persons holding or claiming under such disposals shall be, and is hereby, confirmed: *Provided, however,* That where the original cash purchasers are the present owners this act shall be operative to confirm the title only of such cash purchasers as the Secretary of the Interior shall be satisfied have purchased without fraud and in the belief that they were thereby obtaining valid title from the United States. That nothing herein contained shall be construed to confirm any sales or entries of land, or any tract in any such State selection, upon

which there were bona fide pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States, and all such pre-emption and homestead claims are hereby confirmed.

A reference to the said decision (10 L. D., 616) shows that Cyr's location was canceled solely upon the ground that the lands located were not subject to such location, and I think the conclusion may be fairly drawn that his rights under the statute cited were not considered.

Although under the rules applicable to courts of law "all matters which the parties might have urged before the adjudication was closed are usually to be held concluded by the judgment" (Wells on Res Adjudicata and Stare Decisis, p. 6, Sec. 10), yet I should not feel inclined to hold him to this strict and harsh rule of law, if the record as presented showed that his case clearly came within the relief provided by said act.

I think it is apparent from the record that, if he had invoked this statute, and it had been considered in said case, the judgment would have been the same. This statute did not confirm entries of this kind, when they embraced lands "upon which there were bona fide pre-emption or homestead claims on the first day of May, eighteen hundred and eighty-eight, arising or asserted by actual occupation of the land under color of the laws of the United States." (See last part of said Sec. 3.)

Your decision shows that on "April 15, 1888, he (Fogarty) moved, with his family, to his claim, where they have since continued to reside and make improvements." This fact is not disputed in either application for certiorari, and, while, in both, the good faith of Fogarty is assailed, that question was fully considered and determined in *Cyr v. Fogarty*, *supra*, and can not now be disputed, Cyr and Blake both having been parties thereto and acquiesced in said judgment. Cyr has therefore failed to show that he has been injured by your judgment, and his application is denied.

As to the application of Blake, I think, it abundantly appears from your decision that she is not a party in interest. Cyr, by his own testimony, shows that he is not acquainted with Eliza Blake, and that he and others (presumably Selden and Stegmiller) are the owners of the Blake scrip and he employed Ball (attorney in fact) to make the location. From this it sufficiently appears that Cyr procured the location of the Blake scrip for the purpose of endeavoring to hold the land thereunder, in the event of his failure to hold the same under his original location, with supreme court scrip.

A location of Sioux half breed scrip by one acting in his own interest, and not for the half breed, is in violation of the statute under which the scrip is issued. (*Allen et al. v. Merrill et al.*, on review, 12 L. D., 138.)

I can not, therefore, find that the application of either of these parties raises a reasonable presumption of error or oversight requiring correction.

## RESERVATION--TREATY OF SEPTEMBER 30, 1854.

GEORGE R. STUNTZ.

An executive order creating a military reservation issued prior to the treaty of September 30, 1854, must be taken as excluding the land covered thereby from the operation of said treaty by the consent of both parties thereto, and excepting such lands from the right of purchase accorded under said treaty.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 15, 1891.*

I have considered the appeal of George R. Stuntz from your decision of July 25, 1890, rejecting his application to purchase at Duluth, Minnesota, September 26, 1887, fractional lot one, section 20, T. 49 N., R. 13 W. (containing 7.32 acres), under the provisions of the treaty of September 30, 1854, with the Chippewa Indians of Lake Superior (10 Stat., 1109, 1111, Art., 10), providing that,—

All missionaries, and teachers, and other persons of full age, residing in the Territory hereby ceded, or upon any of the reservations hereby made by authority of law, shall be allowed to enter the land occupied by them at the minimum price whenever the surveys shall be completed to the amount of one quarter section each.

The claimant alleges that in 1853 he obtained a trading license from Willis A. Gorman, the then governor of the Territory of Minnesota, and *ex-officio* Superintendent of Indian affairs in and for said Territory, to trade with the Indians of Lake Superior, with headquarters on Minnesota point, now in St. Louis County, near the mouth of St. Louis river. That under said license he built and furnished a store, and there traded with the Indians for one year, and then renewed his license and continued his occupation until the execution of said treaty, by the terms of which he became entitled to enter the land in dispute. It appears that on November 24, 1857, the applicant filed declaratory statement for this and other land at Buchanan, Minnesota, and that on March 1, 1858, he filed in said local office his relinquishment of said lot one, under the following circumstances :

On March 20, 1854, the Commissioner of the General Land Office wrote to the surveyor general at Dubuque, Iowa,—

I have the honor to inform you that the President, by his order, bearing date the 13th instant, has reserved fractional sections 27, 28 and 29, township 49 north, range 13 west, of the 4th P. M. at the mouth of the St. Louis River, Wisconsin, together with three-fourths of a mile off the end of the north or left cape of the St. Louis River, in Minnesota, not yet surveyed, for military purposes, and I have to request that you will note the same on the plats in your office as reserved, for the purpose specified.

This "3/4 of a mile" embraced the land in dispute, which was accordingly reserved from the public domain, from which it has never been released. The claimant alleges that said relinquishment was filed, owing to the construction and maintenance of a light house on said lot

one (which is now wholly abandoned and unused), "with the distinct understanding, that if at any time the said land should cease to be utilized for lighthouse purposes that he should acquire title to said land, and that said understanding and stipulation is now of record," and he now makes application to obtain his rights under said stipulation.

He further contends that the President had no authority to establish this reservation, for the reason that such action was in violation of article 5 of the treaty of December 2, 1795 (Revision of Indian Treaties, pp. 184, 188), which provides that "The Indian tribes who have a right to those lands are quietly to enjoy them, hunting, planting, and dwelling thereon so long as they please, without any molestation from the United States" etc.

The local officers rejected the application to purchase, on the ground that said land was embraced in said reservation. On appeal you affirmed their action, and the case is now brought before me.

The errors specified substantially embrace the contentions above mentioned. A copy of the stipulation is not included in the papers transmitted, and no judgment can be passed upon its contents.

But the mere fact that the plaintiff entered into a stipulation with any officers of the United States, was a practical recognition of the power and authority of the government to establish such reservation and stipulate in relation thereto, and now it is too late after the lapse of nearly forty years to question the power of the President to establish said reservation.

Again, this reservation was established by executive order dated March 13, 1854, and will be presumed to have been rightly so done, and as the treaty of 1854, under which the claimant founds his rights, was not proclaimed till September 30, 1854, or, after the land had been set aside for a reservation, only the Indians themselves could complain of such appropriation of their lands, and not the claimant, who then only had a license to trade with the Indians. The treaty only gave him the right to enter lands occupied by him at its date, and he could not lawfully occupy land then included in a reservation. Such land must be held to have been excluded from the operation of such treaty by the consent of both parties to it. As the reservation is still in force its lands cannot be sold.

Your judgment is affirmed.

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PRUITT *v.* SKEENS.

Motion for review of the departmental decision rendered in the case above entitled June 13, 1891, 12 L. D., 629, allowed by Secretary Noble, December 15, 1891, and a rehearing in said case directed.

## RESERVOIR SITE—SURVEY—NATURAL LAKE.

## COLORADO LAND AND RESERVOIR CO.

Where the boundary lines of a reservoir cross the lines of the public survey the point of intersection should be marked with a stake or stone, and the distance from such point to the nearest established corner outside of the reservoir noted on the map.

The survey of a reservoir may be mapped to the scale of one thousand feet to one inch.

The act of March 3, 1891, does not contemplate the appropriation, for reservoir purposes, of natural lakes that are already the source of a water supply.

*Secretary Noble to the Commissioner of the General Land Office, December 11, 1891.*

I am in receipt of your letter "F" of October 29, 1891, transmitting the articles of incorporation and proofs of organization of "The Colorado Land and Reservoir Company," with a series of maps of reservoirs Nos. 1 and 2, and "Lake Hannah," "Lake Pearl," "Lake Mouse," "Lake May," and "Lake Lolita" reservoirs, with its application for the benefits of the act of March 3, 1891, relating to reservoirs. These reservoirs lie in townships 20 and 21 S., R. 56 W., and in T. 21, R. 54 W., Pueblo, Colorado, land district.

The surveys of these reservoirs appear to have been carefully made; the initial point of the survey properly determined by reference to an established corner of the government survey, and the courses and distances noted, and the field notes carefully made out in each case. The subdivision lines of the quarter-sections are not traced on the map; this should have been done. Where the boundary lines of the reservoir cross the lines of the public survey no note appears to have been made. These reservoirs include a number of established corners of the government survey. When the water overflows this land these will be, for all practical purposes, "lost corners;" hence, the necessity of marking the point of intersection with a stake or stone, and ascertaining and noting on the map the distance from such point to the nearest established corner on the government line, lying without the reservoir.

The surveys are mapped to a scale of 1000 feet to one inch. This scale is not applicable to canals, but will be accepted on surveys of reservoirs. The surveys having been made by true courses, the departure of the magnetic meridian is immaterial.

The maps name five of these reservoirs as "lakes," but an inspection of the plats of the government surveys of these townships shows the existence of but one of these lakes, to-wit: Lake Hannah, and it is noted on the plat as a "dry bed of a lake."

It was, evidently, the intention of Congress, by sections 18 to 21, inclusive, of the act of March 3, 1891, to encourage the much needed work of constructing ditches, canals, and reservoirs, in the arid portions of the country; but it is quite clear that it was not intended that a person

or corporation could, by running a boundary line around a natural lake that is already a source of water supply, thereby become the proprietor of it. While, under the general law, the water of such lake may be appropriated, the act mentioned cannot be construed as granting an easement in a natural lake, as in the land used in constructing an artificial one. The grant of the easement in the land is a bonus or reward to such person as will expend his money and labor, in constructing the means of conveying water and storing it, where nature has failed to furnish a supply. If, however, these so-called lakes are merely depressions in the surface, which, although they may collect water in the rainy season, furnish no supply in the summer, there can be no good reason why they should not be utilized as reservoir basins, but upon this question testimony should be furnished showing the conditions.

You approve this map, and it is far above the average map that has been transmitted to the Department with your approval; but, as it is incomplete in the matters indicated, I return it without approval, that it may be amended in these particulars, and that evidence may be furnished on the point indicated.

The papers in the case, including articles of incorporation, certified copy of the statute of the State, proof of organization, with verification of engineer, appear to be correct; they are approved and will be placed on file.

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RESERVOIR SITE—ACT OF MARCH 3, 1891.

PENASCO RESERVOIR.

A reservoir site can not be secured under the act of March 3, 1891, by damming a river and overflowing the adjacent land.

*Secretary Noble to the Commissioner of the General Land Office, December 11, 1891.*

I am in receipt of your letter of October 31, 1891, transmitting a map filed by L. Wallace Holt, with application for its approval, that he may have the benefit of the provisions of sections 18 to 21, inclusive, of the act of March 3, 1891, relating to ditches, canals and reservoirs, said reservoir site being in the Roswell, New Mexico, land district.

The said map shows that said reservoir extends from a point S 78 45 W, 1508 feet from south-east corner of section 36, T. 16 S., R. 17 E., to a point N 11 E 1480 feet, from the south-west corner of the south-east quarter of section 27, same township and range.

You say: "said map has been examined in connection with the lines of the public surveys, and found to agree therewith, except in the particulars mentioned in the note of the chief draughtsman; in which he states that the location of the Rio Penasco on the map is not as represented on the township plat? You recommend, however, that this map "be received and placed on file"—which is equivalent to recommending its approval.

The map shows that the applicant proposes to construct a dam across the Rio Penasco river to dam the water up the river about two and three-fourths miles, and flow it over the low land along the river bank, in some places between a half and three-fourths of a mile, and this is called a reservoir site. It was said in the Colorado Land and Reservoir Company case, 13 L. D.,

It was evidently the intention of Congress, by sections 18 to 21, inclusive, of the act of March 3, 1861, to encourage the much needed work of constructing ditches, canals and reservoirs in the arid portion of the country, but it is quite clear that it was not intended that a person or corporation could by running a boundary line around a natural lake, that is already the source of water supply, thereby become the proprietor of it. While under the general law the water of such lake may be appropriated, the act mentioned cannot be construed as granting an easement in a natural lake as in the land used in constructing an artificial one.

This principle is applicable to rivers that are sources of water supply. A person cannot be permitted by damming a river overflowing the adjoining land, surveying this "back water" and calling it a reservoir site, to become sole proprietor of the natural source of supply. If he would be allowed an easement two and three fourths miles along the river, as in this case, he might in a river of less fall per mile, or by a higher dam, appropriate ten or twelve miles of the river and make other proprietors along the river bank pay tribute to him. This cannot be done. The map complies with the law only in one particular, that is, the initial point of the survey is properly referred to an established corner of the public survey. In every other particular it is wrong, beside locating, as you say, and as the note made on the map by the chief draughtsman shows, the Penasco river in the wrong part of the township.

It is useless to point out the defects in the map, as the application, as I have said, does not come within the purview of the act of March 3, 1891. The application is therefore rejected.

#### INDIAN LANDS—CHILDREN OF INDIAN WOMAN—ACT OF MARCH 2, 1889.

##### BLACK TOMAHAWK *v.* WALDRON.

The common law rule that the offspring of free persons follows the condition of the father prevails in determining the status of children born of a white man, a citizen of the United States, and an Indian woman his wife. Children of such parents are, therefore, by birth not Indians, but citizens of the United States, and consequently not entitled to allotments under the act of March 2, 1889.

*Secretary Noble to the Commissioner of Indian Affairs, December 14, 1891.*

I acknowledge the receipt of your communication of March 14th last and its enclosures relative to the case of Black Tomahawk *v.* Jane E. Waldron, requesting decision on the following questions:

First: Whether under the laws cited and the evidence furnished Jane E. Waldron, a Santee Sioux Indian, was, at the time the act of March 2, 1889, took effect, entitled

to receive rations and annuities at the Cheyenne River agency, South Dakota, where she appears to have received rations and annuities for the greater part of the time since the year 1883.

Second: If it is decided that she was so entitled to receive rations and annuities, whether, under the laws cited and the evidence presented, she is entitled to the allotment of lands on the ceded portion of the Great Sioux reservation for which she is contending against Black Tomahawk.

In response, I transmit herewith copy of an opinion of the Hon. Assistant Attorney General for this Department, in which I concur, wherein it is held that Mrs. Waldron is not an Indian and was not at the date of the act of March 2, 1839, entitled to receive rations and annuities at the Cheyenne River Agency.

#### OPINION.

*Assistant Attorney-General Shields to the Secretary of the Interior, November 27, 1891.*

I have the honor to acknowledge the receipt, by reference, of the letter of the Commissioner of Indian Affairs, dated March 14, 1891, submitting the report of Indian Inspector Cisney, relative to the case of Black Tomahawk *v.* Jane E. Waldron, involving the rights of the respective parties to a tract of land within what was the Great Sioux Indian reservation, with a request for an opinion upon the questions presented.

The questions, as formulated by the Commissioner, are as follows:

First: Whether under the laws cited and the evidence furnished Jane E. Waldron, a Santee Sioux Indian, was, at the time the act of March 2, 1839, took effect, entitled to receive rations and annuities at the Cheyenne River agency, South Dakota, where she appears to have received rations and annuities for the greater part of the time since the year 1883.

Second: If it is decided that she was so entitled to receive rations and annuities, whether, under the laws cited and the evidence presented, she is entitled to the allotment of lands on the ceded portion of the Great Sioux reservation for which she is contending against Black Tomahawk.

The "evidence furnished" from which an opinion is to be formed consists of a large number of *ex parte* affidavits made by and in behalf of the respective parties, which are contradictory in the extreme and as to many points wholly irreconcilable. The matter is also further complicated by antagonistic reports of agents of the General Land Office and of the Office of Indian Affairs, and charges and counter-charges of fraud and corruption on the part of the claimants, their attorneys and friends, and the agents of the government.

It is insisted, however, that Mrs. Waldron is not an Indian, and therefore is not entitled to an allotment within said reservation. It seems but proper that this question as to the status of one of these claimants under said law should be first disposed of. The Commissioner of Indian Affairs seems to have taken it for granted that Mrs. Waldron is an Indian within the meaning of the law in question.

The facts affecting Mrs. Waldron's status as to nationality are not so fully and clearly set forth as they might and ought to be with the numerous investigations and reports that have been made. It is clearly shown, however, that Mrs. Waldron's father, Arthur C. Van Meter, is a white man and a citizen of the United States. Her mother is a half blood Indian, being born of half blood parents, each of whom was the offspring of a union between a white man and an Indian woman. Where these parents of Mrs. Van Meter lived, whether with the Indians as members of some tribe or among the whites as citizens of the United States, is not shown.

It is admitted by all that Mrs. Waldron's name has, since 1883 or 1884, been borne upon the rolls at the Cheyenne River Agency, and that she has since then been receiving rations at that agency. Prior to that time her name had not been upon the roll of any agency as entitled to receive rations, nor had she received any rations. In fact, neither her mother nor any member of her father's family had prior to that time been drawing rations at any agency. The father has never become a member of any tribe of Indians, but the family seems to have lived among the whites.

The relations existing between the various tribes and nations of Indians within our boundaries and the government of the United States are peculiar and have furnished the material for much discussion in the courts. It is unnecessary to cite the long line of cases, beginning with *The Cherokee Nation v. The State of Georgia* (5 Peters, 1), and running down to the present time, wherein the status of these tribes and the members thereof has been considered. Two propositions may be stated as well settled by these decisions: (1) The members of the various nations and tribes of Indians, although living within the geographical limits of the United States, are not by birth citizens thereof; and (2) These people constitute separate and distinct though dependent nations, and their individual members are freemen.

The status of the parents of Mrs. Waldron's mother is not sufficiently shown to justify a positive conclusion thereon, but for the purposes of this opinion she may be considered an Indian. We have then to determine, whether the child of a white man, a citizen of the United States, and an Indian woman his wife is an Indian within the purview of the act of March 2, 1889 (25 Stat., 888).

In the case of *Ex parte Reynolds* (5 Dill., 394), the question, who is an Indian, was presented and quite fully discussed. It was concluded that, the Indians being free persons, the common law rule, that the offspring of free persons follows the condition of the father, prevails in determining the status of the offspring of a white man, a citizen of the United States, and an Indian woman.

This ruling was cited and followed in the case of *the United States v. Ward* (42 Fed. Rep., 320).

These cases arose under laws defining the jurisdiction of the courts

of the United States, but the rule laid down is general. It was there sought to determine what persons were included in the general term "Indians," and the same term is under consideration here. It is a question not depending for its solution upon the proportion of Indian blood flowing in the veins of the person whose status is in question.

Under the rule laid down in the decisions cited, which rule is in my opinion a sound one and applicable to the case under consideration, Mrs. Waldron was born a citizen of the United States. Her claim, that she is an Indian by virtue of being born of an Indian mother, can not be allowed. There is no allegation that she has taken steps to renounce her allegiance to the United States or to assume the rights and duties of a citizen of any other nation, tribe, or people. The mere fact that her name was placed upon the roll of the Cheyenne River Agency and that she has for several years received rations as an Indian is not sufficient to sustain a claim of membership in that tribe. The authorities cited in the brief filed in behalf of Mrs. Waldron hold simply that one born a member of an Indian tribe is not a citizen of the United States. That proposition will not be disputed, but, as shown herein, it does not control in this case.

The conclusion that Mrs. Waldron is not an Indian carries with it the answer to both questions propounded by the Commissioner of Indian Affairs. In reply to the first question, I would say Mrs. Waldron was not, at the date of the act of March 2, 1889, entitled to receive rations and annuities at the Cheyenne River Agency. This also disposes of the second question, which is hypothetical, dependent upon the first question being answered favorably to Mrs. Waldron's claim.

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APPEAL—HOMESTEAD ENTRY—SECTION 2294 R. S.

SWIMS *v.* WARD.

In the absence of an appeal a decision of the local office is final as to the facts, and will not be disturbed by the Commissioner except under the provisions of rule 48 of practice.

An entry properly made, at a time when the land is subject to appropriation, must remain of record until it is properly canceled or results in a patent. Two entries for the same land cannot be allowed of record at the same time.

A homestead entry based upon a preliminary affidavit executed before a clerk of court without the pre-requisite residence is voidable, and the defect cannot be cured in the presence of the intervening adverse right of a contestant.

*First Assistant Secretary Ohandler to the Commissioner of the General Land Office, December 16, 1891.*

The land in controversy in this case is the  $W\frac{1}{2}$  of the  $SW\frac{1}{4}$  of Sec. 33, and  $NE\frac{1}{4}$  of the  $SE\frac{1}{4}$  of Sec. 32 in T. 9, R. 10 W. Huntsville land district, Alabama.

On the 3d of August, 1888, James A. Ward made homestead affidavit for the land, before the clerk of the circuit court for Winston county,

under section 2294, Revised Statutes, which was filed in the local office on the 20th of that month.

On the 28th of December, 1888, Mary J. Swims made and filed affidavit of contest against said entry, alleging that neither the entryman, his family, or any member thereof were residing on the land at the time he made his entry, and that he had made no settlement nor improvement, neither had he lived thereon, up to the time of filing said affidavit of contest, but that she was residing upon and cultivating said land at the date of said entry.

On the 23d of February, 1889, the local officers issued notice for a hearing, which was appointed to take place on the 15th of April, 1889, the testimony to be taken before the clerk of the circuit court of Winston county, Alabama. That hearing resulted in a decision by the register and receiver, rendered on the 6th of May, 1889, in which they found that Swims had priority of settlement, and recommended that the homestead entry of Ward should be canceled. The parties were duly notified of such decision, but no appeal was taken therefrom, and on the 24th of May, 1890, you notified the register and receiver that their decision had become final as to the facts, and that you agreed with their conclusion of law, and had that day canceled said entry. You directed them to note the cancellation on their records, and notify the parties in interest.

On the 23d of June, 1890, Ward forwarded a petition to your office for a reconsideration of the case, and a reversal of the decision by which his entry was canceled, on the ground that it was contrary to existing laws and regulations. Notice of this motion was served upon Swims, and her attorney filed objections to its consideration, on the ground that as it was not based upon newly discovered evidence, it was not made within the time required by rule 77 of Rules of Practice, and that it was not accompanied by an affidavit of the party, or his attorney, that it was made in good faith, and not for the purpose of delay, as required by rule 78.

Notwithstanding these objections, you considered the petition, and granted the motion. Your decision bears date the 5th of September, 1890, and in it you say: I hereby set aside said decision of May 24, 1890, and re-instate Ward's homestead entry. You will so note on your records, and notify all parties in interest; also advise the contestant of her right of appeal to the Hon. Secretary of the Interior, in accordance with the Rules of Practice. An appeal by her from that decision, brings the case before me for consideration.

No appeal was taken by Ward from the decision of the local officers, which was rendered on the 6th of May, 1889, and in which the cancellation of his entry was recommended. Notice of that decision was served on him by registered letter, on the 8th of that month, and duly received by him, according to the registry return receipt. In the absence of an appeal a decision of the local office is final as to the facts,

and will not be disturbed by the Commissioner except under the provisions of rule 48 of practice. *Farris v. Mitchell* (11 L. D., 300). You found no occasion to disturb the decision of the local officers, under rule 48 of practice, and on the 24th of May, 1890, you notified them that their decision had become final as to the facts, that you concurred in their conclusion of law, and had canceled the entry.

The land was then open to settlement and entry, and two days thereafter, Mary J. Swims, the contestant in the case, made homestead entry therefor, which entry, she asserts in her argument upon this appeal, remains intact upon the records in your office. In your decision of September 5, 1890, you make no allusion to her homestead entry, and only propose to dismiss her complaint against the entry of Ward, in case she takes no further action in the matter. Her entry having been properly made, at a time when the land was open to entry, it will, of course, remain upon the record until it is properly canceled, or results in a patent. It follows, therefore, that so long as her entry remains, Ward's cannot attach, as two entries for the same land cannot be allowed of record at the same time. *Russell v. Gerold* (10 L. D., 18).

There is no question or controversy as to the fact that the preliminary affidavit of Ward was taken before a clerk of court, and not before the register or receiver, and that at that time no member of his family resided upon the land, nor had he made any improvement and settlement thereon. In the case of *Griffin v. Smith* (9 L. D., 20) it was held that the right of a homesteader to file a new preliminary affidavit in lieu of one executed before a clerk of court without the pre-requisite residence, will not be defeated by the intervention of a contest charging such irregularity and setting up a claim of priority, if said priority is not established as alleged.

In the case at bar, there is no evidence that Ward ever filed such new affidavit in lieu of his illegal and defective one, and the local officers found that the claim of priority on the part of Swims "was established as alleged."

In the case of *O'Connell v. Rankin* (9 L. D., 209), it was held, on review, that

a homestead entry based upon a preliminary affidavit executed before a clerk of court, without the pre-requisite residence on the land, is voidable, and said defect can not be cured, if, prior to the establishment of residence, the adverse right of a contestant intervenes.

Ward did not establish his residence upon the land until the 24th of January, 1889, while the adverse right of the contestant intervened on the 28th of December, 1888, on which day she filed her affidavit of contest in the local office. In your decision of September 5, 1890, you say: "It does not appear when this affidavit was filed in the district land office," but in this you are in error, as the first statement of fact contained in the decision of the local officers, is that said affidavit was filed in their office on the 28th of December, 1888, and in *Bolster v. Barlow* (6 L. D., 825), it was held that a contest was initiated when the affidavit of contest is received and accepted by the local office.

Ward did not cure this defect in his preliminary affidavit, by establishing his residence upon the land, prior to the intervention of the adverse right of the contestant, and the cases cited hold that such defect cannot be cured after such rights have intervened. He did not file a new affidavit in lieu of the defective one, as suggested in the case of *Griffin v. Smith, supra*. He did not appeal from the decision of the local officers, which was adverse to him, nor did he accompany his motion for rehearing and review by an affidavit that it was made in good faith, and not for the purpose of delay. It seems to me, therefore, that under the Rules of Practice, and the decisions of the Department, he was not entitled to the relief granted him in your decision of September 5, 1890.

It is not necessary to consider at length the relation which Mrs. Swims occupied toward the land prior to the entry of Ward. It is in evidence that her husband, Newton Swims, had purchased a house built upon the land by a Mr. Miller, and with his wife was living in the house and cultivating the land up to the time of his death, in April, 1888. After his death his widow went to her father's, who lived on an adjoining tract, where she remained until the latter part of August, when she returned to her house upon the land. During the summer of 1888, she had several acres of land cultivated, and left a part of her household effects in her house. It is stated that prior to his death, her husband made entry or filing for the land, but I find no evidence upon that point. It is certain, however, that he did not make entry for it, as in that case the subsequent entry of Ward could not have been allowed. Learning that Ward had made entry for the land, she resumed her residence upon it, and initiated a contest against his entry, alleging priority of settlement on her part, that her improvements were notice to Ward of her prior rights, that his preliminary affidavit was false and fraudulent, and that he had not settled or resided upon the land.

The trial resulted in the establishment of the allegations of her complaint, and the recommendation by the local officers that the entry of Ward should be canceled. This decision became final, no appeal being taken therefrom, and a year afterwards you canceled the entry. Your decision carrying the recommendation of the local officers into effect, rendered the land open to entry, and two days thereafter Mrs. Swims made homestead entry therefor. Good faith seems to have characterized all her acts in connection with the land, while as to Ward his preliminary affidavit was not true, its defects were never cured, "he slept upon his rights" by neglecting to appeal from the decision of the local officers, and asked for a review and reversal of your decision of May 24, 1890, without complying with the rules of practice.

The equities of the case are largely in favor of Mrs. Swims, while the decisions and the rules of practice of the Department are against Ward. Under these circumstances, and for the reasons stated, the decision appealed from is reversed.

## OKLAHOMA TOWNSITE—ACT OF MAY 14, 1890.

WEST GUTHRIE TOWNSITE *v.* COHN ET AL.

Under the act of May 14, 1890, one hundred people, or more, may select three hundred and twenty acres for a townsite, although they may not, at the date of the selection, or of said act, use each smallest sub-division thereof for municipal purposes.

*Secretary Noble to the Commissioner of the General Land Office, December 16, 1891.*

I have considered the various appeals taken from your decision of August 4, 1891, in the case of West Guthrie Townsite *v.* Mark S. Cohn *et al.*, involving title to the W.  $\frac{1}{2}$  of Sec. 8, T. 16 N., R. 2 W., Guthrie, Oklahoma Territory; holding the homestead entries of Mark S. Cohn, for the NW.  $\frac{1}{4}$  of Sec. 8, T. 16 N., R. 2 W., and of James W. Feagins, for the SW.  $\frac{1}{4}$  of said section, for cancellation, and awarding the entire W.  $\frac{1}{2}$  of said section to the townsite,

subject to this condition, namely: that, if when proof is offered, it shall appear that each legal subdivision thereof had been occupied for municipal purposes prior to or on May 14, 1890, or subsequent thereto, and prior to the initiation of a valid homestead claim to any portion thereof, such entry shall be allowed, but, if it appears; that one or more legal subdivisions thereof, shall not have been so occupied at the time named, such subdivisions shall be excluded from such entry, and a hearing will be had . . . . to determine who is the party rightfully entitled to make entry of the same.

The voluminous record in this case, has been examined, and it is found that your decision, appealed from, contains a succinct statement of the facts in the case.

Your judgment holding the entries of Cohn, and Feagins, for cancellation is affirmed, and your action in dismissing the case, as to John Eaton, J. M. Patterson, E. M. Baldwin, G. C. Eldridge, Morrison C. Wilbur, F. M. Baldwin and D. K. Campbell, is also affirmed, but I cannot affirm that part of your decision holding that townsite entries cannot be made under the Oklahoma townsite act of May 14, 1890, (26 Stat., 109), for legal sub-divisions not actually occupied for municipal purposes by the townsite at the date of the passage of the act above cited.

Under said act, one hundred people, or more, may select three hundred and twenty acres of land in Oklahoma Territory for a townsite, although they may not, at the date of the selection, or of the townsite act, use each smallest subdivision thereof for municipal purposes. Townsite of Norman *v.* Robert Q. Blakeney, (13 L. D., 399); William H. Walker *v.* Townsite of Lexington, (13 L. D., 404).

The settlers of the townsite of West Guthrie, selected the W  $\frac{1}{2}$  of Sec. 8., T. 16 N., R. 2 W., as the site of a town, at about 4 o'clock, P. M., on April 22, 1889; town meetings were held that day, and the next, an organization effected, taxes collected from those who had on the first

day located and claimed lots; officers were elected to preside over and control the affairs of the town, an organization for municipal purposes has been kept up continuously since that date. There were at least one hundred people who selected these tracts for town purposes on April 22, 1889, before any agricultural claimant made any settlement or claim to either of said tracts, except Cohn, Feagins and Taylor, who were not eligible to make settlement at that time because of their presence in the Territory prior to 12 o'clock noon, on the day said country was declared to be open for settlement, which gave them an undue advantage over others.

After the settlers of West Guthrie had made their selection of the  $W\frac{1}{2}$  of said section for townsite purposes, and taken possession thereof on April 22d., at about 4 o'clock P. M. the time had passed when any one could initiate a homestead claim for any part thereof, and the fact that a portion of the tract embracing about one hundred and twenty acres, has not yet been settled upon as a place of residence, will not prevent said portion from being included in the townsite entry.

Towns are not built in a day, and from the very nature of things, they should not be required to improve each smallest legal subdivision in their selection before making entry, any more than a homestead claimant should be required to improve each forty acres making up his homestead, before making final entry.

The reasoning used in the two cases above cited, applies with equal force to the case at bar.

You will allow the town-settlers of West Guthrie, to enter the  $W\frac{1}{2}$  of Sec. 8., T. 16 N., R. 2 W., as a townsite, under the act of May 14, 1890.

Your decision is accordingly modified.

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#### RAILROAD GRANT—MINERAL LANDS—APPEAL.

##### NORTHERN PACIFIC R. R. CO.

The Northern Pacific railroad company is not entitled to notice from the General Land Office, with the view to appeal therefrom, where mineral claims, that embrace lands within the odd numbered sections of the grant, are approved for patent, and the record shows the discovery and location of the mine is subsequent to the definite location of the road.

*Secretary Noble to the Commissioner of the General Land Office, December 16, 1891.*

I have considered the appeal of the Northern Pacific Railroad Company from your decision of October 28th, last, declining to notify it of "The approval for patent, or the patenting of any mineral claims so far as they embrace lands in odd-numbered sections within its grant, wherein *the record* shows that the discovery and location of the claim was subsequent to the filing of the map of definite location," and your

refusal on November 6th, last, to review said decision, so that opportunity may be afforded it to appeal the case to this Department for decision whenever it so desired.

The evident purpose of the application of the company is, to ask the Department to review and re-review in each instance, the case of the Central Pacific Railroad Company *v.* Valentine, 11 L. D., 238. In prosecuting this appeal, the company apparently loses sight of your decision and is urging a reversal thereof on the theory that its rights are held by you to be gauged by selecting or listing the odd-numbered sections within its primary limits, and a general discussion of the denial of appeal which is accorded all litigants before the department with the expression of the belief that the Valentine case is wrong, and has been so pronounced by the circuit court of Montana and the supreme court of the United States.

By reference to the letter of the representative of the company of the date of October 1, 1891, upon which your decision is predicated, it will be seen that the question involved in this case is one which has been so thoroughly considered by the Department and upon principle is so firmly seated in my judgment, that further discussion thereof would serve no good purpose.

While it may be true, as contended by counsel, that the circuit court for the 9th judicial circuit has gone to the extent of holding that the right of the company attaches to mineral lands, unless there are known mines thereon, at the date of the definite location of the road, yet I am unwilling to accede to the contention that the supreme court of the United States has so decided. This question, and many of these decisions cited, were all fully and elaborately considered in the Valentine case, and the conclusions arrived at therein are my deliberate judgment of the rights of the company under the terms of its grant. In that case, to which I strictly adhere, it is expressly held, that the discovery of the mineral character of the land at any time prior to the issuance of patent to the railroad company, or certification where patent is not required, effectually excludes it from the grant and I am not disposed to reconsider that doctrine in each individual case which the company may desire to prosecute here upon appeal where the reasons, and the evident intent and purpose for the appeal appear to be as well defined as stated in this application which you denied. The claim is, where the record shows that the discovery and location of the mine was subsequent to the filing of the map of definite location, and approved for patent, the company shall be entitled to notice that it may appeal from your action. This showing, upon its face, discloses the fact that the judgment of the Department must be that the company under such circumstances is not entitled to the land. Even if notice were given as requested in such cases and you should deny the right of appeal and application were made for a writ of certiorari to require you to send up the record for my examination, I should feel bound to deny the writ on

the ground that the company had no just cause for complaint, and I can not require a formal and useless act to be done in a case where the inevitable conclusion of the department must be, and is known beforehand will be, against the position taken in this appeal. I shall hold, until satisfied by a decision of the supreme court to the contrary, that the doctrine announced in the Valentine case is *stare decisis* so far as this Department is concerned, and I have no disposition to consume the time thereof in a further consideration of that question upon a review of the authorities already digested.

Your ruling meets with my approval. The appeal is dismissed and the record returned.

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CONTEST—WITHDRAWAL OF CONTESTANT—SECOND CONTESTANT.

GARDNER *v.* SIMPSON.

A contest may be properly dismissed where the contestant states under oath that he was mistaken in the matters alleged against the entry. The fact that the contestant in such case does not desire an order of dismissal, if the suit of another is to proceed against said entry, will neither control the action of the Department, nor abridge the right of another contestant.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 16, 1891.*

I am in receipt of your letter of December 19, 1890, transmitting the appeal of James Gardner from your decision of June 4, 1890, in which you held that Nora Simpson had the prior and better right to contest the homestead entry of Joaquin S. Fortado, for the W  $\frac{1}{2}$  NE  $\frac{1}{4}$  and E  $\frac{1}{2}$  NW  $\frac{1}{4}$ , Section 2, T. 7 N., R. 10 W., Oregon City, Oregon, Land District.

This case presents a confused record, and many conflicting affidavits. It will be sufficient to say that on November 15, 1883, Joaquin S. Fortado made homestead entry for said land, and on December 7, 1889, Gardner applied to contest the entry, and at the same time made application to enter the land, which applications were rejected because Nora Simpson had filed a contest affidavit against the entry.

It appears that on November 25, 1889, Miss Simpson offered to file an affidavit of contest against the entry, but it not having been corroborated was not filed or entered of record, but was returned to her that it might be corroborated, and on the 5th of December following she presented a new affidavit corroborated by one witness; this was placed on file as being the first affidavit, but on the 9th of said month the first affidavit was presented duly corroborated, and it was filed as a substitute for the one filed on the 5th. There is some confusion, and considerable contradictory evidence upon this subject, which, from the view I take of the case, it is unnecessary to discuss, neither do I pass upon the matter insisted upon by counsel relating to her relations to the office

as "map clerk" or copyist, for the reason that Miss Simpson, on March 7, 1890, submits for consideration her affidavit in which she states substantially that she was mistaken in her statements made in her affidavit of contest, and says:

Therefore I am ready and willing to dismiss and discontinue said contest so soon as said Charles Gardner shall dismiss his contest against said claim, but am not willing to do so and afford an opportunity for said Gardner to harass said claimant with his contest.

She further says that she has such information that she "has become convinced that about everybody who ever pretended to know anything about said claimant or claim were mistaken."

I think, upon this statement, her contest should be dismissed. If she is satisfied that everybody is mistaken about the charges which have been made against the claim, or claimant, she ought on her own motion, to dismiss her contest before attempting to drive Gardner to do likewise. The Department can not allow her to dictate the terms upon which she will dismiss her contest.

So far as the record is concerned, Mr. Gardner is prosecuting his contest in good faith and she can not be permitted to stand in his way if he desires to attack the entry. It is questionable, under the circumstances, who has the preference right of contest, but inasmuch as Miss Simpson has expressed herself in the manner heretofore suggested, her contest is dismissed and Mr. Gardner will be allowed to prosecute his if he shall so desire.

Your decision is therefore reversed.

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**SOLDIERS' ADDITIONAL HOMESTEAD—RES JUDICATA.**

**SAMUEL HILTON.**

Residence and cultivation must be shown under a soldiers' additional homestead entry, where the original entry is abandoned and the land purchased under section 2, act of June 15, 1880.

A letter of instruction issued by the Commissioner of the General Land Office to a local office, is not an adjudication that will prevent subsequent action on the part of his successor in office.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 16, 1891.*

I have considered the appeal of Samuel Hilton from your decision of October 1, 1890, holding the final certificate of his soldiers' additional homestead entry for cancellation, for lots 2 and 4, Sec. 21, lot 4, Sec. 23, and lot 2 Sec. 26, T. 69 N., R. 19 W., Duluth, Minnesota, land district.

It appears from the record that he made soldiers' additional homestead entry for said tract July 31, 1884. The local officers were in-

structed by your predecessor, under date of February 12, 1885, as follows:

Upon receipt of the legal commissions due you will issue final papers on the soldier's additional homestead entry No. 2322 and report the same to me in your current returns,

and again under date of July 12, 1888, as follows:

Upon payment of legal commissions you will issue final certificate and receipt upon H. E. No. 2322 by Samuel Hilton for land in Sec. 26-69-19 W., as directed by letter "C" of February 12, 1885.

In pursuance of these letters final certificate was issued to Hilton May 29, 1890. It seems that his additional homestead entry was based upon his original made November 26, 1867, at Springfield, Missouri, which was canceled June 30, 1876, for abandonment, but the tract covered thereby was purchased by him under the act of June 15, 1880.

In your letter to the local officers, dated October 1, 1890, you say:

The original entry having been abandoned and no proof of compliance with the homestead law made thereunder, Hilton cannot obtain title to the land covered by his additional entry without showing a compliance "with the law by actual residence thereon and cultivation thereof for the full required period." See John W. Hays, 3 C. L. O., 21; and Owen McGrann, 5 L. D., 10, and this without regard to the fact that he has obtained title to the land covered by his original entry by purchase under the 21 section of the act of June 15, 1880.

The fact that residence upon and cultivation of the tract covered by the additional entry must be shown before Hilton is entitled to a final certificate appears to have been overlooked by this office, for by letters "C" of February 12, 1885, and June 12, 1888, you were directed to issue the final papers upon receipt of the legal commissions, and on May 29, 1890, you issued final certificate No. 1472 upon said entry.

Said certificate having been issued without warrant of law, is held for cancellation, the entry remaining intact subject to a proper showing of residence and cultivation by Hilton within the time allowed by law. Advise all parties in interest and at the proper time report action taken.

From this decision he appealed and assigned for error (1) in holding the final certificate for cancellation when a former Commissioner with the facts before him deliberately directed its issuance, and (2) in holding that said certificate issued without warrant of law.

I do not understand from the brief record before me, that this matter was ever adjudicated by your predecessor. The letters quoted from, are, at most, only "instructions" issued to inferior officers. The authorities cited in your letter fully support the view you take of the matter.

You are directed, however, to order an investigation of this entry and if it is found that there are sufficient reasons therefor, you will order a hearing to ascertain whether there has been a compliance with the law, meantime suspending all further action. With this modification your decision is affirmed.

## SECOND CONTESTANT—PREFERENCE RIGHT.

## ARMENAG SIMONIAN.

An affidavit of contest filed in the local office does not secure any preference right of entry to the contestant, in the event that the entry under attack is canceled on the prior contest of another.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 18, 1891.*

I am in receipt of your letter of December 19, 1890 transmitting the appeal and accompanying papers in the application of Armenag Simonian from your decision of September 23, 1890 refusing to allow him the preference right of entry for the NW  $\frac{1}{4}$ , Sec. 9, T. 22, R. 55, Alliance, Nebraska, land district. The record shows that one George D. Prest had made a homestead entry for this land on February 24, 1886. Two contests had been initiated against the entry, both of which were dismissed on the default of contestant to appear on day of hearing. The papers in each of which cases are transmitted to the Department, and it appears by the statement of the register and receiver that one Lewis C. Marquis had initiated a contest against the entry, but the papers are not transmitted to the Department, nor can it be ascertained from your decision or that of the local officers when it was initiated, but it appears that while it was pending, to wit, on June 13, 1890, Armenag Simonian filed an affidavit of contest against the entry. That by the letter of the register and receiver the entry of Prest was canceled on June 20, 1890 on the contest of Marquis, and that he did not exercise his preference right of entry. It is shown by Simonian that he (Marquis) had exhausted his right to make a homestead or timber culture entry or a pre-emption filing.

On July 23, 1890, Lewis F. Saunders made homestead entry for the land. Afterward Simonian applied to enter the tract. When this application was made does not appear in your decision, or that of the local officers and it is not with the papers, but it is conceded by his attorney that it was subsequent to the entry of Saunders. The local officers rejected his application, and he appealed to your office, and you affirmed their action, from which judgment he appealed, and for grounds of error alleges substantially that Simonian as second contestant was entitled to notice of the cancellation of the entry, and that notwithstanding the entry was canceled upon the decision of the prior contest, yet he had a preference right because of his affidavit of contest, subject only to the preference right of the prior contestant.

The preference right is awarded to a successful contestant who pays the land office fees and procures the cancellation of an entry. If he does not exercise his right within thirty days after notice of cancellation, or if he is not a qualified entryman at the time the entry is can-

celed, the land is open to entry by the first qualified applicant. Simonian acquired no rights by his affidavit of contest inasmuch as it in no way contributed or operated to procure the cancellation of the entry.

The decision in the case of Stear *v.* De Mott, cited and relied upon by counsel for appellant, is a decision of your office from which appeal was taken. It is not at all similar to the case at bar. In that case the prior contest was abandoned, while in this case, it was carried to a successful conclusion. Your decision rejecting Simonian's application is affirmed.

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APPEAL—NOTICE—ACCEPTANCE OF SERVICE.

GRAHAM *v.* LANSING.

Failure to appeal within the period prescribed by the rules of practice warrants an order of dismissal. It is no excuse for such failure to show that the appellant's attorney was misled as to the time by a notation on the local office record, where it appears that said attorney accepted service of notice and gave his receipt therefor.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 18, 1891.*

On May 11, 1886, John J. Lansing made a homestead entry for the NE  $\frac{1}{4}$  Sec. 8, T. 20 S., R. 64 W., Pueblo, Colorado. On November 15, 1888, Reginald J. Graham initiated a contest against said entry, charging, in substance, abandonment. A trial was had on January 10, 1889, and on April 18, 1889, following, the register and receiver, after considering the evidence submitted, found in favor of contestant and recommended the cancellation of Lansing's entry. He appealed from this judgment of the local land office to your office. On June 24, 1891, you considered the case and affirmed the decision of the register and receiver, and held the entry for cancellation.

Notice of your decision was served on the attorney for Lansing on July 1, 1891, and he filed an appeal from said decision to this Department on September 9, 1891. Graham has now filed a motion asking that said appeal be dismissed under the provisions of circular of January 17, 1891 (12 L. D., 64), because not taken in time.

Rules 86 and 87 of the Rules of Practice, providing the time within which appeals must be taken from your decisions to this Department, are as follows:

Notice of an appeal from the Commissioner's decision must be filed in the General Land Office and served on the appellee or his counsel within sixty days from the date of the service of notice of such decision.

When notice of the decision is given through the mails by the register and receiver or surveyor-general, five days additional will be allowed by those officers for the transmission of the letter and five days for the return of the appeal through the same channel before reporting to the General Land Office.

The appeal in this case was not taken within the seventy days allowed by the rules, but was taken on the seventy first day, or one day too late.

The attorney for appellant alleges and shows as an excuse for this neglect that the notation made by the local land officers on their records stated that the time for taking said appeal would expire on September 9, the seventy first day, and that he was thereby misled.

I do not think this is a sufficient excuse, for the record discloses that he accepted service of notice and gave a written receipt therefor dated July 1, 1891, he must be held to have known that the rules in such a case required that an appeal should be filed in the local office within seventy days therefrom, and he is not justified in relying upon a memorandum kept in the local land office, especially where the memorandum might readily be shown to be incorrect by reference to his receipt on file.

I conclude that the appeal was not filed in time, and if by that neglect the claimant has failed to have his case considered by this Department, upon its merits, as presented at the hearing, it is wholly the fault of himself or his attorney, in failing to comply with the plain provisions of the rules of practice.

The appeal is dismissed.

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TIMBER CULTURE ENTRY—FINAL PROOF.

DAVID KERNS.

The Department is without authority to issue final timber culture certificate prior to the expiration of eight years after entry, even though the proof may show the cultivation of trees for the requisite period.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 18, 1891.*

This is the appeal of David Kerns from your decision of October 30, 1890, rejecting his timber-culture proof on the NE.  $\frac{1}{4}$  Sec. 2, T. 10 S., R. 18 W., Wa Keeney land district, Kansas.

It appears in this case that said tract was originally entered by George W. Trexler as a timber-culture entry June 14, 1878; that October 1, 1885, said Trexler relinquished his claim and Kerns made entry of the same land under the timber-culture law.

September 16, 1890, Kerns presented final proof on his entry, which was rejected by the local officers on the ground that it was premature, from which judgment he appealed and on October 30, 1890, you affirmed the decision below, whereupon the claimant again appealed, alleging: First, That the law had been complied with in so far that a much larger number of trees has been set out and cultivated for a longer period than the law requires, and that they are in a growing healthy condition; Second, That although he has cultivated the trees himself only

about five years, yet he has paid the former entryman, Trexler, for planting and cultivating the trees for about seven years, which, with his own cultivation, makes a growth of over twelve years, therefore as the trees have been set and cultivated a sufficient period in accordance with law, final proof should be allowed and final certificate issued.

The proof shows in this case that at the time Kerns made entry of the land, there were then growing on the land about ten and a half acres of fine thrifty trees, that were planted in 1879 by Trexler, and cultivated each year since; that said Kerns since making his entry in October, 1885, has cultivated and protected said trees and at date of application to make proof, there were growing on each and every acre set out about 1060 trees all in a healthy prosperous condition, averaging in diameter from three to eight inches and from fifteen to twenty feet high.

The proof indicates that the law as to planting and maintaining a proper stand of trees has been complied with, and therefore the only question in this case is the fact that under the law the proof thereon has been prematurely made.

The act of March 3, 1873 (17 Stat., 605), provided "that any person who shall plant, protect, and keep in a healthy growing condition for ten years, forty acres of timber," on any quarter section of the public lands, shall be entitled to a patent for the whole quarter section of land, "provided, however, that no certificate shall be given or patent issue therefor until the expiration of at least ten years from the date of such entry."

Under date of March 13, 1874 (18 Stat., 21), Congress passed an act amendatory of the act above referred to, reducing the time from ten years to eight years, that the entryman is required to cultivate timber before making final proof and also provides "that no final certificate shall be given or patent issued for the land so entered, until the expiration of eight years from the date of entry."

The act of June 14, 1878 (20 Stat., 113), reduces the number of acres to be cultivated in timber in each quarter section from forty to ten acres, but preserves the requirement of eight years in the former statute. Thus it will be seen that the law is specific and exact in the requirement that a final certificate shall not be given or a patent issued until eight years after date of entry and although the proof may show that so far as the tree culture is concerned the law has been complied with, yet this Department has no authority in this case to direct the issue of the final certificate and patenting of the entry in advance of the period prescribed by law. Your decision is therefore affirmed.

## OSAGE LAND—SECOND ENTRY—ACT OF MARCH 3, 1891.

DANIEL W. DEBO. (ON REVIEW).

Section 23, act of March 3, 1891, confirms second entries of Osage land, where there is no adverse claim, and due compliance with the law in the matters of residence and improvement is shown.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 18, 1891.*

Daniel W. Debo has filed a motion for review of departmental decision of October 8, 1890 (11 L. D., 372), affirming your decision of April 18, 1890, holding for cancellation his Osage cash entry of the N  $\frac{1}{2}$  of the NE  $\frac{1}{4}$  and the N  $\frac{1}{2}$  of the NW  $\frac{1}{4}$  of Sec. 14, T. 32 S. R. 14 E., Topeka land district, Kansas.

The ground of said decision was that he had previously (to wit, on July 12, 1871,) made entry of one hundred and sixty acres of Osage Indian trust and diminished reserve lands; and that having made one such entry he was debarred thereby from making another.

The specifications of error alleged in the motion for review need not be considered, in view of the fact that on the 3d of March, 1891, Congress passed an act "To repeal timber-culture laws, and for other purposes" (26 Stat., 1095), the twenty-third section of which provides (p. 1102):

That in all cases where second entries of land on the Osage Indian trust and diminished reserve lands in Kansas, to which at the time there was no adverse claims, have been made, and the law complied with as to residence and improvement, said entries be, and the same are hereby, confirmed.

The entry in question was confirmed by said act if the entryman had complied with the law as to residence and improvement. You have not yet acted upon his final proof; therefore the same (with the other papers in the case) is herewith returned for adjudication in view of the provisions of the act above quoted. (See John A. Elliott, 13 L. D., 299.)

## OKLAHOMA LANDS—TOWNSITE—SECTION 22, ACT OF MAY 2, 1890.

ORLANDO TOWNSITE.

An applicant for the right of townsite entry under section 22, act of May 2, 1890, should be required to give notice and submit evidence as to his qualifications to perfect title under the homestead law, before the townsite plat is approved. Section 4, of the circular instructions of July 18, 1890, modified.

*Secretary Noble to the Commissioner of the General Land Office, December 16, 1891.*

I am in receipt of your letter of November 24, 1891, transmitting for my approval, three plats of the townsite of Orlando, Oklahoma Territory,

under section 22 of the act of May 2, 1890 (26 Stat., 81), which provides,

That in case any lands in said Territory of Oklahoma, which may be occupied and filed upon as a homestead, under the provisions of law applicable to said Territory, by a person who is entitled to perfect his title thereto under such laws, are required for townsite purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for townsite purposes. He shall file with the application a plat of such proposed townsite, and if such plat shall be approved by the Secretary of the Interior, he shall issue a patent to such person for land embraced in said townsite.

Counsel seem to treat the notice and proof in support of his application to commute under section 21, of the act, as a sufficient compliance with the law under section 22, but such can not be the case. This is an independent proceeding and the rules of the department (11 L. D., 68) must be complied with, before these plats can be approved.

It is clear to my mind that the act contemplates that the head of this Department should be satisfied that the applicant "is entitled to perfect his title" to the land, and that he has complied with the requirements of the law and the instructions thereunder, before the plats of said townsite are approved.

The fourth section of said circular of instructions, it has been submitted, seems to contemplate the approval of the plats before proof of qualification to complete title, and of compliance with the law and the instructions thereunder is submitted. I am satisfied upon further consideration, that this would be an erroneous practice and that the plats should not be approved until this qualification and compliance have been shown, for, should the claimant fail to establish his qualifications as required by law, the approval of the plats would prove a useless act. It seems to me that these requirements should follow in their natural order and the applicant required first to give notice and establish his qualifications as provided in paragraph 5 of said circular before the approval of the plats. They are therefore returned and you will notify the applicant to submit evidence of his qualifications to perfect title under the homestead law, and of his compliance with all the requirements of the law and the instructions thereunder, and to deposit with the Secretary of the Interior the purchase price of said land. When this evidence is received, you will examine the same and if found to be satisfactory, you will so report and submit it, together with the plats for my consideration, and when the plats are approved you will instruct the local officers to make the final entry in their records.

The same course will be pursued in all similar cases and the circular of instructions is hereby modified accordingly.

## UNLAWFUL ENCLOSURE—PRE-EMPTION SETTLEMENT.

JONES *v.* KIRBY.

The intent of the department circular of July 19, 1833, and of the act of February 25, 1835, is to forbid the enclosing of any portion of the public domain, unless such enclosure is made in pursuance of a *bona fide* intention to claim the land enclosed under the land laws.

An enclosure of public land made in violation of the statute and departmental regulations is no bar to the acquisition of a settlement right by another.

An unperfected homestead entry, though neither canceled nor relinquished, does not defeat the right of the entryman to settle on another tract under the pre-emption law, if he has in fact abandoned the land covered by his homestead entry.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 21, 1891.*

Brandon Kirby has appealed from your decision of July 29, 1890, holding his Valentine scrip location, on the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 19, T. 10 S., R. 14 E., Las Cruces, New Mexico, subject to the prior pre-emption settlement right of George S. Jones.

At the dates of Kirby's location and Jones' settlement, the land was unsurveyed, but the legal subdivisions had been approximately ascertained by extending the lines from adjacent townships.

On the 1st day of August, 1886, Jones went upon this land, put up a tent, and immediately commenced the erection of a substantial house, which, as soon as it was completed, he moved into, and has continued to reside in it ever since.

For about a year prior to the date of his settlement the land had been enclosed by a wire fence placed there by one Poe, who had located Sioux half breed scrip on a contiguous forty acres. This scrip entry of Poe, together with the wire fence, had been purchased by Kirby, who had used the land enclosed for cutting hay and grazing cattle. The enclosure contained from one hundred and fifty to two hundred acres, and included about half the forty acres purchased by Kirby from Poe. When Jones made his settlement, he cut the wire fence enclosing the land, there being no other way of gaining access to it.

November 23, 1886, about three months after Jones had settled upon the land, Kirby applied to enter it with Valentine scrip, and on January 14, 1887, Jones appeared and protested against his right to do so, alleging his prior settlement rights in bar of such scrip entry.

A hearing was had in March, 1887, and on July 13, 1888, the register and receiver rendered separate and conflicting opinions, the register finding in favor of the scrip claimant, and the receiver in favor of Jones, the protestant. Jones appealed from the finding of the register, and by your said opinion, you reversed the register and affirmed the receiver, and Kirby now appeals to this Department.

It is insisted by Kirby :

1st. That the settlement of Jones having been effected by breaking through his close was in violation of law ; that no rights were established thereby, and therefore at the date of filing his scrip the land was, in contemplation of law, unoccupied government land, subject to such location.

2nd. That because Jones had, nearly a year previous to his said settlement, made a homestead entry which he had abandoned, but not relinquished, his pre-emption claim, if otherwise legal, could not be asserted and maintained while the said homestead entry was of record.

Jones is not represented by counsel in this Department nor was he before your office.

By the 1st section of the act of February 25, 1835 (23 Stat., 321), the enclosure of any public lands, " heretofore or to be hereafter made," to which the party enclosing had no color of title, nor an asserted right made in good faith, was declared unlawful and prohibited.

The 2nd section of said act provided for instituting suit by the United States district attorney for removing such enclosure.

The 3rd section made it unlawful for any person not a claimant in good faith under the land laws to prevent or obstruct any person from peaceably entering and establishing residence on any lands subject to settlement or entry, either by force, threats, intimidation, or by fencing or enclosing any such public lands.

The 6th section of said act provides :

That where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority of the Secretary of the Interior.

Counsel for Kirby contend that his enclosure embraced less than one hundred and sixty acres, and that section 6 protected him in the appropriation of the land until suit was ordered to be brought by the Secretary, or, to use his own language, " inclosures of less than one hundred and sixty acres are not unlawful unless so declared by the Secretary of the Interior," and that when Jones cut the wire fence surrounding this land he was a trespasser upon the rights of Kirby, and could therefore establish no rights by a settlement so made.

I do not so construe the law.

The 1st section of the act makes " all enclosures " of any public lands unlawful and was designed to prevent the appropriation of any portion of the public domain, to the exclusion of lawful settlers and claimants.

It is true that before survey, lands are not open to entry, and a settler on such unsurveyed lands can thereby establish no rights as against the government, yet he may as between himself and other settlers and claimants.

It was for this reason undoubtedly that Congress in said act provided that no suit should be brought to remove the enclosure of one hundred and sixty acres without the direction of the Secretary. When such amount or less was enclosed, the presumption was that it was enclosed

for the purpose of claiming the land under the land laws, when it should be surveyed and opened to such claim; whereas, if the enclosure should embrace more than one hundred and sixty acres, it would be presumptively unlawful. But it was not thereby intended that a person not intending to appropriate the land as a settler or entryman should be allowed to fence one hundred and sixty or any less number of acres, for this would be an appropriation of the public land for an unlawful purpose, and such an appropriation would be a trespass upon the public domain differing from a larger one only in the extent of the injury.

The instructions of this Department, as contained in the circular of July 19, 1883 (1 L. D., 684), provided that "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 enclosed tracts," and that "graziers will not be allowed on any pretext whatever to fence the public land, and thus practically withdraw them from the operation of the settlement laws." The same circular allowed "persons who desired to make bona fide settlements on the enclosed tracts" to destroy the fences for that purpose. While the mischief that called for this circular and the law above referred to was undoubtedly the practice, that had become very general, of fencing in large portions of the public lands for grazing purposes, yet I do not construe either the circular or the statute to mean that smaller bodies of land (one hundred and sixty acres or less) could be used for the same purpose.

It is contended by counsel that the words in the circular, "beyond that allowed by law," imply that any person may enclose one hundred and sixty acres, because, under the land laws, he is allowed to make entry for that amount.

I do not so interpret these words.

The land "allowed by law" to be enclosed is the land that a settler in good faith intends to claim or is claiming under some one of the land laws, and it by no means follows that, because a qualified entryman is allowed to enter a hundred and sixty acres of land, he may with impunity fence in that amount of land when he has no intention of entering it.

I think the plain intention of the circular and the statute is to forbid the enclosing of any portion of the public domain, unless such enclosure is made in pursuance of a bona fide intention to claim the land enclosed under the land laws.

The proclamation of the President of August 7, 1885 (24 Stat., 1024), made in pursuance of the act of February 25, 1885, *supra*, forbids an unlawful enclosure of the public lands, and directed the officers of the government to enforce the provisions of said act, which made any enclosure, other than that of a *bona fide* claimant, unlawful.

The evidence in this case shows that Kirby and one Cree composed the "Angus Cattle Company," and that they were at the time extensively engaged in raising that description of cattle. Kirby, in his own

testimony, admits that he had no color of title to the land other than a "squatter's right," that he never slept on the land, nor made any improvements thereon with the intention of living on it. His enclosure was therefore not such an one as the law protects.

This Department has held that a settlement established by breaking an enclosure will not be upheld, but in all such cases the force was employed against one who was claiming the land by virtue of a right of entry or settlement, under some one of the land laws. I know of no instance where a bona fide settler has been denied his settlement rights because he entered an unlawful enclosure for the purpose of asserting them, where such enclosure is prohibited by statute and its destruction allowed by circular of this Department. See *Stovall v. Heenan*, 12 L. D., 382.

The fact that Jones had made homestead entry for another piece of land, which had not been relinquished or canceled, can not defeat his settlement, for the evidence shows that he had been deprived of forty acres of such entry by a scrip location, and that he had actually abandoned all claim under the same.

In *Tipp v. Thomas* (3 L. D., 102), this question is discussed. In that case the settler had executed a relinquishment of his homestead entry, but the relinquishment had not been filed at the date of his pre-emption settlement. The relinquishment being of no effect until filed, the adverse claimant insisted, as in this case, that he was debarred from making settlement while his homestead entry remained of record. The Secretary held that it was the actual abandonment that permitted the settlement. This is his language:

Like any other homestead settler, he lost his right to the homestead by abandoning it, and it is immaterial that the contemporaneous relinquishment, which evidenced his good faith in abandoning, was not filed until shortly afterwards. The relinquishment affects the land, not the settler, under the act of May 14, 1880. Having returned the land to the government, he had a perfect right to settle on other lands as a pre-emptor, if he was qualified.

It is true that one can not maintain two claims requiring residence at the same time, but it is equally true that if he has actually abandoned one, he is not maintaining two.

The formal relinquishment is evidence of abandonment. But it is not the only evidence. He may otherwise show such abandonment, and at the hearing in this case it was shown and not disputed, that before he made his pre-emption settlement he had wholly abandoned his homestead entry. Since the hearing, he has relinquished his entry of record, and so declared to the world what he had before declared on the hearing of this case.

The tract in controversy was not unoccupied public land on November 23, 1886, when Kirby filed his scrip for the same.

Your judgment is affirmed.

## CERTIORARI—ORDER FOR HEARING.

FINCH *v.* MORATH.

Orders for hearings are discretionary with the Commissioner of the General Land Office, and the Department will not interfere with the exercise of that discretion unless a clear case of its abuse is shown.

*Assistant Secretary Chandler to the Commissioner of the General Land Office, December 22, 1891.*

By your letter of August 12, 1891, you transmitted the petition of August H. Morath, praying that the record relating to his cash entry for the SE.  $\frac{1}{4}$  of Sec. 8, T. 33 R. 63, made at the Pueblo land district, Colorado, on the 13th of September, 1890, be certified to the Department, under rules 83 and 84 of Rules of Practice.

The decision complained of is that made by you on the 11th of February, 1891, ordering a hearing in the case, upon the affidavit of Finch, alleging alienage, non-residence, and bad faith, on the part of Morath. The application before me consists in part of copies of your decision of the date mentioned, a motion for a review of the same, and of the argument accompanying such motion, together with your decision thereon, dated May 18, 1891.

A previous application for certiorari in the case was made on the 5th of June, 1891, which was denied on the 23d of July, on account of informality, and the present application is made in accordance and in compliance with the rules as stated in *Peterson v. Fort* (11 L. D., 346), and is based upon the specific ground of error that

your action amounts to an abuse of the discretion with which you are invested by the rules of practice, in that, in the face of preponderating and overwhelming evidence in rebuttal of the allegations made in the affidavit of contest and in the corroborating affidavits, you refused to dismiss the contest and give the entryman the protection to which he is justly entitled under the rules of practice and by every consideration of justice and equity and fair treatment.

Upon his motion for a review of your decision of February 11, 1891, it appears that Morath filed a large number of affidavits, contradicting all the allegations contained in the contest affidavit of Finch, and he asked that such contest be dismissed. In your decision of that motion to dismiss, and also of the motion for a review of your former decision in the case, you stated that the contest allegations were rebutted by a great preponderance of evidence, but concluded that—

Inasmuch, however, as a hearing has been authorized, and as I am not convinced that any grave error was committed thereby, and as, also, no adequate reason is, to me, shown for revoking the order of February 11, 1891, the motion is denied. There is no right of appeal from this decision.

After rendering that decision, on the 18th of May, 1891, you suspended proceedings in the case, to allow the claimant to apply to the Department for an order to have all the proceedings in the case certi-

fied before it for examination and action, and it is the application for such order which I am now considering.

Orders for hearings are discretionary with you, and the Department will not interfere with your exercise of that discretion, unless a clear case of its abuse is shown. With all the facts in this case before you, you declined to revoke your order for a hearing, and under rule 81 of Rules of Practice, and the decisions of the Department, an appeal from such decision will not lie. While as a rule an entryman should not be called upon to defend against issues already litigated, or charges which are evidently unfounded, still the Department will not interfere with your discretion in ordering a hearing, as already stated, unless a clear abuse of such discretion is shown. This was held in the case of *Reeves v. Emblen* (9 L. D., 584); *Fletcher v. Roode* (10 L. D., 250), and in numerous other cases of earlier and more recent date.

I do not find such an abuse of your discretion in this case as calls for the intervention of the Department, and the application is therefore denied.

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RIGHT OF WAY—CANAL—SURVEY—DUPLICATE MAP.

KERN VALLEY WATER CO.

The survey of a canal under the right of way provisions of the act of March 3, 1891, should show the width of the canal at places where the lines depart from the width established at the initial point.

Where the lines of survey cross the section and quarter section lines, the distance to the nearest established corner of the public survey should be noted on the map. The certificate of the register should show that a true and correct duplicate map of survey is filed.

*Acting Secretary Chandler to the Commissioner of the General Land Office,  
December 22, 1891.*

I am in receipt of your letter of December 5, 1891, transmitting the articles of incorporation of "The Kern Valley Water Company," with the certificate of organization and copy of the laws of California, under which it was incorporated, together with a duly verified map of its canal, of which you say a duplicate was filed in your office.

The said canal is located in Visalia land district, California. The papers relating to the corporation, organization, etc., appear to be in due form and in compliance with law, and they will be accepted as correct and placed on file.

It appears that this canal was constructed several years before the passage of the act of March 3, 1891, relating to canals and reservoirs, the company having been organized in May, 1887, and that the survey and map, in duplicate, are made and filed that the company may secure the right of way under said act.

The canal begins at a point on the section line between sections 14 and 15, T. 30 S., R. 24 E., M. D. B & M., and ends near the center of

the SE  $\frac{1}{4}$  Sec. 19, T. 27 S., R. 22 E., a distance of twenty-four miles and eleven chains. The survey was made by running a traverse line along each side of the canal fifty feet distant from the water line. The initial point is determined by reference to a section corner, but the terminus is not fixed by any reference to the public survey. An inspection of the map shows that it varies very much in width at different points, and the width is not given except at the initial point, which is shown to be 3.75 chains—247 $\frac{1}{2}$  feet between the lines of the survey, these being each fifty feet from the water line. The lines from this point depart from a parallel 2° 35' for a distance of thirty-five chains, which would add to the width about one hundred and forty feet. Some of the lines depart over twenty degrees from a parallel, for some distance followed by converging lines; so that the canal in some tracts is on an average wider than it is in others.

The field notes of the survey appear to be carefully made, and the width at the various points may be determined by latitude and departure, but it is not the business of the local officers or the adjoining proprietor to do this. The width at the various points should be given on the map.

In addition to this the distance from the several points where these lines cross the section and quarter-section lines, to the nearest established corner on such line, should be ascertained and noted on the map. The public lands over which this canal passes will be sold subject to the easement granted the company; it is therefore important that the lines and points be definitely fixed and determined with reference to established corners of the public surveys.

The map presented cannot be approved in its present form. It, and the duplicate, will be returned, that the survey may be completed and the map show the matters indicated. The certificate of the register should show that a true and correct duplicate is filed.

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#### SCHOOL LANDS—INDEMNITY—SELECTIONS.

##### STATE OF SOUTH DAKOTA.

The provisions of section 2276, R. S., restricting school indemnity selections to the land district in which the losses occur, are repealed by the act of February 28, 1891.

*Acting Secretary Chandler to the Commissioner of the General Land Office, December 22, 1891.*

I am in receipt of your letter of December 30, 1890, transmitting the appeal of the State of South Dakota from your decision of November 24, 1890, rejecting list No. 1 of indemnity school selections made by the State of South Dakota, upon the ground that said selections are not made within the limits of the land district in which the losses occur,

as required by the acts of February 26, 1859 (11 Stat., 385); and May 20, 1826 (4 Stat., 179), which have been incorporated in the Revised Statutes as sections 2275 and 2276.

From this decision the State appeals, contending that the selections made by the State of South Dakota as indemnity to compensate deficiencies for school sections lost in place, or where the 16th and 36th sections by reason of their character are not subject to the school grant, are not controlled by the act of February 26, 18 9, but by the 19th section of the act of February 22, 1889 (25 Stat., 676), providing for the admission of said State into the Union, which provides :

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

The act of February 26, 1859 (Revised Statutes, sections 2275 and 2276), is a general provision, applicable alike to all the States, and is retained as part of the grant for school purposes by the 10th section of the act of February 22, 1889. *L. H. Wheeler*, 11 L. D., 381; *Sharpstein v. State of Washington*, 13 L. D., 378.

Said sections are not in conflict with the 19th section of the act of February 22, 1889, for the reason that the language employed in said act, that school indemnity selections shall be selected "from the unsurveyed and unappropriated public lands of the United States within the limits of the respective states entitled thereto," merely indicates that said selections should be made of public lands within the limits of the respective states provided for in said act, and could not be made of other public lands. But while the four states provided for in said act were required to make those selections within their respective limits, they were also bound to select them within the limits of the district in which the losses occurred, as provided by section 2276.

Section 2276, which provides that such indemnity "shall be selected within the same land district," was repealed by the act of February 28, 1891, which provides "That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur." (26 Stat., 796.)

The express purpose of this act was to remove the restriction requiring the lands selected to be within the same district, and if the list is in all other respects valid and regular, I see no reason why it may not be submitted for approval.

Your decision is reversed.

## SURVEY—INITIAL POINT—STANDARD PARALLEL.

## INSTRUCTIONS.

The Department will not approve a contract for the establishment of an initial point of survey by means of a traverse line, where the point when thus established would be of doubtful certainty.

*Secretary Noble to the Commissioner of the General Land Office, December 16, 1891.*

I am in receipt of your letter of November 27, 1891, transmitting letters from the surveyor general of Montana, dated October 23, and November 11, 1891, with reference to the survey of certain townships in the Kootenai river valley near the Idaho boundary line.

It appears from the statements made by the surveyor-general that the Great Northern Railway is about to be constructed through that section of country, and he desires to contract for the survey of four townships along the line of the road.

These townships are located a long distance from any public surveys and the surveyor-general states,

The expense of getting a starting point in this vicinity will in any event, be considerable, and but four townships can be surveyed at this time, but once such a beginning is made in this region surveys can be extended as appropriations will permit.

The surveyor-general further states,

It is practically speaking, impossible to extend either the seventh or eighth standard parallel into this country, this because of very rugged mountains, which would render any compensation which could be paid by the government totally inadequate, and no deputy can be found who will undertake it.

In view of this condition of affairs, the surveyor-general asks authority to contract for the establishing of an initial point of survey by means of a traverse line run along the line of the railroad bed for a distance of about fifty-five miles, and he asks authority to pay for the same the maximum rate allowed by law for standard and meander lines.

There is doubt as to the authority conferred by law for the payment of this rate for the survey of a traverse line. It could only be allowed on the theory that said line was a temporary standard line. Again the line would run along the ground which has been cleared of timber and undergrowth for the purpose of grading the railroad, hence the survey would not be made under the difficulties and with the obstacles contemplated by the law allowing the maximum rates. In addition to this, however, I have very grave doubts as to the wisdom of attempting to establish a starting point for a survey, other than taking the standard parallel as said initial point. The way proposed to establish so important a point, is an unusual way, and the point when thus established would be, at best, of doubtful certainty.

The surveyor-general reports that it is impossible to have the standard lines correctly run for the rates that are now allowed by law.

Before this vast region of country can be correctly surveyed these standard lines must be established, and no doubt adequate provision will be made for that purpose. Under the present showing, I do not see my way clear to approve the request of the surveyor-general, and must decline to do so.

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STATE SELECTION—APPLICATION FOR SURVEY.

STATE OF MONTANA.

An application of the State for the survey of lands, with the view to their selection under the act of February 22, 1889, does not operate to withdraw such lands from settlement; nor is there any authority in the Department to withhold such lands from settlement or entry until opportunity has been given the State to select the same after survey.

*Secretary Noble to the State Board of Land Commissioners, Helena, Montana, December 16, 1891.*

Your communication under date of August 7, 1891, relating to the selection of lands granted to your State has been carefully considered.

It is stated that finding no available unappropriated surveyed lands out of which to satisfy the several grants made by the act of February 22, 1889 (25 Stat., 676), you made application to the surveyor-general of Montana "for the survey of certain unsurveyed and unappropriated public lands in said State to satisfy the same." These applications which stated that the lands described "will be hereafter selected under prescribed departmental regulations to satisfy the grant of the United States to Montana for educational and other purposes," were approved by the Commissioner of the General Land Office and surveys begun. You further state that numerous persons are settling upon these lands, that you assert no claim to land upon which settlement was made prior to your application for survey, and that if the right of the State does not attach until the surveys are approved "we will lose the benefit of our superior vigilance in procuring surveys, and this means the loss of the entire grant to the State."

Your position is substantially stated in the following sentence in your communication :

Under the foregoing premises and statement of facts we contend that the legal effect of our application for surveys operates as a withdrawal of such lands from settlement, in other words, we sustain the same relations to these lands under the grant as a settler does who occupies the same as a home and asks a survey thereof for the purposes of perfecting his title.

It should be borne in mind in considering this proposition that the settler acquires no right to the land claimed by him by virtue of his application for a survey. His right is initiated by settlement authorized by the terms of the law. The mere application for a survey would not in either case confer any right to the land. The act making the grants to to this State instead of allowing selections of unsurveyed

lands, by prescribing the class of lands that may be selected excludes unsurveyed land from the list. In section 19 of said act of February 22, 1889, *supra*, is found the following language:

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

It will be admitted that the right of the State whether under the grants of quantity or under the indemnity provisions of said act, does not attach to any particular tract of land until selection thereof. But under the provisions of the section of law above quoted, no selection can be made except of surveyed lands, hence, no right in the State, under this grant, can attach to any particular tract of land until after its survey. This Department would not be justified in disregarding this plain provision of the law that selections under this grant must be made of surveyed lands even though the effect of the enforcement of that provision would operate to the injury of the State to the extent claimed.

The Commissioner of the General Land Office to whom your communication was referred after making this presentation of the matter says:

Without discussing the legal aspects of the case, it seems clear that some means should be adopted to protect the right of the State to lands that have been surveyed upon an application by the State authorities, and to prevent indiscriminate settlement thereon by parties who, perhaps, may make such settlement with the sole view of being bought off by the State; and I think that any action that would secure that result without interference with the rights of actual *bona fide* settlers, would have the sanction of the law,

and recommends that the following course be adopted:

That an order be made by the Department that the Commissioner, on his approving any contract for the survey of the public lands for which application is made by the State authorities, instruct the district land officers for the district in which the land lies, in any case in which he shall deem it proper, within his discretion, to cause a notice to be published for thirty days in some newspaper published and circulating in the vicinity of the land, and to be posted in the district land office for the same period, advising all persons interested, of the facts, and that no claims initiated by settlement or otherwise, after the expiration of such thirty days' notice and before the expiration of ninety days from the date of filing the plats of survey in the district land office, adverse to the State's right of selection of the lands, will be recognized as valid; such order to be thereafter enforced as a proper measure within the jurisdiction of the Department for the execution of the statutes making the grants, and giving a preference to the State's claim thereunder in the execution of surveys.

This amounts to a recommendation that all lands which your board may apply to have surveyed be withdrawn from settlement or appropriation until you have been given an opportunity after survey, to select the same. I do not find any authority in the granting act for such action. On the contrary, such a course would operate to virtually annul the

provisions of said act hereinbefore quoted. It would, in effect, be to allow selections of unsurveyed lands in satisfaction of said grant.

I do not see my way clear to grant the relief asked or to adopt the recommendation made by the Commissioner of the General Land Office.

ADJOINING FARM HOMESTEAD—RESIDENCE—COMMUTATION.

JOHN W. FARRILL.

Residence on the original farm, prior to adjoining farm entry, cannot be computed as forming a part of the period of residence required under the latter entry.

The act of May 14, 1880, does not waive any requirement as to the period of residence under an adjoining farm entry, but allows credit for residence on the land embraced therein prior to the entry thereof.

An adjoining farm entry may be commuted, on showing due compliance with law.

The case of Patrick Lynch, 7 L. D., 33, overruled.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 21, 1891.*

On February 15, 1889, John W. Farrill made adjoining farm homestead entry of the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 17, T. 9 S., R. 11 E., Huntsville, Alabama, under section 2289 of the Revised Statutes, and on June 23, 1890, he made final proof upon said entry, which was rejected by the local officers, for the reason that said proof was made prematurely.

Upon appeal, you affirmed the decision of the local officers, under the ruling in the case of Thatcher v. Bernhard, 10 L. D., 485, holding that residence on the original farm prior to entry can not be computed as part of the five years required by law, but that a residence must be maintained after entry for the length of time prescribed for ordinary homestead entries before final proof can be made.

From this decision the claimant appeals, and insists upon his right to offer final proof, upon the ground that his residence upon the original farm has been continuous for more than five years, resting his claim upon the authority of the decision of the Department in the case of Patrick Lynch, 7 L. D., 33, holding that in cases of adjoining farm entries, credit for residence on the original tract may be allowed under the act of May 14, 1880.

Prior to the decision of the Department in the case of Patrick Lynch, *supra*, it was the rule of the land office that the rights of an adjoining farm entry attach only after entry, when the land entered with the original farm is treated as entirety, and that residence and settlement upon an original farm constitute no residence upon an adjoining tract prior to entry, as settlement can not be made at the same time upon two distinct tracts of land. William C. Field, 1 L. D., 68.

This principle was adhered to in the decision of the Department in the case of Hall v. Dearth, 5 L. D., 172, in which it was held that the act of May 14, 1880, was not intended to waive any of the requirements of the homestead law as to residence, but only to give credit for resi-

dence prior to entry. But in cases of adjoining farm entries, such residence must have been actually upon the land entered, because it was distinctly held that a claimant residing upon an original farm could not claim a preferred right to make adjoining farm entry of an adjoining tract by virtue of cultivation and improvement of such tract prior to his application to enter the same, for the reason that residence upon the original farm is not residence upon the adjoining tract, until the entry has been made.

The ruling in the case of Patrick Lynch, *supra*, seems to be in conflict with this view, but upon an examination of that case it will be seen that claimant in his final proof showed that he occupied, cultivated and improved the land for more than nine years, and there is nothing in the decision showing that such occupancy was not in fact upon the land sought to be entered. Besides, it appears that the reason why Lynch did not make an application to enter the land at an earlier date was because it was within the limits of the withdrawal for the benefit of the Texas Pacific Railway Company, and such lands were formerly held not to be subject to entry, but it was afterwards decided that tracts occupied by settlers at date of withdrawal were not affected thereby. This may have controlled the decision of the Secretary in allowing the final proof of Lynch before the expiration of the five years required by the homestead law, but, if it was intended to hold that he was entitled to credit for residence on the original tract prior to entry, as constituting actual residence on the adjoining land, it was contrary to the rulings of the Department, which were not in terms overruled.

In the case of Thatcher *v.* Bernhard, 10 L. D., 485, the Department re affirmed the doctrine announced in the cases of W. C. Field and Hall *v.* Dearth, *supra*, holding that settlement upon the original farm can not be considered settlement upon the adjoining land, until after entry, and that when an adjoining farm entry is made, "the land entered constitutes, with the original farm, one tract, or an entirety, and settlement and residence on the original farm is after such entry imputed to and becomes in contemplation of law settlement and residence on the land entered, just as settlement and residence on one forty of a homestead tract is settlement and residence on the whole," and that residence upon the land after entry must be for the full period required by the homestead law, except where the residence has actually been on the land embraced in the entry, or where the entryman is entitled to credit for military or naval service during the war of the rebellion.

This is, in my judgment, in accordance with the letter and spirit of the act, which is not enlarged or modified by the act of May 14, 1850, except as herein stated, and the case of Patrick Lynch, so far as it conflicts with this decision, is hereby overruled.

In his appeal to your office, the claimant requests that if he is not allowed to make final proof under section 2291 of the Revised Statutes, he may be allowed to commute the same under section 2301.

I see no reason why he may not be allowed to commute said entry

under section 2301, if he can show the requisite proof of continuous residence and cultivation of the tracts, and that he has in all other respects complied with the law.

Your decision is affirmed.

PLACER PATENT—CONFLICTING LODE CLAIM.

JUNIATA LODE.

Where a patented placer is found to be in conflict with a lode claim, and the facts are such as to warrant judicial proceedings for the vacation of the patent as to the land in conflict, the patentee may, by mesne conveyance, surrender the title of such land to the government, and so vest the Department with jurisdiction to again dispose of the land.

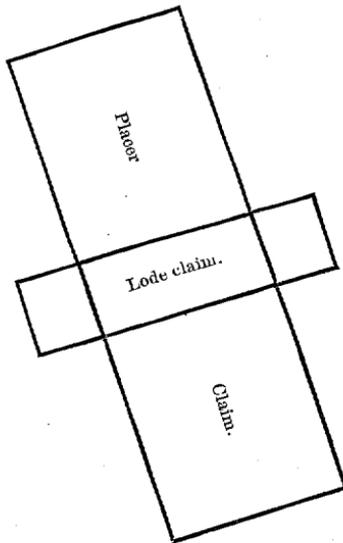
*Secretary Noble to the Commissioner of the General Land Office, December 24, 1891.*

I am in receipt of your letter of November 11, 1891, referring to de mental letter of October 20, 1891, in the matter of the Juniata Lode claim, and asking for additional instructions.

It appears that on May 12, 1880, a patent was duly issued to Thomas H. Fuller for a placer claim on a certain tract of land in the Leadville land district, Colorado.

On October 17, 1889, Lewis T. Brownell, as the owner of the Juniata Lode claim, applied for a patent on said lode, and his application was rejected by the register and receiver because of conflict with the patented placer claim of Fuller.

The following diagram will show the conflict between said claims :



On an appeal being taken from the finding of the local land officers by the lode claimant, you affirmed their decision and held that you had

no jurisdiction to issue a patent on the lode claim because of the outstanding patent to the placer claim.

From your judgment the lode claimant appealed to this Department, and before the appeal was considered here the owner of the placer claim conveyed to the lode claimant by deed that part of the land in conflict, and in turn the lode claimant deeded the same to the United States. A protest was also filed against the issuance of a patent to the lode claimant by the Dunkin Mining Company, who claimed to be the owner of a part of the tract embraced in the lode claim.

On October 20, 1891, the Department returned the case to you stating, substantially, that since that part of the lode claim in conflict had been deeded back to the United States it would seem that you would have jurisdiction to examine the application and to allow the entry of the lode claim, provided no other reasons exist calling for its rejection. The protest of the Dunkin Mining Company was also transmitted to you, in order that it might be passed upon by you in connection with said application.

Your letter of November 11, 1891, suggests that departmental letter of October 20, 1891, "establishes a new rule of practice for this office, in that it permits the issuance of a second patent for a portion of the ground embraced in a former patent outstanding and intact."

You further state that,

If the decision shall be adhered to as being the law, it will open wide the gates to applications for patent for lode claims situated within patented placers, townsites, homesteads, pre-emptions and other patented claims.

In answer to your communication I have to state that the townsite, homestead, pre-emption and placer mining laws all provide that entries made under them shall not include any *known* lodes or veins, and it is the practice of the Department, when a showing is made that the mines were known at the time entries were made and patents issued, to recommend suits in the proper courts to set aside said patents, or such parts thereof as conflict with said mines.—Cameron Lode, 13 L. D., 369; Pacific Slope Lode, 12 L. D., 68; Plymouth Lode, 12 L. D., 513; Pike's Peak, 10 L. D., 200. And in such cases the courts will, on proper proof that lodes existed, known to be valuable for their product at and before entries were made and patents issued, declare vacated and set aside the parts of said entries and patents in conflict with said known lodes.

If, as seen, the courts will vacate that part of the placer claim in conflict with the Juniata lode, and dispossess the placer proprietor thereof, why may he not, to save litigation, expense, and vexation, deed the property over to the party, who might, if he saw fit, in the name and by consent of the United States, finally recover the same. No objection ought to be imposed by the government against a party doing that which it is to the interest of the government to have him do.

The patent issued to the placer proprietors carried with it the title to all the surface of the ground described therein, unless it may be found

that within the land embraced in the patent a lode exists which, contrary to the proof made by the placer claimants, was known to exist and to be capable of being profitably worked for its product at the date the entry was made.

When this is made to appear the placer claimants may be forced to give up that part of their entry. Generally this is made to appear in the courts, because the government having issued the patent is held not to have any further jurisdiction, but as soon as the courts declare vacated any part of a patent, the government at once acquires jurisdiction and may again dispose of the tract heretofore covered by it.

In the case at bar that which might have been proven in court is admitted by the proprietor of the placer by conveying the property to the lode claimant. The lode claimant has conveyed the same to the United States, and the government now has jurisdiction to dispose of it, the same as if no disposal thereof had ever been made or attempted. The deeds have been passed to rectify a mistake, and by these conveyances the government and the parties in interest are left in precisely the same position that would probably have been occupied by each at the end of tedious litigation.

The placer patentee does not forfeit his whole claim, but only that part wrongfully patented to him, and it is a useless practice that requires him to surrender the whole of his patent in order to have all of it patented back to him except the small strip which the proof shows does not belong to him.

It is not a question of issuing a second patent, because that part of the outstanding patent conflicting with the lode has been vacated and surrendered to the government by the deeds, and I see no reason why you may not, by consulting the maps of survey in this case, cancel on the record of patents that part of the patent outstanding which conflicts with the lode location as described in the deeds.

A patent is but the evidence of title, and a patent in the hands of one who by deed has conveyed his interest thereunder to another, is of absolutely no force because his title has passed from him.

The government in this case, to correct a mistake, has taken to itself the title to the strip known as the lode claim, and no one can have any interest therein except the rightful holder thereof under the mineral laws providing for the disposal of lodes; for such parties the government holds the title in trust, and the fact that the original patent issued on the placer claim has not been surrendered to you, as a whole, can not prevent you from acquiring jurisdiction where the government recovers the title thereof through mesne conveyances.

Title is what gives the government jurisdiction over the public lands, and where a title has erroneously been given, for the purposes of correcting the error, without resorting to the courts, the parties may re-convey to the United States, and the title received by the government in this way is as good as when recovered in the courts.

So long as the government can trace its title to itself, such title cannot be questioned; having title it has jurisdiction to dispose of the land the same as it has of all public lands.

Reconveyance should not be allowed except in cases where the government would feel compelled to have the courts vacate and set aside patents for fraud, accident or mistake.

In such cases it is not believed any confusion or inconvenience will arise by accepting the conveyance of the property instead of compelling reconveyance in the courts.

By the departmental letter of October 20, 1891, it was not intended as a direction to you to allow the entry of the lode claimants, but the papers in the case were returned to you in order that in connection with the protest of the Dunkin Mining Company, you might consider the application for patent on its merits.

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RICKS *v.* CURTIS.

Motion for the review of departmental decision rendered in the case above entitled September 11, 1890, 11 L. D., 275, denied by Acting Secretary Chandler, December 24, 1891.

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MINING CLAIM—ADVERSE CLAIM—PUBLICATION—APPEAL.

WATERHOUSE *v.* SCOTT ET AL.

In computing the period within which an adverse claim must be filed the first day of publication should be excluded.

If the last day of publication falls on a legal holiday, the adverse claim may be properly filed on the next business day.

It is not a valid reason for refusing to accept an adverse claim that proof of publication has not been received.

The statutory fee for filing and acting upon an adverse claim cannot be required of the adverse claimant in the event that his claim is rejected by the local office.

An appeal will properly lie from the rejection of an adverse claim.

*Secretary Noble to the Commissioner of the General Land Office, December, 24, 1891.*

I have considered the appeal by Charles C. Waterhouse from your decision rejecting his adverse claim, presented for filing in the land office at Marysville, California, on December 26, 1888, against mineral application No. 317, filed by John Scott December 1, 1887, in behalf of himself and others as co-owners of the Wahoo and West Point placer mining claim.

The notice of said application first published was defective in the description of the land.

On October 15, 1888, the register issued a second notice, which required all adverse claimants to file their adverse claims with the local officers, during the sixty days period of publication thereof, according to law and the regulations thereunder, or they will be barred by virtue of the provisions of chapter six of title thirty two of the Revised Statutes of the United States. It is hereby ordered that the foregoing notice of application for a patent be published for a period of sixty days (ten consecutive weeks) in the Mountain Messenger, a weekly newspaper published in Downieville, Sierra county, California.

A foot-note was appended to said printed notice as follows,—

“The first publication of the foregoing was made on the 27th day of October, 1888, and ending on the 29th of December, 1888” which correctly gives the dates of the first and tenth insertions of the notice in said newspaper, as appears from the affidavit of proof of publication made January 2, 1889.

As this notice was published in a weekly newspaper, the tenth and last insertion just completed the ninth week and sixty-third day of publication, excluding the first day, according to the long established rule. *Miner v. Mariott* (2 L. D. 709); *Bonesell v. McNider* (13 L. D. 286).

On December 26, 1888, which was the 60th day of publication, and therefore within the time for filing adverse claims as ordered by said notice above cited, and as required by law, the plaintiff, Charles C. Waterhouse, presented to the local officers an adverse claim to be filed with the records of said office, and tendered the fee of ten dollars for filing the same.

The action and decision of the local officers thereon is thus detailed by them in their letter to you of February 28, 1889:

The sixty days period of publication having expired on the 25th December, 1888, on the next day, the 26th of said month, Charles E. Swezy, Esq., attorney for said adverse claimant, appeared and presented said adverse claim and tendered the fee of \$10 to have the same entered as an adverse claim. The paper was filed on that same day; but owing to the absence of proof of publication of notice, action on the same and acceptance of the tender was delayed awaiting said proof. And now on the 22nd day of January, 1889, the proof of publication having been received, demand was made upon said attorney for payment of said fee of \$10, who offered and was willing to pay the same upon condition that said adverse claim was favorably acted upon and the mineral entry suspended. He was thereupon advised by us that payment must precede any official action. And upon his declining to pay the said fee, and upon the further ground that it was considered by us that said adverse claim was not presented and filed within the period required by law of sixty days of publication of notice, the same was rejected as an adverse claim.

On January 22, 1889, the day when said decision was rendered, the local officers allowed the mineral entry of John Scott and co-owners (No. 242), and issued final certificate and receipt therefor. An appeal was taken by said Waterhouse from the decision of the local officers rejecting his adverse claim, which was affirmed by you in your letter of August 2, 1890. An appeal now brings the case before me.

It is evident that the local officers made an incorrect count of the

sixty days of publication, when they held that the sixtieth day was December 25, 1888. The case of *Miner v. Mariott*, *supra*, was decided January 4, 1884, and has the force of law, and was doubtless before the local officers, and affords a sufficient rule for their guidance in such cases. This rule was disregarded by them.

Again, as the 25th day of December, 1888, was Christmas, it was a legal holiday by the laws of California (Civil Code, Ed. of 1886, Sec. 7), which also provides that any act of a secular nature, appointed by law to be performed upon a holiday, may be performed upon the next business day with the same effect (*Ibid.* Sec. 11). This case therefore, if December 25, 1888, had been the last day of publication, would have come within the rule established by this Department in the case of *Ground Hog Lode v. Parole and Morning Star* (8 L. D., 430), decided April 25, 1889.

The excuse given for not receiving the adverse claim and the fee tendered, "owing to the absence of proof of publication of notice," cannot be accepted as valid. The law allows the adverse claim to be filed on any one of the sixty days of publication, and the local officers are assumed to know what the period of publication is, as the register is required to publish the notice, and to "post a copy of such notice in his office for the same period." Mineral circular of October 29, 1881, p. 21, Sec. 34, Ed. of 1889. The register is also required, upon the proper filing of an adverse claim,

to give notice in writing to both parties to the contest that such adverse claim has been filed, informing them that the party who filed the adverse claim will be required within thirty days from the date of such filing to commence proceedings in a court of competent jurisdiction to determine the question of right of possession, etc. (*Ibid.* p. 23, Sec. 50).

It is also the duty of the local officers, upon the filing of an adverse claim during the period of publication to stay all proceedings "except the publication of notice and making and filing of the affidavit thereof," until the controversy is settled or decided, or the adverse claim waived. (Sec. 2326 of Rev. Stats.) If no adverse claim is filed within the period of publication it shall be assumed "that no adverse claim exists." (Sec. 2325)

All these requirements are based upon a presumed knowledge on the part of the local officers of the period of publication, and of the date when it expires. And it is a familiar principle that the law should be so construed as to save the right intended to be secured and prevent a forfeiture, if such a construction be admissible. In this case the proof of publication does not appear to have been received till January 22, 1889, or on the 27th day after the last day of publication, so that only three days of the thirty days thereafter, remained to give the notice and bring the suit required by law, if the adverse claim had been received as it should have been. The local officers have no authority to so abridge the period allowed by law.

On January 22, 1889, the local officers demanded a fee of \$10 for re-

jecting the adverse claim. They state that the adverse claimant "offered and was willing to pay the same upon condition that said adverse claim was favorably acted upon and the mineral entry suspended."

The statute prescribes the fees to be paid to each of the local officers upon filing an adverse claim, as follows, (Sec. 2238, Rev. Stats.):

Ninth. A fee of five dollars for filing and acting upon each application for patent or adverse claim, filed for mineral lands, to be paid by the respective parties.

As already stated, the law provides that if an adverse claim is not filed within the period of publication it must be assumed "that no adverse claim exists;" if it does not exist it cannot be "filed and acted upon." The above statute contemplates a legal filing, "within the sixty days," and the "action" to be taken consequent thereon, as already mentioned. The demand of the local officers was erroneous. The adverse claimant was only required to pay the fee "for filing and acting upon" his adverse claim, and that he offered to do, and his tender was therefore good in law.

Under these circumstances the principle announced in the case of *Lytle v. Arkansas* (9 How., 314, 333), is applicable that,

It is a well established principle, that where an individual in the prosecution of a right does everything which the law requires him to do, and he fails to attain his right by the misconduct or neglect of a public officer, the law will protect him.

The adverse claimant in this case must be protected in his right to file his adverse claim. It will therefore be received upon his payment of the fee, and be duly filed, and such further action taken thereon as the law requires.

The applicants have filed, since the appeal removed the case to this Department, a motion to dismiss the same on the ground that "the Executive Department has no jurisdiction of adverse mineral claims which, under the law, are adjudicated exclusively by the courts of law; and for the further reason that applicant is a protestant merely and has no standing as a litigant in the case, and no right of appeal."

The first proposition is correctly stated, so far as the subject matter of the adverse claims is concerned. But this Department has the right, and it is its duty, to decide whether or not an adverse claim has been filed within the period of publication, as required by law. And if it has been so filed, or presented for filing, and the adverse claim has been illegally rejected, the adverse claimant has been denied a right secured to him by the law, and from the denial of that right he can appeal. It is a "question relating to the disposal of the public lands and to private land claims" within Rule 81 of Rules of Practice.

The second proposition is without merit. The adverse claimant is a litigant for the right to file his adverse claim. He is knocking at the door of this Department that it may be opened to enable him to assert his right to the land by the institution of a suit in a court of competent jurisdiction, as provided by law. This, I think, he has a right to do.

The motion is denied.

Your judgment is reversed.

## CONTESTANT—PROTESTANT—APPEAL.

EMBLEM *v.* WEED.

One who charges a default against an entryman, furnishes proof in support thereof, and pays the costs of taking his own testimony, is not a protestant, but a contestant, even though he formally waives all claim to a preference right of entry in the event of success, and as such contestant is entitled to the right of appeal.

*Acting Secretary Chandler to the Commissioner of the General Land Office, December 23, 1891.*

By your letter of August 13, 1891, you transmitted the application of George F. Emblen, asking that the record of the proceedings in the case of George F. Emblen *v.* George F. Weed, involving the pre-emption cash entry of the latter for the SE  $\frac{1}{4}$  of Sec. 22, T. 2 N., R. 48 W., Akron land district, Colorado, be certified to the Department, under rules 83 and 84 of Rules of Practice.

His application is based upon your decision of May 28, 1891, which was adverse to him, and wherein he was denied the right of appeal. A motion for a review of that decision was denied by you on the 29th of July, 1891. Copies of these decisions form part of the motion papers before me. The others comprise a specification of errors which it is alleged those decisions contain, the arguments of counsel for plaintiff in favor of the motion, and for defendant in opposition thereto.

From the papers before me, I learn that Weed made cash entry for the land on the 19th of September, 1885, and received final certificate that day. On the 4th of October, 1889, Emblen filed affidavit of contest, which resulted in a hearing, and a decision by the local officers in favor of Weed.

On the day the hearing took place, Emblen filed in the local office a relinquishment of all preference right of entry upon said land under the second section of the act of May 14, 1880 (21 Stat., 140), and upon his request, the costs of the contest were adjusted under rule 55 of Rules of Practice.

Emblen having relinquished all preference right to make entry for the land, and having declined to pay the costs of the contest, you regarded him as a protestant in your decision of May 28, 1891, and applied the doctrine of *Martin v. Barker* (6 L. D., 763), to the case, and denied him the right of appeal to the Department from your decision, which, like that of the local officers, was in favor of Weed.

Soon after obtaining final certificate for the land, Weed sold and conveyed the greater portion of it to different parties, and at the time of the rehearing, which took place upon your direction, it was a part of the town of Yuma, and was occupied by a railroad station, and by the residences and places of business of a large number of people.

In your decision of July 29, 1891, in which you denied Emblen's motion for a review of your former decision in the case, you held that

the entry of Weed was confirmed by section 7, of the act of March 3, 1891 (26 Stat., 1095), and would pass to patent under that act, independent of the fact that it was sustained on its merits and entitled to patent on that ground.

It is claimed that you erred in applying the doctrine of the case of *Martin v. Barker* to Emblen, and also in applying the seventh section of the act of March 3, 1891, to the case. Emblen insists that notwithstanding his relinquishment of preference right of entry to the land, given him by the second section of the act of May 14, 1880, (21 Stat., 140), he remained a contestant, and did not by that act become simply a protestant. He also insists that by paying the costs of the contest under rule 55 of Rules of Practice, he is entitled to all rights awarded to contestants prior to the passage of the act of May 14, 1880. Rules 54 and 55 of Rules of Practice are as follows:

Rule 54. Parties contesting pre-emption, homestead, or timber-culture entries and claiming preference rights of entry under the second section of the act of May 14, 1880 (21 Stat., 140), must pay the costs of contest.

Rule 55. In other contested cases each party must pay the costs of taking testimony upon his own direct and cross examination.

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

In your decision of May 28, 1891, after reciting all the facts and circumstances of the case, you conclude by saying:

In the disposition of this case, as aforesaid, Mr. Emblen, in view of the fact that he claims no preference right of entry under act of May 14, 1880, and the fact that by letter addressed you July 26, 1890, it was ruled, that as to costs, Practice Rule 55 applied to him, must be considered merely as a protestant. The ruling of the Department in the case of *Martin v. Barker* (6 L. D., 763), appears applicable. Hence no appeal from this decision to the Honorable Secretary will be allowed.

It is unnecessary to cite authorities holding that an appeal will lie from an order made by you denying a party a right. It was so decided in 3 L. D., 516, 6 L. D., 124, 9 L. D., 377, and in numerous other cases. By the above quotation from your decision, it seems to me that Emblen occupied the same relation to this case that all contestants did to contest cases prior to the passage of the act of May 14, 1880. He charged default on the part of the entryman, he furnished proof in support

thereof, and he paid the costs of taking his testimony. This made him a contestant, and gave him the right of appeal.

In the case of *Ewing v. Rourke* (12 L. D., 538), it was correctly held that the right of appeal cannot be exercised by one who is not a party in interest, but in the case of *McKinley v. Walsh* (13 L. D., 507), it was held that "A protestant against pre-emption final proof who desires to clear the record in order that he may enter the land, has such an interest as entitles him to be heard on appeal." The doctrine of that case, applied to the one under consideration, would most certainly find in Emblen a party with sufficient interest to entitle him to be heard on appeal.

I have given the case careful consideration, and my conclusion is, that by relinquishing his preference right to make entry for the land, Emblen did not change his relation to the case from that of contestant, to that of protestant, but that by prosecuting the contest, and paying his costs thereof, as required by rule 55 of Rules of Practice, he continued a contestant, with the right of appeal. Your decision denied him that right, and I think he is entitled to the relief asked for in the application before me. You will therefore certify the proceedings in the case to the Department, and suspend further action until they are passed upon.

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SURVEY—ISLAND—NON-NAVIGABLE STREAM.

J. H. LESSARD.

An application for the survey of an island in a non-navigable stream will not be allowed.

*Secretary Noble to the Commissioner of the General Land Office, December 23, 1891.*

I am in receipt of your letter of October 19, 1891, transmitting for departmental action the application of J. H. Lessard of Waterloo, Iowa, for the survey of two islands situated in Cedar river, Sec. 22, T. 89, R. 13 West, Iowa.

The application is accompanied by the affidavits of Samuel H. Baum and E. J. Chapman, stating that the islands contain about five acres; that the width of the channel on either side between the islands and the main shore is one hundred and fifty feet on the north and two hundred feet on the south, and the depth thereof at ordinary stages of the water is from four to six feet.

That the islands are about two feet above high water mark, not subject to overflow and the land fit for agricultural purposes; that the improvements situated thereon consist of a small house on each island, built since service of notice and valued at \$75.

Notice was duly served upon the parties, owning the lands upon opposite sides of the river and nearest thereto, and they have filed pro-

tests against the survey, claiming the proprietorship of the islands under riparian rights.

Neither the application for the survey nor the accompanying affidavits contain an averment that the river is navigable.

E. J. Cowin, president of the Cedar River Park Association, in his protest, which is sworn to, states, that said association is the lawful owner and in possession of the entire river frontage (on the north side); that the islands are immediately in front of the land so owned by the association.

J. E. Sedgwick, in his protest (also sworn to), represents himself as the owner of the river front on the south of side of the river and opposite the two islands—throughout their whole extent

The two protests are made on the following ground, namely :

1. Cedar river is not a navigable stream,
2. That said islands are not above high water mark,
3. That they are subject to overflow,
4. That they are not fit for agricultural purposes,
5. That the configuration of the shore of the main land has materially changed since the original survey of the water front on the mainland,
6. That protestants are the owners of the islands.

Several affidavits are filed in support of the protests, from which it appears that the islands are subject to overflow and are not fit for agricultural purposes; that they are composed of light sandy soil and sand drift, and are densely covered with low underbrush, briars and vines, and are prevented from being washed away from the thickly matted roots.

The city of Waterloo is represented as being one and a half miles below the islands; that there has been maintained, by the Union Mill Company, at said city a dam across said river—having a water head from five to six feet; that the water at the islands is at all times increased in depth by reason of said dam; that there would be no channel between the north shore and the north island but for said dam.

By the government survey made in 1846 lot No. 3, on south side of river, as meandered contained 22.40 acres; a new survey was made of said lot in February, 1890, when it was found to contain but 17.43 acres. Protestants state that this loss was caused by the overflow and shifting of the river current.

Those rivers are regarded as public navigable rivers in law which are navigable in fact. *Packer v. Bird* (137 U. S., 666). It is not shown that Cedar river at Waterloo is a navigable stream; on the contrary, several affidavits are filed which show that it is not.

Section 5248 of the Revised Statutes of the United States is as follows :

So much of the Iowa river within the State of Iowa as lies north of the town of Wapello shall not be deemed a navigable river or public highway, but dams and bridges may be constructed across it.

The Cedar river is a tributary of the Iowa, and the junction of the two rivers is about ten miles north of Wapello, so that the Cedar river is, in effect, declared to be non-navigable by public statute, and its dams and bridges prevent its use as a highway of commerce over which travel and trade are or may be conducted. It is, therefore, not navigable in fact.

In regard to streams not navigable, the common law rules of riparian ownership were incorporated into the act of May 18, 1776 (1 Stat., 464), which provides that in all cases where the opposite banks of any such stream shall belong to different persons, the stream and the bed thereof shall be common to both. *Railroad v. Schurmeir* (7 Wall., 272).

I think it, also, sufficiently appears that the islands sought to be surveyed are not fit for agricultural purposes, since they are subject to overflow, and I concur in your recommendation that the application be disallowed.

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PRACTICE—REVIEW—REHEARING—IMPROVEMENTS.

FORBES *v.* COLE.

A motion for review of a decision is based upon some error of the tribunal rendering the same, either in the finding of fact from the record, or in the interpretation of the law governing the fact.

A motion for a rehearing is based upon newly discovered evidence, or some error in the trial of the case, by which the complainant is deprived of a substantial right. Motions for review, and motions for rehearing, invoke different and distinct remedies and should be filed separately.

A motion for rehearing on the ground of newly discovered evidence will not be granted unless it appears that the alleged evidence would warrant a change of judgment. The purchase of improvements made by a prior occupant is a compliance with the law in the matter of improvements, if the purchaser makes his home on the land.

*Secretary Noble to the Commissioner of the General Land Office, December 23, 1891.*

William Forbes, the contestant in the case of said Forbes *v.* L. E. Cole, has filed a motion for a rehearing, reconsideration, and review of departmental decision of April 4, 1891, awarding to the latter the NW.  $\frac{1}{4}$  of Sec. 23, T. 25 S., R. 9 E., M. D. M., San Francisco, California.

The reasons assigned for the motion are :

- 1st. That said decision is based upon a mistake of the facts.
- 2nd. That it is based upon a mistake of the pre-emption law in regard to settlement and good faith in inhabitaney, cultivation and improvement of the land.

The counsel for Forbes in this motion invokes two remedies, which are entirely different and distinct in character, and should properly be separately filed.

A motion for review of a decision is based upon some error of the tribunal rendering the same, either in the finding of fact from the record, or in the interpretation of the law governing the facts.

A motion for a rehearing is based upon newly discovered evidence, or some error in the trial of the case, by which the complainant is deprived of a substantial right.

The decision of the local officers awarding the land to Cole was rendered in July, 1887. May 8, 1891, three years and ten months subsequent thereto, the contestant, Forbes, claims to have discovered new evidence which will warrant a reversal of the judgment and a finding in his favor. Now, when the motion is reached for disposal, nearly four years and a half have elapsed since the judgment of the *nisi prius* court was rendered. In the meantime, the witnesses for Cole, on whom he must rely to rebut the new evidence, may have died or removed beyond his reach.

From these observations, it is plain that motions for a rehearing filed in this Department should be carefully and cautiously considered, and granted only when it is shown that the claimant has brought himself clearly within the remedy invoked. Has he done so in this case?

The newly discovered evidence is contained in the separate affidavits of W. P. Beck, Stephen Hatch, and that of the contestant himself, all of which are of the same import and nearly identical in language. These affidavits, after stating the residence and improvements of Forbes on the land, are all to the effect that Cole has never lived on the land, since June 18, 1887; that he never placed any improvements on the land, nor cultivated it, and

that affiant is informed and believes that the said Cole was merely a hireling of one James Lynch to claim the land, and that said Lynch has paid all the expenses of the contest of Cole against said Forbes, and that said Cole had agreed to convey his claim to said Lynch before the hearing, and has actually conveyed shortly thereafter, and that said Cole never had any interest in said land, but was hired by the said Lynch to claim it for the interest of said Lynch, and not for himself.

Now, if a new trial should be granted, and these three witnesses should testify that they were *informed and believed* that all these acts of Cole were done in the interest of Lynch, could it be rationally claimed that such testimony would change the judgment? The only fact set out in support of such information and belief of the affiant is, that Cole executed to Lynch a deed for the land, October 29, 1887, which was not made of record until April 27, 1891, three weeks after the decision now sought to be reviewed.

Granting that this fact could be conclusively shown, would it warrant a new trial? I think not.

This deed was executed nearly a year after he submitted his proof, and three months after the local officers had sustained his entry on a hearing ordered by your office. The fact that but five dollars is stated as the consideration is of little, if any, force; for it is an universal rule of law that the consideration expressed in a deed may be disputed. The fact that Lynch did not record the deed until nearly two years later, is susceptible of many explanations compatible with good faith.

Moreover, it is nowhere alleged in the motion, nor shown in the affi-

avits in support thereof, that the newly discovered evidence was not obtainable at the trial by the use of ordinary diligence, which is a material requirement in all courts of law, and adopted by rule 76, *supra*. It is true, the deed to Lynch could not have been procured at the hearing, because it was not then in existence, having been made subsequent to the finding of the local officers in favor of Cole.

Is there any error of law calling for a review of the departmental decision? The decision is a simple affirmance of the judgment of your office, and it is charged that "it is based upon a mistake of the pre-emption law in regard to settlement and good faith in inhabitancy, cultivation and improvement of the land." The point relied upon to sustain this allegation of error seems to be that Cole did not erect a dwelling on the land, nor cultivate or improve it.

Your decision shows (and this fact is not disputed by counsel for Forbes) that on the morning of the 17th of May, 1886, Cole "purchased of one S. Hatch the house and improvements which said Hatch had put on the same, at the time he had possession of the land" (page 3, Commissioner's decision).

This Department and the supreme court, in cases too numerous to need citation, have held that the purchase of improvements made by a prior settler is a compliance with the law as to improvements, provided he makes his home on the land.

This, then, is not an error of law, and, after a careful consideration of the argument of contestant's counsel, I find no other allegation of error, unless comment on the evidence can be so considered. The evidence has been three times considered, and I do not feel it incumbent on me to go over it again for the fourth time.

There must be an end of litigation here, as well as in the courts, and a departure from well established rules governing rehearings and reviews of judgments would work inconceivable mischief.

I am satisfied that this motion would not be entertained in any court of record on the showing made, and to sustain it and entail four more years of litigation upon the parties hereto would be an abuse of the discretionary power vested by law in this Department.

The motion is denied.

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#### SCHOOL INDEMNITY—SELECTION FEE.

##### STATE OF COLORADO.

A fee of one dollar each to the register and receiver is properly chargeable to the State for each school indemnity selection of one hundred and sixty acres.

*Secretary Noble to the Commissioner of the General Land Office, December 28, 1891.*

On the 11th of October, 1890, a request was made to you, in behalf of the State of Colorado, for a revocation of that part of a circular of your office, dated March 23, 1887, and approved by the Department May 2,

1887, (5 L. D., 696), which provides that "a fee of one dollar each allowed registers and receivers for each final location of one hundred and sixty acres by the act of July 1, 1864, (seventh subdivision of section 2238, Revised Statutes), must be paid by the State upon admission of school selections;" and, further that the several land offices in the State be instructed to discontinue the collection of fees on account of such selections, as being unauthorized by law.

Under date of October 11, 1890, in a letter addressed to the attorney representing said State and making such request, you declined to make such revocation and to issue such instructions, and suggested that the correctness of your conclusion should be tested by an appeal from your decision to this Department.

Such an appeal is before me, and the error complained of is stated in the following language:

Error in deciding that selections of school indemnity under the act of February 26, 1859 (11 U. S., Stat., 385; sections 2275 and 2276 Revised Stat.) and the grant to the state by the act of March 3, 1875, (18 U. S., Stat., 474), must be regarded as state selections or locations within the meaning of the act of July 1, 1864. (13 U. S. Stat., 335; seventh subdivision of section 2238 Rev. Stat.), which requires fees of the States in making selections exclusive of those under the agricultural college grant.

Section 7 of the act of March 3, 1875 (18 Stat., 474), admitting Colorado into the Union, provides:

That sections numbered sixteen and thirty-six in every township, and where such sections have been sold or otherwise disposed of by any act of Congress, other lands, equivalent thereto, in legal subdivisions of not more than one quarter section, and as contiguous as may be, are hereby granted to said state for the support of the public schools.

On the 2d of April, 1884, an act was passed (23 Stat., 10) to enable the State of Colorado to take land in lieu of the sixteenth and thirty-sixth sections found to be mineral lands, and to secure to the State of Colorado the benefit of the act of July 2, 1862, entitled "An act donating public lands to the several States and Territories which may provide colleges for the benefit of agricultural and mechanic arts." This act of 1884 provided:

That an act entitled "An act to enable the people of Colorado to form a constitution and State government, and for the admission of the said State into the Union on an equal footing with the original States," approved March third, eighteen hundred and seventy-five, shall be construed as giving to the State of Colorado the right to select for school purposes other lands in lieu of such sixteenth and thirty-sixth sections as may have been or shall be found to be mineral lands: *Provided*, That such selections shall be made from lands returned as agricultural, and upon which at the date of selection no valuable mineral discoveries have been made; and all such selections shall be reported to the Secretary of the Interior, who shall, if he is satisfied such lands so selected are not mineral, so certify, and thereupon the right of said State to such selected lands shall finally attach; and the Secretary of the Interior shall also ascertain whether any of such sixteenth and thirty-sixth sections are mineral lands, and shall certify their character, which certificate shall determine the matter.

Section 2238 of the Revised Statutes provides what fees registers and receivers shall each receive, in addition to their salaries, and the seventh subdivision of said section reads as follows:

In the location of lands by States and corporations under grants from Congress for railroads and other purposes (except for agricultural colleges), a fee of one dollar for each final location of one hundred and sixty acres; to be paid by the State or corporation making such location.

The act of April 2, 1884, the provisions of which I have already quoted, secured to Colorado the benefits of the act which donated public lands to the several States and Territories, for agricultural colleges, and also allowed the State to take lands for school purposes, in lieu of any which were found to be mineral in sections sixteen and thirty-six.

The law in existence at the time this act was passed, provided, in effect, that registers and receivers should each receive a fee of one dollar, for every one hundred and sixty acres of land granted by Congress to the State of Colorado, except for the land in sections sixteen and thirty six in each town, and for such other land as was granted said State for agricultural colleges, which fee should be paid by the State.

Upon these terms and conditions the State accepted the lands granted it by Congress, which grants included fifty sections for the purpose of erecting public buildings, fifty sections for penitentiary purposes, and seventy-two sections for university purposes. For these lands the State paid, as a locating fee, the sum of two dollars for each one hundred and sixty acres, which was equal to one and one-quarter cents per acre. That is certainly not an exorbitant price to pay for land, but it is to be relieved from the payment of this sum, for such land as the State may choose to take in lieu of the lands in sections sixteen and thirty-six, as happen to be mineral, which prompts the application under consideration. All lands in those sections not mineral, were granted to the State without a locating fee, as where a designated section was granted, registers and receivers had no locating services to render. But where other lands were taken by the State, in lieu of such as were mineral in those sections, they must be selected, and a fee of one and one quarter cents per acre was provided as compensation to registers and receivers for making a record thereof in their offices, and reporting such selections to your office.

Other States were the recipients of similar grants, for similar purposes, upon similar terms, and they neither objected to the grants, nor to the terms. The State of Colorado does not object to the grants, but desires to be relieved from the terms. I see no reason for making an exception in favor of that State, especially as Congress nowhere intimates, in the act making these grants, that it intended to do more for Colorado than it had done for other States. It is to be presumed that Congress was familiar with the rules of the Department when it made these grants, and that it legislated with reference thereto. Had it desired to put these lieu school lands upon the same

footing as those for agricultural colleges, it would have provided, as in that case, that they should be located without the payment of fees. Not having made this exception, these lands are taken by the State upon the same terms as all other lands granted it, "except those for agricultural colleges."

While this subject, in the form in which it is now presented may not have been directly passed upon by the Department, the principle involved was discussed and decided in the case of the State of Wisconsin (2 L. D., 667). In that case your office had held that the State must pay the fee of one dollar each to the register and receiver for the location of each one hundred and sixty acres of swamp land granted it by Congress. Secretary Teller reversed your decision, and held that the lands which passed by the original grant were taken without the payment of the locating fees authorized by section 2238, Revised Statutes, but when the State selected and located indemnity swamp lands, payment of the fee would be required. The acts granting swamp lands, and those granting school lands, to the several States and Territories, are quite similar in their provisions, and the rule which would apply to the location of indemnity swamp lands, would seem to be applicable to the selection of lieu school lands. As to indemnity swamp lands, the rule was stated in the decision cited, and I see no good reason why that rule should not be applied to the lieu school lands of Colorado, and to the application before me.

In view, therefore, of the fact that the rule which I am asked to revoke, has been the standing rule of the Department for many years, under which all the States and Territories have selected their school lands up to the present time, I do not think the reasons urged are sufficient to justify its revocation. Your decision of October 30, 1890, in which you declined to revoke that part of the circular of May 2, 1887, complained of, is therefore affirmed.

In connection with his appeal from your decision, the agent and attorney for the State of Colorado, asks for repayment of fees heretofore collected from the State, on account of the selection of such school lands. The announcement of the fact that the Department approves of the conclusion reached by you in the decision appealed from, disposes of that, and all other questions raised by the application before me, and renders further discussion unnecessary.

## PRACTICE—MOTION TO DISMISS AN APPEAL.

WINANS *v.* BEIDLER.

A motion to dismiss an appeal will not be entertained, where the question raised thereby involves the examination of the record and testimony in a case not reached in its regular order.

*Secretary Noble to the Commissioner of the General Land Office, December 28, 1891.*

I have considered the motion of Geo. A. Beidler to dismiss the appeal of J. F. Winans in case of the latter against the former involving the NE.  $\frac{1}{4}$  of Sec. 28, T. 12 N., R. 3 W., Oklahoma City, Oklahoma Territory.

The motion recites that on

June 5th, J. F. Winans made homestead entry No. 2361 for the same tract of land. August 5th, Winans filed protest against allowing Beidler to make homestead filing on said tract, alleging that Beidler "entered and occupied a portion of the lands opened to settlement in the Oklahoma country prior to twelve o'clock noon, on the 22d day of April," and that he was therefore disqualified to make homestead entry. August 15th, 1889, Beidler presented his homestead application, which was rejected. Beidler appealed and, on December 27th, 1889, a hearing was ordered. The register and receiver decided that Beidler was disqualified to make homestead entry. Beidler appealed from the local officers' decision and the Commissioner of the General Land Office decided on August 6th, 1891, that Winans's entry should be canceled and Beidler's homestead application be allowed. October 5th, 1891, Winans, through his attorneys, appealed from said decision and the case is now before you for decision.

Upon this statement Beidler moves that the appeal of J. F. Winans be dismissed for the reason that the said Winans is now and has been during the pendency of this contest before the register and receiver and the Commissioner of the General Land Office, an employé of the General Land Office, and he is, therefore, under section 452 of the Revised Statutes of the United States, and under circular instructions issued September 5th, 1890, approved by the Acting Secretary, "Prohibited from entering, or becoming interested directly or indirectly in any of the public lands of the United States," and we pray the Honorable Secretary to rule upon this motion before considering the merits of the appeal of J. F. Winans, and, irrespective of the merits of the case.

In argument in support of the motion the case of Herbert McMicken *et al.* (10 L. D., 97), is cited and relied upon. Whatever bearing or application that case might have, if any, upon the determination of the case at bar upon the merits, it is impossible to tell without an examination of the testimony and record in the case which the Department would not be justified in making until the case shall be reached in its regular order. The Rules of Practice furnish the guide by which parties litigant and the Department may proceed in the orderly disposition of cases on appeal, a departure therefrom in one instance would only serve to open the way for other deviations in other cases and confusion would be the necessary consequence which would retard and delay the disposition of cases before it. The case of McMicken *et al.*, *supra*, was decided upon the merits and not upon a mere motion to dismiss the appeal.

The circular of September 15, 1890 (11 L. D., 348), to officers and employés of the Land Department is also cited in support of the motion. While said circular prohibits all officers, clerks, and employés in the offices of the surveyors-general, the local land offices, and the General Land Office, or any other persons, wherever located, employed under the supervision of the Commissioner of the General Land Office, during such employment, from entering or becoming interested, directly or indirectly in any of the public lands of the United States, it does not provide for questions as to such disqualification to be adjudicated in appeal cases upon a motion.

On the 17th day of January, 1891, the Department made an order (12 L. D., 64),

That until otherwise directed, motions to dismiss pending cases, on jurisdictional questions arising on the record, may be presented, orally or otherwise, before the office of the Assistant Attorney-General, on the first Monday of each month . . . and no question will be considered in any case that involves the examination of the testimony.

The motion under consideration does not come under this rule because it does not raise or pretend to raise any jurisdictional question, and would involve the examination of the testimony in the case.

In the opening statement of your decision you say that:

It appears from the record that some of the questions involved in this case have not been adjudicated by this Department, and that a large number of cases now pending before this office involving the same questions. Therefore, for the purpose of settling these questions and establishing a precedent, this case is made special, and advanced upon the docket.

Under this statement alone, it would be manifestly improper to pass upon the case upon a motion to dismiss the appeal.

The motion is denied.

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#### KLAMATH INDIAN RESERVATION.

P. D. HOLCOMB.

The lands embraced within the Klamath Indian reservation were not restored to the public domain by the act of April 8, 1864, but reserved for disposition in accordance with the special provisions of said act.

*Secretary Noble to the Commissioner of the General Land Office, December 28, 1891.*

I have considered the appeal of Phineas D. Holcomb from your decision of October 6, 1890, sustaining the action of the local officers in rejecting his application to make homestead entry, filed November 30, 1889, for lot 5, and the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 3, lots 8 and 9, in Sec. 4, and lots 1 and 2 in Sec. 10, T. 13 N., R. 1 E., Humboldt, California.

The tract of land in question was embraced within the limits of the Klamath River Indian reservation created by executive order dated

November 16, 1855, and according to the statements made by the Indian office, said reservation has been occupied by the Indians since that date.

By the act of Congress approved April 8, 1864 (13 Stat., 39), the number of Indian reservations in the State of California was reduced to four and the reservation in question was not selected as one of the four thus provided for. By the same act, however, it was provided that the Indian reservations in California which were not retained as Indian reservations under the provisions of the act, should be surveyed into lots, appraised and offered for sale at public outcry, and after that should be held subject to sale at private entry according to regulations prescribed by the Secretary of the Interior.

It is true that these provisions of the act have never been complied with and the land has continued to remain reserved for a certain purpose, viz., to be disposed of as directed by the act.

It is clear that it was not the intention of Congress to restore these lands to the mass of the public domain to be disposed of under the public land laws. This view is most clearly set forth in the decision of the United States district court in the case of the United States v. Forty-Eight Pounds of Rising Star Tea (35 Federal Reporter, 403), which decision was sustained by the circuit court (38 Federal Reporter, 400). Hence Holcomb, by his settlement in December, 1883, obtained no valid rights to said tract, and his application was properly rejected not only for the reason above stated, but for the further reason that by order of the Secretary of the Interior, dated February 25, 1889, you were directed to refuse all entries or filings attempted to be made within the boundaries of the reservation above mentioned.

By executive order dated October 16, 1891, the tract in question was included in the Hoopa Valley Reservation,

Your decision is affirmed.

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HOMESTEAD—RESIDENCE—HUSBAND AND WIFE—OFFICER.

WILLIAM A. PARKER.

Erroneous advice of the local officers will not operate to confer a right denied by the law.

A husband and wife can not each secure an entry of contiguous lands by residence in a house built across the dividing line; and where one of such parties has submitted proof, and received final certificate, the entry of the other must be canceled.

*First Assistant Secretary Chandler to the Commissioner of the General Land Office, December 30, 1891.*

William A. Parker made homestead entry on August 29, 1883, of the W  $\frac{1}{2}$  of the SW  $\frac{1}{4}$  of Section 33, T. 35 N., R. 3 E., Seattle land district, Washington.

On November 8, 1888, he made final proof, showing cultivation and improvement of the tract sufficient to satisfy the requirements of the

law,—the only question in issue being that of residence. Relative to this the proof shows that he began living on the tract in August, 1883, and has since resided thereon continuously, with but one absence of more than a week; that in January, 1886, he married Arabella Van Valkenberg, who had made homestead entry of an adjoining tract; that as soon as they were married he built a house on the line, and the two moved into it, and have since lived in that house.

About the time of their marriage (as appears from correspondence on file in the record) he wrote to the register of the land office at Olympia, inquiring what course to pursue as to residence. The register replied,—

A man and woman who marry after each has made a homestead entry of adjoining land may live in a house built on the dividing line; or, if they have resided on their claims for more than six months, either may commute their entry to cash entry, and can complete the five years residence on the other entry.

Mrs. Parker made final proof on her entry, receiving final certificate on August 23, 1889. When Mr. Parker offered his final proof the local officers rejected it, giving him his election which of the two tracts to retain. On appeal, you sustained the action of the local officers; whereupon he appeals to the Department. He contends that as there is no adverse claim of record, the question is solely between him and the government, and that as he was misled by the agent of the government, he has equitable rights that should be considered in the disposition of the case.

The register, in his reply to the entryman's inquiry, went beyond the scope of his authority. The local officers have not the power to authorize any person to violate the law, nor to dispense with any statutory requirement. In the case of the Montana Improvement Company (4 L. D., 67), it was said, regarding the powers of the Secretary of the Interior:

He is not at liberty to violate the law, nor can he authorize any one else to violate the law. If, even in accordance with permission received from him, the men . . . . . have violated the law, they are none the less amenable to the law for such violation; for such permission could not render lawful anything that the statute expressly forbids.

The register of a local land office can not be held to possess authority that is denied to the Secretary of the Interior.

In your letter to the local officers you say, that their "decision in the rejection of the final proof of William A. Parker is affirmed." You do not state specifically whether such affirmation extends merely to the rejection of his proof, or whether it includes also the affirmation of their action in allowing him to "surrender all rights obtained under the final proof of his wife," whereupon his proof would be accepted—the same being satisfactory in other respects.

The Department has held that where a man and his wife made entry of adjoining tracts, and occupied one house built upon the line, they

might (under certain circumstances) elect which of the two they would retain.

In the case of Thomas E. Henderson (10 L. D., 266), Viola O. Henderson had submitted her proof, on November 19, 1887. It appearing therefrom that the two, being husband and wife, had built their house upon the line, your office suspended the entry of the wife, and allowed the parties thirty days in which to elect which of the two entries they would retain. In the above named case it does not appear that the husband had submitted final proof.

In the case of John O. and Minerva C. Garner (11 L. D., 207,) both made commutation proof at the same time, and both proofs were rejected. You directed that the claimants be required "to elect which one of said entries they will retain, after which election the other will be canceled." Your decision was affirmed by the Department.

I fail to find any departmental decision permitting the husband and wife to elect which entry they will retain, after the issuance of final certificate to either party. On the contrary, in the case of Lydia A. Tavener the Department said (9 L. D., 426):

A husband and wife, living as one family, can not maintain separate residences at the same time; and as the husband has been permitted to prove up on his residence, the wife can not also prove up on account of her residence in the same house with her husband, and during the same period;

and no opportunity for election was afforded the parties.

In the case at bar, final certificate has been issued to the wife; and following the rule in the Tavener case, *supra*, the husband can not be permitted to make proof, and no opportunity for election will be given. With this understanding, your decision is affirmed.

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#### SWAMP LANDS—FIELD NOTES OF SURVEY.

##### STATE OF MINNESOTA.

The election of the State to be governed in the selection of swamp lands by the field notes of survey will not preclude the allowance of a hearing as to the character of tracts claimed under the grant, but not shown to be swamp by the field notes. But a hearing will not be ordered in such case in the absence of a *prima facie* showing that said lands are in fact of the character granted.

*Secretary Noble to the Commissioner of the General Land Office, December 31, 1891.*

The State of Minnesota has appealed from your decision of November 22, 1888, rejecting its claim, under the swamp-land grant of March 12, 1860 (12 Stat., 3), to the tracts described in said decision.

It appears that J. H. Baker, United States surveyor general for Minnesota, after an examination of certain lands in Polk, Marshall,

and Kittson counties, in said State, reported certain tracts to be swamp, certifying in regard to them as follows, under date of May 14, 1878:

I, James H. Baker, surveyor general, do hereby certify that after an examination of the field-notes of the surveys, in accordance with the instructions of the Commissioner of the General Land Office, I am satisfied that the greater part of each quarter-section, or other smallest legal subdivision of the lands hereinbefore described is swamp and overflowed within the meaning of the act of September 28, 1850, and as such inures to the State of Minnesota.

The list so reported to be swamp and overflowed, contained a little more than 46,000 acres.

The larger portion of this list (somewhat more than 41,000 acres) has heretofore—to wit, on April 6, 1885—been approved to the State under said swamp-land grant.

The remaining tracts, embracing in the aggregate about five thousand acres, you reject, on the ground that “the tracts described have been compared with the field-notes of the United States survey on file in your office, and are found therefrom *not* to be of the character contemplated by said grant.

The State appeals upon the following grounds:

(1). It was error to reject said selections, or any part thereof, without an opportunity first offered the State to be heard as to the validity of the selections.

(2). It was error to hold that said lands are not of the character contemplated by the grant of March 12, 1860.

The question primarily in issue is, whether the State of Minnesota (having elected to be governed in the selection of swamp-lands by the field notes of survey), can be allowed to contest a decision avowedly based upon such field-notes.

This question has already been repeatedly decided. In the case of *Sutton v. Minnesota* the doctrine is very clearly stated as follows (7 L. D., 562):

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 upon the 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 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.

Wisconsin (like Minnesota) elected to make the field-notes of survey the basis for determining what lands passed under the grant (Swamp-land Circular of September 22, 1890, fourth paragraph). But in the case of *Wisconsin v. Wolf* (8 L. D., 555), although the field-notes showed,

with reasonable certainty, that the greater part of each legal subdivision of said tract was at the time of survey, and presumably at the date of the grant, *dry and cultivable*, yet the State was allowed sixty days after receipt of notice of the decision within which to institute the usual proceedings for a hearing—with the understanding that, “the field-notes failing to show the swampy character of said tract, the burden of proof will be on the State.”

The decision in the case of *Nita v. Wisconsin* (9 L. D., 385,) was substantially to the same effect.

In the case of *Dox v. Wisconsin* (10 L. D., 39,) it was said that it was *error* to hold “that the field-notes of survey are conclusive as against the State.”

Arkansas is another State which elected to make the field-notes of survey the basis for determining what lands passed under the grant (Swamp-land Circular of September 22, 1890, *supra*). In the case of said State, decided by this Department on the 7th instant (not reported), it was said :

The fact that none of the field-notes describe the character of the land as swamp or swampy, wet, or overflowed, should not preclude an investigation, when a hearing is asked upon affidavits showing that such is the real character of the land.

And you were directed to order a hearing to determine its true character.

It would therefore appear that the State is entitled to a hearing—upon sufficient showing properly made.

It does not appear, however, that the proper foundation for a hearing has been laid in the present case. The State has not—so far as the record before me discloses—furnished affidavits showing that the tracts selected by it, which selections have been rejected by you, are swamp-land. Its first allegation—that “it was error to reject said selections, or any part thereof, without an opportunity first offered the State to be heard as to the validity of the selections,” does not even so much as assert that a single tract among those rejected was in fact swamp-land, or that it has sustained any loss whatever as the result of your decision. Its second allegation—that “it was error to hold that said lands are not of the character contemplated by the grant of March 12, 1860”—is not a specific pointing out as to wherein the error lies.

Your judgment rejecting the selections embraced in the list of lands contained in your decision is therefore affirmed. You will, however, notify the State authorities that in case they shall, within ninety days after receipt of notice hereof, make application for a hearing, specifying what tracts are swamp and supporting the same in each case by affidavit that shall constitute a *prima facie* showing that such tracts are swamp, overflowed, or wet, then a hearing will be granted, and the case adjusted upon the evidence taken—a special agent of your office to be present, of course, to represent the United States on the occasion of such hearing.

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