

101522

*Int.*

DECISIONS

E. C. F.

OF

THE DEPARTMENT OF THE INTERIOR

AND

GENERAL LAND OFFICE

IN

CASES RELATING TO THE PUBLIC LANDS

FROM JANUARY 1, 1899, TO JUNE 30, 1899.

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VOLUME XXVIII.

Edited by S. V. PROUDFIT.

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WASHINGTON:

GOVERNMENT PRINTING OFFICE.

1899.

49

DEPARTMENT OF THE INTERIOR,  
*Washington, D. C.*

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DECISIONS  
RELATING TO  
THE PUBLIC LANDS.

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BOUNTY LAND WARRANT—ASSIGNMENT.

OPINION.

The Commissioner of the General Land Office may properly determine, in advance of location, whether the assignment of a bounty land warrant has been made according to the prescribed form and regulations.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*January 3, 1899.* (E. F. B.)

I am in receipt, by reference, of a communication from the Commissioner of the General Land Office asking whether he has authority to pass upon the sufficiency of an assignment of a bounty land warrant before it has been presented for location, in view of the following instructions to registers and receivers in the circular of February 15, 1896:

To avoid as far as possible complications of land titles arising in consequence of the location of fraudulent or imperfectly assigned warrants, registers and receivers are peremptorily enjoined to refuse all warrants presented when the assignments thereof do not accord in every essential particular with the rules herein prescribed; and in all cases when the question of title is in doubt they must decline to receive the warrants until the holders thereof have submitted the same to this office for examination, and have obtained a favorable decision thereon. (27 L. D., 218.)

There is no conflict between these instructions and the practice which has prevailed in the General Land Office for the past fifty years, of determining in advance of location whether assignments of bounty land warrants are made in accordance with the form and pursuant to the regulations prescribed by the Commissioner of the General Land Office.

These warrants are declared by statute to be assignable "by deed or instrument of writing made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land Office" (U. S. Rev. Stat., section 2414), and there is no reason why the Commissioner may not, in advance of location, determine whether the assignment has been made according to the form and in pursuance of the regulations prescribed by him.

Approved:

C. N. BLISS,

*Secretary.*

## ABANDONED MILITARY RESERVATION—PREFERRED RIGHT OF ENTRY.

CARILLO *v.* ROMERO ET AL.

In determining whether a preferred right to enter lands within an abandoned military reservation is asserted within the period fixed by the act of August 23, 1894, time should not be held to run while said lands are withheld from entry under direction of the General Land Office.

The words "and are now residing upon any agricultural lands in said reservations" as used in said act, apply only to persons who are then actually residing upon said lands to the exclusion of a home elsewhere.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 3, 1899. (E. F. B.)

This controversy arose upon a contest filed November 9, 1895, by Elvira Carillo against the homestead entry of Carmen Romero, made June 25, 1895, for the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 26 and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 35, T. 13 S., R. 14 E., Tucson, Arizona, alleging a preference right of entry under the act of August 23, 1894 (28 Stat., 491), by virtue of prior occupancy and improvement of said tract.

This tract is part of the Fort Lowell abandoned military reservation, established by executive order October 26, 1875, which was relinquished February 24, 1891, and subsequently became subject to the operation of said act of August 23, 1894, which opened to settlement and entry under the public land laws (under certain conditions and exceptions) lands within abandoned military reservations containing over five thousand acres, which had theretofore been placed under the control of the Secretary of the Interior for disposition under the act of July 5, 1884. Said act further provided

That a preference right of entry for a period of six months from the date of the act shall be given all *bona fide* settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations, and for a period of six months, from the date of settlement when that shall occur after the date of this act.

That part of the reservation embracing the tracts in controversy was surveyed and the township plats were approved and filed in the local office prior to the creation of the reservation.

June 3, 1895, Carmen Romero filed application to make homestead entry of the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 26; NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 27, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 35, township and range aforesaid, which was placed of record June 5, but on July 5 thereafter she relinquished the forty acres in Sec. 27.

June 4, 1895, Elvira Carillo filed application to make homestead entry of the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and W.  $\frac{1}{2}$  of the NE.  $\frac{1}{2}$  of said Sec. 35, which she withdrew on June 10, and at the same time filed another application for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ ; the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 35, and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 26. This application was also

withdrawn on June 17, 1895, and another application was filed for the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 26.

On November 17, 1895, Mrs. Carillo withdrew her last application, and on the 19th of said month she filed an affidavit of contest against the homestead entry of Romero, alleging settlement, occupation and improvement of said tract by affiant and her husband prior to survey and before the establishing of the reservation. That since her husband's death in 1890 she has by herself or her employees and her tenants been in actual, peaceable and notorious possession of said land, and by virtue of said occupation she has under the act of August 23, 1894, the preferred right to enter said land at any time within six months from June 3, 1895.

The filing of her contest must therefore be considered as the first assertion of her right under the act of August 23, 1894, as she acquired no rights by her several applications which were voluntarily withdrawn.

The contest therefore presents two issues: First, whether Mrs. Carillo was residing upon the tract within the meaning of the act of August 23, 1894, at the date of said act; and, Second, whether she asserted her preference right of entry within the period limited by the act.

The surveyed portion of the reservation which embraced the land in dispute was subject to entry at the date of the passage of the act, but by erroneous advice to the local officers it was withheld from entry until they were instructed by letter of May 28, 1895, that "entries may be allowed to go of record in said reservation for the surveyed lands, subject to the conditions named in the act of August 23, 1894." This letter was received at the local office on or about June 3, 1895, and it is from this date the contestant claims that the time prescribed by the act within which the preference right must be asserted begins to run.

The circular of December 1, 1894, 19 L. D., 392, issued under this act, instructed the local officers that

where the lands have not been surveyed the equitable construction of this act seems to be that the preference right of entry shall extend to a period of six months from the date of the filing of the triplicate plats of survey in your office.

This principle will apply with equal force when the lands have been withheld from entry by the action of your office. It is therefore held that Mrs. Carillo was not barred by the failure to assert her claim within six months from the date of the act, she having commenced her contest within six months from the date that the local officers were notified that entries might be allowed.

Omitting for the present all reference to the claim of Mrs. Romero to the preference right given by the act by virtue of her residence upon the tract embraced in her homestead entry at the date of the act, the next question presented by this contest is whether Mrs. Carillo was a resident upon the tract in controversy within the meaning of the act,

and at the date thereof. The evidence clearly shows that she had not at the date when the land became subject to entry made either an actual or constructive residence upon the tract nor at any time prior to the date of Romero's application to enter, but that her actual and legal residence was in the town of Tucson.

It is claimed by the contestant that she "resided" on the land "in the sense that the word is used in the act," and that it was not intended by the act that an actual residence must have been maintained, but residence within the meaning of the act could be shown by actual settlement of one who had improved the tract and was the owner of the improvements at the date specified, of which he was in possession either by his tenants or servants.

The word residence is employed in this act in the same sense that it is used in the homestead laws, and means a residence to the exclusion of a home elsewhere.

In construing this act the Department, in the decision of January 28, 1898, 26 L. D., 87, said:

The words open to settlement under the public land laws must necessarily have reference to laws under which settlement is one of the means of initiating a right and is an essential condition to the acquisition of title. It has a well known technical meaning, and has reference to settlement which can only be made and maintained in person; as contradistinguished from occupancy and settlement which may be maintained by tenants and agents as in the case of occupants of townsite lots.

The words "and are now residing upon any agricultural lands in said reservations" must, for the same reason, apply solely to persons who are then actually residing upon said lands to the exclusion of a home elsewhere.

It appears that Juan Tomas Romero settled upon this land in 1868, then unsurveyed and not reserved. The township plat of survey which was filed in the local office January 2, 1874, showed that his possessions, among other lands, embraced the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of said section 26, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of said section 35, the subdivisions really in controversy.

Romero resided upon the land until his death in 1872, and since that time to the present his widow, the contestee, has resided thereon.

Before the land was surveyed Romero sold a portion of the claim occupied by him to Leopold Carillo, the husband of the contestant, and by mutual agreement the land was divided by a lane. Carillo during his life time improved his portion of said subdivision by the erection of a dwelling house, constructed irrigating ditches and cultivated the land, and his widow, the contestant, has continued to cultivate and occupy the land by her employees and tenants since his death.

The survey of the lands showed that their improvements and respective possessions were upon the same legal subdivisions.

Neither party acquired any right by virtue of their settlement except such as were recognized and confirmed by the act of August 23, 1894.

If Mrs. Carillo was a *bona fide* settler upon the land at the date of said act she would be entitled to make joint entry of the subdivisions in controversy, under section 2274 of the Revised Statutes, but mere occupancy and cultivation of the land by tenants and employees without settlement and residence, to the exclusion of a home elsewhere, will give her no right to the benefit of the act of August 23, 1894, or to the provisions of said Sec. 2274 Revised Statutes. The Department can not lend its aid to enforce contracts as to the possession of public land except as between *bona fide* settlers.

Your decision dismissing the contest of Mrs. Carillo is affirmed.

HOMESTEAD CONTEST—DEATH OF ENTRYMAN—HEIRS.

LYMAN *v.* BALDWIN'S HEIRS.

A charge of failure to cultivate, brought against the heirs of a homesteader within six months after the death of the entryman, does not call for cancellation, and is not sufficient ground to support a contest.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 3, 1899. (L. L. B.)

January 22, 1892, Daniel G. Baldwin made homestead entry for the E.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 22, and the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 23, all in T. 3 N., R. 21 W., Missoula, Montana.

January 17, 1893, he was adjudged insane and committed to the Warm Springs, Montana, Insane Asylum, where he died on October 16, 1895.

March 25, 1896, Patrick Lyman filed affidavit of contest alleging that:

Daniel G. Baldwin is now deceased and that his heirs are not residing upon or cultivating said land as required by law; that during the life of the entryman he wholly abandoned said tract and changed his residence therefrom for more than six months.

Notice of contest was served on the defendants April 10, 1896.

Hearing was had in May following. The register and receiver found that the heirs had failed to reside on or cultivate the land since the death of the entryman; that the entryman had complied with the law up to the date he was declared insane, but recommended the cancellation of the entry because of the failure of the heirs to cultivate the land since the death of the entryman.

Construing the act of June 8, 1880 (21 Stat., 166), providing for the relief of entrymen who have become insane, the local officers held that the operation of the statute ceased with the death of the insane entryman, and that thereafter it was incumbent upon the heirs of the deceased "to resume cultivation of this land within six months of the entryman's death."

Upon appeal your office concurred with the register and receiver, both as to the finding of facts and the construction of the said statute, and their action was affirmed.

The heirs have appealed.

The evidence has been examined and found to clearly preponderate in favor of a compliance with the law as to residence and cultivation by the entryman up to the time he became insane. It also shows that the heirs have failed to reside on or cultivate the land since the death of the entryman.

The contestant having failed to show default upon the part of the entryman, the contest must be dismissed, because the other charge in the affidavit of contest (namely, failure on the part of the heirs to reside upon or cultivate the land) was prematurely brought. The entryman died October 16, 1895, and the contest was filed March 25, 1896. Notice issued the next day and service was had April 10, 1896. This was less than six months from the death of the entryman.

The charge of failure to cultivate by the heirs brought within six months after the death of the entryman does not call for a cancellation of the entry, and is not a sufficient ground to support a contest. (*Serl v. Sullivan's Heirs*, 15 L. D., 182.)

The decision appealed from is reversed and the contest dismissed.

#### HOMESTEAD ENTRY—DEATH OF ENTRYMAN—WIDOW—HEIRS.

##### KEYS *v.* KEYS.

On the death of a homesteader, leaving a widow and heirs, the widow takes the homestead right of her husband free from any claim on behalf of the heirs; and an agreement to divide the land with the heirs, made by her under mistake as to her rights in the premises, can not be held binding, in the absence of any action taken under said agreement by which she would be estopped from the repudiation thereof.

*Secretary Bliss to the Commissioner of the General Land Office, January 3, 1899.* (W. V. D.) (C. W. P.)

The case of Horace A. Keys against Frances E. Keys, involving lots 1 and 2 and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 5, T. 9 N., R. 2 E., Oklahoma land district, Oklahoma Territory, on appeal by Horace A. Keys from your office decision of June 4, 1897, dismissing his contest of Mrs. Keys' entry of the tracts in question, has been considered.

Robert C. Keys made homestead entry of said tracts October 5, 1891, and died December 16, 1894, leaving a widow, the defendant, Frances E. Keys, and four children by a former wife, surviving him.

Mrs. Keys, on February 25, 1896, filed a relinquishment of said tracts, and on the same day made homestead entry of the same.

March 2, 1896, Horace A. Keys, one of the children of the decedent, filed an affidavit of contest against said entry, alleging that at the date of the entry made by Mrs. Keys, he was an actual *bona fide* settler on said tracts, and had made valuable improvements thereon.

A hearing was ordered for November 16, 1896, when both parties appeared. After the evidence on the part of the contestant had been produced, the defendant's counsel moved to dismiss the contest. The local officers sustained the motion and dismissed the contest. The contestant appealed. Your office affirmed the judgment of the local officers.

The contestant now appeals to the Department.

It appears from the evidence submitted by the contestant that Robert C. Keys died December 16, 1894, and that shortly after his death, his widow, the defendant, under the mistaken belief that she was only entitled to a third of the land in question, as well as to a third of the personal property of the decedent, agreed to a division of the land, and took a certain portion thereof, containing fifty acres, as her part, leaving the remainder for division between the children of the decedent by his former marriage. In the latter part of December, 1894, the contestant moved into an unoccupied house upon the land, and has resided on the land ever since. And he rented from the contestee a part of that portion of the land which was taken by her under the arrangement above referred to. In July, 1895, the contestant built a dugout on that part of the land taken by the children and moved into it. It also appears that soon after the division of the property, Mrs. Keys, having discovered that she was entitled to the whole of the land in question, under the homestead law, told the contestee that she was going to hold the entire tract.

That Mrs. Keys, as the widow of Robert C. Keys, had a right to his homestead claim upon his death, there can be no question, and that she was entitled to relinquish the claim, if she so elected; there can be no doubt since the decision of the Department in the case of *Steberg v. Hanolt*, 26 L. D., 436.

It appears that, under a mistaken idea of her right to the land, she agreed to divide it with the children of her deceased husband. It cannot be held that such a contract would be binding upon her, in the absence of something in the nature of an estoppel, and it is not pretended that either the contestant or the other children of the decedent have placed any valuable improvements upon the land, or are in any way injured by the contestee's repudiation of her agreement.

Even if it should be conceded that the contestant could be regarded as a settler upon the land under the settlement laws, the testimony shows that Mrs. Keys was the prior settler.

The claim that this agreement should be held to be binding on Mrs. Keys for the reason that the division of the land was made in pursuance of an agreement by Mrs. Keys with her husband prior to his death which prevented him from making a will in favor of his children, is without force, for the decedent could not by will defeat the law which provides that upon the death of the entryman the homestead right shall inure to the benefit of the widow.

Your office decision is therefore affirmed.

MCKINNON *v.* ANDERSON.

Motion for review of departmental decision of July 8, 1898, 27 L. D., 154, denied by Secretary Bliss, January 4, 1899.

CANTREL *v.* BURRUSS.

On motion for review of departmental decision of July 27, 1898, 27 L. D., 278, the judgment of cancellation as to Cantrel's entry is so modified as to leave said entry intact as to the land not in conflict with the claim of Burruss. Acting Secretary Ryan to the Commissioner of the General Land Office, January 9, 1899.

## PRACTICE—ATTORNEY—APPEAL—LOCAL OFFICERS.

BROADBROOKS *v.* KYLE.

The failure of an attorney to file written authority for his appearance before the local office will justify said office in refusing to recognize said attorney; but the absence of such written authority cannot be afterwards taken advantage of by one who has otherwise authorized such appearance.

Mailing an appeal to the local officers within the time allowed for taking an appeal from their action, does not bring the appeal within the rule as to time, if not received at the local office within the time fixed therefor.

A desert land entry is not invalid because allowed by the receiver, in the absence of the register, where both offices are filled at such time, and the register on his return approves the action of the receiver.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 9, 1899.* (C. W. P.)

The case of Clarence E. Broadbrooks *v.* Mary A. Kyle is before the Department on appeal of the former from your office decisions of February 27, 1897, and June 3, 1897, whereby Mary A. Kyle's desert land entry, No. 302, made January 27, 1896, of the E $\frac{1}{2}$  of the SW $\frac{1}{4}$  and lots 3 and 4, Sec. 31, T. 32 N., R. 34 E., Miles City land district, Montana, was held intact, and the claim of Broadbrooks, under his desert land application for the same tract, was denied.

The facts are stated in the decisions appealed from.

The grounds of appeal alleged are:

1st. In holding that John J. Kerr was the attorney for the appellant on November 30, 1895, or at any time prior to February 16, 1896, and that notice of the rejection by the local officers of the appellant's desert land application given to Kerr was binding upon the appellant.

2nd. In finding that the appeal of the applicant, filed on February 26, 1896, from the second rejection of his desert land application, was not filed in time.

3rd. In finding that it was not necessary to consider the question as to whether appellant's second application should have taken precedence

over that of Mrs. Kyle, because, as he claims, it reached Miles City simultaneously with the latter and antedated it.

4th. In holding valid Mary A. Kyle's desert land entry, which was allowed by the receiver, in the absence of the register.

5th. In affirming Mrs. Kyle's right to the land, and declaring that her desert land entry should remain intact.

6th. In not holding that appellant's desert land application should now be allowed.

7th. In refusing appellant's motion for review.

1. It appears that on November 30, 1895, the local officers rejected the appellant's first desert land application, and that notice of the rejection was given by mail to John J. Kerr, as attorney for the appellant, on the same day. Notice does not appear to have been given to the appellant himself, and it is claimed by the appellant that Kerr was not his attorney at the time notice was served on him, and that consequently notice to him was not notice to the appellant.

The record shows that Kerr drew up the applicant's first application papers and forwarded them to the local officers, together with the purchase money for the land, and that he received the purchase money returned to him by the local officers, on the rejection of the appellant's first application, and again forwarded the purchase money, with the appellant's second application, which was again returned to him by the local officers, on January 29, 1896, and he was notified of the rejection of the appellant's second desert land application, and advised that "Clarence E. Broadbrooks has this day been notified by registered mail."

It is admitted that Kerr was authorized by the appellant to draw up his application papers and forward them to the local officers, together with the purchase money, which he did, and it is not pretended that the appellant gave the local officers notice that his employment as attorney was limited to those specific acts. But it is argued that Kerr's employment was in fact confined to those acts, and that he was not authorized to receive notice of the action of the local officers in rejecting the appellant's application, and that consequently such notice was not binding on the appellant. It is insisted that only attorneys who file their appearance and authority for acting as attorneys for the parties, whom they claim to represent, can be recognized as such attorneys under the regulations of March 19, 1887 (5 L. D., 308).

That Kerr was authorized to represent the appellant as his attorney in regard to his desert land application cannot be denied upon the admitted facts, and the appellant cannot be permitted to deny that notice of the rejection of his application given to Kerr as his attorney was notice to him. *Walker v. Gwin*, 25 L. D., 34; *Duncan v. Rand*, 19 L. D., 354; *Atkins v. Creighton*, 14 L. D., 287. The failure of the attorney to file written authority for his appearance would have justified the local office in declining to recognize said attorney in the first instance; but the absence of such written authority can not now be

taken advantage of by the applicant who, as hereinbefore shown, had otherwise authorized said attorney to act for him in the premises.

2. The next point presented is in regard to the appellant's second appeal.

It is admitted that the appellant was notified by the local officers of the second rejection of his application on January 29, 1896, and the record shows that the appellant's second appeal was not filed in the local office until March 10, 1896. The time for appeal expired March 9, 1896. The appeal was consequently filed, too late. Affidavits were filed by the appellant, tending to prove that the appellant mailed to the local officers at Miles City a copy of this appeal on March 3, 1896, and also that the said Kerr mailed to the local officers at Miles City said appeal on February 26, 1896. But mailing an appeal to the local officers within the time allowed for taking an appeal from them does not bring the appeal within the rule as to time, if not received at the local land office within the period fixed therefor. (*McLeod v. La Rock*, 18 L. D., 137.)

3. In view of the foregoing, it is manifest that there is no error in your office decision in the ruling complained of in the third assignment of errors.

4. It is insisted that the entry of Mrs. Kyle is invalid because allowed by the receiver at Miles City, in the absence of the register.

The record shows that William J. Smith, who made desert land entry of said land July 16, 1894, but whose entry had been canceled on October 5, 1895, filed a relinquishment of his entry on January 25, 1896, and that Mrs. Kyle, on January 27, 1896, presented a desert land application for said land, which was accepted by the receiver in the absence of the register, and that upon the register's return, the action of the receiver was approved by him.

While it is true that a vacancy in the office of either the register or receiver disqualifies the remaining officer for the performance of the duties of his own office during the vacancy, the rule is not held to apply to the case of the absence of one of the officers, when both offices are filled. In the case of *Clewell and Marsh*, 2 L. D., 320, in which Marsh had visited the receiver at his residence at some distance from his office, and presented an application to enter a tract of land under the homestead law, at the same time tendering the fees, and the receiver accepted the application and the fees, the entry was allowed. In the case of *Paris Meadows et al.*, 9 L. D., 41, it was held that a filing by Meadows, received and accepted by the receiver during the temporary absence of the register, was not void because presented to and accepted by the receiver in the absence of the register, as was held in the original decision of the Department, and it was said:

On the other hand, I have no doubt that, when a paper is presented to and received by the register, receiver, or an authorized clerk, and is duly made of record as a declaratory statement, and placed on the proper files, it is then within the meaning

of the law filed not only in the office, but with the officer to whom the law directs it, provided the two offices of register and receiver are then filled. To hold otherwise would tend to unsettle titles and give rise to interminable litigation, imposing upon parties, who have in the utmost good faith attempted to fulfill every requirement of the law, great trouble and expense, followed by the loss of claims and homes, which on every principle of right and justice they have reason to think secure. (See *Walker v. Sewell*, 2 L. D., 613.)

But the case of *Potter v. United States*, 107 U. S., 126, is conclusive on the point. It is there held that the register and receiver were not required to sit at the same time and concurrently pass upon the sufficiency of the proof of settlement and improvement by pre-emptors; that if the proof is submitted to the register on one day and he is satisfied, there is nothing in the statute which implies that it may not be lawfully submitted, at some subsequent day, to the receiver for his approval; that they were nowhere required to meet and jointly consider the sufficiency of the proof; that if both were satisfied, that is all the law requires. It will be observed that the desert land law (19 Stat., 377,) simply requires that the applicant shall file his declaration with the register and receiver.

The fifth, sixth, and last errors assigned by the appellant are too general to require special consideration. Rule of practice 88 requires a specification of errors "which shall clearly and concisely designate the errors of which he complains."

The decisions of your office are accordingly affirmed.

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JONES *v.* PUTNAM.

Motion for review of departmental decision of October 31, 1898, 27 L. D., 575, denied by Acting Secretary Ryan, January 9, 1899.

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HOMESTEAD CONTEST—SECOND ENTRY.

MAY *v.* COLEMAN (ON REVIEW).

A homestead entry, made in good faith, for one hundred and sixty acres when the entryman was entitled to take but eighty acres, is illegal only as to the excess, and in such case the entryman may be allowed to retain the eighty on which his improvements are situated and relinquish the remainder.

*Acting Secretary Ryan to the Commissioner of the General Land*  
(W. V. D.) *Office, January 11, 1899.* (C. W. P.)

This is a motion filed by the attorney for Jacob W. May to review the decision of the Department of November 2, 1898, in the case of the said May against James A. Coleman, affirming the action of your office in canceling the entry of the said Coleman as to the S.  $\frac{1}{2}$  of the

NE.  $\frac{1}{4}$  of Sec. 35, T. 28 N., R. 3 E., Perry land district, Oklahoma Territory, and allowing his entry of the N.  $\frac{1}{2}$  of said NE.  $\frac{1}{4}$  to stand, subject to his compliance with the requirements of the homestead law, and also awarding the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of said section to May.

The motion is based upon the same grounds which were urged by the attorney for May, in his elaborate brief in the case, when it was before the Department upon the merits.

The record shows that Coleman made homestead entry of the NE.  $\frac{1}{4}$  of said Sec. 35, September 28, 1893; that on July 5, 1894, May filed an affidavit of contest, charging that Coleman on May 15, 1877,

filed his homestead entry for the S.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of Sec. 22, Tp. 14 S., range 1 E., in Dickinson Co., Kansas, submitted final proof on the same October 6, 1881, and patent was issued in April, 1882; the tract contained eighty acres.

This affidavit was corroborated by one J. T. Howard, who on May 23, 1895, withdrew his corroboration. On the motion of Coleman, May was required to amend his affidavit of contest, and on June 26, 1895, he filed an amended affidavit, in which he charged that Coleman has "totally exhausted his homestead right and has had the benefit of the homestead law, and is thereby disqualified from acquiring title to the tract of land herein involved."

In these affidavits there is no charge of fraud or of wilful and deliberate perjury, but the charge is simply that the homestead entry made by Coleman September 28, 1893, is illegal by reason of his having exhausted his homestead right by his homestead entry of May 15, 1877.

The case was set for hearing on March 27, 1896, and on motion of Coleman the hearing was postponed to April 3, 1896, when May appeared in person and by attorney, but Coleman failed to appear, and the case was heard upon the evidence presented by May.

The local officers held that the contestant had sustained the charges made in his contest affidavit, and had proven to their satisfaction that Coleman's entry was fraudulent and voidable in its inception and should be canceled, and they so recommended. Coleman appealed.

The evidence showed that Coleman, on May 15, 1877, made homestead entry of the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 22, T. 14 S., R. 1 E., Salina land district, Kansas, upon which he made final proof, and that final certificate issued October 6, 1881, and patent April 29, 1882; that he did not commute said entry, but made proof of his compliance with the homestead law as to residence and cultivation for a period of five years, less the term of his military service. There was also in evidence a certified copy of the homestead affidavit of Coleman for the land in controversy, which contains the averment that he had not "heretofore made entry under the homestead laws, or filed a soldier's declaratory statement."

The contestant testified that Coleman told him that he had previous to his entry of the land in controversy made a homestead entry in Kansas, and that he had commuted it. He also offered in evidence

the deposition of R. L. Cormack, who testified that Coleman lived on the land he entered in Kansas, about three years. This was all the testimony in the case.

Your office did not decide directly upon the contest, but Coleman having filed in your office a relinquishment of the S.  $\frac{1}{2}$  of said NE.  $\frac{1}{4}$ , accompanied with the affidavit, which is set out, in substance, in the decision complained of, your office held that Coleman was clearly entitled under section 6 of the act of March 2, 1889 (25 Stat., 856), to make an additional homestead entry of eighty acres, accepted his relinquishment, canceled his entry as to the S.  $\frac{1}{2}$  of the said NE.  $\frac{1}{4}$ , held his entry of the N.  $\frac{1}{2}$  of said NE.  $\frac{1}{4}$  intact, and awarded the S.  $\frac{1}{2}$  of the said NE.  $\frac{1}{4}$  to the contestant. The decision complained of affirmed your decision.

The record shows that, at the time Coleman entered the land in controversy he was entitled, under the sixth section of the act of March 2, 1889 (25 Stat., 854), to make an additional entry of eighty acres of land. He made entry of one hundred and sixty acres under the belief, as he swears in the affidavit which accompanies his relinquishment, that he was entitled to make entry for that quantity of land.

In the case of Legan v. Thomas (4 L. D., 441), the Department held (syllabus) that an entry covering more than one hundred and sixty acres will be canceled to the extent of the illegal excess, but that prior to such cancellation the entire tract is preserved from all other appropriation; and in Henry C. Tingley's case, 8 L. D., 205, it was held that a homestead entry, embracing tracts in two or more sections, must approximate one hundred and sixty acres, as nearly as practicable, without requiring a division of the smallest legal subdivision included therein; and that a homestead entry allowed in violation of this rule is subject to attack for such illegality, and a preference right to enter the lands finally excluded therefrom may be awarded to the adverse claimant; and that the entryman should be allowed to select and relinquish one of the smallest legal subdivisions.

It is clear that Coleman's entry was only illegal as to the excess, and that he should be allowed to select the eighty acres on which his improvements are situated and relinquish the other eighty.

In regard to the objections that May, after he instituted his contest, had a vested right to the land in controversy, if he successfully prosecuted his contest, of which he would be unlawfully deprived if Coleman were allowed to relinquish his claim to eighty acres of the land involved and retain the other eighty, it is not necessary to add anything to what is said in the decision complained of.

The motion for review is therefore denied.

## MINING CLAIM—ANNUAL EXPENDITURE—FINAL CERTIFICATE.

TRIPP ET AL. *v.* DUNPHY.

The expense of keeping a watchman and custodian in charge of a mine that is not being worked, may be properly charged as an item of annual expenditure. The final certificate on a mineral entry should issue in the name of the heirs of the applicant, where it is known at the date of its issuance that the applicant died prior to the submission of final proof and making payment for the land.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 11, 1899.* (C. J. W.)

The controversy in the above stated case involves mineral entry No. 458, for lot No. 37, sections 25 and 26, township 9 south, range 21 east, M. D. M., Stockton land district, California, and known as the Second Volcano Quartz Mine. It appears that said claim was located by Mack Culler and Sarah J. Beck, on November 21, 1882, and that William Dunphy derived his possessory title from said locators, through a regular chain of conveyances, set forth in the abstract of title filed with the record, and that on March 12, 1892, said William Dunphy filed his application for patent therefor.

Notice of the application was published and posted from March 19, to May 21, 1892, during which period no adverse claim or protest was filed.

About the 17th of September, 1892, William Dunphy died, and on March 6, 1896, Carmen U. Dunphy, executrix of the estate of said William Dunphy, made mineral entry No. 458 for said claim, but subsequently, by direction of your office, the name of William Dunphy was substituted for that of Carmen U. Dunphy, executrix, in the final certificate.

January 1, 1896, George A. Tripp and W. P. Thompson located the Tripp Quartz mining claim, embracing the same land and lode as the Second Volcano Quartz mine, and their location notice was recorded by the recorder of Madera county, on February 17, 1896.

On March 6, 1896, they filed their protest, verified by the affidavit of Tripp alone, and on April 20, thereafter, filed the corroborative affidavits of H. E. Bigelow, O. H. Cole, John Brown, and W. H. Henderson. The protest charged, in substance, the abandonment of the mine by defendant and a failure to perform assessment work for the year ending December 31, 1895, which it was insisted operated as a forfeiture of the possessory title and left said mine legally subject to relocation.

On June 15, 1896, your office directed the local officers to allow a hearing for the purpose of ascertaining whether or not the claimants of the Second Volcano Quartz mine performed the annual assessment work therefor for the year ending December 31, 1895. Such hearing occurred, at which both parties submitted testimony, and appears to have closed on September 19, 1896.

On December 28, 1896, the local officers rendered a joint decision, in which they found that the owners of said Second Volcano Quartz mine had expended upon it for the year 1895 more than was required by the statute, and recommended that the protest be dismissed and that patent issue in the name of William Dunphy. The protestants appealed from this decision, and on May 4, 1897, your office affirmed the local officers, and dismissed the protest. The protestants have appealed to the Department, upon the following grounds:

1st. That the preponderance of the evidence does establish that the said mining claim was abandoned and forfeited by the said applicant prior to the location by protestants.

2nd. That the protestants were in the quiet, peaceable, adverse and exclusive possession of said mining claim at the time entry was made by Carmen U. Dunphy.

3d. That the evidence shows that protestants' location was legally and regularly made in compliance with all the laws, rules and customs governing the same.

4th. That the Honorable Commissioner erred in holding that protestants were obliged to show that the contestee abandoned and forfeited the said mine.

5th. The Honorable Commissioner erred in not requiring the contestee to show that she had complied with the law, relative to holding and possessing a mining claim on public land.

6th. That the Honorable Commissioner erred in holding it necessary to sustain the protest that protestants were required to show the validity of their own location and also to negative the claim of contestee.

7th. That the evidence fails to show that the contestee did or caused to have done the one hundred dollars worth of work on said mine for the year 1895, as required by law.

The vital issue in the case made by the respective contentions of the parties, is whether or not the amount of assessment work required by law had been done upon the mine by or for the defendant for the year 1895.

There is a great deal of irrelevant testimony in the record, notice of which is not deemed necessary. The proof shows clearly that E. E. Calhoun, who made the affidavit showing the assessment work for the year 1895, and who was dead at the time of the hearing, was the agent of defendant, and the watchman and keeper of the mine for its owner, and understood the duties and responsibilities of such position. The protestants, who subsequently made a relocation of this claim, knew of its occupancy by Calhoun for the defendant, and Tripp made application for Calhoun's place a short time before making relocation. That he had full notice of defendant's claim is abundantly shown, and not denied. There was no abandonment of it by the owner, and if his right to it was lost, it could in this case only be because of a failure to have the assessment work performed for the year 1895.

In reference to this matter, the proof shows that defendant paid in cash for labor on the mine in 1895 eighty-eight dollars, for which receipts are exhibited, and that other payments were made, not in actual cash, but its equivalent, which, when added to the cash payments, raise the expenditures on assessment work for 1895 to much more than one hundred dollars. It is objected to these items of expenditure that they

can not properly be charged to the account of assessment work. It appears from the evidence that the agent, Calhoun, was to have, as compensation for looking after the mine, the use of a dwelling house, consisting of several rooms, near by, but not on the property, which belonged to the estate of the mine owner; that Calhoun was post-master, and not only resided in the building, but used one room as a post-office, and the building was shown to be worth four or five dollars per month for rent. It further appears that nothing on this account was embraced in Calhoun's receipt, which was for cash paid for specified work. It is denied by protestants that the expense of keeping a watchman over the mine can be properly charged as an item of assessment expenditure. If this sort of service may be properly classed as labor on the mine, it would then be within the express terms of section 2324 of the Revised Statutes.

That one who guards and cares for the works, machinery, and buildings of a developed mine, which has been worked, but in which mining operations are temporarily suspended, performs an important and necessary service can not be doubted.

In the case of *Lockhart et al. v. Rollins*, 21 Pacific Reporter, 413, it was held by the supreme court of Idaho (syllabus) that:

Where mining works are idle, time and labor of a watchman and custodian expended on the property in taking care of it is labor done on the claim.

This seems to be a reasonable interpretation of the law, and under it the value of the use of the building furnished Calhoun could be properly allowed as a credit on his assessment account. This item alone added to the eighty-eight dollars paid in cash, would make the expenditures on the mine for the year 1895 over one hundred dollars.

There is another item, connected with the agreement made with one Lee, a Chinaman, who removed the old mill building and stacked the lumber, which the defendant is fairly entitled to have added to the amount paid on assessment work. It seems that Lee was to have ten dollars, which was paid him in cash, and certain quartz and tailings from the mill, which appears to have yielded several dollars.

It is manifest that the estate of defendant paid out much more than a hundred dollars for the year 1895, in the effort to preserve the hoisting works and other valuable appendages of the mine, and the steps taken indicate not an intention to abandon the claim, but rather the reverse.

While there is some conflict in the testimony, the decided weight of it is in favor of defendant, who appears to have paid five thousand dollars for his possessory title, and to have maintained his claim by a substantial compliance with the law as to annual work.

The material facts elicited at the hearing are sufficiently set forth in your office decision.

If the testimony of George C. Crane, the bookkeeper for the Dunphy estate, who acted under instructions from those interested in it,

and who paid out money for it, is to be credited, it is manifest both that it was the purpose of the owners to maintain their claim to the mine, and that the assessment work for 1895 was done. The protestants insist that Crane is impeached by statements made by him in a trial before a justice of the peace several months before the hearing when he was charged with malicious mischief for working upon the claim in question, which statements they claim are inconsistent with his testimony at the hearing. No foundation was laid for the introduction of this secondary evidence, but if it is to be considered as having a place in the record, the vagueness and uncertainty of it leaves Crane's testimony unimpaired.

It is noticed that by direction of your office the final certificate issued to Carmen U. Dunphy, executrix, was changed by substituting the name of William Dunphy, the deceased applicant for patent. As it was known at the time of issuing such final certificate that William Dunphy died after making application for patent and before submitting final proof and making payment of the purchase money for the land and thereby earning title, it appears that the certificate should have been issued in the name of "the heirs of William Dunphy, deceased," and the certificate should now be so corrected.

Both parties have participated in all of the proceedings in this case, including the hearing in the local office, the appeal to your office and the appeal to the Department, without calling attention to or asking a decision of the question, if any, growing out of the failure of William Dunphy, his heirs and representatives, to carry his application for mineral patent to entry within a reasonable time after the expiration of the period of publication and such question is not intended to be considered as determined or decided by what is here done or said.

As modified herein your office decision is accordingly affirmed.

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REPAYMENT—DESERT LAND ENTRY.

THOMAS R. DEAN.

One who submits final proof and secures patent on part of the land embraced in his desert land entry, and relinquishes the remainder, and then applies for repayment of the money paid on the relinquished tract, will not be heard to say that his entry was "erroneously allowed."

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 13, 1899. (C. J. G.)

The record in this case shows that Thomas R. Dean made desert land entry No. 424, April 14, 1890, for the E.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  Sec. 25, T. 36 N., R. 11 E., and NE.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , lots 3 and 4, and SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  Sec. 30, T. 36 N., R. 12 E., M. D. M., containing 601.95 acres, Susanville land district, California.

June 6, 1890, final proof was made and final certificate issued for the NE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , E.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$ , lots 3 and 4, SE.  $\frac{1}{4}$  of NW.  $\frac{1}{4}$  Sec. 30, T. 36 N., R. 12 E., M. D. M., containing 401.35 acres. Proof was not made on a portion of the original entry, to wit, the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  Sec. 25, T. 36 N., R. 11 E., and the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$  Sec. 30, T. 36 N., R. 12 E., M. D. M. Dean relinquished all his right, title and claim to this portion of his original entry, and May 23, 1891, your office canceled said entry to that extent.

November 9, 1891, patent issued on that portion of Dean's entry for which final proof was made.

April 9, 1897, Dean filed an application for repayment of the purchase money paid by him on the portion of his original entry that had been relinquished. The basis of said application was:

The entry was erroneously allowed for the reason that the entryman had previously made a Lassen county filing, for lands in sections 29 and 32, T. 36 N., R. 12 E., No. 861, on July 18, 1887, and had thereby exhausted his right to make desert land entry.

May 10, 1897, your office, after stating the facts in the case, denied the said application for repayment, and Dean has now filed an appeal to the Department.

Without discussing the allegations of error set forth in the said appeal it is sufficient to state that Dean, having submitted his proof and received patent for a portion of the land included in his entry, will not now be heard to say that said entry was erroneously allowed.

Your office decision is hereby affirmed.

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#### FRANK v. CORLISS' HEIRS.

Motion for review of departmental decision of October 8, 1898, 27 L. D., 510, denied by Secretary Bliss, January 13, 1899.

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#### RAILROAD GRANT—LANDS EXCEPTED—SETTLEMENT CLAIM.

##### UNION PACIFIC RY. CO. v. GRANT.

The occupancy and improvement of land at the date of the definite location of the Union Pacific road, do not constitute a pre-emption claim that has "attached" at such time, within the meaning of the excepting clause in the grant to said company.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 13, 1899. (F. W. C.)

The Union Pacific Railway Company has appealed from your office decision of June 16, 1896, sustaining the action of the local officers in holding the NW.  $\frac{1}{4}$  of Sec. 5, T. 5 S., R. 70 W., Denver land district, Colorado, to have been excepted from the grant made to aid in the construction of that portion of the Union Pacific railway formerly known

as the Denver Pacific railroad, by reason of the settlement claim of one Mrs. Townsend existing at the date of the filing and approval, on August 20, 1869, of the map of definite location of that portion of the line of the road opposite this tract.

From the records of your office it does not appear that any claim has ever been asserted to this tract prior to the tender, on October 16, 1884, of the homestead application of Frederic H. Grant, which application was accompanied by his affidavit, corroborated, in which he alleged that he had been acquainted with the land for ten years, that when he first knew it there were very old buildings and improvements upon it, and that he, affiant,

is informed that it was settled upon, resided upon, and improved, by a Mrs. Townsend, a widow, in or prior to the year 1868, and that she continued to reside upon and improve said land until after the definite location of the line of the Denver Pacific Railway and Telegraph Company, August 20, 1869.

Upon said allegation hearing was ordered, due notice being given the company, and at the time appointed two witnesses were introduced on behalf of Grant. John Davis, the principal witness, testifies that he first became acquainted with this land in 1868, that at that time the land was unsurveyed, the plat of survey not being filed until 1874, and that Mrs. Townsend was at that time living upon what after survey became the NW.  $\frac{1}{4}$  of said section 5, being the tract here in question; that she had a small portion of the SW.  $\frac{1}{4}$  of said section cultivated at that time, and that he, Davis, purchased of her the improvements upon the SW.  $\frac{1}{4}$ ; that Mrs. Townsend's house was finished in the spring of the following year, and that she resided upon the land at intervals until 1870, when she sold the remainder of her improvements upon the tract here in question, also to him, Davis. During the year 1869 she planted to potatoes a small piece of the tract here in question, and this, together with her house upon the tract, constituted her entire improvement.

As to her qualification to assert a settlement claim, the record is very meager. Both the witnesses introduced by Grant swear that she intended to claim the tract under the pre-emption law, that she appeared to be a native-born citizen, and that the general report was that she was a divorced woman. She does not appear to have been heard from since 1870, and does not appear to have ever initiated a claim to the land by any proceeding in the local office.

Upon the record thus made the local officers found that the tract here in question "was in the possession and occupancy of a Mrs. Townsend, who claimed the same under the pre-emption laws," and held "that the land was excepted from the operation of the grant, and therefore recommended that Frederic H. Grant's application to make his homestead filing upon the land be accepted." Upon appeal by the railroad company your office sustained the local office, as before stated, and the company has prosecuted the case by appeal to this Department.

The grant under which the Union Pacific Railway Company lays claim to this tract is similar to the grant made to aid in the construction of the Central Pacific railroad, and provides that the odd-numbered sections granted are those "to which a pre-emption or homestead claim may not have attached at the time the line of said road is definitely fixed," and in the recent case of *Wight v. Central Pacific Railroad Co.* (27 L. D., 182) it was held that:

It is true that some of the departmental decisions have given recognition to claims resting only on settlement, possession, cultivation or improvements existing at the time of definite location, but as applied to grants which are in terms and in legal effect the same as the one now under consideration they are in conflict with the decisions of the supreme court and can not be followed.

Again, in the case of the *Central Pacific Railroad Co. v. Hunsaker* (27 L. D., 297), the decision in the case of *Wight v. Central Pacific Railroad Co.*, *supra*, was referred to and followed.

Under these decisions, which are in harmony with the repeated rulings of the supreme court involving a construction of the grant under which appellant lays claim, it must be held that the record before the Department does not evidence such a claim to the land under consideration, at the time of the filing or approval of the company's map of definite location, as would serve to except the tract from the operation of the grant, and your office decision is accordingly reversed and the application by Grant to make homestead entry of this land will stand rejected.

#### HOMESTEAD ENTRY—DESERTED WIFE—SETTLEMENT RIGHT.

##### SINNETT *v.* CHEEK.

The right of a deserted wife to make entry of the land embraced within the relinquished homestead entry of her husband, depends upon her settlement on the land when his entry is canceled, and to be effective, as against an adverse claimant, must be asserted within three months from such cancellation.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 13, 1899. (E. F. B.)

The land in controversy, to wit, the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 23, and SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 24, T. 39, R. 18 W., Boonville, Missouri, was formerly embraced in the homestead entry of Jacob M. Sinnett, made October 24, 1889, which he relinquished December 10, 1894, and on the same day Stephen R. Cheek made homestead entry of said tracts.

On October 10, 1895, Mary A. Sinnett contested said entry, alleging that she was the deserted wife of Jacob M. Sinnett; that she furnished the money to make his entry; that she lived on said land with her husband from date of entry until February, 1892, when he took her and their children to her father's house in an adjoining county on a pretended visit, but did not return for them, although he promised to do

so; that while her husband, the entryman, had lived on the land sufficient time to entitle him to a patent, he declined to make final proof, but relinquished said entry in favor of the defendant to deprive her of her rights, of which the defendant had notice.

At the hearing the facts alleged in the contest were substantially proven, except as to any collusion between defendant and Sinnett with the intention of defrauding her, although he knew that she had placed on record a notice that she claimed a homestead in said land.

There is no question that her absence from the land while on a visit to her father was enforced by the failure of her husband to take her back to the homestead as he had promised, and to which she was always willing to return. But although it may be conceded that his residence was her residence until after his abandonment of contestant, and that when the relinquishment was executed and his purpose to abandon her was manifested, she was constructively residing on the land, it does not appear that she took any steps to secure her rights as a settler until nearly one year after the entry of Cheek. Whatever right she may have had to make entry of this particular land as the deserted wife of Sinnett must have depended upon her settlement upon the land at the date of the cancellation of his entry, and this right could only have been preserved and maintained by proper proceedings in the land office within three months from the initiation of her right, either by making entry of the land or by filing within that period a contest against the entry of Cheek.

As no action was taken by her until ten months after the entry of Cheek, whatever right she might have had was barred by this delay.

The decision of your office dismissing the contest and holding Cheek's entry intact is affirmed.

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REPAYMENT-ENTRY CANCELED FOR CONFLICT.

GEORGE D. CLONINGER.

An entry that on contest is canceled on account of the superior right of a bona fide settler is "canceled for conflict" within the meaning of the repayment act of June 16, 1880.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 13, 1899. (G. C. R.)

George D. Cloninger has appealed from your office decision of September 9, 1897, which denied his application for repayment of fees and commissions paid on homestead entry, No. 8080, for the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 36, T. 30, R. 10 W., Ironton, Missouri.

It appears that a former application for repayment, &c., on said entry was made by Cloninger in March, 1886, and was on April 15, next thereafter, denied because "the law does not provide for repayment in cases where parties voluntarily relinquish or abandon their claims;" and the

decision appealed from denied the application because of the former action of your office, which had not been appealed from.

It appears that Cloninger's entry of said tract was canceled in January, 1886, as a result of a contest brought by one Hensley, alleging prior settlement upon the land. It would therefore appear that the applicant did not "voluntarily relinquish," as found by your office in its decision of April 13, 1886, denying the repayment.

Sec. 2 of the act of June 16, 1880 (21 Stat., 287), provides that:

In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter *be canceled for conflict*, or where, from any cause, the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excess paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

It appears that Cloninger's entry was canceled "for conflict"—that is, his entry was canceled because it conflicted with the superior rights of a *bona fide* settler, and that those rights were determined by a contest properly initiated and successfully prosecuted. Niles N. Ydsti (27 L. D., 616). The case therefore falls within the meaning of the statute.

The decision appealed from is reversed, and the application for repayment will be allowed.

#### REPAYMENT—DESERT LAND ENTRY.

EDWARD BAER.

Where a desert entry, not "erroneously allowed," is canceled for failure to effect reclamation within the statutory period, the entryman is not entitled to repayment on a showing that he did not reclaim the land because he believed it might be held subject to a railroad grant.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 6, 1899.* (G. O. R.)

On December 19, 1887, Edward Baer made desert land entry for the NE.  $\frac{1}{4}$  of Sec. 23, T. 5 N., R. 5 W., S. B. M., Los Angeles, California. He paid fifty cents an acre, amounting to eighty dollars, on the date of said entry. Upon the expiration of the statutory period for making proof of reclamation, he was notified to show cause why his entry should not be canceled for failure to comply with the law, etc. Failing to respond thereto, his entry was, on October 20, 1891, duly canceled. On June 1, 1897, he relinquished all claim to the land, and applied for a return of the fees, commissions and purchase moneys by him expended in making said entry. He accompanied his application with an affidavit, in which he states

that he never made any attempt to reclaim the land embraced in said entry, for the reason that shortly after date of entry it became a matter of public notice that the Hon. Secretary of the Interior had, in a communication dated June 23, 1888, to the Commissioner of the U. S. General Land Office, informed that official that the Southern Pacific R. R. Co. would contend for lands claimed by it under its grants in the courts;

that he "ascertained" that his entry covered land claimed by said railroad company "to have been reserved for it under an act of Congress, approved July 26, 1866," which grant had not been finally adjusted, and therefore his entry was "erroneously allowed" for the reason that the land department had no jurisdiction over the land embraced therein until the grant had been finally adjusted and the land excepted therefrom; that even if he reclaimed the land and made final proof, etc., it would avail him nothing, if the court confirmed the claim of the company; or he might be defeated after reclamation, etc., should it later appear that the company had sold the land, etc.

Your office, by decision dated July 7, 1897, denied his application for a return of the purchase money, and he has appealed to this Department.

It appears that said desert land entry embraces land in an odd section and within the primary limits of the grant to the Atlantic and Pacific Railroad Company (act of July 27, 1866, 14 Stat., 292), and within the indemnity limits of the Southern Pacific Railroad. The grant to both companies was made by the same act. The withdrawal for the benefit of the Southern Pacific Railroad Company under that act was made March 22, 1867, but this withdrawal was revoked August 15, 1887 (6 L. D., 92).

The act of July 6, 1886 (24 Stat., 123), forfeited the grant to the Atlantic and Pacific Railroad Company, and the record fails to show that the Southern Pacific Railroad Company ever selected the tract.

The entry in question was therefore not "erroneously allowed" within the meaning of the statute which authorizes repayment. The fact that the appellant was dissuaded from complying with the law after entry, on the grounds that said company might at some future time claim the land, and that he might after all lose its purchase price and his labor in its reclamation, will not justify, under the terms of the statute, the repayment applied for.

The decision appealed from is affirmed.

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ROBERTSON *v.* PHILLIPS.

Petition for re-review denied, January 13, 1899, by Secretary Bliss. See departmental decisions reported in 27 L. D., 74 and 369.

## MINING CLAIM—NOTICE OF APPLICATION—EXCLUSION.

WOODS *v.* HOLDEN ET AL.

Where the notice of an application for a mineral patent excepts and excludes therefrom all conflict with a specified survey, no portion of the land embraced in said survey, as it existed at the time when the posting and publication of said notice commenced, should be included within the entry allowed under said application.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 13, 1899. (E. B., Jr.)

The previous decisions of the Department in this case were made February 14, 1898 (26 L. D., 198), and September 12, 1898 (27 L. D., 375). The case is again before the Department upon the motion of Holden *et al.* for a reconsideration of so much of said decisions as holds that the Mary Mabel entry, as allowed by the local office, improperly embraces a part of the area in conflict with the Little Montana. In support of this contention it is said that before the filing of the application for patent to the Mary Mabel, the owners of the Little Montana, in recognition of the superiority of the right of the owners of the Mary Mabel to that portion of the conflict between the Mary Mabel and Little Montana which is embraced in the Mary Mabel entry, waived, renounced and abandoned all right thereto and thereby recognized the same as being a part of the Mary Mabel; and that while the notices of the application for patent to the Mary Mabel excepted and excluded the conflict with the Little Montana, the words of exception and exclusion in such notices had reference to that portion of said conflict which was at that time claimed by the owners of the Little Montana and did not refer to that portion thereof which had been theretofore waived, renounced and abandoned by the owners of the Little Montana. Assuming, as was done in the decision of February 14, 1898, that prior to the application for patent to the Mary Mabel, the owners of the Little Montana had relinquished to the United States for the use of the Mary Mabel that portion of said conflict which is embraced in the Mary Mabel entry, it does not follow that this contention is correct. Its weakness lies in the fact that the notices of the application for patent to the Mary Mabel excepted and excluded the conflict with survey "No. 8826, Little Montana lode." Whatever was embraced and included with this survey was excepted and excluded by the Mary Mabel notices, which clearly conveyed the information that the conflict with survey "No. 8826, Little Montana lode," was excepted and excluded in its entirety from the claim sought to be patented under such notices. At the time of the application for patent to the Mary Mabel and during the greater portion of the period of publication and posting of the notices of that application, survey No. 8826 of the Little Montana lode embraced and included the entire conflict with the Mary Mabel, and it was not until about a week before the expiration of such period of publication and posting that any

change was made in that survey. It was then amended so as to eliminate that portion of said conflict which is now in controversy, but that amendment did not operate retrospectively so as to reduce and diminish the exception and exclusion expressly made in the Mary Mabel notices as theretofore published and posted. Considering the purpose for which these notices were published and posted, they must be considered as referring to survey No. 8826 as it existed at the time when the publication and posting of the notices was commenced.

There has been no attempt to produce an instrument or conveyance whereby the owners of the Little Montana have relinquished to the United States for the benefit of the Mary Mabel, or otherwise, any portion of the area in conflict between the Mary Mabel and Little Montana, but it is asserted that the course pursued by the owners of the Little Montana in obtaining a patent to that claim amounts to a waiver or abandonment of that portion of the conflict which is embraced in the Mary Mabel entry. Whatever may have been the effect of these proceedings upon the right of the owners of the Little Montana to this portion of said conflict, the question of its inclusion or exclusion by the Mary Mabel notices must be determined not by ascertaining whether it was then claimed by the owners of the Little Montana, but by ascertaining whether it was then a part of survey No. 8826 of the Little Montana lode.

It appearing that the contention made by the motion for reconsideration is not well taken, that motion is denied and is herewith transmitted for the files of your office.

PRICE OF LAND IN RAILROAD LIMITS—ACT OF MARCH 27, 1854.

HANS OLESON.

Under a railroad grant which provides that "the sections and parts of sections which by such grant *remain* to the United States . . . shall not be sold for less than double minimum," the sections so *remaining* are identified when the map showing the definite location of the line of road is filed and accepted, and from such time, irrespective of any order of withdrawal or notice to the local office, are subject to sale only at the double minimum price.

The act of March 27, 1854, providing that settlers on "public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal shall be entitled to pre-emption at the ordinary minimum," refers to and contemplates withdrawals that are made in anticipation of the location of proposed roads, and not such as are made after the road has been definitely located, and in recognition of rights which have attached thereunder.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 14, 1899. (G. B. G.)

I have considered the application of Haus Oleson for repayment of an alleged excess paid by him upon his preemption entry covering the NE.  $\frac{1}{4}$  of Sec. 14, T. 118, R. 41 W., Marshall land district, Minnesota.

The application is made under the act of June 16, 1880 (21 Stat., 287), and is before the Department on appeal from your office decision of May 5, 1896, holding that "as Hans Oleson's settlement was on May 1, 1868, subsequent to the date of definite location of the railroad, the price he paid, \$2.50 per acre, was the proper price."

This land is within the primary limits of the grant made by the act of July 4, 1866, to the State of Minnesota (14 Stat., 87), and conferred by the State upon what afterwards became the Hastings and Dakota Railway Company. The granting act contained the following provisions material to the questions here presented:

That there be, and is hereby, granted to the State of Minnesota, for the purpose of aiding in the construction of a railroad from Houston, in the county of Houston, through the counties of Fillmore, Mower, Freeborn, and Faribault, to the western boundary of the State; and also for a railroad from Hastings, through the counties of Dakota, Scott, Carver, and McLeod, to such point on the western boundary of the State as the legislature of the State may determine, every alternate section of land designated by odd numbers to the amount of five alternate sections per mile on each side of said road; but in case it shall appear that the United States have, when the lines of route of said roads are definitely located, sold any section, or part thereof, granted as aforesaid, or that the right of preemption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected, for the purposes aforesaid, from the public lands of the United States nearest to the tiers of sections above specified, so much land in alternate sections or parts of sections, designated by odd numbers, as shall be equal to such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or preemption has attached as aforesaid, which lands, thus indicated by odd numbers and sections, by the direction of the Secretary of the Interior, shall be held by said State of Minnesota for the purposes and uses aforesaid:

\* \* \* \* \*

That the sections and parts of sections of land which by such grant shall remain to the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands.

The line or route of said road was definitely located through the township in which the land covered by Oleson's entry lies by the filing and acceptance of the map of definite location June 26, 1867. An order purporting to make a withdrawal of the lands falling to the grant, according to this definite location, was made by the Commissioner of the General Land Office April 22, 1868, notice of which was received at the local office May 7, 1868.

Oleson settled upon the tract and filed his preemption declaratory statement therefor May 1, 1868. He thereafter submitted proof and made payment for the land at the rate of one dollar and twenty-five cents per acre, but the amount paid not being satisfactory to your office he made an additional payment of one dollar and twenty-five cents per acre for the return of which the application under consideration is made.

It is contended that inasmuch as Oleson's settlement and filing were made before notice of definite location was received at the local office,

he was entitled to preempt this land at one dollar and twenty-five cents per acre, and that having been erroneously required to pay two dollars and fifty cents per acre, he is entitled to repayment of the excess, by virtue of the act of June 16, 1880 (*supra*).

When did the definite location of the line or route of said road become operative and what was the effect thereof upon the price of the alternate even numbered sections within the limits of the grant?

In view of the contentions of counsel, and to avoid any possible uncertainty in the decisions of the Department, these questions deserve extended consideration.

This grant was of five alternate sections per mile, designated by odd numbers, on each side of said road, subject to the condition that if when the line or route of said road was "definitely located," the United States had sold any such section or part thereof, or if the right of preemption or homestead settlement had attached thereto, or if the same had been reserved by the United States for any purpose whatever, then the lands so sold, preempted, homesteaded, or reserved, should be excepted from the grant and it should be the duty of the Secretary of the Interior to cause to be selected from adjacent public lands an equal quantity of other lands in lieu of those so excepted.

In the case of *Van Wyck v. Knevals* (106 U. S., 360, 365), the court had under consideration the question of when the rights of the Saint Joseph and Denver City Railroad Company attached to the sections of land granted to the State of Kansas for the use and benefit of that company by the act of July 23, 1866 (14 Stat., 210), and particularly the significance of the term "definitely fixed," as used in that act, which corresponds to the term "definitely located" used in the act here under consideration. In that case the court said:

The grant is of ten alternate sections, designated by odd numbers, on each side of the proposed road, subject to the condition that if it appear, when the route of the road is "definitely fixed," that the United States have sold any section or a part thereof, or the right of preemption or homestead settlement has attached, or the same has been reserved by the United States for any purpose, the Secretary of the Interior shall cause an equal quantity of other lands to be selected from odd sections nearest those designated in lieu of the lands appropriated, which shall be held by the State for the same purpose. The grant is one *in presenti*, except as its operation is affected by that condition; that is, it imports the transfer, subject to the limitations mentioned, of a present interest in the lands designated. The difficulty in immediately giving full operation to it arises from the fact that the sections designated as granted are incapable of identification until the route of the road is "definitely fixed."

\* \* \* \* \*

The inquiry then arises, When is the route of the road to be considered as "definitely fixed" so that the grant attaches to the adjoining sections? The complainant in the court below, who derives his title from the company, contends that the route is definitely fixed, within the meaning of the act of Congress, when the company files with the Secretary of the Interior a map of its lines, approved by its directors, designating the route of the proposed road. On the other hand, the defendant,—the appellant here,—who acquired his interest by a subsequent entry of the lands and a patent therefor, contends that the route can not be deemed definitely fixed, so

that the grant attaches to any particular sections and cuts off the right of entry thereof until the lands are withdrawn from market by order of the Secretary of the Interior, and notice of the order of withdrawal is communicated to the local land-officers in the districts in which the lands are situated.

We are of opinion that the position of the complainant is the correct one. 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; it is, in the language of the act, "definitely fixed," and can not be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required by the company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land-officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary nor any other officer of the Land Department can extend the period by requiring something to be done subsequently, and until done, continuing the right of parties to settle on the lands as previously. Otherwise, it would be in their power, by vexatious or dilatory proceedings to defeat the act of Congress, or at least seriously impair its benefit. Parties learning of the route established—and they would not fail to know it—might between the filing of the map and the notice to the local land-officers, take up the most valuable portions of the lands. Nearness to the proposed road would add to the value of the sections and lead to a general settlement upon them.

Under this decision it is clear that the right of the railway company in the case at bar attached to the granted sections June 26, 1867, upon the filing and acceptance of its map of definite location, and no order of withdrawal by the Commissioner of the General Land Office or notice to the local office was necessary to give effect thereto.

What was the effect of this definite location upon the even numbered sections within the place limits of the grant?

Section 2 of the granting act provides, as before shown,

that the sections and parts of sections of land which by such grant remain to the United States within ten miles on each side of said road shall not be sold for less than double the minimum price of public lands.

The sections and parts of sections which "remain to the United States" include the alternate even numbered sections within the geographical limits of the grant. When may these be said to remain to the United States within the meaning of the granting act? Obviously, that which identifies the lands passing under the grant equally identifies those not passing, that is, those remaining to the United States. This identification, under the terms of the granting act, is accomplished by the filing and acceptance of the map of definite location. Congress having directed that the lands which "remain to the United States . . . shall not be sold for less than double the minimum price of

public lands," it follows that when the identification of the lands so remaining is accomplished, the double minimum price attaches at once by reason of the legislative direction, and, thereafter, such lands can not be sold for less than double the minimum price.

This view not only seems to be in accord with the letter of the law, but it is the only one finding support therein which would not, to a greater or less extent, defeat the object of this portion of the granting act. The legislative policy in making land grants to railroads was primarily to develop the country; and it was thought that there would result an increase in the value of the public lands remaining to the United States within the limits of the grants, so that the sale of those lands at double the usual price would compensate the government for the loss of the lands granted. If a time subsequent to that at which the line of road becomes definitely located were fixed for the attaching of the increased price, the lands remaining to the United States might be appropriated at single minimum, after such definite location and before the attaching of the increased price, and the purpose and intent of the law be thereby defeated. As said by the supreme court in the case of *Van Wyck v. Knevals, supra*:

Parties learning of the route established—and they would not fail to know it—might, between the filing of the map and the notice to the local land-officers, take up the most valuable portions of the lands; nearness to the proposed road would add to the value of the sections and lead to a general settlement upon them.

It is stated in counsel's brief that the order of April 22, 1868, contained the following direction:

When legal inceptive rights have attached under the preemption laws prior to the receipt of this letter, you will permit the party to prove up and pay for the land at \$1.25 per acre.

Counsel is mistaken in this statement, for there is no such provision in that order. A withdrawal of lands upon a trial line of said road, made July 12, 1866, contained a provision in substance like that quoted, but the tract embraced by Oleson's entry was not within the limits of that withdrawal, so the terms thereof could not affect the matter now under consideration.

The order of April 22, 1868, was made by the Commissioner of the General Land Office, was addressed to the local officers and concluded with the following direction: "The withdrawal herein ordered will take effect from the receipt of this." After calling attention to the fact that the company had filed its map of definite location June 26, 1867, the order directed the local officers to withhold from all entry the odd numbered sections within the limits of the grant and to withhold the even numbered sections from private entry, but to permit preemption and homestead entry thereof at the increased price of \$2.50 per acre. Congress having prescribed in the granting act the time when the company's rights to the granted lands would attach and when the lands remaining to the United States would be increased in price, viz,

upon the definite location of the line or route of the road, it was not competent for the Commissioner of the General Land Office to prescribe a different time, and thus defeat the will of Congress, and the concluding paragraph in the order of April 22, 1868, can not be given that effect. This order must be treated as intended to enforce proper recognition of the fact that by operation of law the right of the company had attached to the granted lands and the lands remaining to the United States had been increased in price upon the definite location of the line or route of the road, and should not be treated as an attempt by the Commissioner of the General Land Office to postpone the effect given by the statute to such definite location.

In speaking of the operation and effect of an order of withdrawal made upon the filing of the map of general route of the Northern Pacific Railroad, it is said in *Buttz v. Northern Pacific Railroad* (119 U. S., 55, 72, 73):

When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the Department in such cases to formally withdraw them. It can not be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

\* \* \* \* \*

In the present case, the general route of the road was indicated by the map filed in the office of the Secretary of the Interior on the 21st of February, 1872. It does not appear that any objection was made to the sufficiency of the map, or to the route designated, in any particular. Accordingly, on the 30th of March, 1872, the Commissioner of the General Land Office transmitted a diagram or map, showing this route, to the officers of the local land office in Dakota, and by direction of the Secretary ordered them to withhold from sale, location, preemption, or homestead entry all surveyed and unsurveyed odd numbered sections of public land falling within the limits of forty miles, as designated on the map.

In *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company* (139 U. S., 1, 18), in following the case of *Buttz v. Northern Pacific Railroad*, *supra*, and in speaking of the same order of withdrawal of the lands along the general route, it is said: "His action in formally announcing their withdrawal was only giving publicity to what the law itself declared."

It is urged by counsel that since Oleson's settlement was made before the order of April 22, 1868, was received at the local office, he was entitled under the act of March 27, 1854 (10 Stat., 269), since incorporated into section 2281 of the Revised Statutes), to preempt the land so settled upon, at \$1.25 per acre. This act read as follows:

That every settler on public lands which have been or may be withdrawn from market in consequence of proposed railroads, and who had settled thereon prior to such withdrawal, shall be entitled to preemption at the ordinary minimum to the lands settled on and cultivated by them: *Provided*, They shall prove up their rights according to such rules and regulations as may be prescribed by the Secretary of the Interior, and pay for the same before the day that may be fixed by the President's proclamation for the restoration of said lands to market.

Apart from the fact that the act refers in terms to settlement made prior to withdrawal of the land from market in consequence of a proposed railroad, instead of to settlement made prior to the receipt of notice of the withdrawal at the local office, it is believed that a withdrawal like that of April 22, 1868, made after the right of the railroad company has attached and become fixed, is not such a withdrawal as is there contemplated.

In the nomenclature of the public land laws, the word "withdrawal" is generally used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from sale and entry under the general land laws, in order that presently or ultimately they may be applied to some designated public use, or disposed of in some special way. Some times these orders are not made until there is an immediate necessity therefor, but more frequently the necessity for their making is anticipated. Withdrawals are also made by Congress and are then spoken of as legislative withdrawals to distinguish them from those before described which are known as executive withdrawals. In the administration of the grants of public lands made to aid in the construction of railroads, executive withdrawals are made, either in advance of the definite location of the line or route of the road, and for the purpose of preserving the land for the satisfaction of the grant, or after such definite location and for the purpose of properly advising the local officers and others that the lands falling to the grant, as well as those remaining to the United States have been identified, and that the granted lands have passed to the railroad company, and the lands remaining to the United States can be disposed of only at double the minimum price. The former withdrawal is made in recognition of what is about to occur, and the latter in recognition of what has occurred.

At the time of the passage of the act of March 27, 1854, there had been but three acts making grants in aid of the construction of railroads and these were the acts of September 20, 1850 (9 Stat., 466), June 10, 1852 (10 Stat., 8), and February 9, 1853 (10 Stat., 155). Almost contemporaneously with the passage of each of these acts, in one instance the day before, an order was issued by the Commissioner of the General Land Office, under the direction of the President, whereby, in anticipation of the probable location of the line or route of the proposed railroad, the lands adjacent thereto were withdrawn from sale and entry, so that they might not be disposed of in advance of the attaching of the rights of the railroad company and thus the purpose sought by Congress, viz.,

the construction of the road, be defeated. Subsequently, maps were duly filed definitely locating and fixing the lines or routes of these roads, but no orders of withdrawal were issued thereon, so that at the time of the passage of the act of March 27, 1854, the only withdrawals made prior thereto to which reference could have been had were such as had been made in advance of the location of the lines or routes of proposed roads and before any rights had attached thereunder. Considering the conditions existing at the time of the passage of the act, and giving to it a construction not inconsistent but in harmony with the act of June 4, 1866, *supra*, and other granting acts, it must be held that the act of March 27, 1854, refers to and contemplates such withdrawals as are made in anticipation of the location of proposed roads and not such as are made after the road has been definitely located and in recognition of rights which have attached thereunder.

For the reasons here given the decision of your office is affirmed.

#### RAILROAD GRANT—WITHDRAWAL ON GENERAL ROUTE.

##### UNION PACIFIC R. R. CO. (CENTRAL BRANCH) *v.* PETERSON.

Under a railroad grant that directs a withdrawal by the Secretary of the Interior on the filing of a map of general route, no rights attach to specific tracts on the filing of said map; and where the order for such withdrawal is by its terms not effective until received at the local office, and a homestead entry is allowed prior to such time, though after the filing of said map, and remains of record at date of definite location, it excepts the land covered thereby from the operation of the grant, and this is true even though the entry thus allowed is not enforceable by the entryman.

*Secretary Bliss to the Commissioner of the General Land Office, January 20, 1899.*  
(W. V. D.) (F. W. C.)

The Central Branch of the Union Pacific Railroad Company has appealed from your office decision of May 12, 1897, holding the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 7, T. 7 S., R. 7 E., Topeka land district, Kansas, to have been excepted from the grant made by the act of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), under which it claims this land, by reason of the homestead entry of Johann Swenson, made July 14, 1863.

Your office decision rests upon the ground that said entry was of record, uncanceled, at the date of the filing of the map showing the definite location of the company's line of road opposite this tract, May 29, 1868.

In its appeal it was urged on behalf of the company that this tract was within the limits of the withdrawal authorized by the act upon the map of general route, and that said map of general route was filed and the withdrawal ordered thereon prior to Swenson's entry, it being claimed as a consequence that Swenson's entry was improperly allowed and, further, that Swenson had, prior to making the entry under con-

sideration, to wit, May 25, 1863, made homestead entry of lots 7 and 8 of said section 7, upon which entry he subsequently made final proof and final certificate issued; and that the entry now under consideration was, by your office letter of August 6, 1869, canceled as illegal because of the prior entry made by Swenson.

These matters were not treated of in your office decision appealed from, but have been made the subject of reports, from which it appears that the map of general route was filed June 27, 1863, upon which a withdrawal was ordered July 9, 1863, which order was not, however, received at the local office until July 23, 1863.

The act making the grant provides that, upon the filing of the map of general route, "the Secretary of the Interior shall cause the lands within fifteen miles (afterward changed to twenty-five miles) of said designated route or routes to be withdrawn from preemption, private entry, and sale."

In the present case it would appear that the Secretary ordered the withdrawal upon the filing of the map of general route without unnecessary delay, but before the notice thereof was received at the local land office, Swenson had been permitted to make entry of the land.

In the case of *Kansas Pacific Railway Company v. Dunmeyer* (113 U. S., 629, 636), in considering the effect of the filing of the map of general route under this grant, the court says:

This action does not, like the filing of the line of definite location, vest in the company a right to any specific piece of land. It establishes no claim to any particular section with an odd number. It authorizes the Secretary to withdraw certain land from sale, preemption, etc. What if he fails to do this? What if he makes an order, as in this case, withdrawing a limit of twenty-five miles from sale, yet permits a party to enter and obtain a patent on some of this land?

In ordering the withdrawal upon the map in question it was directed that "this order will take effect from the date of its reception at your office" (being the local office).

The statute directing withdrawal upon general route was not self-executing and this anticipatory executive withdrawal was by its terms not effective until received at the local office, and since no title vested in the company to any specific tract by the filing of the map of general route, it can not be held that Swenson's entry was without effect.

Said entry remained of record unexpired, until after the definite location of the road, when it was discovered that Swenson had made a prior homestead entry, and for that reason his entry covering the tract in question was canceled.

In the case of *Whitney v. Taylor* (158 U. S., 85), the court, after reviewing the holding in several railroad cases, proceeds—

Although these cases are none of them exactly like the one before us, yet the principle to be deduced from them is that when on the records of the local land office there is an existing claim on the part of an individual under the homestead or preemption law, which has been recognized by the officers of the government and has not been canceled or set aside, the tract in respect to which that claim is existing is

excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard.

The local officers have permitted Swenson to make entry of the land, and having thereby given recognition to his claim, the fact that such entry was not enforceable by Swenson, and that it was subject to cancellation because he had made a prior entry, can not affect the question as to whether the tract covered thereby passed under the railroad grant. As stated by the court—

It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard.

See also *Hastings and Dakota Railroad Company v. Whitney* (132 U. S., 357, 364).

Your office decision holding this tract to have been excepted from the company's grant is therefore affirmed.

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#### NORTHERN PACIFIC R. R. Co. v. WALTERS ET AL.

Motions for review and rehearing denied by Secretary Bliss, January 20, 1899. See departmental decisions reported in 23 L. D., 331 and 492.

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#### JURISDICTION—NOTICE OF CONTEST.

##### SLOCUM v. HARRISON.

The fact that notice issues on a contest before a prior contest against the same entry has been formally closed, will not prevent a consideration of the case on its merits, when the defendant participates in the trial, and appeals asking for a judgment on the merits, as well as on the jurisdictional question, and no prejudice is alleged or shown.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 20, 1899. (J. L. McC.)

Cuthbert Harrison, on October 26, 1893, made homestead entry for the NE.  $\frac{1}{4}$  of Sec. 29, T. 25, R. 6 W., I. M., O. T.

On October 30, 1893, one O. L. Palmer instituted contest against said entry, alleging prior settlement. A hearing was had, as the result of which the local officers found and held that Palmer had proved his allegation. They advised Harrison of their decision by registered letter dated November 8, 1895. He did not appeal.

The record of the proceedings in the case was transmitted to your office; which, on July 27, 1896, affirmed the decision of the local officers, and directed them to notify Palmer that he would be allowed thirty days within which to file application for said land.

Palmer, after due notice, failed to exercise his right; of which the local officers notified your office by letter of October 29, 1896. In reply your office, by letter of November 14, 1896, directed the local officers as follows:

If he has not done so, he has waived his right to the land by virtue of his contest; and in accordance with letter "H", of July 26, 1896, Harrison's entry remains intact, and you will so inform him.

By letter of April 6, 1897, your office finally closed the case of Palmer, *v.* Harrison, leaving Harrison's entry intact.

Prior to the last named date, however—to wit, on April 2, 1896—Jesse C. Slocum had filed contest affidavit, alleging that Harrison had never established residence upon the land, and that Palmer had abandoned it. Action on said contest was suspended to await the result of the Palmer-Harrison contest.

On November 4, 1896, the local officers issued notice of a hearing as between Harrison and Slocum—such hearing to be had December 19, 1896. Personal service was obtained on Harrison on November 18, 1896.

At the trial both Slocum and Harrison appeared, personally and by counsel.

As the result of the hearing the local officers rendered joint decision recommending the cancellation of the entry:

The entryman appealed to your office; which, on June 26, 1897, affirmed the decision of the local officers and held the entry for cancellation.

The entryman has appealed, alleging that your office erred—

In refusing to pass upon the sufficiency of the notice issued and served in said cause, said notice having been issued and served prior to the action of the Commissioner in closing the former contest of Palmer *v.* Harrison for prior settlement, involving the land in controversy.

This allegation has reference to the fact, shown by the record (*supra*), that notice of contest in the case of Slocum *v.* Harrison was issued (November 4, 1896) before your office had finally closed the contest case of Palmer *v.* Harrison. When the case came up for hearing before the local officers, counsel for the defendant filed a motion to dismiss on this ground; but the motion was overruled, and the hearing proceeded. When the case was brought on appeal before your office the defendant contended that,

all proceedings in this case against Harrison, including the issuance of contest notice and trial December 19, 1896, were without jurisdiction, and defendant's motion to dismiss should have been sustained.

It is to be observed that at said hearing, notwithstanding the objection thus raised, counsel for the defendant continued to take part in

the proceedings, cross examined the contestant's witnesses, examined the defendant and his witnesses, and has based his appeal to your office, and from your office to the Department, upon the merits of the case (as well as upon the question of jurisdiction). The defendant Harrison had never appealed from the local officers' adverse decision of November 8, 1895—a year, lacking four days, prior to the issuance of notice of the hearing between Harrison and Slocum; hence his rights were in no way prejudiced by such notice; nor does he even allege such prejudice. The question thus raised is purely technical.

The Department held, in the case of *Mott v. Coffman* (19 L. D., 106):

A case will not be remanded on objection to the notice, though such objection be well grounded, where the defendant appears, participates in the trial, and appeals, asking for a judgment on the merits of the case, and no prejudice is shown.

The case at bar is analogous, in principle, to the case above cited; and the ruling therein enunciated warrants the assumption of departmental jurisdiction in the case here under consideration—not perhaps under strict rules, but certainly in the exercise of administrative authority.

It appears proper, therefore, to proceed to a consideration of the case upon its merits.

The testimony taken at the hearing showed that Harrison at one time had a shanty, "part dugout and part boards," upon the land; that upon the adverse decision of the local officers in the case of *Palmer v. Harrison* he drew the board portion of the shanty off the land and left it at the side of the road for awhile, after which he drew it upon his sister's claim. According to the defendant's testimony, he left the land "in the fore part of July, 1894," and remained away until "the last Monday in August, 1896." He states further that upon his return he broke about one acre of the land, cleared out a well that Palmer had dug, and partially repaired a sod-house that Palmer had left on the land, one end of which had fallen out. In this house, which by the description must have been uninhabitable in wintry weather, Harrison alleges that he established residence. He slept there a few nights, upon or under bedclothing which he borrowed for the purpose and returned to its owner the next morning; and the food he ate upon the land was cooked for him before he took it there. It is clear from his own testimony that his sleeping and eating upon the land were solely for the purpose of making a merely colorable compliance with the requirements of the homestead law, and that he never re-established (if indeed he ever actually established) residence upon the land.

The decision of your office is correct, and is hereby affirmed.

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MATTHIAS S. FEATHERSTONE.

Motion for review of departmental decision of September 30, 1898, 27 L. D., 476, denied by Secretary Bliss, January 23, 1899.

## INDIAN LANDS—ALLOTMENT—PROTEST.

## ELDORADO WOOD AND FLUME CO.

A protest against the allowance of an Indian allotment justifies a hearing, where it is shown that said allotment, as applied for, covers land included within the occupation, enclosure, and exclusive possession of one who in good faith has placed valuable improvements thereon, relying on a school indemnity selection that subsequently proved invalid.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 23, 1899.* (H. G.)

The Eldorado Wood and Flume Company, a corporation, appeals from the decision of your office of March 11, 1896, refusing its application for a hearing upon its protest filed against the approval of the Indian allotment applications filed November 6, 1893, numbered respectively 10 and 13, by Maggie James, for her minor child Ehney James, and Capt. Pete Mayo-Pin-now-now, Indians of the Washoe tribe, for the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 35, and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 34, T. 11 N., R. 19 E., M. D. M., and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 35, and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 34, T. 11 N., R. 19 E., M. D. M., in the Sacramento, California, land district, as to such portions of said allotments as conflict with the claim of said company to the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$ , the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 34, and the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 35, T. 11 N., R. 19 E., of which tracts last mentioned the State of California made selection on October 15, 1875, in said land district, in lieu of an alleged deficiency of school lands in fractional township 3 north, range 2 east. These tracts were sold by the State to one A. A. Terry, and by mesne conveyances, in the nature of assignments of the certificate of purchase and by quit-claim deeds, were transferred to the said Eldorado Wood and Flume Company, the last conveyance being dated January 31, 1877.

Prior to the selection of the said tracts by the State of California, a party occupying said lands without any apparent claim or color of title thereto, except possession, occupancy and improvement, sold his possessory rights to the company.

June 8, 1885, the State's lieu selection for such tracts, previously described, was canceled, for the reason that the basis on which it was made belonged to the State, thus rendering void the selection of lands taken in lieu thereof. The protest, which is duly verified, asserts that the corporation remained in ignorance of the rejection of the State's selection, and continued to pay interest to the State upon the unpaid portion of the purchase price up to the year 1891. These payments were irregularly made at different intervals, the longest of which was four years. One-fifth of the purchase money was paid at the date of the purchase from the State by the original assignor of the certificate of

purchase therefrom. The improvements purchased and made by said company amount to several thousand dollars, the main expenditure for which was made upon a tract adjoining the tracts in conflict with the Indian allotment applications.

June 5, 1894, the State of California filed a new selection for the same land as that included in the former rejected selection covering the tract that the protestant corporation claims, and this selection was presumably induced by the said company.

November 6, 1893, when these allotment applications were filed, a portion of the tracts filed on had been in the possession of the lessee of the Eldorado Wood and Flume Company for fifteen years. Although the State selection had then been canceled for nearly eight years, the company had paid interest to the State on its assigned certificate of purchase for five years after such cancellation. The failure to pay additional interest up to the time of the notification of the filing of the Indian allotment applications may be accounted for from the fact that the interest theretofore had been paid at irregular intervals and only whenever demanded.

Your office refused the application of the said Eldorado Wood and Flume Company for a hearing upon the protest against the Indian allotment applications, substantially upon the following grounds: (1) The company has, by reason of its occupancy, acquired no rights to the land as against the United States, and can only hope to obtain title through its grantor, the State of California, which has applied to make a new selection of the tracts claimed by the company, in lieu of deficiency in Sec. 16, T. 9 S., R. 30 E., reserved for forest purposes; (2) The State has no right to the land as against the Indians who have applied for allotments; and (3) At the time of the filing of the Indian allotment applications the land was not so "appropriated" as to render it not subject to allotment. Your office also rejected the application of the State of California to make indemnity school selection for the same tracts.

A motion for review of your said office decision was filed, which was denied by your office decision of March 16, 1897. Accompanying this motion were several affidavits made by officers of the protestant company, its lessee and a surveyor. They are to the effect that the improvements upon the tracts covered by the company's claim are of the value of at least five thousand dollars, and that the Indian applicants have made no improvement thereon, with the exception of a shanty worth not to exceed fifty dollars, which was erected with the consent of the lessee of the company outside of its enclosure. As the only charge contained in these affidavits which presented new matter was that the Indians had not occupied the lands in question nor cultivated and improved the same, your office held that such an allegation was equivalent to an allegation that they never made settlement on the lands sought to be allotted as required by law (act of February 28, 1891, Sec. 4, 26 Stat., 794), and that as it appeared that the shanty on said tract, even though erected without the enclosure of the company and with

the knowledge and consent of its lessee, was presumably used as a residence, there is some doubt about the sufficiency of the charge of non-settlement. However, your office held that it had no jurisdiction of such charge of non-settlement, as the departmental circular of June 13, 1896, defining the jurisdiction of your office and of the Indian Office in Indian allotment cases, provides that "the action of the office of Indian Affairs on said allotments shall be conclusive, so far as the General Land Office is concerned, as to whether the Indian was a settler upon said land," and for the reason, apparently, that the matter was within the province of the Indian Office, and not under the jurisdiction of your office, the application for a hearing, based on the affidavits filed with the motion for review, was denied, as well as the motion itself, which was based upon alleged errors in the former decision of your office.

Another, a homestead applicant for some portion of the tracts involved, Henrietta E. Barnes, has withdrawn her application for a hearing and also her appeal from the action of the local office in rejecting her application, and her rights need not be considered herein.

At the time of the purchase of the tracts described from the State by the predecessor in title of the corporation protestant, the lands had been merely selected by the State, and nearly ten years elapsed before action was finally taken by your office rejecting the selection. The title has never passed from the United States to the State of California for any of the lands in question, and the State never had any title or right to a title to convey. It appears to have been the practice in that State to make selections and then dispose of the lands without awaiting the action of your office in confirming or rejecting such selection, a practice probably caused by the length of time necessarily consumed in determining the right of the State to such lieu selections.

It must be assumed that the corporation took its certificate of purchase for the tracts with full knowledge of the situation and the power vested in the land department to withhold approval of the selection under which the purchase was made. The right of your office and of this Department to disapprove of the selection of the State is unquestioned, and it is only after the lands selected have been approved or certified to the State, that purchasers from the State are protected by force of the act of March 1, 1877 (19 Stat., 267; *Durand v. Martin*, 120 U. S., 366, 369). It is not contended by the protestant corporation that this act affords it any protection, nor that it was necessary to give it notice of the rejection of the selection by the State of the lands in question. The lack of notice to the corporation is relied upon only for the purpose of showing its good faith. Its officers paid interest on the purchase money for five years after the rejection of such selection and were ready to pay the residue under the contract of purchase as it accrued, upon demand, as they had always done. At the inception of the purchase from the State of the tract in dispute, one-fifth of the purchase money was paid, and the corporation in good faith also purchased the improvements of

the former occupants. It rested secure for about seven years in its ignorance of the action of your office rejecting the selection of the State, and when apprised of the filing of the Indian allotment applications, sought to have the State make a new selection for the lands, which was accordingly done. The officers of the corporation evidently relied upon the right of the State to the lands.

It must be borne in mind that the State selection was certified to by the local office as not in conflict with any adverse right, and until the action of your office nearly ten years later, it might reasonably have been hoped that the State would be able to complete its title.

The protestant was recognized by the State as a purchaser, and its good faith is manifest. It has also sought to obtain title by procuring the State to make a new selection embracing the lands in question, and this selection was rejected because the Indian allotment applications had intervened. It is true that these applications were made for lands not covered by an entry at the time, but the occupation, enclosure and improvements of the corporation and its lessee were then open and well known. In the technical sense of the word, the tract may not have been lawfully appropriated at the time of the allotment applications, but it was in a sense actually appropriated by the occupation, enclosure and exclusive possession of the portion enclosed, which covered the main body of the land in question. The rights of the Indian applicants should be protected as fully as those of other claimants to the public lands, but they can not be permitted to seize upon the fruits of the labor and expenditure of others, made under an honest belief that their tenure would ripen into a perfect title; to permit this to be done in a case like this is represented to be, would shock the moral sense and do violence to the spirit and intent of the public land laws. *Williams v. United States*, 138 U. S., 514.

The foregoing views are based wholly upon the allegations of the protest and the supplemental affidavits filed in support of the motion for a review. Their truth is assumed only for the purposes of inquiring whether or not a hearing should be ordered. They show sufficient ground for such an inquiry, at which the State of California, the protestant, and the Indians, represented by their proper agent and by attorney, should appear. The proceeding is one begun for the purpose of securing a hearing before the approval of the allotments.

Your office will direct a hearing to determine the issues presented by the protest of the company and the affidavits accompanying the motion for a review of the decision of your office. So much of your office decision as confirms the selection of the State is affirmed, but so much thereof as rejects that portion of the selection of the State conflicting with the Indian allotment applications is vacated, and the selection of the State as to the tracts last mentioned will be suspended pending the result of the inquiry ordered herein.

Transmitted with the papers in the case are the homestead entry papers of Lewis Cameron, filed August 21, 1896, for the S.  $\frac{1}{2}$  of the SW.

$\frac{1}{4}$  of Sec. 34, and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 33, T. 11 N., R. 19 E., M. D. M., in the same land district, which includes a portion of the tract claimed by said corporation protestant, but which does not include lands in either of the said Indian allotment applications. In order to avoid a circuitry of action, and to fully determine the rights of all of the parties, Cameron will also be cited to appear at such hearing. The application of the State to select lands, a portion of which is embraced in the entry of Cameron, was prior to his entry, and was awarded to the State by your office decision in this case, without notice to this entryman, as your office decision was promulgated prior to his entry. He must be afforded an opportunity to be present at such hearing.

It does not appear what action has been taken in this matter by the Commissioner of Indian Affairs, but in any event the circular of June 13, 1896, cited by your office, does not affect the authority of the Secretary of the Interior.

MINING CLAIM—PLACER PATENT—ADVERSE—LODE WITHIN PLACER.

NORTH STAR LODE.

The statutory provisions relative to adverse proceedings apply only to cases where there are adverse claims to the same unpatented ground, hence a suit instituted by a placer patentee against a lode claimant for land included in the placer patent is not an adverse proceeding within the purview of the statute, and the judgment rendered therein can not be accorded the conclusive effect which attaches to a judgment rendered in an adverse proceeding such as is contemplated by the statute.

Whether all the land embraced in a lode location within a patented placer, such location having been after the placer location but before the placer application, is excepted from the placer patent, or only the known lode or vein and twenty-five feet on each side thereof subsequently entered by the lode claimant: *Query?*

Where it is held in a judicial proceeding, though such proceeding may not be of the adverse character contemplated by the statute, that all of the land embraced in such a lode location is excepted from the placer patent, and that such excepted land, not included in the lode entry, is public land open to exploration, and awards the same to a subsequent lode claimant, as against the placer patentee, and said patentee acquiesces in such judgment, and thereafter, having due notice of proceedings before the Department by such lode claimant to secure patent, makes no objection thereto, the patent may go in accordance with the judicial award.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 23, 1899.*

The record in this case discloses the following facts:

October 15, 1878, John Noyes and others located what has since been known as the Noyes placer mining claim, and December 17, 1878, made application for patent therefor, thereafter obtained the allowance of mineral entry thereof (No. 511, Helena, Montana,) and received patent for the claim July 28, 1880. The patent contained the following reservation:

That should any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, be claimed or known to exist within the above described premises at the date hereof, the same is expressly excepted and excluded from these premises.

December 2, 1878, after the location of the placer claim but before the application for the placer patent, the South Star lode claim, fifteen hundred feet in length and three hundred feet in width—one hundred and fifty feet on each side of the vein or lode, was located chiefly within the boundaries of the Noyes placer. November 2, 1886, Samuel Ayotte, Maxime Lalande and another person, made application for patent for said lode claim, describing it as fifteen hundred feet in length and fifty feet in width—twenty-five feet on each side of the vein or lode, and entry thereof was allowed September 1, 1887.

November 28, 1890, your office, in due course of proceeding, held the South Star entry for cancellation on the ground of conflict with the patented placer claim. The South Star applicants appealed to the Department and also instituted suit in the local court to obtain a judicial determination of the rights of the claimants, respectively, to the ground there in controversy. The complaint filed in that suit asserted ownership and right of possession, as against the placer claimants, to the premises described in the application for the lode patent, being fifteen hundred feet in length and fifty feet in width as aforesaid and a part of the South Star lode claim as originally located. The Department suspended the appeal from your office decision to await the result of the suit in court.

April 14, 1893, judgment was rendered by the court in favor of the South Star claimants for the lode claim described in their complaint, and patent therefor (fifteen hundred feet in length and fifty feet in width—twenty-five feet on each side of the vein or lode) was awarded them by departmental decision of March 12, 1895 (South Star Lode, 20 L. D., 204).

January 1, 1888, more than two years after the application for patent to the South Star lode claim, that portion thereof as originally located, lying within the limits of the placer claim and north of the South Star claim as applied for and patented, was located by Frank Clemens as the North Star lode claim. Clemens thereafter conveyed the North Star claim to Samuel Ayotte and Maxime Lalande, two of the South Star claimants, who December 19, 1889, made an amended location of the North Star and January 3, 1890, made application for patent therefor at the local office. During the period of publication the owners of the patented placer alleging title under their patent to the ground covered by the North Star location and application, filed in the local office April 11, 1890, what they termed an adverse, and instituted suit thereon in the local court. In this suit judgment was rendered May 5, 1893, in favor of the North Star claimants, and December 16, 1895, mineral entry of that claim was allowed by the local officers.

It was not claimed in the court proceedings that the vein or lode in the North Star claim was "known to exist" at the date of the application for the placer patent, but the contention of the North Star claimants was, that all the surface ground embraced within the South Star

claim as originally located was by virtue of that location and by operation of law, excepted from and carved out of the placer patent; and that by reason of this exception from the placer patent and the subsequent entry by the South Star claimants of a portion of the excepted ground containing the South Star lode or vein, the residue of the excepted ground (of which that now in controversy is part) was at the time of the discovery and location of the North Star lode subject to location and purchase by anyone discovering a vein or lode therein. This contention seems to have been sustained by the local court in the suit against the North Star claimants and to have been followed by the local office in allowing mineral entry of the North Star December 16, 1895.

June 8, 1896, your office, having before it for consideration all the papers in the present case, including a copy of the record of proceedings in the local court, held the North Star entry for cancellation on the ground that the existence of the vein or lode upon which the same is based was not known at the date of the application for the placer patent; that a lode within a patented placer can not be located or patented upon a discovery made subsequent to the application for the placer patent, and that no surface ground was excepted from the placer patent except as an incident to the known South Star lode.

From this decision the North Star claimants have appealed to the Department and in their assignments of error and argument they present practically the same contention that was urged by them in the local court, viz., that the entire South Star claim as originally located (three hundred feet in width) was excepted from the patented placer, absolutely and forever, and that the portion thereof not included in the South Star application, entry and patent, was open to location and purchase at the date of the North Star location.

The so-called adverse claim and suit of the placer patentees were intended to be in conformity with sections 2325 and 2326 of the Revised Statutes, which, as a part of the proceedings to obtain patent to a mining claim, provide for judicial determination of the possessory right to ground embraced in conflicting mining claims. These proceedings were commenced prior to the decision (April 28, 1890) by the supreme court in the case of *Iron Silver Mining Co. v. Campbell* (135 U. S., 286), and, presumably, upon the theory that it was incumbent upon the placer patentees to take such action in order to protect their rights against the application of the North Star lode claimants. In the case cited, however, the supreme court held that the statutory provisions relating to adverse claims apply only where there are adverse claims to the same unpatented mining ground, and that they do not apply to one who "had himself gone through all the regular proceedings required to obtain a patent for mineral land from the United States; had established his right to the land claimed by him, and received his patent."

The suit instituted in the local court by the placer patentees against

the North Star lode claimants was, therefore, not an adverse proceeding within the purview of the statute, and the judgment rendered therein, while entitled to great respect, can not be accorded the conclusive effect which attaches to a judgment rendered in an adverse proceeding such as is contemplated by the statute.

The principal question arising upon these facts is: Is the ground embraced in the North Star claim public land of the United States and as such subject to present disposition by the land department, or did the title thereto effectually vest in the placer claimants upon the issuance of the placer patent? That question could probably be determined only by inquiring whether the entire surface area of the South Star claim as originally located, was absolutely and forever excepted from the placer patent by the provisions of section 2333 of the Revised Statutes. See *Elda Mining and Milling Co. v. Mayflower Gold Mining Co.* (26 L. D., 573) and *Cape May Mining and Leasing Co. v. Wallace* (27 L. D., 676, 679).

The difficulties in reaching a correct solution of this question are such that the Department believes it better to withhold a decision thereof until a case is reached wherein the opposing views and arguments are fully presented, so that the decision may be based upon full consideration thereof.

If the title to the ground for which patent is here sought effectually vested in the placer claimants upon the issuance of the placer patent, they are the only persons who will be injured or who can complain if a lode patent is now issued to the North Star claimants for the same ground.

The placer claimants, however, seem to have acquiesced in the judgment of the State court rendered against them in their suit against the North Star claimants; and although having full notice of this proceeding in the land department, they are making no objection to the issuance of patent to the North Star claimants, and are not contesting the jurisdiction or authority of the land department in the premises. Under these circumstances, the decision of your office is reversed, and the North Star mineral entry will be passed to patent, if the claimants are otherwise entitled thereto.

A paper is found among the files which purports to be an adverse claim against the North Star application, filed by Robert M. Cobban and William F. Cobban, claimants of the Midnight lode. Whether this adverse claim was filed in time, and what, if any, proceedings have been had thereon, are matters which have not been considered, but will be left to the disposition of your office.



him to complete his entry by payment for the land, on the proof submitted by him, but it does not appear that he has yet complied with this order.

February 6, 1897, John C. Miller, as administrator of George H. Miller, deceased, filed an application to have the timber land entry of said George H. Miller reinstated, and the homestead entry of Germain canceled.

It is alleged in this application that at the time the hearing was ordered on the report of the special agent, the said George H. Miller was confined in jail, in King county, Washington, charged with murder; that on account of this legal detention he never received notice of the hearing; that he remained in jail until late in the year 1888, when he was released, his health shattered and his mind seriously impaired; and that he lingered in this condition until July, 1894, when he died.

This application was denied by your office for the reason that notice of the order holding said entry for cancellation and of the right of the entryman to apply for a hearing was sent to his last known address, by registered mail, on August 30, 1886, and was received and receipted for on the following day by John C. Miller, then a minor, who, it appears, is the son of said entryman and the same person who now, as administrator is applying for the reinstatement of the entry.

From this action of your office the applicant has appealed.

This case involves several questions in regard to the proceedings upon a special agent's report, and a brief preliminary examination of those proceedings would not be out of place.

For many years the Department has employed special agents to investigate and report upon entries in order to prevent frauds upon the government. At first, these reports were accepted by your office as final, and an entry was canceled upon an adverse report without giving the entryman an opportunity to be heard.

In "The Le Cocq Cases" (2 L. D., 784), however, the Department put an end to this practice, and directed that thereafter no entry should be canceled on a special agent's report until the entryman had been given an opportunity to appear and defend himself. Your office then adopted the practice of holding the entry for cancellation upon the report and directing the local officers to appoint a day for hearing and notify the entryman thereof, the burden of proof being thrown upon him. In the case of George T. Burns (4 L. D., 62), it was directed that thereafter in hearings ordered upon a special agent's report the burden of proof should be upon the government. No change, though, was made in the practice of immediately holding the entry for cancellation upon the report.

By circular of July 31, 1885 (4 L. D., 503), the practice of ordering hearings as a matter of course and without application, in cases of entries held for cancellation on special agents' reports, was discontinued, and it was directed that thereafter when an entry was so held

for cancellation the entryman should be allowed sixty days, after due notice, in which to appeal to the Secretary of the Interior or to show cause why the entry should be sustained. This circular was amended May 24, 1886 (4 L. D., 545), by striking out the alternative of direct appeal to the Secretary, since which time there has been no further material change in the practice.

In the case of Henry C. Putnam (5 L. D., 22,) an outline of the proceedings upon a special agent's report was given, as follows:

When from the report of a special agent it appears that an entry is fraudulent, or from any other cause its validity should be enquired into, such entry should not be canceled upon the report of the agent or the testimony accompanying it, but should be held for cancellation, and the entryman should be notified of such action and allowed sixty days in which to apply for a hearing to show cause why the entry should be sustained; and if it appears from the report of the special agent that the entry has been transferred, the transferee shall also be notified as well as the original entryman. If at the expiration of such time the claimant fails to apply for a hearing to show cause, the entry should then be canceled by the action of your office. But if in response to such notice, the claimant offers to show cause why the entry should be sustained, a hearing should be ordered, at which the government should offer proof to sustain the allegation that the entry is illegal or fraudulent before the entryman shall be required to present his defense. Such hearing is a proceeding *de novo*, at which the register and receiver should not consider the *ex parte* testimony contained in the agent's report, but in all such cases where the entry has been regularly made and final certificate issued, the burden of proof is on the government, and it will be required to establish the truth of the charge at the time of the hearing by the examination of the special agent or such other witnesses as may be produced, so that the entryman may have the opportunity of cross examination as allowed by law.

It is doubtful whether the special agent's report against Miller's entry stated facts, as contradistinguished from mere opinions of the agent, sufficient to warrant the cancellation of the entry, even if they had been admitted to be true, but apart from this, the question arises as to whether Miller was properly notified of the charges against his entry and given due opportunity to make defense against the same.

As the proceedings on the reports of special agents are required to be conducted in accordance with the rules of practice prescribed for contests so far as the same are applicable, and as it has been held that notice by registered mail in contest cases is not sufficient to confer jurisdiction, it follows that jurisdiction is not acquired in these proceedings where notice is served by registered mail, unless it is so provided in some special rule.

It is considered by your office that special authority is found in the circular of July 31, 1885, *supra*, which provides that:

Notice to claimants will be sent by registered letter to their last known post office address, and the return letter receipt (or returned letter) will be transmitted to this office with register and receiver's report.

Notice will also be served personally if claimant can be reached, and registers and receivers and special agents will take every precaution to see that notice reaches the party or his attorney, and to preserve and transmit the evidence of service, or of attempt to procure service.

Under the terms of this circular, notice by registered letter to the last known address and personal service, if the claimant can be reached, are equally important and equally necessary.

In the case of *United States v. Dana*, (18 L. D., 161), it was said :

That part of the circular quoted, which provides that notice will be served personally if claimant can be reached, and enjoining on registers and receivers and special agents that they shall take every precaution to see that notice reaches the party or his attorney, is merely directory, and is not a limitation on the manner of notice, as therein before provided.

This statement was not necessary to the decision in that case and overlooks the letter and spirit of the rule and the superiority of personal service, where claimant can be reached, as a means of imparting information of the action taken and about to be taken on the special agent's report. The quoted portion of the decision cited will not be followed.

Here the report of the special agent affirmatively showed that the entryman was not at home, but was in jail, charged with murder. It was known therefore that he could be reached and yet no effort was made to serve notice upon him personally. It is true that the registered letter containing notice was received and receipted for by his minor son, but it is not shown that this minor son was acting at the request of the father or with his knowledge.

It appears then, that the claimant was never properly served with notice of the action of your office. Your office decision is accordingly reversed, and you are directed to instruct the local officers to call upon Germain to show cause why his entry should not be canceled and the entry of Miller reinstated.

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#### APPLICATION TO ENTER—ADVERSE CLAIM.

##### MURRAY *v.* PIERCE.

An application to enter presented in accordance with an order of the local office at a time when on account of the press of business it could not be acted upon, and on which the fees were tendered in a reasonable time, confers upon the applicant a right superior to that acquired under a subsequent entry of the land by another.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 23, 1899.* (L. L. B.)

On December 26, 1893, Clarence L. Pierce made homestead entry for the NE.  $\frac{1}{4}$  of Sec. 1, T. 25 N., R. 3 W., Enid, Oklahoma.

January 25, 1894, Francis E. Murray filed contest against said entry, alleging settlement on the 16th day of September, 1893, and claiming priority of right by reason of his said settlement.

This was the sole charge in the affidavit, except that he applied to enter on December 26, 1893. The record shows that this application to enter was rejected because of the prior entry of Pierce made on the same day.

The hearing was finally reached January 10, 1895. Francis E. Mur-

ray was introduced, and after stating his name, age, residence and occupation, and that he had been sworn, counsel for the defendant objected to the introduction of any testimony on the material charge, and moved to dismiss the contest because the contest affidavit did not contain sufficient facts to constitute a cause of action, for that the charge was prior settlement, and the settlement was alleged to have been made more than ninety days prior to the entry of Pierce. The notice of contest recited the same charge.

The motion was overruled, and the evidence at the hearing showed that the contestant had actually applied to make entry on the 12th of December, 1893, within ninety days from his alleged settlement.

His said application of December 12th was made in virtue and under the provisions of the following order made and signed by the register and receiver of the said land office, and conspicuously posted on the land office door.

Whereas there are about 7,243 quarter sections of land subject to entry in this district, and whereas up to the close of business on December 5, 1873, there have been acted on by this office 6,589 applications to wit: 5,142 homestead entries, 1,168 rejected and suspended applications, 287 declaratory statements, 34 applications to make second entries, and 18 applications to amend, and whereas only 10 days, including this day remains before the expiration of the 90 days allowed by law for those to file their applications who claim settlement on September 16, 1893, and whereas there has lately been issued by this office for the convenience of the people 1,822 numbers 925 of which were called up to the close of business on Dec. 5th, now therefore:

It is ordered that those who have received numbers present themselves as usual at the Land Office and will be disposed of at a rate not to exceed 200 per day.

Beginning on Monday the 11th inst., in addition to the numbered line the register will receive the application of all those who have not been numbered, swear the parties to the affidavit if desired, and stamp upon each application the day, hour and minute or fraction of a minute at which it is received. The application will then *be kept in the Land Office and considered filed as of the time it is stamped* and will be acted upon in its order. The applicant calling after the 15th inst., if necessary, to pay his money, and get his receipt, as the law only requires that the application shall be presented within 90 days by this process every possible application can be received within the 90 days and no right be lost to any applicant. The result shows that more applications will have been acted upon by Dec. 16th than there are quarter sections subject to entry, but lest the fact that there are more applications than there are tracts subject to entry may impair the right of some person who has made settlement, the above method is adopted out of abundance of caution.

The record shows that in obedience to this order Murray presented his application and swore to his homestead affidavit on the said 12th of December, 1893, and left his entry papers in the hands of the local officers. This was a full compliance with said order.

But the register and receiver in their opinion, wherein they awarded the superior right to Pierce, say:

They (referring to applicants under this order) were notified that this was simply done in order to give every one an opportunity to file his application before the expiration of ninety days, and that all parties must see to it that they responded as their numbers were called, so as to pay the fees and commissions and have their applications acted upon,

that this applicant failed to respond, although his number was repeatedly called prior to December 16, 1893.

Mr. Whittinghill, the attorney for Murray, testified that as such attorney he appeared at the land office for the purpose of paying his \$14.00 (fee and commission for entering), and getting his receipt; that when he got there the register came to the door of the land office and announced that they would call these numbers up to 100; that Mr. Murray's number, being No. 486, was not reached for several days; that he appeared at the land office for Mr. Murray and others almost every day for two weeks longer, and finally was, with many others, allowed to look through a great number of papers lying on a desk in the east end of the land office, but could not find Murray's papers; that he finally found them on December 26, 1893, and tendered the fees for filing, but was informed that the land had been filed on just before he came in. This testimony, which is not disputed by any witness, relieves Murray from any charge of negligence, and appears to show that his failure to tender the fees at an earlier date was due in a measure to his papers having been misplaced, or so promiscuously mixed up with a large number of similar applications as to make it difficult to discover them. But, however this may be, having made his application in compliance with the order of the register and receiver, and having tendered the money due for making his entry within a reasonable time thereafter, it must be held that his rights under his application were superior to those of Pierce under his entry.

Pierce initiated his claim by entry made December 26, 1893. He was not a settler on the land at that date. It follows that Murray's right, in virtue of his application to enter made December 12, 1893, entitles him to the land, irrespective of any rights he may have acquired by settlement.

As the records of the local office as here presented show that Murray is entitled to the tract in controversy although such showing is not set out in the contest affidavit, this Department in the exercise of its supervisory authority will administer justice on the record presented.

It is therefore ordered that the entry of Pierce be canceled and the application of Murray be accepted of record. The decision appealed from is therefore affirmed.

#### CONTEST—AUTHORITY OF LOCAL OFFICE TO ORDER HEARING.

##### MENDENHALL *v.* CAGLE.

The Department will not interfere with the action of the local officers in directing a hearing in any case unless it be shown that by such action they have exceeded their authority.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 25, 1899. (J. L. McC.)

This Department, on February 9, 1898 (26 L. D., 177), rendered a decision in the case of Byron E. Cagle *v.* W. J. Mendenhall, reversing

previous departmental rulings in the same case (20 L. D., 447, and 21 L. D., 96), and directing that Cagle be allowed to make homestead entry for the NW.  $\frac{1}{4}$  of Sec. 22, T. 23 N., R. 1 W., Perry land district, Oklahoma Territory.

Pursuant to the above direction, your office, on March 11, 1898, instructed the local office to cancel Mendenhall's entry and permit Cagle to make entry of the land.

On March 2, 1898, Mendenhall filed in the local office a protest against the allowance of Cagle's entry, alleging that the latter was a "sooner," and asking a hearing to establish that fact. On March 22, 1898, when Cagle presented his application to enter, the local officers declined to receive it, and ordered a hearing on Mendenhall's protest. Cagle filed in the Department a petition addressed to the supervisory authority of the Secretary. This petition, with affidavits and exhibits accompanying the same, were by departmental letter of April 7, 1898, transmitted to your office "for your early consideration and appropriate action."

On April 14, 1898, Cagle made entry of the land.

On April 26, 1898, Mendenhall filed contest affidavit against said Cagle, alleging "that said Byron E. Cagle, subsequent to August 19, 1893, and prior to 12 o'clock, noon, September 16, 1893, did enter upon and occupy a portion of the lands known as the Cherokee Outlet."

This affidavit is corroborated by that of M. F. Kelso, who states, in substance, that he saw said Byron E. Cagle (and another man) in the vicinity of the land in controversy, and at a point about two or two and a half miles west of the west line of the Otoe and Missouri reservation," at about eleven o'clock A. M. of the day of the opening.

This affidavit was afterwards amended so as to read:

That on September 16, 1893, and before twelve o'clock, noon, on said date, I saw Byron E. Cagle in the Red Rock bottom, at a point west of the west line of the Otoe and Missouri Indian reservation, near the NW.  $\frac{1}{2}$  of Sec. 22, T. 23 N., R. 1 W.

Cagle filed a motion to dismiss the contest, principally upon the ground that the question of "soonerism" had already been adjudicated by this Department, in the decisions hereinbefore referred to.

The local officers denied the motion, and ordered a hearing to be had on January 25, 1899.

Cagle has filed in the Department a petition for the exercise of its supervisory authority, asking that it order the dismissal of said contest, on the grounds, in substance, that the contest affidavit is not sufficiently specific, and that the question of "soonerism" has been already adjudicated.

In the departmental decisions (20 L. D., 447; 21 L. D., 90; and 26 L. D., 177;) heretofore rendered, the controlling question has been whether or not Cagle was disqualified because of his having entered the territory from the west line of the Otoe and Missouri Indian reservation. This question was, by the decision of February 9, 1898, decided in the negative, and Cagle was held not to be disqualified—on that ground.

The question as to whether Cagle entered the territory prior to twelve

o'clock, noon, on the day of the hearing, was not touched upon in your office decision of February 5, 1895, by appeal from which the case was brought before the Department; neither does it appear that the Department has ever definitely passed upon that question.

The Department will not interfere with the action of the local officers in directing a hearing in any case unless it be shown that by such action they have exceeded their authority. It does not appear that they have erred in directing a hearing in the case at bar to determine whether or not Cagle entered the territory prematurely.

In view of the facts set forth, and of the long time during which the case has been under litigation, you are hereby directed to instruct the local officers to proceed with the hearing heretofore ordered by them; and after such hearing to pass judgment upon the case with the greatest expedition consistent with its careful consideration. Should the case come to your office on appeal, you will take prompt action thereon.

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

Cagle's petition is denied, and, with the accompanying documents, herewith transmitted for the files of your office.

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HOMESTEAD CONTEST—VOID MARRIAGE.

CRANDALL v. GRAY.

A charge that an entrywoman at the date of her entry was, by reason of marriage, disqualified to make entry must fail where it appears that the alleged marriage was illegal and void *ab initio*.

*Secretary Bliss to the Commissioner of the General Land Office, January*  
(W. V. D.) 25, 1899. (G. R. O.)

Cyprian U. Crandall has appealed to this Department from your office decision of May 11, 1897, dismissing his contest against homestead entry No. 5268, made March 31, 1890, by Susan Gray, for the SE  $\frac{1}{4}$  of Sec. 8, T. 15 S., R. 2 W., in the Los Angeles, California, land district.

This contest was begun by Crandall on February 24, 1896, the substance of his charges being that Susan Gray at the date of her entry was the wife of William Gray and therefore not a qualified entryman. Hearing was had, and on July 28, 1896, the local officers recommended the dismissal of the contest. On appeal your office affirmed their decision.

There is no dispute between the parties as to the material facts of this case. It appears that in December, 1869, William Gray was married to one Martha Titherington in Yorkshire, England. He left her immediately after the marriage and came to this country. He was told, in 1870, that this woman was dead, and believing this to be true,

in December, 1872, he married Susan Gray, the defendant in this case. In February, 1886, he made homestead entry of the land in question. He lived with Susan Gray as her husband for many years, and had seven children by her. In the latter part of 1889 he learned that Martha Gray was still living, and in March, 1890, after the birth of their youngest child, he told Susan Gray of this fact. They then abandoned their marital relations. He relinquished his homestead entry for the land in dispute and allowed her to make entry of it so that she would have a home for herself and her children, and since then he has contributed to their support. He has made occasional visits to the house where she lived, but they both deny that they have lived together as husband and wife since March, 1890. Their neighbors and their own children have always looked upon them as husband and wife.

Sec. 61 of the civil code of California provides:

A subsequent marriage contracted by any person during the life of a former husband or wife of such person, with any person other than such former husband or wife, is illegal and void from the beginning, unless:

1. The former marriage has been annulled or dissolved;
2. Unless such former husband or wife was absent, and not known to such person to be living for the space of five successive years immediately preceding such subsequent marriage, or was generally reputed and was believed by such person to be dead at the time such subsequent marriage was contracted; in either of which cases the subsequent marriage is valid until its nullity is adjudged by a competent tribunal.

The marriage of Gray with Martha Titherington has not been annulled or dissolved; Gray has known his wife, Martha Gray, to be living at a time less than three years before the date of his marriage with Susan Gray, and it was not "generally reputed," at such time, that his former wife was dead, nor does it appear that he had any good reason for believing that she was dead. Under these circumstances his marriage with Susan Gray was illegal and void, *ab initio*, and she was not, therefore, disqualified by such marriage from making this entry. Your decision is affirmed.

#### HOMESTEAD CONTEST—WIDOW—ADMINISTRATOR.

##### BUCHER *v.* BENHAM.

The temporary separation of a homestead entryman and his wife will not defeat the right of the latter, as the widow of the entryman, to submit final proof on his entry.

The administrator of the estate of a deceased homesteader is not entitled under the law to perfect the entry of the decedent.

*Secretary Bliss to the Commissioner of the General Land Office, January (W. V. D.) 25, 1899. (G. R. O.)*

On September 20, 1890, Elias C. Benham made homestead entry No. 8789, for the  $W\frac{1}{2}$  of  $NW\frac{1}{4}$ ,  $SE\frac{1}{4}$  of  $NW\frac{1}{4}$  and  $NW\frac{1}{4}$  of  $SW\frac{1}{4}$  of Sec. 12, T. 2 N., R. 5 W., in the Oregon City, Oregon, land district. On Sep-

tember 12, 1893, after giving notice, Evaline Benham, claiming to be the widow of said entryman, appeared at the local office and submitted final proof. On the same date Joseph Bucher, administrator of the estate of Elias C. Benham, deceased, filed a protest against the allowance of said proof, alleging:

First. The said Evaline Benham is not the widow of the said E. C. Benham, but is the wife of Charles Buckingham, and at the time she went through the form of a marriage with said E. C. Benham, she had a living husband, to wit, the said Charles Buckingham.

Second. The said Evaline Benham was not living with said E. C. Benham as his wife at the time of his death and had not been for a long time.

Third. Said Evaline Benham is not attempting to make said proof for her own benefit but for the benefit of certain persons living at Noquin in the State of Washington and said Evaline Benham has sold or agreed to sell said land in advance to said persons.

Hearing was had on this protest before the local officers on June 26, 1896, both parties appearing. On September 29, 1896, the local officers rendered a decision finding that Evaline Benham was the person legally entitled to submit final proof under E. C. Benham's homestead entry. On appeal your office affirmed this decision. A further appeal brings the case before this Department.

The protestant contends that the marriage of the defendant with the entryman, Elias C. Benham, on December 21, 1891, was invalid, because she was, at that time, the wife of Charles Buckingham. The testimony shows that she was married to said Buckingham on July 3, 1889, and that on February 26, 1891, she was granted a decree of divorce by the circuit court of Multnomah county, Oregon. This decree, through an inadvertence, was not entered of record at that time, but on January 28, 1895, it was, by order of said court, "entered as of said 28th day of February, 1891." Her divorce from Buckingham took effect therefore on this last-mentioned date, and her marriage with Benham on December 21, 1891, was valid. She was his wife at the time of his death and, as his widow, was entitled to make final proof on his entry. The fact that she had not lived with him for about six months prior to his death will not, under the circumstances, deprive her of this right. Their separation was made with his consent, for the purpose of earning money to support the family, and was not intended to be permanent.

There is nothing whatever in the testimony to sustain the charge that the defendant is seeking to secure title to the land in the interest of any person other than herself.

The appellant alleges error in your decision in holding that the proof was regularly submitted and that said proof is sufficient. These are questions that are not in issue in this controversy, and they need not be discussed in this decision.

Error is also alleged in your decision "in not dismissing the proof submitted, and allowing Joseph Bucher, as administrator, to make proof thereon." The administrator of the estate of a deceased home-

stead entryman who dies before making final proof, has no interest whatever, as such administrator, in the land embraced in such entry. In such cases the right to make final proof and receive patent for the land is given to his widow, or, in the event of her death, to his heirs or devisee, and to no other person. (Sec. 2291, Revised Statutes.) The protestant in this case can be regarded only as a mere objector, or *amicus curiae*. Even were it held that the proof should be dismissed Bucher would not be entitled to perfect Benham's entry.

If in other respects regular, the final proof of the defendant may be approved. Your decision is affirmed.

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SOUTHERN PACIFIC R. R. Co. v. CHERRY.

Motion for review of departmental decision of September 30, 1898, 27 L. D., 470, denied by Acting Secretary Ryan, January 30, 1899.

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ALASKAN LAND—OCCUPANCY—PAYMENT.

ALASKA IMPROVEMENT CO. (ON REVIEW).

A supplemental showing of improvements made after survey may be accepted in proof of the actual occupancy of land applied for under the act of March 3, 1891, where the necessity for such occupancy, the use of the land prior to application, and the good faith of the applicant are manifest.

Certificates issued on account of the deposit made to secure a survey can not be accepted in payment for lands purchased for purposes of trade and manufacture.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 30, 1899.* (E. F. B.)

The Department by decision of September 23, 1898, (27 L. D., 451) affirmed the decision of your office, upon the application of the Alaska Improvement Co. to purchase land in the Territory of Alaska occupied for the purposes of trade and manufacture, as far as it required the applicant to amend the survey so as to cover only the land actually used and occupied by it for trade and manufacture.

This ruling was based upon the decision of the Department in the case of John G. Brady, which held that an entry of lands in Alaska for the purpose of trade or manufacture under the act of March 3, 1898, must be limited to the land possessed and actually occupied for such purpose. In this case the official survey showed that the improvements did not occupy a frontage on the Karluk river exceeding one-half of the frontage claimed, and the company was required to amend its survey to conform to the rule above stated.

A motion for review of this decision has been filed by the company, supported by affidavits, plats and photographs, showing that all of said frontage is actually occupied by said company in the prosecution of its

business, and that owing to a high and very steep bluff along the entire front varying from two hundred to two hundred and fifty feet above the line of ordinary high water-mark, the character of the frontage is such that buildings and other structures must be placed on the narrow rim between the bluff and the shore.

It is further shown that the entire frontage is occupied by improvements of the company which have been made from time to time by said company since said survey, at a cost of about \$46,000, and about a million feet of lumber was used in their construction; that the full frontage of the survey on said river is occupied by such improvements as shown by the plat exhibited with said affidavits, and that all of said frontage is necessary for the convenient and successful carrying on of the business of a fishery canning company.

These facts are shown by the affidavits filed with said motion, from which it now appears that all of said frontage was actually occupied and is necessary for the business of said company, and it is now shown that the part of the frontage which did not appear to be occupied by improvements when the case first came before the Department is now occupied by a fisherman's lookout, posts, piles, net racks, capstans, tanks for coal oil, and other structures necessary to the use of the business carried on by said company.

While it is true that most of these improvements have been made since the survey, they were made upon the space that has always been used by the company in hauling its seines, and spreading the nets, for the purpose of facilitating the operations and uses to which the land theretofore had been applied.

The good faith of the applicant being abundantly shown, and it appearing that the entire frontage claimed is actually necessary for the successful prosecution of the business, and has always been used for the purpose in aid of which the improvements placed thereon since survey, the application comes within the spirit of the act and no further survey should be required.

The decision of September 23, 1898, so far as it required the applicant to amend the survey is revoked.

It appears from your letter that the *ex officio* surveyor general "issued his receipt for the money tendered in payment for the land, being triplicate certificate of deposit for the survey." Your attention is called to the case of John G. Brady, 26 L. D., 305, in which it is held that there is no statutory authority for accepting in payment for lands purchased for trade and manufacture the certificates issued on account of the deposit made to secure the survey of said land. You will therefore require payment to be made for said land in accordance with said ruling before approving the entry.

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FEELEY v. HENSLEY.

Motion for review of departmental decision of October 4, 1898, 27 L. D., 502, denied by Acting Secretary Ryan, January 30, 1899.

## SCHOOL LAND—SURVEYED LAND IN FOREST RESERVATION.

## STATE OF CALIFORNIA (ON REVIEW).

Where a forest reservation includes within its limits a school section, surveyed prior to the establishment of the reservation, the State under the authority of the first proviso to section 2275 R. S., as amended by the act of February 28, 1891, may be allowed to waive its right to such section and select other land in lieu thereof.

The decision herein of December 27, 1894, 19 L. D., 585, recalled and vacated.

Instructions of December 19, 1893, 17 L. D., 576, modified.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 30, 1899.* (E. B., Jr.)

This is a motion by the State of California for review of the decision of the Department, dated December 27, 1894 (19 L. D., 585), rejecting the application of the State to select, as school land, the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 26, T. 16 S., R. 7 E., M. D. M., in lieu of the same quantity of land in Sec. 36, T. 7 S., R. 29 E., M. D. M. Briefly stated, the contention of the State is that section 2275 Revised Statutes, as amended by the act of February 28, 1891 (26 Stat., 796), furnishes authority for the allowance of the selection in question and that the Department erred in holding to the contrary. The State of Oregon is also interested in the question presented and by its Attorney-General has filed a brief in the case.

The land in section thirty-six is within the boundaries of the Sierra forest reservation established by executive order, dated February 14, 1893 (27 Stat., 1059). The section was surveyed prior to the establishment of the reservation. It is conceded by the State that full title to the tract in that section passed to it not later than the date of the public survey thereof, and that it was not thereafter within the power of the executive to reserve the same or in any way impair the State's right thereto. The State insists, however, that under the provisions of the said amended section it may be allowed to surrender the land to the United States and then take other public land in lieu thereof.

It is urged that by reason of the inclusion and isolation of the land in section thirty-six within the boundaries of the reservation, the State is practically precluded from either leasing or selling it, or deriving revenue therefrom in any manner for the use of public schools, and that thus, unless it can surrender the same and take other land in lieu thereof, the State's grant of lands for school purposes will, in this and many similar instances, suffer serious substantial loss; also, on the other hand, that, should the State succeed in selling or leasing such and similar tracts, its vendees or lessees would have necessarily a right of way over the reservation, thus destroying the integrity of the same and subjecting the territory within its boundaries to a divided jurisdiction—a condition which would seriously obstruct and interfere with the purposes of the reservation and probably be fruitful of confusion and controversies growing out of the attempts of the State and Federal authorities to administer their respective laws. Such considera-

tions as these, it is urged, doubtless influenced Congress to enact the legislation in question under which the State claims the privilege of relinquishing the land in section thirty-six and taking the other tract in lieu thereof. These are undeniably important considerations, and to be borne in mind in interpreting the said legislation.

As amended by the act of February 28, 1891, *supra*, section 2275 Revised Statutes reads:

Where settlements, with a view to pre-emption or homestead, have been or shall hereafter be made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption or homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: *Provided*, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory, to compensate deficiencies for school purposes where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: *Provided, however*, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

The above is general legislation applicable to all the States and Territories to which public lands have been granted, reserved or pledged by acts of Congress. The section is readily divisible into four parts. There is first a grant of indemnity for lands settled upon which, on subsequent survey, are found to be in sections sixteen or thirty-six. Then follows a grant under which a State or Territory may take lands in lieu of such of said sections as "are mineral land, or are included within any military, Indian, or other reservation, or are otherwise disposed of by the United States," to which is directly attached the important proviso that—

Where any State is entitled to said sections sixteen and thirty-six or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections.

The third grant is made "to compensate deficiencies," where those sections are fractional, or where one or both are wanting in the township. And last, there is made provision for ascertaining in advance of the public survey the number of school sections in any military, Indian or other reservation and for allowing indemnity without awaiting such survey. It is under the second division of the section that the State specifically claims the privilege of making the exchange above indicated.

In the decision under review it was said that the words "before the survey," which appear only in the first part of the section, were to be regarded as appearing in each of the other parts. Certainly it was not intended that these words should be inserted in the third division, because it could not be known that "sections sixteen or thirty-six are fractional in quantity" until after survey, and it is difficult to discover where these words could be interpolated in the second division of the section without substantially changing its meaning. Upon very careful consideration, the Department is of opinion that it was error to read these words into this part of the statute, and that it was the intention of Congress to make provision therein for the selection by a State or Territory of other lands in lieu of the sixteenth and thirty-sixth sections included within a reservation, whether such sections had been surveyed prior or subsequent to the creation of the reservation. Read as a whole, and keeping in view the language used in its proviso, the second division of the section does not support the conclusion that Congress intended to confine the right of a State or Territory to make lieu selections, to cases where sections sixteen and thirty-six were unsurveyed at the date of the reservation.

In the decision under review, the position is taken that after the survey of these sections the right of the State thereto becomes fixed and absolute and the land ceases to be public land; that this second division of the section contemplates the allowance of indemnity only where section sixteen or thirty-six has been *disposed of by the United States*; that as a matter of law the United States can not dispose of these sections after the right of the State thereto becomes fixed and absolute, and Congress did not intend that any disposition thereof, after the right of the State becomes fixed and absolute, should be made in the creation of forest reservations, because the authority to create such reservations is, by the act of March 3, 1891, *infra*, confined to the setting apart and reserving of "public lands," and that therefore where sections sixteen and thirty-six are surveyed at the time of their inclusion within a forest reservation, they are not disposed of by the United States but the right of the State thereto remains intact, unimpaired by the creation of the forest reservation. This view, however, does not accord to the proviso its proper influence in the interpretation of this division. The entire division should be read together to correctly determine its meaning. The language in the proviso recognizes unmistakably that sections sixteen and thirty-six may be "mineral land or

embraced within a military, Indian or other reservation," and yet the State be entitled thereto, or they be reserved to a Territory; and distinct provision is made that in such event the selection of other lands "in lieu thereof by said State or Territory, shall be a waiver of its right to said sections." It may be worthy of mention that there is no such recognition of the right of the State, and no such provision for a waiver thereof, in the first division of the section which authorizes the allowance of indemnity for sections sixteen and thirty-six, where they have been taken by preemption or homestead settlers in pursuance of settlement made with a view to preemption or homestead, before the survey of the lands in the field.

There are many statutes authorizing a selection of lieu lands: sometimes these selections are authorized as indemnity for lands which were lost to a grant because they were otherwise disposed of or claimed, before the identification by survey or otherwise, of the lands passing under the grant; at other times, they are allowed in exchange for lands which have been identified as passing under a grant and to which the rights of the grantee have attached, but which are needed by the government for some reservation or other public purpose, or to enable it to discharge some claimed obligation to others. The terms "indemnity" and "lieu selection," therefore, in the nomenclature of the public land laws are not used simply to denote a compensatory allowance for lands which have been lost to a grantee, but are also at times employed to include the giving of one tract for another, the right to which is relinquished or waived by the grantee.

While it is not within the power of Congress or of the executive to divest the State of school lands after its right thereto has attached, the thing contemplated by this statute is an exchange made at the solicitation of the State and not a taking of its property against its will. Such an exchange is not wholly new. By the second section of the act of March 1, 1877 (19 Stat., 267), provision was made whereby the State of California was permitted to take title to indemnity school selections, previously made and certified, in lieu of granted sections to which it had full title, but for which the State had been allowed to make lieu selection upon the belief that the granted sections were within a Mexican grant. Title to the said granted sections thereupon returned, under the terms of the act as construed by the supreme court in *Durand v. Martin* (120 U. S., 366), to the United States. In speaking of the exchange there provided for, the court said (pp. 375-6):

The selection was confirmed, and the United States took in lieu of the selected land that which the state would have been entitled to but for the indemnity it had claimed and got. In its effects this was an exchange of lands between the United States and the state. . . . If the state was actually entitled to indemnity, it was got, and the United States only gave what it had agreed to give. If the state claimed and got indemnity when it ought to have taken the original school sections, the United States took the school sections and relinquished their rights to the lands which had been selected in lieu.

See also *California v. Nolan* (15 L. D., 477, and same *v. Herbert*, id., 519).

It is worthy of note that the legislation under which the Sierra forest reserve and other forest reservations were created (section 24, act of March 3, 1891, 26 Stat., 1095, 1103) was pending before Congress at the time when the act of February 28, 1891, *supra*, was pending, and became a law only a few days later. Congress knew when these acts were under consideration that such reservations would necessarily embrace, in many instances, lands which had been granted, reserved or pledged to States and Territories for the use of public schools. It surely knew also that these reservations would frequently contain surveyed townships or portions thereof within which would be the school sections sixteen and thirty-six which had passed to the States or were reserved or pledged to the Territories, and that these sections, entirely surrounded by government lands and sometimes far within the boundaries of the reservations, would be of little or no benefit—as is alleged to be the fact in the case at bar—to the States or Territories while the reservations existed. It is very desirable on the part of the United States that in all cases where reservations are made the land therein should be subject, as far as possible, to the same governmental authority and jurisdiction in order to successfully carry out the objects sought in creating them. It is believed, therefore, that the conclusion herein reached accords with the intent of Congress, and is in pursuance of a wise public policy. It gives to the State that which she reasonably asks—the right to select the tract herein described in lieu of the equal tract in section thirty-six, which is completely enclosed in the Sierra forest reservation. The selection, when approved, will operate as a waiver by the State of its right to the tract used as a basis. The exchange will apparently be mutually beneficial to both parties.

The decision of December 27, 1894, is hereby recalled and vacated, and the opinion expressed in your office letter of September 29, 1894, to the effect that the State's application should be allowed under said amended section 2275, is hereby approved. The instructions relative to indemnity for school lands within the boundaries of forest reservations approved by the Department December 19, 1893 (17 L. D., 576), will be amended to conform to the views herein expressed.

HOMESTEAD—LAND SUBJECT TO ENTRY—SECTION 2289 R. S.

BARBOUR *v.* WILSON ET AL. (ON REVIEW).

The words "subject to pre-emption" used in section 2289 R. S., prior to its amendment by section 5 act of March 3, 1891, to define in part lands subject to homestead entry, are omitted from the section as amended; and since said amendment the only limitation placed upon the character of lands subject to homestead entry by said section is that they shall be "unappropriated public lands."

No State law incorporating a town can, of itself, appropriate any public lands of the United States, and thereby withdraw or except them from disposition under the homestead law, or other laws of the United States. If such an appropriation exists it is because some law of the United States so declares.

See by Jo May 87900 "5"  
Some Curiousness, Papers - Emb

The act of March 3, 1877 (19 Stat., 392), reserves from pre-emption and homestead entry public lands within the limits of an incorporated town to the extent of the maximum quantity susceptible of entry by such town under the townsite laws.

Where the limits of an incorporated town embrace less than 2560 acres, the maximum quantity susceptible of entry under the townsite laws, a part of which has been entered as a townsite and the remainder of which is vacant and unoccupied land contiguous to that theretofore entered, all of such public land is reserved from pre-emption and homestead entry.

A homestead entry improperly allowed of land so reserved may be permitted to stand, where subsequently the town is disincorporated, and no adverse claim exists.

The protestant herein held not an adverse claimant.

The departmental decision of December 3, 1896 (23 L. D., 462), recalled and vacated, and the case remanded with instructions to pass the entry to patent.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *January 30, 1899.*

This is a motion by the Castle Land Company for a review and re-consideration of the decision of this Department, dated December 3, 1896 (23 L. D., 462), involving soldiers' additional homestead entry of the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  (lots 5 and 6) Sec. 24, T. 8 N., R. 8 E., Helena, Montana, land district.

The status of this land has been the subject of consideration by this Department for several years. April 5, 1894, a Sioux half-breed scrip location thereof made by William L. Quinn on August 25, 1890, was declared invalid, and your office directed to cancel the same (McGregor *et al. v. Quinn*, 18 L. D., 368), and this decision was adhered to on motion for review (19 L. D., 295). After the scrip location and prior to the decision directing its cancellation, the land was sold to the Castle Land Company by Massena Bullard, who had purchased the same from Quinn, the scrip locator. The land company platted the tract and conveyed by warranty deeds to George H. Barbour and others a number of lots therein, the title to which being dependent upon the validity of the scrip location, failed with the cancellation thereof. On account of such failure, the appellant and other lot purchasers afterwards brought suits in the local courts against the company upon its covenants of warranty.

After the cancellation of the scrip location, and on October 30, 1894, the defendant, Wilson, filed his application to make soldiers' additional homestead entry of the tract. The land being within the limits of the incorporated town of Castle, the town authorities were cited to show cause, if any, why such application should not be allowed, and through the mayor and town clerk and under the corporate seal of the town, they advised your office that the land was not then and never had been occupied for trade or business, and that the town would not interpose any objection to the Wilson entry. The application was then allowed under the direction of your office, and afterwards the land company purchased the land from Wilson; but on August 2, 1895, Arthur P.

Heywood initiated a contest against the Wilson entry, alleging that the same was made in the interest of said company, under a prior agreement by the entryman to convey the title when acquired.

August 30, 1895, Heywood made application to amend his affidavit of contest by adding thereto the charge that the land in question, at the date of Wilson's application and entry, was within the limits of an incorporated town. The amendment was disallowed by your office October 28, 1895, on the ground that if the additional charge were true it would not of itself require the entry's cancellation. This ruling was, presumably, because of the town's previous consent to the entry.

A hearing was had upon the original charge, at which the contestant also introduced evidence in support of the charge made in his rejected amendment, but the local officers decided in favor of the defendant and recommended the dismissal of the contest. February 13, 1896, the contestant Heywood waived his right of appeal, and February 15, 1896, George H. Barbour made application to intervene and appeal. The application alleges that the company procured Heywood to waive his right of appeal; that Barbour is a party in interest having purchased one of the Castle lots from the company prior to 1894; that the Wilson entry is fraudulent because made for the benefit of the Castle Land Company, and that Barbour does not wish any after-acquired title which the company may procure.

Your office denied said application, and also the right of Barbour to appeal, whereupon he invoked the supervisory authority vested in the Secretary of the Interior, and on July 1, 1896, procured an order directing your office "to certify the record and proceedings in the case to this Department for consideration and such action as may be found necessary and proper." (23 L. D., 12.)

In the decision under review, the Department held that the validity of Wilson's entry was not affected by the fact that it was made for the benefit of another, because being a soldiers' additional homestead, the right was assignable either before or after entry, citing *Webster v. Luther* (163 U. S., 331). That decision also held that the amendment of section 2289, of the Revised Statutes, by the act of March 3, 1891 (26 Stat., 1095), did not remove the inhibition theretofore contained in sections 2258 and 2289 of the Revised Statutes against homestead entry of public lands included within the limits of an incorporated town, and that if, at the date of Wilson's entry the land covered thereby was in an incorporated town, the entry was invalid because the land was not "unappropriated public land" within the meaning of the homestead law. That decision made no reference to the act of March 3, 1877 (19 Stat., 392), hereinafter mentioned.

The motion for review alleges error in these rulings and in permitting Barbour to be heard to defeat the company in its effort to make good the title and covenants of warranty under and through which he claims to be interested in the controversy.

Section 2258 of the Revised Statutes, before its repeal, declared :

The following classes of lands, unless otherwise specially provided for by law, shall not be subject to the rights of preemption, to wit:

First. Lands included in any reservation by any treaty, law, or proclamation of the President, for any purpose.

Second. Lands included within the limits of any incorporated town, or selected as the site of a city or town.

Third. Lands actually settled and occupied for purposes of trade and business, and not for agriculture.

Fourth. Lands on which are situated any known salines or mines.

Section 2289, prior to its amendment, declared :

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section or a less quantity of unappropriated public lands, upon which such person may have filed a preemption claim, or which may, at the time the application is made, be subject to preemption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing upon land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

By the provisions of this section the same classes of land which were excepted from preemption were excepted from homestead entry.

The act of March 3, 1891, *supra*, in section 4 repealed the preemption law, of which section 2258 was a part, and in section 5, amended section 2289 so as to read:

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

In the original section the lands subject to homestead entry were described as "unappropriated public lands . . . subject to preemption," while in the amended law they are described as "unappropriated public lands," the words "subject to preemption" being stricken out or repealed. When these words were stricken out or repealed the statute stood, and was to be construed, as if they had never been inserted therein. Whatever effect or meaning was given to the section by their presence was withdrawn by their repeal. Prior to the amendment it was necessary to examine the preemption law to determine what lands were subject to homestead entry, but since the amendment that question is to be determined without reference to the preemption law.

The repeal of the pre-emption law did not in itself necessitate any change in the homestead statute, and the expression to the contrary in the decision under review is not sustained by authority. While by its repeal the pre-emption law ceased to have any force as a separate or independent law, yet it had been made a part of the homestead statute in so far as it furnished an interpretation of the words "subject to pre-emption" in the latter, and in that respect it was not repealed. Sutherland's Statutory Construction, Sec. 257. Endlich's Interpretation of Statutes, Sec. 492. Maxwell's Interpretation of Statutes, p. 31. Clarke v. Bradlaugh, L. R. 8 Q. B. Div., 63, 69. *In re Commissioners of Lunatic Asylums*, 8 Irish Rep., Eq. series, 366. Spring Valley, etc., Co. v. San Francisco, 22 Cal. 434. Wood v. Hustis, 17 Wis., 416. Sika v. Chicago, etc., Ry. Co., 21 Wis., 370. Schwenke *et al.* v. Union Depot, etc., Co., 7 Colo. 512.

The only limitation placed upon the character of lands subject to homestead entry by section 2289, since the amendment of March 3, 1891, is that they shall be "unappropriated public lands." Were the lands embraced in this soldiers' additional entry of that character? That they were public lands of the United States is not questioned. While geographically within the boundaries of an incorporated town they were not settled upon or occupied but were vacant and unoccupied. Were they appropriated by law; and if so, by what law?

That the authority of the United States over the disposition of the public domain is paramount is established. The second paragraph of section 3 of Article IV of the Constitution provides that "The Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States."

In *M'Culloch v. Maryland*, 4 Wheaton, 316, 406, Chief Justice Marshall delivering the opinion of the court, said:

The government of the United States, then, though limited in its powers, is supreme; and its laws, when made in pursuance of the Constitution, form the supreme law of the land; 'anything in the Constitution or laws of any State, to the contrary, notwithstanding.'

In *Wilcox v. Jackson*, 13 Peters, 498, 517, the court said:

We hold the true principle to be this, that, whenever the question in any court, state or federal, is whether a title to land, which had once been the property of the United States, has passed, that question must be resolved by the laws of the United States.

In *United States v. Gratiot*, 14 Peters, 526, 537, involving the power of Congress to dispose of the public lands, under said provision of the Constitution, the supreme court said:

The term territory, as here used, is merely descriptive of one kind of property, and is equivalent to the word lands. And Congress has the same power over it as over any other property belonging to the United States, and this power is vested in Congress without limitation, and has been considered the foundation upon which the territorial governments rest.

In *Gibson v. Chouteau*, 13 Wall., 92, 99, Mr. Justice Field, speaking for the court, said:—

With respect to the public domain, the Constitution vests in Congress the power of disposition and of making all needful rules and regulations. That power is subject to no limitations. Congress has the absolute right to prescribe the times, the conditions, and the mode of transferring this property, or any part of it, and to designate the persons to whom the transfer shall be made. No state legislation can interfere with this right or embarrass its exercise.

It is apparent from these citations that no State law incorporating a town can, of itself, appropriate any public lands of the United States and thereby withdraw or except them from disposition under the homestead law, or other laws of the United States. If such appropriation exists it is solely because a law of the United States so declares. Is there such a law?

The act of May 23, 1844 (5 Stat., 657), authorized the corporate authorities of a town, or, if not incorporated, the judge of the county court, to enter at the minimum price, public lands "settled upon and occupied as a townsite." The entry was to be in trust for the several use and benefit of the occupants according to their respective interests and was required to be made prior to the commencement of the public sale of the body of land which included such townsite, otherwise the same would be sold at public auction like other lands. While the occupants were thus given a preference right of entry at the minimum price, that right was required to be exercised before the public sale, so that, if the land was not taken by the occupants the government might obtain for its treasury such price as the lands would command at public auction. This act applied to lands "settled upon and occupied as a townsite," whether within an incorporated town or not. Settlement and occupancy, and not incorporation, determined the application of the statute. It did not attempt to deal with or appropriate vacant and unoccupied lands, no matter where located. This was the only townsite law in existence when the homestead statute was enacted permitting homestead entry of "unappropriated public lands . . . subject to pre-emption." Vacant and unoccupied public lands even though located within the boundaries of an incorporated town were at that time "unappropriated," but they were not "subject to pre-emption" because of the express exception from the operation of the pre-emption law of "lands included within the limits of any incorporated town."

The act of March 3, 1863 (12 Stat., 754, Rev. Stat., Secs. 2380-2381), authorized the President "to reserve from the public lands, whether surveyed or unsurveyed, townsites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population," and provided for surveying such townsites into lots and appraising and selling the same. The reservation of a townsite by the President in pursuance of this act, would, undoubtedly, constitute an appropriation of the lands therein for townsite purposes, but the tract here involved was never so reserved nor was its reser-

vation ever requested, hence no appropriation of it can be predicated upon this statute.

The act of July 1, 1864 (13 Stat., 343; Rev. Stat., secs. 2382-2384), repealed the act of May 23, 1844, *supra*, and authorized tracts of public land not exceeding six hundred and forty acres to be disposed of as townsites "in any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands." The act required a plat of the townsite to be filed with the recorder of the county and a verified transcript thereof to be transmitted to the General Land Office and a similar map to be filed in the local land office. The President was then authorized to cause the lots embraced therein to be offered at public sale to the highest bidder, the lots not disposed of at public sale to become subject to private entry. No attempt has been made to bring the lands here in question within the provisions of this act. Neither a plat thereof nor a transcript of a plat has ever been filed in either the local land office or in the General Land Office. This act also requires that proof be made showing "the extent and character of the improvements" and "that such city or town has been established in good faith." There were no improvements upon the tract here in question, no city or town was actually founded or established thereon and no one has applied to the Land Department for permission to found a city or town thereon or to have the tract disposed of as a townsite. This statute makes no reference to incorporation and operates independently of that fact.

The act of March 2 1867, (14 Stat., 541; Rev. Stat., secs. 2387-2393), is quite similar to the repealed act of May 23, 1844, *supra*, and authorizes the corporate authorities of a town, or, if not incorporated, the judge of the county court, to enter at the minimum price, public lands "settled upon and occupied as a townsite." Here, again, settlement and occupancy, and not incorporation, determine the application of the statute. The quantity of land subject to entry under this act is scaled according to the number of inhabitants, the maximum quantity being 2560 acres, but vacant and unoccupied lands are not within its operation, no matter where located.

From what has been said, it seems clear that none of these townsite laws has the effect of appropriating for townsite purposes, or of withholding from other disposition, vacant and unoccupied public land merely because it happens to be within the artificial limits of an incorporated town.

It remains to consider the purpose and effect of the act of March 3, 1877 (19 Stat., 392).\* At the time of its passage "lands included

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\* ACT OF MARCH 3, 1877.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from pre-emption or homestead entry a greater quantity than twenty-five hundred and sixty acres of land, or*

within the limits of any incorporated town" were absolutely excepted and excluded from the operation of the pre-emption and homestead laws by sections 2258 and 2289 of the Revised Statutes. Originally it was not the purpose of this exception and exclusion to reserve for townsite purposes lands so situated, but only to reserve them from pre-emption and homestead entry. The reason for this was that the government desired by the sale of these lands at public auction to obtain for its treasury the advantage of their appreciation in value incident to their proximity to centers of population and trade. *Root v. Shields* (1 Woolworth, 340; 20 Fed. Cas., 1160.) When, later on, the practice

the maximum area which may be entered as a townsite under existing laws, unless the entire tract claimed or incorporated as such townsite shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved, and used for business and municipal purposes.

Sec. 2. That where entries have been heretofore allowed upon lands afterward ascertained to have been embraced in the corporate limits of any town, but which entries are or shall be shown, to the satisfaction of the Commissioner of the General Land Office, to include only vacant unoccupied lands of the United States, not settled upon or used for municipal purposes, nor devoted to any public use of such town, said entries, if regular in all respects, are hereby confirmed and may be carried into patent: *Provided*, That this confirmation shall not operate to restrict the entry of any townsite to a smaller area than the maximum quantity of land which, by reason of present population, it may be entitled to enter under section twenty-three hundred and eighty-nine of the Revised Statutes.

Sec. 3. That whenever the corporate limits of any town upon the public domain are shown or alleged to include lands in excess of the maximum area specified in section one of this act, the Commissioner of the General Land Office may require the authorities of such town, and it shall be lawful for them, to elect what portion of said lands, in compact form and embracing the actual site of the municipal occupation and improvement, shall be withheld from pre-emption and homestead entry; and thereafter the residue of such lands shall be open to disposal under the homestead and pre-emption laws. And upon default of said town authorities to make such selection within sixty days after notification by the Commissioner, he may direct testimony respecting the actual location and extent of said improvements, to be taken by the register and receiver of the district in which such town may be situated; and, upon receipt of the same, he may determine and set off the proper site according to section one of this act, and declare the remaining lands open to settlement and entry under the homestead and pre-emption laws; and it shall be the duty of the secretary of each of the Territories of the United States to furnish the surveyor-general of the Territory for the use of the United States a copy duly certified of every act of the legislature of the Territory incorporating any city or town, the same to be forwarded by such secretary to the surveyor-general within one month from date of its approval.

Sec. 4. It shall be lawful for any town which has made, or may hereafter make entry of less than the maximum quantity of land named in section twenty-three hundred and eighty-nine of the Revised Statutes to make such additional entry, or entries, of contiguous tracts, which may be occupied for town purposes as when added to the entry or entries therefore [theretofore] made will not exceed twenty-five hundred and sixty acres: *Provided*, That such additional entry shall not together with all prior entries be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population as prescribed in said section twenty-three hundred and eighty-nine.

Approved, March 3, 1877.

of selling public lands at auction was substantially abandoned, the effect of this exception and exclusion was that lands within the limits of an incorporated town could be disposed of, omitting mention of some minor exceptions only under the townsite laws, and for that reason they came to be generally considered as reserved for townsite purposes, although that was not the primary purpose of the law.

The extent of the incorporated limits of a city or town not being prescribed by the laws of Congress but by State and Territorial laws (*Root v. Shields, supra*) the artificial boundaries of incorporated towns frequently departed from the lines of settlement and occupancy and included tracts of vacant and unoccupied land which greatly exceeded in area the quantity susceptible of entry under townsite laws. Thus, under the exception and exclusion made by sections 2258 and 2289 all public lands within the limits of an incorporated town in excess of the quantity susceptible of entry under townsite laws, came to be practically withheld from all disposition.

It was to correct this situation that the act of March 3, 1877 (19 Stat., 392), entitled "An act respecting the limits of reservations for townsites upon the public domain" was passed. It presupposes or assumes the existence of another statute reserving from pre-emption and homestead entry all lands within the limits of an incorporated town, but contains within itself sufficient to give it full operation and effect independently of the existence or repeal of the statute whose existence is so assumed.

Giving due consideration to all of its provisions, so far as applicable to a case like this, this act may be summarized as follows:

1. It reserves from pre-emption and homestead entry the maximum quantity of public land within the limits of an incorporated town which is susceptible of entry by such town under the townsite laws.
2. When within the limits of an incorporated town there are included more public lands than the maximum quantity susceptible of entry by such town, it provides for identifying the lands reserved and for subjecting to the pre-emption and homestead laws all lands in excess of the quantity so reserved.
3. It authorizes a town which has made entry of less than the maximum quantity to make additional entries of contiguous tracts occupied for townsite purposes, the aggregate of all entries not to exceed the quantity of land which the existing population of the town entitles it to enter according to the scale prescribed by section 2389 of the Revised Statutes (act of March 2, 1867, *supra.*), and not to exceed the maximum quantity of 2560 acres.
4. The quantity of land so reserved from pre-emption and homestead entry is not merely the area which the existing population of the town entitles it to enter, but the maximum area of 2560 acres, less that embraced in prior entries, if there have been any; in other words, the reservation is not confined to the present needs of the town, but in anticipation of its future growth, includes the total area which the town

may yet enter, without going beyond the maximum limit prescribed by the townsite laws.

Whether the land so reserved is thereby appropriated for townsite purposes so as to withdraw and withhold it from all other disposition under the public land laws, or whether under the terms of the statute the appropriation is operative only against the pre-emption and homestead laws, it is not now necessary to inquire.

At the time of Wilson's soldiers' additional homestead entry the corporate limits of the town of Castle embraced the land here in controversy and other contiguous land theretofore entered under the townsite laws, all of which was less than 2560 acres in area. Thus, while the land here in controversy was then vacant and unoccupied and therefore not subject to entry under the townsite laws, it was so situated that it would probably become subject to such entry in the event of the future growth of the town, and was therefore clearly reserved under the act of March 3, 1877. The entire area included within the boundaries of the incorporated town being less than 2560 acres, and this land being contiguous to the land theretofore entered, its identification as reserved land was fully accomplished by the statute. It follows that at the time of Wilson's entry, January 22, 1895, the land included therein was not "unappropriated" within the meaning of section 2289 as amended, and that the allowance of the entry was improper.

In September, 1895, on account of a falling off in its population, the town of Castle was disincorporated under the laws of the State, and thus the obstacle in the way of the entry was removed; in other words, while the land was not subject to homestead entry when Wilson's entry was allowed, it became subject to homestead entry soon thereafter, and is so now.

In the administration of the public land laws it is uniformly and wisely held that an entry of land held in reservation or for other reason not subject to entry, made and maintained in good faith under color or claim of right will, if the land has since become subject to that class or character of entry, be permitted to remain intact as having attached when the land became subject to entry, if there be no adverse claim. (Richard Griffin, 11 L. D., 231; Thunie v. St. Paul, Minneapolis and Manitoba Ry. Co., 14 L. D., 545; John W. Imes, 15 L. D., 546; Settoon v. Tschirn, 19 L. D., 1; James M. Dewar, 19 L. D., 575; Oscar Sassin, 20 L. D., 12).

The facts of this case bring it clearly within this rule. If Wilson's entry were canceled he or his assignees could immediately make another entry of the same land in the exercise of his soldiers' additional right. It would not accord with the spirit in which the government's business should be transacted to require this course to be followed when the same result can be attained by more direct and reasonable means.

Without now undertaking to determine for all cases who is an adverse claimant within the meaning of the cases last cited, it is certain that

Barbour does not occupy that status. He does not claim to have initiated or acquired, and does not seek to initiate or acquire, any right to the land in opposition to that entry, but confesses that his interest in the land is one the preservation and protection of which depends upon the Wilson entry being successfully carried to patent. Indeed the attitude in which Barbour comes before the land department is that of a vendee inviting the government to aid him in defeating his vendor's title. He was accorded an opportunity of showing that the entry should not be passed to patent and has failed in the undertaking, but there was nothing in this which made him an adverse claimant.

The decision under review is recalled, and the case is remanded to your office with instructions to pass the entry to patent.

INDIAN LANDS—ALLOTMENT—LAW OF DESCENT.

HEIRS OF GEORGE B. VAN ARSDALE.

In determining rights of inheritance under an allotment to a citizen Pottawatomie of land in Oklahoma the law of descent in force in said Territory must govern; and under said law, where the widow of an allottee dies all of her children, or their representatives, have a share in the interest held by the widow.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior*  
*January 30, 1899.* (W. C. P.)

I am in receipt, by your reference, with request for an opinion, of the letter of the Commissioner of Indian Affairs, dated December 29, 1898, and accompanying papers, relating to the question of the present ownership of lands allotted to George B. Van Arsdale, a Citizen Pottawatomie Indian, now deceased.

This question arose upon the presentation for approval of a deed, in which the grantors were described as "Nellie Finley, *nee* Van Arsdale, sole heir at law of George B. Van Arsdale, Pottawatomie allottee No. 562, and of Josette Van Arsdale, his widow, and John B. Finley, husband of said Nellie Finley," and purporting to convey the land formerly allotted to said George B. Van Arsdale.

It seems from the papers submitted that this land, situated in Oklahoma, was allotted to said Van Arsdale, that he died in June, 1892, leaving Josette, his widow, and Nellie Finley, his daughter, as his sole heirs, that the widow died in July, 1895, leaving said Nellie Finley, her daughter by the marriage with Van Arsdale, and several other children, the fruits of a former marriage with one Trapp, as her heirs.

The Commissioner of Indian Affairs expresses the opinion that under the laws of Oklahoma the land upon the death of Van Arsdale went in equal parts to his widow and child, and that upon the widow's death her interest descended to all her children equally; but since the attorney for Nellie Finley, disputes the right of the children of the for-

mer marriage to any interest in said land, the Commissioner submits the matter, saying:

As . . . . proposes to appeal the case, I respectfully transmit the papers for your consideration of the question of heirship, which is the only question presented for your consideration and decision.

There is no argument among the papers against the Commissioner's position, nor is there any appearance here in behalf of Nellie Finley.

The act of February 8, 1887 (24 Stat., 388), under which this allotment was made, provides:

That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided.

There is nothing in the act to take this land out of the general rule, and therefore the laws of Oklahoma as to descent and partition apply.

The law of Oklahoma relating to succession (Chap. 86, Art. 4, Sec. 3) provides that the estate of one who dies intestate shall be succeeded to and distributed:

First. If the decedent leave a surviving husband or wife, and only one child, or the lawful issue of one child, in equal shares to the surviving husband, or wife and child, or issue of such child.

Under this law the interest of Van Arsdale in this land went to Josette, his widow, and Nellie, his only child, in equal shares.

This section further provides:

If the decedent leave no surviving husband or wife, but leaves issue, the whole estate goes to such issue, and if such issue consists of more than one child living, or one child living and the lawful issue of one or more deceased children, then the estate goes in equal shares to the children living or to the child living, and the issue of the deceased child or children by right of representation.

Josette Van Arsdale left Nellie Finley, her daughter, also several children and issue of deceased children by a former marriage. Under the law, her estate, which included a half interest in the land in question, went to her children and the representatives of her deceased children.

The Commissioner of Indian Affairs states that section 12 of said article 4, chapter 86, of the Oklahoma statutes, is cited in support of the claim that Nellie Finley is the sole owner of this land. Said section reads as follows:

Kindred of the half blood inherit equally with those of the whole blood in the same degree, unless the inheritance come to the intestate by descent, devise or gift of some one of his ancestors, in which case all those who are not of the blood of such ancestors must be excluded from such inheritance.

I agree with the Commissioner of Indian Affairs that this section has no bearing on this case. All the children of the decedent, Mrs. Van Arsdale, are equally of her blood.

The law as above quoted governing this case is so clear and explicit as not to be in need of construction to ascertain its meaning, nor is argument necessary to demonstrate the applicability of the law to the case.

I concur in the opinion expressed by the Commissioner of Indian Affairs that Nellie Finley is not the sole owner of this land and that all the children, or their representatives, of Josette Van Arsdale, have a share in the half interest in said land which went to her upon the death of the allottee.

Approved, January 30, 1899,

THOS. RYAN, *Acting Secretary.*

APPLICATION TO ENTER—ADVERSE CLAIM.

LUNSFORD *v.* NABORS.

An application to enter irregular in form, and returned to the applicant for correction, protects him as against intervening adverse claims.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 1, 1899.* (C. J. G.)

This is an appeal by James B. Nabors from your office decision of May 29, 1897, reversing the decision of the local office and holding his homestead entry for the S $\frac{1}{2}$  of the SE $\frac{1}{4}$  of Sec. 6, T. 20 S., R. 3 W., Montgomery land district, Alabama, subject to the right of William G. Lunsford to make homestead entry of said land.

It appears that on January 27, 1896, Nabors went before the clerk of the court of Jefferson county, Alabama, and made homestead affidavit and application for the land described, at the same time paying the proper fee and commissions. These papers, with the fee and commissions, were duly transmitted to the local office, and were received there January 28, 1896. The same day the local office returned to Nabors his homestead application, in order that he might remedy his failure to show that he was within the provisions of the act of May 26, 1890 (26 Stat., 221), amending section 2294 of the Revised Statutes, which provides under what circumstances applications may be prepared remote from the local office. The perfected application was received in the local office February 4, 1896, was placed of record, and duplicate receipt issued to Nabors.

In the meantime, to wit, January 30, 1896, William G. Lunsford established residence on the land in question by moving into a cabin built thereon by a prior settler. At that time Lunsford found a notice, signed by Nabors, tacked on the door of the cabin, warning trespassers to keep off.

February 3, 1896, Lunsford applied to make homestead entry of this land which was rejected for conflict with the prior application of Nabors; and on March 9, 1896, he filed affidavit of contest against the entry of Nabors, alleging that he established residence on the land prior to said entry.

Testimony was taken before W. H. Hunter, U. S. Commissioner at

Birmingham, both parties being present with their counsel. The local office rendered decision in favor of Nabors, it being held that Lunsford's allegation had not been sustained, and that Nabors was the first legal applicant. Upon appeal your office reversed this decision.

The evidence is conflicting as to the time the trespass notice, found by Lunsford when he moved on the land, was placed there by Nabors; the former swearing that it was there in October, 1895, while the latter and several of his witnesses testify that it was not posted until January 28, 1896. The evidence is conclusive, however, that said notice was there and observed by Lunsford on January 30, 1896.

Your office held that the posting of the notice by Nabors was not an act of settlement, and in this the Department concurs. It was held in the case of *Henline v. Ginder*, 24 L. D., 476, that the rule recognizing slight acts of settlement in the presence of an adverse claim is limited to parties making the race for Oklahoma lands, and is not applicable to the ordinary case of a party who claims priority of settlement. The claim of Nabors is thus made to depend upon his application to enter. Upon this point your office held that said application "was not lawful and valid until it was received complete on February 4, 1896, and his rights must date from this time"; citing in support thereof the case of *Davis v. Fraser*, 21 L. D., 294.

In the case of *Walk v. Beaty*, 26 L. D., 54, it was held (syllabus):

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

That case cited and distinguished the case of *Lawson H. Lemmons*, 19 L. D., 37, the syllabus of which is:

An application for public land should be rejected if defective when presented; and the right of the applicant, in such case, to thereafter perfect his application can not be recognized in the presence of an intervening adverse claim.

The *Lemmons* case, however, was overruled by that of *Neff v. Snider*, 26 L. D., 389, the syllabus of which is:

An application to enter suspended on account of defects therein, with notice of such action to the applicant, operates to reserve the land from other disposition until final action thereon.

In the case of *McCormick v. Barclay*, 21 L. D., 60, it was held (syllabus):

Where an application to enter is found irregular in form, and is returned to the applicant for correction, it should be regarded by the local office as pending for a reasonable time, and excluding, during said period, other applications for the land.

See also the case of *Smith v. United States*, 16 L. D., 352, wherein an application to make homestead entry, returned to the applicant because it did not show why it was made before the clerk of the district court instead of at the local office, as in the case under consideration, was held to be a pending application and to protect the rights of the applicant.

With respect to the case of *Davis v. Fraser*, *supra*, upon which your office relies, it is not considered as conclusive of the case under consideration, for the reason that there is not a parallel state of facts in the two cases. In that case it was held that "a homestead application prepared before a clerk of court, or other officer remote from the local office, takes effect only when filed in the proper land office." This ruling is applicable to and controlling in the case at bar. The facts in the case cited, however, are that the homestead application prepared before the clerk of court was not actually filed in the local office until an entry had intervened, although said application was executed the day before the entry was made. It was accordingly held that such application did not become a finished act before the filing of it; and as this was subsequent to the entry the application was therefore too late. It was also held that "homestead applications and affidavits made before a United States commissioner, or the clerk of a State court, are not lawful and valid, unless they show that the applicant 'is prevented' by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office." But this can not properly be construed to mean that an application erroneous in form, returned for correction, does not operate to reserve the land from other disposition until final action thereon, or that a homestead application must be complete in every particular when first presented in order to so reserve the land. In the case at bar the application of Nabors was filed in the local office prior to Lunsford's settlement or application to enter. Therefore the question in this case, as distinguished from the one cited, is, whether the application of Nabors, being incomplete when filed and returned to him for correction, was a pending application and protected his rights against the subsequent claims of Lunsford.

Under the decisions cited herein the Department is of opinion that the omission of Nabors to file the affidavit referred to was properly curable upon notice to him; and that when cured, as was done, it took effect by relation as of the date filed.

Your office decision is hereby reversed, and the entry of Nabors will remain intact subject to compliance with law.

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#### RAILROAD GRANT—LAND EXCEPTED—PRE-EMPTION FILING.

#### UNION PACIFIC RY. CO. *v.* FISHER.

The preferred right of purchase secured by a pre-emption filing on "offered" land terminates with the expiration of the statutory period for the submission of final proof and making payment, and, if within that period such filing is not carried to entry, it is not after such time even an apparent record claim to the land, for the same record that gives notice of the filing, gives like notice of its termination. Such expired filing is of no advantage to the claimant which a formal cancellation would withdraw, and no obstacle to the disposition of the land which such a cancellation would remove.

By the terms of section 3, of the act of July 1, 1862, making a grant of lands to the Union Pacific Ry. Co. all lands, "sold, reserved or otherwise disposed of by the United States," or "to which a pre-emption or homestead claim may . . . have attached at the time the line of said road is definitely fixed," were excepted from said grant; and by section 4, of the amendatory act of July 2, 1864, it was provided that said grant should not defeat or impair any "pre-emption, homestead . . . or other lawful claim;" and it is held that an expired pre-emption filing upon "offered" land is not an existing or subsisting claim upon the records of the local office, and does not constitute a pre-emption, or other lawful claim, within the meaning of the excepting clauses in said grant.

*Acting Secretary Ryan to the Commissioner of the General Land Office,  
(W. V. D.) February 1, 1899.*

The Union Pacific Railway Company has appealed from your office decision of May 15, 1897, holding that the preemption filing of Almon Benton excepted the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  Sec. 13, T. 7 S., R. 11 E., Topeka land district, Kansas, from the grant made by the act of July 1, 1862 (12 Stat., 489) and the amendment thereto of July 2, 1864 (13 Stat., 356).

This tract is within the limits of that grant and the line of road opposite thereto was definitely fixed by the map of definite location filed January 11, 1866.

The land was offered for sale under proclamation No. 636, dated March 22, 1859, under which a sale of public lands commencing September 19, 1859, was held at the Kickapoo land office. While offered for sale the tract was not sold, and thereupon took the status of offered land.

August 5, 1862, Almon Benton filed preemption declaratory statement embracing said tract, in which July 21, 1862, was given as the date of his settlement, but the filing was never perfected into an entry. At the date of the definite location of the line of road, this filing had not been formally canceled upon the records of the local office and for that reason it is held in your office decision that the land covered by the filing was excepted from the grant.

The railroad company listed the tract for patent under its grant June 21, 1881, but notwithstanding this listing the local officers, without notice to the company, permitted Frank F. Fisher to make homestead entry of the tract October 7, 1896, and this entry is sustained by your office decision.

What was the status of Benton's preemption filing at the date of the definite location of the line of road? Was it at that time an existing preemption claim, within the meaning of the granting acts? If it was, the land embraced therein was excepted from the grant.

By the terms of section three of the granting act there were excepted from the grant all mineral lands and all lands "sold, reserved or otherwise disposed of by the United States" or "to which a preemption or homestead claim may . . . have attached, at the time the line of said road is definitely fixed," and by section four of the amendatory act it was provided:

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, on any lands returned and denominated as mineral lands.

The main contention of appellant is that the tract was offered land at the time of the filing thereon by Benton and that the filing had, by operation of law, wholly expired and become altogether inoperative before the definite location of the line of road and was therefore as completely extinguished as if formally canceled.

It becomes necessary to inquire what were "offered" lands and to ascertain the effect and status of a pre-emption filing thereon.

Originally the controlling purpose in disposing of the public lands was the obtaining of public revenue. Under the proclamation of the President and after appropriate public notice the lands were offered at public sale to the highest bidder, the minimum price being one dollar and twenty-five cents per acre, and if when so offered a tract remained unsold it became subject to private sale under section 3 of the act of April 24, 1820 (3 Stat., 566—R. S., Sec. 2357), which provided:

And all the public lands which shall have been offered at public sale before the first day of July next, and which shall then remain unsold, as well as the lands that shall thereafter be offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry as aforesaid.

As a result of this system of public and private sales, the public lands came to be spoken of as "unoffered" lands, meaning those which had not yet been exposed to public sale, and "offered" lands, meaning those which had been exposed to public sale but remained unsold. The latter, but not the former, were subject to private sale or entry at the minimum price. It will not be necessary to here refer to a class of lands the status of which has been affected by a change in the price thereof as shown in the case of *Eldred v. Sexton* (19 Wall., 189).

The preemption act of September 4, 1841 (5 Stat., 453; Secs. 10-15), gave a preferred right to purchase or enter, at the minimum price, not exceeding one hundred and sixty acres, or a quarter section, of public land to one who should make a personal settlement thereupon, inhabit and improve the same, and erect a dwelling-house thereon. This preferred right extended equally to unoffered and offered lands, except that by section 14 it was provided respecting unoffered lands:

That this act shall not delay the sale of any of the public lands of the United States beyond the time which has been, or may be, appointed by the proclamation of the President, nor shall the provisions of this act be available to any person or persons who shall fail to make the proof and payment, and file the affidavit required before the day appointed for the commencement of the sales as aforesaid.

and by section 15 it was provided respecting offered lands:

That whenever any person has settled or shall settle and improve a tract of land, subject at the time of settlement to private entry, and shall intend to purchase the same under the provisions of this act, such person shall in the first case, within

three months after the passage of the same, and in the last within thirty days next after the date of such settlement, file with the register of the proper district a written statement, describing the land settled upon, and declaring the intention of such person to claim the same under the provisions of this act; and shall, where such settlement is already made, within twelve months after the passage of this act, and where it shall hereafter be made, within the same period after the date of such settlement, make the proof, affidavit, and payment herein required; and if he or she shall fail to file such written statement as aforesaid, or shall fail to make such affidavit, proof, and payment, within the twelve months aforesaid, the tract of land so settled and improved shall be subject to the entry of any other purchaser.

Thus the effect of the act of 1841 was that, as to unoffered lands, the filing of a preemption declaratory statement was not required, but the preference right of purchase was lost unless exercised by the making of due proof and payment before the time fixed for the public sale, in which event the land would be offered and sold to the highest bidder, and if not sold would become subject to private entry by the first applicant, at the minimum price. As to offered lands, the preference right was dependent upon the filing of a declaratory statement in the local office within thirty days after the time of settlement and would be lost unless exercised by the making of due proof and payment within twelve months after the date of settlement.

Under the statute regulating sales of public lands, unoffered land could not be purchased at any price or in any manner in advance of the public sale, while offered land was at all times subject to purchase by the first applicant at a fixed price. The preemption act of 1841 gave to one complying with the terms thereof the privilege of purchasing unoffered land at the same fixed price at any time before the day appointed for the commencement of the public sale. This was the conferring of an entirely new privilege, but the privilege of purchasing offered lands at the fixed price was conferred by the act of April 24, 1820, and existed independently of the preemption law, so that as to them the only effect of the act of 1841 was to give to one complying with its terms a period of twelve months from the time of settlement within which to fully exercise his privilege and make payment for the land. This was not the conferring of an entirely new privilege but rather the modification or enlargement of an existing one.

The act of March 3, 1843 (5 Stat., 619), supplemented the preemption act of 1841, and by section 5 required that settlers upon unoffered lands should file a declaratory statement in the local office within three months from the time of settlement, in default of which the tract would be awarded to the next settler in order of time who should file such statement and otherwise comply with the law, and section 9 referring to the provision respecting offered land, in section 15 of the act of 1841, to the effect that the tract would be subject to the entry of any other purchaser unless the preference right was exercised by the making of proof and payment within twelve months after the date of settlement, provided as follows:

And said act shall not be so construed as to preclude any person who may have filed a notice of intention to claim any tract of land by preemption under said act, from the right allowed by law to others to purchase the same by private entry after the expiration of the right of preemption.

Respecting the right or privilege secured by a preemption filing, the two acts of 1841 and 1843, taken together, made a difference between unoffered and offered lands in that on unoffered lands the right or privilege continued up to the commencement of the public sale whenever that might be, and if the filing had not then been perfected into an entry the land was offered at the public sale and if not sold became subject to private entry by the first applicant, and on offered lands the right or privilege continued for twelve months from the time of settlement and if the filing had not then been perfected into an entry, the land was likewise subject to private entry by the first applicant, the person who made the filing having the same right as others to thereafter purchase the land by private entry. The effect, however, of a failure to carry a preemption filing into an entry within the time prescribed by these acts was the same whether the filing embraced unoffered or offered lands, that is, the right or privilege secured by the filing terminated *ipso facto*, by operation of law, and thereafter the person who made the filing had no greater or different right or privilege of purchasing or entering the land than was possessed by others, and had no greater or different right or privilege of purchasing or entering the land than he would have possessed if he had not made the filing. If at the time of the filing the land was unoffered, he could purchase at the public sale by becoming the highest bidder, or if it remained unsold at the close of such sale he could then make private entry thereof at the minimum price upon the same terms accorded to others, but neither at the public sale nor in making such private entry would his filing avail him anything whatever. So if the land was offered land at the time of the filing, upon the expiration of the time for carrying the filing into an entry the land became subject to private entry by the person who made the filing upon the same terms that it was subject to such entry by others, but the filing would be of no advantage to him either in the presence or absence of other applicants. This result was not dependent upon the cancellation of the filing upon the records of the local office, nor was it the custom or practice of the land department to make a formal cancellation of such filings. The absence of a formal cancellation was therefore no indication that the officers of the land department recognized the expired filing as one thereafter to be prosecuted to confirmation, nor, indeed, would such recognition have been within the range of their authority.

That the "right of preemption," in the instance of offered lands, expired by operation of law with the expiration of the time for making proof and payment, and was so regarded by Congress, is fully illustrated by section 9 of the act of 1843, where it is provided that one who may have filed a preemption declaratory statement for offered land under the act of 1841 shall not be excluded "from the right allowed by law to others to purchase the same by private entry after the *expiration of the right of preemption.*"

The fact that a filing had thus terminated and that all rights and privileges thereunder were extinguished, was as much a matter of record in the local office as would be a formal entry of cancellation, so that no inquiry into matters not shown by the records of that office was necessary in determining the status or effect of the filing. The date of settlement given in the declaratory statement, whether the filing had been perfected into an entry, whether the land was unoffered or offered at the time of the filing, and if unoffered whether it had since been exposed to public sale, were matters necessarily appearing upon the records of the local office. It follows, therefore, that under the acts of 1841 and 1843 a preemption filing whether made upon unoffered or offered land did not, after the expiration of the time for making entry thereunder, constitute even an apparent record claim to the land. The same record which gave notice of the filing gave like notice of its termination. The filing was thereafter of no advantage to the claimant which a formal cancellation would withdraw and it was no obstacle to the disposition of the land which such a cancellation would remove.

In *Union Pacific Railway Co. v. Hartwich* (26 L. D., 680), it was held that a preemption filing made on unoffered lands was extinguished by operation of law, if proof and payment were not made thereunder before the day appointed for the commencement of the public sale at which such land was offered, and that a formal cancellation upon the records was not necessary to put an end to the preemption right.

The case under consideration is essentially different from that of a filing which has become subject to cancellation by the claimant's failure to maintain personal settlement, his ownership of three hundred and twenty acres of other land or his agreement to sell the land before entry. In such a case the claim would not be enforceable by the claimant and would be subject to cancellation upon an ascertainment of the facts, but in the absence of such ascertainment matters of this character would not appear upon the records of the local office, and would, therefore, not affect the status of the filing as an existing claim.

The status of the land at the time of the definite location of the road, January 11, 1866, constitutes the criterion by which the lands to which the company is entitled are to be determined. *Van Wyck v. Knevals* (106 U. S., 360); *Kansas Pacific Ry. Co. v. Dunmeyer* (113 U. S., 629). At that time Benton's preemption filing made upon offered land August 5, 1862, and based upon a settlement made July 21, 1862, had expired by operation of law, as shown by the records of the local office, and had no more effect as a claim to the land than if it had never been made. It is not claimed that Benton's settlement continued after the expiration of his filing and up to the time of the definite location of the line of road, but this was not deemed material by your office and is not deemed material by the Department.

Following the enactment of the homestead law, May 20, 1862, the

practice of disposing of public lands at public sale was gradually abandoned, and while the authority for such sales remained, it came to be rarely exercised. As before shown, under the statutes then existing, one making a preemption filing upon unoffered land had until the day appointed for the public sale within which to carry his filing into an entry by making proof and payment. The abandonment, therefore, of public sales resulted in giving to those who had made preemption filings upon unoffered land, an unlimited or indeterminate time within which to perfect or complete their claims by making proof and payment. To correct this situation, the act of July 15, 1870 (16 Stat., 279), and the resolution of March 3, 1871 (16 Stat., 601), provided that claimants for unoffered lands should make the proper proof and payment within thirty months after the date prescribed for filing declaratory statement. (See sec. 2267, R. S.) These additional enactments being subsequent to the definite location of the company's line of road and being limited to unoffered lands do not affect the case at bar and are now mentioned only for the purpose of completing the historical statement of the legislation affecting the general subject under consideration. Any discussion of their effect upon filings upon unoffered land must be left to a case whose facts make such discussion necessary.

The views here expressed are not altogether in conflict with the decisions of the Department in the cases of *Allen v. Northern Pacific R. R. Co.* (6 L. D., 520); *Schetka v. Northern Pacific R. R. Co.* (5 L. D., 473), and *Emmerson v. Central Pacific R. R. Co.* (3 L. D., 117 and 271). At the time when these decisions were rendered the Department held that settlement, inhabitancy and improvement constituted a preemption claim within the meaning of the excepting clauses of this and other similar railroad grants, and that lands so settled upon, inhabited and improved at the time of the definite location of the line of road, were excepted from the grant, although no declaratory statement had been filed or action taken in the land office, whereby a claim to the land had been asserted or recognized. The decisions cited applied this holding to the cases of persons who made preemption filings upon offered land and failed to make proof and payment within the time prescribed, but who, when the line of road was thereafter definitely located, were still inhabiting the land; and in support thereof it was said that "the preemption law bases the preemption right on settlement," and that "the mere fact that the preemptor's filing had lapsed is not sufficient evidence of the abandonment of his claim." That which was thus held to except the land from the grant was the settlement and not the expired filing. In the *Schetka* case a filing was made upon offered land by one Barth and the time for making proof and payment thereunder expired before the definite location of the line of road. It was held:

If the settlement existed at the time of the definite location, the claim of the company is at an end. If, however, the claim of Barth to the land had ceased at that date, I see no reason from this record why the tract should not be awarded to the company.

In the Allen case, a filing upon offered land, made by one Fittlar, had expired before definite location, and the decision, calling attention to the absence of an allegation that the original claimant continued to hold the land at the time of the definite location of the road, ordered a hearing to ascertain the facts in that connection, and held that "if the land was at that date free from the settlement claim of Fittlar, aforesaid, I see no reason from the present record why the railroad company should not get the land." These were, in effect, decisions that an expired filing upon offered land, although not formally canceled upon the records of the local land office, did not constitute such a preemption claim as excepted the land from the grant, for clearly there was no occasion to inquire whether personal settlement or inhabitancy had been maintained up to the time of the definite location of the line of road, if the filing itself, although expired, defeated the grant. That this is the proper interpretation of these decisions is shown by the subsequent cases of Northern Pacific R. R. Co. v. Stovenour (10 L. D., 645) and Meister v. St. Paul, Minneapolis and Manitoba Ry. Co. et al. (14 L. D., 624). In the Stovenour case, which involved unoffered land, it was said:

This conclusion renders it necessary further to consider whether the land was 'free from preemption, or other claims or rights,' at the date when the line of the company's road was definitely located, to wit: July 6, 1882. At that date, it will be observed, the time prescribed by statute, within which proof and payment were required to be made under the declaratory statements of Pare and Yeaman, had elapsed, without proof and payment having been made. These declaratory statements were, therefore, at the date when the company's rights attached under its grant, what are usually denominated 'expired filings;' and there is no evidence, or allegation even, that the parties named were then settlers or residents on the land.

Were these filings, nevertheless, 'preemption claims,' such as served to except the land from the grant? I am of the opinion that they were not. 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.

In the Meister case, which involved offered land, it was said:

Said land was offered at public sale October 26, 1864. On July 8, 1869, Garrett Cronk filed preemption declaratory statement (No. 81) for said tract and others, alleging settlement July 5, 1869, but never attempted to perfect title under said filing.

You affirmed the decision of the local officers on the ground that Cronk's filing expired before the attachment of rights under said grant, and that said land therefore enured to said grant.

On appeal to this Department, Meister alleges error in rejecting his application on such ground. Under the preemption law (Sec. 2264 of the Revised Statutes) it

was necessary for Cronk, within twelve months after the date of his settlement to 'make the proof, affidavit, and payment' required, and upon failure thereof said land became 'subject to the entry of any other purchaser.' Cronk never complied with this provision of the law. The twelve months from his settlement expired July 5, 1870, and said tract then became prima facie vacant public land, and subject to the grant of the company at the date of the definite location of its road on December 19, 1871, and must be held to have passed under its grant in the absence of any showing to the contrary.

The holding of the Department upon which all these decisions seem to have been predicated, viz, that settlement, or settlement followed by inhabitancy and improvement, constitutes a preemption claim with the excepting clauses found in this and similar grants to aid in the construction of railroads, has given way to subsequent rulings of the supreme court fully establishing what is a preemption or homestead claim within the meaning of these granting acts. The court's rulings are here given in its own language.

In *Kansas Pacific v. Dunmeyer* (113 U. S., 629, 640, 644), it is said:

The land granted by Congress was from its very character and surroundings uncertain in many respects, until the thing was done which should remove that uncertainty, and give precision to the grant. Wherever the road might go, the grant was limited originally to five sections, and, by the amendment of 1864, to ten sections on each side of it within the limit of twenty miles. These were to be odd-numbered sections, so that the even-numbered sections did not pass by the grant. And these odd-numbered sections were to be those 'not sold, reserved, or otherwise disposed of by the United States, and to which a preemption or homestead right had not attached at the time the line of said road is definitely fixed.' When the line was fixed, which we have already said was by the act of filing this map of definite location in the General Land Office, then the criterion was established by which the lands to which the road had a right were to be determined. Topographically this determined which were the ten odd sections on each side of that line where the surveys had then been made. Where they had not been made, this determination was only postponed until the survey should have been made. This filing of the map of definite location furnished also the means of determining what lands had previously to that moment been sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim had attached; for, by examining the plats of this land in the office of the register and receiver, or in the General Land Office, it could readily have been seen if any of the odd sections within ten miles of the line had been sold, or disposed of, or reserved, or a homestead or pre-emption claim had attached to any of them. In regard to all such sections they were not granted. The express and unequivocal language of the statute is that the odd sections *not* in this condition are granted. The grant is limited, by its clear meaning, to the other odd sections, and not to these.

\* \* \* \* \*

In the case before us a claim was made and filed in the land office, and there recognized, before the line of the company's road was located. That claim was an existing one of public record in favor of Miller when the map of plaintiff in error was filed. In the language of the act of Congress this homestead claim had *attached* to the land, and it therefore did not pass by the grant.

Of all the words in the English language, this word *attached* was probably the best that could have been used. It did not mean mere settlement, residence, or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title

by future residence and cultivation. With the performance of these conditions the company had nothing to do. The right of the homestead having attached to the land it was excepted out of the grant as much as if in a deed, it had been excluded from the conveyance by metes and bounds.

The Dunmeyer decision is cited with approval in *Dakota Railroad Co. v. Whitney* (132 U. S., 357), and *Whitney v. Taylor* (158 U. S., 85). In the latter it is said at page 93:

With reference to the first of these reasons it is true that there must be a settlement and improvement in order to justify the filing of such a declaratory statement. Settlement is the initial fact. The act of September 4, 1841, c. 16, 5 Stat., 453, which was in force at the time of these transactions, gave the right of preemption to one making 'a settlement in person,' and who inhabits and improves the land and erects a dwelling thereon, (§ 10,) and authorized the filing of a declaratory statement within three months after the date of such settlement. (§ 15.) In this respect a preemption differs from a homestead, for the entry in the land office is in respect to the latter the initial fact. Act of May 20, 1862, c. 15, 12 Stat., 392; Rev. Stat. § 2290; *Maddox v. Burnham*, 156 U. S., 544. But it is also true that settlement alone without a declaratory statement creates no preemption right. 'Such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose.' *Lansdale v. Daniels*, 100 U. S., 113, 116. And the acceptance of such declaratory statement and noting the same on the books of the local land office is the official recognition of the preemption claim. While the cases of *Kansas Pacific Railway Co. v. Dunmeyer* and *Hastings and Dakota Railway Co. v. Whitney*, *supra*, involved simply homestead claims, yet, in the opinion in each, preemption and homestead claims were mentioned and considered as standing in this respect upon the same footing. Further, it may be noticed that the granting clause of the Pacific Railroad acts, differing from similar clauses in other railroad grants, excepts lands to which preemption or homestead 'claims' have attached, instead of simply cases of preemption or homestead 'rights.' And the filing of this declaratory statement was, in the strictest sense of the term, the assertion of a preemption claim, and when filed and noted it was officially recognized as such.

In *Northern Pacific Railroad Co. v. Colburn* (164 U. S. 383, 386, 388), it is said:

But frequent decisions of this court have been to the effect that no preemption or homestead claim attaches to a tract until an entry in the local land office. Thus, in the case of *Kansas Pacific Railroad v. Dunmeyer*, 113 U. S., 629, 644, Mr. Justice Miller, speaking for the court said:

'Of all the words in the English language, this word "attached" was probably the best that could have been used. It did not mean mere settlement, residence or cultivation of the land, but it meant a proceeding in the proper land office, by which the inchoate right to the land was initiated. It meant that by such a proceeding a right of homestead had fastened to that land, which could ripen into a perfect title by future residence and cultivation.'

This language was quoted and the decision reaffirmed in *Hastings and Dakota Railroad v. Whitney*, 132 U. S. 357; *Whitney v. Taylor*, 158 U. S. 85. In *Lansdale v. Daniels*, 100 U. S., 113, 116, it was ruled that 'such a notice of claim or declaratory statement is indispensably necessary to give the claimant any standing as a preemptor, the rule being that his settlement alone is not sufficient for that purpose.' See also *Maddox v. Burnham*, 156 U. S., 544. Now in this case the allegations are that Kelly never made any entry in the local land office, and the decision of the Secretary of the Interior is based simply on the fact of occupation and cultivation. And while the decision of that fact may be conclusive between the parties, his ruling that such

occupation and cultivation created a claim exempting the land from the operation of the land grant, is a decision on a matter of law which does not conclude the parties, and which is open to review in the courts.

\* \* \* \* \*

For the reasons above indicated, because the decision of the land department was only on matters of fact and did not conclude the law of the case, and because such facts so found were not of themselves sufficient to disturb the title of the railroad company, the judgment is reversed.

In this connection see *Wight v. Central Pacific R. R. Co.* (27 L. D., 182), and *Central Pacific R. R. Co. v. Hunsaker* (27 L. D., 297).

After a careful examination of the statutes and of judicial and departmental decisions it is held that an expired preemption filing upon offered land is not an existing or subsisting claim upon the records of the local land office, and does not constitute a preemption or other lawful claim within the meaning of the excepting clauses of the grant here under consideration.

In some departmental decisions expressions are found attributing to the case of *Whitney v. Taylor*, *supra*, a conclusion different from that here announced. (See *Fish v. Northern Pacific R. R. Co.*, 21 L. D., 165; 23 L. D., 15.) Without giving any consideration to whether the land in question was offered or unoffered or whether a filing upon offered land, shown by the records of the local land office to have expired by operation of law, is any more an existing or subsisting record-claim than one shown by those records to have been canceled or set aside for matters dehors the record, these decisions quote, and give special force to, the following extract from the opinion in that case:

When on the records of the local land office there is an existing claim on the part of an individual under the homestead or preemption law, which has been recognized by the officers of the government and has not been canceled or set aside, the tract in respect to which that claim is existing is excepted from the operation of a railroad land grant containing the ordinary excepting clauses, and this notwithstanding such claim may not be enforceable by the claimant, and is subject to cancellation by the government at its own suggestion, or upon the application of other parties. It was not the intention of Congress to open a controversy between the claimant and the railroad company as to the validity of the former's claim. It was enough that the claim existed, and the question of its validity was a matter to be settled between the government and the claimant, in respect to which the railroad company was not permitted to be heard. . . . Jones had filed a claim in respect to this land, declaring that he had settled and improved it, and intended to purchase it under the provisions of the preemption law. Whether he had in fact settled or improved it was a question in which the government was, at least up to the time of the filing of the map of definite location, the only party adversely interested. And if it was content to let that claim rest as one thereafter to be prosecuted to consummation, that was the end of the matter, and the railroad company was not permitted by the filing of its map of definite location to become a party to any such controversy.

That case involved the effect of an unexpired preemption filing upon unoffered land existing upon the records of the local office at the time of the definite location of the company's line of road, March 26, 1864. It was charged by the company that the claimant had not made settlement upon the land, or that if such a settlement had been made the

claim had been abandoned before the definite location of the line of road. A consideration of the entire decision seems to indicate that what was said in the extract quoted above was in response to this charge. It was also charged that the filing was not followed by payment and final proof within the time prescribed, and that at the date of the definite location of the company's line of road the filing had become, in the nomenclature of the land office, an expired filing, and the land had become thereby discharged of all claim by reason thereof. In response to this charge the court, quoting from the decision of the Secretary of the Interior thereon, said:

It thus appears that the tract in question remained in the category of unoffered lands, and was not proclaimed for sale. The preemption act of March 3, 1843 (5 Stat., 620), provided that the settler on unoffered land might make proof and payment at any time before the commencement of the public sale, which should embrace his land. Until such time arrived the filing protected the claim of the settler. This was the status of the law at the time said company's rights attached, and it so continued until modified by the act of July 14, 1870. 16 Stat., 279.

That this decision upon the effect of an unexpired filing upon unoffered land is not a decision upon the effect of an expired filing upon offered land is manifest, and that the court does not consider that the status of an expired filing was thereby determined seems probable in view of the subsequent decision in Northern Pacific Railroad Company v. Colburn (164 U. S., 383, 388), where the court says:

There are other questions in this case, such as the significance of an 'expired filing.' . . . But as none of these matters were considered by the supreme court of the State, and are not noticed by counsel for defendant in error, we deem it unwise to make any observations thereon, leaving them for consideration in the future progress of the case.

The decision of your office is reversed, and the entry of Fisher is ordered cancelled.

#### HOMESTEAD ENTRY—SETTLEMENT RIGHT.

##### HEAD v. ROBERTS.

The failure of a settler to make homestead entry within the statutory period after settlement cannot be excused on the ground of poverty, in the presence of an intervening adverse entry made in good faith after the right of such settler has expired by limitation of the statute.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) February 1, 1899. (L. L. B.)

George D. Roberts has appealed from your office decision of June 24, 1897, sustaining the contest of Samuel E. Head against his homestead entry for the SE $\frac{1}{4}$  of Sec. 18, T. 38 N., R. 22 W., Boonville district, Missouri.

The facts are correctly stated in the decision appealed from and may be summarized as follows:

May 14, 1896, Roberts made his entry.

July 16, 1896, Head filed contest alleging settlement in November 1894, and that he moved his family on the land December 24, 1894.

His improvements are valued by himself at seventy-five or eighty dollars.

His excuse for failing to make entry until more than a year and a half after his settlement is that he was an old man, and not in good health, and that between the date of his settlement and the entry of Roberts he was unable to secure the fourteen dollars necessary to place his entry of record.

It is shown that Roberts knew of Head's occupation of the land when he made entry, but he says, and it is not disputed, that he did not know that Head designed to enter the land, but believed that he had squatted on the land for the purpose of selling his improvements and possessory rights and so traffic in the land.

By your office decision, as well as that of the local officers, the contest of Head was sustained because of the poverty of Head and the fact that Roberts knew of his settlement on the land at the time he entered the same. There is no evidence tending to show that Roberts practiced any deception, trick or fraud of any kind upon the rights of Head, or that he knew, or had reason to believe, that Head designed to make entry of the land.

Because Roberts was able to make entry of this land and Head was not, certainly does not amount to an unlawful advantage such as is contemplated in the case of *Keeler v. Landry* (22 L. D., 465), quoted in your said office decision. Nor is the case of *Paxton v. Owens*, 18 L. D., 540 (also relied on in support of your said office decision), decisive of the case at bar, for the Department therein held Owen's entry for cancellation, because—

Owen's entry was made in bad faith and not for the purpose of actual settlement and cultivation, and without intent to endeavor to comply faithfully and honestly with the requirements of the homestead laws and make this tract of land a home for himself and family.

It is believed that this Department has never held that inability to procure the money necessary to make entry of a tract of land would afford an excuse to a settler to defer his entry beyond the three months in which his rights are protected by settlement, as against an entryman who makes entry in good faith after the rights of the settler have expired by limitation of the statute. The fact that Roberts knew when he made his entry that Head was in the occupation of this land and had been for more than a year and a half would in no manner impeach his good faith, for the presumption arising from this long continued occupation is not in favor of but against the theory of an intention on the part of the settler to enter the land. The presumption of an intention to enter the land by a settler ceases after the expiration of three months.

The case of *Pruitt v. Skeens*, 12, L. D., 629, is decisive of the case at bar. In that case it was held that—

The excuse offered by *Pruitt* for his laches in filing a correct application cannot be accepted without doing violence to the rulings of this Department. If he did not wish to spare, at once, the money required to make his entry, and preferred to wait until he could do so more conveniently he must wait at his own hazard. Even should it appear that he did not have the money and could not obtain it this Department would not be authorized on that account to withhold the land from entry by another more fortunately circumstanced. . . . It is true he knew *Pruitt* was a settler on the land at the time he, *Skeens*, made his entry, but *Pruitt* not having applied to enter within three months after notice of the rejection of his first application, the law raises the presumption that he did not design to enter. And if it should be shown in evidence that *Skeens* knew that *Pruitt* meant to enter the land, this fact, of itself, would be no bar to *Skeens*'s entry, for *Pruitt* not having made his entry within the time prescribed by the statute, the land was subject to the application of the next qualified settler.

Had it been shown that by some trick, deception, or other fraudulent practice, *Skeens* had overreached *Pruitt*, or had taken advantage of facts or information obtained from him through any fiduciary, or other confidential relations existing between them, as in the case of *Newbaur v. Bush* (12 L. D., 533), the case would have presented a very different aspect.

The decision appealed from is reversed and the entry of *Roberts* will be held to await compliance with the homestead law.

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#### JONES v. PUTNAM.

Motion for rehearing denied by Acting Secretary *Ryan*, February 1, 1899. See departmental decision of October 31, 1898, 27 L. D., 575.

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#### UNCOMPAHGRE UTE LANDS—ALLOTMENT—ENTRY.

##### INSTRUCTIONS.

*Commissioner Hermann to register and receiver, Salt Lake City, Utah, April 14, 1898.*

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
*Washington, D. C., April 14, 1898.*

On April 5, 1898, the Honorable Secretary of the Interior directed this office to instruct you not to permit or accept any filings or entries on Uncompahgre lands until receipt of instructions therefor from the Department.

The act of Congress of June 7, 1897 (30 Stat., 87), provides that:

The Secretary of the Interior is hereby directed to allot agricultural lands in severalty to the Uncompahgre Ute Indians now located upon or belonging to the Uncompahgre Indian reservation in the State of Utah, said allotments to be upon the Uncompahgre and Uintah reservations or elsewhere in said State. And all the

lands of said Uncompahgre reservation, not theretofore allotted in severalty to said Uncompahgre Utes, shall, on and after the first day of April, 1898, be open for location and entry under all the land laws of the United States, excepting, however, therefrom, all lands containing gilsonite, asphalt, elaterite or other like substances.

And the title to all of the said lands containing gilsonite, asphaltum, elaterite or other like substances is reserved to the United States.

The following instructions have, therefore, been now determined upon:

You are instructed to allow entry for said lands, not excepted by the above quoted clause, under the regulations now in force under the different land laws of the United States. You will require from each applicant, except for mineral lands, a non-mineral affidavit, form 4-062, amended so as to show that the land not only does not contain the minerals mentioned in the form, but also does not contain gilsonite, asphalt, elaterite, or other like substances, and you will require of any applicant for mineral lands an affidavit showing that the land does not contain gilsonite, asphalt, elaterite or other like substances, and both of these affidavits must be made before officers qualified to take non-mineral affidavits under existing laws, and must be made on personal knowledge and not upon information and belief.

Where you have reason to believe that the land embraced in the application of any of the applicants contains either or any of the substances mentioned in the exception of the act of June 7, 1897, above, you will suspend such application and report to this office your reasons for such belief so that instructions may be given you looking to a full investigation if same should be warranted. And you will warn all persons making entries that any entry made by them, of whatever character, for such lands, will be void.

Approved,

C. N. BLISS, *Secretary.*

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FOREST RESERVE—USE OF LAND FOR CHURCH AND SCHOOL PURPOSES.

T. S. C. LOWE ET AL.

Permission to occupy lands within a forest reserve for church and school purposes, under the provisions of the act of June 4, 1897, asked for on behalf of a corporation, may be granted to the petitioners as individuals, where it appears that they are settlers residing in the vicinity of said reserve.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 4, 1899.* (J. I. P.)

I am in receipt of your office letter of the 30th ultimo enclosing a petition and correspondence by Prof. Lowe and others of the trustees of Lowe Institute for permission to occupy certain lands in the San Gabriel timber land reserve in California for church and school purposes, under the act of June 4, 1897 (30 Stat., 34-36), and departmental regulations of June 30, 1897 (24 L. D., 589), thereunder.

The act of June 4, 1897, provides that—

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

Paragraph 10 of the regulations of June 30, 1897, under said act provides that—

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

The petition of Prof. Lowe and others, referred to, declares that the Lowe Institute is a corporation, but that the petitioners themselves are settlers residing in the vicinity of said forest reservation.

Your letter apparently construes the term "settlers" as used in the act and the regulations thereunder to mean "persons residing in or near the reserve or persons who may come to that locality temporarily for the purpose of enjoying the benefit of its educational institutions," and in the light of that construction you recommend the granting of the petition.

The petitioners request the granting of this privilege for and on behalf of the Lowe Institute. As the Lowe Institute is a corporation it can not be held to be a settler within the meaning of the act or the regulations thereunder, nor does the present case require any unusual construction of the word "settlers" to bring it within the statute and regulations.

The petition, which is signed by T. S. C. Lowe, Leontine A. Lowe, Thaddeus Lowe and Leon P. Lowe and others, declares that said petitioners are settlers residing in the vicinity of and near the San Gabriel forest reserve, and as they are properly within the purview of the act, the privilege petitioned for is hereby granted to them as individuals.

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CONFIRMATION—ALABAMA LANDS.

JAMES G. HARRIS ET AL.

An entry of Alabama land, reported valuable for coal prior to the act of March 3, 1883, and not thereafter offered at public sale, is within the confirmatory provisions of the proviso to section 7, act of March 3, 1891, if there was no action in the nature of a protest or contest against the validity of the entry until after the expiration of two years from the issuance of the receiver's receipt.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 3, 1899.* (G. B. G.)

I have considered the request for instructions contained in your letter of the 24th instant, respecting the proper disposition to be made of the entries of James G. Harris, Oliver P. Quinn, Philip H. Harris,

William J. Youngblood and John E. Kilgore, of lands within the Montgomery, Alabama, land district, and the entry of Mary E. Minter, of lands within the Huntsville, Alabama, land district, all of which entries were erroneously allowed for the reason that the lands embraced therein had been reported to your office as containing coal, prior to the act of March 3, 1883 (22 Stat., 487), which directed that lands so reported should be offered at public sale before becoming subject to disposal as agricultural lands. These lands have not been offered at public sale, but if there was no contest or protest against the validity of said entries nor any action in the nature of a contest or protest against their validity until after the expiration of two years from the date of the issuance of the receiver's receipt upon the final entry, you will dispose of said entries as coming within the confirmatory provisions of the proviso to the seventh section of the act of March 3, 1891 (26 Stat., 1095), notwithstanding this element of irregularity or invalidity in said entries.

HOMESTEAD ENTRY—SETTLEMENT RIGHTS.

HODGES *v.* DANIELS.

In the case of a settlement claim that includes surveyed and unsurveyed lands, the right of the settler to make entry of the surveyed land is only protected for the period of three months from settlement as against intervening adverse claims.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 6, 1899.* (L. L. B.)

July 23, 1875, a fractional survey of T. 12 S., R. 9 W., Oregon City, Oregon district, was completed. This survey embraced the north tier of sections, together with sections 10, 11 and 12.

Neither the record here nor that of your office shows when the plat was filed in the local office.

The remaining part of the township was surveyed October 15, 1893, and the plat filed in the local office December 12, 1894. This plat embraced sections 8 and 9 of said township.

On said December 12 George A. Hodges applied to make homestead entry for lots 1 and 2, Sec. 8, lot 4, Sec. 9, and the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 4, in said township. His application was rejected for excess in acreage (190.12), and because in conflict as to the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 4, with the pending homestead application of Wade H. Daniels, made December 3, 1894, for SW.  $\frac{1}{4}$  of said Sec. 4. Thereupon Hodges filed amended application, leaving out lot 2 of Sec. 8. This application was filed December 24, 1894, and was rejected for conflict with Daniel's entry which had been allowed December 12, 1894. Thereupon Hodges filed a contest against Daniel's entry, alleging that he settled upon the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of said Sec. 4, together with lot 1 in Sec. 8, and lot 4 in Sec. 9, in 1887, and had continued to cultivate said tract ever since his settle-

ment. From this statement it will be seen that the controversy is over the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  Sec. 4, T. 12 S., R. 9 W.

Although the exact date of filing the plat of the survey embracing said section 4 is not in the record, it was presumably filed within a reasonable time after the survey was completed, and the record discloses that said section was open to settlement as early as November, 1888.

At the hearing Hodges showed that he had settled on the land in 1887, and that he had cultivated about an acre and a half and fenced in about nine acres of the forty acre tract in dispute. It was also shown that Daniel settled on the tract covered by his entry in 1891.

The register and receiver found in favor of the contestant, and by your office decision of January 26, 1897, their action was reversed and Hodges contest dismissed. Hodges has appealed.

From this record it will be seen that Daniel was the first to apply to make entry of the tract in dispute, and if his claim is to be defeated it must be by reason of Hodges prior settlement in 1887. As the foregoing shows Hodges settlement embraced unsurveyed lands in sections 8 and 9, and the forty acres in dispute which was surveyed in 1875, and which was subject to entry as early as November, 1888, as will hereafter appear.

The third section of the act of May 14, 1880 (21 Stat., 140), allowed a homestead settler three months (same as a preemption settler) from the date of his settlement in which to make his entry. During this time his rights were preserved by his settlement.

By decisions of this Department too numerous to need citation, this statute has been construed to require a settler on surveyed lands to make his entry within three months from the date of his settlement, and a settler on unsurveyed lands within the same time after the plat of survey has been filed in the local office for the district in which the land is located; that after the expiration of that time his rights are not preserved by his settlement, but the land is open to the claim of the first legal applicant, or settler.

Hodges settlement upon that portion of the land that was not open to entry until December 12, 1894, protected his claim thereto, but the forty acres in dispute had been open to entry many years prior to the date of his application to make entry therefor, and under all the departmental decisions his rights acquired by settlement thereon had expired long prior to his application and long prior to the application and entry of Daniel.

But Hodges claims protection under letter of your office of date February 9, 1881, addressed to the register and receiver of the Los Angeles land office, as follows:

GENTLEMEN: I have received from you a number of applications from homestead settlers to amend their entries to include parts of their claims surveyed since the dates of their entries.

It is the established practice of this office, that a preemption settler on unsurveyed land is not bound to file his declaratory statement until after an approved survey

has been made, which shall enable him to describe the tract claimed by proper legal subdivisions. Where part only of his claim has been surveyed, he is not bound to file until after the entire tract claimed has been surveyed, and plat thereof returned to the local office.

This rule now applies to homestead settlers on unsurveyed lands, under the third section of the act of May 14, 1880. You will therefore advise this class of settlers that they are not bound to file until after the entire tract claimed has been surveyed and a plat thereof returned to your office; and that in cases where part only of their claims are surveyed and they desire to make immediate entry thereof, their election to take a less number of acres than the law allows them will be considered a waiver of their right to take the greater quantity. (Copp's Land Owner, Vol. 8, p. 7.)

Upon a diligent search no reported decision is found based upon this letter, nor any decision in which it is discussed or in any manner referred to.

That part of the letter in which it is said that "Where part only of his claim has been surveyed, he is not bound to file until after the entire tract claimed has been surveyed, and plat thereof returned to the local office," if thereby it is meant that the surveyed portion of his claim is protected by his settlement alone, as against other qualified claimants, after three months from date of settlement, is believed to be in violation of all departmental precedents. Nor can he justly claim to have been misled by this instruction of your office, for it appears from the record that in November, 1888, he was informed by the register of the local office, in answer to a letter written by himself, that all of the lands upon which he had settled were unsurveyed except the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  (the tract in dispute) and that no filing could be allowed on said unsurveyed part prior to survey, and "you will have to take your chances as to the SW.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  of Sec. 4; as to balance you are all right until survey is made."

Daniel was the first to apply to enter the land, and his entry was allowed when there was no other valid claim thereto.

Your office decision is right and it is affirmed.

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BRIDGES *v.* BRIDGES.

Motion for review of departmental decision of December 6, 1898, 27 L. D., 654, denied by Acting Secretary Ryan, February 6, 1899.

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KNOBLE *v.* ORR.

Motion for review of departmental decision of November 19, 1898, 27 L. D., 619, denied by Acting Secretary Ryan, February 6, 1899.

## RAILROAD GRANT—LAND EXCEPTED—PRE-EMPTION FILING.

UNION PACIFIC RY. CO. *v.* CUNNINGHAM.

An unexpired pre-emption filing existing of record at the date of the grant and definite location, serves to except the land covered thereby from the operations of the grant to the Union Pacific.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) February 6, 1899. (F. W. C.)

The Union Pacific Railway Company has appealed from your office decision of May 12, 1897, in which it is held that the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 25, T. 10 S., R. 8 E., Topeka land district, Kansas, was excepted from its grant made by the acts of July 1, 1862, and July 2, 1864, by reason of the pre-emption declaratory statement by one E. Colburn.

From your office decision it appears that this tract has not been offered at public sale, and that on May 30, 1857, said Colburn filed pre-emption declaratory statement covering this land, in which settlement was alleged the same day.

Under the acts of September 4, 1841 (5 Stat., 453), and March 3, 1843 (5 Stat., 621), the privilege secured by a pre-emption filing continued up to the commencement of the public sale including the tract filed for.

This was the law at both the dates of the acts making the grant and of the definite location of the road opposite this land on July 11, 1866.

The filing by Colburn was therefore a subsisting claim sufficient under the terms of the grant to defeat its operation upon the land in question. (Union Pacific Railway Co. *v.* Wade, 27 L. D., 46.)

It further appears from your office decision that on December 18, 1896, Frank Cunningham was permitted by the local officers to make homestead entry of this land, which entry is still of record.

Although it would appear that said entry was allowed without notice to the company, notwithstanding it had been previously listed on account of the grant, no rights were acquired by said listing, and in view of the above decision holding the tract to be excepted from the grant, the entry by Cunningham will be permitted to stand, subject to due compliance with law, and the company's listing will be canceled from the records.

Your office decision is accordingly affirmed.

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 SHAFER *v.* GRISS.

Motion for review of departmental decision of October 10, 1898, 27 L. D., 519, denied by Acting Secretary Ryan, February 6, 1899.

## RAILROAD GRANT—WITHDRAWAL—ACT OF APRIL 21, 1876.

WILLIAM E. INMAN *v.* NORTHERN PACIFIC R. R. CO.

The act of April 21, 1876, is remedial in character and was intended to relieve settlers who, without notice of a withdrawal of lands in aid of a railroad grant, made entries of lands so withdrawn, but should be construed, in each case arising thereunder, in connection with the granting act, and so applied as not to impute to Congress an intention to defeat or impair vested rights, or to legislate with respect to lands that had passed beyond legislative control.

Under a railroad grant title to the designated sections vests immediately upon the definite location of the line of road, and thereafter such lands are beyond control or disposition by Congress, except upon breach of a condition subsequent; and where, prior to the act of April 21, 1876, the legal title to lands has thus passed to a railroad company, such lands are not subject to disposal under said act, in the absence of a forfeiture for breach of a condition subsequent. The word "withdrawal" employed in said act must be held to refer to withdrawals of lands remaining subject to control and disposition by Congress.

By the terms of the grant to the Northern Pacific a legislative-withdrawal took effect at once upon the filing and acceptance of the map of general route, by which the lands thus withdrawn were taken out of the public domain, as between the company and individuals, irrespective of any notice to the local office of such withdrawal. A homestead entry of lands so withdrawn is without effect as against the company, and while, prior to definite location, it may be confirmed or validated by act of Congress, if it is not so confirmed during said period it is ineffective as against the operation of the grant on definite location, and thereafter it is not competent for Congress to confirm said entry, in the absence of a breach of condition subsequent, and the said act of 1876, is consequently not applicable thereto.

The cases of Northern Pacific R. R. Co. *v.* Symons, 22 L. D., 686, and Inman *v.* Northern Pacific R. R. Co., 24 L. D., 318, overruled.

*Secretary Bliss to the Commissioner of the General Land Office, February*  
(W. V. D.) 7, 1899. (E. F. B.)

The Department has considered the appeal of William E. Inman from the decision of your office of January 19, 1895, holding for cancellation his homestead entry of the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 35, T. 13 N., R. 2 W., Vancouver, Washington, land district.

The railroad company contends that there was no valid pre-emption or homestead claim to this land at the date of definite location of the portion of its road opposite thereto such as would bring Inman's entry within the provisions of the act of April 21, 1876 (19 Stat., 35), and this contention was sustained by the decision of your office.

This land is within the limits of the legislative withdrawal made by operation of law (see *Buttz v. Northern Pac. Railroad*, 119 U. S., 55, 72; and *St. Paul and Pacific Railroad Co. v. Northern Pacific Railroad Co.*, 139 U. S., 1, 17), as well as the executive withdrawal made by order of the Secretary of the Interior, upon the filing and acceptance of the map of the general route of the road August 13, 1870, notice of which was received at the local office of the district within which the land is situated, October 19, 1870. The line of road opposite

thereto was definitely located September 13, 1873, and this tract fell within the primary limits of the grant as adjusted to such definite location.

After the filing of the map of general route and the resulting withdrawal, but prior to the time when notice thereof was received at the local office, Anna M. Lane made homestead entry of the quarter-section embracing the tract now in controversy. This entry was existing of record at the date of definite location of the road, but Lane having failed to perfect title thereunder, it was canceled November 26, 1877.

October 31, 1889, William E. Inman made homestead entry of the land in controversy, alleging settlement November 27, 1888. He claims the right to perfect title under his homestead entry pursuant to the second section of the act of April 21, 1876. Said act is as follows:

That all preemption 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 preemption 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.

SEC. 2. That when at the time of such withdrawal as aforesaid valid preemption or homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were reentered by preemption or homestead claimants who have complied with the laws governing preemption or homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto.

SEC. 3. That all such preemption 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.

The act is remedial in character and was intended to relieve settlers who, without notice of a withdrawal of lands in aid of a railroad grant, made entries thereof, but it must be construed in connection with the granting act because it could not have been intended to thereby impair or defeat vested rights or to affect lands not subject to the control of Congress.

Under the usual railroad land grants the title to the designated sections vests in the railroad company immediately upon the definite location of the line of road and thereafter such lands are beyond control or disposition by Congress, except upon breach of a condition subsequent such as the failure to construct the road. This is so clearly established by supreme court decisions as to be no longer a subject of controversy.

In the case of *Van Wyck v. Knevals* (106 U. S., 360, 365, 366), the court said:

When that route is thus established the grant takes effect upon the sections by relation as of the date of the act of Congress. In that sense we say that the grant is one *in praesenti*. It cuts off all claims, other than those mentioned, to any portion of the lands from the date of the act, and passes the title as fully as though the sections had been capable of identification. . . . When the route of the road is "definitely fixed," no parties can subsequently acquire a preemption right to any portion of the lands covered by the grant. The right of the State and of the company is thenceforth perfect as against subsequent claimants under the United States.

The question as to what act was necessary to fix the definite location of the road, and when the title to the lands vested, was directly in issue in that case. On the one hand, it was contended that the route was definitely fixed within the meaning of the granting act when the company filed with the Secretary of the Interior a map of its lines, approved by its directors, designating the route of the proposed road. On the other hand, it was contended that the route was not definitely fixed so that the grant attached to any particular sections, and cut off the right of entry thereof until the lands were withdrawn from market by order of the Secretary of the Interior, and notice of the withdrawal was communicated to the local land officers in the districts embracing the lands.

The court in passing upon these adverse contentions said, at page 366:

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; it is, in the language of the act, "definitely fixed," and can not be the subject of future change, so as to affect the grant, except upon legislative consent. No further action is required of the company to establish the route. It then becomes the duty of the Secretary to withdraw the lands granted from market. But if he should neglect this duty, the neglect would not impair the rights of the company, however prejudicial it might prove to others. Its rights are not made dependent upon the issue of the Secretary's order, or upon notice of the withdrawal being given to the local land-officers. Congress, which possesses the absolute power of alienation of the public lands, has prescribed the period at which other parties than the grantee named shall have the privilege of acquiring a right to portions of the lands specified, and neither the Secretary nor any other officer of the Land Department can extend the period by requiring something to be done subsequently, and until done, continuing the right of parties to settle on the lands as previously. Otherwise, it would be in their power, by vexatious or dilatory proceedings, to defeat the act of Congress, or at least seriously impair its benefit. Parties learning of the route established—and they would not fail to know it—might, between the filing of the map and the notice to the local land-officers, take up the most valuable portions of the lands. Nearness to the proposed road would add to the value of the sections and lead to a general settlement upon them.

This doctrine was re-affirmed in the cases of *Kansas Pacific Railroad Company v. Dunmeyer*, 113 U. S., 629; *Walden v. Knevals*, 114 U. S.,

373; Wisconsin Railroad Company *v.* Price County, 133 U. S., 496; and Deseret Salt Company *v.* Tarpey, 142 U. S., 241.

In the last case cited, at page 248, the court, in passing upon the character of title acquired by the railroad company by the definite location of its line of road, quoted with approval the following language from Wisconsin Railroad Co. *v.* Price County, *supra*:

The title conferred was a present one, so as to insure the donation for the construction of the road proposed *against any revocation by Congress*, except for non-performance of the work within the period designated, accompanied, however, with such restrictions upon the use and disposal of the lands as to prevent their diversion from the purposes of the grant.

The court further said, at page 249:

The terms used in the granting clause of the act of Congress, and the interpretation thus given to them exclude the idea that they are to be treated as words of contract or promise, rather than, as they naturally import, as words indicating an immediate transfer of interest. The title transferred is a legal title, as distinguished from an equitable or inchoate interest.

Where before the act of April 21, 1876, the legal title to lands had thus passed to a railroad company beyond the power of revocation by Congress, excepting for non-performance of conditions subsequent, such lands are not subject to disposition under that act in the absence of a forfeiture for breach of a condition subsequent. A construction must be given to the act which does not impute to Congress an intent to divest legal titles which had theretofore vested and respecting which no breach of a condition subsequent was asserted. Examining its provisions in the light of this rule it is clear that the word "withdrawal" there employed refers to withdrawals of lands remaining subject to control and disposition by Congress and not to prior withdrawals made contemporaneously with the vesting of title in the grantee company.

In furtherance of grants made to aid in the construction of railroads, the authority to withdraw lands along the probable routes thereof in anticipation and in advance of their definite location, was exercised by the President and by the Secretary of the Interior from the date of the earliest grants. In speaking of the purpose and character of the withdrawals made in connection with railroad grants, it was said in the recent case of Hans Oleson (28 L. D., 25):

In the nomenclature of the public land laws, the word "withdrawal" is generally used to denote an order issued by the President, Secretary of the Interior, Commissioner of the General Land Office, or other proper officer, whereby public lands are withheld from sale and entry under the general land laws, in order that presently or ultimately they may be applied to some designated public use, or disposed of in some special way. Sometimes these orders are not made until there is an immediate necessity therefor, but more frequently the necessity for their making is anticipated. Withdrawals are also made by Congress and are then spoken of as legislative withdrawals to distinguish them from those before described which are known as executive withdrawals. In the administration of the grants of public lands made to aid in the construction of railroads, executive withdrawals are made, either in advance of the definite location of the line or route of the road, and for the purpose of preserving the land for the satisfaction of the grant, or after such definite location and for the purpose of properly advising the local officers and others that the lands fall-

ing to the grant, as well as those remaining to the United States have been identified, and that the granted lands have passed to the railroad company, and the lands remaining to the United States can be disposed of only as double the minimum price. The former withdrawal is made in recognition of what is about to occur, and the latter in recognition of what has occurred.

At the time of the passage of the act of March 27, 1854, there had been but three acts making grants in aid of the construction of railroads and these were the acts of September 20, 1850 (9 Stat., 466), June 10, 1852 (10 Stat., 8), and February 9, 1853 (10 Stat., 155). Almost contemporaneously with the passage of each of these acts, in one instance the day before, an order was issued by the Commissioner of the General Land Office, under the direction of the President, whereby, in anticipation of the probable location of the line or route of the proposed railroad, the lands adjacent thereto were withdrawn from sale and entry, so that they might not be disposed of in advance of the attaching of the rights of the railroad company and thus the purpose sought by Congress, viz, the construction of the road, be defeated.

In discussing the power of Congress over lands embraced in such withdrawals, the court said in *Menotti v. Dillon* (167 U. S., 703, 720):

The railroad company accepted the grant subject to the possibility that Congress might, in its discretion, and prior to the definite location of its line, sell, reserve or dispose of enumerated sections for other purposes than those originally contemplated. *Kansas Pacific Railway v. Dunmeyer*, 113 U. S., 629, 639, 644; *United States v. Southern Pacific Railroad*, 146 U. S. 570, 593. In *Northern Pacific Railroad v. Sanders*, 166 U. S., 620, 634, we said: "The company acquired, by fixing its general route, only an inchoate right to the odd-numbered sections granted by Congress, and no right attached to any specific section until the road was definitely located, and the map thereof filed and accepted. Until such definite location it was competent for Congress to dispose of the public lands on the general route of the road as it saw proper."

It is true, as said in many cases, that the object of an executive order withdrawing from preemption, private entry and sale, lands within the general route of a railroad is to preserve the lands, unencumbered, until the completion and acceptance of the road. But where the grant was, as here, of odd-numbered sections, within certain exterior lines, "not sold, reserved or otherwise disposed of by the United States, and to which a preemption or homestead claim may not have attached, at the time the line of said road is definitely fixed," the filing of a map of general route and the issuing of a withdrawal order did not prevent the United States, by legislation, at any time prior to the definite location of the road, from selling, reserving or otherwise disposing of any of the lands which, but for such legislation, would have become, in virtue of such definite location, the property of the railroad company. Especially must this be true, where the grant is made subject to the reserved power of Congress to add to, alter, amend or repeal the act containing such grant. The act of 1866 did not take from the railroad company any lands to which it had then acquired an absolute right. The right it acquired, in virtue of the act making the grant and of the accepted map of its general route, was to earn such of the lands, within the exterior lines of that route, as were not sold, reserved or disposed of, or to which no preemption or homestead claim had attached, at the time of the definite location of its road. That act did not violate any contract between the United States and the railroad company, for the reason that the contract itself recognized the right of Congress at any time before the line of road was definitely located, to dispose of odd-numbered sections granted. It was one that disposed of the lands in question before the definite location of the road. It dedicated these and like lands, part of the public domain, to the specific purposes stated in its provisions, and to that extent removed the restrictions created by the withdrawal order of 1865, leaving that order in full force as to other lands embraced by it. *Bullard v. Des Moines and Fort Dodge Railroad*, 122 U. S., 167, 174. That order took these lands out of the public domain as between the rail-

road company and individuals, but they remained public lands under the full control of Congress, to be disposed of by it in its discretion at any time before they became the property of the company under an accepted definite location of its road.

From the authorities cited the following rules are clearly deducible:

First. Subject only to the control and power of disposition remaining in Congress, an anticipatory withdrawal, whether legislative or executive, during the time it remains in force, withholds the lands embraced therein from other appropriation or disposition, and prevents the acquisition of any legal or equitable title or right by settlement or entry in violation of such withdrawal.

Second. Until the definite location of the line of road the railroad company's right to the designated sections is at most only an inchoate one and, notwithstanding the anticipatory withdrawal, they remain under the control of Congress and may be disposed of by it in its discretion at any time before the line of road is definitely located.

Third. Upon the accepted definite location of the line of road the designated sections immediately become the property of the railroad company and are not subject to further control or disposition by Congress, unless there be a breach of a condition subsequent.

We must now apply these rules to the facts in the case at bar. The map fixing the general route of the road was filed by the railroad company and accepted by the Secretary of the Interior August 13, 1870, and the land in controversy is part of an odd-numbered section within forty miles of the route so fixed. In speaking of the legislative withdrawal made by operation of law, as well as of the executive withdrawal made by order of the Secretary of the Interior, upon the filing and acceptance of this map of general route, it was said in *Buttz v. Northern Pacific Railroad* (119 U. S., 55, 72):

When the general route of the road is thus fixed in good faith, and information thereof given to the Land Department by filing the map thereof with the Commissioner of the General Land Office, or the Secretary of the Interior, the law withdraws from sale or preemption the odd sections to the extent of forty miles on each side. The object of the law in this particular is plain: it is to preserve the land for the company to which, in aid of the construction of the road, it is granted. Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the Department in such cases, to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the Department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless.

In again discussing the same matter, the court said in *St. Paul and Pacific Railroad Company v. Northern Pacific Railroad Company* (139 U. S., 1, 17):

Besides, the withdrawal made by the Secretary of the Interior of lands within the forty-mile limit, on the 13th of August, 1870, preserved the lands for the benefit of the Northern Pacific Railroad from the operation of any subsequent grants to other companies not specifically declared to cover the premises. The Northern Pacific act directed that the President should cause the lands to be surveyed forty miles in width on both sides of the entire line of the road, after the general route should be

fixed, and as fast as might be required by the construction of the road, and provided that the odd sections of lands granted should not be liable to sale, entry or preemption before or after they were surveyed, except by the company. They were therefore excepted by that legislation from grants, independently of the withdrawal by the Secretary of the Interior. His action in formally announcing their withdrawal was only giving publicity to what the law itself declared. The object of the withdrawal was to preserve the land unencumbered until the completion and acceptance of the road.

In the recent case of *Buttz v. Railroad Company*, 119 U. S., 55, 72, this court, speaking of the act making the grant to the Northern Pacific Company, said:

"Although the act does not require the officers of the Land Department to give notice to the local land officers of the withdrawal of the odd sections from sale or preemption, it has been the practice of the department in such cases to formally withdraw them. It cannot be otherwise than the exercise of a wise precaution by the department to give such information to the local land officers as may serve to guide aright those seeking settlements on the public lands; and thus prevent settlements and expenditures connected with them which would afterwards prove to be useless."

After such withdrawal, no interest in the lands granted can be acquired, against the rights of the company, except by special legislative declaration, nor, indeed, in the absence of its announcement, after the general route is fixed.

It is thus seen that a legislative withdrawal of the odd-numbered sections to the extent of forty miles on each side of the general route of the road took effect immediately upon the filing and acceptance of the map of general route whereby said lands were reserved and appropriated by operation of law for the purpose of satisfying the grant to said company. At that time the land in controversy was free from claim and therefore fell within the operation of the withdrawal. The homestead entry of Anna M. Lane was made at the local land office during the continuance of this withdrawal and at a time when, as between the railroad company and individuals, this land had been taken out of the public domain and could not, as against the rights of the company, be acquired by entry under the homestead law. The entry was made before notice of the withdrawal was received at the local office, but it was, nevertheless, made after the withdrawal became operative, and in the two cases last cited it is held that while the giving of such notice to the local land officers was the exercise of a wise precaution it was not required by the granting act and was not essential to the operation of the withdrawal. A similar ruling was made in *Van Wyck v. Knevals*, *supra*, respecting notice of definite location and the consequent passing of title to the railroad grantee.

The case of *Riley v. Wells*, decided by the supreme court March 7, 1870 (Book 19, Lawyers' Cooperative Edition of United States Supreme Court Reports, 648), involved a preemption entry allowed by the local officers at a time when the land embraced therein was withdrawn from entry to await an ascertainment as to whether it would be required in satisfaction of a land grant, and in discussing the status of that entry the court said:

It will appear from the case of *Wolcott v. The Des Moines Co.* (*supra*) that the tract of land, of which the lot in question was a part, had been withdrawn from

sale and entry on account of a difference of opinion among the officers of the Land Department as to the extent of the original grant, by Congress, of lands in aid of the improvement of the Des Moines river, from the year 1846 down to the resolution of Congress of March 2, 1861, and the act of July 12, 1862, which acts, we held, confirmed the title in the Des Moines Company. As the husband of the plaintiff entered upon the lot in 1855, without right and the possession was continued without right, the permission of the register to prove up the possession and improvements, and to make the entry under the preemption laws, were acts in violation of law, and void, as was also the issuing of the patent.

To the same effect see *Wood v. Beach* (156 U. S., 548); *Spencer v. McDougal* (159 U. S., 62); *Wolcott v. Des Moines Co.* (5 Wal., 681), and *Woolsey v. Chapman* (101 U. S., 755).

At the time of Lane's entry the homestead law was applicable only to "unappropriated public lands" not "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." This land being reserved and appropriated by law for the purpose of satisfying the grant to the railroad company was not subject to homestead entry. However the right to the land in controversy which the company acquired by fixing the general route of its road was only an inchoate one, and until the passing of title by definite location of the line of road it was competent for Congress to confirm or validate said entry or to otherwise dispose of said land as it saw proper. Had said entry been so confirmed or validated before the definite location of the line of road, it would have become a subsisting entry whose existence at the time of such definite location would have excepted the land included therein from the grant to the railroad company, but in the absence of its confirmation or validation by Congress the entry, being of land included in said legislative withdrawal, was without effect and Lane acquired no right or claim thereunder as against the railroad company. At the time of the definite location of the line of road, September 13, 1873, the entry had not been confirmed or validated and therefore was no bar or obstacle to the passing of the legal title to the railroad company under its grant.

Upon definite location of its line of road the land became the property of the railroad company and was no longer subject to control or disposition by Congress, except upon a breach of a condition subsequent. It was not until more than two years thereafter that the act of April 21, 1876, was passed, and then it was not competent for Congress to confirm or validate Lane's entry as against the vested right and title of the railroad company in the absence of a breach of a condition subsequent. The road has been constructed, is now in operation and there is no claim of a forfeiture for non-performance of a condition subsequent. It results that neither Lane's entry, made during the existence of the legislative withdrawal on general route, nor Inman's settlement and entry made after title passed to the railroad company upon the definite location of its line of road, can be recognized as defeating the title of the company.

While the Department is always prompted by a strong desire to protect the interests of individual claimants under the land laws, it recognizes that in so doing it is not authorized to impair or destroy legal rights vested in others, and that it is its duty to administer the land laws according to the final and authoritative interpretation given to them by the decisions of the Supreme court.

The effect of the act of April 21, 1876, upon the right and title of a railroad company to lands along lines of road which were not definitely located until after the passage of that act, is not presented by the facts of this case and is, therefore, not a matter requiring discussion or decision herein.

The decision of your office is affirmed. The former departmental decisions in the cases of Northern Pacific Railroad Co. *v.* Symons (22 L. D., 686), and Inman *v.* Northern Pacific R. R. Co. (24 L. D., 318), are overruled in so far as they are in conflict herewith.

The case is one which can be disposed of under the act of July 1, 1898 (30 Stat., 620).

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REGULATIONS UNDER THE ACT OF JULY 1, 1898 (30 STAT., 597,620), TO FACILITATE THE ADJUSTMENT BY THE LAND DEPARTMENT OF CONFLICTING CLAIMS TO LANDS WITHIN THE LIMITS OF THE GRANT TO THE NORTHERN PACIFIC RAILROAD COMPANY.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

Washington, D. C., February 14, 1899.

The provision in the act of July 1, 1898, is as follows:

That where, prior to January first, eighteen hundred and ninety-eight, the whole or any part of an odd-numbered section, in either the granted or the indemnity limits of the land grant to the Northern Pacific Railroad Company, to which the right of the grantee or its lawful successor is claimed to have attached by definite location or selection, has been purchased directly from the United States or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States or any ruling of the Interior Department, and where purchaser, settler, or claimant refuses to transfer his entry as hereinafter provided, the railroad grantee or its successor in interest, upon a proper relinquishment thereof, shall be entitled to select in lieu of the land relinquished an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim or not occupied by settlers at the time of such selection, situated within any State or Territory into which such railroad grant extends, and patents shall issue for the land so selected as though it had been originally granted; but all selections of unsurveyed lands shall be of odd-numbered sections, to be identified by the survey when made, and patent therefor shall issue to and in the name of the corporation surrendering the lands before mentioned, and such patents shall not issue until after the survey: *Provided, however,* That the Secretary of the Interior shall from time to time ascertain and, as soon as conveniently may be done, cause to be prepared and delivered to the said railroad grantee or its successor in interest a list or lists of the several tracts which have been purchased or settled upon or occupied as aforesaid, and are now claimed by said purchasers or occupants, their heirs or assigns, according to the smallest government subdivisions. And all right, title, and interest of the said rail-

road grantee or its successor in interest in and to any of such tracts, which the said railroad grantee or its successor in interest may relinquish hereunder shall revert to the United States, and such tracts shall be treated, under the laws thereof, in the same manner as if no rights thereto had ever vested in the said railroad grantee, and all qualified persons who have occupied and may be on said lands as herein provided, or who have purchased said lands in good faith as aforesaid, their heirs and assigns, shall be permitted to prove their titles to said lands according to law, as if said grant had never been made; and upon such relinquishment said Northern Pacific Railroad Company or its lawful successor in interest may proceed to select, in the manner hereinbefore provided, lands in lieu of those relinquished, and patents shall issue therefor: *Provided further*, That the railroad grantee or its successor in interest shall accept the said list or lists so to be made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but it shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal: *And provided further*, That whenever any qualified settler shall in good faith make settlement in pursuance of existing law upon any odd-numbered sections of unsurveyed public lands within the said railroad grant to which the right of such railroad grantee or its successor in interest has attached, then upon proof thereof satisfactory to the Secretary of the Interior, and a due relinquishment of the prior railroad right, other lands may be selected in lieu thereof by said railroad grantee or its successor in interest, as hereinbefore provided, and patents shall issue therefor: *And provided further*, That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act, and nothing in this act shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted: *And provided further*, That all qualified settlers, their heirs or assigns, who, prior to January first, eighteen hundred and ninety-eight, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States or any ruling of the Interior Department, any part of an odd numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad Company to which the right of such grantee or its lawful successor is claimed to have attached by definite location or selection, may in lieu thereof transfer their claims to an equal quantity of public lands surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry, situated in any State or Territory into which such railroad grant extends, and make proof therefor as in other cases provided; and in making such proof, credit shall be given for the period of their bona fide residence and amount of their improvements upon their respective claims in the said granted or indemnity limits of the land grant to the said Northern Pacific Railroad Company the same as if made upon the tract to which the transfer is made; and before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee or its successor in interest any list or lists of the several tracts which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them or hold his claim and allow the said railroad company to do so under the terms of this act.

A. *Who are the beneficiaries under this act? From whom may relinquishments be received and by whom may the lieu selections be made?*

1. The act designates a class of beneficiaries whose status is that of claimants adverse to the Northern Pacific Railroad Company or its successor in interest, and in doing so, different words and terms of description are used in different portions of the act, but considering the act in its entirety, and giving due recognition to each provision therein, this class embraces any qualified person who, prior to January 1, 1898, by settlement, entry, or purchase, initiated in good faith a claim to lands of the description given "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and who is still maintaining such claim conformably to such law or ruling. This class also embraces the heirs of the claimant, in all instances where he has died, and his claim or entry, or right to perfect title thereunder, is one which under the public land laws descends or passes to his heirs; it further embraces the assigns of the claimant, in all instances where, in the absence of an inhibition against so doing, he has sold or transferred his claim or entry, or the right to perfect title thereunder, to one who is not by law disqualified from succeeding to such claim or entry, or the right to perfect title in himself thereunder.

2. The act designates as one beneficiary the Northern Pacific Railroad Company, or its lawful successor in interest, subject, however, to the following proviso:

*And provided further,* That nothing herein contained shall be construed as intended or having the effect to recognize the Northern Pacific Railway Company as the lawful successor of the Northern Pacific Railroad Company in the ownership of the lands granted by the United States to the Northern Pacific Railroad Company, under and by virtue of foreclosure proceedings against said Northern Pacific Railroad Company in the courts of the United States, but the legal question whether the said Northern Pacific Railway Company is such lawful successor of the said Northern Pacific Railroad Company, should the question be raised, shall be determined wholly without reference to the provisions of this act.

An examination of a certified copy of the record in the foreclosure proceedings referred to, and a consideration of the opinion of the Attorney-General, dated February 6, 1897 (21 Opinions of Attorneys-General, 486), show that the Northern Pacific Railway Company is such lawful successor in interest as to all lands within the limits of the grant, excepting those situated in the State of Minnesota and in the State of North Dakota east of the Missouri River. As to all lands within the limits of the grant situated in the State of Minnesota and in the State of North Dakota east of the Missouri River, the Northern Pacific Railroad Company has no successor in interest, but its property and affairs are now in the hands of receivers, appointed and acting under the authority and direction of certain circuit courts of the United States. Within the limits of that portion of the grant to which the Northern Pacific Railway Company is thus the lawful successor in interest, relinquishments should be executed, and selections in lieu thereof should be made, by said railway company. Within

the limits of that portion of the grant situated in the State of Minnesota and in the State of North Dakota east of the Missouri River, relinquishments should be executed by the Northern Pacific Railroad Company and also by the receivers thereof and selections in lieu thereof should be made by such receivers on behalf of the railroad company, the receivers in executing relinquishments and in making lieu selections to act under proper authorization first obtained from the proper court.

3. In these regulations the claimant adverse to the railroad company or its successor in interest, will for convenience be spoken of as the individual claimant, his claim to the land in contest or controversy will be spoken of as an individual claim, the railroad company or its successor in interest, as the case may be, will be spoken of as the railroad claimant, and its claim to the land in contest or controversy will be spoken of as the railroad claim.

B. *What lands are subject to relinquishment so as to become the bases for lieu selections?*

4. To authorize a lieu selection the relinquishment must be of the whole or some legal subdivision of an odd-numbered section in either the primary or indemnity limits of the land grant to the Northern Pacific Railroad Company, which is the subject of conflicting claims asserted by an individual claimant upon the one part and by the railroad claimant upon the other part.

5. A relinquishment can in no event be made until after the land claimed has become identified by the public surveys.

6. The act makes *special provision* for instances where after January 1, 1898, a qualified person in good faith makes settlement, with a view to homestead entry, upon unsurveyed lands within the primary limits of said grant, which, upon survey, are found to be within an odd-numbered section to which the right of the railroad company has attached by the definite location of its line of road. The purpose of this provision is to afford relief to those who make such settlement before the identification by survey of the lands to which the railroad claimant is entitled. Such settlement claim must be continued and the right of the settler asserted after survey, by an application at the local land office to make homestead entry of the lands settled upon, accompanied by proof of such settlement and the continued maintenance of the claim. These claimants are not accorded the privilege of taking other lands in lieu of those settled upon, but if the proof submitted is deemed satisfactory the railroad claimant will be requested to relinquish the lands embraced in said claims and to take other lands. All the provisions of these regulations are applicable to these lands, excepting those pertaining to relinquishments by individual claimants.

7. Since the issuance of patent terminates the jurisdiction of the Land Department over the lands patented and exhausts its power to examine and decide upon claims to such lands, and since this act manifestly refers to conflicting claims to lands which have not passed beyond

the jurisdiction of the Land Department, it follows that its provisions are confined to unpatented lands, and that lands which have been patented are not the subject of relinquishment and can not be made the basis of a lieu selection under this act; but the point to which the opposing claims have been prosecuted or the extent to which they have been considered by the Land Department is not material, if they be otherwise within the terms of the act and the lands remain unpatented.

C. *What are the claims which come within the provisions of this act?*

8. An individual claim adverse to the railroad claim is one which prior to January 1, 1898, was initiated in good faith by some qualified person, by settlement, entry, or purchase "under color of title or claim of right under any law of the United States or any ruling of the Interior Department," and which is still maintained conformably to such law or ruling, and is one which, in the absence of the railroad claim, could be perfected into full title. (See also paragraph 6.)

9. The railroad claim is one which arises from the definite location of the line of railroad if the land is within the primary limits of the grant, or which arises from a lieu selection if the land is within the indemnity limits, and is one which, in the absence of all individual claims, would enable the railroad claimant to obtain full title to the land.

10. The purpose of the act is to avoid further strife and contention before the land department between the railroad claimant upon the one hand, and individual claimants upon the other hand, and to that end the act extends alternatively to the individual claimant and the railroad claimant an opportunity to acquire other lands of equal area in lieu of those in contest. The privilege of making a lieu selection is not dependent upon success or failure in the contest, but rather upon the existence of a contest or controversy which is intended to be disposed of without subjecting the parties to the delay, expense and inconvenience incident to its further prosecution. The act contains a provision that nothing therein "shall be construed as enlarging the quantity of land which the said Northern Pacific Railroad Company is entitled to under laws heretofore enacted" but in the light of other provisions in the act in harmony with which this one must be construed, it is obvious that this provision is not intended to restrict the operation of the act to these instances in which the railroad claim is ultimately found to be the superior one. To ascertain that fact would require the prosecution of every contest to a final decision and would render the act practically inoperative, because, if compelled to litigate its claim to a final decision through the local office, the General Land Office and before the Secretary of the Interior, it is doubtful whether the railroad claimant would surrender for the benefit of the defeated individual claimant the railroad claim thus established at a cost of much time, expense and inconvenience. The claim which will support a relinquishment and lieu selection is not described as a *lawful* one but as a "right . . . claimed to have attached by definite location or selection" and as a

claim initiated in good faith "*under color of title or claim of right,*" etc. Under the act of July 2, 1864 (13 Stat., 365) the railroad company became entitled to all the odd-numbered sections within the primary limits of the grant or to indemnity for such as were "granted, sold, reserved, occupied by homestead settlers, or preempted, or otherwise disposed of," at the date of the definite location of its line of road. Thus the maximum quantity of lands to which the company was entitled is established by ascertaining the area included in odd-numbered sections within the primary limits of the grant as adjusted to the line of definite location. The clause in the act of July 1, 1898, providing against an enlargement of the quantity of lands to which the railroad company was then entitled has reference to the maximum quantity ascertained as aforesaid, and does not restrict the privilege of making selections under that act to those instances where the railroad claimant has an absolute legal right to the particular lands relinquished, a matter which would not be involved in an ascertainment of the quantity of the grant.

D. *What lands are subject to selection in lieu of those relinquished?*

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

12. Subject to the limitations named in paragraphs 13 and 14, selections may be made from any public lands within a State into which the Northern Pacific Railroad land-grant extends, surveyed or unsurveyed, not mineral or reserved, not valuable for stone, iron or coal, not subject to valid adverse claim, and not occupied by a settler at the time of such selection; but odd-numbered sections within the Bozeman, Helena, and Missoula land districts in the State of Montana, and the Cœur d'Alene land district in the State of Idaho, which are also within the primary or indemnity limits of said land-grant, can not be selected by or patented to the railroad claimant unless they have been finally classified as non-mineral under the act of February 26, 1895 (28 Stat., 683).

13. Selections of unsurveyed lands by the railroad claimant are confined to odd-numbered sections or legal subdivisions therein "to be identified by the survey when made," that is, the selection must be of the whole or some legal subdivision of a designated odd-numbered section so that the public survey when made will give identity to the land selected.

Selections of unsurveyed lands by an individual claimant must be designated according to the description by which they will be known when surveyed, if that be practicable, or, if not practicable, by giving with as much precision as possible the locality of the tract with reference to known land-marks, so as to admit of its being readily identified when the lines of survey come to be extended, and the selection must

be made to conform to such survey within thirty days from the date of the receipt at the local land office of the approved plat of the township embracing such lands.

14. Lands selected by an individual claimant in lieu of other lands, the claim to which has *not* been carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, must be in a compact body and be of the character subject to entry under the particular law controlling the claim relinquished, and this applies whether the lands selected are surveyed or unsurveyed. (See paragraph 36.)

E. *Procedure in obtaining relinquishments.*

15. As soon as may be practicable after the adoption of these regulations, an examination will be made of the contests pending before the Secretary of the Interior, and those appearing to come within the provision of the act of July 1, 1898, will be returned to the Commissioner of the General Land Office for disposition hereunder, together with all like contests then pending in the General Land Office. From time to time thereafter other contests or controversies appearing to come within the provisions of said act will be disposed of in like manner. Any claimant believing that his or its claim comes within the provisions of said act may request that such claim be disposed of thereunder, and such request will receive due consideration.

16. In speaking of the surrender by the individual claimant of the lands in contest and the taking by him of other lands in lieu thereof, the act describes it as a *transfer of his claim or entry*, but since the transaction, whether by the individual claimant or by the railroad claimant is essentially the same, it is for convenience described and spoken of throughout these regulations as a relinquishment of the lands in contest and a selection of other lands in lieu thereof.

17. The option of relinquishing the lands in contest and selecting other lands in lieu thereof is by law first extended to the individual claimant, and if he elects to hold the lands which are in contest the railroad claimant will be called upon to relinquish the same and to select other lands in lieu thereof. (See paragraphs 29 to 31, inclusive.)

18. Whenever any contest or controversy appears to come within the provisions of said act, the Commissioner of the General Land Office will notify the individual claimant of the option accorded by law to individual claimants and will request him, if still maintaining his claim as herein required, to make proof of such continued maintenance and to exercise his option within sixty days after the time of receiving such notice. (See paragraph 30.) If the claimant elects to relinquish the lands in contest and take other lands in lieu thereof, he must execute a proper relinquishment as hereinafter required (see paragraphs 24 to 26, inclusive) and transmit the same to the Commissioner of the General Land Office, together with notice of his election so to do.

19. In all cases where the individual claim has not passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, a failure to furnish satisfactory proof of the continued maintenance of the claim and to exercise such option within the time named will be deemed an abandonment of the claim, and the land embraced therein will be disposed of accordingly.

20. In all cases where the individual claim has passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, proof of the continued maintenance of the claim is not essential, but a failure to exercise such option within the time named will be deemed an election on the part of the individual claimant to hold the land in contest.

21. The Commissioner of the General Land Office may in his discretion extend the time for exercising such option in special cases upon proper cause being shown.

22. An individual claimant may, without formal notice or request, make proof of the continued maintenance of his claim, and exercise his option and notify the Commissioner of the General Land Office thereof, in which event the notice and request otherwise required will not be necessary. (See paragraphs 18 and 24 to 26, inclusive.)

23. From time to time, and as soon as conveniently may be done, the Commissioner of the General Land Office shall prepare and submit to the Secretary of the Interior, duplicate lists describing, according to the smallest legal subdivision, the lands to which there are conflicting claims as described in these regulations, and which the individual claimants have elected to hold, and upon the approval of any such list by the Secretary of the Interior, the Commissioner of the General Land Office will retain one copy thereof in his office and will transmit the other copy thereof to the said railroad claimant, with the request that it relinquish its claim to the lands therein described. Every list will be deemed conclusive against the railroad claimant to the extent that it will be required, within sixty days after receipt thereof, to execute and deliver to the Secretary of the Interior a proper relinquishment to the United States of all lands in said list, or to make satisfactory showing that those not relinquished have been sold or contracted to be sold or are used or needed for railroad purposes or are valuable for stone, iron or coal. (See paragraphs 24 to 26 inclusive, and 29 to 31 inclusive.)

F. *What is a proper relinquishment?*

24. The relinquishment must be by an instrument in writing describing the lands in contest and making appropriate reference to the claim intended to be surrendered, and in terms releasing, quit-claiming, and relinquishing unto the United States of America, all the right, title, interest and claim of the individual or railroad claimant, as the case may be, to such lands. It must be executed, witnessed and acknowledged conformably to the laws respecting the conveyance of real property in the State where the land is situate.

25. Relinquishments by individuals of claims which have passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, must also be executed by the wife of the claimant, if he have one, in such manner as will effectually bar any dower, homestead or other interest on her part in or to the lands relinquished.

26. A relinquishment of an individual claim which has passed to final entry and certificate, or to the submission of final proof entitling the claimant to final entry and certificate, or which under existing laws is assignable before that time, and also all relinquishments by the railroad claimant, must be accompanied by proof satisfactorily showing whether the land relinquished has been sold, contracted to be sold, or encumbered. (See paragraphs 1 and 32.)

G. *Effect of relinquishment—when right to select other lands is complete.*

27. Upon the filing with and acceptance by the Commissioner of the General Land Office of a relinquishment by the individual claimant, the lands in contest may be patented to the railroad claimant, in the same manner as other lands falling within the terms of the grant; and the individual claimant, upon receiving notice of the acceptance of his relinquishment, will be entitled upon proper application (see paragraph 32), to select other lands according to the conditions and limitations of said act (see paragraph 36).

28. Upon the filing with and acceptance by the Commissioner of the General Land Office of a relinquishment by the railroad claimant, the lands so relinquished "shall revert to the United States, and such tracts shall be treated under the laws thereof in the same manner as if no rights thereto had ever vested in the said railroad grantee;" and the individual claimants thereto shall be permitted to perfect their claims or entries and to obtain title thereunder upon compliance with the laws pertaining thereto. In the event that any individual claim on account of which a relinquishment is made by the railroad claimant is not perfected into full title, the lands embraced therein will not revert to the railroad claimant but will be subject to other disposition according to law. The railroad claimant, upon receiving notice of the acceptance of its relinquishment, will be entitled, upon proper application (see paragraphs 32 to 41 inclusive), to select other lands according to the conditions and limitations of said act.

H. *Disposition of contests involving lands sold or contracted to be sold by the railroad claimant, used or needed for railroad purposes, or valuable for stone, iron or coal.*

29. By the terms of the act the railroad claimant is exempted and excused from relinquishing lands which have been sold or contracted to be sold by it, or which are used or needed for railroad purposes, or which are valuable for stone, iron or coal.

30. Where it satisfactorily appears from the record in any contest that the lands in controversy come within the terms of this exemption,

the Commissioner of the General Land Office in calling upon the individual claimant to exercise the privilege accorded to him (see paragraphs 17 and 18) will notify him that the railroad claimant can not be required to relinquish such lands and that unless he elects to relinquish the same and take other lands in lieu thereof, the contest will proceed to final determination without further regard to said act; and where such exemption is satisfactorily shown after the individual claimant has elected to hold the lands in contest (see paragraph 23) the Commissioner of the General Land Office will notify him thereof and accord him another opportunity, to be exercised within a stated time, to relinquish the lands in contest and take other lands. In the event that this privilege is declined the contest will proceed to final decision in the usual way.

31. The affidavit of two persons having personal knowledge of the facts will be deemed sufficient to *prima facie* establish that any lands come within this exempted class; but such affidavit should state fully when and to whom the lands were sold or contracted to be sold, and if contracted to be sold, the extent to which such contract has been performed and whether it is still subsisting; the necessity for the present or future use of such lands for railroad purposes and the extent thereof; or how it has been ascertained that they are valuable for stone, iron or coal, as the case may be.

I. *Procedure in selecting lieu lands and perfecting title thereto.*

32. Applications to select lieu lands hereunder, whether by an individual claimant or by the railroad claimant, must be presented to the local land office of the district within which the lands selected are situate. The application must particularly state the description and acreage of the lands relinquished, the acceptance by the Commissioner of the General Land Office of the relinquishment and the description of the lands selected (see paragraph 13) and must be accompanied by proof that the land selected is of the character subject to selection. (See paragraphs 11 to 14, inclusive.) If the records of the local office do not show to the contrary, the character of the land will be deemed to be *prima facie* established where the application is supported by the oath of the individual claimant, or of an agent of the railroad claimant based upon a personal examination of the land.

33. If the application is in proper form and upon examination of the records in the local office the lands selected appear to be subject to such selection, the local officers will accept the application, give it an appropriate number, make due notation of the selection upon the records of their office and transmit the papers to the Commissioner of the General Land Office for his consideration.

34. When the lands selected have been returned as mineral by the surveyor-general, the first sub-division of paragraph 103 of the Mining Regulations, approved December 15, 1897, shall be applicable thereto, but in view of the proof exacted by paragraph 32 hereof the require-

ments of paragraph 104 of such Mining Regulations will be dispensed with as to all selections hereunder of lands not returned as mineral.

35. When any lands, whether surveyed or unsurveyed, have been selected hereunder by an individual claimant or by the railroad claimant, no right thereto can be initiated by settlement or entry while such selection remains of record.

36. Where lands are selected by an individual claimant in lieu of lands the claim to which has not been carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, the claimant will be required to perfect his right to the lands selected by compliance with the law relating to that class of claims and to submit proof thereof in the usual way, but credit will be given for his *bona fide* residence, improvements, cultivation, or reclamation, as the case may be, and for any payment of fees or purchase money, upon the land relinquished, it being the purpose of the act to give individual claimants the same status with respect to the lieu lands selected by them which they occupied with respect to the lands relinquished.

*J. Time of issuing patents to selected lands.*

37. Unsurveyed lands, whether selected by an individual claimant or by the railroad claimant, will in no event be patented until after survey.

38. Unsurveyed lands selected by the railroad claimant will not be patented until after the expiration of four months from the date of the receipt at the local land office of the approved plat of the township embracing the lands so selected; and surveyed lands selected by the railroad claimant will not be patented until after the expiration of four months from the date of selection.

39. Unsurveyed lands selected by an individual claimant in lieu of lands the claim to which has been regularly carried to final entry and certificate or to the submission of final proof entitling him to final entry and certificate, will not be patented until after the expiration of four months from the date of the receipt at the local land office of the approved plat of the township embracing the lands so selected; and surveyed lands selected by an individual claimant in lieu of lands the claim to which has reached a like status will not be patented until after the expiration of four months from the date of selection.

40. The purpose of the last two paragraphs is, in all instances where publication and notice will not be had, to give to settlers, if any, upon such lands at the time of the selection thereof, the full period prescribed by law within which to apply at the local land office to make homestead entry of the land, and to afford ample time for the local officers to advise the Commissioner of the General Land Office of any such application before the time arrives for issuing patent under the selection.

41. Selections made by the railroad claimant which are found satis-  
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factory by the Commissioner of the General Land Office will, upon the expiration of the time required to elapse before the issuing of patent (see paragraphs 37 to 40, inclusive), be certified to the Secretary of the Interior, and if approved by him will be patented to the railroad claimant as though originally granted.

K. *Forms to be used in the administration of said act.*

42. The election of the individual claimant to hold or relinquish the lands in controversy, and the proof of the maintenance of his claim, may be made according to the following form:

THE STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss.

\_\_\_\_\_, being first duly sworn upon his oath, deposes and testifies as follows:

1. Q. What is your name, age and post-office address?—Answer. \_\_\_\_\_.
  2. Q. Are you a native born citizen of the United States, and, if so, in what State or Territory were you born?—Answer. \_\_\_\_\_.
  3. Q. If you are not a native born citizen of the United States, have you declared your intention to become a citizen or have you been naturalized? If so, when and where? Answer. \_\_\_\_\_.
  4. Q. Are you the identical person who has heretofore been claiming (here describe land) under the \_\_\_\_\_ law? If so, how and when was your claim initiated?—Answer. \_\_\_\_\_.
  5. Q. Do you understand that there are conflicting claims to this land, one of which is your claim and the other of which is the claim of the Northern Pacific Railroad Company, or its successor in interest?—Answer. \_\_\_\_\_.
  6. Q. Do you desire and elect under the act of Congress approved July 1, 1898 (30 Stat., 597, 620), to hold the land in controversy and retain your present claim thereto, or do you desire and elect under said act to relinquish the land in controversy and to transfer your said claim to other lands?—Answer. \_\_\_\_\_.
  7. Q. State fully and accurately where you resided from time to time since the initiation of your said claim to said land?—Answer. \_\_\_\_\_.
  8. Q. Of whom does your family, if any, consist, and where have they resided from time to time since the initiation of said claim?—Answer. \_\_\_\_\_.
  9. Q. State accurately what you have done in the way of improving, cultivating or reclaiming this land, giving dates, value of improvements and amount of expenditure?—Answer. \_\_\_\_\_.
  10. Q. How much of the time were you upon said land during the year 1897, and what work did you do or have done thereon during that year?—Answer. \_\_\_\_\_.
  11. Q. What personal property did you have on this land on January 1, 1898?—Answer. \_\_\_\_\_.
  12. Q. Have you sold, conveyed or mortgaged any portion of this land or assigned your claim thereto? If so, state when, to whom and for what purpose?—Answer. \_\_\_\_\_.
  13. Q. How much other land do you own now?—Answer. \_\_\_\_\_.
  14. Q. Have you ever made a filing upon or an entry of other public lands? If so, give the time, description of the land, name of the land office, and character of the filing or entry?—Answer. \_\_\_\_\_.
  15. Q. To whom can you refer for support and corroboration of the statements made herein?—Answer. \_\_\_\_\_.
- (Sign plainly with full name.) \_\_\_\_\_

I hereby certify that the foregoing testimony was fully read to the said \_\_\_\_\_ before being subscribed by him and that the same was subscribed and sworn to by him before me this \_\_\_\_\_ day of \_\_\_\_\_.

\_\_\_\_\_

NOTE.—This affidavit may be made before the register or receiver of the local land office, or before any other officer authorized to administer an oath.

If the claimant elects to relinquish the lands in controversy he must execute the accompanying relinquishment.

43. A relinquishment by an individual claimant may be made substantially according to the following form, and one by the railroad claimant may be modeled therefrom :

*Know all men by these presents :*

That I, \_\_\_\_\_ of \_\_\_\_\_ county, in the State of \_\_\_\_\_ the identical person who heretofore initiated and is now asserting a claim to the following described lands, to wit: (Describe fully and accurately) under the \_\_\_\_\_ law, desiring to take advantage of the provision in the act of Congress approved July 1, 1898 (30 Stat., 597, 620), authorizing an adjustment by the land department of conflicting claims to lands within the limits of the grant to the Northern Pacific Railroad Company, do hereby release, quit-claim and relinquish unto the United States of America, all my right, title, interest and claim in and to the lands aforesaid, and I request that this relinquishment be accepted by the Commissioner of the General Land Office in order that, under the provisions of the act of Congress aforesaid, I may select other lands in lieu of those hereby relinquished and may perfect and obtain title to the lands so selected instead of to the lands hereby relinquished.

I, \_\_\_\_\_ wife of the said \_\_\_\_\_ for the purposes aforesaid, do hereby join my said husband in releasing, quit-claiming and relinquishing unto the United States of America, the lands aforesaid, and I do especially waive and relinquish any and all dower, homestead or other interest in the lands relinquished, to which I am now or might hereafter be, entitled according to law.

Witness our hands and seals this \_\_\_\_\_ day of \_\_\_\_\_ A. D. \_\_\_\_\_.

\_\_\_\_\_  
\_\_\_\_\_  
[SEAL.]  
[SEAL.]

Witnessed by:

\_\_\_\_\_  
\_\_\_\_\_

NOTE.—This relinquishment must be executed, witnessed and acknowledged conformably to the laws respecting the conveyance of real property in the State where the lands relinquished are situate, and the officer before whom the acknowledgment is made must make and attach hereto, under his name and official seal, an appropriate certificate of such acknowledgment.

44. The application to select lands in lieu of those relinquished, and the affidavit in support thereof, may be substantially according to the following forms:

UNITED STATES LAND OFFICE AT \_\_\_\_\_,  
(Date) \_\_\_\_\_.

No. \_\_\_\_\_.

I, \_\_\_\_\_, of the County of \_\_\_\_\_, in the State of \_\_\_\_\_, having made relinquishment of my (state character of claim) claim, covering the \_\_\_\_\_ of Section \_\_\_\_\_, in Township \_\_\_\_\_, Range \_\_\_\_\_, in \_\_\_\_\_, land district, containing \_\_\_\_\_ acres, heretofore included in the conflicting claims of the Northern Pacific Railroad Company, or its successor in interest, and myself, which relinquishment has been duly accepted by the Commissioner of the General Land Office, do hereby make application to select in lieu of the lands so relinquished the following lands, to wit: \_\_\_\_\_, in \_\_\_\_\_ land district.

My post-office address is \_\_\_\_\_.

\_\_\_\_\_.

UNITED STATES LAND OFFICE AT \_\_\_\_\_,  
(Date) \_\_\_\_\_.

We hereby certify that we have carefully considered the foregoing application and have critically examined the plats and records of this office, so far as they apply to the lands sought to be selected. Finding that the application and proofs fully conform to the statute and regulations thereunder, and that the lands selected appear by the records of this office to be subject to selection, we have accepted the application, and have made due notation thereof upon the records, pending the advice of the Commissioner of the General Land Office. \$ — fees paid.

\_\_\_\_\_,  
*Register.*

\_\_\_\_\_,  
*Receiver.*

AFFIDAVIT TO BE MADE BY INDIVIDUAL CLAIMANT IN SUPPORT OF FOREGOING APPLICATION TO SELECT.

UNITED STATES LAND OFFICE AT \_\_\_\_\_.  
(Date) \_\_\_\_\_.

No. \_\_\_\_\_.

I, \_\_\_\_\_, of \_\_\_\_\_ county in the State of \_\_\_\_\_, being duly sworn upon my oath, do depose and say that my post-office address is \_\_\_\_\_; that I am the individual claimant who makes the foregoing application under the act of July 1, 1898 (30 Stat., 597, 620); that I am acquainted with the lands sought to be selected under the foregoing application, and have examined every subdivision thereof; that there is not to my knowledge within the limits of said land any vein or lode of quartz or other rock in place, bearing gold, silver, cinnabar, or other mineral substance; that there is not within the limits of said land to my knowledge any placer or other valuable mineral deposit or any salines; that no portion of said land is claimed for mining purposes under local customs or rules of miners, or otherwise; that no portion of said land is worked for mineral during any part of the year; that said land is essentially non-mineral land; that it does not to my knowledge contain any valuable stone, iron or coal; that it is not reserved in any manner, is not subject to any valid claim whatsoever, and is not occupied by any settler. And further affiant sayeth not.

I hereby certify that the foregoing affidavit was read to affiant in my presence before he signed his name thereto; that said affiant is to me personally known (or has been satisfactorily identified to me); that I verily believe him to be a credible person and the person he represents himself to be; and that this affidavit was subscribed and sworn to by him before me at my office at \_\_\_\_\_, within the \_\_\_\_\_ land district, on this \_\_\_\_\_ day of \_\_\_\_\_.

NOTE.—This affidavit may be made before the register or receiver of the local land office or before any other officer authorized to administer an oath.

If the claim relinquished be a desert land claim, timber culture claim, or a timber purchase claim, which has not been carried to final entry and certificate or to the submission of final proof entitling the claimant to final entry and certificate, the applicant must also make proof of the character of the land selected, as required by the regulations controlling that class of claims.

45. The following form may be used in listing lands to be relinquished by the railroad claimant:

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,  
Washington, D. C., ———, 18—.

Whereas an act of Congress, approved July 1, 1898 (30 Stat., 597, 620), makes provision for the relinquishment by the Northern Pacific Railroad Company, or its successor in interest, upon the conditions therein named, of the whole or any part of an odd numbered section, in either the primary or indemnity limits of the land grant to that company, to which the right of said company, or its lawful successor, is claimed to have attached by definite location, or selection, and which prior to January 1, 1898, has been "purchased directly from the United States or settled upon or claimed in good faith by any qualified settler, under color of title or claim of right under any law of the United States, or any ruling of the Interior Department," or which, if an odd numbered section in the primary limits, is settled upon after January 1, 1898, and before survey, by a qualified person, in good faith, with a view to homestead entry, and makes provision for the selection by said company, or its successor in interest, of other lands in lieu of those relinquished; and

Whereas it is further provided in said act that the Secretary of the Interior shall ascertain and from time to time cause to be prepared and delivered to said railroad company, or its successor in interest, a list or lists of the tracts coming within the provisions thereof; and

Whereas it is further provided by said act that said railroad company, or its successor in interest, shall accept the list or lists so made by the Secretary of the Interior as conclusive with respect to the particular lands to be relinquished by it, but "shall not be bound to relinquish lands sold or contracted by it or lands which it uses or needs for railroad purposes, or lands valuable for stone, iron, or coal;" and

Whereas it is further provided, as to all claims, excepting homestead settlements made on unsurveyed lands after January 1, 1898, that "before the Secretary of the Interior shall cause to be prepared and delivered to said railroad grantee, or its successor in interest, any list or lists of the several tracts, which have been purchased or settled upon or occupied as hereinbefore provided, he shall notify the purchaser, settler, or claimant, his heirs or assigns, claiming against said railroad company, of his right to transfer his entry or claim, as herein provided, and shall give him or them option to take lieu lands for those claimed by him or them, or hold his claim and allow the said railroad company to do so, under the terms of this act;" and

Whereas, upon examination by this office the following tracts of land have been found to be of the character authorized to be relinquished under said act, and the claimants therefor against the railroad company (where entitled to such option) have, upon due notice of their rights under said act, refused to transfer their respective claims to other lands, to wit:

LIST No. —.

State of ———, ——— Land District.

Parts of Sections.	Sec.	Tp.	R.	Adverse Claimants.

Now, therefore, the said list is hereby submitted to the Secretary of the Interior for his consideration, with the recommendation that directions be given to this office to call upon the Northern Pacific Railroad Company or its successor in interest, as the case may be, to relinquish all of said lands or to satisfactorily show that those not relinquished have been sold or contracted to be sold, or are used or needed for railroad purposes, or are valuable for stone, iron or coal; and to advise said railroad company or its successor in interest that upon filing the relinquishment requested it will be entitled to select other lands in lieu thereof, as provided in said act.

\_\_\_\_\_,  
Commissioner.

DEPARTMENT OF THE INTERIOR,  
\_\_\_\_\_, 1899.

Approved:

\_\_\_\_\_,  
*Secretary of the Interior.*

*L. Cases not covered by these regulations.*

46. If in the administration of said act cases are found which are not covered by these regulations, such cases will be disposed of according to their respective merits, under special instructions, or supplemental regulations embracing cases of that character will be adopted, as may seem necessary.

BINGER HERMANN,  
*Commissioner.*

Approved, February 14, 1899:

C. N. BLISS,  
*Secretary.*

RAILROAD GRANT—SECTION 1, ACT OF APRIL 21, 1876.

CAMPLAN *v.* NORTHERN PACIFIC R. R. CO.

The confirmation, by section 1, act of April 21, 1876, of a preemption filing, as against a prior withdrawal on the general route of the Northern Pacific, is dependent upon compliance with the preemption law, and the presentation of proper proofs thereof by the claimant; and if these conditions are not complied with the confirmation is not operative, and does not defeat the attachment of the company's right.

*Secretary Bliss to the Commissioner of the General Land Office, February*  
(W. V. D.) 7, 1899. (E. F. B.)

Emil A. Camplan has filed a motion for review of the decision of the Department of May 3, 1897 (unreported), rejecting his application to contest the right of the Northern Pacific Railroad Company to the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 33, T. 2 N., R. 4 W., Helena, Montana, land district.

This land is within the limits of the legislative withdrawal made by operation of law, as well as the executive withdrawal made by the order of the Secretary of the Interior, upon the filing and acceptance of the map of the general route of the road, February 21, 1872, notice of which was received at the local office May 6, 1872. The line of road opposite thereto was definitely located July 6, 1882, and this

tract fell within the primary limits of the grant as adjusted to such definite location. After the filing and acceptance of the map of general route and the resulting withdrawal, but prior to the time when notice thereof was received at the local office, Andrew McJorley filed pre-emption declaratory statement for said tract, together with other lands, alleging settlement thereon the same day. McJorley did not comply with the pre-emption law; did not make final proof under his filing; did not make payment for the land, and, indeed, never carried the filing into an entry.

The present case arises upon the application of Camplan, made September 4, 1895, to contest the right of the railroad company to said tract, with a view of making entry thereof under the homestead law, contending that the declaratory statement of said McJorley, filed before notice of withdrawal upon general route was received at the local office and existing upon the records of that office at the date of the definite location of the line of road, constituted such a claim as excepted the tract from the grant to said company.

The tract in controversy is part of an odd-numbered section lying within forty miles of the general route of the road, as fixed February 21, 1872.

Upon the authority of *William E. Inman v. Northern Pacific R. R. Co.*, (28 L. D., 95), decided this day, it is held that the legislative withdrawal of the odd-numbered sections to the extent of forty miles on each side of the general route of the road took effect immediately upon the filing and acceptance of the map of general route, whereby said lands were reserved and appropriated by operation of law for the purpose of satisfying the grant to said company; and that the pre-emption filing of McJorley, made at the local land office during the continuance of this withdrawal, was made at a time when as between the railroad company and individuals this land had been taken out of the public domain and could not, as against the rights of the company, be acquired by settlement, filing, or entry under the pre-emption law. Lands so reserved and appropriated were not subject to pre-emption.

Until the passing of title to the railroad company by the accepted definite location of the line of its road, it was competent for Congress to confirm or validate this filing or to otherwise dispose of said land, as it saw proper. This confirmation could therefore have been made absolute or subject to such conditions and limitations as Congress deemed proper. By the first section of the act of April 21, 1876 (19 Stat., 35), Congress exercised its power of confirmation, but made the confirmation dependent upon compliance with the pre-emption law, and the presentation of proper proofs thereof by the claimant. This condition was not complied with by McJorley, either before or after the act of April 21, 1876, and for that reason the confirmation never became operative and did not defeat the title of the railroad company under its grant.

The motion for review is therefore denied.

## MINING CLAIM—LODE APPLICATION—INTERSECTING MILLSITE.

## PAUL JONES LODE.

An application for a lode patent should not embrace land lying within and beyond an intersecting patented millsite.

*Secretary Bliss to the Commissioner of the General Land Office, February*  
(W. V. D.) 10, 1899. (C. W. P.)

The Combination Mining and Milling Company has appealed from the decision of your office, dated August 5, 1897, holding for cancellation that part of mineral entry No. 28, embracing the Paul Jones quartz lode claim lying south of the patented Gladstone millsite claim, and requiring an amended survey of said lode claim, showing the portion of the claim for which patent may issue. In view of the errors assigned, a history of the case will be given from the outset.

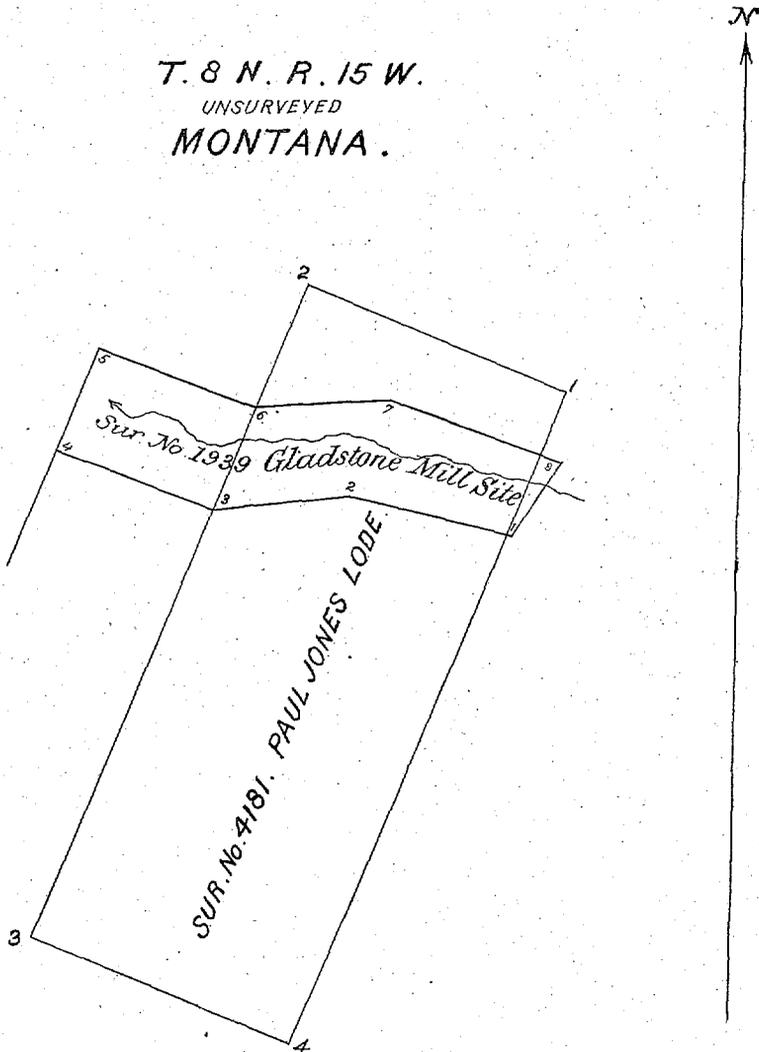
It appears that on November 14, 1893, your office, upon the application for a patent to the Paul Jones lode claim, by the Combination Mining and Milling Company, found that the approved plat and field notes of survey show that said claim conflicts with the Gladstone Millsite claim, survey No. 1939, lot 46 B., which passes entirely across said Paul Jones lode claim, dividing it into two separate non-contiguous portions, 175 feet of said lode lying in the northeasterly end of said claim, wherein is situated the discovery tunnel, the improvement claimed in the estimate of \$500 expended in the development of this claim, and 1125 feet lying southwesterly and beyond said millsite claim, the remaining 200 feet of said lode being within the boundaries of said millsite, lot 46 B., upon which patent issued December 2, 1892, to the Black Pine Mining and Milling Company and Æneas McAndrew, the same being embraced in Helena mineral entry No. 1644, upon the Gladstone lode and millsite claim; that the Paul Jones location was made January 19, 1891, upon a discovery on that portion of the claim lying northeasterly of said millsite; that the survey of said claim was made February 28, 1893, and approved May 6, 1893; that application for patent was filed June 1, 1893. Upon these findings your office held that it was error to extend the survey beyond the northerly line of the patented millsite, or to include in the application for patent for the Paul Jones claim ground already patented; and held that said entry must be canceled as to the part above stated, but, that inasmuch

as much the greater part of the Paul Jones lode claim lies southeasterly from said millsite, claimant may, if he so desires, retain that portion of his claim, provided he can show a discovery of mineral thereon, and that \$500 have been expended in labor or improvements upon that part of said claim,

and allowed the claimant thirty days to elect which part of said claim it will retain under its application and said

at the expiration of the time allowed said entry will be held for cancellation as to one of the non-contiguous portions of the lode claim at the point where the lode enters the patented millsite and passes within it.

January 30, 1894, the Combination Mining and Milling Company filed a paper in your office, in which it is stated that the Combination Mining and Milling Company, after the entry of the Gladstone millsite, became the owner thereof, and that said company is now the owner of both the Gladstone millsite and the Paul Jones lode claim; that the



issuance of a patent for the Gladstone millsite, in so far as it includes the ground in conflict, was a "mistake," and it is requested that the Combination Company be permitted to correct or rectify the mistake by executing a deed to the United States, upon a proper showing as to present ownership by said company, and that a patent be then issued

for the entire area embraced in the Paul Jones lode claim, including that part in conflict with the Gladstone millsite claim.

March 2, 1894, the Combination Company filed three affidavits, made by F. H. Bird, Henry Isendorf and J. D. McDonald.

In the affidavit of F. H. Bird, it is set out:

That from the discovery on the said Paul Jones claim there is a well defined vein of lead matter containing silver ores running across the said Gladstone millsite; that said vein is indicated by float and out croppings along the entire course of said vein, and that by the aforesaid float and out croppings the said vein can be readily traced entirely through the said Gladstone millsite; that said float and out croppings from their present appearance and from the nature of the ground must have been readily discernible to any person acquainted with the ground and who carefully inspected the same before the patent to the said Gladstone millsite was issued. That between the 17th and 20th of October A. D. 1894, by his direction a tunnel was run upon the ground so in conflict, and at a distance of about 185 feet from the discovery on the said Paul Jones claim and at a depth of about four feet from the surface, the said tunnel struck the vein hereinbefore mentioned, which said vein was readily traced and had a well-defined wall, and that during the aforesaid time by his direction a shaft was sunk upon the ground so in conflict with the said Gladstone millsite, and at a distance of about 230 feet from the discovery on the said Paul Jones Quartz Lode mining claim, and at a distance of about 165 feet from the north boundary line of the said Gladstone millsite, and at a depth of about seven feet from the surface the said shaft struck the said vein, which said vein consisted of similar lead matter containing silver, and could be readily traced and had a well defined wall.

These averments are corroborated by Isendorf and McDonald in their affidavits.

Your office, by letter dated February 6, 1897, after stating that the survey of the Paul Jones lode claim was made February 28, 1893, based on a location made January 19, 1891, and that

the record in the case of the Gladstone millsite shows that the original survey of said claim was made in October, 1886, by Thomas T. Baker, U. S. deputy surveyor, who reported that no veins or lodes of quartz or other rock in place . . . is known to exist on any part of the Gladstone millsite, so far as I know or could ascertain, (and that) August 6, 1892, a resurvey of said claim was made, the deputy (surveyor) making, substantially, the same report as to the character of the land embraced in the millsite claim, (and further stating that) there is also on file with the case the usual affidavit as to no known veins or lodes, made by Jos. W. Harper, attorney for claimant company, corroborated by two witnesses, who swear that for six months they have resided near and have often been upon said millsite, and that, so far as they know, there is no vein or lode or other rock in place bearing gold, silver, cinabar, lead, tin, or copper, and that they verily believe that none exists thereon, your office said: "It thus appears that the patent for the millsite claim was regularly issued upon competent evidence, and does not appear to have been a 'mistake.'"

The request contained in the paper filed by the Combination company, January 30, 1894, was denied by your office, but on April 23, 1897, sixty days were allowed to file the evidence of discovery and expenditure theretofore required.

In the decision appealed from it is held that, no action having been taken by the claimant and the time allowed having expired, "said mineral entry, No. 28, is hereby—pursuant to decision of November 14,

1893,—held for cancellation as to all that portion of the Paul Jones claim lying south of the said Gladstone millsite,” and that should that decision become final, instructions will be issued to the U. S. surveyor-general, requiring an amended survey of the Paul Jones claim, showing the portion of the claim for which patent may issue, i. e., that portion lying north of the Gladstone millsite.

The records of your office show that the Gladstone millsite was located September 17, 1886; that application for patent thereto was made August 29, 1887, and publication duly made for the prescribed period of sixty days, and it appears that the resurvey which was made August 6, 1892, was made at the instance of the Combination Mining and Milling Company. It also appears that the affidavit as to no known veins or lodes was made by Joseph W. Harper, who was one of the incorporators of the Combination Mining and Milling Company, incorporated December 23, 1887, three days prior to the date of said affidavit, that no adverse claim was filed and that patent was issued December 2, 1892, to the Black Pine Mining Company and Æneas McAndrew, co-claimant. It thus appears that the government's title to the land covered by the millsite has passed to the Black Pine Mining Company and Æneas McAndrew, and all control of the executive department over the title has ceased.

It is alleged in the appeal from your office decision that the land in conflict was known to be mineral land at the date of the millsite patent, but this averment is not supported by the affidavits filed in the case. Moreover, it is not alleged that the land was known to be mineral land at the date of the application for the millsite patent or at the date of final entry. It does not appear that there was any “mistake” in the issuance of the patent for the millsite; nor is sufficient ground shown for the acceptance of a surrender of the title to the land covered by the millsite patent.

There appears to be no error in your office decision of November 14, 1893, holding that the Paul Jones Quartz lode mining claim could only stand for one or the other of the two parts, and giving the claimant the privilege of retaining the larger portion by showing a discovery of mineral thereon and that \$500 in labor or improvements thereon had been expended. Said decision is supported by the Andromeda lode case, 13 L. D., 146, cited in the decision; the Bi-metallic Mining Company's case, 15 L. D., 309, and the Mabel Lode case, 26 L. D., 675.

Your office decision of August 5, 1897, is therefore affirmed.

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HAYDEN *v.* TINGLEY ET AL.

Motion for review of departmental decision of September 24, 1898, 27 L. D., 455, denied by Acting Secretary Ryan, February 16, 1899.

## RAILROAD LANDS—ACT OF JULY 1, 1898.

LAMB *v.* NORTHERN PACIFIC R. R. Co.

A claim resting upon a rejected application to make homestead entry, and not upon settlement, entry, or purchase, is not within the provisions of the act of July 1, 1898, or the regulations thereunder.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 16, 1899.* (J. L. McC.)

Your office, on August 28, 1896, affirmed the action of the local officers in rejecting the application of June 10, 1895, of James W. Lamb, to make homestead entry for the SE.  $\frac{1}{4}$  of Sec. 15, T. 19 N., R. 8 W., Olympia land district, Washington, for conflict with an indemnity selection of said tract made by the Northern Pacific Railroad Company per lists of June 5, 1885, and June 7, 1893.

August 6, 1894, the Department directed that one Eugene L. Curtiss be permitted, in pursuance of his prior application, to make entry of said land within a fixed time, in which event the company's selection would be canceled.

Curtiss did not make entry of the land, and hence the only objection to the company's indemnity selection was removed. Lamb's subsequent application was therefore properly rejected, and the decision of your office is affirmed. *Northern Pacific R. R. Co. v. Dean et al.* (27 L. D., 462); *Northern Pacific R. R. Co. v. Fly* (27 L. D., 464); *Dunnigan v. Northern Pacific R. R. Co.* (27 L. D., 467).

Lamb's claim rests upon a rejected application to make homestead entry and not upon settlement, entry, or purchase, and therefore does not appear to come within the provisions of the act of July 1, 1898 (30 Stat., 597, 620), or the regulations thereunder (28 L. D., 103).

## STATE BOUNDARY—NAVIGABLE STREAM—RELICTION.

GILLESPIE *v.* STATE OF NEBRASKA.

The control and right to dispose of public lands lying under a navigable stream, that forms the boundary of a State, and within the limits thereof, passes from the government to the State on its admission to the Union, and if a sudden change occurs thereafter in the course of such stream, the reliction lying within said State is not the property of the United States.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 16, 1899.* (G. B. G.)

April 15, 1896, the local officers rejected the application of Lloyd G. Gillespie to make homestead entry for lot 5 of Sec. 1, T. 28 N., R. 8 E., and lots 5, 6, 7 and 8 of Sec. 36, T. 29 N., R. 8 E., O'Neal land district, Nebraska, for the following reasons:

1. Notations on the plats of this office showing the resurvey of townships 28 and 29 of range 8 east show that the tracts applied for are not "subject to disposal, nor

location, until special instructions are given by the Commissioner of the General Land Office to the register and receiver at this office," and it does not appear that any instructions have been received at this office from the Commissioner of the General Land Office relative to the disposition of the tracts in question, since the filing of the above mentioned plats.

2. Under section 7 of the act of April 19, 1864 (13 U. S. Stat., 47), a portion of the tract applied for, viz: lots 5, 6, 7 and 8, of Sec. 36, T. 29 N., R. 8 E., belongs to the State of Nebraska for the support of common schools.

Gillespie duly appealed from that action; whereupon your office rendered its decision of February 20, 1897, allowing his application for lot 5 of Sec. 1, aforesaid, but rejecting it as to the said lots 5, 6, 7 and 8 of Sec. 36, for the reason stated that said last named tracts are within a section granted to the State of Nebraska for the support of common schools by section 7 of the act of April 19, 1864 (13 Stat., 47).

Gillespie has appealed to the Department.

It appears from your said office decision and from the records and files of your office, which have been examined, that at the date of said granting act, April 19, 1864, all of the above described land was covered by the waters of the Missouri river, which river formed the boundary line between the State of Nebraska and the Territory of Dakota. The river flowed in a southerly direction at this point, and, making a bend towards the east and north, enclosed a peninsula about two and a half miles long, and about twenty-three chains wide, across the neck. This peninsula was then on the Dakota side of the river. The township was originally surveyed in 1858, and the west side of the river was then meandered. Some time between 1867 and 1869 the river cut its way through the neck, leaving its former bed, which included the lands in controversy, practically dry, and placing the peninsula on the Nebraska side.

After the river had changed its course, and in February, 1870, a survey was made of the old river bed, and this survey made the old meander line of the west bank of the river the western boundary of the above-described lots, while the center of the old channel became their eastern boundary.

By act of April 28, 1870 (16 Stat., 93), Congress made the center of the new channel the boundary line between Nebraska and Dakota, but this did not affect the status of the lands in controversy in any way, since they have been within the original limits of the State of Nebraska since its formation, the enabling act of that State providing as to its boundary line at this point that said line shall follow "the middle of the channel" of the Missouri river (13 Stat., 47).

This being so, this case is controlled by the recent case of *John J. Serry et al.* (27 L. D., 330), wherein it was held that (syllabus):

Where a sudden change occurs in the course of a navigable river that forms the boundary between a State and a Territory, the reliction lying within the State is not the property of the United States.

The Missouri river being a navigable stream, the control and right to dispose of the public lands under said stream and within the limits of

the State passed to the State upon its admission into the Union. *Pollard v. Hagan* (3 Howard, 212); *Barney v. Keokuk* (94 U. S., 324); *Hardin v. Jordan* (140 U. S., 371).

In this view it is not necessary to discuss the action of the local officers denying Gillespie's application, because of the aforesaid notations upon the plats of this land on file in their office. His application is hereby rejected as to all of said lots, because they are not now and were not at the date of filing said application the property of the United States. Your office decision is so modified.

RAILROAD GRANT—ACT OF APRIL 21, 1876.

NORTHERN PACIFIC R. R. CO. *v.* SHERWOOD.

The withdrawal on the general route of the main line of the Northern Pacific of lands lying within the common limits of said route and the primary limits of the branch line, as thereafter fixed by definite location, took effect at once, on the filing and approval of the map of said route, and a pre-emption filing on lands, while so withdrawn is without effect, nor is it confirmed by section 1, act of April 21, 1876, if the preemptor does not comply with the law and submit proof thereof, and hence will not defeat the attachment of rights under the grant for the branch line on the subsequent location thereof.

*Northern Pacific R. R. Co. v. Urquhart*, 8 L. D., 365, *Howard v. Northern Pacific R. R. Co.*, 23 L. D., 6, overruled.

A claim resting upon a rejected application to enter, and not upon settlement, entry or purchase, is not within the provisions of the act of July 1, 1898.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 16, 1899.*

The Northern Pacific Railroad Company has appealed from your office decision of February 4, 1898, holding that lots 1, 2, 3, and 4 (north of the river), Sec. 25, T. 9 N., R. 22 E., North Yakima land district, Washington, were excepted from the grant pertaining to the branch line of its road. The tract in controversy is part of an odd-numbered section lying within forty miles of the general route of the main line of said road, down the valley of the Columbia river, as fixed by the filing and acceptance of the map of such general route August 13, 1870, and is, therefore, within the limits of the legislative withdrawal made by operation of law, as well as the executive withdrawal made by the order of the Secretary of the Interior upon the fixing of such general route, notice of which was received at the local office December 8, 1870. The tract is also within the primary limits of the grant for the branch line of said road, as adjusted to the map of definite location of such branch line, filed and accepted June 23, 1883. The portion of the main line down the valley of the Columbia river was never definitely located or constructed and the grant pertaining thereto was declared forfeited by the act of September 29, 1890 (26 Stat., 496), which was subsequent to the definite location of the branch line and the consequent attachment of the rights of the railroad company thereunder.

This tract is part of a section which the company elected to take pursuant to instructions of December 24, 1890 (11 L. D., 625, 628), in part satisfaction of its moiety of the lands falling within the common limits of the grant for the branch line and the grant for the portion of the main line which was so forfeited.

Except as it may have been affected by the definite location of the branch line, the legislative withdrawal made upon the fixing of the general route of this portion of the main line, remained in force until the declaration of forfeiture made September 29, 1890. Upon September 19, 1870, which was after this withdrawal took effect and before notice thereof was received at the local office, Henry Burbank filed preemption declaratory statement for said tract, alleging settlement thereon August 14, 1870, but he never attempted to perfect title thereunder.

The legislative withdrawal made by operation of law upon the fixing of the general route of the main line down the valley of the Columbia river, took effect immediately upon the filing and acceptance of the map of such general route and reserved and appropriated the land in controversy for the purpose of satisfying the grant for said main line, and the preemption filing of Burbank, made during the continuance of such withdrawal, was made at a time when such lands were not subject to settlement, filing or entry under the preemption law and was therefore without effect. (*Inman v. Northern Pacific R. R. Co.*, 28 L. D., 95)

Until the passing of title to the railroad company by an accepted definite location of one of its lines of road, it was within the power of Congress to confirm or validate this filing or to otherwise dispose of said lands as it saw proper, and such confirmation could have been made absolute or subject to such conditions and limitations as were deemed proper. By the first section of the act of April 21, 1876 (19 Stat., 35), Congress exercised this power but chose to make the confirmation dependent upon the settler's compliance with the preemption law and his presentation of proper proofs thereof. Had the confirmation been made absolute the filing would have had the same status and effect as if there had been no existing withdrawal, but the conditions attached by Congress to the confirmation show that it was made solely for the protection of the settler whose filing was made without notice of the existing withdrawal and that it was intended to be operative only in the event that he complied with the preemption law and submitted proper proof thereof. This condition was not complied with by Burbank and for that reason the confirmation never became operative. (*Camplan v. Northern Pacific R. R. Co.* (28 L. D., 118), and *Northern Pacific R. R. Co.* (20 L. D. 191).)

It is true that the legislative withdrawal, by reason of which the land in controversy was withheld from the operation of the preemption law at the time of Burbank's settlement and filing, was made upon the fixing of the general route of the main line down the valley of the Columbia river, and that the grant for this portion of the main line was

afterwards forfeited; but prior to such forfeiture and during the continuance of such withdrawal, the branch line had been definitely located and the title to the tract in controversy had become thereby vested in the railroad company subject only to the effect given to Burbank's filing by the first section of the act of April 21, 1876. As before stated, this act would have confirmed that filing had Burbank complied with the preemption law and submitted proper proof thereof. This he did not do and for that reason his filing was not brought within the terms or purpose of the statute and did not become operative against the grant to the railroad company. So far as the case of Northern Pacific R. R. Co. v. Urquhart (8 L. D., 365), and Howard v. Northern Pacific R. R. Co. (23 L. D., 6), are in conflict herewith, they are overruled.

The present controversy arises over James Sherwood's application to make homestead entry of the land, made September 9, 1889, which was rejected by the local office, your office and the Department (220 L. and R., 318), and which was repeated or renewed March 3, 1897, and again rejected by the local office. These applications were rejected for conflict with the grant to the railroad company. Sherwood has not made entry of or purchased the land, and neither of his applications alleged settlement prior thereto. He does not therefore seem to be entitled to the benefit of the act of July 1, 1898 (30 Stat., 597, 620).

Under these circumstances it does not become necessary to consider the application of Jock Morgan to purchase said land under section five of the act of March 3, 1887 (24 Stat., 566).

The decision of your office is accordingly reversed.

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RAILROAD GRANT—ACT OF JULY 2, 1864—EXPIRED FILING.

UNION PACIFIC RY. CO. v. WADE (ON REVIEW).

The enlargement of the grant to the Union Pacific made by the act of July 2, 1864, is operative as to lands which were at the date of said act public lands, and were otherwise subject to the grant on definite location.

An expired preemption filing on offered land is not an existing or subsisting "claim" within the meaning of the excepting clauses of the grant to this company.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 16, 1899.* (F. W. C.)

With your office letter of September 15, 1898, was returned the motion, filed on behalf of the Union Pacific Railway Company, for review of departmental decision of June 6, 1898 (27 L. D., 46), in which it was held that the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 33, T. 7 S., R. 8 E., Topeka land district, Kansas, was excepted from the grant made by the acts of July 1, 1862 (12 Stat., 489), and July 2, 1864 (13 Stat., 356), for the reason that said tract was included in the pre-emption declaratory statement of William Shute filed July 31, 1861.

The lands in the above township, including the tract here in question,

were offered in accordance with proclamation No. 636, beginning September 19, 1859, at Ogden, Kansas. The land was therefore offered land at the date of Shute's filing, and under the act of September 4, 1841 (5 Stat., 453), Shute was required to make proof and payment within twelve months of his settlement, which time expired July 31, 1862.

In the previous decision of this Department it was held that said filing had not expired at the date of the grant, the tract being supposed to be within the limits of the grant made by the act of July 1, 1862.

In the motion for review it is alleged that, as adjusted to the map of definite location filed January 11, 1866, this tract falls beyond the limits of the grant made by the act of 1862, but within the enlarged grant made by the act of July 2, 1864. It is therefore urged that said filing was not a subsisting claim at the date of the passage of the act of July 2, 1864, and for this reason a review of the previous decision of the Department is requested.

The motion was entertained and returned for service by departmental letter of August 8, 1898, and as returned by your office letter of September 15, 1898, bears evidence of the service made as required.

Upon inquiry at your office it is learned that the tract in question is beyond the limits of the grant made by the act of 1862 and within the enlarged limits of the grant made by the act of July 2, 1864. Although the enlargement of the grant by this later act was not made by words of new and additional grant, but merely by enlarging the number of sections named in the original grant and the distance from the road within which they were to be taken, yet as to the enlargement the grant must be held as operating upon lands which at the date of the passage of the later act were public lands, and were otherwise subject to the grant on definite location.

The tract in question being offered land, the filing by Shute had expired prior to July 2, 1864, and the case is therefore controlled by the recent decision of the Department in the case of *Union Pacific Railway Co. v. Fisher* (28 L. D., 75). For reasons therein given it must be held that Shute's filing was not a subsisting claim at the date of the enlarged grant, and the previous decision of the Department is therefore recalled and vacated and the land held to have passed to the company upon the definite location of its line of road opposite thereto. It follows that the homestead entry of William L. Wade, made of this land on December 9, 1896, was without authority and in violation of the rights of the company, and said entry is therefore ordered canceled.

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DERRICK *v.* STATE OF CALIFORNIA.

Motion for review of departmental decision of November 25, 1898, 27 L. D., 644, denied by Acting Secretary Ryan, February 17, 1899.

## RAILROAD STATION GROUNDS—APPROVAL OF PLAT.

## OPINION.

Under a grant of a railroad right of way through the Indian Territory, with necessary station grounds, it is a proper exercise of the general authority of the Interior Department over the public lands to require a plat to be filed showing the lands required for station purposes, although the granting act does not provide for the filing of such plat, and the approval thereof fixes the right of the company to occupy the ground included therein.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*February 17, 1899.* (W. C. P.)

I have the honor to acknowledge the receipt of your communication of the 3d instant, enclosing a letter from Hon. O. H. Platt, United States Senate, calling attention to the provisions of the acts granting a right of way to the Kansas and Neosho railroad and also the southern branch of the Union Pacific railroad, and asking whether the approval of the map of location fixes the right of the railroad company to all the lands included within the lines marked on the plat for station grounds, and as to the proper way now to ascertain how much land is necessary for station purposes at the different stations.

The grant to the State of Kansas to aid in the construction of the Kansas and Neosho Valley road is found in the act of July 25, 1866 (14 Stat., 236), and that to aid in the construction of the southern branch of the Union Pacific in the act of July 26, 1866 (14 Stat., 289).

The grant of the right of way to the Neosho Valley road is found in section six of the act of July 25, and its extent is defined as follows:

Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, workshops, depots, machine-shops, switches, side-tracks, turn-tables and water-stations.

By section eight the company was authorized to construct its road through the Indian Territory, and a right of way was provided for as follows:

And the right of way through the Indian Territory, wherever such right is now reserved or may hereafter be reserved to the United States by treaty with the Indian tribes, is hereby granted to said company, to the same extent as granted by the sixth section of this act through the public lands; and in all cases where the right of way, as aforesaid, through the Indian lands, shall not be reserved to the government, the said company shall, before constructing its road, procure the consent of the tribe or tribes interested, which consent, with all its terms and conditions, shall be previously approved and indorsed by the President and filed with the Secretary of the Interior.

Section six of the act of July 26, provides for the right of way for the southern branch of the Union Pacific road, and is in the same words as section six of the other act hereinbefore quoted from. By section eight of the latter act the Union Pacific company is authorized

to construct its road from the southern boundary of Kansas "south through the Indian Territory, with the consent of the Indians, and not otherwise," to Fort Smith in the State of Arkansas. The right of way for that portion of the road is provided for as follows:

And the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work-shops, machine-shops, switches, side-tracks, turn-tables, and water-stations.

The provisions of these two acts relating to the use of lands for station purposes are in effect the same, so that they may be considered together. Neither act provides specifically for the filing of a plat of station grounds, nor is provision made in specific terms for determining the quantity of ground for any one station.

The Secretary of the Interior is charged with the supervision of public business relating to Indians, just as he is with that relating to public lands. The management of the public business relating to Indian affairs is committed primarily to the Commissioner of Indian Affairs, while the management of that relating to the public lands is committed primarily to the Commissioner of the General Land Office. In the case of Catholic Bishop of Nesqually *v.* Gibbon (158 U. S., 155), the supreme court had under consideration an act of Congress which confirmed to missionary societies land then occupied by them not to exceed six hundred and forty acres. No plan was provided for determining what societies were entitled to land under that provision nor for ascertaining the quantity to which any such society should receive title. The court held that these duties devolved upon the Interior Department, saying:

It may be laid down as a general rule that in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express declaration to the contrary.

The same rule applies in this case, and it must be held that, inasmuch as there is no direction to the contrary, the administration of these acts devolves upon this Department. By section six of the act of July 26, necessary station grounds for that part of the line outside the Indian Territory were granted, there being no direction as to how the quantity of land necessary therefor should be determined. That part of the grant has been administered by this Department. That the administration of the grants made by these acts comes within the jurisdiction of this Department does not in my opinion admit of any doubt. It is true, as stated by Senator Platt, that neither of the acts contains any requirement for the filing of maps of location or that such a map if filed should be approved by the Secretary of the Interior. The omission as to the latter point is supplied by the general provisions of law as above

pointed out. The necessity for filing plats for station and other purposes has been considered by this Department in connection with the grant for the Atlantic and Pacific railroad, made by the act of July 27, 1866 (14 Stat., 292), which is as to station grounds to the same effect as the acts under consideration. In the decision in that case (*Santa Fe Pacific R. R. Co.*, 27 L. D., 322) the following is said:

As to these additional lands made necessary for the purposes named in the act, there is no express provision contained therein requiring the filing of a map or plat thereof, but the necessity for the filing of such a map arises from the fact that the ground desired must be identified and from the further fact that only the right to take ground necessary for the purposes named is granted, and an affirmative showing of such necessity must be made to the Secretary of the Interior, who is charged with the administration and disposition of the public lands under the laws of Congress.

The same necessity exists inside the Indian Territory and the same rule should obtain there. The purpose of these plats being to identify the ground the company is entitled to occupy under its grant for the purposes specified, it follows that approval of a plat fixes the right of the company to occupancy of the ground included therein. So far as such plats have been filed and approved the quantity of land which may be used and the necessity therefor have been determined by the tribunal charged with that duty and thereby the company has acquired a vested right to the use of the land embraced in such plats.

So long as the law remains as now, conditions may at any time become such as to create a necessity for new station buildings, workshops, depots, machine-shops, etc., and the company upon showing such necessity would be entitled to the use of the required quantity of ground. Not only is this true under the provisions of the acts under consideration, but the act of April 25, 1896 (29 Stat., 109), provides a plan by which any company operating a railroad in the Indian Territory may acquire the right to use additional ground at existing stations or for the establishment of new stations or depots. Thus Congress recognized the probability that additional lands will be needed for railroad purposes. Under none of these acts can the railroad company secure the use of land to which there is at the time a prior adverse claim.

If it is desired to limit the quantity of land which may hereafter be acquired for station and other purposes to a certain number of stations within a given length of road, and to a definite quantity of land for each station, etc., additional legislation is needed for that purpose.

Approved, February 17, 1899.

THOS. RYAN,  
*Acting Secretary.*

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BRADBURN *v.* LOWE.

Motion for review of departmental decision of December 22, 1898, 27 L. D., 705, denied by Acting Secretary Ryan, February 18, 1899.

## REPAYMENT—ENTRY—PATENT—JURISDICTION.

JOHN C. HOLLISTER.

Where a patent issues on an entry erroneously allowed, and the patentee, under a suit to quiet title is adjudged to hold the title in trust for another and required to convey the land to the successful party in such proceeding, and so does, and thereafter applies for repayment, the Land Department is without jurisdiction to cancel of record the entry so allowed, but may properly regard it as no longer a subsisting entry of the applicant requiring cancellation.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *February 20, 1899*

Herewith find the papers relating to the repayment claim of John C. Hollister. Your attention is especially invited to the letter of the Auditor for the Interior Department, dated August 26, 1898, and its enclosure, being a copy of the opinion of the Acting Comptroller of the Treasury upon said claim dated April 23, 1898.

The Auditor and Comptroller seem to be of the opinion that your office still possesses the power and authority to cancel upon the public records Hollister's entry, and this notwithstanding the fact that upon that entry a patent was issued conveying the land embraced therein to Hollister, under which patent the Stimson Land Company is now holding the legal title to said land, pursuant to the judicial proceedings described in department decision of March 8, 1898, reported in 26 L. D., 328.

It has been so frequently decided by the supreme court that upon the issuance of patent all control and jurisdiction over the land patented, and over the proceedings by which such patent is obtained, passes beyond the land department, that this question is now recognized as entirely settled by those who are familiar with proceedings in the land department. It is, therefore, not within the province of your office to cancel or make other disposition of Hollister's entry, if under existing conditions he has a subsisting entry to be canceled.

The departmental decision herein proceeded upon the view that Hollister no longer has a subsisting entry requiring cancellation, and this is shown by the following extract from said decision:

The statute, however, makes the repayment conditional upon the surrender of the duplicate receipt, the execution of a proper relinquishment of all claims to the land and the cancellation of the entry by the Commissioner of the General Land Office. Here the decree of the court and the conveyance of Hollister thereunder operate as a surrender and relinquishment to Smith of all claims by Hollister to the land.

According to the decree of the court Smith was entitled to the government title, and a surrender and relinquishment to him of Hollister's claim was as effective as would be a surrender and relinquishment to the government itself, in a case where it had not otherwise disposed of the land. By the decree of the court Hollister's entry and title, with all the rights resulting therefrom, were effectually transferred to and invested in Smith, so that no entry by Hollister remains to be canceled.

The purpose in requiring the surrender of the duplicate receipt, the relinquishment of all claims to the land and the cancellation of the entry was to prevent any

assertion of claim or right under the entry after such repayment. In other words, any possible cloud cast upon the title by reason of the entry must be removed before the purchase money and commissions can be returned. Here the purpose of the statute has been fully satisfied by the complete transfer of all possible rights under the Hollister entry to one who has been decreed to have succeeded to all of the rights of the government in the land.

It is to be regretted that this Department is constrained to differ from the opinion given by the Auditor and Comptroller. It may be that their attention has not been called to the fact that the land department, after the issuance of patent, is without control or jurisdiction over either the land patented or the proceedings by which the patent is obtained. The duty, however, of prosecuting the claim before the Auditor and the Comptroller is one which devolves upon the claimant, and can not be assumed by the land department.

The Auditor and Comptroller seem to be of opinion that it is your duty to make an appropriate cancellation of Hollister's entry, and that this duty is so clearly ministerial in character that it can be enforced by mandamus. The claimant is of course at liberty to institute judicial proceedings of this character, or to rely upon the decision of this Department allowing his claim, and to commence a suit in the Court of Claims or in a district court of the United States, to test his right to repayment.

You will advise the claimant of the action of the Auditor and Comptroller and of the action of this Department, in order that he may take such further steps, if any, as may to him seem proper. No further action will be taken by the land department.

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INDIAN LANDS—RAILROAD GRANT—ACT OF JUNE 22, 1874.

OPINION.

The act of June 22, 1874, and the amendatory act of August 29, 1890, relate only to railroad lands that are settled upon and claimed under the preemption or homestead laws, and do not extend to lands occupied by Indians, not under said laws, but merely in continuance of their ancient right of occupancy or possession.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,  
February 20, 1899.*

Under your reference of November 22, 1897, I have considered certain papers relative to a request made upon the Northern Pacific Railroad Company for the reconveyance, under the provisions of the act of June 22, 1874 (18 Stat., 194), of certain tracts of land, in all forty-eight, which have been patented to the company on account of its grant.

It appears that certain Calispel Indians—that is, those now living and their ancestors—have occupied these lands since long prior to the passage of the act making the grant for said company, and have no other home.

No reservation was ever provided for on their account, and these

lands, being within the limits of the grant as adjusted to the map of definite location, filed August 30, 1881, were patented to the railroad company on account of its grant October 29, 1895.

The company was called upon to reconvey the lands under the provisions of the act of June 22, 1874 (*supra*), and to select other lands within the limits of its grant in lieu thereof.

To this request the company replied, under date of November 5, 1897, as follows:

The proposed relinquishments, as we understand, are requested under the act of June 22, 1874, and whilst there is no doubt as to the ability of the company to relinquish to the United States the land in place and heretofore patented to the company, an examination of said act makes it extremely doubtful whether the Department of the Interior has jurisdiction to allow the company indemnify for the same. The company is not satisfied that exchanges made under this act for the benefit of Indians would be legal, and is therefore unable to comply with the government's request for the relinquishment of the lands in place.

According to its previous advices to the Department, the company is willing to relinquish these lands, provided a legal and satisfactory way is found to indemnify it for the same. In the absence of express legislation, it occurs to the company that further action by Congress should be taken, having for its object the authorization for the Secretary of the Interior to receive relinquishments from the company in such cases as the above, and permit the company to select and receive patents in lieu thereof in even numbered sections within its grant.

The company would be pleased to know of any intended introduction of a bill looking to the accomplishment of this end, because there are other cases of similar character, which should also be provided for under such a bill.

It was upon receipt of this response that the matter was referred to me for opinion as to the authority of the Secretary of the Interior to permit selections of other lands within the limits of the grant in lieu of the lands desired for these Indians, and for a statement as to whether any further legislation is necessary to obtain the end desired.

Being of opinion that under existing legislation the railroad company could not be given indemnity upon surrendering these patented lands for the purposes named, I prepared, and you transmitted with favorable recommendation to the committees in Congress, an amendment to a pending appropriation bill, which was intended to authorize an exchange of lands in instances like that here under consideration. The amendment, while at first adopted, was ultimately rejected, and there has been no further legislation upon the subject.

I am of opinion that the act of June 22, 1874 (*supra*), and the act of August 29, 1890 (26 Stat., 369), amendatory thereof, relate only to instances where the railroad lands are settled upon and claimed under the pre-emption or homestead laws, and that they do not include instances where such lands are occupied by Indians, not under the pre-emption or homestead laws, but merely in continuance of their ancient or pristine right of occupancy or possession.

Approved, February 20, 1899,

THOS. RYAN,

*Acting Secretary.*

## HOMESTEAD CONTEST—DEATH OF ENTRYMAN—NOTICE.

BARKSDALE *v.* RHODES.

A contestant who alleges the death of an entryman, and that the deceased left no heirs competent to inherit his rights under the entry, and secures the cancellation of the entry on the proof of such allegations, is entitled to a preferred right of entry.

A stranger to the record will not be heard to allege want of due notice to the defendant.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) February 20, 1899. (L. L. B.)

October 16, 1891, Robert Rhodes made homestead entry for the SW.  $\frac{1}{4}$  of Sec. 21, T. 14 N., R. 5 E., Guthrie, Oklahoma. At that time he was not a citizen of the United States, having only declared his intention of becoming a citizen.

July 14, 1894, he died.

July 16, 1894, Isaac McKendrick applied to make homestead entry for the tract, which was rejected the same day because the land was covered by the entry of Rhodes.

On the same day that McKendrick applied to enter, but later in the day, Wm. P. Barksdale filed an affidavit of contest against the entry of Rhodes, making the heirs-at-law of Robert Rhodes the parties defendant.

In his said affidavit he alleged the death of the entryman, that he had never been naturalized, that he was unmarried, and that he had no heirs in the United States or elsewhere, competent to inherit the land embraced in the entry of the decedent.

August 16, 1896, one month subsequent to the date of the rejection of his application to enter and the filing of Barksdale's contest affidavit, McKendrick appealed from the rejection of his said application.

Notice of Barksdale's contest, after a proper showing, was made by publication and posting. It does not appear that any copy of the notice was mailed by registered letter or otherwise to the defendants, but a copy thereof was served on the administrator of Rhodes' estate.

On the day of the hearing McKendrick appeared and filed a protest in writing against the "receiving or acceptance" of the ex parte proof offered by Barksdale. No one appeared in defense of the entry.

The reasons assigned in McKendrick's protest are: That he applied to enter the land before Barksdale filed his contest; that he went upon it and commenced to cultivate it "after the death" of the entryman, and that the contestant well knew these facts when he filed his contest; that in his appeal to the Commissioner from the rejection of his application, he asked for a hearing to determine his rights, and he therefore asked that all action be suspended by the register and receiver until final action by the Commissioner on his appeal.

The record does not show what action was taken by the local office

on this protest; it must have been overruled or ignored, for the hearing on Barksdale's contest proceeded and the register and receiver recommended that the entry be canceled.

By your office letter of May 26, 1897, the action of the local office was affirmed and the entry of Rhodes held for cancellation on the contest of Barksdale.

McKendrick has appealed.

The charges in the affidavit of contest were sustained by the proof, and this fact is not disputed by McKendrick, but his counsel insist: First. That upon the death of the entryman without heirs the land immediately reverted to the government and became open to entry and settlement, and therefore the application of McKendrick to make entry was wrongfully rejected, and his application having been made prior to the commencement of Barksdale's contest he should be awarded the right of entry.

Second. That inasmuch as Barksdale failed to address a registered copy of his notice of contest to the defendants, the local office acquired no jurisdiction to entertain his contest.

While it is true that upon the death of an entryman without heirs, all rights accruing under his entry are determined, the land covered thereby remains segregated until the entry is canceled of record. This was accomplished by the contest of Barksdale bringing to the knowledge of the local office the fact that the entryman left no heirs capable of inheriting his rights under the entry. Having thus secured the cancellation of the entry of Rhodes he is entitled to the preference right of entry under the act of May 14, 1880 (21 Stat., 140). Such right has been awarded to the contestant when the default upon the part of the entryman was discoverable from the records of the General Land Office (*Krichbaum v. Perry*, 4 L. D., 517); and when such default was apparent in the records of the local land office (*Austin v. Norin*, Id., 461).

It is also held that a successful contestant is entitled to a preference right of entry where the default alleged was failure to submit final proof within the statutory period, which fact is always a matter of record.

The contest was properly allowed, notwithstanding Fay's entry had expired by limitation, for it was properly allowed when made and was intact upon the records when Matthews applied to contest. While it so remained of record, Matthews could not be allowed to make entry of the land, but was compelled first to remove Fay's entry, which he could only do by a contest, and his contest was initiated before any steps had been taken by the government to cancel it. (*Matthews v. Barbaronie*, 12 L. D., 285).

As to the second error assigned, it is sufficient to say that the defendant, and those claiming under him, only can be allowed to object to the sufficiency of the notice of contest.

A stranger to the record will not be heard to allege the want of due notice to the defendant. *Hopkins v. Daniels et al.* (4 L. D., 126).

Questions affecting the sufficiency of notice can only be raised by the defendant or those claiming under him. *Burdick v. Robinson* (11 L. D., 199).

The decision appealed from is affirmed.

HOMESTEAD SETTLEMENT.—CITIZENSHIP.

MCDADE *v.* HIVELY (ON REVIEW).

The residence of an alien in this country the last three years of his minority, who is otherwise within the terms of section 2167 R. S., qualifies him in the matter of citizenship to the extent that he may initiate a homestead claim by settlement, without having previously filed a declaration of intention to become a citizen.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) February 20, 1889. (G. B. G.)

By departmental decision of July 14, 1898 (27 L. D., 185), it was adjudged that Catherine Hively is entitled to lots 3 and 4 and the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 7, T. 12 N., R. 6 W., Oklahoma Territory, by virtue of her homestead application of January 28, 1896, "unless defeated by the prior settlement claim of Mary McDade," and in view of the allegations of settlement contained in McDade's amended application to enter said land, your office was directed

to order a hearing between the parties, on condition that Mary McDade, within thirty days from notice of this decision, files in your office a sworn statement that she was a settler on the land prior to and on January 28, 1896.

August 31, 1898, counsel for Hively filed with the Department a petition for reconsideration of said decision, and in view of the matters therein contained your office was directed to take no further steps in said case until further advised. Said petition has now been considered.

There is only one question submitted therein which did not receive careful consideration of the Department at the time of the former decision, viz:

(1) It was error to overlook the fact that Mary McDade admits that she is alien born, and that she did not declare her intention to become a citizen until March 7, 1896.

(2) It was error not to hold that inasmuch as defendant's rights under her application to make entry are conceded to have attached on January 28, 1896, contestant's qualifications of citizenship, under her declaration of intention made March 7, 1896, could not relate back so as to defeat defendant, and a hearing on the question of prior settlement would therefore be useless.

This Department has uniformly and often held that no rights are acquired by acts of settlement upon the public lands, by an alien who has not declared his intention to become a citizen of the United States as required by the naturalization laws, and that a subsequent declaration of such intention does not operate retroactively so as to give legal effect to such acts of settlement as against an intervening adverse

claim legally asserted. *McMurdie v. Central Pacific Railroad Company* (8 C. L. O., 36); *Aubrey v. Clapp* (1 L. D., 489); *Bell v. Ward* (4 L. D., 139); *Central Pacific Railroad Co. v. Painter* (6 L. D., 485); *Titamore v. Southern Pacific Railroad Co.* (10 L. D., 463); *Central Pacific Railroad Co. v. Booth et al.* (11 L. D., 89); *Central Pacific Railroad Co. v. Taylor et al.* (11 L. D., 354); *Silva v. Rees et al.* (12 L. D., 507); *Herron v. Northern Pacific Railroad Co.* (14 L. D., 664); *Butler v. Davis* (24 L. D., 60).

It follows that if Mary McDade must depend upon her declaration of intention, made March 7, 1896, her claim must fail, for the reason that prior to that time Hively had initiated her claim to the land in controversy by a homestead application therefor.

A further question is presented, however, which finds its predicate in an affidavit executed by McDade, May 21, 1896, in which she says:

I came to the United States from Ireland when an infant about three years of age, and have resided in the United States ever since . . . and am forty-four years of age.

These facts are not disputed.

The question is, whether under these facts the preliminary declaration of intention to become a citizen, as directed by section 2165 of the Revised Statutes, is not by section 2167 dispensed with, and, if so, whether an alien coming within the descriptive clause of section 2167 and who has not filed a declaration of intention, can initiate a right of homestead under section 2289.

Sections 2165 and 2167 of the Revised Statutes are in part as follows:

SEC. 2165. An alien may be admitted to become a citizen of the United States in the following manner, and not otherwise:

First. He shall declare on oath, before a circuit or district court of the United States, or a district or supreme court of the Territories, or a court of record of any of the States having common-law jurisdiction, and a seal and clerk, two years, at least, prior to his admission, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and, particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject.

Second. He shall, at the time of his application to be admitted, declare, on oath, before some one of the courts above specified, that he will support the Constitution of the United States, and that he absolutely and entirely renounces and abjures all allegiance and fidelity to every foreign prince, potentate, state, or sovereignty; and, particularly, by name, to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; which proceedings shall be recorded by the clerk of the court.

(The declaration required by this section may now be made before the clerk of any of the courts named therein. 19 Stat., 2.)

SEC. 2167. Any alien, being under the age of twenty-one years, who has resided in the United States three years next preceding his arriving at that age, and who has continued to reside therein to the time he may make application to be admitted a citizen thereof, may, after he arrives at the age of twenty-one years, and after he has resided five years within the United States, including the three years of his minority, be admitted a citizen of the United States, without having made the

declaration required in the first condition of section twenty-one hundred and sixty-five; but such alien shall make the declaration required therein at the time of his admission; and shall further declare, on oath, and prove to the satisfaction of the court, that, for two years next preceding, it has been his bona fide intention to become a citizen of the United States; and he shall in all other respects comply with the laws in regard to naturalization.

In the case of *Dougherty v. California and Oregon Railroad Company*, it appeared that the land there involved was settled upon by Dougherty November 1, 1866, that it was withdrawn for the benefit of said company November 25, 1867, and that Dougherty filed his pre-emption declaratory statement therefor April 16, 1868, which was in time, the only question in the case being his personal qualification. It further appeared that he came to this country from Ireland in 1854, being at that time about fourteen years of age. April 17, 1868, he was admitted to citizenship under the act of May 26, 1824 (4 Stat., 69, now section 2167 of the Revised Statutes), without having filed previous declaration of intention. Mr. Secretary Delano said (2 Copp's L. L., 929):

The act of September 4, 1841, extends the privilege of pre-emption to every person otherwise qualified, "being a citizen of the United States, or having filed his declaration of intention to become a citizen as required by the naturalization laws."

You decide that as Dougherty had not actually filed declaration of intention to become a citizen, his settlement was invalid; that the land, at date of withdrawal, was public land and included therein; that his claim wholly failed, and the land passed to the railroad company.

The manifest purpose of this restriction of the pre-emption act is in consonance within the policy of Congress, as manifested in all the laws for the disposal of the public domain, to wit, to prevent aliens acquiring title under it; and such construction must be given to the act as will secure that end. At the same time the pre-emption act is of such a nature as to entitle it to a construction that will, within proper boundaries, most widely extend its beneficent provisions.

The restriction is, "having filed declaration of intention as required by the naturalization laws." If it is not required by the naturalization laws, it is not required by the pre-emption act. If the former substitutes something else as equivalent therefor, it may be substituted under the latter.

But in cases such as Dougherty's, said laws do not require filing of declaration of intention three [two] years before making application, etc. Proof that for three [two] years preceding the application it has been the bona fide intention of the alien to become a citizen is substituted therefor, and at the expiration of the three [two] years the person is in the same condition legally that he would have been had he filed his declaration of intention in the usual way.

To put aliens, naturalized without previous filing of declaration, on the same footing as those who were naturalized after making such filing, I think was clearly the intention of Congress.

In the essentially similar case of *Meriam v. Poggi* (17 L. D., 579), except that the decision in that case was put on two grounds, Mr. Secretary Smith said:

In the case at bar, Miss Poggi has already completed her citizenship, a certificate to that effect, under section 2167 of the Revised Statutes, bearing date December 18, 1890, forming part of the record before me.

The questions presented for determination are: 1. Did the residence of Miss Poggi in this country during the last three years of her minority, confer upon her the right

of pre-emption? 2. Does the minor child of an alien, who declares his intention to become a citizen, but who does not secure citizenship during such child's minority, possess the same rights as would be possessed had such parent died during the minority of his child, without securing naturalization papers?

An affirmative answer to either of these questions, decides the case at bar in favor of Miss Poggi.

A declaration of intention to become a citizen of the United States does not make the declarant a citizen. It is the initiation of the right thereafter to become such citizen upon the performance of the other requisite acts.

The naturalization laws have also made certain acts and conditions the equivalent of the formal declaration of intention otherwise required. . . .

The pre-emption law authorizes entry thereunder by citizens of the United States, or those who have "filed a declaration to become such as required by the naturalization laws." Surely, under this language, those charged with the administration of the preemption laws must accept as a satisfactory compliance with that law those acts, recognized by the naturalization laws as equivalent to the formal declaration of intention prescribed.

Had the preemption law extended its privileges only to citizens of the United States, and to those who had declared their intention to become citizens, it would have been much more restrictive than the naturalization laws. In the passage of the preemption law, I think it was the intention of Congress to put aliens, naturalized without previous filing of declaration, on the same footing as those who were naturalized after making such filing. There can be no reason for any distinction, and hence the preemption law provided, as I construe it, that a declaration of intention, under its provisions, should only be required in such cases as it was required by the naturalization laws.

The only difference in the two cases last cited and the case at bar is that in those cases the citizenship of the alien was an accomplished fact at the time the Department had them under consideration, while here, so far as appears from the record, Mary McDade is still an alien. There is no material difference in the fact that in those cases a right was asserted under the preemption law, while here it is asserted under the homestead law. The requirements of the two laws as to a declaration of intention to become a citizen are the same. Nor is the first difference above noted believed to be important. The material question decided in those cases was that an alien such as is described in section 2167 of the Revised Statutes may initiate a right under the public land laws which may not be defeated by the intervention of an adverse claim; that such an alien occupies the same status under the public land laws as does an alien who has made his preliminary declaration of intention under section 2165.

With reference to the clause in section 2177 of the Revised Statutes, that "such alien shall make the declaration required therein at the time of his admission," it has been held that this refers to the declaration required by the second condition of section 2165 (*State v. McDonald*, 24 Minn., 48). This condition does not relate either in terms or by implication to the applicant's intention at some future time to become a citizen of the United States, but provides that the applicant shall declare on oath that he will support the Constitution of the United States, and that he thereby renounces all allegiance to every foreign

government, and the requirements of this condition of said section presupposes either that the preliminary declaration of intention has been filed or that the law did not require it.

The requirement of section 2167, that the applicant shall "further declare on oath and prove to the satisfaction of the court that for two years next preceding it has been his bona-fide intention to become a citizen of the United States," takes the place of the preliminary declaration of intention required by the first condition of section 2165—not because it is a declaration of intention, but because it is part of the proof required to be shown of a past and continuing intention not evidenced by the formal declaration required by section 2165.

In other words, an alien within the descriptive clause of section 2167 who has filed no declaration of intention to become a citizen occupies the same position with reference to citizenship as does an alien not within that section who has filed such declaration, conditioned only upon his ability to make proof that his intention has been bona fide such.

This being so, inasmuch as the homestead law does not require more in the matter of citizenship than does the naturalization law, it follows that an alien who occupies the *position* of one who has filed his declaration of intention is entitled to the same rights under the homestead laws as one who has in fact filed such declaration.

The phrase found in section 2289, "as required by the naturalization laws," may not be extended by construction to include something not required by the naturalization laws.

The policy of the United States government has been, and is, to give homes to the people of other countries whenever these people renounce their allegiance to their own government and have become sufficiently familiar with our own institutions to give reasonable promise of good citizenship. The evidence of these qualifications is fixed by statute.

In the case at bar, Mary McDade has resided in the United States since infancy and for more than forty years. If at any time before final certificate, she makes the proof required by section 2167 and obtains full citizenship, her rights as a citizen will relate back to and protect her settlement, if she had one, upon the lands in controversy.

It follows that the residence of Mary McDade in this country during the last three years of her minority, qualifies her to the extent that she may initiate a homestead claim without the previous filing of a declaration of intention to become a citizen. She was therefore qualified to initiate a settlement right on the land in controversy, without reference to her declaration of intention of March 7, 1896.

The petition is denied, and your office is hereby directed to carry into effect the decision hereinbefore rendered.

## EDWARD O'KEEFE.

Motion for review of departmental decision of October 20, 1898, 27 L. D., 565, denied by Acting Secretary Ryan, February 18, 1899.

## HOMESTEAD—DESERTED WIFE.

ELLIOTT *v.* SEARS.

The right of a deserted wife to make entry of the land settled upon or entered by her husband, is not a right that she acquires through him, but is by virtue of the claim that she initiates in her own right, and by her own acts after she has become qualified to make settlement and entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.)                      *February 25, 1899.*                      (E. F. B.)

This controversy involves the right to the SE.  $\frac{1}{4}$  of Sec. 21, T. 24 N., R. 3 W., Enid, Oklahoma, embraced in the homestead entry of William W. Sears, made October 4, 1893, against which a contest was brought November 6, 1893, by George O. Elliott, alleging prior settlement.

A hearing was ordered and the case was continued upon the application of Elliott from time to time until November 7, 1894, when it was dismissed for failure to prosecute. Upon the appeal of Elliott your office, by decision of April 29, 1895, affirmed said decision, due notice of which was given and no further action therein was taken by said contestant.

June 25, 1895, Josephine Elliott filed an application to be allowed to intervene and to prosecute said contest in her own name and behalf, alleging that she is the deserted wife of George O. Elliott, and is in all respects a qualified homesteader; that in the month of November, 1894, George O. Elliott deserted his family (affiant and her two children) leaving them on said land without making provision for their support; that she settled on said tract September 19, 1893, her husband having settled thereon September 16, and with her husband established residence on said land, moving all their personal effects on the land, upon which she with her family have continuously resided ever since; that at the time she settled upon said tract with her husband no other person was claiming the land and no improvements were upon said tract belonging to said defendant; that after she had resided upon said tract more than six months, the defendant Sears moved his family on said tract and established his residence thereon the latter part of March, 1894; that she, her husband, and her children, had been residing upon said tract from September 19, 1893, and were so residing there October 4, 1893, when Sears made his homestead entry, and that since settling on said land she has caused to be made nearly all the improvements, consisting of a sod house, a well, about 65 acres of breaking, an orchard

of about 85 trees, and a stable partially completed built of sod and lumber. She further swears that she never learned of the condition of said contest until May 7, 1895, having received up to that time all her information through her husband; that she cannot account for his failure to submit testimony in said cause when it was set for hearing, except upon the theory, which she believes to be true, of a conspiracy between her husband and Sears to allow said contest to be dismissed in order to defeat her rights and claims.

A hearing was had upon said application, and the local officers found that the evidence failed to sustain the allegations of Josephine Elliott. They recommended that her contest be dismissed and that the homestead entry of Sears remain intact.

Upon the appeal of Josephine Elliott your office held that while the testimony as to priority of settlement was contradictory, the preponderance of evidence shows that George O. Elliott's settlement was prior to the settlement of Sears, and that

if George O. Elliott's initial act of settlement was prior to Sears' settlement, then Josephine Elliott's rights as the deserted wife of George O. Elliott relate back to the date of settlement and his right as a prior settler inures to the benefit of Josephine Elliott.

Your decision rests upon the theory that Josephine Elliott acquired a valid settlement right by reason of the initial act of settlement of her husband and that as the deserted wife of George O. Elliott she succeeded to all his right as a settler and was therefore entitled to prosecute his contest against the entry of Sears in her own name and for her benefit.

The effect of your decision was to revive a contest for her benefit and to confer upon her rights under said contest which could not have been accorded to her husband. When she filed her application George O. Elliott had no right under his contest, except such as he might obtain or preserve by review or by appeal to the Department to correct the error of your office, if there was any, in sustaining the action of the local officers dismissing his contest. He had ample opportunity to prosecute his contest for more than a year, and by refusing to proceed with it after the local officers, upon sufficient grounds, had refused a further continuance of the case, the contest was properly dismissed, which decision was affirmed by your office on appeal of Elliott. Furthermore, at the date of the dismissal of the contest he had not deserted his wife, but was living with his family on the tract. She says her husband deserted her in November 1894. In her testimony she says it was before Christmas. George O. Elliott in a corroborated affidavit dated November 19, 1894, filed with his appeal to the Commissioner from the decision of the local officers, swears that he has resided with his family continuously upon the land since September 19, 1893. In another affidavit dated November 30, 1894, he swears that he was then living upon the tract with his family. In her testimony she says that she knew as early as January, 1895, that the contest had been dismissed, and at

that time she first learned that her husband had finally left her, but she took no steps to assert any claim or to watch the contest proceedings until after the decision of your office of April 29, 1895.

There is not the slightest evidence of any collusion between Sears and Elliott, nor any circumstance to warrant the presumption that the dismissal of the contest was the result of a collusion between the parties.

Whatever may have been the motive that prompted the action of Elliott, there is no evidence or circumstance that tends in the slightest degree to implicate Sears in any improper transaction with Elliott. Sears evidently believed he had the superior right to the land, and always evinced a disposition to proceed with the hearing.

But independently of this, it was error to hold that the initial act of settlement of George Elliott inured to the benefit of Josephine Elliott, and that her rights as the deserted wife of George O. Elliott related back to the date of his settlement, so as to confer upon her all rights that he might have asserted under such settlement as against an entryman claiming adversely to him.

The wife of a homestead settler acquires no individual rights by virtue of her husband's settlement, nor is she as a deserted wife subrogated to the right acquired by the husband, either under settlement or entry. The act of desertion simply qualifies her to make entry in her own name and for her own benefit as the head of a family. As no one can be a qualified settler under the homestead law who is not entitled to make original entry, it must follow that no rights can be acquired by settlement that can be asserted against an adverse claimant, except by a person qualified to make entry.

If the desertion of a wife by a homestead settler invests her with all the right that he acquired under his settlement from the date of his initial act, by virtue of their marital relation at the time of settlement, she would for the same reason succeed to all his rights under his entry and in case of entry it would only be necessary to prove the desertion and abandonment of the land by the husband to entitle her to make final proof and receive patent for the land, under her husband's entry. This was the precise question at issue in *Bray v. Colby*, 2 L. D., 78, in which it was distinctly held that a deserted wife cannot make final proof or obtain patent in her own name under her husband's entry. Nor does any of the five rules prescribed in said decision for the government of your office in cases of desertion, recognize any right in the wife to claim the land in her own right by virtue of her husband's settlement or entry; but on the contrary it was held that her rights can only accrue from the date that she is qualified to initiate a claim.

This principle was clearly stated in *Larson v. Pechierer et al.*, 1 L. D., 401, wherein it was said:

As regards Mrs. Larson's claim to the tract in question, it should be observed that in her declaratory statement she alleges settlement as of March 5, 1868, the date of

her husband's alleged settlement; thereby basing her claim upon an act alleged to have been performed by herself during coverture. Whereas she could only acquire title to the land under the pre-emption law, by virtue of certain specific acts performed by herself when a *feme sole* and the head of a family, in compliance with the statutory requirements, because during the period of coverture her being was merged, in contemplation of law, into that of her husband, none of whose acts could inure to the benefit of her claim, preferred, as it was, subsequently to the date of her divorce. Hence it follows that his abandonment of the land was her abandonment, so that she could only acquire title, in any event, *de novo*, as stated.

In the case of Mary Lewis, 3 L. D., 187, the husband made entry and deserted his wife, abandoned the land and surrendered to her his duplicate receipt and improvements on the premises. Afterwards his entry was canceled upon his voluntary relinquishment, and thereupon a pre-emptor filed declaratory statement for the land. Shortly after the cancellation the wife applied for reinstatement of her husband's entry, which was rejected "upon the ground that said entry having been canceled, no right can inure to her by virtue whereof she can assert claim under the same." The Department concurred in this view, but allowed her to make entry in her own right, as she was a settler upon the land, and the pre-emption filing was a nullity, having been made without previous settlement.

In Tyler *v.* Emde, 12 L. D., 94, the husband deserted his wife leaving her upon the land, and relinquished his entry. The Department said:

I therefore find that Mrs. Tyler was a deserted wife on December 19, 1885, when the relinquishment was filed in pursuance of the agreement. From that time I hold she was a settler. Under the act of May 14, 1880, she was entitled to the time allowed to pre-emptors to put her claim of record. . . . As she was a settler at the instant of the cancellation of Tyler's entry, and the prior settler, her rights are fully protected by the law.

From the authorities cited, it will be seen that the right of a deserted wife to make entry of the land settled upon or entered by her husband, is not a right that she acquires through him, but is by virtue of the claim that she initiates in her own right, and by her own acts, after she has become qualified to make settlement and entry.

If a homestead entryman deserts his wife, leaving her upon the land, she may contest his entry upon the ground of abandonment and secure the right to enter said tract, not only as a successful contestant but by virtue of her settlement existing at the date of cancellation. Bray *v.* Colby, 2 L. D., 78; Roche *v.* Roche, 18 L. D., 9; Sinnett *v.* Cheek, 28 L. D., 20.

Where a deserted wife secures the cancellation of her husband's entry and thereafter makes entry of the land, she may in making final proof be entitled to credit for her residence on the tract prior to the date of her husband's desertion; Jennie W. Lindsey, 24 L. D., 557. But this is not by virtue of any right that she acquired through her husband's settlement and entry, but by reason of her own actual residence. While such residence gave her no right to assert a claim to a tract of public

land, as against others whose rights were initiated prior to her qualification as a homesteader, she may, as between the government and herself, be allowed credit for such residence, after she has made entry of the tract, as in the case of an alien settler, who by reason of his alienage was not qualified to make a valid settlement. But in such cases the alien may upon the removal of the disability be entitled to credit for the time that he resided upon the land during the disability, which will not, however, relate back so as to defeat an intervening or adverse claim or right existing prior to the removal of the disability. *Phillips v. Sero*, 14 L. D., 568, and authorities cited; *Herron v. Northern Pacific R. R. Co.*, *Ib.*, 664.

Both of the parties to the original contest settled on the land the afternoon of September 16, 1893, and each performed sufficient acts of settlement, which was followed within a reasonable time by actual residence, and both improved and cultivated the tract. The testimony is conflicting as to which was the first settler, but that is immaterial so far as it affects the right of Sears and Mrs. Elliott. Conceding that George O. Elliott was the first settler, he alone could defeat the entry of Sears, who was at least the next settler in point of time, and who has in good faith complied with the law as to residence and cultivation of the tract, and has continuously resided on the land with his wife and children since February, 1894.

Your decision is reversed, and the homestead entry of Sears will remain intact.

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CONTEST—CHARGE—STRANGER TO THE RECORD.

ENGBARD *v.* RUNGE ET AL.

After the local officers have accepted an affidavit of contest, and issued notice thereon that has been duly served on the defendant, the contest should not be dismissed on the motion of a stranger to the record alleging that said affidavit fails to set forth a cause of action.

A hearing should not be had under a second contest, charging collusion between the parties to the prior suit, until final disposition of such suit.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 25, 1899.* (C. J. W.)

On April 14, 1893, Theodore A. Runge made homestead entry for the SW.  $\frac{1}{4}$  of Sec. 13, T. 105 N., R. 69 W., Chamberlain, South Dakota.

On May 31, 1898, John Engbard filed his affidavit of contest, as follows:

That the said Theodore A. Runge has wholly abandoned said tract, and changed his residence therefrom for more than six months since making said entry, and next prior to the date herein; this said tract is not settled upon and cultivated by said party as required by law.

On the same day, but after Engbard's affidavit was filed, Joseph E. Sailer filed an affidavit, alleging:

That the said Theodore A. Runge has wholly abandoned said tract of land and changed his residence therefrom for more than six months since making said entry; that he abandoned said tract wholly and absolutely more than six months prior to April 14, 1898, and also next prior to the date herein, and that such abandonment and change of residence from said tract commenced more than six months prior to April 14, 1898, and continued to this date; that said tract is not settled upon and cultivated by said party as required by law, nor was it so settled upon and cultivated for the six months next preceding April 14, 1898.

The defendant Runge was personally served with notice of the contest of Engbard on June 20, 1898, which was set for hearing July 20, 1898, at which time Engbard appeared and Runge did not, but the case was continued to July 21st, on account of pressure of other business. On July 21st, Engbard again appeared, but Runge made default. At this time Sailer appeared by his counsel and filed a motion to dismiss Engbard's contest, on the ground that it failed to state a cause of action. Engbard then offered to amend his affidavit as follows:

That the said Theodore A. Runge has abandoned said tract and changed his residence therefrom for more than three years next prior to the date hereof, and that said abandonment has continued down to the date of the making of this affidavit; that the said tract is not settled upon and cultivated by the said party as required by law, and has not been so settled upon nor cultivated during any portion of the period of time hereinbefore set out.

The local officers thereupon held that Engbard's affidavit stated no cause of action and could not be amended, and that the amendment offered by him constituted a new contest, and was therefore junior to that of Sailer, citing as authority for such ruling the case of *Wilson v. Lefreiner*, 24 L. D., 398. From this decision Engbard appealed, and on November 3, 1898, your office affirmed the local office.

Upon substantially the same grounds set out in his appeal from the decision of the local officers, Engbard has appealed from your office decision to the Department.

Whether or not Engbard's first affidavit of contest stated a cause of action is the main issue upon which the whole structure of the case is made to depend. The local officers found that it did not, and your office concurred in that conclusion.

The affidavit was filed on May 31, 1898, and charged that the abandonment occurred more than six months before that date and still continues. This is, in substance, a charge that the entryman abandoned the land as early as November 30, 1897, four months and fourteen days before the expiration of five years from the date of his entry, and that his abandonment was still continuing at the date of the affidavit, one month and sixteen days after the expiration of five years from the date of the entry. The question as to whether or not the entryman could have cured the default charged, commencing as it did in the five year period required for residence and cultivation, and

extending into the period allowed for the submission of final proof, and together constituting abandonment for more than six months, by resuming residence on the land, between the date of the affidavit of contest and the date of service of notice of the contest on him, need not be now considered, since the defendant alone could raise that question and he has not appeared. Nor need it be now determined in what respect the affidavit is defective, further than to hold that there is enough in it to amend by, and the defendant alone could object to its sufficiency and to its amendment. *Hemsworth v. Holland* (8 L. D., 400); *Svenneby v. Broste* (10 L. D., 108). After the local officers had accepted Engbard's affidavit of contest and had issued notice upon it which was served on the defendant, it was error to dismiss it on the motion of a stranger to the record. Sailer had no right to appear, or to make any motion in the case of Engbard *v.* Runge.

It appears from the record that pending Engbard's appeal from the decision dismissing his contest, the local officers permitted Sailer to contest both Engbard and Runge on a charge of speculation and collusion between them, upon which a hearing was had and a decision rendered adverse to Sailer, from which he did not appeal. Your office properly held that it was error upon the part of the local officers to order a hearing upon the charges of Sailer while the contest of Engbard *v.* Runge was pending.

In so far as your office decision applies to the contest of Engbard *v.* Runge, it is reversed. Engbard will be allowed to amend his affidavit without losing his status as the first contestant.

The case is remanded, that a hearing may be had in accordance with the views herein expressed, and Engbard allowed an opportunity to offer proof in support of his charges.

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#### ALASKAN LANDS—SOLDIERS' ADDITIONAL—APPROXIMATION.

##### OPINION.

By means of special survey the acreage which an applicant is entitled to enter in Alaska as a soldiers' additional homestead may be definitely described and separated from the body of the public lands, hence no reason exists why the rule of approximation should be applied in such entries made in said district.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
(W. V. D.) *February 25, 1899.* (E. B., Jr.)

I am in receipt, by reference from the Secretary, "for consideration and opinion upon the question presented by the Commissioner," of a letter dated the 7th instant from the Commissioner of the General Land Office, asking to be instructed whether the rule of approximation in additional homestead entries outside the district of Alaska is to be followed in allowing entries made in Alaska upon soldiers' additional

homestead certificates. The occasion for this inquiry appears to be a letter from Mr. W. Scott Beebe, of this city, in which, after stating that he has "several pieces of soldiers' additional homestead scrip" with which he desires to acquire land in Alaska, he asks:

Can I have a survey made of the land desired, and if in area it amounts to ten acres, can I enter it with a piece of certified scrip calling for 5.15 acres by paying the government price for the excess of 4.75 acres?

The rule of approximation to which the Commissioner refers is a rule of expediency which amounts, in many cases, almost to a rule of necessity in the allowance of soldiers' additional homestead entries for land over which the public surveys have been extended. By the terms of the statute (section 2306, Revised Statutes), the soldiers' additional homestead right is limited to the entry of "so much land as, when added to the quantity previously entered shall not exceed one hundred and sixty acres." When this right of entry is exercised upon surveyed land, as it must be, if exercised at all, outside of Alaska, the land must be taken according to legal subdivisions, which, as it has been found in practice, cannot usually be adjusted to the area previously entered so as to make one hundred and sixty acres in the combined entries. The additional entry must usually be allowed for more or less than the acreage to which the applicant is entitled under the law, or the application be altogether rejected. Hence the rule of approximation, long since established, which allows an applicant to include and pay for the excess above the amount to which he is entitled, provided such excess is not greater than the deficiency would be should a subdivision be excluded (Richard Dotson, 13 L. D., 275).

Section one of the act of May 14, 1898 (30 Stat., 409), among other things, grants the right to enter unsurveyed lands in the district of Alaska under provisions of law relating to the acquisition of title through soldiers' additional homestead rights. Public lands in Alaska are not surveyed and no provision has been made for extending over them the system of public surveys. The conditions there are essentially different, therefore, from those which gave rise to the rule of approximation in soldiers' additional homestead entries, and which still support the rule elsewhere. Land cannot be entered there as an additional homestead, by legal subdivisions, because there are no such subdivisions. It is essential, however, to the allowance of entry that the land shall have been surveyed, and provision is made in the fourth paragraph of circular instructions, issued June 8, 1898, under the said act (27 L. D., 248), for the necessary survey, in the following language:

The act makes no direct provision for the surveying of lands sought to be entered as soldiers' additional homestead claims, and therefore special surveys must be made of such lands in the manner provided for in section 10 of this act, at the expense of the applicant.

By means of the special survey the acreage to which an applicant is entitled under additional homestead right may be definitely described

and separated from the body of the public lands. There does not therefore appear to be any reason, and none is alleged by Mr. Beebe, why the rule of approximation should be applied in additional homestead entries in Alaska under present conditions.

Approved,

E. A. HITCHCOCK,

*Secretary.*

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TOWNSITE—CORPORATE LIMITS—LEGISLATIVE ACTION.

LAWSON ET AL. v. KING.

The inclusion of a part of an Indian reservation, established by treaty, within the corporate limits of a city, under authority of a territorial statute, is beyond the legislative power of the Territory and without effect.

The register of a local land office is not disqualified to act in a case by the fact that he was of counsel in another suit involving the same land.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 28, 1899.* (C. J. W.)

Henry J. King made homestead entry for lots 3 and 4 and the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 10, and lot 1 of Sec. 15, T. 104 N., R. 71 W., at Chamberlain, South Dakota, on September 30, 1897. On April 22, 1898, pursuant to notice, duly published, King submitted commutation proof in support of his entry at the local office, in Chamberlain, under section 2 of the act of June 3, 1896 (29 Stat., 197), at the conclusion of which a protest, in the name of William Lawson and twenty-seven others, claiming the land as a townsite under section 2387 of the Revised Statutes, was filed. The right to cross-examine the claimant and his final proof witnesses was asserted and demanded, and it was asked that a hearing be ordered in the event the proof was not rejected. By permission of the local officers, counsel for protestants cross-examined the claimant and his witnesses, so far as said testimony related to the support of his claim.

The local officers overruled a formal motion made by protestants to reject King's final proof, but allowed a hearing, and set the same for May 18, 1898.

Counsel for protestants having alleged the disqualification of the register to act in the case, and having suggested the appointment of some suitable agent or other officer to act with the receiver should a hearing be had, the proceedings were reported to your office, in order that the question of the alleged disqualification of the register might be passed upon, which appears to have been done by your office on May 4, 1898, of which ruling protestants were duly notified.

On May 3, 1898, protestants filed appeal from all the rulings and orders of the register and receiver in the above entitled proceedings on and prior to April 27, 1898.

On May 18, 1898, that being the day set for the hearing, counsel for protestants presented the local officers with a paper urging that the register was disqualified to pass upon the rights of protestants, and for that and other reasons refused to submit to the jurisdiction of said officers at said hearing. No appearance being made by or on behalf of said protestants for the purposes of the hearing, counsel for claimant moved to dismiss the protest and that the final proof be accepted and entry allowed thereon. The local officers thereupon dismissed the protest, but adjourned the further consideration of the proof, from day to day, until May 20, 1898, pending the filing of a proper non-alienation affidavit by claimant. Said affidavit was furnished by claimant on May 20, 1898, and thereupon cash certificate, No. 392, was issued to him. On the same day the papers and decision of the register and receiver were forwarded to your office, together with a motion by counsel for claimant to dismiss the appeal filed by protestants on May 3, 1898, on the ground that the same was from an interlocutory order.

On September 17, 1898, your office considered the various matters presented by the record, approved the final proof, and affirmed the action of the local officers in dismissing the protest. The case is before the Department on the appeal of protestants from your office decision.

In order that the questions now presented may be better understood, a recital of the main facts which led up to the entry of King becomes necessary.

On April 14, 1890, Henry J. King filed application to make homestead entry for the land involved, and filed therewith an affidavit setting forth that he made settlement on the same immediately after the executive order of February 27, 1885, declaring it open to settlement, and had continued to reside upon and improve said land.

The order referred to was subsequently revoked and held to be void, but King's application for the land was rejected because of the then existing claim of the Chicago, Milwaukee and St. Paul Railway Company, which has since been forfeited. (*King v. Chicago, Milwaukee and St. Paul R'y Co.*, 14 L. D., 167). Although his application was rejected because of the prior right then existing in said railroad company, he maintained his settlement upon the land until, by proclamation of the President, issued December 5, 1894, declaring the rights of the railroad company forfeited (19 L. D., 431), his rights attached. On April 15, 1895, after notice of the restoration of the land to the public domain had been published, he again made application to enter it as a homestead. Other claimants were present and protested against the allowance of the entry, and a hearing was finally ordered for the purpose of settling the rights of the various claimants and, amongst others, the rights of those claiming as townsite settlers.

The townsite claimants were represented in the application by Orcutt, as mayor of Chamberlain, who applied to enter the land for townsite purposes for the use of the occupants.

The decision of the local office was adverse to the townsite claimants, as was that of your office, and your office decision was affirmed by the Department on June 15, 1897 (*City of Chamberlain v. King et al.*, 24 L. D., 526).

The townsite claimants moved for review of said departmental decision, which was denied on September 9, 1897 (*City of Chamberlain v. King et al.*, on review, 25 L. D., 249).

The decision declared against the right to enter the land in controversy for townsite purposes and designated the land which King and Reynolds would each be permitted to enter. King made entry in pursuance of the right thus awarded, and has offered proof and obtained final certificate.

The protest filed at the conclusion of King's final proof is substantially as follows:

That said land was opened to legal settlement and entry on April 15, 1895, on which date it was in the exclusive possession of over one hundred townsite settlers who claimed it under the townsite laws and had thereon improvements to the value of \$10,000.00; that on said April 15, 1895, King was neither a settler upon nor occupant of said land, but resided on private land in the city of Chamberlain; that said land is now, was on April 15, 1895, and has been at all times since March 7, 1885, included within the corporate limits of the city of Chamberlain; that in a recent suit brought by said Eliza Reynolds against said city involving the validity of said act of the territorial legislature, dated March 7, 1885, a state court of general jurisdiction upheld the validity of said act of incorporation, as shown by exhibits filed with the protest; that said King has never used, or attempted to use this land for agricultural purposes, but has used it for trade and business; that if he ever made a legal settlement on any portion of the land, the same was confined to lot 1 of section 15; that excepting the small tract on said lot 1 covered by King's alleged house, all the land in question is now in the exclusive possession of the townsite claimants; that as shown by a plat filed with and made part of the protest, the land is surveyed into blocks and streets, said plat exhibiting the name of the occupants, the number of persons in each family, and value of improvements; that King's said entry was allowed without authority of law and against good morals; that the decision reported in 24 L. D., 526, only determined that the city of Chamberlain could not make entry of this land; that these protestants claim the land under section 2387 of the Revised Statutes, and assert that they have never had their day in court.

The protest was not sworn to by any of the parties, except Lawson, and its terms clearly indicate that it is an attempt to reopen and readjudicate the questions passed upon in the decisions to which reference has been made.

Your office overruled the various contentions presented, all of which rulings, it is alleged in the appeal, were erroneous.

There was an inaccuracy in the departmental decision as to the time when the land in question became subject to settlement, but it is an error of which the homestead applicants only could complain. No application to enter the land in question would have been allowed by the local officers previous to April 15, 1895, but nevertheless the act of March 2, 1889 (25 Stat., 888), had the effect of restoring the land to the public domain upon the issuance of the proclamation of the President

on December 5, 1894, *supra*, declaring the forfeiture of the rights of the railway company therein, and King then being a settler on said land his rights attached *eo instanti*.

It is insisted that the claim of protestants is based upon section 2387 of the Revised Statutes, and that their rights under this section have never been investigated or passed upon. The fact that the proceeding had at the instance of the mayor failed to indicate whether it was the purpose of the townsite claimants to make original townsite entry or an additional entry, is mentioned in the decision therein, but the effect of that decision was to deny the right of the townsite claimants to make either an original or an additional entry, and hence the contention that the rights of protestants under section 2387 have never been considered is incorrect. The protestants secured no rights under section 2387 of the Revised Statutes, for the reason that the rights of King and Reynolds, the homestead claimants, had previously attached.

The effect of the act of the legislature of the Territory of Dakota of March 7, 1885, including the land in controversy within the incorporated limits of the city of Chamberlain, was considered in the decision of June 15, 1897 (24 L. D., 526). At that time the land in controversy was embraced in a reservation created and set apart by article two of the treaty of April 29, 1868 (15 Stat., 635). After designating the lands reserved for the Indians; this article of the treaty proceeds:

be, and the same is, set apart for the absolute and undisturbed use and occupation of the Indians herein named, and for such other friendly tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them; and the United States now solemnly agrees that no persons except those herein designated and authorized so to do, and except such officers, agents and employes of the government as may be authorized to enter upon Indian reservations in discharge of duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article, or in such territory as may be added to this reservation for the use of said Indians.

The act organizing the Territory of Dakota, March 2, 1861 (12 Stat., 239), fixed the general boundaries and authority of the Territory, but excepted from such authority the rights of person and property of Indians so long as they should remain unextinguished by treaty; and section 1851 of the Revised Statutes placed the following limitation upon the legislative authority of the territory: "The legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." This treaty was a law of the United States and it was not competent for the legislature of the territory to adopt any legislation inconsistent therewith. The inclusion of a part of this reservation within the incorporated limits of the city of Chamberlain, and the extension over that part of the reservation of the authority and jurisdiction of said city, was manifestly inconsistent with the absolute and undisturbed use and occupation of the reservation pledged to the Indians by the treaty, and was therefore beyond the legislative power of the territory,

and consequently abortive. The land in controversy was therefore not included within the corporate limits of the city of Chamberlain.

It will be assumed that Congress had the power to dispose of the land in question as it saw proper, after the extinction of the Indian title and the forfeiture of the rights of the Chicago, Milwaukee and St. Paul Railway Company. Under the act of March 2, 1889 (25 Stat., 888), the relinquishment of the Indian title was secured, and that act provides that upon the relinquishment of such title and the forfeiture of the rights of the railway company aforesaid, the title shall revert to the United States and the land be subject to entry under that act. During the life of the claim of the railroad, the use of the land for townsite purposes, directly or indirectly, was prohibited.

Without undertaking to determine to what other forms of entry the land was subject upon its forfeiture, it was certainly subject to homestead entry.

It is therefore held that King is shown to have been the first settler on the land after it became subject to entry on December 5, 1894, at which time none of the protestants were occupying it; that the appeal of protestants from the order for a hearing was unauthorized, that being an interlocutory order and not a final disposition of the case by the local office, and was properly dismissed. The register was not disqualified from acting in the case because of his having been of counsel in another case involving the same land.

There was no error in accepting King's final proof, and your office decision is accordingly affirmed.

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#### HOMESTEAD—TOWNSITE—ALIENATION.

##### LAWSON ET AL. v. REYNOLDS.

A written agreement executed by a homesteader, and operating as a mere lease of a part of the premises, and the grant of an easement, the use of which would tend to improve and increase the value of the land as a homestead, is not an alienation of any part of such land, and no bar to the perfection of the entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *February 28, 1899.* (C. J. W.)

Eliza Reynolds, on October 4, 1897, made homestead entry for lot 9 of Sec. 15, T. 104 N., R. 71 W., which land lies near the city of Chamberlain, in South Dakota, and was covered by a conditional grant of lands for right of way and station purposes to the Chicago, Milwaukee and St. Paul Railway Company, by act of March 2, 1889 (25 Stat., 888); which grant was forfeited by proclamation of the President of December 5, 1894 (19 L. D., 43), and thereupon the land was restored to the public domain and became subject to entry.

The right to make said entry was awarded to said Reynolds by the

decision of the Department of June 15, 1897, in the case of City of Chamberlain *v. King et al.* (24 L. D., 526.) Said decision was an affirmation of your office decision in the same case of March 24, 1896, and was adhered to on motion for review (25 L. D., 249).

On March 10, 1898, Reynolds gave notice of her intention to submit commutation proof in support of her claim under section 2 of the act of June 3, 1896 (29 Stat., 197). Her proof was accordingly submitted, at the close of which a protest was filed against the acceptance of said proof by William Lawson; William Findley, John Elshire, R. J. Clute, and George Seath. The protest is, substantially, as follows:

1. The alleged homestead entry of said Eliza Reynolds was allowed without authority of law, and is absolutely null and void. The said tract of land at the time it became subject to settlement and entry having been (and is still) within the incorporated limits of the city of Chamberlain, and actually settled upon, occupied and used for townsite purposes.

2. Said tract of land is now and at all times has been since the 7th day of March, 1885, within the incorporated limits of the city of Chamberlain and in a certain proceeding instituted by the said Eliza Reynolds against the city of Chamberlain, its mayor and city council, for the express purpose of having said lot 9 on Sec. 15, T. 104, R. 71, declared outside the city limits, it was on demurrer to her said bill duly adjudicated by a court of general jurisdiction that the same was duly and legally within the incorporated limits of the city of Chamberlain, a copy of which demurrer, marked Ex. "A", and a copy of the opinions and judgment of said court marked Exhibit "E" are hereto attached and made part hereof.

3. That said tract of land is now and has been at all times since February 27, 1885, selected, surveyed and platted for townsite purposes into lots (being lots 35 to 41 inclusive of the entire townsite selection), and that said Eliza Reynolds is not now and never has been anything but a townsite settler and occupant, and has not now and never has been in possession or control of any of said land, except lot 40, which she settled upon in 1885, a substantial subdivisional plat of said lot 9 being hereto attached, marked Ex. "C", and made part hereof.

4. That the said entry of Eliza Reynolds was allowed by the Secretary of the Interior under the hallucination that he possessed the judicial power to declare null and void the act of March 7, 1885, of the Legislature of the Territory of Dakota (a power he does not possess) and the mistaken conception that it was the city of Chamberlain attempting to make a townsite entry, and the further supposed fact that there was a tract of land between the original incorporation and the addition that was not included; in all of which propositions of law and fact, upon which her said entry was allowed, there was manifest error and misconception; and his said allowance of her said entry does not become *res judicata*. The act (or section 1) of the original incorporation, marked Ex. "D", and the amendment of March 7, 1885, showing what lauds were included in the incorporation, are hereto attached, marked Ex. "E", and made part hereof.

5. Said Eliza Reynolds did on or about December 5, 1895, enter into an agreement with one of the townsite occupants for the use of lot 41, for the purposes of trade and business, a copy of which agreement is hereto attached, marked Exhibit "F", and made part hereof, and that said premises now contains an electric light plant, run by a water power from an artesian well on the premises, and a large creamery building, all combined representing a value of some \$10,000.00 and said agreement for ninety-nine years and said plant and water power constitute an alienation, and the use of said premises for trade and business, which estops said alleged claimant from making final proof.

6. That said premises were never subject to homestead settlement or entry until

April 15, 1895, and no preference or prior right thereto existed in favor of Eliza Reynolds or any others, and that on said date (April 15, 1895,) and at all times since the same was within the incorporated limits of the city of Chamberlain, and each and every lot thereon was and is in the sole exclusive use, possession and occupation of the respective claimants named on said plat Ex. "C", with improvements, enumerated, as townsite claimants under the townsite laws of the United States, and the only effect of the decision of the Secretary of the Interior was to hold that the townsite claimants should have made application for a townsite entry through the county judge, which was not done and cannot be done by reason of the land being within the incorporated limits of a city, and so adjudicated by the courts of the State.

7. Said premises on April 15, 1895, not being in the exclusive possession of Eliza Reynolds, but being all occupied by and as a townsite, with valuable improvements, her entry was without authority of law and null and void, and under the law and the decisions of the Interior Department and the Supreme Court of the United States, she cannot make thereon a legal homestead entry, cannot make final proof and confiscate the rights and properties of others.

8. The said Eliza Reynolds has never at any time used said premises for anything except as a townsite settler and occupant, never having had the sole and exclusive possession of the same to enable her to cultivate and appropriate the same for agricultural purposes.

9. That at the time said land became subject to settlement and entry, on February 27, 1885, lot 41, now occupied by the Chamberlain Electric Light Plant, and exclusively used for trade and business, was actually settled upon by one Daniel Overacker, and, again, on April 15, 1895, when finally opened to entry, the same was again actually settled and occupied by said Overacker with some ten persons or inhabitants, members of his family, and later the said premises were by said Overacker transferred for the purposes of business to the present occupants, and said lease for ninety-nine years is and constitutes on the part of said Eliza Reynolds a recognition of said townsite occupation, estopping her from making said final proof.

10. Said William Findley has four members in his family; said William Lawson has six members in his family; said John Elshire has eleven members in his family; said R. J. Clute has seven members in his family; said George Seath has six members in his family—representing thirty-four inhabitants having the occupation of said premises, besides the said Eliza Reynolds, and the actual value of their respective improvements is shown on the respective lots on said plat Ex. "C", and said lot 41, occupied for trade and business, is exclusively used for business, and not for residence.

The protestants demanded the right to cross-examine the claimant and her witnesses, and asked that if the proof was not rejected, that a hearing be allowed. The protest was sworn to by Lawson only.

The cross-examination of claimant and her witnesses was allowed and concluded on April 19, 1898. The protestants filed a motion to reject the final proof of claimant, that a hearing be ordered, and the disqualification of the register to act in the case was also alleged.

The local officers overruled the motion to reject the final proof and the suggestion as to the disqualification of the register, but allowed the hearing upon the material allegations of the protest, and set the hearing for May 4, 1898. The protestants excepted to so early a hearing, and on May 3, 1898, appealed from all orders and proceedings of the register and receiver in said case on and prior to April 27, 1898. On May 4, 1898, at the hour set for hearing, the case was called, but protestants did not appear. One hour later, protestants not appearing, a motion to dismiss the protest was renewed by counsel for claimant and allowed; the final

proof of claimant was accepted, and cash certificate and receipt, No. 388, issued in her name. On the same day, the protestants were advised of the action taken.

In the letter of May 4, 1898, transmitting the papers and proceedings to your office, the local officers report as follows:

After a careful consideration of this case with all papers filed therein, we have deemed it proper to submit the full case to your office for consideration, and for your information and our explanation for our acts we would beg to state: first, there is no application to enter this land under any of the townsite laws in this office; second, we consider the most of the allegations in the protest are matters which were fully adjudicated by the Honorable Secretary of the Interior as between these parties, and, third, we would state that the disqualifications referred to, of the register of this office, by said attorney for protestants in his motion and pretended appeal, is without foundation in fact, the register having never acted as attorney or counsel for any of the parties mentioned in this case; we are therefore confident that this assertion on the part of the protestants is for the sole purpose of delay.

The pretended appeal mentioned herein has been ignored by us, for the reasons that no decision or final determination of the case had been had, and the order allowing the protestants to put in their testimony is considered by us an interlocutory order, and an appeal will not lie therefrom.

Counsel for claimant filed a motion in your office to dismiss the appeal of protestants, upon the ground that no appeal lay from an interlocutory order.

Your office, on September 17, 1898, granted the motion, affirmed the action of the local officers in dismissing the protest, and approved the final proof. From this decision the protestants have appealed.

Substantially the same questions are presented by the appeal under consideration as have this day been considered and passed upon in the case of *William Lawson et al. v. Henry J. King*, involving part of the same land, and it is deemed unnecessary to discuss here at any length the matters therein considered, but reference is made to the reasons set forth in said decision sustaining King's final proof, in support of the action taken in this case.

The ground of protest, however, presents a question which was not in the case of these parties *v. Henry J. King*, and requires notice. It is therein charged that Reynolds, about December 5, 1895, did enter into an agreement with one of the townsite occupants for the use of a part of the land claimed by her, for trade and business, which estops her from making final proof. The agreement referred to is in writing, and a copy was offered in evidence by protestants and marked "Exhibit 'F'." It is as follows:

STATE OF SOUTH DAKOTA, *Brule County, ss.*

Know all men by these Presents:

We, Eliza Reynolds and W. L. Montgomery have made and entered into the following agreement, and respectively bind ourselves, our heirs, assigns, and successors, to the faithful fulfillment, in spirit and in fact, of the same. This agreement being as follows: The said Eliza Reynolds, for herself, her heirs, and assigns, agrees and binds herself that the said Montgomery, his heirs, assigns, and successors, shall for such time, not exceeding ninety-nine (99) years, as he or they may desire,

have the exclusive right and permission to locate and maintain on the north bank of American Creek, where the same is intersected and crossed by Main St., of the City of Chamberlain, and the public road running north out of said city as a continuation of said Main street, and on the east side of said street or road, an artesian well or other necessary power for the required purposes of said Montgomery, his heirs, assigns, or successors, and for his and their electric light and manufacturing plants, upon the following terms and conditions, the said Montgomery: his heirs, assigns and successors for such term as they may desire the use of the site on said American Creek for their artesian well, electric light and manufacturing plant, shall, at his and their cost and expense, lay and maintain a good and sufficient pipe to take and convey water from the artesian well or wells to be sunk by him and them, to my house and premises situated upon the same lot of land (Lot 9 in section 15, township 104 north of range 71), and through the same supply me, the said Reynolds, with all the necessary water required for household, laundry, sewerage, stock, garden and hot house irrigation purposes, and I, the said Reynolds, for myself, my heirs and assigns, obligate myself and them that there shall be no unnecessary use of the water, but that I will use the same as a prudent person would use their own, and the said Montgomery, for himself, his heirs, assigns and successors, agrees and binds himself and them that he will and they shall in good faith carry out their part of this agreement, and that no unnecessary structures or nuisances shall be placed upon said premises, and that the plants placed thereon shall be kept and maintained in a business like manner.

It is further agreed and stipulated that whenever said Montgomery, his heirs, assigns and successors, discontinue the use of the well or wells on said premises, they shall belong to the premises, and that the other improvements placed upon the premises shall belong to said Montgomery, his heirs, successors or assigns, and they shall have permission to remove the same.

To witness which the said Eliza Reynolds and the said W. L. Montgomery have hereunto set their respective hands on this the 5th day of December, A. D. 1895.

The facts pertinent to this agreement, as reported by your office, are as follows:

It appears that under this agreement Montgomery dug an artesian well, 8 inch bore and 600 to 700 feet deep, at the designated point on said lot; that Mrs. Reynolds' house and premises have been supplied through pipes with water from said well since its construction; that prior to that time she had to purchase by the barrel all water used by her for general domestic purposes, and that her garden is dependent upon artificial irrigation; that the power supplied by said well is used to run a water wheel and electric dynamo from which wires extend and connect with the electric lighting system of Chamberlain; that said wheel and dynamo were placed in house which, on April 15, 1895, was occupied by one Overacker and family; that another building was erected near by for the purposes of a creamery and was so used for a time, but that Mrs. Reynolds objected to such enterprise as encroaching upon her rights and forbade the digging of another well for use in connection therewith; that the power of said artesian well is also employed to run a small buzz saw. The improvements made on lot 9 by Montgomery are all confined to a small area designated on protestants' plat (Exhibit "C") as lot 41.

In the light of the facts disclosed, the instrument is not an alienation of any part of the land, but a mere lease of a portion of the premises and the grant of an easement, the use of which would tend to improve and increase the value of the land as a homestead. No consideration having been received by Reynolds for the easement, except that she is to have water conveyed without charge to her house and upon her premises for domestic use and irrigating purposes, the arrangement is

not inconsistent with good faith upon her part and is no bar to the consummation of her entry.

The order of the local officers for a hearing was an interlocutory order, from which no appeal lay. There was no abuse of discretion in setting an early day for the hearing, and your office properly dismissed the appeal. The protestants having failed to appear at the hearing, there was no error in dismissing the protest. The final proof appearing to be sufficient, it was not error to approve it.

Your office decision is accordingly affirmed.

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HOMESTEAD CONTEST—SALE OF LAND—DURESS.

BARRY *v.* HENDRICKS.

A charge that an entryman has sold the land embraced within his entry must fail if it appears that the alleged sale was the result of coercion or duress.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 2, 1899.* (G. C. R.)

Elisha B. Hendricks has appealed from your office decision of February 21, 1898, which holds for cancellation his homestead entry, made January 27, 1893, for the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 17, T. 10 S., R. 2 E., Huntsville land district, Alabama.

Your said office decision reverses the action of the register and receiver, which recommended that the contest be dismissed.

On May 14, 1897, John G. Barry filed his affidavit of contest against the entry, alleging that:

E. B. Hendricks sold the above described lands and the improvements thereon to M. E. Hendricks for the sum of two hundred and fifty dollars, on or about the day of November, 1896, and said M. E. Hendricks paid him said amount, and the said E. B. Hendricks agreed to abandon possession of the same and turn over to the said M. E. Hendricks, and did so abandon, turn over and deliver the possession of the said lands to the said M. E. Hendricks; and at the same time he agreed to turn over to her the certificate of entry, and further agreed at the same time to sign his name on the back of said certificate of entry, which was to be done in the presence of two witnesses, who were to witness his signature; and the said E. B. Hendricks was to have [give] authority to have written above his signature on said certificate a transfer to the said M. E. Hendricks, or a relinquishment of the same to the United States government, whichever she desired, and that he afterwards signed his name on the back of said certificate in the presence of M. L. Ward and Lon Shelton. On the same day the said E. B. Hendricks delivered to the said M. E. Hendricks the said certificate, with his name written thereon and the name of the above witnesses as subscribing witnesses thereto.

The appeal alleges error, in substance, as follows:

1. That it was error to find that the entryman sold the land.
2. That there was any consideration for the alleged sale.
3. That there was no duress.

The M. E. Hendricks, to whom it is alleged the entryman actually sold the land, is the entryman's wife.

The principal facts as shown by the record are as follows:

The entryman, Elisha B. Hendricks, was sixty years old at date of hearing (July 5, 1897). He and his family had lived upon the land about four years, and had made substantial improvements, and cultivated a part of the land each year. The entryman had been married to his second wife about twenty-six years, when, about October 31, 1896, he was charged with a serious and revolting crime, and was arrested and put under bond for his appearance, etc. The nature of the charge was such that, if true, he was liable to a sentence in the penitentiary for a term not less than one nor more than seven years, also to pay a penalty of more than \$500. On being arrested, his wife refused longer to live with him, and demanded a division of property, which the entryman agreed to. It appears by the terms of the agreement that their outstanding debts were first to be paid and the residue equally divided between them. In pursuance of this agreement, a part of the property was divided, mutual friends assisting in the division. The entryman sold the cotton raised on the land and discharged the debts, and took away with him a part of his household goods.

It is insisted that when the agreement was made to divide the property, the entryman sold to his wife the land covered by his entry. Mrs. Hendricks, who is an aunt of contestant, John G. Barry, testified that she bought from her husband the land in controversy and gave him \$220.00 for it; that the sale was made at the time the property was divided; that in February, 1897, she sold her interest in the land to Barry, the contestant, the latter giving therefor his note for \$150; that her husband delivered to her his "certificate of entry" (receiver's receipt), upon which he had written his name; that when he delivered to her the receiver's receipt he told her she "could put anything else on it that would enable me (her) to get the land."

Willy C. Jones, a brother of Mrs. Hendricks, testified that he was present at the division of property and sale of the land, and that Mrs. Hendricks "bought an improvement from her husband;" that "she gave \$250 for the homestead and the improvements, and paid for it with means she (had) at the time she married;" that

the agreement between them was that Elisha B. Hendricks was to sign his name on the back of the certificate of entry, and she was authorized to write or have written whatever might be required to make it a legal transfer above his name.

Mrs. Hendricks testified that her husband got a wagon and a yoke of oxen, which came to her from her father's estate, valued at \$100. It would appear that the alleged consideration for the land was that sum of money, with interest for about twenty-six years.

On cross-examination, Mrs. Hendricks states that she agreed that her husband might use the wagon and oxen, and that she "kept no account against him," and that the alleged indebtedness from her husband to her had never been mentioned between them from the time they were married (twenty-six years before) till they made the agreement to divide their property (November, 1896).

The written evidence, principally relied upon to establish the alleged sale of the land, is the receiver's receipt, on the back of which the entryman wrote his name; above his signature M. L. Ward, attorney for Barry, the contestant, wrote the following:

I, Elisha B. Hendricks, hereby relinquish back to the U. S. all the right, title and interest that I have under and by virtue of within certificaté.

Mr. Hendricks swears that he gave no authority to Ward or any one else to write a relinquishment on his receipt, but says:

I signed it to make satisfaction until I could get the property that belonged to me—to make satisfaction with my wife who was troubling me.

He also says:

I did not receive one cent for signing my name.

It is evident that Mrs. Hendricks, who was a strong witness against her husband, and apparently much interested in Barry's behalf, was not satisfied with the promise made by her husband with respect to the land when he signed his name to the receiver's receipt. About a month after that date and before she sold her alleged claim to Barry, she went to her husband (after their separation) and requested him to sign a relinquishment to the land; this her husband refused to do unless she paid him \$100. She declined to pay him. Mr. Hendricks testifies to the same fact, and also swears that he made an additional offer to relinquish the entry if Mrs. Hendricks would abide by the contract with reference to the payment of the outstanding debts, etc.; that she declined to do so.

When (about November 1, 1896,) Hendricks moved out of the house in which he and his wife formerly lived, he took a part of his goods—table, trunk, bed, etc.—and put them in another house on the land, and when not occupying the house he kept his door locked. He took his meals with near by neighbors, but slept on the land—at least, part of the time.

Barry, the contestant, on the order of Mrs. Hendricks tore down that house, and scattered the goods; for this act Barry was arrested and convicted. After that time Hendricks occasionally slept in a crib on the land. In the season of 1897, he cultivated six or eight acres of the land, and rented to one Doyle about the same quantity. Hendricks frequently ordered Barry off the place, but the latter appears to have remained and cultivated a part of the land.

As shown in the contest affidavit, the principal allegation is, that the entryman sold the land and delivered to his transferee possession, etc.

The proof does not sustain the charge that the entryman ever abandoned his claim to the land; on the contrary, it shows that he endeavored in good faith to occupy and improve it from the date of the alleged abandonment, November, 1896, to the date of contest and hearing.

The sole question to be determined is, whether the entryman violated the law by an attempted sale of the land, and, if so, whether such attempted sale was the result of duress.

If, as claimed by appellee, Hendricks voluntarily relinquished his entry to the United States, that relinquishment, when filed, would have released the land from the entry, and Mrs. Hendricks, if a deserted wife and the head of a family, and otherwise qualified, or Barry, if qualified, might have made entry of the land. But Hendricks utterly repudiated the so-called relinquishment, and the fact that Barry did not file the relinquishment, which was made to appear regular in form by Ward's endorsement of the formal part above Hendrick's name, indicates that Barry was not certain that Hendricks intended to relinquish the entry by merely signing his name on the back of the receiver's receipt. The relinquishment, even though in proper form, and the voluntary act of the entryman, was of no effect, because it was not filed. Even if it be admitted that when Hendrick's signed his name to the receiver's receipt, he also attempted to sell the land to his wife, it is apparent that he made the contract because he feared the threatened prosecution, and that by making the agreement, he would induce his wife to relent.

Duress is not limited in its meaning to a threatened danger to life or body. Even threats of lawful prosecution for the purpose of overcoming the will through intimidation will avoid a contract thereby obtained.

From the above considerations, it is seen:

1. That the so-called relinquishment was of no effect, because not filed.
2. That even if Hendricks attempted to sell the land to his wife, he continued to claim and assert dominion over it, repudiating the alleged contract.
3. That his attempted sale of the land was the result of coercion or duress.

For these reasons, his entry will remain intact and the contest will be dismissed.

The decision appealed from is reversed.

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REPAYMENT—OFFERED TIMBER LAND—SET OFF.

MARY A. PHINNEY ET AL.

A purchaser erroneously allowed to buy "offered" timber land takes nothing thereby; and if he cuts timber from such land is liable in damages to the United States in a civil action, to the same extent as though the trespass had been committed upon any other part of the public domain.

While there is no statutory authority by which the Secretary of the Interior may set off a demand of the United States against the claim of an individual, the Department will not certify such a claim to the Treasury Department with knowledge of a probable valid demand of the government against the claimant, without an ascertainment of the existence and extent of such demand.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 3, 1899. (G. B. G.)

December 24, 1896, Mary Phinney and Francis J. Burns, as the duly appointed administrators of the estate and guardian of the minor

children of James F. Phinney, deceased, respectively, joined in the execution of a power of attorney making Harvey Spaulding and sons their attorneys to collect and receive from the government the purchase money, fees and commissions, amounting to three hundred and ten dollars, paid by the said James F. Phinney April 1, 1884, under the timber and stone act, for the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 20 and the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 29, T. 33 N., R. 3 E., Olympia, Washington. January 29, 1897, said attorneys filed in your office a proper application for the repayment of said money, which was rejected. Appeal here.

James F. Phinney died June 22, 1891, and your office canceled his entry for said land, March 6, 1895, "because the land included therein was offered land and hence not subject to entry under the act of June 3, 1878." This entry being of offered lands was erroneously allowed, and its confirmation was not authorized by law, since the timber and stone act of June 3, 1878 (20 Stat., 89), only authorized entries of unoffered lands. The cancellation thereof was therefore proper action.

Section 2 of the act of June 16, 1880 (21 Stat., 287), provides that, where from any cause an entry under the desert land laws

has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

Your office denied said application for the following reasons:

Special Agent C. E. Loomis was directed to make an inspection of this tract and report the condition of the timber thereon. On August 12, 1892, the special agent reported that Phinney had cut and removed about a million feet of timber from this land in 1884 and 1885. The fees and purchase money paid by Phinney on this entry amount to \$310. This amount is deemed a partial set-off for the timber trespass committed by Phinney on this land.

This decision is complained of by the appellants, in substance, that it was error to hold that a trespass was committed by Phinney, though the truth of the statements made in said agent's report be conceded; error to hold that there is any evidence showing or tending to show that Phinney cut or removed a million feet of timber, or any portion of such timber, from this land, and error

in holding that where it is plain an entry is erroneously allowed and cannot be confirmed, and the entry is canceled for that reason, that the government can, on a one-sided, partial and unsubstantiated report of a special agent, without notice to the applicant, that at some time there has or may have been a cutting of the timber on the tract involved, avoid the repayment of the purchase money, as provided for in the act of June 16, 1880.

If the entryman or any one for him cut or removed timber from this land, he was, while living, and his estate is liable in trespass therefor. The officers of the Land Department, acting as the agents of the government under special powers, exceeded their authority in making

the sale of this land under the timber and stone act, and the purchaser took nothing by his purchase. He was therefore liable in damages and his estate is now liable in damages to the United States, to the same extent as though the trespass had been committed on any other of the public lands of the United States. He was not liable to a criminal prosecution, because he was acting in good faith, believing that the timber belonged to him, but this is not a valid defence to a civil action.

This being so, if the fact of the trespass and damages were shown or conceded, it would be the duty of this Department to take into consideration that fact in adjusting the claim. No statutory authority is found which authorizes the Secretary of the Interior to set-off a demand of the United States against the claim of an individual, but the act of March 3, 1875 (18 Stat., 481), makes it the duty of the Secretary of the Treasury, in all cases where a

claim duly allowed by legal authority (shall be presented to him for payment) and the plaintiff or claimant therein shall be indebted to the United States in any manner . . . to withhold payment of an amount of such judgment or claim equal to the debt thus due to the United States.

For this Department to certify the claim of an individual to the Treasury Department for payment, with knowledge of a probable valid demand of the government against the claimant, without a disclosure of the existence and extent of such demand, might defeat the purposes of the statute just quoted.

In the absence of an ascertainment of the extent of this trespass and of the amount of the claim of the government arising therefrom further consideration will not be given to the pending claim for repayment.

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OKLAHOMA LANDS—ADDITIONAL ENTRY—ACT OF FEBRUARY 10, 1894.

SMITH *v.* KUYKENDALL.

The privilege of making an additional homestead entry under the act of February 10, 1894, of lands on the south side of the Deep Fork river, as against adverse claimants, rests upon the priority of the initiation of the claim to such lands, and not upon the priority of settlement on the land north of said stream.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 3, 1899. (J. L. McC.)

James P. Smith, on August 26, 1894, made homestead entry, No. 12,397, for lots 16 and 17 of Sec. 28, T. 14 N., R. 1 E., Guthrie land district, O. T., containing 38.20 acres.

Said land lies immediately upon the north side of the Deep Fork of the Canadian river.

On May 23, 1895, the land on the south side of said Deep Fork—being within the limits of the former Kickapoo Indian reservation—was

opened to settlement and entry by presidential proclamation of May 18, 1895 (29 Stat., 868).

On May 23, 1895, James M. Kuykendall made homestead entry, No. 12,589, for lots 15 and 18, and the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of said Sec. 28, containing 115.30 acres.

On the same date, but later in the day, said James P. Smith filed what he termed an application to amend, but what in reality was an application to make an additional homestead entry, of said land last described, under the act of February 10, 1894 (28 Stat., 37), granting to homestead settlers on the left bank of the Deep Fork river in the former Iowa reservation, who had entered less than one hundred and sixty acres, the right to enter other lands adjoining, so that the full amount of one hundred and sixty acres could be secured.

The local officers rejected Smith's application; but inasmuch as he alleged prior settlement they ordered a hearing.

Subsequently the local officers, on Kuykendall's motion, revoked the order for a hearing, on the ground that Smith's entry No. 12,397 (for the land on the north side of the Deep Fork) was made after February 10, 1894, and that therefore he did not come within the terms of the act of that date.

Smith appealed to your office; which, on June 12, 1897, sustained the action of the local officers—citing the departmental instructions of May 18, 1895 (20 L. D., 470).

Smith has appealed from the decision of your office to the Department. He alleges that he settled on the land embraced in his entry No. 12,397 (north of the Deep Fork), on January 29, 1894, prior to the passage of the act of February 10, 1894, and that he used due diligence to make homestead entry for said land until August 28, 1894, at which time he was residing on said land; that he was prevented from entering the same by reason of the United States failing to have a proper plat and record of the same in the United States land office in Guthrie; also by reason of the government officials accepting other entries for said land that were illegal at their inception; that appellant's former application (presented and rejected January 9, 1894,) was equivalent to entry, and especially so since his entry was afterward properly allowed.

The department circular of May 18, 1893 (20 L. D., 470), bearing upon the matter here under consideration, says:

It must be remembered that, while the parties coming under the provisions of the said act of February 10, 1894, are permitted the privilege of making an additional entry, based on the original entry theretofore made by them, there is no provision permitting the reservation of any particular tracts for their benefit; and therefore their claim to any lands under said statute will rest upon a priority of initiation, as in other cases.

In view of the above instructions, it must be held, (1) that the portion of the SW.  $\frac{1}{4}$  of Sec. 28 lying south of the Deep Fork was not

reserved for the benefit of Smith, after it was opened to settlement—May 23, 1895; (2) that (even if it were to be conceded that he was not excluded from the benefits of the act of February 10, 1894, because of his not having made entry of the land on the north side of the Deep Fork prior to that date), his claim to the land on the south side of the stream must rest upon priority of initiation of right to *that* land—not upon priority of settlement on the land north of the Deep Fork; and he does not show settlement on the land south of the Deep Fork prior to Kuykendall's entry thereof.

This renders it unnecessary to discuss the several questions raised by the appellant.

The decision of your office is correct, and is hereby affirmed.

OKLAHOMA LANDS—CHEROKEE OUTLET—HUNDRED FOOT STRIP.

Fritch v. COLLINS.

In determining the location of the hundred foot strip opened to occupancy "immediately within the outer boundaries" of the Cherokee Outlet, where a meandered river forms a boundary thereof, the strip should be measured from the meander line of said stream.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 3, 1899.* (G. R. O.)

William H. Fritch has appealed to this Department from your office decision of May 7, 1897, wherein you dismiss his contest against Wesley Collins' homestead entry No. 1579, made October 5, 1893, for the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and Lots 3, 4 and 5 of Sec. 21, and Lot 1 of Sec. 20, in T. 18 N., R. 6 E., Perry, Oklahoma, land district.

The said land is within the territory opened to settlement on September 16, 1893, by the President's proclamation of August 19, 1893 (28 Stat., 1222). Affidavit of contest was filed by Fritch on April 2, 1894, and an amended affidavit was filed on October 1, 1895. These alleged, in substance, that Collins had entered into the said territory prior to twelve o'clock, noon, of September 16, 1893, and subsequent to the 19th day of August, 1893; that he had failed to establish his residence upon the land with his family as required by law, and that he held said entry for sale and speculation. Hearing was had, and on September 15, 1896, the local officers rendered a decision in which they found that Collins had complied with the requirements of the law as to residence and that he did not enter the land for speculative purposes. They held further, however, that he was disqualified from making the entry by having entered the territory during the prohibited period, and they recommended the cancellation of his entry. On appeal your office approved their findings as to Collins having resided upon the

land and having made entry in good faith, but you reversed their decision as to his disqualification, and dismissed the contest.

The allegations of the contestant that Collins had failed to establish his residence upon the land, and that he had made the entry for speculative purposes are clearly not sustained by the evidence, and the findings of the local officers and of your office on these points are correct. The question as to Collins' disqualification remains, however, to be considered.

There is no dispute as to the material facts in the case. The land in controversy borders on the Cimarron river, which forms a part of the southern boundary of the territory opened to settlement. On September 16, 1893, Collins crossed the river in the forenoon to the north bank where he remained until the hour of opening, at a point about ten feet from the water's edge. Indeed he waited at this point until about fifteen minutes after the others had started in the race and then blazed three trees and cut some brush upon the track which bordered the river at that point. The land which he thus selected was in section 17, but by mistake in making his entry on October 5, 1893, he described the land in controversy in his application papers. Soon afterwards he learned that the land in section 17, on which he had settled, was covered by an Indian allotment, and he then, about October 15, 1893, settled upon the land which was described in his entry papers.

The proclamation opening the territory to settlement provided that "a strip of land one hundred feet in width, around and immediately within the outer boundaries of the entire tract of country to be opened to settlement" should be temporarily set apart and opened to occupancy, in advance of the time of opening, by persons intending to settle in the territory. Collins assumed that this one hundred foot strip would be measured from the water's edge. The local officers held that it should be measured from the centre of the stream and therefore found that Collins, at the time of the opening, was within the prohibited territory. Your office, however, concurred in the view taken by Collins, and ruled that the one hundred feet should have been measured from the meandered line of the river. According to your view Collins was not beyond the boundaries of the one hundred-foot strip prior to the appointed time.

The Department is of the opinion that your ruling is the correct one. The one hundred-foot strip was provided for in order that those persons who came to the territory prior to the time of opening intending to settle therein, might have a place within which to camp while waiting, where they would be secure from interference from those who owned the lands immediately adjoining the territory to be opened. It was certainly not intended that the bed of a flowing river should be used for such a purpose. The strip was to be within the boundaries of the country "opened to settlement." The surveys here went to the north bank of the river, and its meanders, as shown on the township

plats, form the boundary of the lands opened to settlement. The one hundred-foot strip lay immediately within this meandered line, and Collins' presence within the territory, but within this one hundred foot strip, prior to the hour of opening, was not in violation of law. Your office decision is affirmed.

OKLAHOMA LANDS—DISQUALIFICATION OF SETTLER—RESIDENCE.

DEVER ET AL. *v.* AYARS.

In a hearing directed to determine superiority of right as between adverse applicants, where no entry has been allowed, the burden of proof can not be said to rest upon either of the applicants.

Where a party of intending settlers in Oklahoma select as their starting point in the race a stream that constitutes a boundary of the territory, and, finding the bed of said stream affords a doubtful crossing place, procure its improvement prior to the hour of opening, such act will not be held to disqualify a member of said party as a settler.

Advantage gained by presence within the territory prior to the passage of the act opening it to settlement, does not disqualify a settler.

Priority of settlement will not avail an applicant as against adverse claimants if he fails to maintain a *bona fide* residence on the land.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 6, 1899.* (H. G.)

The case of Henry J. Dever and others *v.* James T. Ayars, upon the appeal of the latter from the decisions of your office of May 29, and August 11, 1897, affirming the rejection by the local officers of his application to enter the SE.  $\frac{1}{4}$  of Sec. 1, T. 13 N., R. 3 E., Oklahoma land district, Oklahoma Territory, has been considered.

The record shows that said tract is part of the Kickapoo lands, opened to settlement and entry at twelve o'clock noon of May 23, 1895 (27 Stat., 557); that James T. Ayars filed his homestead application for said tract May 24, 1895; that it was rejected by the local officers on the ground of "soonerism," and that from said rejection Ayars appealed to your office; that on May 25, 1895, Henry J. Dever presented his homestead application for said tract, which was suspended by the local officers pending action on Ayars' rejected application, and on the same day Dever filed a protest in the nature of a contest against the allowance of the entry of Ayars, wherein Dever alleged prior settlement on the tract in controversy; that May Neil filed an application to enter said tract as a homestead May 28, 1895, which was suspended pending action upon the applications of Ayars and Dever; and that on June 21, 1895, John B. Harrod filed his homestead application for said tract, which was suspended to await action on the prior applications.

November 2, 1895, your office directed the local officers to order a hearing to determine the rights of the several claimants to said tract, and a hearing was ordered for January 20, 1896. After two continu-

ances, Dever and Ayars appeared on May 25, 1896, the day finally set for a hearing. Harrod and Neil made default. The local officers decided in favor of Dever, holding that he was the prior settler and that Ayars' excuse for failure to reside upon the land with his family was not sufficient.

Upon appeal, your office affirmed the decision of the local office, upon the ground that, although a clear preponderance of the evidence established the fact that Ayars was the prior settler, he was disqualified from entering lands in the Kickapoo country because of his presence therein during the prohibited period. Ayars appeals.

The priority of settlement between Ayars and Dever is involved in some doubt. A hearing having been ordered prior to entry, and the application of the parties having been suspended in the meantime, the burden of proof can not be said to rest upon either of the parties whose claims are under consideration. Ayars had nearly half a mile less distance to traverse to reach the tract from his starting point than Dever, but the latter had a better road, unimpeded by steep banks and hills that were climbed by Ayars, and Dever rode a swift horse. Neither of the parties attempts to give the time of his arrival on the tract, although it appears that Ayars had a watch. However, the evidence fairly considered establishes the fact that Ayars was first to reach the land and plant his stake. This fact is proven by eye witnesses, who state positively that Ayars was the first to reach the tract, while Dever's witnesses do not clearly state that he was the first to arrive.

Ayars and a few others selected for their starting point a bend in the Deep Fork of the Canadian River, northeast of the tract in question and but about half a mile from it. Ascertaining that the bed of the stream was very muddy, and that it would be difficult and dangerous to their horses to attempt to cross it at a rapid gait, one Martin was employed to construct a passageway of logs and brush, covered with dirt, on which to cross the stream, and he constructed the same before the hour of opening. This laborer was paid about a dollar for his services, but it appears that Ayars, who collected the money for that purpose, did not contribute any of it himself. The local office held that these acts were not sufficient to disqualify Ayars, and this conclusion must be adopted. It is not quite clear that the trail across this creek, which was the boundary of the lands opened to settlement, was impassable without this improvement, but even if it were, the filling of this miry place would not constitute an unlawful or premature entry. No advantage appears to have been gained by Ayars over any of his party or of those who crossed this stream or creek bed in the vicinity, and the advantage gained over others who passed into the Kickapoo country at the hour of opening at other points on the boundary not made by the stream, is too much a matter of conjecture to be seriously considered. It can not be held, for this reason, that Ayars was disqualified to make entry.

He was in the country previous to the opening day, before the tract was opened to settlement, owing to the report that the country had been opened to settlement, but he does not appear to have been in the vicinity of the tract except in the early part of 1893, before the passage of the act in relation to such lands. One witness "thinks" that this was in April of the year mentioned, after the passage of the act opening the lands to settlement, but Ayars swears positively that it was prior to the passage of the act, and in this he is corroborated by the witness in an affidavit correcting his testimony at the hearing. Without considering this affidavit, it must be held that the survey of the tract by Ayars took place before the passage of the act in question.

The tract is familiarly known as the "mound" claim, owing to the presence of a mound east of its center. Ayars, from his visit in 1893 to the tract, must have known the location of its corners and of this mound, and it was well known by the members of his party that he intended to make the run for that claim on the opening day.

There is no doubt of his advantage over others in this respect, as he evidently intended to stake, and did stake, in the vicinity of the northeast corner of the tract; but this disadvantage would not appear to disqualify him.

It appears, however, that Ayars was employed as a pharmacist in a drug store at Chandler, Oklahoma, about six miles from the tract involved, after the opening day, and received a salary of forty dollars per month for his services. He states that this employment took about three-fourths of his time, and that he spent the other portion of his time upon the claim, frequently driving out at night and returning in the early morning, and remaining there on Sunday. His wife, who had been an invalid for many years, spent most of her time at the hotel at Chandler kept by her parents, which had been managed by Ayars before the opening. A portion of the time Ayars hired the work done upon the tract, but he performed some of the labors upon the tract in gathering crops, husking corn, and in other labors, such as covering the walls of his dwelling with canvass.

It is quite clear from the record that his presence upon the tract has been the exception, and not the rule, and that his professional duties at Chandler have kept him, and will continue to keep him, away from the tract for a large portion of the time. His excuse is, that he could, with greater advantage, hire the work done upon the tract by others and devote his small salary to the improvement of his claim and the maintenance of his family, than if he should reside continuously thereon.

His frequent visits to the tract have not been a sufficient compliance with the law. It is not even asserted by him that his employment away from the tract has been, or is, temporary. Dever kept a memorandum of the visits of his adversary to the tract, which clearly shows that Ayars made but occasional visits there for the purpose of a technical compliance with the law; and this showing is not contradicted.

It is true that most of Ayar's household goods were upon the tract, but during his absence he remained at the hotel kept by his wife's parents, where he had a bedroom set, purchased after the opening, and it is quite clear from the record that his wife and himself have actually resided away from the tract most of the time since his settlement. His unmarried children have been absent from the tract for the necessary purpose of attending school. A fair consideration of the testimony upon the matter of his residence, discloses that he did not make his home upon the tract to the exclusion of one elsewhere, and that his employment as a pharmacist at Chandler was not of a temporary nature or one caused by poverty or by anything more than a desire to more profitably employ his time than at agricultural labor.

Dever has been absent from the claim one hundred and one days, attending to a crop elsewhere, which had apparently been planted before his settlement. At no time has he been absent for a longer consecutive period than one month, and his temporary absences were necessary and excusable.

It follows that the findings of fact of the local office, as to the priority of settlement in favor of Dever, can not be sustained by the evidence, but that their finding adverse to the disqualification of Ayars, and as to the insufficiency of his residence upon the tract, must be sustained.

Your office found that Ayars was disqualified, owing to the building of the causeway or passage across the bed of the stream on the border of the Kickapoo country, which Ayars crossed on the opening day; but this finding, as has been stated, is not concurred in, although the holding that Ayars was the prior settler is sustained.

For the foregoing reasons, the decision of your office in favor of Dever is affirmed, upon the ground of the failure of Ayars to maintain his residence upon the tract from the time of his settlement until the time of the hearing, in the face of the adverse claim of Dever.

Henry J. Dever will be permitted to make entry of the tract involved in this controversy.

#### ARID LAND ACT—MINING CLAIM—WITHDRAWAL.

##### COLOMOKAS GOLD MINING COMPANY.

A mineral entry based on a location made after the withdrawal of the land for a reservoir site, under the act of October 2, 1888, confers no right; but such entry may be suspended, and if it subsequently appears that the land is not required for reservoir purposes, the entry may then pass to patent.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 6, 1899.* (C. W. P.)

On June 1, 1895, the Prairie Dog lode claim, on June 4, 1895, the Old Maid lode claim, and on June 10, 1895, the Buffalo lode claim were

located on the SW.  $\frac{1}{4}$  of Sec. 25, and the SE.  $\frac{1}{4}$  of Sec. 26, T. 15 S., R. 69 W., Pueblo land district, Colorado, and on January 8, 1897, the Colomokas Gold Mining Company made application for patent for the land, under the mining laws of the United States, alleging that it had become the owner, and was in the actual, quiet and undisturbed possession of said claims.

After due publication, proof and payment, final certificate was issued to said company on April 22, 1897.

On March 6, 1890, the Director of the Geological Survey recommended that certain lands in the Pueblo land district be selected as a reservoir site, on Beaver creek, known as No. 13. The SW.  $\frac{1}{4}$  of Sec. 25 and the SE.  $\frac{1}{4}$  of Sec. 26, T. 15 S., R. 69 W., are included in the lands recommended for such purpose. This proposed selection was under the act of October 2, 1888 (25 Stat., 526). On March 20, 1890, your office informed the local officers at Pueblo that said lands had been reserved for that purpose by Secretary's order of March 10, 1890, and directed them to allow no further entries or filings on the lands designated in said list and embraced within their district. On August 18, 1894, the Secretary, in a letter to your office, after stating that the Director of the Geological Survey had reported that in the near future site No. 13 and other sites

will be needed for the storage of waters for public purposes, and that while some of the lands covered by the sites will have to be acquired by condemnation, or other means, before the remaining lands can be used for reservoir purposes, yet, he thinks, it would be wise policy to reserve what is yet undisposed of, as their chief value is for reservoir purposes, and the future necessities must demand their acquirement in maintaining a proper storage of water, if opened to entry under the general land laws,

directed that these lands continue withdrawn from disposition to await further action by Congress in the matter of these reservoir sites.

On July 16, 1897, your office informed the local officers that the mining claims in question were located subsequent to the act of October 2, 1888, and directed them to advise the claimant that its mineral entry, No. 1184, was held for cancellation.

The case is brought to the Department by an appeal from the decision of your office.

The act of Congress of October 2, 1888, reserved from sale, as the property of the United States, all such lands as should thereafter be designated or selected for reservoirs, canals, ditches, etc., for irrigating purposes, until further provided by law.

The act of Congress of August 30, 1890 (26 Stat., 391), repealed so much of the act of October 2, 1888, as provided for the withdrawal of the public lands from entry, occupation, and settlement,

except that reservoir sites *heretofore* located or selected shall remain segregated and reserved from entry and 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 location or selection thereof.

The seventeenth section of the act of March 3, 1891 (26 Stat., 1095), provided that reservoir sites located

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 land occupied by actual settlers at the date of the location of said reservoirs.

The selection in this case having been made in conformity with the acts of Congress, and the mineral location made after the selection of the reservoir site, the claimant acquired no rights under its mineral entry (John U. Gabathuler, 15 L. D., 418), but following the rule announced in Mary E. Bisbing's case, 13 L. D., 45, and followed in the subsequent case of Newton F. Austin, 18 L. D., 4, there appears to be no reason why this entry may not be suspended to await the further action of the proper authorities, in the matter of the actual location of the reservoir, when, if it shall appear that the land is not required for that purpose, the entry may be completed.

Your office decision is modified accordingly.

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MINERAL LAND—MINING CLAIM—CERTIFICATE OF LOCATION.

MAGRUDER *v.* OREGON AND CALIFORNIA R. R. Co.

A certificate of the location of a mining claim is not in itself evidence of the mineral character of the land, and therefore would not be sufficient to overcome an agricultural return by the surveyor general.

The cases of Sweeney *v.* Northern Pacific R. R. Co., 20 L. D., 394; Northern Pacific R. R. Co. *v.* Marshall *et al.*, 17 L. D., 545; and Walker *v.* Southern Pacific R. R. Co., 24 L. D., 172, overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 6, 1899.* (C. W. P.)

Sixty acres embraced in lots 5 and 6 of Sec. 11, T. 36 S., R. 3 W., Roseburg land district, Oregon, are the lands involved in this case.

The tracts are within the primary limits of the grant made to the Oregon and California Railroad Company, by the act of July 25, 1866 (14 Stat., 239), of "every alternate section of public land, not mineral," etc.

December 24, 1896, upon the protest of C. Magruder, alleging that these tracts are mineral land and therefore excepted from the grant, your office ordered a hearing to determine their character.

The hearing took place on February 26, 1897, and March 29, 1897, the register and receiver rendered their decision, in which they hold that the tracts embraced in the mining locations of J. W. Hays, C. Magruder, and H. H. Magruder, for sixty acres in lots 5 and 6, Sec. 11, T. 36 S., R. 3 West, are more valuable for mining than for agricultural purposes, and that the same do not pass to the railroad company under its grant.

From that finding an appeal was taken by the company to your office, which on July 2, 1897, rendered a decision holding that the land is mineral, and that the company's claim thereto should be rejected.

The company has appealed to the Department.

The record shows that the land was returned by the surveyor general as agricultural, and was therefore *prima facie* subject to the operation of said grant.

The evidence for the protestant shows that in December 1894, J. W. Hays, C. Magruder, the protestant, and his brother, H. H. Magruder, filed placer mining locations of twenty acres each, embracing portions of said lots 5 and 6, that these locations are now claimed by Hays, the Magruders and Beeman, who are the owners of some patented lands in in Sec. 10, adjoining the lands in question; that they own valuable water rights, consisting of one ditch, three miles and a half long, and another, one mile in length, a reservoir, 1100 feet of pipe, etc.; that mining is now being carried on night and day on the tract in Sec. 10, that no work is being done at present on the tracts in Sec. 11, but that they are trying to get on to these tracts; that a portion of the main ditch crosses a corner of lot 6, Sec. 11, and that the tracts in Sec. 11 can be mined by the ditches which they have constructed in Sec. 10; that two tests made in the winter of 1896 on lots 5 and 6, Sec. 11, averaged from twenty-seven to thirty-five cents per square yard.

J. W. Hays stated, in his testimony, that over \$2,000 in gold had been taken from lots 5 and 6, Sec. 11, during the two years preceding the hearing, by different parties, working by license, and that he had received a percentage of what they took out of the mine.

J. H. Beeman, who said he was twenty-nine years of age, and his occupation mining and milling, testified that he had prospected the ground in question, and that the result of his investigation had led him to invest \$2,000 in the purchase of a one-half interest in said lots 5 and 6, Sec. 11; that he had general supervision of the work being done on the adjoining land in Sec. 10; that he was working with the "Giant," which is in operation day and night; that it has been the custom of their company to permit miners to work on the land in controversy whenever the water could be spared from their ditch, and that he has got as high as forty to fifty cents to the pan of dirt from the ground; that he was confident that the ground can be mined at a profit, "especially so, since our (their) company own and control all the water rights, and that the ditch is already constructed;" that it was his "experience in conducting the mine, that some work is conducted at a loss, but after this dead work is done, we strike ground that pays for all the dead work and leaves a profit."

The railroad company introduced four witnesses, but only one of them claimed acquaintance with the land.

Charles De France was the first witness for the company, and said he was a lumberman, and resided in Portland, Oregon; that on the

day preceding the hearing he had "made considerable examination of lots 5 and 6, Sec. 11," and made a partial examination of lot 5 in Sec. 10 adjoining the lots in question, and found mining operations in progress in lot 5, Sec. 10; that the work was being done at right angles with the river and not towards lot 5, Sec. 11; that it looked as if the work on that lot had been abandoned for some time. He said he had some dirt and gravel from the entrance to an abandoned tunnel in lot 5, Sec. 11, panned out, and out of about twenty pans of dirt he got one color of gold about the size of a point of a pin; that the same conditions existed as to lot 6, Sec. 11; that he saw nothing on either lot 5 or lot 6 that looked like bed rock; that, in his opinion, the land was more valuable for agriculture than for mining purposes, and that it was valuable for raising fruit; that it would cost from three to four times as much to work the ground over as could be got out of it.

The next witness examined, D. M. Watson, said he kept a restaurant in Portland, Oregon; that in November, 1894, he examined lots 5 and 6, Sec. 11, and noticed that there had been considerable mining done in lot 6, but that it had evidently been abandoned for at least five years; that he and his associates filed mineral locations on lots 5 and 6, Sec. 11, with a view of ascertaining whether it would be profitable to work a mine there, and they found that sixty per cent of it is as suitable for farming purposes as several other tracts which are now in cultivation in the same township; and that, after having one hundred and twenty-five feet of drifting and tunneling done, digging several holes, and panning dirt that came from several other holes that were dug on the land, panning in gulches and exposed banks, he was willing to swear that, outside of a narrow strip along the river, it is not what should be termed as mining land, and that he did not believe that there is a single yard of gravel or earth inside of the meander lines of lots 5 and 6, Sec. 11, that would bear ten cents in gold; that judging from the prospecting and exposures on the lots, the amount of earth removed from them by mining will not exceed one acre, the same being removed from the gulches passing through the land; and that all the prospecting and mining done have not developed any bed rock, except the rim or foot of the mountains on the north side of the lots, leaving the bulk of them without bed rock above the surface of the water. He further said that he was claiming the land as transferee of the Oregon and California Railroad Company, having purchased it from the company as agricultural land for two dollars and fifty cents per acre.

N. E. Brett said he resided in Newburg, Oregon; that he examined lots 5 and 6, Sec. 11, in November, 1896, for the purpose of determining their character, as to whether they are more valuable for mineral or agricultural purposes, and to ascertain the amount of mining work that had been done on them, and whether they were being worked and occupied as mining ground; that he found they had been worked out, and the land abandoned; that the land was more valuable for agricultural than for mining purposes.

C. L. Carr, who was the last witness examined for the company, said he was a special agent of the general land office; that he had been over lots 5 and 6, Sec. 11, and other lands in their vicinity, and that he considered lots 5 and 6 of such a character as are classed as agricultural; that this visit was made on February 18, 1897.

The local officers and your office, concurring in opinion that railroad company did not show the non-mineral character of the land, held it to be mineral. This conclusion was based upon the theory that a certificate of the location of a mining claim upon land returned as agricultural is sufficient evidence that the land is mineral in character to cast the burden of proving the contrary upon one who asserts its agricultural character, as held in the case of *Sweeney v. Northern Pacific R. R. Co.* (20 L. D. 394); *Northern Pacific R. R. Co. v. Marshall et al.* (17 L. D., 545), and *Walker v. Southern Pacific R. R. Co.* (24 L. D., 172). But the theory announced in these cases can not be sustained, and they are to that extent overruled.

The return of the surveyor general, in connection with the survey of public land to the effect that the land is mineral or non-mineral, is sufficient evidence of its character to cast the burden of proving the contrary upon one who alleges that the land is of a different character; but the opportunities and qualifications of surveyors for determining the mineral or non-mineral character of land are so uncertain that this presumption is only a slight one and may be readily overcome by evidence of a higher character. *Aspen Consolidated Mining Co. v. Williams* (27 L. D., 1); *Winscott v. Northern Pacific R. R. Co.* (17 L. D., 274, 276); *Barden v. Northern Pacific R. R. Co.* (154 U. S., 288, 320); *Lindley on Mines*, Secs. 106, 689. This land having been returned as agricultural, it was necessary for the protestants to show the existence of mineral in sufficient quantities to make the land more valuable for mining than for agricultural purposes; or, as was held in the case of *Castle v. Womble* (19 L. D. 455), it was incumbent upon them to show such a mineral discovery as would warrant a person of ordinary prudence in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. A certificate of the location of a mining claim is not in itself evidence of the mineral character of the land, and therefore would not be sufficient to overcome an agricultural return by the surveyor general. Such a certificate is nothing more than a notice or statement of the location of a mining claim, the recording of which is intended to impart constructive notice of the claim, its locality and extent. *Lindley on Mines*, Sec. 379. This notice or certificate is not made necessary by the laws of Congress but may be exacted by local laws or customs, *Lindley on Mines*, Secs. 273, 328, 389; and when so exacted

it is *prima facie* evidence only of such facts as are required by law to be stated therein, provided they are sufficiently stated. A record of a certificate of a location which recites the citizenship of locators, the fact of discovery, and the fact that the location had been marked upon the ground so that the boundaries could be readily

traced, is not evidence of any of these facts in any of the States or Territories, for the simple reason, that no such facts are required to be stated in any of the statutory notices. Lindley on Mines, Sec. 392.

A legal mining location must, under Sec. 2320 of the Revised Statutes, be predicated upon an actual discovery of mineral, and hence a mere location certificate, which—even where exacted by local laws or customs—is only one of the steps required to give effect to such location, is not evidence of such discovery. *Etling et al. v. Potter* (17 L. D., 424); *Strepey et al. v. Stark et al.* (7 Colo., 614).

The hearing in this case in the local office was conducted, up to the time of the decision by the register and receiver, as if the burden of proof was upon the protestants, and therefore what was said by the local officers and your office respecting the burden of proof was without injury to the railroad company if under the evidence produced the protestants have sustained the burden of proof cast upon them by the rule here announced. This it is believed they have done; their evidence preponderates over that of the railroad company and shows that the land in question reasonably promises, with further development, to become a paying mine.

The conclusion reached by your office is therefore correct, and to that extent the decision appealed from is affirmed.

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MINING CLAIM—ALIEN—ACT OF MARCH 2, 1897.

OPINION.

The act of March 2, 1897, in defining and regulating the rights of aliens to acquire real estate in the Territories has reference only to lands the title to which has passed from the United States, and become the subject of private ownership, and does not confer upon aliens the privilege of occupying or purchasing mining claims from the government under the mining laws.

Any restriction placed by section 2, act of March 3, 1887, upon the acquisition of public lands by a corporation in which a part of the stock is owned by persons, corporations, or associations, not citizens of the United States, was removed by the act of March 2, 1897, so that now a corporation organized under the laws of the United States, or any State or Territory thereof, may occupy and purchase mining claims from the government, irrespective of the ownership of stock therein by persons, corporations, or associations, not citizens of the United States.

Under the mining laws as at present existing in the United States, and the Dominion of Canada, the provisions of section 13, act of May 14, 1898, according certain privileges in Alaska to citizens of the Dominion, are inoperative.

*Secretary Hitchcock to the Secretary of State, March 9, 1899.*

(W. V. D.)

(G. B. G.)

At your direction the Third Assistant Secretary of State, in a letter of January 24, 1899, requests an official interpretation of that clause in section two of the act of March 2, 1897 (29 Stat., 518), entitled "An

act to better define and regulate the rights of aliens to hold and own real estate in the territories," which reads as follows:

This act shall not be construed to prevent any persons not citizens of the United States from acquiring or holding . . . any mine or mining claim in any of the territories of the United States.

The language of the clause shows that it was merely intended to place a precautionary limitation upon the general restrictions of that act and not to affirmatively authorize the doing of something for which there was no authority outside of that act.

Section 2319 of the Revised Statutes, under which rights in and title to mineral lands may be acquired from the United States, is as follows:

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

This section forms a part of the mining laws of the United States, is applicable alike to all public mineral lands, whether situate in a Territory or in a State, and restricts the privilege of occupying and purchasing mining claims under such mining laws to "citizens of the United States and those who have declared their intention to become such."

The act of March 2, 1897, *supra*, is applicable only to the territories of the United States, and prescribes when an alien may and when he may not "acquire title to or own any land in any of the territories," and but for the provision of section 7 thereof it might be contended that the act applies to the acquisition of both public and private lands. Section 7 declares

That this act shall not in any manner be construed . . . to authorize aliens to acquire title from the United States to any of the public lands or to in any manner affect or change the laws regulating the disposal of the public lands of the United States.

While there is nothing in the act of 1897 which expressly or necessarily manifests an intention to repeal or alter the pre-existing legislation contained in section 2319 and other portions of the public land laws, the disposition and purpose of Congress to avoid any such consequence or result is clearly disclosed by the language employed in section 7. It seems therefore to follow that the act of 1897, in defining and regulating the rights of aliens to acquire real estate in the territories has reference only to lands the title to which has passed from the United States and become the subject of private ownership, and that it was intended that the privilege of acquiring rights in and to title to public lands should continue to be defined and regulated by the public land laws.

By section 2321 of the Revised Statutes it is shown that the words "citizens of the United States," employed in section 2319, include "a corporation organized under the laws of the United States or of any State or Territory thereof," and thereby the privilege of occupying or purchasing mining claims under the mining laws is extended to such corporations.

By section two of the act of March 3, 1887 (24 Stat., 476), it was provided:

SEC. 2. That no corporation or association more than twenty per centum of the stock of which is or may be owned by any person or persons, corporation or corporations, association or associations, not citizens of the United States, shall hereafter acquire or hold or own any real estate hereafter acquired in any of the Territories of the United States.

This act seems to have been amended and re-enacted by the act of 1897, which omits, and thereby repeals, section two just quoted, so, any restriction which that section placed upon the acquisition of public lands by a corporation a part of the stock of which is owned by persons, corporations or associations not citizens of the United States, was removed by the act of 1897, and now a corporation organized under the laws of the United States or of any State or Territory thereof may, under sections 2319 and 2321 of the Revised Statutes, occupy and purchase mining claims from the government, irrespective of the ownership of stock therein by persons, corporations or associations not citizens of the United States.

The clause first above quoted from section two of the act of 1897, to which specific reference is made in the request for this opinion, does not confer upon aliens the privilege of occupying or purchasing mining claims from the government under the mining laws.

Since the inquiry, in response to which this opinion is given, grows out of a report from the United States consul at Victoria, British Columbia, respecting the enactment by the provincial legislative assembly of an act limiting the privilege of placer mining to British subjects and joint stock companies or corporations incorporated under the laws of that province, your attention is called to section 13 of the act of May 14, 1898 (30 Stat., 409, 415), which provides:

SEC. 13. That native-born citizens of the Dominion of Canada shall be accorded in said district of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said district of Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect.

The rights and privileges accorded by this section to citizens of the Dominion of Canada are confined to the district of Alaska and do not extend to any other Territory or to any State of the United States. It has been found impracticable thus far to promulgate or enforce any

rules or regulations to carry this section into effect, for the reasons stated in the following portion of the regulations adopted June 8, 1898, under the said act of May 14, 1898 (27 L. D., 248, 267):

By the laws of the Dominion of Canada citizens of the United States are, with all other citizens over 18 years of age, permitted to lease mineral lands in British Columbia and the Northwest Territory upon the payment of a certain royalty to the general government, but the laws of that Dominion do not authorize the purchase of mineral lands in British Columbia or the Northwest Territory.

The existing laws of the United States do not make any provision for the leasing of mineral lands in Alaska either to citizens of the United States or to others, but they do provide for and authorize the purchase of such lands in Alaska by our own citizens.

Since this section accords to native-born citizens of Canada "the same mining rights and privileges" accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada, and since under the laws of the Dominion of Canada the only mining rights and privileges accorded to citizens of the United States are those of leasing mineral lands upon the payment of a stated royalty, and since the laws of the United States do not accord to its own citizens the right or privilege of leasing mineral lands in Alaska, and since this section also provides that "no greater rights shall be thus accorded" to citizens of the Dominion of Canada "than citizens of the United States or persons who have declared their intention to become such may enjoy in such District of Alaska," it results that for the time being this section is inoperative.

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#### HOMESTEAD—ABANDONMENT.

##### THOMAS *v.* GREGG.

A charge of abandonment will not be sustained, where it appears that the entryman duly established his residence on the land, and that during his absence his family remained thereon.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 9, 1899.* (F. C. D.)

On April 28, 1893, Mack Gregg made homestead entry for the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 1, T. 14 N., R. 5 E., Guthrie, Oklahoma, land district; and on December 2, 1895, William Thomas filed an affidavit of contest against said entry, alleging abandonment; also, an affidavit showing that Gregg was a fugitive from justice, and was not in Oklahoma.

Notice thereupon issued and service was made by publication. Hearing was had January 16, 1896, at which Thomas appeared and submitted testimony in behalf of his contest. Gregg was held in default.

The local officers, on November 18, 1896, rendered a decision in favor of Thomas; which decision your office, under the second exception to Rule 48 of Practice, reversed.

Thomas has now appealed to this Department.

On February 27, 1896, Martha J. Gregg filed corroborated affidavit alleging, substantially, that she is the widowed mother of the said

Mack Gregg; that the said Gregg is her eldest son and only support; that he was single and they have always had their home in common; that she and her minor son, aged sixteen years, have resided on said land with her son Mack Gregg continuously since November 1, 1892; that this land is the only home she and her family possess, and the only home they have ever claimed since Gregg made said entry; that there are thirty-five acres in cultivation and fifty fruit trees on the land; that she has personally expended the sum of about six hundred dollars to improve said land since the making of said entry; that on the 25th day of April, 1895, Mack Gregg was indicted by the grand jury of Lincoln county, Oklahoma Territory, in the district court of said county and territory for burglary; that he was arrested by the officers and committed to the county jail in default of bail, to await his trial at the November, 1895, term of said court, but during his incarceration, escaped from said jail and is now a fugitive from justice; and that she does not know the whereabouts of the said Gregg. She asked that the case be reopened in order that she might be allowed to submit proof in support of her said allegations.

The local officers denied the said application.

It is not denied or disputed by Thomas that Gregg duly established his residence on said land and maintained his residence thereon and cultivated the land until within a year from date of trial; and continuous absence on the part of Gregg from said land is only shown for a period of about eight months previous to trial, during which period it appears from the evidence, the mother of the entryman remained there and cultivated the land; therefore, Gregg having established his residence on said land in good faith, and his family, consisting of his mother and minor brother, being and remaining on the land during his said absence, a charge of abandonment will not be sustained.

The decision of your office is accordingly affirmed and the contest dismissed.

Mrs. Gregg, in her answer to Thomas' appeal to this Department, alleges—

That she is informed, states and so believes, that the said Mack Gregg died at Blackwell, in the Territory of Oklahoma, on the 4th day of December, 1896; that at the time of his death the said Mack Gregg was a single and unmarried man and left no widow or minor children surviving him; that she the said Martha J. Gregg is the mother of the said Mack Gregg, deceased, and his only heir.

Therefore, and inasmuch as more than five years have elapsed since the date of Gregg's entry, Mrs. Gregg may be allowed to duly submit satisfactory proof of the death of the entryman, and of compliance with the homestead law.

## OMAHA LANDS—FORFEITURE—ALIENATION.

## CLAYTON P. WILMOT ET AL.

Although a purchaser of Omaha lands under the act of August 7, 1882, may be in default, he is not divested of his right of purchase until a forfeiture of such right has been declared by the Secretary of the Interior.

There is no statutory inhibition against the sale and transfer of the right of purchase accorded by said act.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 9, 1899. (E. F. B.)

The Department is in receipt of your letter of January 7, 1899, with accompanying papers, relative to the status of the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , Sec. 25, T. 24 N., R. 7 E., O'Neill, Nebraska, in which you recommend that the right of purchase of said tract under the declaratory statement of Clayton P. Wilmot, made March 21, 1887, at Neligh, Nebraska, be declared forfeited, and that said land be offered for sale under the third section of the act of May 15, 1888 (25 Stat., 130).

This tract is part of the Omaha Indian lands subject to disposal under the act of August 7, 1882 (22 Stat., 341), which provided for the opening of said lands to settlement by proclamation and for the purchase thereof, at the appraised value, at any time within one year after the date of said proclamation, by *bona fide* settlers occupying any portion of said lands and who have made valuable improvements thereon. The terms of payment were to be, one-third in one year from date of entry, one-third in two years, and one-third in three years, from said date, with interest at the rate of five per cent per annum, and in case of default in either of said payments the person thus defaulting for a period of sixty days to forfeit absolutely his right to the tract purchased and to any payments he may have made.

Clayton P. Wilmot filed declaratory statement for said tract March 21, 1887, together with the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section 25, and lot 5 of section 36, same township and range, under the act of August 7, 1882, *supra*, and submitted final proof thereon September 17, 1887, which was rejected by the local officers because of insufficient residence through the months of June, July, August, and up to September 17; but he was allowed to make supplemental proof at any time showing continuous residence for six months. From this action no appeal was taken.

The third section of the act of May 15, 1888 (25 Stat., 150), extending the time of payment for said lands, provided as follows:

The Secretary of the Interior is hereby directed to declare forfeited all lands sold under said act upon which the purchaser shall be in default, under existing law, for sixty days after the passage of this act, in payment of any part of the purchase-money, or in the payment of any interest on such purchase-money for the period of two years previous to the expiration of said sixty days. The Secretary of the Interior shall thereupon without delay cause all such land, together with all tracts of

land embraced in said act not heretofore sold, to be sold by public auction, after due notice, to the highest bidder over and above the original appraisal thereof, upon the terms of payment authorized in said act. And the proceeds of all such sales shall be covered into the Treasury, to be disposed of for the sole use of said Omaha tribe of Indians, in such manner as shall be hereafter determined by law.

Pursuant to instructions, the register at Neligh, Nebraska, June 12, 1889, transmitted a list of said Omaha lands, upon which no proof had been made under said act of August 7, 1882, in which was included all the lands embraced in the declaratory statement of Wilmot except the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , the land now in question, which was probably inadvertently omitted.

This list was submitted for consideration to the Secretary of the Interior, who, on August 31, 1889 (9 L. D., 326), declared a forfeiture of all the lands embraced in said list and directed that they be advertised and sold in compliance with the terms of the statute. Your office thereupon canceled the filings covering the lands embraced in said lists and said lands were sold at public outcry as provided by the statute.

At the sale Clayton P. Wilmot became the purchaser of the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section 25, and lot 5 of said section 36, being the only lands embraced in his declaratory statement which had been declared forfeited; and as to these lands the payments demanded have been made and the law has otherwise been complied with.

By letter of July 25, 1898, the local officers reported that their records showed that Wilmot's declaratory statement was canceled October 9, 1889, as to the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 25, and lot 5, Sec. 36; but nothing is said in regard to the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section 25. It appears that the local office considered that the action of your office cancelling the filing of Wilmot had reference solely to the tracts embraced in the lists reported to the Secretary, which had been declared forfeited, and they accepted from Wilmot, in December, 1891, the interest on the purchase price of the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  from March, 1888, to August 2, 1891, based upon his original declaratory statement, and the interest on the purchase price of said tract has since been regularly paid.

October 27, 1898, you informed the local officers that while the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  was not described in the list, it was no doubt intended that it should be, and as the declaratory statement had been canceled, and there was no proof to support the filing, the payment for the tract was erroneously accepted. The local officers were therefore directed to advise Wilmot, or any other known party in interest, that he would be allowed sixty days from notice to make any showing he might desire, at the end of which time the matter would be submitted to the Department for appropriate action.

In response to this notice a letter was filed by F. B. Barber, transferee, stating that he purchased from Wilmot the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of

said section 25, and lot 5 of section 36, and at the same time he also purchased from Wilmot the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , which was included in the deed with the other lots; that he made application to the local officers at Neligh, Nebraska, to have said tract "annexed to the land sold to Wilmot at auction," and they informed him that he could have the land by paying accrued interest from the date of the public sale on the appraised valuation of the land, which was twelve dollars per acre. He stated that he had paid the back interest and has paid the interest regularly since.

Upon said showing you held that the filing covering the said SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  had been canceled by your office, and there being no proof of settlement on said tract, you recommend that the right of purchase be declared forfeited and that said tract be offered for sale under the third section of the act of May 15, 1888.

The failure of the local officers to embrace this tract in the list submitted to the Secretary of the Interior was evidently through inadvertence, because, if Wilmot's right of purchase was subject to forfeiture as to any part of the land embraced in his filing, it was subject to forfeiture as to all. But as the list of lands submitted to the Secretary, which he declared forfeited, did not embrace this tract, his action was effective only as to the lands described in the list, and there was no authority in your office to cancel any filing except as to the lands which the Secretary had declared forfeited and directed to be re-offered for sale in the manner provided by the act.

Although a purchaser under the act of August 7, 1882, may be in default, he is not divested of his right of purchase until a forfeiture of such right has been declared by the Secretary (Edward Uhlig, 12 L. D., 111). In this case the records of the local office showed that the filing of Wilmot remained intact as to the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , and he was therefore allowed to pay interest upon the purchase price, based on his original declaratory statement.

The act of August 19, 1890 (26 Stat., 329), extended the time of payment to the purchasers of said lands and provided that no forfeiture shall be deemed to have been incurred on account of the failure to make the payments due July 1, 1890, under the act of August 7, 1882, and the acts amendatory thereof.

The act of August 11, 1894 (28 Stat., 276), further extended the time by making the first payment due December 1, 1897, and the second and third payments in one and two years thereafter, respectively. This act, as well as the act of August 19, 1890, provided that the interest that had been paid on said lands should be distributed to the members of the Omaha tribe of Indians in Nebraska *pro rata*, and all interest thereafter coming in shall be annually distributed in like manner.

In view of the fact that the filing of Wilmot as to the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said section 25 has not been canceled, and no forfeiture has been declared as to said tract, he may be allowed to complete his pur-

chase under the act of August 11, 1882, if he has complied with the law, which may be determined from the final proof submitted September 17, 1887, which is now with the record in the case.

The mere fact that the local officers rejected said proof and that no appeal was taken therefrom, will not preclude the Department from considering the same, there being no adverse claimant.

The proof submitted by Wilmot shows that he was qualified to purchase said lands and was an actual resident thereon, with his family, on the 15th day of March, 1887, which was maintained continuously to June 15, 1887; when he boarded with his family elsewhere on account of sickness, but that he had no other residence than on said claim, upon which he had put valuable improvements and where he kept his furniture, domestic animals and live stock. The proof shows that he had no personal property except what was on the tract, and that all the land that could be broken was prepared for the cropping of 1888. The proof was rejected by the local officers because he had failed to actually reside on the land with his family from June 15, 1887, to September 15, the date when his final proof was taken.

This proof should not have been rejected. While Wilmot did not actually reside on the land for the three months preceding the submission of his proof, he was at the date of his filing a *bona fide* settler who, with his family, was occupying the tract and had made valuable improvements thereon. The act provided that these lands should be appraised in tracts of forty acres each and sold at the appraised value to *bona fide* settlers occupying the same and having valuable improvements thereon, not exceeding one hundred and sixty acres to be sold to each settler. The proof submitted by Wilmot shows that he was a qualified purchaser under said act.

Subsequent to December, 1890, Wilmot sold the tracts of land purchased by him at the public offering to F. B. Barber, and included in the same deed the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , which had not been so offered and upon which he had paid interest on the purchase price based upon his original filing therefor. Barber has since continued to pay the interest upon the purchase price for said tract. The sale of his right of purchase to Barber was not in violation of law, as there was no inhibition in the act against such sale and transfer.

You will therefore advise the local officers that upon the payment by Barber of all amounts due for said tract, both principal and interest, they will issue final certificate to him accordingly.

## HOMESTEAD CONTEST—DISQUALIFICATION—RELINQUISHMENT.

MARSHALL *v.* MURRISON.

The surveyor general's return, as to the quantity of land in a legal sub-division, is only considered conclusive for the purpose of the disposition thereof as public land.

To establish the allegation that an entryman is disqualified by the ownership in fee simple of one hundred and sixty acres, the proof must show that the entryman owned in full said quantity or more; if the ownership is of a less quantity, however much less that quantity may be, the owner is not disqualified.

A relinquishment cannot be held the result of a contest where it is made and filed without actual knowledge of said contest, and the principal charge therein is not sustained by the evidence submitted.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 9, 1899.* (G. C. R.)

On September 23, 1898, the Department reversed the action of your office and the local office, and held intact the homestead entry made November 21, 1893, by Edward Murrison for the NE.  $\frac{1}{4}$  of Sec. 23, T. 29, R. 3 W., Enid, Oklahoma.

On December 10, 1898, the Department entertained a motion for review, notices whereof have been duly given and arguments of opposing counsel filed.

The record shows that on November 15, 1893, Elisha J. Tibbitts made homestead entry of the land, and on November 21, 1893, Edward Murrison applied to enter it; his application was rejected because of Tibbitts' entry.

On December 14, 1893, Tibbitts made a written relinquishment of his entry on the back of the receiver's receipt, and on the same day acknowledged before a notary public the instrument "to be his voluntary act and deed." On the next day, December 15, 1893, but before Tibbitts' relinquishment was filed in the local land office, Walter S. Marshall filed his homestead application for the land, and also his contest affidavit against Tibbitts' entry, alleging that he (Marshall) was—

The prior *bona fide* settler on the land embraced in said homestead entry and by reason of his priority of settlement made prior to said entry and prior to any settlement made by said entryman, that affiant made settlement on said tract at about 10 o'clock, A. M., on the 6th day of November, 1893, and said entry was made in fraud of affiant's prior settlement rights to said tract. Affiant is a qualified homestead entryman, as shown by his homestead application and affidavits hereto attached and made a part of this affidavit. Said affiant further alleges that at the date of settlement there was no one residing there except said Elisha J. Tibbitts, who lived there without his wife; that affiant began improving said land on the 8th (of) Nov. 1893—then began on the 14th building a house eight by sixteen feet—frame. Affiant further says that said defendant, as he is informed and believes, is not a qualified entryman for the reason that affiant is informed and believes that said defendant was at the date of settlement and entry by said defendant the owner of one hundred and sixty acres in fee simple, etc.

Three days after said contest affidavit was filed, and on December 18, 1893, Tibbitts' relinquishment (above referred to) was filed, and on the same day Edward Murrison made homestead entry of the land.

On August 16, 1894, or eight months after Marshall filed his contest affidavit, hearing was ordered. The trial was set for October 5th of that year; Tibbitts made default, but Murrison appeared and asked to be allowed to intervene. His motion was denied. Marshall introduced testimony under his contest, and Murrison was notified to appear at the local office on October 15, 1894, and show cause why his entry should not be canceled. Under that order considerable testimony was taken, resulting in the decisions to which reference is above given.

The motion herein alleges error, substantially, as follows:

1. In not finding that Tibbitts' relinquishment was the result of Marshall's contest.

2. In not finding that Tibbitts was disqualified from making said entry because he was at the time the owner of one hundred and sixty acres of land in the State of Kansas.

3. Error not to find that the tract books of your office show that the lands in the State of Kansas, described in copies of deeds introduced in evidence as owned by Tibbitts, embrace one hundred and sixty acres—the exact area of the two as shown by the plat being 160.269 acres.

4. Error not to find that Tibbitts having filed his relinquishment pending Marshall's contest, said relinquishment inured to the benefit of contestant.

5. Error not to find that Murrison was not a *bona fide* settler on the land prior to Marshall.

6. Error not to find that Marshall's contest, filed December 15, 1893, was notice to both Murrison and Tibbitts.

The first and principal question raised by this motion is, whether the Department erred in holding that Marshall failed to sustain his allegation that Tibbitts was disqualified when he made entry of the land.

In Marshall's contest against Tibbitts—the latter defaulting—there were introduced certified copies of two deeds. The certificates were made by the register of deeds for Geary county, Kansas, and were dated August 31, 1894, thirty-five days before the hearing.

The copies so certified show that, on November 8, 1880, William L. Girard and wife, for the consideration of \$1200, conveyed to Elisha J. Tibbitts the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 14, T. 12 S., R. 4 E., Kansas (erroneously noted in movant's brief as the S.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of said section), "containing eighty acres, more or less," subject to a certain mortgage of \$500; also that on November 29, 1882, Jane Thomas, a widow, &c., for the consideration of \$1000, conveyed to Elisha J. Tibbitts the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 12, T. 12 S., R. 4 E., Kansas, "containing eighty acres," and subject to a mortgage of \$100.

It appears that the lands above described were in the name of Elisha J. Tibbitts, on November 15, 1893 (the date of his entry).

Marshall testified that he wrote to the register of deeds of Geary county, Kansas, and learned that Tibbitts "owned one hundred and sixty acres of land."

Movant admits that the above testimony "was substantially the record" upon the close of the testimony of *Marshall v. Tibbitts*.

In response to the order of the register to show cause, etc., Murrison appeared at the local office, October 15, 1894, and moved for a continuance. The affidavit in support of that motion cannot be found among the files of the case; it was evidently, however, based upon the absence of certain witnesses, for Marshall in resisting the motion admitted that the absent witnesses would if present "testify to the facts set out and contained in said affidavit," and the trial proceeded.

The record shows that Marshall admitted that H. H. Mead would, if personally present, testify as follows:

I am the county surveyor of Geary county; the government plats and field notes in my office show that E. J. Tibbitts' land in this county contains 157.74 acres and no more.

Marshall further admitted that, if George Gross were personally present he would testify as follows:

I am recorder of deeds of Geary Co., Kansas; the records in my office show that the N.  $\frac{1}{2}$  SW.  $\frac{1}{4}$  of Sec. 12, Tp. 12 S., R. 4 E., and the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$  of Sec. 14, Tp. 12, R. 4 E., is the only land in this county in the name of E. J. Tibbitts.

In admitting that the absent witnesses would, if present, testify to the statements above set out, Marshall did not admit the truth of those statements; but the statements must be received with like force and effect as if the witnesses had been present and so testified. Movant insists that the testimony of the absent witnesses so offered does not show that Tibbitts was not the owner of one hundred and sixty acres at date of his entry (November 15, 1893); that the statements in the affidavit related to the date of hearing, and not the date of entry; hence, did not disprove the showing made in the certified copies of the deeds. As before seen, the affidavit for continuance is not among the files, and its date cannot therefore be given.

If the alleged facts to which the absent witnesses would testify did not meet the averments in the contest affidavit, or the proof offered in support of them, by reason of the fact that the deeds showed Tibbitts' ownership of one hundred and sixty acres of land at date of entry, and the absent witnesses would only swear to Tibbitts' ownership of a less quantity of land at a later date, that fact should have been pointed out at the time the affidavit for continuance was offered, and objections made to the motion on that account. The fact that such objection was not made, and that the motion was denied, shows that the parties all

understood that the time referred to in the affidavit was the date of Tibbitts' entry.

Movant calls attention to the plat books and the tract books of your office, and insists that those records show that the lands above described as being conveyed to Tibbitts contain more than one hundred and sixty acres of land, and that the Department should test "the accuracy of the recitals" in the deeds to Tibbitts by those books.

The land conveyed to Tibbitts had long prior to that conveyance been patented by the government and had become private property. It may be admitted that the government plat books show that the designated subdivisions of the Kansas lands as originally patented contain one hundred and sixty acres. The plat books, which are made out from the field books, show the boundaries and contents of the land. Under section 2396 of the Revised Statutes, each section or subdivision of section the contents whereof have been returned by the surveyor general "shall be held and considered as containing the exact quantity expressed in such return." The surveyor general's return, as to the quantity of land in a legal sub-division, is only considered conclusive for the purposes of the disposition thereof as public land (*Mason v. Cromwell*, 26 L. D., 369). It results that the plat books referred to by the movant as showing the quantity of land held by Tibbitts, are not conclusive evidence in this case of the quantity of such lands at the date of Tibbitts's entry.

Eliminating all considerations of the affidavit for continuance, and the plat books of your office, and leaving the case alone upon the evidence of the deeds showing Tibbitts' ownership of the Kansas lands, the proof is not sufficient.

It will be noticed that the deed from Girard and wife to Tibbitts conveyed "eighty acres more or less"—how much more or how much less does not appear. The deed to Tibbitts from Mrs. Thomas calls for eighty acres. So there is no positive proof that Tibbitts was at date of entry "seized in fee simple of one hundred and sixty acres of land."

As said in the decision under review, the alleged disqualification must be shown by "definite, positive proof." To establish the disqualification charged, the proof must show that the entryman owned in full one hundred and sixty acres of land, or more; if the ownership is of a less quantity, however much less the quantity may be, the owner is not on that account disqualified. *Mason v. Cromwell*, on review, 26 L. D., 169.

The proof offered does not affirmatively show the disqualification alleged.

As above seen, Tibbitts actually executed his relinquishment before Marshall filed his contest affidavit. The relinquishment appears to have been given to Murrison in pursuance of a previous promise on Tibbitts' part, who had been threatened with a contest. While the relinquishment was filed three days after Marshall filed his contest,

yet it is clear that neither Murrison nor Tibbitts had actual knowledge of the contest when the relinquishment was made and acknowledged, or when the same was filed and Murrison's entry allowed. But Tibbitts' relinquishment was evidently the result of his fears that some one would contest his entry; several had threatened to file such a contest alleging his disqualifications, and among them was Marshall. It is above shown that Marshall failed to sustain his charge. Counsel for movant insists that the filing of the relinquishment was an admission of record "of the truth of Marshall's charge that he, Tibbitts, was the owner of 160 acres of land," &c., and cites the case of *Osborne v. Crow*, 11 L. D., 210, which says:

The rule that a relinquishment filed pending a contest is presumed to be the result of the contest is founded upon the theory that the entryman by filing the relinquishment has admitted the truth of the charge, but when the charge is not sustained no such presumption can attach. It has therefore been held that while a relinquishment filed pending a contest is presumed to be the result of the contest, such presumption is not conclusive, and upon proof that the relinquishment was not the result of the contest, the contestant must depend upon his ability to sustain the charge. *Mitchell v. Robinson* (3 L. D., 546); *McClellan v. Biggerstaff* (7 L. D., 442).

It is above shown that neither Tibbitts nor Murrison had actual knowledge of the contest filed by Marshall; and since the principal charge made in the contest affidavit, i. e., Tibbitts' disqualifications, was not sustained by the proofs offered, it cannot be presumed that the relinquishment was the result of the contest.

Finally, the proof wholly fails to show that Marshall settled on the land in advance of Murrison. The latter first slept on the land November 4, 1893, eleven days before Tibbitts made entry. Murrison was therefore a settler on the land when the same was public land, and continued to occupy and improve it. It is true that he occupied the house built by Tibbitts, but it was apparently not with the latter's consent. To prevent a contest, Tibbitts promised Murrison that he would relinquish the entry, and did so in less than a month after his entry was allowed. If Marshall ever settled on the land, he lost his settlement rights by abandonment, for he had not established his residence on the land at date of hearing—eight months after his alleged settlement.

Upon due consideration of all that is said in support of the motion for review, no sufficient grounds appear for disturbing the decision complained of.

The motion is therefore denied.

## SURVEY—SMALL HOLDING—COMMON BOUNDARY.

JOHN H. WALKER.

In the survey of a small holding claim that has a boundary line in common with an adjacent claim, for which mileage has been charged and allowed, the surveyor is only entitled to compensation for such common boundary line when it is actually run the second time, and such action appears from the record to have been necessary.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 9, 1899.* (E. F. B.)

The Department has considered the appeal of John H. Walker, deputy surveyor, from the decision of your office of November 29, 1898, requiring a re-statement of his account for surveys of "small holding claims" in the Territory of New Mexico under contract No. 298.

This contract was awarded for the survey of possessory claims arising under the sixteenth section of the act of March 3, 1891 (26 Stat., 854), as amended by the act of February 21, 1893 (27 Stat., 470), which provides:

That in township surveys hereafter to be made in the Territories of New Mexico, Arizona, and Utah, and in the States of Colorado, Nevada, and Wyoming if it shall be made to appear to the satisfaction of the deputy surveyor making such survey that any person has, through himself, his ancestors, grantors, or their lawful successors in title or possession, been in the continuous adverse actual *bona fide* possession, *residing thereon as his home*, [the words underscored being stricken out of the original act by the amendatory act of February 21, 1893], of any tract of land or in connection therewith of other lands, all together not exceeding one hundred and sixty acres in such township for twenty years next preceding the time of making such survey, the deputy surveyor shall recognize and establish the lines of such possession and make the subdivision of the adjoining lands in accordance therewith. Such possession shall be accurately defined in the field-notes of the survey and delineated on the township plat, with the boundaries and area of the tract as a separate legal subdivision. The deputy surveyor shall return with his survey the name or names of all persons so found to be in possession, with a proper description of the tract in the possession of each as shown by the survey, and the proofs furnished to him by such possession.

In stating his account for the surveys made under said contract, the deputy surveyor has charged for the entire mileage of each separate claim, although some of said boundary lines are identical and common to adjoining claims, which he asserts is in accordance with the advice contained in the letter from your office of October 25, 1897.

Your office rejected said account and required the deputy surveyor to restate it upon the ground that to allow payment for the same would be to allow double compensation for chaining and measuring boundary lines which are identical and common to adjoining claims.

The letter of October 25, 1897, which the deputy surveyor in his appeal contends authorized the statement of the account in the manner presented, was written in response to a letter from the surveyor-

general requesting a ruling upon several questions therein presented, among which was the following:

Where the dividing or boundary line of one claim is also the boundary of another claim, and is written in the field notes of the deputy surveyor twice, or as a distinct boundary for each claim, as is always required, will said line be computed as having been run twice?

To this inquiry your office, by letter of October 25, 1897, answered that—

Where said line, as described, is actually run and marked in the field, and said action is absolutely necessary in order to determine the boundaries of the claim in question, compensation will be allowed for running and marking said line, even though the line had previously been marked in connection with the boundaries of another and adjoining claim.

The action of your office in requiring a re-statement of this account was not inconsistent with the advice contained in your said letter of October 25, 1897. It is not shown that the common boundary lines between two claims were actually run and marked in the field twice, or that said action was absolutely necessary in order to determine the boundary of the second claim. If the line for which the charge is made was actually run twice, and such action was necessary to determine the boundary of any claim, the deputy surveyor would be entitled to compensation for mileage of the entire claim, although one of the boundaries may be common to an adjoining claim for which mileage had already been charged and allowed; but no showing to this effect is made in this appeal. The principal ground upon which he bases his claim is that proofs on said claims can not be legally obtained at one and the same time, so as to survey them at one and the same time, but they must be done at various periods, and such claims can not be surveyed without retracing many of the lines of previously surveyed claims. He further contends that it requires twice the time to write up the field notes in small holding claims, for each separate claim, that it does to do the field work, and the adoption of a line which has been once run and marked for one claim as the boundary of a subsequently surveyed claim, requires it to be retraced and re-marked, which materially increases the labor and should not be required without compensation.

Whether the compensation allowed be or be not adequate to the work performed, it is sufficient to say that there is no authority to allow mileage for running the same line twice unless it was actually run a second time and was necessary, which does not appear from this record.

The decision of your office is affirmed.

## RESERVOIR SITE—WITHDRAWAL—ACT OF MARCH 3, 1891.

## CARLS HILDT.

Under the act of March 3, 1891, the Secretary of the Interior has authority to release from reservation any portion of the lands selected for reservoir purposes under the act of October 2, 1888, and the acts amendatory thereof, if it is made to appear that such land is not actually necessary for the purpose for which said reservation was made.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 9, 1899.* (E. F. B.)

The Department is in receipt of your letter of December 23, 1898, with accompanying papers relative to the petition of Carls Hildt to have lots 1, 2, 3 and 4, Sec. 8, T. 14 N., R. 5 E., Salt Lake Meridian, withdrawn from reservation, and that he be allowed to make homestead entry of said tract.

These lots were reserved for reservoir purposes as the Bear lake reservoir site No. 1, Utah-Idaho, under the act of October 2, 1888 (25 Stat., 505, 526), making an appropriation for the selection and survey of sites for reservoir purposes, which contained the following provision:

And all the lands 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 act of August 30, 1890 (26 Stat., 371, 391), repealed so much of said act of October 2, 1888, as provided for the withdrawal of the public lands from entry, occupation and settlement, and provided that—

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.

By the seventeenth section of the act of March 3, 1891 (26 Stat., 1095), it was provided that the reservoir sites located and selected, and to be located and selected, under said acts—

shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs, excluding as far as practicable lands occupied by actual settlers at the date of the location of said reservoirs.

The petitioner shows by his corroborated affidavit that he settled upon this land during the month of April, 1889, and that his settlement and residence upon said tract has been continuous from that time to the present.

While the reservoir site embracing the land settled upon by Hildt

was not designated or selected for reservoir purposes until July, 1889, it took effect from the date of the act of October 2, 1888, under which the selection was made, and no relief is afforded to Hildt under the act of August 30, 1890. But there is ample authority, under the act of March 3, 1891, in the Secretary of the Interior, to release from reservation any portion of the lands selected for reservoir purposes under the several acts if it shall be made to appear that any lands so selected are not actually necessary for the purposes for which said reservation was made.

This petition was referred to the Director of the Geological Survey, who, by letter of January 19, 1899, reported thereon as follows:

The tract of land involved is so small, as compared with the area of land which may be flooded by the construction of a reservoir, that it does not seem desirable to withhold from Hildt the privileges shared by others. It does not seem to me necessary to retain this particular land, and I beg to suggest that it be released from reservation, retaining, if permitted by law, the flowage right to the height of approximately 10 feet above the present ordinary lake level. From general knowledge of the conditions it does not seem desirable to incur the expense of a special survey.

In view of the recommendation of the Director of the Geological Survey, and it appearing that the petitioner has settled upon and improved said tract in ignorance of the reservation for reservoir purposes and has continued to reside upon and improve said land since the date of his settlement, it is hereby ordered that said lots 1, 2, 3 and 4 of Sec. 8, T. 14 N., R. 5 E., Salt Lake Meridian, be released from said reservation, and that the Director of the Geological Survey be notified of this action.

The application of Carls Hildt to make homestead entry of said tracts will be received if no other objection appears against the granting of the same.

#### SCHOOL INDEMNITY SELECTIONS—FOREST RESERVATION.

##### CIRCULAR.

*Commissioner Hermann to registers and receivers, March 11, 1899.*

The following regulations are hereby prescribed under Sec. 2275 of the Revised Statutes, as amended by the act of February 28, 1891 (26 Stats., 796), in pursuance of the decision of the Secretary of the Interior, dated January 3, 1899, in the case of the State of California (28 L. D., 57), to wit:

1. Applications for indemnity lands in lieu of school sections sixteen and thirty-six which have been embraced, after survey, within the boundaries of a forest reservation, must designate by specified *legal subdivisions* the lands in lieu of which indemnity is desired. The mere designation of forty, eighty, or other number of acres, will not be accepted as a sufficient description.

2. The State will be required to file with each list of selections a relinquishment to the United States, by the officer or officers charged with the care and disposal of such State lands, of all its right and title in and to the lands designated as bases; and also a certificate by such officer or officers that the State has not encumbered, sold or disposed of, nor agreed to encumber, sell or dispose of, any of the said lands, and that none of them are in possession of any third party under any law or permission of the State.

3. The said relinquishment must be executed, acknowledged and recorded in the same manner as conveyances of real property are required to be executed, acknowledged and recorded by the laws of the State; and therewith must be filed a certificate by the recorder of deeds or official custodian of the records of transfers of real estate in the proper county, that no instrument purporting to convey or in any way encumber the title to any of said land is on file or of record in his office.

4. All applications pending at date of the receipt hereof by the respective local land offices must be made to conform to the foregoing requirements, and for that purpose a reasonable time will be allowed for amendment.

Approved,

THOS. RYAN,  
*Acting Secretary.*

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SINNETT *v.* CHEEK.

Motion for review of departmental decision of January 13, 1899, 28 L. D., 20, denied by Acting Secretary Ryan, March 11, 1899.

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INDIAN LANDS—CONTEST—SUSPENDED ALLOTMENT.

BRADLEY *v.* LEMIEUX ET AL.

A hearing will not be ordered to ascertain alleged settlement rights acquired on land embraced within a suspended Indian allotment, where, prior to the alleged settlement, the allotment was allowed and the order of suspension made.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 11, 1899.* (W. M. W.)

Albert Bradley has appealed from your office decision of October 29, 1898, rejecting his application for a hearing for the purpose of determining his right to make homestead entry for the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 10, and the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 11, T. 151 N., R. 29 W., Duluth, Minnesota, land district.

On August 24, 1898, said Bradley filed in the local office his corroborated affidavit, alleging that on April 20, 1896, he—

commenced settlement on the E.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , section 10, and the W.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , section 11, Twp. 151 N., R. 29 W., with a view to acquiring the same under the homestead laws of the United States.

That he immediately prosecuted said settlement by erecting on said land a habitable and sufficient log house, which, when completed, he furnished with all necessary housekeeping and cooking utensils and established his actual residence therein. That he has ever since maintained his actual and continuous residence in said house on said land and has cleared about two acres of said land, and raised crops thereon each season since his said settlement.

That at the time of his said settlement there were no improvements of any character on said land, nor were there any indications whatever that any person claimed, or had ever claimed, the same. That the plat of the survey of said township had not been filed in this office and he had no means of knowing, and did not know, that any appropriation of said tract, or any part thereof, had been attempted by any one.

That as now appears by the records of this office, the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said section 10 is covered by the Indian allotment No. 329 of one John Lemieux, and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said section 10 has thereon the Indian allotment of one Peter Lemieux for his minor child Paul Lemieux.

And in this behalf affiant says that said allotments are, and each of them is, fraudulent and void for the reason that said John Lemieux never made or caused to be made, any improvements of any nature or character on said tract covered by his said allotment, and said Peter Lemieux never settled and resided upon an allotment claim of his own, as a basis for asserting any allotment for his minor child.

He prays that a hearing may be ordered at which he may be allowed to prove the allegations of his affidavit,

with a view to the cancellation of said allotments Nos. 329 and 371 and the allowance of his homestead entry pursuant to his said settlement on said land.

The register and receiver forwarded Bradley's showing to your office, and on October 29, 1898, your office considered and disposed of it as follows:

However, as allotment applications Nos. 329 and 371, which cover a part of the land claimed by Bradley, were suspended by the Secretary of the Interior on December 2, 1895, and as Bradley does not claim settlement prior to the dates of the allotments, which were filed in 1894, and as his application for a hearing was made subsequent to the date of the order suspending the said allotments, his said application for a hearing is dismissed.

Bradley appeals.

In Willam J. Cowling (27 L. D., 554) it was held that (syllabus):

Land included in a suspended Indian allotment is not open to purchase under the timber land law; nor will a contest against said allotment, filed subsequent to the order of suspension be entertained.

The land involved in said case was alleged to be valuable only for the timber. In the case at bar it is sought to lay the foundation for a homestead entry covering land presumably valuable for agricultural purposes.

In the appeal it is in effect conceded that a contestant who is asserting a claim based on other grounds that a settlement right, might be denied the right to contest said allotment under the order of the Department generally suspending all allotments in the Duluth land district. But it is contended that because Bradley is asserting a claim as a *bona fide* settler on the land in question his case should be made an exception to the general rule.

The suspension of the allotments here in question was essentially the initiation of proceedings against them on the part of the government. The alleged settlement claim of Bradley dates from April, 1896, which was long after the allotments sought to be contested were filed, and after they were suspended.

The matter of settlement upon land embraced in an Indian allotment similar to those involved herein, was before the Department and thoroughly considered in the case of William Kalmbach, 26 L. D., 207.

In that case the applicant to contest the allotment alleged settlement prior to the time the allotment was filed. Your office dismissed the application to contest the same, as in this case, and upon appeal it was held (syllabus):

In proceedings by the government to determine whether an application by an Indian to select certain tracts as an allotment shall be allowed, a stranger to the record, alleging prior settlement rights, will not be heard to set up his claim, but must await the disposition of the pending action.

In this class of cases, if the right of contest should be denied a contestant who alleges prior settlement upon the land involved, there certainly would be equal, if not stronger, reason for denying the right to one who alleges settlement after the filing and suspension of the allotment claim.

It follows that there was no error in the action of your office in dismissing Bradley's application to contest the Indian allotment claims in question.

The decision appealed from is accordingly affirmed.

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JARED v. REEVES.

Motion for review of departmental decision of November 11, 1899, 27 L. D., 597, denied by Acting Secretary Ryan, March 11, 1899.

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HOMESTEAD SETTLER—DISQUALIFICATION—OWNERSHIP OF LAND.

GOURLEY v. COUNTRYMAN (On Review).

The fact that a settler is not disqualified as an entryman by the ownership of land at the date of his settlement, will not relieve him from the operative effect of the statutory inhibition, if he subsequently becomes the owner in fee simple of one hundred and sixty acres while his rights, as against an adverse claimant, are dependent upon the maintenance of his status as a qualified settler.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 11, 1899.* (L. L. B.)

Counsel for William Gourley have asked a review of departmental decision of December 21, 1898 (27 L. D., 702), involving the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 28, T. 11 N., R. 3 W., Oklahoma land district, Oklahoma.

In said decision the action of your office dismissing Gourley's contest against the entry of George W. Countryman for said land was affirmed.

The contest alleged prior settlement by Gourley and that the entry of Countryman was made in collusion with one Pence for the purpose of acquiring Gourley's improvements.

Countryman's entry was made upon the relinquishment of Pence July 26, 1895. The entry of Pence was made February 14, 1896, in the exercise of a preference right awarded him for a successful contest against a former entry by Gourley. At the time Pence relinquished and Countryman made entry (July 26, 1895), Gourley, the movant herein, was still occupying the tract in controversy, not having removed therefrom after the cancellation as the result of the contest of Pence. It was such settlement by him that he relied on to sustain his claim against the entry of Countryman.

It was shown in evidence and admitted by Gourley that he made final proof and received final certificate for one hundred and sixty acres of land in South Dakota on August 14, 1895, while the land in controversy was covered by the entry of Countryman and while Gourley was claiming settlement thereon.

In the decision complained of the Department held that—

At the instant Gourley received his final certificate, the superior right of Countryman attached by reason of his entry, which was no longer assailed by the claim of a qualified settler.

Counsel in their motion assail this conclusion of law and insist—

1st. That the holder of a final certificate is not such an owner in fee simple as is contemplated by the act of May 2, 1890 (26 Stat., 81), and

2nd. That the acquisition of one hundred and sixty acres of land after settlement has been initiated, does not, under said act, disqualify the settler.

In the decision sought to be reviewed it was said:

At common law, the owner in fee simple of land was such an owner as had full disposal of the title during his lifetime and upon whose death the absolute title descended to his heirs,—

and that under the decisions of this Department and of the supreme court, lands embraced in a final certificate of entry were subject to alienation, and upon the death of the holder of the certificate descended to his heirs, and that consequently such an ownership came within the purview of the statute and disqualified the owner from entry of lands in Oklahoma.

While not disputing the right of alienation, counsel insist that until patent is issued the fee remains in the government. The legal title does remain in the government until patent issues; but, if the entryman has complied with the law and received final certificate, he is the equitable owner of the land and the government holds the legal title in trust for him. The government can not thereafter dispose of the land, but the entryman can. It is true that while the legal title remains in

the government the land department possesses the power and authority to inquire whether the law has been complied with and the final certificate rightfully issued, and, after due notice and hearing, to cancel the certificate if wrongfully obtained or issued. After patent issues the courts possess similar power and authority, and yet it has never been suggested that this prevents a patentee from being seized in fee simple within the meaning of the statute now under consideration.

In the brief submitted with the motion it is very strongly insisted, in effect, that if it should be conceded that the holder of a final certificate is such an owner of land as contemplated by the act, it must be shown that he was such an owner at the date of initiating his settlement, and that the subsequent acquisition of a hundred and sixty acres of land would not disqualify him. In support of this, counsel rely upon the language of the act, as follows:

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

They contend that the phrase, "at the time," refers to the *initiation* of the settlement, and if the settler is qualified at that instant, the demands of the law, in this respect, are satisfied.

There is, perhaps, nothing better settled by adjudicated precedents than that settlement under the act of May 14, 1880, to be effectual as against an adverse claimant, must be continuous. If it is interrupted or discontinued, the adverse claim attaches.

The rule is uniform and unbroken that in all cases of settlement or filing when the claimant is disqualified he can acquire no rights by either until after the disqualification is removed. If during the time the disqualification exists, a claim, whether by settlement or filing, is initiated by a competent claimant to the land claimed by the person disqualified, the initiation of such claim defeats the right of the disqualified claimant. (*Bennett v. Nuekolls*, 22 L. D., page 261 of decision.)

If a claim initiated during the settlement of a disqualified settler will prevail, it can not be seriously contended that a claim previously initiated and still continuing at the time the disability attaches, will not, as well, prevail over that of the disqualified claimant. Gourley's settlement claim could not attach prior to July 26, 1895, because prior thereto the land was embraced in the entry of Pence, and Gourley's continuance thereon was but a naked trespass upon the rights of Pence. Within a month after the entry of Countryman, whatever rights Gourley had under his claimed settlement ceased by reason of his disqualification attaching by reason of his ownership of the land in South Dakota.

It is alleged in the motion that the Department erred in finding that there was no evidence introduced sustaining the charge of conspiracy between Pence and Countryman. This allegation of error is not sustained by the record, which shows an entire absence of any such evidence or any attempt to produce it.

There being nothing in the motion calling for a reversal or other interference with the decision sought to be reviewed, the motion is denied and herewith returned for the files of your office.

REPAYMENT—MORTGAGEE—ASSIGNEE.

COMMONWEALTH TITLE, INSURANCE AND TRUST CO.

The assignee of a mortgage is entitled to repayment, where an entry is erroneously allowed and prior to its cancellation the land is mortgaged and the mortgage assigned, and after cancellation the mortgage is foreclosed and a sheriff's deed secured; but the assignee in such case should relinquish all claim to the land before repayment is allowed.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 11, 1899.* (C. J. G.)

This is an appeal by the Commonwealth Title, Insurance and Trust Company, of Philadelphia, Pennsylvania, from your office decision of October 27, 1897, denying its application for repayment of the purchase money paid by Amanda Cormack on the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 21, and the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 28, being a part of her cash entry No. 4096 for the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 21, and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 28, T. 20 E., R. 5 E., Helena land district, Montana.

The facts as to this entry are set forth in departmental decision of April 5, 1894 (18 L. D., 352), in the case of said Amanda Cormack, from which it appears that she made settlement on the land embraced in her entry, October 25, 1888, and continued to reside thereon until April 30, 1890, when she made final proof. Her proof was accepted May 9, 1890, and final receipt and certificate issued to her.

January 8, 1890, the township embracing the land in question was selected and recommended for reservoir purposes, and July 8, 1890, your office advised the local office of that fact.

May 10, 1890, Cormack obtained a loan of three hundred dollars from the Northwestern Guaranty Loan Company, of Minneapolis, Minnesota, and as security therefor executed and delivered to the company a mortgage deed upon the land embraced in her entry. June 9, 1890, the said company assigned this mortgage to the Commonwealth Title, Insurance and Trust Company aforesaid.

January 9, 1891, your office informed the local office

that the land in question with other lands, was reserved for the Box Elder reservation system, and that the preemption cash entry of Cormack was therefore held for cancellation as illegal.

Cormack appealed, and the Northwestern Guaranty Loan Company filed a petition praying

that a time and place be fixed for a hearing on this petition, and that your petitioner and the said Amanda Cormack as well, may be granted an opportunity to show cause why the entry of the said Amanda Cormack may not be canceled.

In the decision referred to it was held that, as the selection of the land in question was made in conformity with the acts of Congress, the Department was "without authority to grant the relief demanded by Cormack, or to order the hearing petitioned for by the Northwestern Guaranty Loan Company." Your office decision of January 9, 1891, with certain modifications as to the description of the land, was accordingly affirmed.

August 16, 1894, your office canceled the part of Cormack's entry in conflict with the Box Elder reservation system.

April 29, 1896, in a suit brought by the Commonwealth Title, Insurance and Trust Company against Amanda Cormack, for the foreclosure of said mortgage, the district court for Cascade county, Minnesota, the county in which the land is situated, rendered a decree directing that said land should be sold to satisfy said mortgage indebtedness. In accordance with this decree the land was sold, the said company becoming the purchaser and receiving a sheriff's deed for the land.

The Commonwealth Title, Insurance and Trust Company now applies for repayment as the assignee of Amanda Cormack. Section two of the act of June 16, 1880 (21 Stat., 287), is as follows:

In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where from any cause the entry has been erroneously allowed and can not be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assignees, the fees and commissions, amount of purchase money and excess paid upon the same, upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office.

Your office denied the company's application on the ground that said company is not an assignee within the meaning of the repayment statute, because it took title to the land covered by Cormack's entry after the cancellation of said entry. This ruling is based upon that portion of departmental circular of August 6, 1880, which declares that those persons are assignees, within the meaning of the statutes, authorizing the repayment of purchase money, who purchase the land after the entries thereof are completed, and take assignments of the title under such entries prior to complete cancellation thereof.

It is also held by your office that the mortgage deed given by Cormack created merely a lien on the land, and that the mortgagee therefore is not an assignee of the entryman.

In departmental decision of April 5, 1894, *supra*, it was held that the selection of the land in question for reservoir purposes was controlled by the act of October 2, 1888 (25 Stat., 526), and that under said act such selection operated retrospectively to reserve the land from entry, settlement and occupation from the date of the act. As Cormack did not make settlement until October 25, 1888, and as the selection of the land for reservoir purposes operated to withhold it from entry, settle-

ment and occupation from the time when the act was passed (October 2, 1888), and thereby avoided Cormack's subsequent settlement and entry, it seems to have been held that her entry was erroneously allowed and could not be confirmed, and it was therefore canceled. The case is thus one in which repayment is authorized by the statute, the only question being as to whether the company making application therefor is an assignee within its terms.

The facts in the case of California Mortgage, Loan and Trust Co. (on review), 26 L. D., 425, are similar to those in the case under consideration. In that case William B. Stewart's pre-emption cash entry was canceled because the land covered thereby had been, by executive order, reserved from entry for the benefit of the Mission Indians. Prior to the cancellation of his entry the California Mortgage, Loan and Trust Company had loaned Stewart one thousand dollars, taking a mortgage upon the land embraced in said entry to secure payment. After cancellation of his entry in furtherance of the mortgage, Stewart gave to the company a deed to the land and an assignment of his claim against the United States for repayment of the purchase money. In rendering decision the Department concluded as follows:

It is believed that the California Mortgage, Loan and Trust Company is such an assignee. If it be conceded that a mortgagee is not an assignee within the meaning of this statute, and that the right of repayment is restricted to assignees of the land and does not extend to assignees of only the claim for money paid; and if it be conceded that the right of repayment is acquired by an assignee whose interest in the land is not obtained until after the cancellation of the entry, it does not follow that the claim of this company should be denied. Inasmuch as the deed executed by Stewart to the company in 1894 grew out of and was the consummation of the mortgage transaction, it should be treated as giving additional effect to the mortgage, which antedated the cancellation of the entry, and as converting the mortgage lien into a claim to the land itself in so far as Stewart or any assignee of his could have such a claim after cancellation of the entry.

In the case at bar Cormack obtained the loan, and executed and delivered the mortgage deed as security therefor to the Northwestern Guaranty Loan Company, after the entry and prior to its cancellation. By assignment of the mortgage the Commonwealth Title, Insurance and Trust Company succeeded to the rights of the Northwestern company, and this was also effected prior to the cancellation of Cormack's entry. The foreclosure of the mortgage and the delivery of the sheriff's deed, "grew out of and were the consummation of the mortgage transaction." The mortgage lien thus ripened into a claim to the land itself—a claim initiated prior to the cancellation of Cormack's entry. It is apparent that, had there been no failure of government title, the land, under the foreclosure, would have gone to the Commonwealth company as assignee. Said company is therefore entitled to repayment in this case.

The repayment statute requires, before purchase money is repaid, the "surrender of the duplicate receipt and the execution of a proper relin-

quishment of all claims to the land." The duplicate receipt accompanies the papers in this case, as well as a properly authenticated abstract of title, but there does not seem to have been a relinquishment from the Commonwealth Title, Insurance and Trust Company of all claim to the land.

Your office decision is hereby reversed, and upon further compliance by the said company with the law as herein indicated, repayment will be allowed for that part of the land embraced in Amanda Cormack's entry which was made ineffectual by the reservation for reservoir purposes.

SOLDIERS' ADDITIONAL HOMESTEAD—ACT OF JUNE 15, 1880.

JOHN M. RANKIN.

Section 2, act of June 15, 1880, is a part of the homestead laws, and provides a method of consummating title under that class of homestead entries which comes within its provisions. The privilege thus accorded, and the title obtained thereunder, rest upon and have their inception in the original homestead entry, which is merged in the higher and perfected title obtained by compliance with the provisions of said section.

By a purchase under section 2, act of June 15, 1880, of land entered under a soldiers' certificate of additional right, the original entry is merged in the perfected title secured under said act, the certificate of right is thereby satisfied, and the certified right of the soldier exhausted.

The case of John H. Howell, 24, L. D., 35, overruled.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 15, 1899.*

John M. Rankin appeals from your office decision of June 2, 1898, denying his application of January 18, 1898, for a recertification in his own name of the certificate of soldiers' additional homestead right issued July 18, 1878, to George W. J. Nations, based upon service in the Missouri Home Guards during the war of the rebellion.

There is no controversy as to the facts. Later in the year of its issuance the certificate was transferred to Maletna C. Haws, who made homestead entry thereunder at the Los Angeles, California, local office. August 6, 1884, your office referring to the case of Wilson Miller *et al.* (6 C. L. O., 190), held said entry to be illegal because based upon service in the Missouri Home Guards, and allowed Mrs. Haws sixty days within which to show cause why the homestead entry should not be canceled, or to initiate proceedings to obtain title under section two of the act of June 15, 1880 (21 Stat., 237). The action taken in similar instances is further shown in the case of William French (2 L. D., 238). Mrs. Haws elected to comply, and did comply, with the provisions of said section two and the land was patented to her accordingly, June 12, 1885. After she had met the requirements of said section the homestead entry made under the Nations certificate was formally canceled upon the records and a notation of such cancellation, with the remark

"scrip unauthorized," was written across the face of the certificate, which was further defaced by the drawing of red lines through the testimonium and signature of the Commissioner. The certificate was not returned to Mrs. Haws but was retained in its obliterated condition in the files of the General Land Office, among the entry papers. January 10, 1898, Mrs. Haws, who was asserting ownership of the certificate and of the right to make entry therein certified, assigned the same to Rankin. Mrs. Haws was herself a *bona fide* purchaser for value of the certificate.

Your office decision is in the form of a letter to Rankin and holds, or at least suggests:

1st. That the certificate was issued on account of service in the Missouri Home Guards and was therefore void *ab initio* for want of authority in your office to issue the same, so that there was never anything to assign;

2nd. That at the time of his purchase Rankin had knowledge of the notation upon and defacing of the certificate and therefore was not an innocent purchaser thereof, even if the person from whom he bought was an innocent purchaser; and

3rd. That said homestead entry became merged into the title obtained by Mrs. Haws under section two of the act of June 15, 1880, of which it formed the basis, and therefore the certificate with which such entry was obtained was satisfied, and the right therein certified was exhausted, before the passage of the act of August 18, 1894 (28 Stat., 397), so that no certificate remained upon which the confirmatory provisions of that act could operate.

That act provides, among other things:

That all soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value.

The third paragraph of instructions under the foregoing act, issued October 16, 1894 (19 L. D., 302), provides:

To enable assignees of these certificates to exercise in their own names the right of entry confirmed by this statute, it is directed that the certificate itself shall, in each instance, prior to any entry by the assignee, be presented to this office for examination and additional certification covering the fact of assignment. Holders of such certificates desiring to exercise a right of entry in their own names, must file such certificates in this office, together with satisfactory proof of ownership and of bona fide purchase for value. If, upon examination, the proof so filed is satisfactory, an additional certificate will be attached to the original authorizing the location thereof, or entry of land therewith, in the name of the assignee or his assigns. You will allow no entries in the names of assignees except upon presentation of such

additional certificates issued by this office. When such additional certificates are presented, you will issue homestead papers and the final certificate and receipt, in the name of the transferee, referring to him in said papers as the "assignee of the soldier."

Considering said legislation and instructions, it was said, in the case of John M. Rankin (26 L. D., 555):

Under the said act and circular, all that a holder of one of these certificates is required to show to obtain an additional certification in his own name as assignee, is that he is a *bona fide* purchaser thereof for value.

The construction of this act has heretofore received consideration in several departmental decisions, and property rights have attached thereunder to such an extent as to forbid a re-examination of the conclusion announced in those decisions. The rulings have been that the act is remedial in character; that the purpose of Congress was to make valid and effective these certificates of soldiers' additional homestead rights when held by *bona fide* purchasers for value, irrespective of any irregularity in their procurement, and notwithstanding the then existing departmental rulings did not recognize transfers or sales thereof; and that one who, relying upon the action of your office in issuing the certificate, has made purchase thereof in good faith and for value, comes within the protection of the act. (John M. Rankin, on re-review, 21 L. D., 404; Henry N. Copp, 23 L. D., 123; John H. Howell, 24 L. D., 35; Robords v. Lakey *et al*, *ibid.*, 291.)

Under this interpretation of the act, where the original certification was improvident or unauthorized, the burden of the injury and loss must be borne by the government whose agents committed the mistake, if the certificate is in the hands of a *bona fide* purchaser for value who purchased upon the assumption that the certificate was lawfully issued.

Mrs. Haws being a *bona fide* purchaser for value of the certificate, the views thus expressed eliminate every question as to the suggested irregularity or invalidity in its issuance.

If the certificate was not satisfied and the right therein certified was not exhausted by the action taken by Mrs. Haws, in perfecting or obtaining title under the act of June 15, 1880, Rankin's knowledge of the notation upon and defacing of the certificate is not material. The action of your office in attempting to revoke the certificate did not take from Mrs. Haws her status as a *bona fide* purchaser for value, and could not prevent Congress from subsequently recognizing and validating her claim. If the certificate was not satisfied and the right therein certified exhausted before the passage of the act of August 18, 1894, that act made the certificate and certified right a claim in her hands which she could lawfully sell, and which Rankin could therefore lawfully buy, irrespective of his knowledge of the element of irregularity or invalidity in the original issuance of the certificate.

The real question, therefore, is whether the title obtained by Mrs. Haws under the act of 1880, satisfied the certificate and exhausted the right therein certified. If so, Rankin was necessarily charged with notice thereof at the time of his purchase and therefore took nothing by it.

Section two of the act of June 15, 1880, is as follows:

That persons who have heretofore under any of the homestead laws entered lands properly subject to such entry, or persons to whom the right of those having so

entered for homesteads may have been attempted to be transferred by bona fide instrument in writing, may entitle themselves to said lands by paying the Government price therefor, and in no case less than one dollar and twenty-five cents per acre, and the amount heretofore paid the Government upon said lands shall be taken as part payment of said price: *Provided*, This shall in no wise interfere with the rights or claims of others who may have subsequently entered such lands under the homestead laws.

The privilege conferred by this section is restricted to those who had theretofore made homestead entry of lands properly subject thereto and to their transferees, and this privilege consists of an opportunity or right on the part of the entryman or his transferee to entitle himself to the lands entered by paying the government price therefor. There being no occasion for the exercise of this privilege where the entry had been perfected into full title, it was obviously intended that the privilege should embrace instances where the entryman had not entitled, or could not entitle, himself to the lands entered by compliance with existing laws. As to such entries, payment of the purchase price named was substituted for compliance with the requirements of existing laws. Four things were thereby made necessary to the obtaining of full title: (1). The land must have been theretofore entered under the homestead laws by the applicant or one through whom he claims; (2) the land must have been properly subject to homestead entry; (3) payment of the government price, less the amount, if any, theretofore paid the government upon the land; and (4) the absence of intervening adverse rights. Whether the homestead entry was still subsisting or whether on account of irregularity in its allowance or subsequent non-compliance with existing laws it had been canceled, was not material, because if no intervening adverse right to the land had been acquired the entry was for the purpose of perfecting title under this statute, confirmed as against any irregularity in its allowance and rehabilitated as against any cancellation thereof. It was clearly the purpose of Congress to provide a method of speedily perfecting an imperfect title under homestead entries theretofore made. The homestead entry thus became the basis or genesis of the title.

That section two of the act of June 15, 1880, became a part of the homestead laws is shown in the following decisions:

The case of Martha A. Carter (9 L. D., 604), presented the question whether a perfecting of title under that section constituted a disposition of the land "under and according to the provisions of the homestead laws" within the meaning of the joint resolution of May 14, 1888 (25 Stat., 622), which temporarily prohibited all other disposition of certain lands in Alabama, and it was there said:

In my opinion, the joint resolution referred to was not intended to repeal, as to the public lands in Alabama, the second section of the act of June 15, 1880. While an entry under that section is, no doubt, a "cash entry," in one sense and not merely the consummation of the homestead entry on the previous existence of which the right to purchase is based, it still remains true that such a "cash entry" is by the

statute allowed only in view of the prior homestead entry, and stands in much the same relation to the latter as would a cash entry made under the "commutation clause" of the homestead act. The making of such entries is not what is technically meant, in public land-law, by "private sale," against which it is that the prohibition in the resolution was really directed. In my opinion, the act of June 15, 1880, is in fact a part of the "homestead" system, to the whole of which the name "homestead laws" is generically applied in the provision of the resolution that only under these "laws," should lands in Alabama be disposed of during the period mentioned.

Section two of the act of March 2, 1889 (25 Stat., 854), authorizes persons who had theretofore made entry of land under the homestead law, but who had not then perfected and should not thereafter perfect, title under such entry, to make another homestead entry; and the case of Joseph H. Nixon (13 L. D., 257), presented the question whether one who, under section two of the act of June 15, 1880, perfected title to land theretofore entered by him under the homestead law thereby debarred himself from making another homestead entry under the second section of the act of 1889. The question was answered in the affirmative, it being held that he had perfected title under the homestead law to the land entered by him thereunder, and had thereby exhausted his homestead right. Like rulings were made in the cases of John Lindell (14 L. D., 616); George Wilson's Heirs (22 L. D., 484), and Samuel S. Montgomery (25 L. D., 227).

Upon mature consideration it is held that section two of the act of June 15, 1880, is to be regarded as a part of the homestead laws and as providing a method of consummating title under that class of homestead entries which comes within its provisions. The privilege accorded by that section and the title obtained thereunder rest upon and have their inception in the original homestead entry which becomes merged into the higher and perfected title obtained by compliance with the provisions of said section.

It follows therefore that the Nations certificate, with which Mrs. Haws' entry was effected, became satisfied, and the right therein certified exhausted, when she carried that entry into a completed title under the act of 1880. The fact that this was followed by a formal cancellation of the homestead entry upon the records is of no moment. That entry being one of the links in the chain of her perfected title, its cancellation was no more efficacious than would be that of a soldiers' declaratory statement which has been carried into an entry, or that of a homestead entry which has been commuted to a cash entry under section 2301 Revised Statutes, or that of a preemption filing which has been transmuted to a homestead entry under section 2289 Revised Statutes, or that of any designated entry which has been passed to patent.

The case of John H. Howell (24 L. D., 35), in so far as it involves the status of a certificate of soldiers' additional right after an entry made therewith has been perfected into full title under section two of the act of June 15, is hereby overruled.

The decision appealed from is affirmed.

## JURISDICTION—SOLDIER'S ADDITIONAL HOMESTEAD—VESTED RIGHTS.

## MEE v. HUGHART ET AL.

If in proceedings instituted to acquire title to public land an injustice is done to any party, and the land yet remains subject to the jurisdiction of the Department, it is within the power of the Secretary of the Interior, and it is his duty, to correct the error.

A soldier's additional homestead right is assignable, and where such right is transferred by means of a power of attorney to make entry in the name of the soldier, coupled with the right to receive patent thereunder, the death of the soldier does not revoke the power so conferred, and an entry thereafter made in conformity therewith is valid.

Vested rights secured under a valid entry are not defeated by an erroneous order of cancellation; and if the land yet remains within the jurisdiction of the Department, and the party claiming under said entry has not acquiesced in its erroneous cancellation, it is the duty of the Secretary of the Interior to reinstate the same, and the intervention of adverse claims is no bar to such action.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 20, 1899.* (E. B., Jr.)

This case, involving the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 35, T. 63 N., R. 13 W., Duluth, Minnesota, land district, comes again before the Department under an order dated October 21, 1898, entertaining the written request of Louis Stegmiller *et al.*, filed December 23, 1896, for reconsideration of their petition of July 11, 1896, to vacate and set aside the decisions of the Department, dated, respectively, November 2, 1891 (13 L. D., 484), June 18, 1894 (unreported), and January 10, 1895 (20 L. D., 2), and to reinstate soldier's additional homestead entry No. 1437, made July 15, 1889, in the name of Simeon W. T. Hughart. The entry had been canceled January 23, 1895, pursuant to the above mentioned decisions. The said petition was denied November 23, 1896 (23 L. D., 455).

The ground upon which the petition is based and the reasons for the denial thereof are stated in the last mentioned decision in the following language:

The petition under consideration calls the attention of the Department to a recent decision of the supreme court in the case of Webster v. Luther, 163 U. S., 331, in which that court held that the right of entry given to a soldier who had heretofore entered, under the homestead laws, less than one hundred and sixty acres, to enter enough more to make up that quantity, was assignable before entry.

It is true, as stated in the petition, that the decisions of the Department of November 2, 1891 (13 L. D., 484), and June 18, 1894, were based upon the previous ruling of the Department, in a long line of decisions, that the right to make soldier's additional homestead entry is a personal right and not assignable, which construction of the law is now held by the supreme court to be erroneous.

It is admitted that the decisions of November 2, 1891, and June 18, 1894, were in accordance with the established ruling of the Department; and the fact that such ruling is now held by the supreme court to be erroneous is not deemed a sufficient reason for reversing and annulling decisions which have become final.

The petition must, therefore, be denied.

The decisions under which the entry was canceled were thus conceded to have been erroneous. The only reasons given for the refusal to vacate them and reinstate the entry were that the decisions complained of were in accord with the established ruling of the Department when rendered and had become final. These were insufficient reasons. The land was then and still is within the jurisdiction of the Department, and if in the proceedings to acquire title thereto injustice has been done to any party, it is within the power of the Secretary, as it is clearly his duty, to correct it (*Knight v. United States Land Association*, 142 U. S., 161; *Michigan Land and Lumber Co. v. Rust*, 168 U. S., 589; *Beley v. Naphthaly*, 169 U. S., 353; *Parcher v. Gillen*, 26 L. D., 34; and *Aspen Consolidated Mining Co. v. Williams*, 27 L. D., 1).

There is no controversy as to the facts in this case. The said entry was made with a certificate of soldier's additional homestead right which had been issued to Hughart in August, 1880, and which he had sold and assigned to one Tuttle in September, 1880, for a consideration of one hundred and seventy dollars. At the time of the sale, as was then the custom in such cases, in order to avoid the effect of the ruling of the land department that the right to a soldier's additional homestead was not assignable, Hughart gave a power of attorney to Tuttle, irrevocable by its terms, and "with power and right of substitution, association and revocation," to locate, enter and perfect title to the quantity of land specified in the certificate, sell, receive the purchase money therefor, sign the grantor's name, and make and deliver any instruments he might deem fit for enforcing the authority therein granted. His wife joined therein by releasing her rights "of dower, homestead exemption and of any other claim" that she might have "in the additional homestead entry or right of entry." In 1883 Stegmiller purchased the said certificate, paying therefor, he swears, about \$1440. He was duly substituted and appointed attorney in fact by Tuttle under the said power of attorney, and caused the entry aforesaid to be made in the name of Hughart. On the day of the entry, July 15, 1889, as such attorney in fact, by a deed executed in the name of Hughart, he conveyed the land entered to John A. Jacobson, James Ball, and Louis D. Cyr.

Simeon T. Hughart died December 28, 1887. April 18, 1890, Edward W. Mee applied to contest the entry, alleging Hughart's death prior thereto, and contending that the entry was therefore made without authority of law and was void. His application came before the Department in due course, and proceeding upon the theory that Hughart's additional homestead right was non-assignable, the decision of November 2, 1891, allowed the application to contest, holding that if Hughart had died as alleged, before entry, the said power of attorney was revoked by his death, and the entry was a nullity, and directed that if, upon investigation, the facts should be proven as alleged, the entry should be canceled. The decision of June 18, 1894, affirmed your office decision of December 19, 1892, holding the entry

for cancellation pursuant to the decision of November 2, 1891, and the proof of Hughart's death adduced at a hearing had in March, 1892. The decision of January 10, 1895, denied a petition by Stegmiller to vacate the decision of June 18, 1894, holding that the preference right of Mee as successful contestant was not defeated by the confirmatory act of August 18, 1894 (24 Stat., 397).

The decision of June 18, 1894, was promulgated July 2, 1894. July 9, 1894, Harry Brown offered a timber application for the land, which was rejected because of Hughart's entry and because of the homestead application of Mee presented July 5, 1890, shortly after his application to contest. Brown appealed. The said entry was canceled January 23, 1895, as already stated. Edward W. Mee, the contestant having died in the meantime, Harry Mee, for himself and the other heirs at law of Edward W., filed a timber and stone application for the land March 7, 1895, in assertion of the preference right accorded to a successful contestant and published notice of intention to make final proof thereunder on September 11, 1895. No appearance in behalf of the heirs of Edward W. Mee was made on the date last named, nor, so far as appears, has any further action been taken by them, or in their behalf, relative to the consummation of their claimed preference right.

September 12, 1895, Hattie E. Logan offered homestead application to enter the land. September 23, 1895, Ellen J. McPherson also offered homestead application therefor, and on the same date Logan was allowed to make homestead entry of the land, and on the next day the application of McPherson was rejected because of Logan's entry. McPherson appealed September 27, following, and the same day also filed affidavit of contest against Logan's entry. January 9, 1896, your office considered the claims of Brown, Logan, and McPherson, respectively, and held that Brown's timber land application was entitled to the precedence and must be placed of record, unless Logan should show cause to the contrary within thirty days from notice. Logan was also required to make a more definite showing as to her qualifications to make homestead entry. Action on McPherson's contest affidavit was deferred "pending the final determination of Brown's appeal." McPherson thereupon appealed. To the order to show cause Logan made response February 8, 1896, which, however, your office decided, June 20, 1896, to be insufficient, and held her entry for cancellation. She then also appealed. The appeals of McPherson and Logan are still pending before the Department in the case known as Vol. 24, No. 801, *Ellen J. McPherson v. Hattie E. Logan and Harry Brown*, each of whom has been served with a copy of the entertaining order herein, of the said request of Louis Stegmiller *et al.* of December 23, 1896, and of the argument in support thereof, as required by the order.

The supreme court of the United States having decided May 18, 1896, in the case of *Webster v. Luther*, as already stated, that a soldier's additional homestead right is assignable (see also *Beley v. Naphtaly*, *supra*), and it appearing that the additional homestead right of Hughart

was duly assigned by him to Tuttle and by or through the latter to Stegmiller, it can no longer be questioned that the power of attorney given by Hughart and under which Stegmiller caused entry to be made was a power coupled with an interest (in fact with the sole beneficial ownership) in the right to make the additional homestead entry and receive patent thereunder which was the subject matter of the power. It is too well settled to need any citation of authority that such power is not revoked by the death of the grantor. The exercise thereof by Stegmiller in causing the said entry to be made was entirely legitimate and proper. But for the erroneous ruling that the right was not assignable, and in obedience to which an entry in any name other than that of Hughart would not have been permitted, Stegmiller might have disclosed the assignment to him and have made the entry in his own name. He acted however under the power making the entry in the name of Hughart, the grantor, as he had the right to do. The entry was valid in every respect and the cancellation thereof clearly erroneous, in view of the controlling decision in *Webster v. Luther*, *supra*.

It only remains to inquire whether the proceedings by Brown, Logan and McPherson, or either of them, constitute a bar to the reinstatement of the Hughart entry. The claimants under that entry have never acquiesced in the cancellation thereof and have ever since actively and persistently urged their right to the reinstatement of the entry and patent pursuant thereto. The entry being valid when made the equitable title to the land and the right to patent thereto at once vested in Stegmiller as assignee. Of these vested rights he was not deprived and could not be deprived by the erroneous and wrongful cancellation of the entry. As was decided by the supreme court in *Stark v. Starrs* (6 Wall., 402, 418):

The right to a patent once vested is treated by the government, when dealing with the public lands, as equivalent to a patent issued. When, in fact, the patent does issue, it relates back to the inception of the right of the patentee, so far as may be necessary, to cut off intervening claimants.

In *Cornelius v. Kessel* (128 U. S., 456, 461), the court, speaking of the erroneous cancellation by your office of an entry after payment for the land (and the language will apply equally where the cancellation is by direction of the Department), said:

By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it.

Under this doctrine, even if patent had issued to one of the above intervening adverse claimants, it would avail nothing as against the superior rights of those claiming under the Hughart entry if duly asserted in a suit in equity. The difference between their rights before and after the issuance of patent would be principally in the forum where relief could be sought and not in the principle to be applied.

So long as the legal title to the land remains in the United States, and the proceedings for acquiring it are as yet *in fieri*, the courts will not interfere to control the exercise of the power vested in the officers of the land department, but when the legal title passes out of the United States the power of these officers to deal with the land also passes away, and any question as to the real ownership becomes a matter for judicial inquiry in the courts. *United States v. Schurz* (102 U. S., 378, 396).

It would but add to the wrong already done them if the Department should now relegate the claimants under the Hughart entry to the courts for a remedy which cannot be obtained until after the issuance of patent to some other party.

The case of *Aspen Consolidated Mining Co. v. Williams, supra*, was similar in principle to the case at bar. Williams' pre-emption entry had been rightfully allowed and erroneously canceled, and entry of the land in controversy had been subsequently made by the mining company. In its decision, above referred to, which directed the cancellation of the company's entry and operated to reinstate the entry of Williams, the Department, in the course of an exhaustive consideration of the question of jurisdiction, said:

Adequate jurisdiction and authority to prevent such a miscarriage of proceedings for the disposition of public lands, as would result from the issuance of a patent to one not entitled thereto, when another has by compliance with the public land laws fully earned the right to receive such patent, is certainly lodged in either the land department or the courts. That the courts are without such jurisdiction while the legal title remains in the United States is settled by many decisions of the supreme court, among which are *United States v. Schurz, supra*, and *Michigan Land and Lumber Co. v. Rust, supra*. A suit by the United States at the present time against either Williams or the mining company to recover the legal title to the land in controversy, can not be maintained because the government can not recover a title which it still retains and because one can not be compelled to restore a title which he has not received and does not possess. A suit at this time to determine whether Williams or the mining company has acquired an equitable title to the land would be equally unsuccessful for the reason that the authority of the land department over proceedings to acquire title to public lands is exclusive while the legal title remains in the United States, and that authority extends to determining whether or not an equitable title has passed. *Michigan Land and Lumber Co. v. Rust, supra*. If the contention of the mining company is correct, it necessarily follows that during the period intervening between the decision of Secretary Smith and the issuance of a patent, there is a hiatus in which such jurisdiction does not exist anywhere, and that the land department must issue a patent under Secretary Smith's decision even though it clearly appears by the records and proceedings in that department that this decision makes an obvious mistake and does manifest injustice in that it directs a patent to be given to one not entitled thereto and to be withheld from one who has lawfully and fully earned the right to its issuance. A contention which leads to such an anomalous and unreasonable result is believed to be without support in the statutes or judicial decisions.

In *Parcher v. Gillen, supra*, cited and followed in *Aspen Consolidated Mining Company v. Williams*, the Department held:

The true rule drawn from an examination of all of the authorities is that the jurisdiction of the land department ceases where the jurisdiction of the courts com-

mences, viz., when the legal title passes, and that there is no hiatus between the termination of the one and the beginning of the other. Under this rule the land will always be within a jurisdiction which can administer the law and protect both public and private rights.

\* \* \* \* \*

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

In accordance with the views herein expressed, the previous decisions of the Department in the case are recalled and vacated, and you are directed to reject the abandoned timber and stone application of the heirs of Mee, to cancel the homestead entry of Logan, to reject the application of Brown and McPherson and the contest affidavit of the last named party, and to reinstate the Hughtart entry.

It is provided by the act of August 18, 1894, *supra*, that all entries theretofore or thereafter made with soldier's additional homestead certificates by bona fide purchasers "shall be approved, and patent shall issue in the name of the assignees." You will therefore issue patent for the land to the present transferees or holders of the equitable title upon due proof thereof.

The appeals in the case of McPherson *v.* Logan and Brown will be dismissed in a decision of even date herewith, and the papers returned to your office for action as directly herein.

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SHEPARD ET AL. *v.* MEYER ET AL.

Motion for review of departmental decision of October 27, 1898, 27 L. D., 569, denied by Acting Secretary Ryan March 20, 1899.

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ISOLATED TRACT—PRICE OF LAND.

THOMAS J. O'DONNELL.

Section 2455 R. S., as amended by the act of February 26, 1895, contemplates that land to become subject to sale thereunder, as an isolated tract, must have been subject to entry under the homestead law by any qualified applicant during the period specified in said act.

The minimum price of isolated tracts of land in alternate reserved sections within the limits of a railroad grant is, by section 2455 R. S., as amended by the said act of 1895, reduced from two dollars and fifty cents per acre, to one dollar and twenty-five cents per acre.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) March 22, 1899. (G. B. G.)

April 1, 1887, Hew S. Bigger made timber culture entry for the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of section 20, township 3 S., range 60 W., Denver, Colorado, which entry was canceled by relinquishment August 29, 1895.

On that day (August 29, 1895,) Thomas J. O'Donnell filed in the local office his petition asking that the above described land, together with the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 32, T. 2 S., R. 60 W., in the same land district, be ordered into market and sold in accordance with the provisions of section 2455 of the Revised Statutes, as amended by the act of February 26, 1895 (28 Stat., 687).

December 7, 1895, your office denied said petition as to the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of section 20, aforesaid, for the reason that the same had not been subject to homestead entry for a period of three years after the surrounding land had been entered, filed upon, or sold by the government, and held as to the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of section 32, aforesaid, that said land being within the twenty mile limits of the grant to the Union Pacific Railroad is double minimum land, which should be charged for at the price of such lands, and instructed the local officers to offer the last named tract at not less than two dollars and fifty cents per acre, if the petitioner still desired that tract ordered into market.

O'Donnell appealed from said decision, alleging, in substance, that your office erred in holding that the said SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  was not subject to sale under said section of the Revised Statutes as amended, and erred in holding that the said NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  should be offered for sale as double minimum land.

Section 2455 of the Revised Statutes, as amended by the act of February 26, 1895, *supra*, is as follows:

It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: *Provided*, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the government: *Provided*, That not more than one hundred and sixty acres shall be sold to any one person.

In the case of G. W. Allen, 26 L. D., 607, the Department held that this section as amended contemplates that to become subject to sale thereunder the land must have been subject to entry under the homestead law by any qualified applicant during the period specified in said act. In that case it appeared that the land sought to be subjected to sale as an isolated or disconnected tract was included in a subsisting homestead entry during a portion of the designated period of three years following the disposition of some of the surrounding land, and it was held that land thus included in a subsisting entry was not "subject to homestead entry" in the sense that any qualified applicant could have made entry thereof as a homestead and the application was accordingly denied.

The said SW  $\frac{1}{4}$  of the SW  $\frac{1}{4}$  was segregated from the public domain by the timber culture entry of Bigger, April 1, 1887, and remained so segregated until the cancellation thereof August 29, 1895. During the existence of that entry the land was not subject to homestead entry.

Said tract was not therefore subject to sale as an isolated tract at the date of the filing of O'Donnell's petition, and, inasmuch as the filing of said petition has operated to prevent its disposal under the homestead laws in the meantime it is not now subject to sale under this statute.

As regards the NW $\frac{1}{4}$  of the NW $\frac{1}{4}$ , aforesaid, your office erred in holding that it should not be offered at public sale at less than two dollars and fifty cents per acre.

The minimum price of isolated tracts of land in alternate reserved sections within the limits of a railroad grant is, by section 2455 of the Revised Statutes, as amended by the act of February 26, 1895, *supra*, reduced from two dollars and fifty cents per acre to one dollar and twenty-five cents per acre. Charles Tyler (26 L. D., 699).

The petitioner was therefore entitled to an offering of this tract fixing the minimum price at one dollar and twenty-five cents per acre.

In a letter to the Department by Mr. O'Donnell, dated March 15, 1899, it is said that he does not care to purchase one of the above described tracts of land unless he can purchase both, and inasmuch as both tracts cannot be offered, his application is denied.

With the papers in this case is found the homestead application of Daniel J. Cole, made December 27, 1895, and that of Michael J. Welch, made March 26, 1896, for the SW $\frac{1}{4}$  of the SW $\frac{1}{4}$  aforesaid.

These applications and the papers therewith are herewith returned to your office, for such action as may seem appropriate.

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#### SOLDIERS' ADDITIONAL HOMESTEAD—ASSIGNMENT.

##### RICARD L. POWEL.

The abandonment of the original entry does not defeat the soldier's right to make an additional homestead entry under the provisions of section 2306, Revised Statutes.

On the application of an assignee to make a soldier's additional homestead entry, the evidence required to establish the identity of the soldier and the assignment of his claim, should not be of such character as to unreasonably restrict the exercise of the soldier's right by an assignee.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 22, 1899.* (G. B. G.)

The land involved in this proceeding is the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 9, T. 16 S., R. 12 E., Las Cruces, New Mexico.

May 9, 1898, the local land officers at that place forwarded to your office the application of Ricard L. Powel, assignee of William P. Cranmer, to make a soldier's additional homestead entry for said land.

Your office, considering said matter. August 27, 1898, after noting that the alleged military service of William P. Cranmer in Co. "G" 11th Reg't Mo. Vet. Inf., from February 21, 1865, to January 15, 1866,

is verified by the records of the War Department; that on February 6, 1868, he made homestead entry No. 5283 for eighty acres of land in the Boonville, Missouri, land district, and that J. A. Wilson and J. C. Whitmire, corroborating witnesses to the affidavit of Cranmer as to military service, identity, etc., state that they have been well acquainted with him for about twenty years and have reason to know that his statements in said affidavit are true, said:

The time said witnesses have known the soldier is not sufficient. The affidavit must be corroborated by two subscribing witnesses having personal knowledge of the facts establishing the identity of Cranmer with the person performing the military service alleged and (the person who) made the original entry.

Duly advise Powel that he is allowed sixty days from notice in which to file the necessary affidavit of identity, or to satisfactorily explain why such evidence cannot be furnished, and if he fails to do so within the time specified his application will be rejected.

The alternative privilege given the applicant by this ruling to "satisfactorily explain why such evidence cannot be furnished," would not seem to be of any value to him, since your office had previously held that the evidence offered was not sufficient to authorize the allowance of the application. If the evidence already in does not authorize the allowance of the application, any explanation why additional evidence cannot be furnished would not strengthen the showing already on file, nor justify favorable action thereon. The effect of the ruling of your office was therefore to deny the application upon the showing made.

The appeal of Powel brings the case here.

The record shows that Cranmer made homestead entry for the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 25, T. 39 N., R. 6 W., Boonville, Missouri, February 6, 1868. April 25, 1898, he made oath that he was legally entitled to the benefit of a soldier's additional homestead right of eighty acres, under and by virtue of section 2306 of the Revised Statutes of the United States; that he had never had the benefit of said right, and had never theretofore assigned or transferred the same, and on that day he assigned this alleged right to William E. Moses.

April 27, 1898, the said Moses assigned the same to the applicant, Ricard L. Powel.

It is further shown, by a certified copy of a certificate of discharge, and, as stated by your office, also shown by the records of the War Department, that one William P. Cranmer, a private of company "G" 11th Regiment of Missouri Veteran Infantry Volunteers, was enrolled on the 21st day of February, 1865, and that he was honorably discharged from the service of the United States January 15, 1866.

A special affidavit by Cranmer, executed April 25, 1898, recites that he is

the identical person who was mustered into the military service of the United States under the name of William P. Cranmer in Co. G, 11th Regiment of Missouri Veteran

Inf. Volunteers, on the 21st day of February, 1865, and was honorably discharged from such service on the 15th day of January, 1866,

and that he is the identical person who made original homestead entry No. 5283 at Boonville, Missouri. This affidavit is corroborated by J. A. Wilson and J. C. Whitmire, as follows:

The undersigned do solemnly swear that we have been well acquainted with said William P. Cranmer, who made the above affidavit, for about twenty years, and that we have reason to know that his statements in said affidavit are true.

The papers in the matter of Cranmer's original homestead entry have been examined, and these papers suggest a question not referred to in the decision of your office herein nor in the appeal therefrom.

It appears that the homestead entry of Cranmer, No. 5283, was canceled by your office March 24, 1874, for abandonment, and it is worthy of consideration whether this fact authorizes or requires that he be denied the benefits of section 2306 of the Revised Statutes. That section is as follows:

Every person entitled under the provisions of section 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 added to the quantity previously entered, shall not exceed one hundred and sixty acres.

If Cranmer is the person he alleges himself to be, he comes within the descriptive clause of section 2304, and is a "person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead," within the meaning of this language as used in section 2306, these words as there used evidently meaning a person who comes within the descriptive clause of section 2304, without reference to whether he is, at the time of offering to make an additional entry, entitled to the benefits conferred by that section. This must be so, else the provisions of section 2306 are themselves contradictory in terms, inasmuch as that section provides that only such persons shall be entitled to its benefits as have theretofore entered under the homestead laws a quantity of land less than one hundred and sixty acres; hence, instead of an entry under the homestead laws of less than one hundred and sixty acres disqualifying a soldier from exercising the privileges conferred by section 2306, the one is made a condition precedent to the other, and no good reason is perceived why Congress should have intended to restrict the operation of section 2306 to such persons as had not abandoned an original homestead entry. Cranmer's abandonment carried with it its own penalty, to wit, the loss of the land entered, and prevents him, or any one else by virtue of his assignment, from ever acquiring title from the government to more than eighty acres under the homestead laws.

There can be little doubt, and the fact is not questioned by your office, that the William P. Cranmer who made homestead entry No. 5283, February 6, 1868, is the same William P. Cranmer who assigned

the soldier's additional right to Moses, April 25, 1898. This being so, the question of identity growing out of the present proceeding is narrowed down to, whether the William P. Cranmer who made said homestead entry February 6, 1868, is the same William P. Cranmer who was mustered out of the service of the United States January 15, 1866. A little more than two years time had elapsed between these dates, and no motive for the fraudulent impersonation of another is apparent. There is no apparent reason, and no reason is suggested either by your office or the record herein, why the man who made the homestead entry should have assumed the name of William P. Cranmer. At that time the acts of April 4, 1872 (17 Stat., 49), June 8, 1872 (17 Stat., 333), and March 3, 1873 (17 Stat., 605), from which sections 2304, 2305 and 2306 of the Revised Statutes were taken, had not been enacted. These acts first conferred special privileges upon honorably discharged soldiers and sailors in the acquisition of homesteads on the public lands of the United States. At the time Cranmer's homestead entry was made, his successful impersonation of an honorably discharged soldier of the United States would have secured to him no advantage not possessed by any other person qualified to make an entry under the homestead laws. Of course, it is possible that there were two men named William P. Cranmer, and this fact being known might have suggested a possibility of the perpetration of a fraud upon the government, but such a theory would be a purely speculative one, unsupported by any fact or suggestion found in this record, and, besides, Cranmer, the soldier, must under the proof submitted have been a party to such a scheme, for the reason that the officer who certifies the copy of the certificate of discharge on file, further certifies that the certificate itself was exhibited to him by William P. Cranmer.

The chances for fraud in this case are too remote to authorize either the rejection or suspension of Powel's application.

There is no rule of your office cited, and none has been found, which would seem to require further proof than has been already submitted in support of the assignment, nor is there any departmental decision, rule or regulation which requires more than has already been done to establish the claim of the assignee.

Prior to May 18, 1896, when the supreme court rendered its decision in the case of *Webster v. Luther* (163 U. S., 331), the Department had uniformly held that the right of additional entry conferred by section 2306 of the Revised Statutes was not transferable. The court in that case held otherwise, and said, in substance, that Congress in the enactment of the act of June 8, 1872, *supra*, intended to bestow a gratuity in the most advantageous form to the donee, and to make it as valuable as possible; that it was not intended to hamper the gift with conditions that would lessen its value, and that the measure of its real value was the price that could be obtained by its sale.

This was said with special reference to the assignability of the right,

but it applies with force to the question of proof of the assignment of the right. Burdensome requirements of proof of the right to locate by assignment might, and in many cases would, contribute to defeat the intention of Congress to make the right a valuable one. The measure of its value as a property right depends upon an ability to ultimately locate it upon the public lands of the United States, and unreasonable restrictions in the matter of proof may fetter and render less valuable the right, just as surely as a denial of the right to assign it, and would, therefore, be in violation of the spirit of the ruling of the supreme court in said case.

The Department is urged by the appellant in this case to establish a general rule that shall hereafter govern the proof of assignment of soldiers' additional homestead rights, but it is not believed that such a rule would serve any good purpose.

The proof of the identity of the soldier and of the assignment of his claim are sufficient in this case, and the decision appealed from is reversed, with directions to allow the application of Powel, unless further objection appears.

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SOLDIERS' ADDITIONAL HOMESTEAD—ASSIGNMENT.

RICARD L. POWEL, No. 2.

On application to make soldiers' additional homestead entry, by one claiming as an assignee, satisfactory proof must be furnished as to the identity of the alleged soldier with the person who performed the military service.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 22, 1899.* (G. B. G.)

The land involved in this proceeding is lots 21 and 22, Sec. 5, T. 16 S., R. 12 E., Las Cruces, New Mexico.

July 2, 1898, the local land officers at that place forwarded to your office the application of Ricard L. Powel, assignee of Job Van Valkenburg, to make a soldier's additional homestead entry for said land.

Your office, considering said matter, November 22, 1898, after noting that the military service of Job Van Valkenburg in Co. "C" Hotches' Independent Bat. Minn. Cav., is verified by the records of the War Department, that he made homestead entry No. 534 for eighty acres of land at Minneapolis, Minnesota, January 1, 1864, and that O. H. Bushnell and S. W. Junkin, corroborating witnesses to the affidavit of Van Valkenburg as to military service, identity, etc., state they have been well acquainted with him for about five years, and have reason to know that his statements in said affidavit are true, said:

The time said witnesses have known the soldier is not sufficient. The affidavit must be corroborated by two subscribing witnesses having personal knowledge of the facts establishing the identity of Van Valkenburg with the person who performed the military service alleged and who made the original entry.

Duly advise Powel that he is allowed sixty days from notice in which to file the necessary affidavit of identity or to satisfactorily explain why such evidence can not be furnished, and if he fails to do so within the time specified, his application will be rejected.

Powel has appealed to the Department.

In the case of Ricard L. Powel, assignee of William P. Cranmer, this day decided by the Department, it was held that the proof of the identity of Cranmer and of the assignment to Powel were sufficient, and your office was directed to allow Powel's application in that case.

It is said by Powel, in a brief in the case now under consideration, that the two cases are essentially similar. This is not so. They are essentially dissimilar in many respects. In the present case the proof of the identity of the Job Van Valkenburg who assigned the soldier's additional right to Powel as the Job Van Valkenburg who performed the alleged military service is not nearly as strong as is the proof of identity in the other case. In the Cranmer case the corroborating witnesses had known him for twenty years; in this case the corroborating witnesses have only known Van Valkenburg for five years. In the Cranmer case the identity of the man who made the assignment as the man who made the original homestead entry was clearly established; in this case there is room for doubt whether the Van Valkenburg who makes the assignment is the same Van Valkenburg who made the original homestead entry. The name signed to the original homestead application herein is spelled "Vanvalkenburgh," whereas the name signed to the assignment of the soldier's additional right is spelled "Van Valkenburg." The military service of "Job Van Valkenburgh" is shown to have been from August 22, 1863, to June 22, 1866, and the homestead entry of "Van Valkenburgh" was made between these two dates. It was therefore made while he was in the army. This fact requires explanation, inasmuch as the entry appears to have been made in person at the land office, at Minneapolis, January 18, 1864.

In the Cranmer case, the original certificate of discharge of William P. Cranmer, the soldier, appears to have been in the possession of the William P. Cranmer who made the assignment of the soldier's additional right, while in this case the certified copy on file of a certificate of discharge shows that said certificate of discharge was not issued until March 26, 1885, that it was a duplicate certificate given by the War Department upon evidence that the original discharge had been lost or destroyed.

The act of March 3, 1873 (17 Stat., 582), specifically provides that such a duplicate certificate "shall not be accepted as a voucher for the payment of any claim against the United States for pay, bounty or other allowance, or as evidence in any other case."

The evidence of the identity of the soldier in this case is not sufficient.

The decision appealed from is affirmed, without reference to the ground upon which it was put by your office.

## RAILROAD GRANT—WITHDRAWALS—INDEMNITY SELECTION.

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

The provisions in section 2, of the railroad grant of July 25, 1866, directing a withdrawal when a map of the survey of the road is filed, refer only to lands within the primary or granted limits.

If there is no ascertained or established deficiency in a railroad grant, and the indemnity lands are not withdrawn, the company has no rights within the indemnity limits prior to selection, that will bar the initiation of a settlement claim.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 25, 1899.* (F. W. C.)

The Oregon and California Railroad Company has appealed from the decision of your office, dated June 25, 1897, holding for cancellation its indemnity selection for the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and lots 1, 2, and 3, of Sec. 19, T. 16 S., R. 7 W., Roseburg land district, Oregon.

Said selection was made April 11, 1896—the same day that the approved plat of survey of the township was filed.

On May 12, 1896, William W. Post applied to enter said land as a homestead, alleging settlement thereon in June, 1890. A hearing was had, at which it was shown that Post is a qualified entryman; that he settled on the land June 1, 1890, with the intention of entering it when surveyed; that he and his family continued to reside thereon from that date until the hearing; and that his improvements are worth at least three hundred dollars.

As it was shown that Post was a qualified settler upon the land at and prior to the selection by the company, it was held, in effect, both by your office and the local officers; that by reason of said selection no such right attached to the land as would bar the completion of entry of this land by Post.

In the appeal by the company it is urged, in effect, (1) that the act making the grant required the withdrawal of both granted and indemnity lands upon the definite location of the line of road opposite thereto, and as a consequence the Secretary of the Interior had no power to remove the indemnity withdrawal, as was attempted by Mr. Secretary Lamar in 1887; and (2) that an adjustment, made by the company, shows that the grant can not be satisfied from the land undisposed of within the indemnity limits, that a selection of the lands within the indemnity limits is unnecessary, and, as the road was located and constructed opposite this land as early as 1872, that Post gained no right by reason of settlement made thereon in 1890.

It is admitted that the first contention is contrary to the prevailing decisions of this Department, but it is urged that Secretary Lamar had no power to set aside and revoke the indemnity withdrawal made by his predecessor, and in support thereof the case of *Noble v. Union River Logging Co.* (147 U. S., 165) is cited.

In that case Secretary Noble had sought to set aside an approval of a right of way made by his predecessor. By the approval the jurisdiction of the land department over the matter was at an end, a patent or other evidence of title not being required by the law under which the approval was given.

It will not be seriously contended that the withdrawal of indemnity lands passed a title to the company and that by reason of said withdrawal the jurisdiction of the land department over the land withdrawn was at an end.

The decision in said case can therefore have no possible application to that here under consideration.

Further, an examination of the act making the grant does not support the contention that therein the Secretary of the Interior is required to withdraw, upon the definite location of the line of road, the lands within both the granted and indemnity limits.

The grant was made by the act of July 25, 1866 (14 Stat., 239), and the second section thereof provides that—

as soon as the said companies, or either of them, shall file in the office of the Secretary of the Interior a map of the survey of said railroad, or any portion thereof, not less than sixty continuous miles from either terminus, the Secretary of the Interior shall withdraw from sale public lands herein granted on each side of said railroad as far as located and within the limits before specified.

Considered by itself, the above direction might be construed to include the lands within both granted and indemnity limits. In said section it is further provided, however, that—

the sections and parts of sections of land which shall remain in the United States within the limits of the aforesaid grant shall not be sold for less than double the minimum price of public lands when sold.

As the numerous grants made to aid in the construction of railroads have uniformly increased in price only the sections remaining to the United States within the primary or granted limits, the language used in both provisions, viz., "lands herein granted on each side of said railroad, as far as located and within the limits before specified," and "land which shall remain in the United States within the limits of the aforesaid grant," are construed to have the same meaning and to relate only to the primary or granted limits prescribed by the act.

If there was doubt in the matter, in view of the long acquiescence in the construction of the act that prompted the action taken by Secretary Lamar in 1887, the Department should refuse, at this late day, in the absence of an authoritative decision of the courts, to disturb such construction.

Relative to the second contention, it is but necessary to say, that, so far as shown, there had not been, at the date of Post's settlement, nor, indeed, has there been to the present time, an ascertained or established deficiency in this grant, and the decisions of the courts and of this Department, referred to in counsel's brief, do not support the con-



applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

The notice of this application being published in a weekly newspaper by insertion in ten successive issues thereof, covered a space of more than sixty days. Each of the first eight insertions of the notice was a publication thereof not merely for the day upon which the paper was issued, but also for the period intervening before the next regular issue of the paper, and the ninth insertion was a living and continuing publication of the notice during so much of the statutory period of sixty days as was not covered by the preceding eight insertions. (Albert A. Prenzlauer, 27 L. D., 617.)

The contention of the appellant seems to be that the "sixty days of publication," within which the statute permits the filing of an adverse claim, is the period of publication named in existing mining regulations; that under such mining regulations notice when published in a weekly newspaper is required to be inserted in ten consecutive issues thereof; and that this adverse claim having been filed within the period of actual publication as made under such regulations, was filed "within the sixty days of publication" prescribed by the statute.

This contention can not be sustained. In the case of Prenzlauer, *supra*, the question was whether a publication in a weekly paper for six consecutive weeks was necessary under a statute requiring "at least thirty days notice," and it was held that a sixth insertion of the notice was not necessary, and that the required publication was completed before the time for the sixth issue of the paper.

The principle there decided disposes of the appellant's contention herein.

The statute does not require more than sixty days publication of the notice of an application for patent for a mining claim, nor does it authorize or permit the filing of an adverse claim after that time. "The sixty days of publication" within which an adverse claim may be filed under the statute is the same "period of sixty days" during which the same statute requires that the notice of the application for patent shall be published:

Paragraph 50 of the Mining Laws and Regulations, approved December 15, 1897 (25 L. D., 563, 578), provides, among other things, that when the notice of an application for patent for a mining claim "is published in a weekly newspaper, ten consecutive insertions are necessary." This regulation is inconsistent with law and therefore cannot control. The statute provides that the notice shall be "published for the period of sixty days," and the Department is not authorized to require publication for a longer time. When the notice has been inserted in nine successive issues of a weekly newspaper and the full statutory period of sixty days has elapsed the publication is complete.

The purpose of the publication is to give notice of the pending application so that those having adverse claims may present them during the period of sixty days limited therefor. Prolonging or continuing the publication after that time has passed can not subserve any beneficial purpose and is not contemplated by the statute.

The case of *Miner v. Mariott* (2 L. D., 709) is authority in support of the proposition that an adverse claim may not be filed after the expiration of sixty days continuous publication of notice of such an application, but there is language, at page 711 of that decision, in conflict with the views herein expressed, and to the extent of such conflict said decision is modified.

The decision of your office is affirmed.

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MCMILLAN ET AL. *v.* HARRIS.

Motion for review of departmental decision of December 20, 1898, 27 L. D., 696, denied by Acting Secretary Ryan, March 25, 1899.

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RAILROAD GRANT—INDEMNITY SELECTION—DESIGNATION OF LOSS.

CHICAGO, MILWAUKEE AND ST. PAUL RY. CO. *v.* TRITES.

The failure of a railroad company to specify a loss in support of an indemnity selection of lands duly withdrawn in aid of the grant, will not defeat its right, where, prior to the revocation of the withdrawal, the grant is found largely deficient.

No rights are acquired under a timber culture entry made at a time when the land is included within a railroad indemnity withdrawal; nor can any right under such entry attach on the revocation of said withdrawal, if, prior thereto, the company applies to select the land.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 25, 1899.* (L. L. B.)

Edward Trites has appealed from your office decision of May 28, 1897, holding for cancellation his timber culture entry embracing the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 19, T. 93 N., R. 32 W., Des Moines, Iowa, for conflict with the grant to the railroad now known as the Chicago, Milwaukee and St. Paul Railway Company.

The land is within the indemnity limits of the grant and was withdrawn from settlement and entry September 12, 1864, and the withdrawal was in force December 8, 1887, when Trites was allowed to make timber culture entry therefor.

February 20, 1888, the company applied to select the tract in controversy. The application was denied, because the land was covered by the said timber culture entry of Trites. The company appealed, alleging the withdrawal of the land for the benefit of the grant ante-

rior to the entry of Trites, and that such withdrawal had not been revoked.

The withdrawal was revoked May 22, 1891 (see *St. Paul and Sioux City R. R. Co. et al.*, 12 L. D., 541).

The appeal of the company from the rejection of its application to select the tract was transmitted to your office March 29, 1888. The letter of transmittal contained no papers except the appeal of the company and evidence of service of notice of the same upon Trites. Upon receipt of this appeal, your office, by letter of April 24, 1888, called upon the register and receiver to forward the other papers in the case. It appears that ever since the last named date a correspondence has been going on between your office and the local officers with a view to securing the application of the company to select this tract, and other papers which were not forwarded with the appeal. No other paper has yet been forwarded. This was the status of the land in controversy on January 11, 1897, when, by letter of that date, your predecessor called upon Trites to show cause why his timber culture entry should not be canceled for conflict with the superior rights of the company.

In response Trites filed in the local office, April 9, 1897, his answer alleging as grounds for retaining his entry—

1st. That he has been in possession of the tract for nearly ten years.

2nd. That he has improved the land, thereby raising its value from five to twenty dollars per acre.

3rd. That "he is informed and verily believes" that the company has received all the lands it is entitled to "under the indemnity land grant."

4th. That the local officers denied the company's application to select this tract and that their action has never been reversed.

5th. That the company has received all the land it is entitled to under its grant.

This answer was thought not to be sufficient, and by your office decision here appealed from, his entry was held for cancellation.

In his specifications Trites charges error in holding that the land was not subject to entry at date of his timber culture entry; in assuming that the company made selection of the land; in holding that there were any other papers ever filed by the company; in holding that the entry of Trites was erroneously allowed; in holding that the rights of the company were superior to the rights of appellant; in holding that the reasons given by the entryman why the entry should not be canceled were insufficient; in holding that any rights of the company attached to the land prior to the company's selection thereof, and insisting that there was no selection because at the time selection was applied for the tract was covered by the entry of Trites.

As the withdrawal of 1864 was in force at the date of Trites' entry, he could secure no rights as against the company by his entry so erroneously allowed.

This withdrawal was revoked in 1891, and the question now to be determined is: did the company legally apply to select the tract prior to the revocation of the withdrawal?

It is insisted by counsel for Trites that there is nothing in the record showing that the fees were tendered or a proper basis assigned in the selection presented by the company in 1888.

There is in the record a copy of a letter from the register of the Des Moines land office, dated February 20, 1888, and directed to the land commissioner of the railway company, acknowledging the receipt of "your selection in triplicate for Chicago, Milwaukee and St. Paul Ry. Co. of N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , 19-93-32" (the tract in controversy), and stating that "it cannot be approved" on account of the entry of Trites. In the same letter it is stated that "we return check for 1.00 and papers herewith." This is certified by the present register of the said land office to be a correct copy of the original letter, as shown by the press copy-book in that office.

There is also in the record an original letter from the then register (March 29, 1888) to the railway company's land commissioner, stating that, "In the matter of selection N.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$  of 19-93-32, you [the said land commissioner] can mark it 'Money tendered and rejected.'"

The foregoing copy and original letter were attached to and filed with the company's brief before this Department, and being documentary evidence, it must be considered sufficient to show that the necessary fee accompanied the application to select.

There is nothing in the record, however, showing that a loss was designated as a basis for the selection, and counsel for Trites contend that this failure on the part of the company is fatal to its claim; that, although the entry may have been unlawfully allowed during the withdrawal, yet upon the revocation thereof in 1891 his entry took effect, in the absence of a legal and proper application by the company to select the land during the continuance of the withdrawal, and that an application to select indemnity, without a designated loss, is not a legal application.

There is nothing in the record showing that the selection presented by the company designated the loss upon which the selection was based, other than may be inferred from the fact that the reason given for the rejection of the application was the entry of Trites; that is to say, the register and receiver did not base their rejection of the selection upon any defect in the application papers, but refused it solely upon the ground that the tract was embraced in the entry of Trites.

Such inference is not believed to be sufficient to afford a legal presumption that no other ground for rejection existed.

But whether or not the company designated a proper basis for its selection, under the law as declared in the case of the Chicago, Rock Island and Pacific R. R. Co. *et al.*, *v.* Wagner, 25 L. D., 458, the omission of a base would not interfere with the right of the company to

select this tract, because, prior to the date of the restoration (1891), to-wit, May 19, 1890, an adjustment of the grant was submitted to this Department by your office and received departmental recognition and approval, in which the grant was shown to be deficient to the extent of more than 800,000 acres. (See Chicago, Milwaukee and St. Paul Ry. Co., 15 L. D., 121.)

The entry of Trites having been made when the land was not subject to entry by reason of its having been withdrawn to satisfy the grant, no rights were acquired by him thereby, nor could any rights attach thereunder prior to the restoration of the land to settlement and entry, and prior to that time the company had duly applied to select it.

It follows that the entry and occupation of this land by Trites was, and is, in violation of the rights of the company.

Trites' entry will therefore be held subject to the right of the company to perfect its selection within a time to be fixed by your office, when the same will be submitted to this Department for approval; and if approved the entry will be canceled.

In the event of failure on the part of the company to renew and perfect its application to select within the time prescribed, the entry of Trites will remain intact.

The decision appealed from is accordingly modified.

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MINING CLAIM—PUBLICATION OF NOTICE.

DIMOND ET AL. v. KAHN ET AL.

Publications of notice, on application for mineral patent, made or begun prior to June 1, 1897, are to be treated in accordance with the practice of the Department existing prior to the original decision in the case of Gowdy *et al.* v. Kismet Gold Mining Co.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 28, 1899.*

On June 23, 1896, Hermina Kahn and H. H. Harper made mineral entry, No. 4064, for the Little Mollie and nine other lode claims situated in the Leadville, Colorado, land district. August 13, 1896, Thomas Dimond, Edward Kelly and Patrick McShane filed corroborated protest against said entry, alleging, in substance, that the published notice of application for patent was defective and did not show compliance with the requirements of paragraphs 29 and 35, of the circular of December 10, 1891; that they were the owners of the Panic and Barry lode claims, in conflict with the claims embraced in said entry, and that they had neither legal nor actual notice of the application for patent until after the period of publication had expired and the application had been approved.

This protest was transmitted to your office, and on October 28, 1896, you rendered a decision in which you said—

Upon consideration of the case I arrive at the conclusion that none of the allegations contained in said protest justify any action by this office except the allegation as to the insufficiency of the publication of notice of application for patent. This allegation is borne out by the record which shows that no adjoining adjacent claims were mentioned in said notice.

Following the decision of the Honorable Secretary in *Chicago Girl lode v. Kismet lode case*, the entrymen in this case will be required to republish their notice of application for patent in accordance with paragraphs 29 and 35 of the circular of December 10, 1891.

January 2, 1897, the entrymen filed a petition for revocation of the order requiring republication. You considered this petition on April 30, 1897, and held that—

The notices published and posted in this case appear, upon further examination, to be in accordance with the practice prevailing before the rendition of the departmental decision of May 23, 1896, in the case of *Gowdy et al. v. the Kismet Gold Mining Company* (22 L. D., 624). Therefore, and following the Honorable Secretary's decision in *Gowdy et al. v. Kismet Gold Mining Company*, on re-review (24 L. D., 191), and the circular of March 11, 1897, the order of October 8, 1896, for republication of the notice of application for patent in this case is hereby revoked.

Upon further consideration of the allegations contained in said protest, I concur in the decision of October 28, 1896, and the protest is therefore hereby dismissed.

The protestants have appealed to the Department.

The only question that need be discussed here is as to the sufficiency of the notice of application for patent. In the case of *Gowdy et al. v. Kismet Gold Mining Co.* (on re-review, 24 L. D., 191), it was contended by the protestants that a notice, in all essential respects similar to that published in the case at bar, was insufficient, and that republication of such notice should, therefore, be ordered. The Department held, however, on February 27, 1897, that "there was a substantial compliance by the applicants with the rules as then administered and construed," and that, this being true, new publication of notice would not be required.

In accordance with directions contained in said decision your office, with the approval of the Department, on March 11, 1897 (24 L. D., 266), issued a circular amending paragraph 29 of the Mining Regulations. This circular went into effect on June 1, 1897, and it provided that—

All publications made or started prior to that date are to be treated in accordance with the practice of the Department existing prior to the original decision in the case of *W. H. Gowdy et al. v. The Kismet Gold Mining Company*.

The notice in this case having been given in accordance with the practice of the Department existing prior to the decision spoken of in this circular, and having been made prior to June 1, 1897, no new notice will be required.

Your decision is affirmed.

## RAILROAD GRANT—WITHDRAWAL—INDEMNITY SELECTION.

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

No title to land within the indemnity limits of a railroad grant passes to the company until after selection, and the approval thereof by the Secretary of the Interior.

The directions in section 2, of the railroad grant of May 4, 1870, for a withdrawal on the survey and location of the road are applicable only to the lands within the primary limits of the grant.

In the absence of legislative direction for the withdrawal of indemnity lands it is within the authority of the Land Department to revoke a withdrawal, previously made, of such lands.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 28, 1899.* (F. W. C.)

An appeal has been filed on behalf of the Oregon and California Railroad Company, as successor to the Oregon Central Railroad Company, from your office decision of February 8, 1897, in which it was held that the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and lot 1, Sec. 7, T. 2 S., R. 7 W., Oregon City land district, Oregon, was, by reason of the settlement claim of Everett R. Bales, not subject to indemnity selection by said company, and in which a rule was served upon said company to show cause why it should not reconvey said tract to the United States, as contemplated by the act of March 3, 1887 (24 Stat., 556), it having been erroneously patented to the company during the pendency of a contest brought by Bales against the company, involving this land.

The company lays claim to the land under the provisions of the act of May 4, 1870 (16 Stat., 94), making a grant to aid in the construction of a railroad and telegraph line "from Portland to Astoria, and from a suitable point of junction near Forest Grove to the Yamhill river, near McMinville, in the State of Oregon."

The entire road was located, and on account thereof the lands were withdrawn within both the granted and indemnity limits as adjusted to said location. Thereafter the company constructed its road from Portland to Forest Grove, and from thence south to McMinville. The portion of the road extending northwestwardly from Forest Grove to Astoria being unconstructed, the grant appertaining thereto was declared forfeited by act of Congress approved January 31, 1885 (23 Stat., 296).

The tract here involved was within the indemnity limits of the grant as originally located, and upon the readjustment of the limits to the constructed line it remained within the indemnity limits.

The township plat was filed in the local office July 27, 1893, on which date the Oregon and California Railroad Company filed its selection list No. 10, including this tract. Later in the same day, Everett R. Bales tendered homestead application for this land, and upon his alle-

gation of prior settlement hearing was duly ordered and held May 1, 1895.

The testimony adduced at the hearing evidences that Bales made settlement upon the land in April, 1889, and that he took up a residence upon the land, which was continuous to the date of the hearing, his improvements made upon the tract being of the value of about \$800.

Upon the showing made the local officers, in their opinion of July 30, 1895, recommended that the company's selection be canceled and that Bales be permitted to complete entry of the land upon his homestead application.

The company appealed to your office, and during the pendency of said appeal the company's list of selections was taken up and passed to patent on October 9, 1895, without regard to the pending case arising upon Bales' homestead application.

Thus the matter rested until, in your office decision of February 8, 1897, the case arising upon Bales' homestead application was taken up for consideration, and upon the showing made it was held in said decision that Bales would be permitted to complete entry of the land, but for the fact that during the pendency of the case arising upon said application the tract had been inadvertently patented to the company, and for that reason a rule was laid upon the company to show cause why it should not reconvey the tract thus erroneously patented.

In its appeal from said decision it is contended on behalf of the company that the grant is largely deficient, and for that reason no selection was necessary, and that under the terms of the grant the land was not subject to homestead settlement in 1889, the road having been located and constructed prior to that date; that the act making the grant required that the lands be reserved upon the location of the line of road, and that this land had been withdrawn on account of the grant prior to said alleged settlement, which reservation was still in force at the date of the alleged settlement.

Aside from the question as to the merits of the company's contention, it is apparent that the tract was inadvertently patented during the pendency of the contest arising upon Bales' application, and while by the issue of said patent the land passed beyond the jurisdiction of the land department, the record made upon said application will be considered for the purpose of determining whether such a showing has been made as warrants the institution of suit by the United States for the recovery of said tract, to the end that Bales may be permitted to complete entry of the land.

Relative to the alleged deficiency in the matter of the grant, it is sufficient to say, that no departmental adjudication is referred to as finding or determining any such deficiency in this grant. Under the terms of the grant, in lieu of losses within the primary limits, other lands, within twenty-five miles on each side of the road, were to be selected, under the direction of the Secretary of the Interior.

Under repeated adjudications by the courts and this Department, no title passes to lands within the indemnity limits until they have been selected in the manner prescribed by the act, that is, until the company's selection has been approved by the Secretary of the Interior.

The second section of the act provides:

And whenever and as often as the said company shall file with the Secretary of the Interior maps of the survey and location of twenty or more miles of said road, the said Secretary shall cause the said *granted* lands adjacent to and coterminous with such located sections of road to be segregated from the public lands.

The direction to withdraw the lands on account of such location, it will be seen, was limited to the "granted lands," which term was evidently used in its restricted sense, as applying to the lands within the primary limits which became identified as "granted lands" by the filing of said map and was not intended to include indemnity lands which became identified as passing under the grant only upon actual selection by the company in lieu of lands lost to the grant within the primary limits.

There is nothing in this act, however, limiting the power of the Secretary to make withdrawal of lands within the indemnity limits; and following the definite location of the line of the company's road opposite this land, it appears that the lands within the twenty-five mile or indemnity limits were withdrawn from settlement and entry by your office letter of May 26, 1876. It is claimed on behalf of the company that this withdrawal was never revoked; but an examination of the matter leads to another conclusion.

Following the passage of the forfeiture act of January 31, 1885, which forfeited the portion of the grant opposite the unconstructed road, and upon the re-adjustment of the limits to the constructed line of road a diagram was prepared by your office showing the lands saved from forfeiture within the twenty-mile or primary limits on account of the constructed lines of road. There was also shown upon this map the former limits, both primary and indemnity. There was no extension of the indemnity limits opposite the constructed portion of the road shown, and along the entire indemnity limits formerly established, were printed the following words: "Indemnity lands restored;" thus evidencing an intention to include within the restoration all the indemnity lands, without regard to location with reference to the constructed line.

Of the lands within the indemnity limits as originally established, but a small portion remained within the indemnity limits adjusted to to the lines of constructed road. The tract here in question is a part of the land included within the indemnity limits as originally established and also within the indemnity limits opposite to the constructed lines of road.

In the matter of instructions prepared by your office, addressed to the register and receiver at Oregon City, Oregon, governing the restoration of the lands forfeited by the act of January 31, 1885, and which

was accompanied by the map or diagram above described, it is stated that—

Construing the whole act, it appears to me that Congress intended to reserve from forfeiture the lands within granted limits along the whole of the constructed portion of the road. For the present, therefore, the restoration of lands under the act of January 31, 1895, will be limited to the lines shown on the diagram, which is prepared in accordance with the foregoing views.

These instructions were submitted to this Department and regularly approved July 9, 1885. It will thus be seen that, although the letter of instructions to the local officers does not specifically state that the portion of the lands within the indemnity limits originally established remaining within the indemnity limits opposite constructed road, were restored by the terms of the order contained therein, yet when considered in connection with the map, it leaves but little doubt as to the intention to restore those lands. There being no legislative direction for the withdrawal of the indemnity lands, it was within the power of the land department to revoke the withdrawal previously made of such indemnity lands.

It might be further stated that following the departmental decision of April 5, 1887 (5 L. D., 549), involving the question as to the extent of the grant for this company not included in the forfeiture, your office, by letter of April 18, 1887, transmitted a diagram to the local officers, in which letter the following appears:

Any lands which fall outside the blue twenty-mile limits, you will hold as restored and subject to appropriation as provided by the act of January 31, 1885, by the first legal applicant. Those in the odd numbered sections which fall within the twenty mile blue limits and are free from other claims, are reserved for the benefit of the railroad company.

The yellow twenty-five mile line shows the limit to which the company may go in selecting indemnity for lands in place, but there is no reservation outside the twenty mile blue limits.

Your office plainly construed the previous instructions of 1885 as restoring those lands formerly included within the indemnity limits that would remain within the indemnity limits adjusted to the constructed line of road, and for this reason no action was taken looking to the restoration of the indemnity lands in 1887, when the indemnity withdrawals on account of railroad grants generally were revoked and the lands restored. Under these instructions, construed as aforesaid, the grant has been since administered, and no good reason appears for departing from the rule of adjustment made therein.

It follows that the inadvertence on the part of your office in patenting this land to the company during the pendency of Bales' contest was in violation of the rights gained by his settlement and the timely tender of his homestead application, and it is therefore directed that demand be made upon said company to reconvey this land to the



Arthur entered the tract through a gate in the enclosure. He sought permission to go there; but as no one was upon the place to represent Jones, he made settlement without such permission. Jones ordered him to leave the premises; and thereafter, while he remained in possession, he went upon the tract through the fence of another, who gave him permission to do so.

At the time of Arthur's entry there was some hesitation in allowing it, on the part of the local officer in charge, but after an examination of the records, including the plat book, the entry was allowed.

There appears to be no record that the tract was ever selected by the State of Oregon as school indemnity lands, either in the local office or your office, and your office so found. This finding is supported by a letter of your office bearing date October 20, 1879, addressed to the land department of the State, and transmitted to this Department since your office decision in this case was rendered. In effect, this communication states that no selection appears for the tract in dispute, in any of the lists of selection forwarded to your office, and therefore was presumed to be abandoned, if ever selected, or omitted from the official list of selections by the proper officers "for reasons best known to themselves." Your office held therein that it could not "reconcile their action with the fact, if it be a fact, that the State of Oregon had sold this land previous to the date of making up said lists."

By said letter your office denied the petition of Scott and Kinney, as grantees of the State, to have approved the indemnity school selections of the tract and other lands, alleged to have been made September 25, 1854, by the superintendent of schools of Marion county, Oregon, then acting.

The State of Oregon, on August 28, 1893, over a year after Arthur's entry, through the clerk of its land department, appealed from the action of the local officers, rejecting the application for selection by the State of the tract involved as school indemnity lands, for the reason that the tract was covered by Arthur's entry. The grounds of this appeal are, that the State conveyed the above-described land, with other tracts, to one Thomas Cross, September 17, 1869, as indemnity school lands; that the tract had, since such conveyance, been in the possession of Cross, or his grantees, and was enclosed and cultivated for many years by them, and was so enclosed and cultivated at the time of Arthur's entry by Jones, the contestant herein; that being so enclosed, cultivated and occupied, it was not subject to entry under the homestead laws, and that Arthur was a trespasser thereon. This appeal, in addition to the assignment of errors, contains the following statement:

By some error or oversight, the record does not disclose the fact that said tract was selected as school indemnity land before it was conveyed to Thomas Cross, and the State asks to be allowed to perfect title by making the selection at this time, and that the filing of Thomas J. Arthur be canceled.

Prior to the hearing, Jones instituted a suit in a local court for the possession of the tract, and after a trial, at which Arthur appeared and submitted evidence, as well as Jones, judgment was rendered against Arthur, and he was ejected from the premises by the sheriff of the county, and Jones was put in possession. The matters here in dispute were attempted to be adjudicated in such suit, but the judgment can have no controlling effect in the determination of the matter here.

Application to make entry of the tract, with other lands, was first made by one John W. Crawford, upon May 26, 1879, under a soldiers' declaratory statement filed November 26, 1878. His entry was made August 5, 1879, and a contest was initiated by Scott, as purchaser from the State, resulting in a hearing, at which Crawford did not appear, but made default, and his entry was canceled. He acquiesced in this decision and was permitted to make a new entry of other lands. In an affidavit accompanying his application therefor, he states that he abandoned his entry covering the tract in dispute because the lands had been selected by the State and were occupied by its grantees.

It is manifest that the decision of the case rests upon the validity of Arthur's entry made in the face of the practical enclosure of the tract, with other lands, by Jones, and its occupancy by him and his grantors for so many years, under claim and color of title. Jones paid twenty-five dollars per acre for the tract, while the original grantee from the State paid but two dollars per acre. Jones mortgaged the tract, in common with other lands selected by the State, to the State Board of Land Commissioners, for the sum of fifteen hundred dollars; and it is improbable that State officials should have advanced such a sum or any sum under such mortgage without an honest belief in the validity of the title to each tract covered by the mortgage.

It is true that the tract has been only partially improved and cultivated, but it had been used and occupied in connection with other lands for twenty-three years preceding the entry of Arthur, by those who, beyond question, must have believed their title to be good; particularly as warranty deeds were passed by the State and all of the vendors at each sale.

While Jones might have been informed, after his purchase, of the defect in his title, and in ample time to have made entry of the tract prior to Arthur's entry, it is not clear that he plainly understood the purport of such information. He denies that he was ever so informed, and evidently relied upon the information furnished to him by his attorneys at or about the time of his purchase.

The tract is in a well-settled community, where lands are undoubtedly of much value, and it may be that an ordinary purchaser would have relied upon the security of his title in a like situation, as the public lands in the vicinity had doubtless been nearly all entered prior to his purchase of this tract.

The case seems to fall within the category of cases decided by the

supreme court of the United States, beginning with that of *Atherton v. Fowler* (96 U. S., 513), declaring illegal any attempt to make entry of the public lands occupied and improved by another under honest claim and color of title. As Jones was in actual possession of the tract, by his employé or agent, at the time of Arthur's entry, whether or not the entry of Arthur was made peaceably or with force is immaterial. In the case of *Quinby v. Conlan* (104 U. S., 420, 423), the rule was broadly stated to be, that "a settlement can not be made upon public land already occupied," and the reasoning of the supreme court in all the cases pertinent to this inquiry forbids the invasion of the actual possession of another, maintained under claim and color of title, whether such invasion is accompanied by the use of force or not. (*Goodwin v. McCabe*, 75 Cal., 584, 588, and cases there cited.)

The principle announced in the case of *Burke v. Gamble* (21 L. D., 362, 364) is also applicable to the case at bar. It is well stated in the syllabus, as follows:

No rights are acquired under the settlement laws by an unlawful trespass on the undisputed and known possession of another, who believes his title to be good.

The enclosure of the tract was practically sufficient, and an inquiry on the part of Arthur at the time he made an inspection of the tract prior to his entry, would have revealed the claim of title of Jones.

A question is raised as to the qualifications of Jones to enter the tract. It is shown that he was assessed for taxation for over one thousand acres prior to the year during which the hearing was had, but he asserted at the hearing that he was qualified to make entry of the tract. Even if Jones was disqualified as a homesteader, this question could only arise when his application to enter is presented. If the State be permitted to make selection of the tract at this time, his qualifications as a homesteader become of no importance in the disposition of this case.

The real question to be decided is as to the right of Arthur to enter the tract. Considering the occupancy of the tract for so many years under an honest belief in the validity of the title of the State of Oregon thereto, and under claim and color of the warranty deed from the State, it must be held that the tract was not subject to entry at the time entry thereof was made by Arthur.

It does not appear that the State of Oregon has appealed from the decision of your office rejecting its application to select the tract involved. Although it is not a party to this proceeding, its right to select the tract involved may be considered as incidental to this inquiry, especially since it has attempted to make such a selection through its proper officers for the purpose of correcting the manifest errors of the officers charged with the duty of applying for indemnity selections, and in order to make good its warranty to its citizens who were misled by its solemn deed, and in view of the further fact that the appeal of Jones practically brings the State's case here. There is

not much doubt that the selection of this tract was intended, but owing to the loose methods which it is conceded were in vogue during the early years of the settlement of the State, such intention never ripened into a perfect application or an approved selection of the tract in dispute.

Under the circumstances, it should now be allowed to make the selection, upon furnishing a proper basis therefor.

The decision of your office is reversed. The entry of Thomas J. Arthur will be canceled, and the State of Oregon will be permitted to make selection of the tract as school indemnity land, upon a proper basis furnished therefor, within a time to be limited by your office, and failing so to do, M. L. Jones will be permitted to make entry for the tract within a reasonable time after the failure of the State to make application for such selection, upon showing his qualification to make such entry.

#### SWAMP LANDS—DOUBLE MINIMUM LANDS.

##### STATE OF MINNESOTA.

The State has no right under its grant of swamp lands to double minimum reserved sections within the limits of a prior railroad grant.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *March 28, 1899.* (G. R. O.)

The State of Minnesota has appealed to this Department from your office decision of July 21, 1897, wherein you hold for rejection its claim, under the swamp land grant of March 12, 1860 (12 Stat., 3), for the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 24, T. 35 N., R. 30 W., St. Cloud, Minnesota, land district. As reason for such action you state that—

the said tract of land being in an even-numbered section within the six miles limits of the "former Brainerd branch of the St. Paul and Pacific (now St. Paul and Northern Pacific) Railway Co.," was reserved for the special purpose of reimbursing the government for lands granted to the State of Minnesota to aid in the construction of certain railroads, by the act of March 3, 1857 (11 U. S. Stat., 195); and the reservation by the said act was of such a character as amounted to the disposition of the said tract for other purposes prior to the date of the swamp land grant (1 Lester, 521, and 14 L. D., 229).

By act of September 28, 1850 (9 Stat., 519), Congress granted to the State of Arkansas the whole of the swamp and overflowed lands within its borders which remained unsold at the passage of the act. The act of March 12, 1860 (12 Stat., 3), extended the provisions of said act to the States of Minnesota and Oregon, and contained the proviso—

That the grant hereby made shall not include any lands which the government of the United States may have reserved, sold or disposed of (in pursuance of any law heretofore enacted) prior to the confirmation of title to be made under the authorization of the said act.

The act of March 3, 1857 (11 Stat., 195), granted to the Territory of Minnesota, to aid in the construction of certain railroads, "every alternate section of land, designated by odd numbers, for six sections in width on each side of said roads." Section two of said act provided:

That the sections and parts of sections of land which by such grant shall remain to the United States, within six miles on each side of said roads and branches, shall not be sold for less than double the minimum price of the public lands when sold; nor shall any of said lands become subject to private entry until the same shall have been first offered at public sale at the increased price.

The cases cited in your office decision relate to swamp lands in the State of Illinois. In the first of these it was held by Secretary McClelland, as long ago as November 20, 1855, that said State had no right under the swamp land grant to any of the double-minimum sections within the limits of the grant made by act of September 20, 1850 (9 Stat., 466), because such sections had been reserved for the special purpose of reimbursing the government for the lands granted by said act. The Department has followed this ruling in all cases of a similar nature which have come before it since the said decision was rendered. See the cases of the State of Illinois, 2 C. L. L., pp. 1062, 1069, and 1071, and 14 L. D., 229, and State of Ohio, 10 L. D., 394, and cases cited therein.

The act of March 3, 1857, *supra*, granting lands to the State of Minnesota to aid in the construction of railroads, is substantially the same as that of September 20, 1850, *supra*, granting lands to the State of Illinois for a similar purpose, and the construction which has been placed by the Department upon said last-mentioned act will be adopted in this case. It is held, therefore, that the State of Minnesota has no right under its swamp land grant to double-minimum lands within the limits of the grant to the former Brainerd branch of the St. Paul and Pacific Railway Company.

Your decision is affirmed.

#### MINING CLAIM—PUBLICATION OF NOTICE.

##### GOWDY *v.* CONNELL (ON REVIEW).

Under the rule as announced in the case of Gowdy *v.* Kismet Gold Mining Co., 24 L. D., 191, the failure to include in the published notice of application for mineral patent the names of adjoining claims will not render such notice insufficient, where the publication is made or begun prior to June 1, 1897, and is substantially in accordance with the practice theretofore existing.

The sufficiency of a published notice of application for mineral patent must be determined by taking the notice as a whole, and if, when so taken, the situation of the applicant's claim on the ground is designated with substantial accuracy, the notice should be held sufficient.

The departmental decision herein of June 8, 1898, 27 L. D., 56, recalled and vacated.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 30, 1899.* (E. B., Jr.)

This case is before the Department under an order dated September 9, 1898, entertaining a motion by J. Arthur Connell for review of the

decision of June 8, 1898 (27 L. D., 56), wherein, affirming your office decision of October 13, 1896, in the matter of mineral entry No. 821, of the Big Chief and Big Mike lode claims, survey No. 8868, Pueblo, Colorado, land district, the published notice of the application for patent was held to be insufficient, and new notice was required for the reason that the Chicago Girl lode claim, an adjoining claim, was not mentioned in the published notice, either by name or by its official survey number.

Your office decision was based upon the decision of the Department in the case of Gowdy *et al. v.* Kismet Gold Mining Company (22 L. D., 624). The last mentioned decision was modified on review February 27, 1897 (24 L. D., 191). It is contended in the motion that the decision of February 27, 1897, in that case, which is referred to in the decision under review as if supporting the same, does not in fact support it, but is repugnant to it, and that the decision of the Department dated June 25, 1898, in the case of Hallett and Hamburg Lodes (27 L. D., 104), is also repugnant to it.

William H. Gowdy, the protestant in this case, was also, as alleged owner of the Chicago Girl claim, one of the protestants in the Gowdy-Kismet case, *supra*. In that case it was charged, among other things, that the published notice of the application for patent to the Kismet lode claim did not contain the names of adjoining claims, nor state where the record of the Kismet location could be found. These charges were shown to be true in each particular. The Kismet published notice did not make mention of any adjoining claim, either by name or survey number, nor did it contain any statement relative to the record of the location notice. In these particulars, therefore, the notice did not meet the literal requirements of then existing regulations (mining regulations approved December 10, 1891, paragraphs 29, 35, and 36), which were sustained and insisted upon in the first of the Gowdy-Kismet decisions, *supra*.

Considering these charges in connection with the facts disclosed in that case and in many similar cases in your office, the Department in its decision of February 27, 1897, *supra* (pp. 192 and 193), said:

An informal inquiry at the mineral division in your office discloses the fact that a large proportion of the notices of the character under discussion are not strictly in conformity with the regulations, and some of the features might on strict construction be subject to the same criticism as the one at bar. It has been considered by your office that these notices are a substantial compliance with the regulations. \* \* \*

After mature deliberation on this subject, I am convinced that there is much force in the proposition that the rule announced by the Department in this case, if enforced, would effect a material change in the practice theretofore prevailing in your office, which, by reason of its long standing, may be regarded as having become a rule of property, and that the summary enforcement of such rule as to pending applications, in which notice has been given under the former practice, is not only calculated to cause much confusion, but great expense, both of which should be avoided.

The Department then directed the immediate promulgation of a substitute, therein set out (p. 194), "for the present paragraph 29"—

with instructions that the same will be in full force and effect on and after the first day of June, 1897, and all publications made thereafter must be in conformity with this. All publications made or started prior to that date will be treated under the rule as it was interpreted prior to the original decision in this case.

and in conclusion held that:

in the case at bar there was a substantial compliance by the applicants with the rules as then administered and construed, and that the (previous) decision should be modified to this extent. The order requiring republication and suspending the entry during that period is hereby revoked.

Read in the light of the facts in the Kismet published notice, which contains no reference to any adjoining claim nor to any record of the Kismet location, it is evident that it was intended to hold, in the decision of February 27, 1897, that the failure to include such data in publications of notice "made or started" prior to June 1, 1897, would not render the notice insufficient or make it necessary that new notice be given, but that, as was therein expressly said, such publications "will be treated under the rule as it was interpreted prior to the original decision in this case." While no mention is made of the Chicago Girl claim in the published notice of the Big Chief and Big Mike application, four other claims are mentioned therein by their survey numbers, that is, surveys Nos. 8451, 8360, 8741, and 8426, as conflicting claims, and the conflicts between them and survey No. 8868 are excluded. The Big Chief and Big Mike notice was therefore less objectionable under the letter of the regulations than was the Kismet notice. The former made mention of four conflicting claims by survey numbers; the latter contained no allusion to any other claim.

It is not alleged by the protestant that he was misled, or that any one was misled by the failure to make mention of the Chicago Girl claim in the Big Chief and Big Mike published notice. He had filed a protest as owner of the Chicago Girl, survey No. 8844, February 7, 1894, nearly eight months prior to the commencement of that notice, against the application for the Kismet, survey No. 8451, which conflicts with survey No. 8844, and the mention of survey No. 8451 in the notice in question was, under these circumstances, in itself sufficient to put him upon inquiry. The decision under review is not justified by the decision of February 27, 1897, in the Gowdy-Kismet case. The published notice of the Big Chief and Big Mike application is believed to be within the rule of that decision relative to "publications made or started" prior to June 1, 1897.

A comparison of this notice with the published notice set out in full in the decision in the case of Hallett and Hamburg Lodes, *supra*, shows that the notices are in every respect essentially similar throughout, except that there are certain errors in the latter notice, while there are none in the former. The notice of the Hallett and Hamburg application was held to be sufficient. In considering the official instructions

above mentioned, in connection with the section (2325 Revised Statutes) to which they pertain, it was said in that case:

It is believed to be the intent of the statute (and with this intent the regulations thereunder must be in harmony) that the notice of application for patent, both posted and published, should contain such matter as will inform a man of ordinary intelligence and prudence having an interest in a mining location conflicting with the one applied for, that application is made for patent to the ground in conflict, thereby giving him an opportunity to file and prosecute an adverse claim and thus assert and protect his rights as provided by section 2326 Revised Statutes. If, in any case, a notice contains such information, it is sufficient whether it conforms with every minute requirement of the official regulations or not. Such regulations are prepared and issued as a guide to applicants and the local officers, and are generally in matters of detail, directory rather than mandatory.

The notice must be taken as a whole. If, when so taken, it is misleading, then it fails in the purpose of a notice; but if, taken as a whole, it points out the ground applied for, it is sufficient.

These views are equally pertinent and controlling in the case at bar, the published notice in which is believed to be sufficient. It is so held. The decision of June 8, 1898, in this case is accordingly recalled and vacated, and that of your office dated October 13, 1896, reversed. If there are no other objections to the said entry you will pass it to patent.

INDIAN LANDS—SECOND ENTRY—SECTION 6, ACT OF JANUARY 14, 1889.

SANDSMARK ET AL. *v.* SOVICK.

The provision in section 6, act of January 14, 1889, with respect to the allowance of second homestead entries was intended to afford protection to persons who had made entries or filings, prior to the passage of the act, but who had failed to perfect title to the land so entered or filed upon either before or after the passage of said act.

The case of *Connors v. Mohr*, 18 L. D., 380, cited and followed in the matter of the priority of a settlement right as against an entry made by one who was in waiting at the local office prior to such settlement, but was prevented from making entry by the number of prior applicants then in attendance at said office.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) March 30, 1899. (C. W. P.)

May 15, 1896, Ole B. Sovick made homestead entry, No. 38, of the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and lots 3 and 4 of Sec. 1, T. 14S N., R. 39 W., Crookston land district, Minnesota.

May 19, 1896, Ole G. Sandsmark made homestead application for said land and filed an affidavit of contest against said entry No. 38, claiming settlement at four minutes past nine o'clock A. M., on May 15, 1896.

May 26, 1896, Ole B. Stubson filed homestead application for said land and filed an affidavit of contest, claiming settlement at ten minutes past nine o'clock A. M., on May 15, 1896.

June 4, 1896, August Nelson filed an affidavit of contest, claiming settlement on the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  and lots

2 and 3 of said section 1, at six minutes past nine o'clock A. M., on May 15, 1896.

This land was formerly embraced in the Red Lake Indian reservation, and was opened to settlement and entry at nine o'clock A. M., on May 15, 1896 (see circular of March 27, 1896).

August 3, 1896, a hearing was held before the local officers to determine the rights of these parties.

March 3, 1897, the local officers rendered a decision in favor of Stubson. Sovick and Sandsmark appealed.

August 7, 1897, your office affirmed the judgment of the local officers. Sandsmark and Sovick appealed to the Department.

The evidence shows that Sandsmark made his initial act of settlement at four minutes past nine o'clock A. M., on May 15, 1896, the day of the opening, but that he had done nothing more on the land up to the date of the hearing, and never established residence upon the land. On the other hand, it is shown that Stubson made settlement on the land at ten minutes past nine o'clock on May 15, 1896, and that he has followed up his initial acts of settlement by building a house, twelve by fourteen feet, on May 26, 1896, planting potatoes on a piece of ground of about two square rods, digging a well, etc., and that he has established residence upon the land. The local officers held that:

As Ole B. Stubson seems to be the only one of the contestants that has followed up his initial acts by establishing residence upon the land, and as said acts were begun prior to the hour that entry was made by Ole B. Sovick, we would recommend that said entry be canceled, and that Ole B. Stubson be allowed to make entry therefor;

in which finding your office concurred.

It appears from the record that Stubson made homestead entry, No. 12,225, of the SE.  $\frac{1}{4}$  of Sec. 28, T. 147, R. 42, at the Crookston land office on January 10, 1887, and relinquished his entry on January 21, 1891, "because of the sickness of his wife and failure of crops, and that he received no consideration for his relinquishment." It is contended by Sovick that the sixth section of the act of January 14, 1889 (25 Stat., 642), does not inure to the benefit of Stubson. The provision in said section 6 is:

That any person who has not heretofore had the benefit of the homestead or pre-emption law, and who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws may make a second homestead entry under the provisions of this act.

This provision clearly was intended to afford protection to persons who had made entries or filings, prior to the passage of the act, but who had failed to perfect title to the land so entered or filed upon either before or after the passage of the act.

The contention of Sovick that because he was prevented by the applicants in line at the local office from filing his homestead application before Stubson's settlement, he has the better right to the land, is without force. *Connors v. Mohr*, 18 L. D., 380.

Your office decision is therefore affirmed.

DIAZ *v.* GLOVER.

Motion for rehearing denied by Secretary Hitchcock, March 30, 1899.  
See departmental decision of July 5, 1898, 27 L. D., 144.

## TIMBER CULTURE CONTEST—COMPLIANCE WITH LAW.

O'ROURKE *v.* INGALSBE.

In a timber culture contest, brought prior to the expiration of the current entry year, the failure of the entryman to plant and cultivate trees during that year, and before the contest, affords no ground for cancellation, where there is no default prior to said year, as he is entitled to all of said year in which to comply with the law.

A timber culture entryman is entitled to credit for trees planted and cultivated by a former entryman to whose possessory right he has succeeded.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *March 30, 1899.* (L. L. B.)

January 7, 1891, Orin Ingalsbe made timber culture entry for the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 4, T. 94 N., R. 29 W., Des Moines land district, Iowa. His entry was made upon the relinquishment of a former timber culture entry embracing the same tract.

July 15, 1896, Battie O'Rourke filed a contest affidavit against his said entry, alleging as follows:

That the said Orin Ingalsbe has failed to plant the required number of trees, cuts or seedlings, or to care properly for those that are planted, or to plant the kind or kinds of trees, cuts or seedlings required by law, and has failed in every particular to comply with the requirements of the law in regard to the entry of lands under the act of Congress of June 14, 1878.

Notice was issued, and hearing commenced September 9, 1896, and March 24, 1897, the local office found in favor of the contestant, and, on appeal, your office, by decision of June 26, 1897, affirmed the action of the register and receiver and held Ingalsbe's entry for cancellation.

Ingalsbe's appeal from your said office decision is now here for consideration.

An examination of the evidence shows that there was practically no testimony introduced by the contestant showing any failure upon the part of the entryman to comply with the requirements of the timber culture law for the first five years of his entry, to wit, up to January 7, 1896. They were questioned almost exclusively as to the acts of the entryman in connection with his cultivation and planting in 1896, and whatever testimony was drawn from them as to his acts prior to that year all tended to show compliance with the requirements of the law up to that time.

C. A. Teller, the contestant's first witness, says that he was not acquainted with the tract until August 7, 1896.

Walter Raney, the next witness, says:

He, Ingalsbe, had nothing between the rows the first year he put out the trees. I do not think any of them lived the first year they were put out. The next year he

put out trees and he had beans planted between the rows of trees. That was two years ago. Some of them lived; they were reasonably well cultivated.

Q. That was in 1893 and 1894. Now what was done on the land last year—1895. Did he cultivate it between the rows; and what did he have planted there?—A. I think he had potatoes planted there last year. The potatoes were tended pretty good between the rows of trees. I was there in the fall when he threshed. Some weeds had grown up. When he had dug the potatoes out there were not weeds enough to kill the trees out. There was probably four hundred and fifty feet that he did not plant potatoes on the south end. . . . On the south end he could not cultivate between them and have sufficient room to raise potatoes.

The next witness, Don Fraser, testifies only to seeing Ingalsbe thresh wheat on the north end of the tree strip in the fall of 1895, and that he did not see any maple trees near where they were threshing, and that the willow trees were scattering in that vicinity. He also says, on cross-examination, that he saw the land after it had been cultivated in the spring of 1894.

Watt Jones, the next witness, says that he does not know what Ingalsbe did on the claim in 1892-3-4 or 5. This witness had made timber culture entry for this tract many years before the entry of Ingalsbe, and his testimony was chiefly directed to the fact of his own planting of trees, and that a good proportion of the tree planting claimed by Ingalsbe was done by the witness during his occupancy of the land.

Battie O'Rourke, the contestant, was the next to testify. His testimony in chief in relation to the tree culture was confined to the condition of the claim up to "1890 or 1891." He says that the next time he saw the land to observe it was "this summer or last spring" (1896), and that he "did not pay any attention to it until this year." His testimony covers many pages of the record, and only tends to show that a large part of the trees were on the claim when Ingalsbe entered the land on the relinquishment of Young (the next prior entryman) and that the land was not cultivated in 1896, prior to the date of the contest.

Stewart, the next witness for contestant, and his brother-in-law, says that he never examined the tract until the spring of 1896.

Contestant's next witness, A. J. Jones, says that he does not know what Ingalsbe did on the claim in 1891, and that he "does not know anything about the work he did on the land or what, if any, trees he set out until this year."

Mr. Fraser was next recalled, and said that he did not know what had been done on the claim prior to July of this year (1896).

These were all the witnesses introduced by the contestant, and the foregoing embraces the substance of the testimony as to the cultivation and seeding of the land by the entryman prior to 1896. They all concur in stating that, up to the bringing of the contest in July, the land showed no evidence of cultivation in the year 1896, but admit (evidently thinking it to be against the interest of the entryman) that in August of that year Ingalsbe set out several maple sprouts and carefully cultivated the trees.

From the testimony of contestant's witnesses it is plain that he relied, for the success of his contest, upon showing that many of the trees growing upon the claim were there when the entryman procured the relinquishment of Young, and that there were less than two and one-half acres cultivated and planted to trees. The undisputed evidence shows that the strip planted to trees by Ingalsbe reached across the east end of the tract and was fenced in by a wire fence, and that the enclosure contained about two and one-half acres. It could not be cultivated close up to the fence, and measuring between the lateral outside rows, the land aggregated something more than two acres and something less than two acres and a quarter.

But it was also shown in evidence, and not disputed, that about nine or ten years prior to Ingalsbe's entry a former entryman had planted two rows of white willow clear across two sides of the forty-acre tract and one row across another side, and that most of these trees were growing and thrifty at date of the contest.

There is some evidence going to show that Ingalsbe said that he did not care for the trees, that he was going to prove up and sell the claim; but he denies this, and there is nothing in his acts tending to corroborate this statement.

As before stated, the contest was brought in July, 1896, and his failure to cultivate the land or replant trees during that year, prior to the date of the contest, would not afford a ground for the cancellation of his entry. He had all the year in which to comply with the law, and the testimony of the contestant's witnesses shows conclusively that he did re-set and nicely cultivate the tree strip in August of that year. The defendant and his witnesses testify that the trees or sprouts were seeded and re-set the year before, and the local office and your office found that the preponderance of the testimony showed that this was not done until August, 1896. Inasmuch as the entryman had all that year in which to comply with the law, the question as to when he did this is not material, there being no evidence showing a default prior to 1896. The local officers found that Ingalsbe testified falsely in regard to this replanting, and, concurring in this finding, your office, largely for that reason, held his entry for cancellation. While this is an immaterial matter, it may be stated that an examination of all the evidence makes this finding of your office at least doubtful, but it will not be here discussed.

As to the prematurity of the contest in support of defaults for 1896, see *Cox v. Orr*, 21 L. D., 191; *Stewart v. Carr*, 2 L. D., 249, and many other cases.

The other point to which the most of the contestant's testimony was directed, namely, that many of the trees were not planted by Ingalsbe, but were placed there by a former entryman, is also immaterial.

The object of the law is to encourage the growth of timber, and this purpose is accomplished whether the work be performed by the entryman, his agent, or his

vendor. It is not a mere personal requirement, and if one purchase land which has been in whole or in part broken, planted and cultivated by another, the spirit or intent of the law is as fully met as if he had personally performed the work. (*Gahan v. Garrett*, 1 L. D., 137.)

This principle is approved and followed in *Weaver v. Price*, 16 L. D., 522; *Joy v. Bierly*, 17 L. D., 178, and in many earlier decisions.

Crediting the entryman with the rows planted and growing on three sides of the forty-acre tract (which was independent of the strip fenced and cultivated by him), the full complement of two and one-half acres is more than supplied.

At the conclusion of the contestant's testimony counsel for defendant moved to dismiss the contest because the evidence produced by the contestant was not sufficient to sustain the charge in the affidavit. This motion should have been sustained.

The testimony of defendant's witnesses shows a full compliance with the law by the entryman during each year of his entry. Nearly all his witnesses assisted him in the cultivation of the tract.

The decision appealed from is reversed, the contest of O'Rourke is dismissed, and Ingalsbe's entry is held intact.

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MURRAY v. PIERCE.

Motion for review of departmental decision of January 23, 1899, 28 L. D., 48, denied by Secretary Hitchcock, April 30, 1899.

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REPAYMENT—DOUBLE MINIMUM EXCESS—RETURN OF SCRIP.

ALBERT NELSON.

The repayment act of June 16, 1880, does not authorize the Secretary of the Interior to draw his warrant upon the Treasury for double minimum excess erroneously charged for lands reduced in price by section 3, act of June 15, 1880; but where the consideration received by the government is in the form of surveyor general's scrip, that yet remains in the custody of the Department, the error may be corrected by a return of scrip equal in amount to the excess.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 4, 1899.* (L. L. B.)

September 14, 1895, Albert Nelson commuted his homestead entry, embracing the SW.  $\frac{1}{4}$  of Sec. 34, T. 51 N., R. 5 W., Ashland, Wisconsin, surrendering in payment therefor three certificates of location issued by the U. S. surveyor general for the State of Louisiana and described as follows, respectively: "332 B," for one hundred and sixty acres, "401 H," for eighty acres, and "646 I," for eighty acres; thereby paying double minimum price for the land covered by his entry.

September 17, 1897, he filed in the local office an application for repay-

ment of the excess. His application was transmitted to your office, and upon examination of the record was denied September 28, 1897. His appeal from this action of your office is now here for consideration.

An examination of the records of your office shows that the land was offered at public sale at \$2.50 per acre June 22, 1859.

The third section of the act of June 15, 1880 (21 Stat., 237), provides:

That the price of lands now subject to entry which were raised to two dollars and fifty cents per acre, and put in market prior to January, eighteen hundred and sixty-one, by reason of the grant of alternate sections for railroad purposes is hereby reduced to one dollar and twenty-five cents per acre.

The land is within the limits of the grant to the Chicago, St. Paul, Minneapolis and Omaha Railway Company (Bayfield Branch), the map of definite location therefor having been filed July 17, 1858, and it was by reason of said grant that the land was raised to the double minimum price. It therefore falls within the description of the lands affected by the said act of June 15, 1880, and was thereby reduced to one dollar and twenty-five cents per acre. The exaction of a double minimum price was error. Can it be corrected?

This application does not come within the remedy prescribed by the second section of the act of June 16, 1880 (21 Stat., 287), because Nelson's entry has not been canceled, nor was it erroneously allowed, and it may be confirmed; nor has it "been found not to be within the limits of a railroad grant." So that had he paid for this land in money, and the money so paid had reached the treasury, the said act would not authorize the Secretary to "draw his warrant upon the Treasury for the excess so erroneously paid." (See Inez Rhodes, 27 L. D., 147, and William Edmonston, 20 L. D., 216.)

In the case at bar, however, the consideration received by the government has not been covered into the treasury, but is still in the hands of the officers of this Department, and the matter may be adjusted independently of the statute invoked.

Through the error of the register and receiver he has paid for this land double the amount required by law. It was wrong to exact this, and to retain it would be to continue the wrong. While the consideration remains in the hands of this Department the mistake may and should be corrected. It comes within the principle announced by Attorney-General John Nelson, in 4th Opinions of Attorney-General, page 227, wherein he said:

In reference to cases of error arising out of miscalculations of the amounts to be paid, I have had more difficulty. Money thus paid is never properly in the treasury of the United States. It is paid and received by mutual mistake and as long as it remains in the hands of the receiving officer I can perceive no good reason why, upon the discovery of the error, he should not be authorized to correct it. After it has found its way into the treasury, however, like all other money, it should be withdrawn in strict fulfillment of the requirements of the law, which the administrative power or the executive department of the government cannot control.

The certificates surrendered by the applicant as the consideration

for the land are in the custody and under the control of the Department, and justice and equity demand that the mistake should be corrected.

You will therefore return to the applicant certificates, with proper endorsement thereon, representing an amount equal to the excess paid by him for the land.

The decision appealed from is accordingly modified.

HOMESTEAD ENTRY—LANDS SUBJECT TO ENTRY.

WHEELER *v.* RODGERS.

The enclosure and improvement of public land without authority under any law of Congress, or other claim of right, or color of title, do not constitute an appropriation of such land that will take it out of the class of lands subject to homestead entry.

Rights as to the ownership or possession of improvements, placed on public land without authority of law, are not determined by a judgment of the Department sustaining the validity of an entry of said land; hence it can not be held that such an entry is made for the purpose of securing said improvements.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 4, 1899.* (L. L. B.)

May 6, 1896, William D. Rodgers entered under the homestead law the NE  $\frac{1}{4}$  of the SE  $\frac{1}{4}$  of Sec. 25, T. 2 N., R. 37 E., Blackfoot, Idaho.

August 21, 1896, Wm. E. Wheeler filed contest against this entry alleging that at the date thereof the tract was appropriated for purposes of trade and business and contained improvements of the value of \$3,000.00, and that the entry was not made in good faith but for speculative purposes and to secure the improvements.

Hearing was had in due time and the register and receiver found that the entry was made in bad faith for the purpose of acquiring the improvements on the land, and they recommended that the entry of Rodgers be canceled.

On appeal your office, by decision of August 11, 1897, reversed the action of the local officers and sustained the entry.

The contestant has appealed.

The facts necessary to a consideration of the questions here involved are herewith summarized.

The land is surrounded on three sides by individual additions to the town of Idaho Falls, but is not embraced within the incorporated limits of the town.

In the year 1886 the Bingham County Agricultural Association was organized and took possession of this tract and used it for the purpose of a fair ground. They enclosed it with a tight board fence eight feet high and constructed other buildings and a half mile race-track for use at their yearly exhibitions. It was so used without objection until 1891. In the year 1890 Harvey L. Rodgers, the father of the present

entryman, made desert land entry of the quarter section of which the land in controversy is the northeast forty acre subdivision. His entry was contested and canceled as to this forty acres, upon the ground that it had been reclaimed by the association prior to the entry of Rodgers. (See *Taylor v. Rodgers*, 14 L. D., 194). Thereupon Bronson B. Rodgers brother of the present entryman made homestead entry therefor, and May 6, 1896, he relinquished and William D. Rodgers, claimant herein, made his entry which is now in contest.

The contestant herein was the secretary of the association, and sometime prior to the entry of the defendant an execution was issued upon some claim that had been prosecuted to judgment against the association, and the contestant bought the claim and took a bill of sale from the officers of the said association of all the improvements on the land in order, as he says, to protect himself and other officers of the organization from trouble that might arise under other executions.

These improvements still remained on the land when the entry in controversy was made, but the use of the land for a fair ground had been discontinued since the year 1891 because of proceedings in courts successfully prosecuted by the prior entrymen.

There are but two questions presented by the record:

1st. Was the land subject to entry May 6, 1896, when the defendant's entry was made?

2nd. If this question is answered in the affirmative, was the entry made in good faith?

Prior to the act of March 3, 1891 (26 Stat., 1095), only such lands as were "subject to pre-emption" could be entered under the homestead law.

By the act of March 3, *supra*, the words "subject to pre-emption" were omitted from the section (2289 R. S.) describing the kind of land that could be entered under the homestead law, and thereafter "the only limitation placed upon the character of lands subject to homestead entry by said section is that they shall be 'unappropriated public lands.'" (See *Barbour v. Wilson et al.*, on review, 28 L. D., 1.)

This limits the inquiry to the question: Was the tract in controversy at the date of defendant's entry "unappropriated public land."

At that time (May 6, 1896,) there was no claimant for the land, nor had it been appropriated under any law of Congress.

Nor was the original occupation by the Bingham County Agricultural Association such a possession as is protected against settlement and entry under the rule in the case of *Atherton v. Fowler*, 96 U. S., 513. In that case and in the departmental decisions following it, the parties in possession claimed under color of right. Here there is no such claim. The officers of the association, without any color of right unlawfully enclosed and improved land belonging to the government, and neither said association, nor any other party, at the date of Rodgers' entry, was holding the possession of the land under any claim

from the United States or title or color of title or right derived from any other source. As before stated, whatever business or trade has been conducted within this unlawful enclosure had been discontinued long prior to the date of Rodgers' entry, and the continuance of such enclosure became but a naked trespass upon the public domain.

Such a possession comes within the purview of the act of February 25, 1885 (23 Stat., 321). The first section of said act provides:

That all inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited.

The third section provides:

That no person, by force, threats, intimidation, or by any fencing or enclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands. *Provided*, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith.

The charge that the entry was not made in good faith but for the purpose of appropriating the improvements is not sustained by the evidence. To sustain this charge only the fact that these improvements were on the land at the date of his entry was shown in evidence, and the Department is asked to infer from the mere presence of the improvements that the entry was made in bad faith and for speculative purposes.

A judgment sustaining his entry does not determine any rights as to the ownership or right to the possession of the improvements. That question is with the courts, and so far as this Department is informed, the right to remove his improvements is generally if not always awarded to the unsuccessful litigant. It can not be held then that this entry was made for the purpose of securing the improvements on the land. See *Francisco Mirabal*, 20 L. D., 346; also *Raymond et al. v. Redifer's Heirs et al.*, 21 L. D., 228.

The decision appealed from is affirmed.

EDWARD BAER.

Motion for review of departmental decision of January 6, 1899, 28 L. D., 22, denied by Secretary Hitchcock, April 4, 1899.

## ACCOUNTS—DEPUTY SURVEYOR—RESURVEY.

THOMAS H. CROSWELL.

The fact that a deputy surveyor fails to obtain special authority for making a resurvey is no reason for the disallowance of his account, if, upon examination, it is found that such resurvey was actually necessary and would have been authorized if application had been made therefor.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 4, 1899. (E. F. B.)

This is an appeal from the decision of your office of November 17, 1897, disallowing the account of Thomas H. Croswell as to that part embracing a charge for resurvey of township lines under contract No. 65 for survey of lands in Minnesota.

It appears from the record in this case that the account of Croswell for \$1,240.69 included a charge of \$332.77 for resurvey of the township lines, which was disallowed for the reason that said resurveys were not authorized by your office. The account was audited for the amount as reduced and payment thereof was made and accepted by said deputy surveyor. He afterwards presented an application for the approval of said rejected item, supported by affidavits and the statement of the surveyor general showing the necessity for the resurvey of said township lines.

Your office placed said affidavits before the surveyor general with instructions that if, after an examination thereof, he was satisfied that Croswell executed said resurveys and retracements in good faith under his contract No. 65, and that the same were absolutely necessary in order to initiate and complete the work, he was authorized "to issue to him *nunc pro tunc* special instructions" authorizing the resurveys and retracements for which the account of \$332.77 was rendered. In pursuance thereof the surveyor general, on August 8, 1898, issued an order reciting—

Whereas it appears from a careful examination of your notes of the examination and resurveys of the exterior lines of Tps. 61 and 63 N., R. 26 W., 4th Mer., Minn., surveyed by you under your contract No. 65, dated May 27, 1896, that the west and north boundaries of Tp. 61 N., R. 26 W., and the south, west, and north boundaries of T. 63 N., R. 26 W., are very defective in alignment and position; and whereas it appears from said examinations, as well as from your affidavit, May 6, 1898, that it was absolutely necessary to resurvey and re-establish all of said township lines in order to properly initiate and complete the subdivisions of said township, and no subdivision lines having been closed upon either side of any of said township lines;

Now, therefore, you are specially instructed and authorized to resurvey and

re-establish said west and north boundaries of T. 61 N., R. 26 W., and the south, west, and north exterior boundaries of T. 63 N., R. 26 W., in accordance with instructions to surveyors general, dated June 30, 1894, and the special instructions accompanying your contract No. 65 aforesaid.

These instructions were approved by your office, and on September 8th you transmitted to the Auditor of the Treasury for the Interior Department a certificate of approval of the account for said resurvey amounting to \$332.77, which was disallowed for the reason that said account had been closed and your office could not again assume jurisdiction over it so as to bind the United States to pay what had once been certified was not due. But the Auditor adds:

I can only reopen and make a further allowance upon this account upon appeal by the deputy surveyor to the Secretary of the Interior from the Commissioner's final action in November 1897, and upon the Secretary's decision that such action was erroneous and that the resurveys charged for were actually made in compliance with authority existing at the time they were made.

There seems to be no question as to the necessity for the resurvey of the exterior and boundary lines of the townships for which the charge was made. This is shown by the field notes of surveys, as afterward determined by the surveyor general, whose decision was approved by your office. But it appears that the charge was rejected, when first presented, because the resurveys were made without first submitting a statement of the condition of the exterior lines and obtaining definite authority therefor.

Croswell contends that he was authorized to make the resurvey by the Manual of Instructions and was also justified in construing the special instructions as the special authority therefor.

The conditions under which resurveys of township lines may be made are set forth on pages 72, 73 and 74 of the Manual of Instructions, and on page 224 it is declared that—

in no other case will any resurvey be paid for which is not specifically authorized by the Commissioner.

The clause in the special instructions to which Croswell refers as authorizing the resurveys, is as follows:

If the exterior lines are defective you will make necessary corrections after considering the rules laid down on pages 71 to 74 of the Manual and especially the restrictions on page 224.

Whenever you find it necessary to correct and resurvey any of the township lines you will in your returns note all data found regarding the former marks of survey, and obliterate erroneous corners as shown in specimen field notes on pages 179 to 182. You will also note your preliminary examination of the old surveys as your justification for deciding it necessary to resurvey exterior lines, and if it is not satisfactorily shown to this office that said survey was necessary, or if on inspection it was found unnecessary, no compensation for the work will be allowed, and you are cautioned against making extensive resurveys without first submitting a statement of the condition and obtaining definite authority therefor.

If found necessary the west and north boundaries of T. 61, R. 26, and the south, west, and north boundaries of T. 63, R. 26, will be corrected under rules prescribed by paragraph 1 on pages 72 and 73 of the Manual.

The mere fact that the deputy surveyor failed to obtain special authority for making the resurveys furnishes no reason for the disallowance of his account, if, upon examination, it is found that the resurvey was actually necessary in order that he might properly initiate and complete the subdivision of the township, and that upon a showing of such condition authority would have been given if applied for. If the survey is made without obtaining such authority, it is at the risk of having his account disallowed. (Isaac N. Chapman, et al., 26 L. D., 609.)

From the decision of the surveyor general it appears that the resurvey was authorized by the Manual of Instructions, which provides for resurveys when it is necessary to correct the township boundary in point of alignment. He says:

It appears from a careful examination of your notes of the examination and resurveys of the exterior lines of townships 61 and 63 N., R. 26 W., 4th Mer., Minn., surveyed by you under your contract No. 65, dated May 27, 1896, that the west and north boundaries of T. 61 N., R. 26 W., and the south, west, and north boundaries of T. 63 N., R. 26 W., are very defective in alignment and position,—

and it further appears from an examination of the field notes and of affidavits filed by the deputy surveyor that it was absolutely necessary to resurvey and re-establish all of said township lines in order to properly initiate and complete the subdivision of said townships.

This brings the resurveys clearly within the Manual of Instructions, and the account should therefore have been allowed.

Your decision of November 17, 1897, disallowing said charge was therefore erroneous; and as the resurveys charged for were actually made in compliance with the Manual of Instructions, the account should have been certified for payment.

#### HOMESTEAD CONTEST—ADVERSE CLAIMS—ESTOPPEL.

##### HALL *v.* HUGHES.

One who agrees to relinquish his claim on compliance with specified conditions and thus induces an expenditure of money on the part of an adverse claimant, and thereafter refuses to carry out such agreement, is estopped from setting up his priority of claim as against said adverse claimant.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 4, 1899. (C. J. W.)

On October 5, 1893, Perry C. Hughes filed in the local land office at Enid, Oklahoma, soldier's declaratory statement for the SE.  $\frac{1}{4}$  of Sec. 8, T. 22 N., R. 7 W., said land district.

On November 7, 1893, Charles E. Hall made homestead entry for the same land, and filed a protest against Hughes being allowed to carry his soldier's declaratory statement into a homestead entry, for the reason that the same was fraudulent.

March 15, 1894, Hughes filed application to make homestead entry on his soldier's declaratory statement, and a hearing was ordered on the allegation of fraud made in the protest.

After the submission of testimony by Hall, Hughes demurred to the sufficiency of the testimony. The local officers rendered an opinion, in which they found that Hughes acted fraudulently towards Hall, by encouraging him to purchase the claims of Petty and Chamberlain, for the purpose of getting them out of the way of his (Hughes') claim, but express the further opinion that the contract or verbal agreement between Hall and Hughes was not one which they could enforce. They thereupon dismissed Hall's protest, and Hughes made homestead entry upon his declaratory statement.

Hall appealed, and on October 17, 1896, your office remanded the case for further hearing to give Hughes an opportunity to make his defense.

Such further hearing was had, and on April 26, 1897, the local officers rendered a decision on the whole record, in which it is said that the former finding of facts is sustained by the weight of the testimony, and they recommended the cancellation of Hughes' entry, and that Hall's entry remain intact. From this decision Hughes appealed, and on July 26, 1897, your office affirmed said decision and held Hughes' entry for cancellation.

Hughes moved for review of your office decision, which you denied on September 28, 1897.

The case is before the Department on the appeal of Hughes from said decisions of your office.

The following grounds of error are alleged:

1. In holding that Hughes entered into an agreement with Hall to release his claim upon the land to Hall for the sum of twenty-five (\$25.00) dollars, if Hall could purchase the prior claims of Petty and Chamberlain, when the preponderance of the evidence not only does not support said holding, but shows the contrary.

2. In holding that Hall did purchase the rights of Petty and Chamberlain, paying therefor two hundred and seventy-five (\$275.00) dollars, and that Hughes then refused to relinquish his S. D. S. as he agreed to for twenty-five (\$25.00) dollars, when as a matter of fact he (Hughes) never entered into any such agreement.

3. In not dismissing the protest of Hall, because the matters involved therein were not within the jurisdiction of the General Land Office or the Land Department, as it appears that Hughes made his soldier's declaratory statement on October 5, 1893, and transmuted it to H. E. No. 8586 on December 20, 1894, and as the Land Department has no power to compel Hughes to relinquish his entry or soldier's declaratory statement in pursuance of any previous contract, even if such contract had been made, and it was error to consider any evidence relating thereto, or to order a hearing thereon.

4. In not dismissing the protest of Hall on the ground that neither the Commissioner of the General Land Office nor the Land Department has any jurisdiction or authority whatever to enforce an unexecuted or executory contract, and in not holding that if such contract had been made, the remedy for a breach thereof must be sought in the courts and not in the Land Department.

5. In not holding that the Land Department has no jurisdiction to determine the validity of a contract, to enforce it, or to give judgment for the damages caused by

a breach thereof, and therefore for not dismissing the protest of Hall, and allowing the soldier's declaratory statement and entry of Hughes to remain intact.

6. In holding in effect that Hughes should be compelled to execute a relinquishment for his soldier's declaratory statement and his homestead entry, when there is no evidence whatever that he perpetrated any fraud upon Hall, as the facts claimed by Hall to have been proven only show a refusal to perform an agreement, or a failure to keep a promise.

7. In holding in effect that Hughes should be compelled to relinquish when the law does not require him to do so, even should it appear that he had been guilty of fraud.

8. In attempting to enforce an executory contract notwithstanding the fact that the Department has uniformly refused to interfere in any manner whatever with executory contracts.

The third, fourth, fifth, sixth, seventh and eighth grounds of error may be considered together, as constituting a general demurrer to the action taken by your office, conceding the facts to be as found. The questions of law thus presented, which constitute a denial of the jurisdictional authority of your office or the land department to take cognizance of a contract or agreement like the one alleged to have been made between Hall and Hughes, will first be considered.

A somewhat similar question was before the Department in the case of *Ryan v. Baker* (25 L. D., 399), wherein it was held (syllabus) that:

The Department has no jurisdiction to vacate a contract providing for the sale of a possessory right to a tract of land entered into by adverse claimants therefor, or enforce specific performance thereof, but it may consider and interpret said contract for the purpose of determining the qualifications and good faith of the parties thereto, as applicants under the homestead law.

So, in this case, if it be conceded that Hughes made a contract or agreement with Hall to relinquish his claim to the land in question for twenty-five dollars, and thereby induced Hall to spend money in the purchase of the claims of Petty and Chamberlain, who were settlers upon the same land with claims superior to those of Hughes, and after Hall paid out two hundred and seventy-five dollars in extinguishing these superior claims Hughes then refused to carry out the agreement, it was such fraud as to estop him from setting up his claim as against Hall.

The first and second grounds of error deny the facts to be as found, both by your office and and the local office.

In reference to the facts, your office found as follows:

At the rehearing Hughes testified that he had made no such contract with Hall or any one else as was alleged. He also introduced in his behalf two witnesses, George L. Fortune and Ora E. Westfall, whose testimony tends to corroborate Hughes in this respect. Fortune testified that he was present at Hall's first interview about November 3, 1893, wherein Hughes refused to talk to Hall about relinquishing his S. D. S., and Westfall testified that he heard the conversation of Purcell (attorney for Hall, Petty and Chamberlain) with Hughes, wherein Hughes refused to enter into any contract. Hughes testified that he had one conversation with Petty and they marked down what they would take for their right to the land and each of them marked \$50, but no definite understanding was had.

At the original hearing the plaintiff introduced in his behalf the following wit-

nesses: Frank Purcell, D. D. Snider, J. W. Haughey, J. D. Waters, J. Corry, Robert Connor, Charles E. Hall, the plaintiff, Nicholas Drishen, and George Petty.

Frank Purcell, who acted as attorney for Petty and Chamberlain, and subsequently as attorney for Hall, testifies, in substance, that he had his first interview with Hughes early in October, 1893, with a view of effecting a compromise between the parties; that he had several interviews during the month and finally about the last of the month "Mr. Hughes stated to me that Mr. Chamberlain, Mr. Petty and himself had agreed with Mr. Hall (the plaintiff) for a given sum of money, to let him file on the land—that is, Mr. Hall. And Mr. Hughes was to relinquish his soldier's declaratory. At that time I was requested to draw papers in the case, and I did draw the papers in regard to Mr. Chamberlain, but nothing in regard to Mr. Hughes, as he insisted on drawing his own, and not wanting the matter to be made public at that time, as he desired to have his right restored, but agreed to relinquish upon payment of the money;" that Hughes told him he was to receive from Hall \$25 for his relinquishment; that after the agreement was made and Hall had paid Petty and Chamberlain for their claims, he frequently saw Hughes as the attorney for Hall and requested him to file his relinquishment or a withdrawal of his D. S.; that the agreement on the part of Hall was to pay Petty \$175, Chamberlain \$100, and Hughes \$25.

J. D. Waters testified that Hughes told him, prior to November 6, 1893, that Hall had agreed to buy the improvements of two settlers on the land, and that he (Hughes) had agreed to sell to Hall.

Connor testified that he had a conversation with Hughes about January 1, 1894, in regard to the claim in controversy, and that he told Hughes that Hall had told him, Connor, that he, Hall, had gotten Hughes and the other fellows off and that Hughes replied: "He did, but he can't prove that." Hughes said: "It takes two to prove that."

Hall testified that about the last of October he had an understanding with Hughes, and that Hughes agreed to take \$25 for his claim and give a relinquishment; that he told Hughes of his intended purchase of the claims of Petty and Chamberlain; that Hughes said, "Go ahead," and he (Hughes) would withdraw his S. D. S. and file on other land; that on November 1, 1893, he purchased Chamberlain's for \$100, and subsequently bought Petty's claim through Petty's agent, T. C. Lemasters.

George Petty, one of the parties to the agreement, transacted his business with Hughes through an agent, but his testimony tends to corroborate the testimony of plaintiff's witnesses, to the effect that Hughes agreed to relinquish for a consideration. He testifies that he received \$100 for his interest in the claim from Hall.

I am of the opinion that by a decided preponderance of the evidence, it appears that when Hughes filed his S. D. S. there were two settlers, Petty and Chamberlain, claiming the land as prior settlers; that Hughes entered into an agreement with Hall to release his claim upon the land to Hall for the sum of \$25, if Hall could purchase the prior claims of Petty and Chamberlain; that in pursuance of this understanding Hall did purchase the rights of Petty and Chamberlain, paying therefor \$275, and that Hughes then refused to relinquish his S. D. S. for the sum of \$25, as he agreed to do, but instead thereof transmuted his S. D. S. to homestead entry No. 8586.

The facts have twice been considered, both by your office and the local office, with like result—namely, that the facts as stated are established by a preponderance of the evidence.

Hughes denies the agreement testified to by Hall and his witnesses, but the record supports the conclusion that there was substantially such agreement on which Hall acted, and your office decision is accordingly affirmed.

## HOMESTEAD—SECOND ENTRY.

JOHN HERKOWSKI.

Permission to make a second homestead entry may be accorded where there is no adverse claim, and the first is relinquished on account of the worthless character of the land, and the applicant, under the circumstances, is not chargeable with negligence in the premises.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 4, 1899. (W. A. E.)

October 14, 1891, John Herkowski made homestead entry for the NE.  $\frac{1}{4}$  of Sec. 9, T. 14 N., R. 3 E., Guthrie, Oklahoma, land district.

October 21, 1891, he applied to amend said entry so as to make it cover, in lieu of the land first entered by him, the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 15, T. 14 N., R. 3 E.

In a corroborated affidavit attached to said application, he alleged that he is a native of Poland and unacquainted with the English language; that he settled upon and intended to enter the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of said section 15, but that when he went to Guthrie to file, a land locator, taking advantage of his ignorance, induced him to change his application to the NE.  $\frac{1}{4}$  of section 9, which was represented to him by several parties as good agricultural land; that said tract is forty miles distant from Guthrie, and fearing that if he delayed making entry long enough to go and examine it some one would enter it before him, he entered it without examination; that upon examination he found it to be rocky, hilly, cut up by gulches and entirely unfitted for agricultural purposes, and that it would be impossible for him to make a living thereon.

July 20, 1892, before your office had acted upon the application to amend, Herkowski filed a relinquishment of his entry and a withdrawal of his application to amend, and at the same time presented his application to make second homestead entry to embrace all that portion of the NW.  $\frac{1}{4}$  of Sec. 13, T. 14 N., R. 2 E., lying north of the Deep Fork river. The official plat in your office shows that the portion of the NW.  $\frac{1}{4}$  of Sec. 13 lying north of the Deep Fork river is known as lot 2, and contains 5.10 acres.

Accompanying this application to make second entry was his corroborated affidavit containing substantially the same allegations as were contained in his affidavit filed with his application for amendment.

April 4, 1893, your office denied his application to make second entry, but for some reason not explained, notice of this decision was not served upon Herkowski until April 1, 1895.

In the meantime, on November 13, 1893, Herkowski applied to enter the entire NW.  $\frac{1}{4}$  of Sec. 13, T. 14 N., R. 2 E., and this application was rejected by the local officers, from which action he appealed.

April 9, 1895, he filed motion for review of your office decision of

April 4, 1893, and this motion was denied by your office on June 21, 1895. Neither in the motion nor in your office decision denying it was any reference made to his application of November 13, 1893, to enter the entire quarter section.

August 24, 1895, he appealed to the Department, but this appeal remained in the local office until December 15, 1896, when it was forwarded to your office and by you transmitted to the Department.

It appears from the records of your office that lot 2 of the NW.  $\frac{1}{4}$  of Sec. 13, T. 14 N., R. 2 E., lying north of the Deep Fork river, is in the former Iowa Indian reservation and was open to entry at the time Herkowski filed his application therefor; and that the portion of the NW.  $\frac{1}{4}$  of said Sec. 13 lying south of the Deep Fork river and known as lots 3 and 4 and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  is in the former Kickapoo Indian reservation, and was not open to settlement and entry until May 23, 1895. This portion of the NW.  $\frac{1}{4}$  of Sec. 13, lying south of the Deep Fork river, is now embraced in the homestead entry of one Frank Ossowski.

November 13, 1893, then, when Herkowski filed his application for the entire NW.  $\frac{1}{4}$  of Sec. 14, only that portion of the land applied for lying north of the Deep Fork river was subject to entry, and for that he already had an application pending. He could gain no additional rights by this application of November 13, 1893, and as he seems, by his subsequent actions, to have abandoned it, it need not be further considered. The question then is, whether he shall be allowed to make second entry to cover lot 2 of said Sec. 13.

In the case of Alix Heipfner (26 L. D., 23), it was held that a second entry will not be allowed on account of the worthless character of the land covered by the first, if such entry was made without examination of the land, and that the right to make a second entry under the act of December 29, 1894, can not be recognized, where the first entry was abandoned without any attempt to raise a crop on the lands embraced therein.

At first sight this ruling would appear to be conclusive of the present case, but when the strong equities in favor of the applicant are considered justice seems to demand that an exception be made here.

He evidently acted in good faith and without any great degree of negligence, considering his ignorance, his inability to speak the English language, the distance of the land first entered by him from the local office, the rapidity with which claims were being taken up in that country, and the absence of any reason for supposing that the parties who assured him this was good agricultural land were not speaking the truth. The tract he is now seeking to enter is only five acres in extent, and he had lived there for two years, improving and cultivating it, before notice was served upon him of your office decision rejecting his application to make second entry. There are no adverse claims, and the question is simply between him and the government. It is not

shown whether he attempted to raise a crop upon the land embraced in his first entry, but it is clear that he never received any benefit from that entry and that any attempt to cultivate the land would necessarily have resulted in failure. The reason for the ruling made in the case of Alix Heipfner, *supra*, is the supposed negligence of the entryman. Where, as in the present case, that negligence is shown to be slight, its effect may be overcome by other considerations. Without overruling the case cited, then, an exception will be made here, and the applicant will be permitted to retain the little home he has made for himself.

Your office decision is accordingly reversed, and the application will be allowed.

#### QUALIFICATION OF HOMESTEADER—GUARDIANSHIP.

##### WATT ET AL *v.* THOMAS ET AL.

Submission to a guardianship, created on behalf of one who represents himself as a spendthrift and asks for a guardian of his estate, does not operate to disqualify such person as a homesteader.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 10, 1899.* (L. L. B.)

In this case there were originally four parties. The land in dispute is the SW  $\frac{1}{4}$  of Sec. 27, T. 150 N., R. 38 W., Crookston, Minnesota.

May 15, 1896, Arthur J. Thomas entered under the homestead law, in connection with some other land, the NE. forty acre subdivision of this quarter section, and on the same day Lars T. Nockleby made homestead entry for the S  $\frac{1}{2}$  and the NW  $\frac{1}{4}$  of the said described SW  $\frac{1}{4}$ .

June 22, 1896, Alfred Brisette applied to enter the said SW  $\frac{1}{4}$  alleging settlement prior to these entries, and July 1, 1896, William J. Watt made similar application and charge.

After due notice a hearing was had upon the rights of all the parties, and the local officers found that Watt was disqualified from making entry and recommended the dismissal of his contest; that Thomas' entry was prior to the entry of Nockleby and prior also to the settlement of Brisette.

On appeal your office by decision of August 6, 1897, held that Watt was a qualified settler, and also found from the evidence that his settlement was prior to that of Brisette and prior to the entries of Thomas and Nockleby, and awarded to Watt the right to enter the land in dispute.

Subsequent to the decision of the local office Nockleby relinquished his entry. Thomas did not appeal from your office decision so that now the controversy is between Watt and Brisette as to which has the right to enter the said land.

The evidence has been examined and it clearly shows that Watt was prior to Brisette in asserting his settlement claim, and that he has followed up, with reasonable diligence, his settlement so made. The only question remaining is as to the qualifications of Watt to maintain settlement.

The claim that Watt is disqualified rests upon the fact that on January 9, 1895, at a special term of the probate court of Polk county, Minnesota, a guardian "of the estate" of the said Watt was appointed by the judge of said court.

This action of the court was had upon the personal petition of Watt himself, in which he says that—

Your petitioner is seized of real and personal property to the value of two thousand dollars, that the annual rents and profits of said estate is about \$150., that your petitioner is mentally incompetent to have the management of his property on account of excessive drinking and by reason of said drinking your petitioner desires that a guardian should be appointed to have the management of the estate of your petitioner.

The order of the court appointing the guardian is made on a printed form commonly used when a guardian is appointed over the "person and estate" of an irresponsible person. In the order so made the printed word "person" is erased with a pen stroke and the reason assigned for the appointment of a guardian for his estate is that Watt is a "spendthrift."

It is shown by the evidence that Watt when not intoxicated is possessed of more than ordinary mental ability, and that when he asked that a guardian should be appointed to have the management of his estate, he had a family living upon his farm who, he had been advised, were likely to take advantage of him, in property matters, when he was intoxicated, and it was for the purpose of guarding against such a contingency that his said action was taken.

There was no inquisition or judgment based thereon under the forms of the statute, by which it was determined judically that he was of unsound mind; on the contrary, the guardian was appointed upon his own petition, and apparently without any evidence to support it, and the management of his estate was voluntarily surrendered. A guardian so appointed must be regarded as a mere trustee for his estate, and submission to such a guardianship or trust does not, as found by the local officers, imply that the *cestui que* trust is civilly dead or otherwise incapacitated, except as to the disposal or management of his estate.

Watt will be allowed to make entry for the tract in controversy.

The decision appealed from is affirmed.

## PRACTICE—REHEARING—EVIDENCE.

## BURNS ET AL. v. SMITH.

While evidence secured on an informal proceeding before a special agent can not be made the basis of a final decision, it can be considered in determining whether a further investigation of the case by the Department is justified.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 11, 1899. (C. J. W.)

This case involves the SE.  $\frac{1}{4}$  of Sec. 22, T. 28 N., R. 3 E., Perry land district, Oklahoma. All of the parties were applicants to enter the same, on the ground of prior settlement. Your office ordered a hearing to determine the rights of the several applicants. Before the hearing closed William J. Stewart and John R. Smith withdrew their applications, and the hearing proceeded as between C. P. Noel, William Burns and David L. France, each of whom claimed the right of entry by virtue of having been the first settler upon the land on the day it was opened to settlement. The hearing resulted in a decision by the local officers in favor of Noel and a recommendation that the homestead applications of Burns and France be rejected.

France and Burns appealed, and on July 25, 1896, your office affirmed the decision of the local officers, from which Burns appealed to the Department.

France filed a motion for review of said decision, which being subsequently denied, he then appealed to the Department.

The case was considered by the Department on the appeals of Burns and France, on August 26, 1898, and your office decision was affirmed (not reported).

On October 8, 1898, Burns filed a motion for review of said departmental decision, and on November 26, 1898, France filed a motion for rehearing.

One of the grounds on which the motion for review is asked is, that no action was taken on a petition filed by William Burns, W. P. Steel *et al.*, on November 18, 1897, asking for a special agent to be sent to Oklahoma to investigate the charge of fraudulent combination and perjury made by said petitioners against the Noels and their witnesses. The ultimate purpose of this petition was to obtain a rehearing of the cases to which it refers. It appears that your office, after the departmental decision complained of was rendered—to wit, on September 8, 1898,—sent a special agent to Oklahoma to inquire into the grounds of this complaint and report, and the motions now pending were held up to await that report.

The case appears to have been informally re-tried before the special agent, with all parties present, and several hundred pages of type-written testimony accompany the report. As the agent was without jurisdiction or power to try the case, the evidence taken before him

should not be considered by the Department and made the basis of a final decision. In the present status of the case, this volume of evidence can only be considered as the showing of the respective parties for and against a rehearing. Should a rehearing be ordered, the decision of the Department called in question by the motion for review would necessarily be thereby vacated. The review is not authorized by the original record, and that motion is denied. Such state of facts is, however, presented as appears to call for a rehearing in justice to all of the parties.

No further notice appearing to be necessary, the departmental decision in question is vacated, and the case remanded for rehearing and readjudication before the local office.

In order that it may be in the power of the respective parties to the case to lighten the expense of such rehearing they may, if they see proper, enter into a stipulation to that effect, and submit the testimony taken before the special agent as a part of the testimony to be considered on the rehearing, but each party will be permitted to introduce any additional testimony at his command pertinent to the issues involved. Either party, on motion, may put in evidence the evidence introduced at the first hearing before the local officers, subject to such objection as it was subject to in the first instance.

Your office will transmit the record to the local office, with instructions to rehear the case, after due notice to the parties, and render decision upon the complete record.

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#### SCHOOL LAND—CHANGE OF SURVEY.

##### EMILY W. THURSTON.

On the approval of a survey made after the admission of the State of Nebraska to the Union the title to the school sections vested in the State, and the subsequent resurvey of Grant and Hooker counties, authorized by act of August 9, 1894, did not defeat such title, though by said resurvey the designation of such sections by number may have been changed.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 11, 1899. (C. W. P.)

Emily W. Thurston has appealed from your office decision of August 6, 1897, holding for cancellation her homestead entry, No. 933, of lot 5, Sec. 30, and lots 2 and 3, Sec. 31, T. 24 N., R. 38 W., Broken Bow land district, Nebraska, made May 24, 1897.

It is stated in your office decision that you are in receipt of a letter, dated June 15, 1897, from I. V. Wolf, Commissioner of Public Lands and Buildings, of the State of Nebraska,

relative to the status of section 36, Tp. 24 N., R. 39 W., per survey of 1876, as affected by the recent survey under the act of August 9, 1894 (28 Stat., 275), providing for the resurvey of Grant and Hooker counties in the State of Nebraska, (and that) it

appears from the tracing, transmitted with his letter, and from the records of this (your) office, that the lines of said section have been moved south and west, so that a portion of what was section 36 under the survey of 1876 is now designated as lots 3, 4, and 5, Sec. 25, Tp. 24 N., R. 39 W., lot 5, Sec. 30, and lots 2, 3 and 6 Sec. 31, Tp. 24 N., R. 38 W., a portion of which, to wit: lot 5, Sec. 30, and lots 2 and 3 Sec. 31, T. 24 N., R. 38 W., was entered May 24, 1897, by Emily W. Thurston, H. E. 933; (that) Mr. Wolf desires to know if the State, or its lessee, can be considered actual occupants of the land covered by Mrs. Thurston's entry so as to come within the provision of the act of August 9, 1894, directing the survey, by which it was provided that nothing herein contained shall be so construed as to impair the present bona fide claim of any actual occupant of said land to the land so occupied, or if the State can make indemnity selection of said lots in lieu of lands lost in section 36 — 24 N., R. 32 W., in face of the fact that Mrs. Thurston has entered same,

and your office passed upon the questions raised, as follows:

By act of May 30, 1854 (10 Stat., 277), being an act to organize the Territories of Nebraska and Kansas, it was provided "That when the lands in the said Territory shall be surveyed under the direction of the government of the United States, preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory and in the States and Territories hereafter to be erected out of the same."

By act of April 19, 1864 (13 Stat., 47), admitting the State into the Union, the 16th and 36th sections in every township were granted to the State for the support of common schools.

Township 24 N., R. 39 W., was surveyed in 1876 and the survey approved January 24, 1877, and thereupon the title to sections 16 and 36 in said township vested in the State.

Said survey has never been suspended, but is now superseded by survey approved April 30, 1897, made under the provisions of the act of August 9, 1894.

The resurvey could in no manner defeat or impair a vested interest, nor was it intended by Congress that an inchoate interest should be affected, where such interest amounted to actual occupancy of the land for the purpose of perfecting a bona fide claim. It was only such unperfected claims that could be affected by a resurvey, and the proviso of the act of August 9, 1894, applies only to such lands. The title to said section 36 having been in the State of Nebraska for more than twenty years, under a survey authorized by the government and duly approved, that title cannot now be called in question by a mere change in the designation of the number by which said section or any portion thereof shall hereafter be known,

and your office held that it was error in the local officers to allow Mrs. Thurston's entry, and held it for cancellation.

In accordance with the decision of the supreme court in the cases of *Cooper v. Roberts*, 18 How., 173, and *Beecher v. Wetherby*, 95 U. S., 517, it must be held that the grant as to said section 36, surveyed subsequent to the admission of the State, took effect and the State's title vested thereunder upon the approval of the survey of 1876, which stood unchallenged for so many years, and under which the State has exercised acts of ownership by leasing the land to parties who appear to have made improvements upon the land leased by them, and that the subsequent survey under the act of 1894 did not defeat the appropriation to the State under the original survey.

The uncanceled timber culture entry, No. 11,436, of General P. White,

made July 8, 1887, covers the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and lots 2 and 3 of Sec. 1, T. 23 N., R. 39 W., and the homestead entry, No. 15,489, of Lissie White, patented February 27, 1895, covers the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 3, T. 24 N., R. 39 W., lot 4, Sec. 1; and lots 1 and 2 of Sec. 2, T. 23 N., R. 39 W., under the original survey, embraced under the resurvey in Sec. 36, T. 24 N., R. 39 W.; and it will not be supposed that Congress, while protecting the claims of actual occupants of any of the lands resurveyed to the lands so occupied, intended to cloud the title of the State of Nebraska to lands previously appropriated to the State under the survey of 1876.

\* It was consequently an error in the local officers to allow Mrs. Thurston to make homestead entry of the land in question, and your office decision is affirmed.

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#### CONTEST—SETTLEMENT RIGHTS.

##### FORMAN *v.* HEALEY.

One who alleges priority of settlement, as against an adverse applicant for the right of entry, must comply with the law in the matter of settlement and maintenance of residence during the pendency of such controversy.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 11, 1899.* (C. J. G.)

February 17, 1899, the Department rendered decision in the case of Frank N. Forman *v.* Simon P. Healey, which involves the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , Sec. 35, T. 133 N., R. 48 W., Fargo land district, North Dakota, awarding right of entry to Forman as the prior settler.

Healey has filed a motion for rehearing in said case, alleging that Forman has wholly abandoned said land since the original hearing. The latter's claim depends solely upon his prior settlement, and the Department awarded him preference right of entry upon that ground. It was therefore incumbent upon him to comply in good faith with the settlement laws pending the final determination of this controversy. See *Hall v. Stone*, 16 L. D., 199; *McInnes et al. v. Cotter*, 21 L. D., 97; *Foote v. McMillan*, 22 L. D., 280; *Thompson et al. v. Craver*, 25 L. D., 279; and *Rowan v. Kane*, 26 L. D., 341. As the charge of abandonment was not in issue at the original hearing and refers to a period subsequent to that hearing, it does not afford proper ground for rehearing in this case, and the motion therefor must accordingly be denied. But this action does not preclude your office from directing an inquiry for the purpose of determining this charge. See *Griffin v. Smith*, 25 L. D., 329; *Corbin v. Dorman*, Id., 471; and *Lark v. Livingston*, 26 L. D., 163. In the cases just cited there were entries of record, and the rulings therein are based upon the principle that the law requires an entryman whose entry has been contested, to comply with the law in the matters of settlement, and establishment and maintenance of resi-

dence. This requirement is equally binding upon one who claims the right of entry in a contest proceeding by reason of prior settlement. So that, while only applications to enter were filed in the case under consideration, it is believed that the rulings announced in the cases last referred to afford sufficient warrant for a further investigation in said case.

The motion for rehearing is hereby denied, and the papers are returned to your office for such action as may be deemed proper in the light of this paper.

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SETTLEMENT RIGHT—ADVERSE APPLICANT.

O'HORNETT *v.* WAUGH ET AL.

As between two applicants for the right of entry where the question of priority depends upon the time of settlement on the part of one, as against the time of application by the other, the settler will be given the precedence, if it can not be satisfactorily determined that the adverse application was regularly tendered prior to the act of settlement shown, and entitled to consideration at such time. No question with respect to the regularity of departmental action in the establishment of a booth, as affecting the qualifications of one holding a certificate issued therefrom, will be entertained, in the absence of a showing of advantage gained thereby.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 12, 1899.* (E. F. B.)

The Department has considered the separate appeals of J. W. Aldrich and Andrew M. Waugh from the decision of your office of October 12, 1897, rejecting the homestead applications of said appellants and awarding the land applied for, to wit, the SE.  $\frac{1}{4}$  of Sec. 28, T. 26 N., R. 2 E., Perry, Oklahoma, to Lon O'Hornett, under his settlement claim.

O'Hornett's claim is predicated upon a settlement made at 1:08 p. m. September 16, 1893, the day of opening, which has since been maintained. Aldrich claims by virtue of an application to make homestead entry of said tract, which was sent by mail and received at the local office at 1:20 p. m. the day of opening. Waugh claims under an application to make homestead entry, which was received by the local officers at 2 p. m. of that day, but which he contends was tendered to the local officers prior to the initiation of any other claim, and that they refused to receive and act upon it at that time.

No entry was allowed upon either application. The application of Aldrich was rejected because filed by mail and Waugh's application, which was afterward received by the local officers, was suspended to await action on the prior application of Aldrich.

Upon the appeal of Aldrich your office reversed the action of the local officers refusing to accept his application and ordered a hearing to determine the rights of the respective claimants, O'Hornett having in the meantime protested against the granting of either application because of his priority of right as a settler.

The hearing in this case was continued from time to time and was not had until July, 1895. At that time none of the parties to this controversy had made any improvements on the tract or established and maintained residence thereon, except O'Hornett. Aldrich and Waugh rely upon their applications to make entry, which have not been acted upon, and each contends that his application is entitled to priority of right over all other claimants.

The material facts necessary to a clear understanding of the issues involved are sufficiently stated in the decision of your office, in which it is said:

O'Hornett reached and staked this land at about 1:08 p. m. September 16, 1893, and four days later he built a house on the tract and established his residence there. Though occasionally absent, his residence on the land has been maintained ever since. He has on the land a house, barn, about one hundred acres of breaking and other improvements.

Waugh's homestead application was received and filed at 2 p. m. September 16, 1893, but he contends that it should date as of 1:05 p. m., of that day, because he presented it at the window of your office at that time, when the officer to whom he presented it refused to receive it at that time, because there were other "filings which demanded his attention." It appears that at the time he first presented his application your office was engaged in the consideration of other applications that had been received by mail, and that the applications of other parties in line ahead of Waugh had been refused for the same reason and were not received and filed until about 2 p. m. of that day.

Aldrich's application was, as is shown by the records of your office, received by mail at 1:20 p. m., September 16, 1893, and is one of the applications executed before Judge Woodson and mailed at Perry by one David A. Prior, referred to in the report of Mr. Witten which is quoted in the case of *Parker et al. v. Lynch* (20 L. D., 13).

The appeal of Aldrich assigns error in finding that O'Hornett reached and staked the land at 1:08 p. m., or at any time until after his, Aldrich's, application was received at the local office for filing, and not finding that O'Hornett's settlement was made upon another tract.

Appellant Waugh admits that there is no controversy about the facts in the case, and that the proper disposition of it depends solely upon a correct application of the law.

The finding of your office that O'Hornett reached the land at about 1:08 p. m., which was practically the finding of the local office, is warranted by the testimony offered in his behalf, and no testimony upon this point was offered by defendants. Aldrich's filing was not taken up by the local officers for consideration until 1:20 p. m., although it appears that the mail was delivered at the local office prior to that time.

The case of *Lewis v. Morris* (27 L. D., 113) is cited by Waugh as decisive of his right in this controversy, inasmuch as the defendant, Morris, in that case, whose entry was allowed in preference to a settler who reached the land at 1:10 p. m., is the same person referred to by Waugh in his testimony.

Waugh testified as follows:

I reached the said land office about 24 minutes after 12 o'clock, P. M., of September 16th, 1893, and about one o'clock J. H. Morris and myself, standing at the head of the line at the window of the land office, made an attempt to have our filing papers received, but they were refused. Morris first tendered his application, and was refused. I then handed my application in at the window, and demanded that it should be received. Said application was shoved back to me by Mr. Malone, stating there were filings which demanded his attention. I again demanded that my application be received, and protested strenuously against the action of Mr. Malone, and on his again refusing to accept my application I appealed to the men in line to witness that I had made every effort to have my application received without effect, and that it was at this time five minutes after one o'clock, P. M., September 16th, 1893. After a long delay my application was finally accepted, I think about 20 minutes after 2 o'clock, P. M., on the same day.

I occupied the position of number 8 in said line from the head of same, but on account of a man ahead of me leaving the line before he filed, I filed as number 7. I tendered the money required for filing my papers, together with the papers, at 5 minutes after 1 o'clock, P. M., as before stated.

By reference to the decision in the case of *Lewis v. Morris*, it appears that Waugh testified in that case that he saw Morris tender his papers to the register and demand that they be received. He said:

Mr. Malone must have refused him, and Mr. Morris called on me and Mr. Severns, of Guthrie, who was directly behind me, to witness that he had offered his papers at 1:05, and I looked at my watch and saw that I had that time.

The Department said that "if Morris' place in line had been reached in regular order prior to 1:10 o'clock p. m., the time of Lewis' settlement, then he is entitled to have his entry remain intact," and it was upon the finding that his place in line had been reached in its regular order prior to the initiation of the settlement right of Lewis that entitled him to priority.

It is apparent from this that Waugh could not have presented his claim until after 1:05 p. m.

Whether, if the claim of Morris and Waugh had each been regularly presented and duly acted upon, respectively, by local officers, the application of Waugh would have been presented to the receiving officers prior to the time O'Hornett staked the land, can not be said with any certainty under the circumstances.

While Waugh may have attempted to press his application upon the local officers at 1:05 p. m., it is evident that if the applications of others in line ahead of him had been considered, his would not have been reached in its order until after O'Hornett had initiated his claim by settlement.

It is contended by appellants that O'Hornett is disqualified by reason of having obtained the booth certificate from the booth at Arkansas City, which was illegally established by the Secretary of the Interior, such location not having been provided for by the proclamation. Conceding the irregularity of this action, it could not tend to disqualify

O'Hornett, and appellants can not be heard to question the validity of the order of the Secretary, as it is not shown that O'Hornett gained any advantage over appellants by reason of having obtained his certificate at that place.

A careful consideration of the record discloses no error in the decision of your office, and it is therefore affirmed.

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RAILROAD LANDS—ACT OF MARCH 2, 1896.

WILLIAM THORPE.

The confirmatory operation of the act of March 2, 1896, for the benefit of a *bona fide* purchaser of patented railroad lands, is not affected by the fact that said lands are included within a timber land reservation, where, prior to the establishment of said reservation, the lands had been patented to the company.

*Secretary Hitchcock to the Commissioner of the General Land Office, April*  
(W. V. D.) 13, 1899. (J. I. P.)

I am in receipt of your office letter of the 30th ultimo, submitting for my consideration, the petition of William Thorpe, through his duly authorized agent, C. Cabot, "for confirmation" of title, under the act of March 2, 1896 (29 Stat., 42), to the S.  $\frac{1}{2}$  SW.  $\frac{1}{4}$ , section 15, township 1 N., range 9 W., S. B. M., Los Angeles land district, California.

The tract lies within the overlapping indemnity limits of the forfeited portion of the grant to the Atlantic and Pacific Railroad Company under the act of July 27, 1866 (14 Stat., 292), and the primary limits of the grant to the Southern Pacific Railroad Company (branch line) under the act of March 3, 1871 (16 Stat., 573), and was embraced in a patent issued to the Southern Pacific Railroad Company December 27, 1883.

Under the ruling of the United States supreme court in the case of the Southern Pacific Railroad Company *v.* The United States (168 U. S., 1) said tract was excepted from the operation of the grant to the Southern Pacific Railroad Company, and hence was erroneously patented to it.

The evidence of the *bona fide* sale and purchase of said tract consists of the affidavits of the Land Commissioner of said company and of his chief clerk attached to a schedule of the lands embracing these, on file in your office, to the effect that said tract was sold in good faith and for the full value thereof; also the affidavit of the petitioner herein that he purchased said lands in good faith and for a valuable consideration from the Southern Pacific Railroad Company, that the patent to said company has not been canceled by any court of competent jurisdiction, and that no suit to cancel it is now pending, and that no part of the purchase money has been refunded to him or to his grantors by said company, and that no proceedings have been instituted by him or his

grantors for the recovery of said purchase money; also the certificate of the recorder of the county where the land lies that all interest acquired by the Southern Pacific Railroad Company to said lands by said patent is by mesne conveyances now vested in the petitioner.

The evidence of the sale and *bona fide* purchase of the tract herein involved being satisfactory to the Department the title of the purchaser, the petitioner herein, is held to be confirmed by section 1 of the act of March 2, 1896 (*supra*), (Chicago, Milwaukee and St. Paul Railroad Company, 27 L. D., 552), and your office is hereby directed to make demand under the statute of said Southern Pacific Railroad Company for the value of said lands the title to which is herein held to be confirmed, as the basis of a suit against the company in the event that the demand is not complied with. For the purpose of such demand the minimum government price will be treated as the value of the lands.

It appears that this tract is within the limits of the San Gabriel timber land reserve, established by the President's proclamation of December 20, 1892; but as said tract was embraced in a patent issued to the railroad company prior to the establishment of the reservation, it was excepted therefrom and hence said reservation is no bar to the confirmation of title to said tract.

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#### SOUTHERN UTE INDIAN LANDS OPENED TO SETTLEMENT.

##### INSTRUCTIONS.

*Commissioner Hermann to the register and receiver, Durango, Colorado, April 15, 1899.*

In view of a proclamation issued by the President, April 13, 1899, opening to settlement and entry at 12 o'clock noon, May 4th next, the unallotted and unreserved lands within the present reservation of the Southern Ute Indians, you will consider section 4 of the act of Congress approved February 20, 1895 (28 Stat., 677), which provides:—

That at the expiration of six months from the passage of this act the President of the United States shall issue his proclamation declaring the lands embraced within the present reservation of said Indians except such portions as may have been allotted or reserved under the provision of the preceding sections of this act, open to occupancy and settlement, and thereupon said lands shall be and become a part of the public domain of the United States, and shall be subject to entry under the desert, homestead, and town-site laws and the laws governing the disposal of coal, mineral, stone, and timber lands; but no homestead settler shall receive a title to any portion of such lands at less than one dollar and twenty-five cents per acre, and shall be required to make a cash payment of fifty cents per acre at the time filing is made upon any of said lands: *Provided*, That before said lands shall be open to public settlement the Secretary of the Interior shall cause the improvements belonging to the Indians on the lands now occupied by them to be appraised and sold at public sale to the highest bidder, except improvements on lands allotted to the Indians in accordance with the provisions of this act. No sale of such improvements shall be made for less than the appraised value, and the several purchasers of said improve-

ments shall, for thirty days after the issuance of the President's proclamation, have the preference right of entry of the lands upon which the improvements purchased by him are situated: *Provided further*, That the said purchase shall not exceed one hundred and sixty acres: *And provided further*, that the proceeds of the sale of such improvements shall be paid to the Indians owning the same.

Each applicant to enter any of these lands as a homestead must have the qualifications required of any applicant for homestead entry under existing law. He must, at time of making his original entry, pay the sum of fifty cents per acre in addition to the regular fee and commissions, and at time of making final proof pay the further sum of seventy-five cents per acre, in addition to the regular final commissions. No final commission will be collected where the party submits proof under section 2301 Revised Statutes.

In this connection and for your information and guidance the following paragraph in the President's proclamation is here inserted.

An error having been made in 1873 in the survey and location of the eastern boundary of the reservation hereby opened to settlement and entry whereby certain lands constituting a part of the reservation were erroneously identified as being outside of the reservation, by reason of which several persons in good faith settled upon said lands under the belief that the same were unappropriated public lands open to settlement, and have since improved and cultivated, and are now residing upon the same with a view to the entry thereof under the public land laws, notice is hereby given that in so far as said persons possess the qualifications required by law, and maintain their said settlement and residence up to the time of the opening herein provided for, they will be considered and treated as having initiated and established a lawful settlement at the very instant at which the lands become open, and as having the superior right and claim to enter said lands, which right must be exercised within three months from the time of said opening.

Desert, town-site, coal, mineral, stone and timber entries will be made for said lands in accordance with the general laws applicable thereto.

The ordinary homestead, desert, town-site, coal, mineral, stone and timber blanks will be used, continuing your regular series of numbers, but indicating upon the entry papers and abstracts that the entries are made under the act of February 20, 1895, section 4, Southern Ute Indian reservation lands.

Your special attention is directed to that part of the proclamation which states that the improvements on the NE $\frac{1}{4}$  NW $\frac{1}{4}$ , S $\frac{1}{2}$  NW $\frac{1}{4}$  and NW $\frac{1}{4}$  SW $\frac{1}{4}$  Sec. 1, T. 33 N., R. 9 W., will be sold, and that the party purchasing such improvements will be given thirty days' preference right of entry for the land, after the issuance of the proclamation. Govern yourselves accordingly in the disposition of said tracts.

You will give information as to the opening to the local papers as a matter of news.

Approved,

E. A. HITCHCOCK, *Secretary*.

## FLORIDA HOMESTEADS—RELIEF ACT OF FEBRUARY 25, 1899.

## INSTRUCTIONS.

*Commissioner Hermann to register and receiver, Gainesville, Florida, April 4, 1899.*

Your attention is called to the act of Congress (Public No. 68), approved February 25, 1899, entitled "An Act for the relief of certain homestead settlers in Florida," which provides as follows:—

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That any qualified homestead claimant who was in good faith actually occupying a homestead claim under the laws of the United States in the State of Florida in the month of September, anno Domini eighteen hundred and ninety-six, and who was by, through, or on account of a storm which passed through said State during said month driven from or compelled to leave and remain away from such homestead, may within one year from the passage of this act return to such homestead claim and proceed to perfect title thereto as though absence therefrom had not occurred.

Under the provisions of said act any qualified homestead claimant who was in good faith actually occupying a homestead claim under the laws of the United States in the State of Florida, in the month of September, 1896, and who was, on account of the storm mentioned in the act, driven from or compelled to leave and to remain away from such homestead may return to such homestead within one year from February 25, 1899, the date of the approval of the act, and proceed to perfect title thereto as though absence from such homestead had not occurred.

Said act does not mention the day of the month in which the storm took place, but it is construed as meaning or intending to mean the storm of September 29, 1896, which did much damage in the State of Florida and chiefly in the counties of Alachua, Columbia, Lafayette, Levy, and one or two other counties of said State.

Said act is construed as covering all homestead entries of record in your office at the time or on the day the storm took place and which, since that date, have not been relinquished by the entrymen and canceled on the records of your office *by reason of relinquishment, or for any other reason.*

Where entries have been canceled since the storm of September, 1896, on the relinquishment of claimants compelled to leave their claims on account of said storm, and other persons have made homestead entry of the lands covered thereby, said act is not construed as in any manner affecting the rights of said last named entrymen.

To entitle a party to the relief afforded by said act it must be shown by his affidavit, corroborated by two or more disinterested witnesses, what comprised his improvements on the homestead claim at the time of the storm, such affidavit to be accompanied with a brief statement, duly sworn to, showing the particulars compelling him to leave and remain away from his claim, such affidavit and statement to be filed in your office and to accompany his final proof when submitted.

Any homestead claimant seeking to avail himself of the relief afforded by said act will have one year from February 25, 1899, the date of the approval of the act, in which to come forward and substantiate his claim for such relief. Such persons when submitting final proof will be credited with the time intervening between the 29th day of September 1896, the day on which the storm took place, and the respective dates when they resume settlement and make known to you their intentions to avail themselves of the benefits named in the act, just as though they had been actually occupying their respective claims during such intervening period.

Approved,

E. A. HITCHCOCK,

*Secretary.*

OKLAHOMA LANDS—GREER COUNTY—ACT OF MARCH 1, 1899.

INSTRUCTIONS.

*Commissioner Hermann to register and receiver, Mangum, Oklahoma, April 13, 1899.*

Your attention is called to the provisions of the act of Congress entitled "An Act to amend Section one of an Act to provide for the entry of lands in Greer County, Oklahoma Territory, to give preference right to settlers, and for other purposes," approved March 1, 1899, (Public No. 108) which reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section one of an act to give preference right to settlers in Greer county, Oklahoma Territory, is hereby so amended as to allow parties who have had the benefit of the homestead laws of the United States, and who had purchased lands in Greer county from the State of Texas prior to March sixteenth, eighteen hundred and ninety-six, to perfect titles to said lands according to the provisions of section one hereinbefore mentioned, under such regulations as the Commissioner of the General Land Office may prescribe, and according to the legal subdivisions of the public surveys, if no adverse rights have attached: *Provided*, That no settler shall be permitted to acquire to exceed three hundred and twenty acres under this provision.

The preference right and privileges granted by section one of the act of January 18, 1897 (29 Stat., 490), which is thus amended, were by the terms of that section limited to persons "qualified under the homestead laws of the United States."

This amendatory act does not grant a right to make an additional or second homestead entry in Greer county to one who had theretofore made a homestead entry under section one of the original act, but it does extend to those who had purchased lands in Greer county from the State of Texas prior to March 16, 1896, the privileges given by that section even where they "have had the benefit of the homestead laws of the United States" and are for that reason not qualified under such homestead laws.

A purchaser directly from the State or through mesne conveyances

from the State, will be deemed a purchaser from the State under the provisions of the amendatory act.

Under section one of the original act a preference right was granted for six months from the passage of that act within which to exercise the right of homestead entry and to make the purchase of additional lands therein provided for. Under the terms of the amendatory act and the authority to prescribe regulations thereunder a similar privilege is extended to the class therein named, the same to date from the passage of the amendatory act, March 1, 1899.

The manner of making homestead entry or purchase under the amendatory act, and the character of proof evidencing a purchase from the State of Texas, will be the same as that required by the circular of February 15, 1897 (24 L. D., 184), but instead of stating that he has not had the benefit of the homestead laws of the United States, the applicant will only be required to state that he has not made a homestead entry of lands in Greer County pursuant to the provisions of section one of the act of January 18, 1897.

It will also be necessary in applying to make either a homestead entry or a purchase under the amendatory act, that the applicant make affidavit to the fact that no adverse right to the land applied for existed on March 1, 1899, the date of the amendatory act, the operation of the amendment being limited to lands to which "no adverse rights have attached".

The affidavit of the applicant to the effect that no adverse rights existed to the lands applied for on March 1, 1899, will be sufficient upon which to allow the application, if no claim therefor had been previously filed in the local office.

The entry or purchase may, however, be contested by any adverse claimant, provided the adverse claim is timely presented.

Approved,

E. A. HITCHCOCK,

*Secretary.*

PRIVATE CLAIM—CERTIFICATE OF LOCATION—ACT OF JUNE 3, 1858.

ARCHIBALD McMANUS.

Section 2, act of May 8, 1822, providing for the confirmation of private claims theretofore reported as entitled to such recognition, operated to confirm claims so reported, without respect to the limitation in the matter of acreage contained in the act of March 3, 1819; and where, in the adjustment of a claim thus confirmed, said limitation has been imposed, additional certificates of location, equal in amount to such reduction, should issue under section 3, act of June 2, 1858.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 14, 1899.* (C. W. P.)

The appeal of James L. Bradford, Esq., as attorney for Archibald McManus, curator of the estate of Francis Herault, deceased, from the decision of your office of September 11, 1897, refusing to approve cer-

tain certificates of location, issued to the said McMannus as the legal representative of the said Francis Herault, deceased, by the United States surveyor-general, at New Orleans, Louisiana, under the third section of the act of June 2, 1858 (11 Stat., 294), in satisfaction of the Louisiana private land claim of the said Herault, has been duly considered.

In 1803, the Louisiana territory was ceded to the United States by France, and April 25, 1812, Congress passed an act for ascertaining the titles and claims to lands in that part of the Louisiana territory which lies east of the river Mississippi and island of New Orleans and west of the river Perdido (2 Stat., 713). The act provided that the lands within said limits shall be laid off into two land districts, between which Pearl river shall be the boundary, and for each of which districts a commissioner of land claims shall be appointed by the President.

James O. Cosby was appointed commissioner for the district west of Pearl river, and pursuant to said act, he reported, June 7, 1813, as No. 21 in register C, the claim of Francis Herault. Said register C contains the claims to land in said district founded on grants said to be derived from either the French, British, or Spanish governments, which in the opinion of the commissioner are not valid, according to the laws, usages, or customs, of such governments (American State Papers, Vol. 3, p. 58, Gales and Seaton's Edition).

Congress next passed the act of March 3, 1819 (3 Stat., 528), by which certain claims, reported by the commissioners under the act of 1812, are recognized as valid and complete titles; other claims, though incomplete, are confirmed; and grants are made as donations to a certain class of actual settlers not having any written evidence of claim. But no provision was made for validating the claims embraced in register C.

March 17, 1820, Messrs. Cosby and Skipwith, register and receiver of the district west of Pearl river, Louisiana, acting as commissioners under the act of 1812, presented Herault's claim for confirmation, as No. 1 of register E, which contains "renewed claims" "founded on complete and incomplete titles derived either from the British or Spanish governments, which in the opinion" of the register and receiver ought to be confirmed by the government of the United States.

The claim is reported in said register E. as founded on a Spanish patent, dated October 3, 1806; quantity of land claimed 2000 arpents; situated in East Baton Rouge; grant made by Morales, the Spanish intendant; surveyed June 8, 1806, by Dupin; inhabitation and cultivation from 1807 to 1813.

The register and receiver, in recommending the claims in register E for confirmation by Congress, state that in their estimation, the claims contained in register E ought to be confirmed under the provisions and limitations of the law of the 3d of March, 1819. (Am. State Papers, Vol. 3, p. 441.)

In Cosby's report, under "general remarks," it is stated that the land was sold to Herault at 25 cents per arpent.

Subsequent to the report of Messrs. Cosby and Skipwith, Congress passed the act of May 8, 1822 (3 Stat., 707), entitled "An act supplementary to the several acts for adjusting the claims to land, and establishing land offices, in the districts east of the Island of New Orleans.

By the second section of said act, it is provided:

That all the claims reported as aforesaid, and contained in the several reports of the said registers and receivers, founded on orders of survey, requettes, permission to settle, or other written evidences of claims, derived from the Spanish authorities, which ought, in the opinion of the registers and receivers, to be confirmed, shall be confirmed in the same manner as if the title had been completed: *Provided*, That the confirmation of all the said claims provided for by this act, shall amount only to a relinquishment for ever, on the part of the United States, of any claim whatever to the tract of land so confirmed or granted.

There can be no doubt that Herault's claim was confirmed by said act, and the only question is, was it confirmed without limitation? Your office, following the interpretation of said section 2 adopted by your predecessor in the case of Antonio Grass, decided October 19 1880 (which decision was affirmed by the Department October 17, 1883, solely upon the technical ground that the claim was *res judicata*), held that "the case of Francis Herault is controlled by the subsisting decision in that of Antonio Grass;" that "it must be held that the first mentioned claim has been fully satisfied by location in place, for the quantity of 1,283.04 acres;" and therefore overruled the action of the surveyor-general and held his certificates of location for cancellation.

The surveyor-general, in his report of December 14, 1896, transmitting the application of McManus and the certificates of location, as quoted in your office decision, states that:

It appears that under certificate No. 30 issued on June 23rd, 1823, an order of survey was issued in favor of this claim by the register and receiver on June 28th, 1823. The said order requiring that the said claim be surveyed in strict conformity with the survey made by R. Dupin, on June 8, 1806. This survey embraced an area of 2000 superficial arpents.

I transmit herewith a certified copy of a copy of the above stated order of survey duly certified by Amos Kent, register of the U. S. Land Office, on December 24, 1852; also a copy of the certified copy by the said register on the same day of the plat recorded in his office book C, No. 3, page 348, in support of the said claim of Francis Herault.

I also find the original certificate of confirmation No. 30 issued June 23, 1823 (copy herewith), in favor of this claim. This certificate was originally for two thousand arpents, but appears to have been corrected to twelve hundred and eighty acres.

This correction, I suppose, was made after receipt of Commissioner's letter to the register and receiver dated August 13, 1823, in which the Commissioner seems to be of the opinion that the said claim of Francis Herault is not entitled to confirmation for more than 1280 acres (Laws, Instructions and Opinions, 2-717-720).

The records of this office further disclose that the said claim of Herault was surveyed and located in T. 6 S., R. 1 E., Greensburg district, La., and therein designated as section 50, containing 1283.04 acres. (See map approved June 29, 1853.)

I am of opinion that the said claim is valid in its entirety as represented by the plat of survey by Dupin, and entitled to be recognized according to its established

boundaries as per said survey containing 2000 superficial arpents, the equivalent of 1701.40 superficial acres, and that therefore the said claim stands confirmed by the aforementioned act of May 8, 1822, for the amount of 2000 arpents equal to 1701.40 acres, and having been as before stated surveyed and located for 1283.04 acres, there remains a deficiency of 418.36 acres yet unlocated and due said claim; etc.

It is true, that the register and receiver in their report of March 17, 1820, state that, "in their estimation," the claims contained in register E ought to be confirmed under the provisions and limitations of the law of March 3, 1819, but it can not be presumed that Congress adopted their opinion, in the face of the fact that by the act of May 8, 1822, said class is confirmed absolutely and unconditionally, without any limitation as to quantity, subject only to the proviso:

That the confirmation of all the said claims provided for by this act, shall amount only to a relinquishment for ever, on the part of the United States, of any claim whatever to the tract of land so confirmed or granted.

The second section of the act of 1819 contained a proviso:

That such grant as a donation shall not be made to any one person for more than 1280 acres; which confirmation of the said incomplete titles and grants of donation, hereby provided to be made, shall amount only to a relinquishment for ever, on the part of the United States, of any claim whatever to the tract of land so confirmed or granted.

While a proviso is found in the second section of the act of 1822 that the confirmation of the claims provided for by that act, shall amount only to a relinquishment by the United States, of any claim to the tract of land confirmed or granted, there is no limitation as to quantity, and there seems to be no ground for importing into the later act the proviso as to quantity contained in the earlier act.

While it is thus true that statutes relating to the same subject are to be construed together, this rule does not go to the extent of controlling the language of subsequent statutes by any supposed policy of previous statutes, where such language requires such policy to be disregarded. Where the last statute is complete in itself, and intended to prescribe the only rule to be observed, it will not be modified by the displaced legislation, as laws *in pari materia*. Sutherland on Statutes, Sec. 286.

The doctrine that statutes *in pari materia* are to be taken together is a rule of construction, resorted to in cases of doubt, and is never applicable when the statute is plain and unambiguous. *State v. Cram*, 16 Wis., 343, 347. The rule *in pari materia* does not go to the extent of controlling the language of subsequent statutes by the supposed policy of previous ones. *Goodrich v. Russell*, 42 N. Y., 177, 184.

The concluding part of the third section of the act of June 2, 1858, under which this application is made, provides:

That in all cases of confirmation by this act, or where any private land claim has been confirmed by Congress, and the same, in whole or in part, has not been located or satisfied, either for want of a specific location prior to such confirmation, or for any reason whatsoever, other than a discovery of fraud in such claim subsequent to such confirmation, it shall be the duty of the surveyor general of the district in which such claim was situated, upon satisfactory proof that such claim has been so confirmed, and that the same, in whole or in part, remains unsatisfied, to issue to the

claimant, or his legal representatives, a certificate of location for a quantity of land equal to that so confirmed and unsatisfied; which certificate may be located upon any of the public lands of the United States subject to sale at private entry, at a price not exceeding one dollar and twenty-five cents per acre: *Provided*, That such location shall conform to legal divisions and subdivisions.

As it appears that there remains a deficiency of 418.36 acres yet unlocated and due on this claim, and as a duly certified copy of the record of the proceedings in the matter of the succession of Francis Herauld filed in the case shows the necessary facts to confer jurisdiction under the Louisiana law, and that Archibald McManus was appointed by the 22d district court for the parish of Plaquemines, Louisiana, to manage this succession and complied with the law as to notice, bond, oath, inventory and appraisement of effects, the decision appealed from is reversed, and the case is remanded to your office for such further proceedings as may be necessary and proper in consonance with this decision.

PRACTICE—NOTICE—SERVICE BY PUBLICATION.

CLAFLIN *v.* THOMPSON.

Where a proper affidavit as the basis for service of notice by publication is furnished, and the order therefor duly made, but the service thereunder is defective, and new notice is required, a further showing as a basis for publication is not necessary.

*Secretary Hitchcock to the Commissioner of the General Land Office, April*  
(W. V. D.) 14, 1899. (W. M. W.)

On the 18th day of October, 1893, John A. Thompson made homestead entry for the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 8, T. 144 N., R. 63 W., Fargo, North Dakota, land district.

On September 20, 1897, Ellen Clafin filed an affidavit of contest against said entry, alleging that the entryman had failed to comply with the requirements of the homestead law in the matters of establishing residence upon the tract and the improvement and cultivation thereof. At the same time contestant filed an affidavit for publication of notice to the entryman, upon which notice was published.

The entryman made default. The contestant appeared and submitted evidence, upon which the local officers recommended the cancellation of the entry and sent notice of this decision by registered letter to Jamestown, North Dakota, the entryman's address as given in the record, and said letter was returned unclaimed.

The record and papers were transmitted to your office, and on the 29th day of April, 1898, the same was examined and it was found that:

A copy of contest notice should have been mailed to the entryman at his address of record, as there is nothing in the record to show that he had changed his address. See *Popp v. Doty*, 24 L. D., 350.

Because a copy of contest notice was not properly mailed to the entryman, said case is hereby remanded and the record returned. You are directed to notify the plaintiff that she will be allowed thirty days to apply for notice and proceed anew in strict compliance with the rules of practice, and if she fails to take action, her contest will be dismissed.

On June 2, 1898, new notice was applied for and it was issued and published in a newspaper and posted as required by the law and regulations, but there was no new affidavit or other evidence presented showing that diligence had been used and that personal service could not be made upon the entryman; the only affidavit of diligence and search for the entryman furnished as a basis for service of notice by publication was filed on September 20, 1897.

The entryman did not appear, and the local officers again found in favor of the contestant and recommended the cancellation of Thompson's entry.

The record was transmitted to your office, and on October 31, 1898, your office held that said affidavit for publication, filed September 20, 1897, was not sufficient basis for publishing notice on June 2, 1898, and that:

In order to justify service by publication, the impossibility of personal service must be shown to have existed so recently before the order to serve by publication, as to warrant the presumption of the existence of such status when the publication is made.

A new affidavit as a basis for publication should have been filed.

The record was thereupon remanded with directions to allow the contestant thirty days to apply for notice and proceed anew in strict compliance with the rules of practice.

The contestant appeals, and with her appeal submits an affidavit, made on December 10, 1898, by Ernest Claffin, showing that he had made search and inquiry for the entryman for the purpose of making personal service of notice of the contest upon him, and further stating:

That said contestee was not in said State or a resident of said State at the time the contest herein was initiated or at any time since the initiation of said contest; that personal service cannot now be made within this State, and that there has been no time since the initiation of the said contest when personal service could be made in said case.

Appellant asks that this affidavit be accepted and the case considered on the merits and decided in her favor.

In the appeal error is alleged in the action of your office holding that a new affidavit of diligence as a basis for publication should have been filed before new notice was obtained from the local office.

In this case a proper basis, by affidavit, was laid, originally, for service of notice by publication, whereby the district officers acquired jurisdiction to proceed in the case. There was an irregularity in the service of this notice, in failing to send a copy of the same by registered mail to the entryman at his address of record. Because of this omission your office properly remanded the case with instructions to notify

plaintiff that she will be allowed thirty days within which "to apply for notice and proceed anew," etc.

The failure to send copy of notice by registered letter, as prescribed, was an irregularity in the service thereof but did not destroy the jurisdiction which had been theretofore acquired by the land officers to issue notice by publication in the case. Being an irregularity, it could be cured by proper service, as directed, which was subsequently made. This seems to have been the view of your office when, on April 29, 1898, the case was remanded, with direction to give plaintiff thirty days in which to apply "for notice" and to proceed thenceforth anew. She did so apply and proceeded thereafter regularly in accordance with the rules; and it would be a hardship to again remand the case after she has complied with the instructions of your office.

But independently of your instructions, it was not necessary, under the circumstances, that a new affidavit showing basis for notice by publication, should have been required in this case, as such showing had already been made and accepted by the district officers.

In this respect the case under consideration differs from all the cited cases, in which no proper basis for service, by publication, had been originally laid, but was attempted to be done by affidavits subsequently filed. As said affidavit is a pre-requisite to an order directing service by publication, it has been properly held that the omission could not be subsequently cured. But in this case no such question is presented, as the jurisdictional foundation had been laid by the filing of the pre-requisite affidavit.

It is to be observed that the entryman is not here, nor any one for him, complaining that the service in the case was not proper; and an affidavit filed by the contestant shows that the same conditions existed at the time of the second hearing as when the original application for contest was filed.

Entertaining these views the decision of your office is reversed, and the papers in the case are returned, with directions to proceed to adjudicate the case upon the record thereof.

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#### RAILROAD GRANT—INDEMNITY SELECTION—RESERVATION.

#### SOUTHERN PACIFIC R. R. Co.

Until the approval of a railroad indemnity selection no rights are secured thereunder that can be asserted against the government; and the creation of a forest reservation under authority of the act of March 3, 1891, prior to the approval of a selection embraced within the limits of said reservation, is such a disposition of the land as to defeat the selection thereof, even though the tract was subject thereto when selected by the company.

The words "entry" and "filing" used in the proclamation of February 14, 1893, establishing the Sierra forest reserve, to describe lands excepted from such reservation, must be taken in their proper technical meaning, and as applicable only to record claims made under the general land laws, and not including a railroad indemnity selection.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 14, 1899.* (E. F. B.)

The tract in controversy, to wit: the NW $\frac{1}{4}$  of the NW $\frac{1}{4}$  of Sec. 29, T. 25 S., R. 31 E., M. D. M., Visalia, California, is within the indemnity limits of the grant to the Southern Pacific Railroad Company, and is also included within the limits of the Sierra forest reserve established by proclamation of the President February 14, 1893.

This tract is embraced in list No. 78 of indemnity selections made by the Southern Pacific Railroad Company and approved by the local officers April 22, 1897. It was held for cancellation by decision of your office of May 15, 1897, for the reason that said tract at the date of selection was included within the limits of a public forest reservation made under the 24th section of the act of March 3, 1891 (26 Stat., 1095), and was therefore not subject to selection.

The railroad company appealed from said decision alleging error in holding that the proclamation intends to bar the company of its right to select indemnity lands within said limits, and in assuming that the proclamation reserved all lands that fell within the designated boundaries. It also contends that its right was initiated by selection made prior to the establishment of the reservation, and in support of this contention alleges that:

The said company, on December 5, 1885, applied to select this tract, with other lands, which were clear to the company, in indemnity list No. 23, and offered to pay the selecting fees, but the register and receiver refused to approve said list because the company had not filed lists of "lost" lands covering previous selections. The company appealed, and the Commissioner, November 4, 1891, returned said list to the local officers with direction for re-examination and certification of clear tracts. Thereupon the company presented list 56, which included said tract, and said list was approved by the register and receiver May 10, 1892.

On the return by the Secretary to the Commissioner of clear list No. 24, the Commissioner, August 14, 1895, canceled the company's selection of said NW $\frac{1}{4}$  NW $\frac{1}{4}$  of section 29, because of the expired D. S. No. 9028 of John Gann, filed July 21, 1887, alleging settlement August 21, 1887, which filing and settlement were subsequent to the company's application of December 5, 1885. Said D. S. 9028 was, however, canceled November 14, 1896. Said filing, therefore, being subsequent to the application of the company, was erroneously allowed to go of record.

After this cancellation of the company's selection per list of 1892, the company, to preserve its supposed right, filed its list No. 78, on April 22, 1897.

It is immaterial for the purpose of this decision whether or not the company made application to select this tract prior to the establishment of the reservation. It may be conceded that the tract was embraced in a list of indemnity selections pending at that time and that it was then subject to selection. But the mere fact that a claim

had been so initiated at the time the reservation was established conferred no such right upon the company as to withdraw the land from the control of the government or to affect its power of disposal. All that could have been acquired by such proceedings was merely the inchoate right to have its selection approved which, under departmental rulings, it could have asserted against all others, claiming adversely thereto under any right subsequently initiated, but it conferred no right as against the government. "Until the selections were approved there were no selections in fact, only preliminary proceedings taken for that purpose." (*Wisconsin Central R. R. Co. v. Price*, 133 U. S., 496-512.) The promise of the government to give the company indemnity lands in lieu of lands lost within the granted limits "passed no title, and until it was executed created no legal interest which could be enforced in the courts." (*Ibid.*, 512.) There are no selections in fact until after approval, and until a selection is made the title remains in the government "subject to its disposal at its pleasure." (*Kansas Pacific R. R. Co. v. Atchison Railroad Co.*, 112 U. S., 414-421.)

The selection of the tract in controversy not having been approved at the date of the proclamation, the preliminary proceedings taken by the company conferred no right upon it that could be asserted against the government, and the creation of the reservation under the authority conferred by the 24th section of the act of March 3, 1891, was such a disposition of the land as to defeat the selection even though the tract was subject to selection at the time the preliminary proceedings were taken, unless it was excepted from the operation of the proclamation.

The proclamation creating this reservation contained the usual clause:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and the rules and regulations not in conflict therewith.

The words "entry" and "filing" are technical terms having a well defined meaning, and employed in the various acts pertaining to the disposal of the public domain, to indicate the act by which an individual acquires an inceptive right to a portion of the public lands under the general land laws. (*Choteau v. Pope*, 12 Wheaton, 586.) These words must therefore be considered as having been used in the proclamation with reference to their proper technical meaning, unless it is apparent that it was intended to give them a broader signification and to embrace every proceeding in the local office taken by a person or corporation seeking to acquire a part of the public lands. Unless

there is something in the context to indicate that the meaning of these terms was to be so extended as to include every assertion of a claim to public lands under special acts, made in writing and filed in the local office, they must be given their technical meaning and be held to include only entries or filings made under the general land laws.

From a view of the context we not only fail to find any expression indicating an intention to extend their meaning beyond the well defined and accepted signification of those terms as they are used in the public land laws, but on the contrary the purpose to confine it to claims initiated under the general laws is made manifest by the succeeding clause, which is as follows:

Provided that this exception shall not continue to apply to any particular tract of land unless the entryman, settler or claimant continues to comply with the law under which the entry, filing, settlement or location was made.

The requirement that the entryman, settler, or claimant shall continue to comply with the law under which the claim was initiated, as a condition to the continuance of the exception, plainly indicates that the only lands that were excepted from the force and effect of the proclamation, are those as to which claims had been initiated at the date of the proclamation, pursuant to law under some one of the general land laws, and that these were the laws that had to be complied with.

Furthermore, the proclamation being general in its terms, setting aside and reserving for public uses all lands within the designated boundaries, must operate upon all lands within said boundaries subject to disposal and control by the government unless specially excepted therefrom. The exception or proviso takes no case out of the operation of the proclamation that does not clearly fall within the terms of such exception or proviso.

The decision of your office holding said selections for cancellation is therefore affirmed.

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#### EXCHANGE OF LANDS UNDER THE ACT OF JUNE 4, 1897.

##### F. A. HYDE ET AL. (ON REVIEW).

Where an exchange of land is sought under the act of June 4, 1897, the relinquishment and selection can be made only by the claimant or owner of the land within the limits of the forest reservation.

Unsurveyed as well as surveyed land, which is vacant and open to settlement may be selected under said act.

The words "tract covered . . . by a patent," as used in said act, embrace and include a tract to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent.

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

The departmental decision herein of September 28, 1898, 27 L. D., 477, recalled and vacated.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 14, 1899.* (E. B., Jr.)

The act of June 4, 1897 (30 Stat., 11-36), contains the following provision:

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

December 16, 1897, Joseph William Belden purchased from the State of California the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 16, T. 13 S., R. 31 E., M. D. M., Marysville, California, land district. The tract described is within the limits of the Sierra forest reservation, established by executive order of February 14, 1893 (27 Stat., 1059). As part of a sixteenth section of public land full title to the said tract passed from the United States to the State of California, under its grant of school lands (10 Stat., 246), upon survey of the land in 1884. December 17, 1897, Belden executed a deed of relinquishment and quit-claim of the tract to the United States, his intention being, as expressed in the deed, "to select in lieu thereof a tract of vacant land open to settlement, in accordance with the privilege granted in such cases" by the said act of 1897. This deed was not delivered to or accepted by any officer of the United States, but was handed by Belden to Frederic A. Hyde, together with an instrument in writing, executed by Belden, reciting the making of the deed of relinquishment and quitclaim and purporting to "sell, assign, and transfer" to Hyde "the right conferred upon me (Belden) by said act of Congress, under the deed of relinquishment aforesaid, to select eighty acres of vacant land open to settlement," and to authorize Hyde to select the land in his own name and receive patent therefor. It is not claimed that the tract within the forest reservation was ever conveyed by Belden to Hyde.

December 24, 1897, Hyde, as assignee of Belden, filed an application under the said act to select, in lieu of the tract within the forest reservation an unsurveyed island in the Sacramento River, said to contain seventy-seven acres. This application was accompanied by Belden's deed of relinquishment and quitclaim to the United States, and by his purported assignment to Hyde. Your office rejected Hyde's application May 31, 1898, on the ground that assignment of the right to select lieu land is not recognized by the said act. June 13, 1898, Hyde, as attorney for Belden, presented the application of the latter under the

said act to select the same unsurveyed island in lieu of the tract within the forest reservation. With this application was a letter from Belden to the local officers referring to the decision of your office of May 31, 1898, upon the application of Hyde, and stating that such application was made by his (Belden's) direction and for his benefit, and requesting that if Hyde's application should be finally rejected his (Belden's) application might be filed instead thereof. A letter to the register from Hyde, as attorney of Belden, also accompanied the application of Belden, and therein, referring to the said decision of May 31, 1898, it is stated:

An appeal from the said decision will be taken, but, meanwhile, to prevent the initiation of an adverse claim, I present herewith the application of J. W. Belden himself, for the said island, with a statement from him to the effect that the original application was made by his direction and for his benefit, and, as the same has been rejected, he now presents the application in his own name.

The papers on file in the first application are sufficient to show the right of Belden to make the proposed location. As his attorney I respectfully request that this application may be noted upon the records; that you will transmit the same to the Honorable Commissioner, and that the same be held subject to a determination of the validity of the original location.

June 29, 1898, Hyde appealed from the decision of your office. The Department, considering the case as upon the application of Belden, held, September 28, 1898 (27 L. D., 472), that the same should be rejected, for the reason that the land selected was unsurveyed, and upon that ground alone affirmed the action of your office. A motion by Hyde for review brings the case again before the Department. It is contended in the motion that the provision of the act of 1897, above quoted, authorizes the selection of unsurveyed land in lieu of the tract within the limits of the forest reservation.

(2) Before considering this contention of the motion, the purported assignment by Belden to Hyde should receive some attention. The provision of the statute under which this case arises clearly contemplates an exchange of lands. The parties to the exchange are the United States, on the one hand, and on the other a holder of "an unperfected bona fide claim" within the limits of a forest reservation or an owner "by patent" of land so situated. A case is not properly presented for the favorable action of the land department under said provision until there is filed a relinquishment of the tract covered by the unperfected *bona fide* claim or patent and a selection by the claimant or owner of the land in lieu thereof. The officers of the land department are not authorized to accept, consider or pass upon a relinquishment of the tract within the limits of a forest reservation, except in connection with a proffered or tendered selection of other lands in lieu thereof. Delivery and acceptance of the relinquishment are necessary to give it any effect, and until this is done there is no right to lieu land and hence no right to assign. Hyde had no title to the tract described by Belden's deed, had nothing to relinquish, and had no right of selection. His application can not therefore be recognized. Con-

sidered as his application alone, it should have been rejected. Inasmuch, however, as both Hyde and Belden now aver that such application was made by the direction of the latter and for his benefit, and since, furthermore, the relinquishment and selection have been presented by Belden himself, as owner of the tract, the case will be considered as if upon the application of Belden from the beginning.

Proceeding now to consider the contention of the motion for review, it is to be observed that the words "surveyed" or "unsurveyed" do not anywhere appear in the provision of the statute hereinbefore set out, nor is there any language therein which indicates an intention to limit the selection of lieu land under the said provision to surveyed lands. The only limitation as to kind or condition of the lands subject to lieu selection thereunder is contained in the words "vacant land open to settlement." This language is so clear and explicit as to leave no room for construction. "Vacant land open to settlement" is any public land to which rights may be initiated by settlement, under existing laws. Unsurveyed, as well as surveyed, lands for many years past have been and still continue to be open to settlement. It was entirely competent for Congress to limit such selections to surveyed lands, or to extend them to both surveyed and unsurveyed lands, and the words "vacant land open to settlement" including as they do unsurveyed as well as surveyed lands, must be given their proper legal effect. It follows that lieu selections, under the said provision, are not confined to surveyed lands, but may also be made of unsurveyed lands.

The tract which may be relinquished to the government, in exchange for other land of equal area, must, in addition to being included within the limits of a public forest reservation, be also "covered by an unperfected *bona fide* claim or by a patent." Here are indicated two distinct degrees of right or title to land: First—an inchoate, inceptive or equitable right or title susceptible of perfection by compliance with law, and, second—full legal or fee simple title, the holders or possessors of which are spoken of respectively as "settler" and "owner." The tract which Belden has offered to the government in exchange is "covered" not "by patent," in the literal meaning of the term, but by direct grant from the United States to the State of California, by means of an act of Congress, as already stated. In *Michigan Land and Lumber Co. v. Rust* (168 U. S., 589, 592) it is said:

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother v. Lucas*, 12 Pet., 410, 454; *Grignon's Lessee v. Astor*, 2 How., 319; *Chouteau v. Eckhart*, 2 How., 344, 372; *Glasgow v. Hortiz*, 1 Black, 595; *Langdeau v. Hanes*, 21 Wall., 521; *Ryan v. Carter*, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, *Rev. Stat. Sec. 2449*; *Frasher v. O'Connor*, 115 U. S., 102; but wherever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, *Bagnell v. Broderick*, 13 Pet., 436, 450; and while so

remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

Here the act of Congress passed the fee and therefore made no provision for the issue of a patent. Title by such means is the simplest and highest known to our laws, and is beyond question the full equivalent of title by patent, which is the deed or instrument by which the executive, in pursuance of law, conveys the title to public lands.

The question then presented in this connection is, whether the term "patent," as used in said provision, should be taken in its literal signification only, or should be construed to have been used in the broader, general sense to denote a tract to which the full legal title, however granted or conveyed, has passed out of the government and beyond the control of the land department, in contradistinction to the other and lower degree of right or title indicated by the words "unperfected *bona fide* claim." The Department is constrained to so construe it, in order to give effect to the evident purpose of Congress in the premises, as gathered from this and kindred legislation.

The first general legislation providing for the establishment of forest reservations, and the only general legislation on that subject prior to the act of 1897, *supra*, is contained in section 24 of the act of March 3, 1891 (26 Stat., 1095, 1103), which reads:

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

By virtue of the authority thus conferred, numerous forest reservations, including the Sierra forest reservation, were established in various States and Territories, by executive orders, prior to the act of 1897. By the establishment of these reservations many claimants and owners of lands within the reservation boundaries were placed in a state of greater or less isolation from market and business centers, and from church, school, and social advantages, and the value of their property for residence and other purposes was thereby impaired. The withdrawal from settlement and other disposition of the surrounding public lands precluded such persons from obtaining the advantages consequent upon the continuing and increasing settlement which was anticipated when their claims were initiated or their title acquired. In consequence they were clamorous for relief from Congress. Strenuous efforts were made to have the more recent reservations revoked *in toto*. Instead, Congress granted the measure of relief contained in the act of 1897.

The various provisions of that act, relating to lands within the limits of forest reservations, and additional to that hereinbefore set out, need not be recited. Under these provisions the general integrity of the reservations has been maintained, and rules and regulations have been prescribed and promulgated by virtue of authority vested in the Sec-

retary of the Interior to insure the objects for which the reservations are created, which are to protect and improve the forests thereon for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow (Rules and Regulations, June 30, 1897, 24 L. D., 589). It is obvious that the accomplishment of these objects would be subserved and promoted by exclusive governmental ownership and control of the lands within the reservation boundaries. The extinguishment of the claims, ownership and control of other parties in and over the lands, of the class or classes intended to be reserved, is very desirable on the part of the government, and where this can be done agreeably to the wishes of such parties under a reasonable construction of the above provision for an exchange of lands, it is believed to be the duty of the land department to place such construction upon the law and thus promote the best interests of all concerned.

The provision in question is remedial in character, and should therefore be so construed as to advance the remedy and compass the objects sought. In Endlich on Interpretation of Statutes, section 103, it is said:

It is said to be the duty of the judge to make such construction of a statute as shall suppress the mischief and advance the remedy; and the widest operation is therefore to be given to the enactment, so long as it does not go beyond its real object and scope. When, for instance, the language, in its usual meaning, falls short of the whole object of the legislature, a more extended meaning may be attributed to it, if fairly susceptible of it. The scope of the act being ascertained, the words are to be construed as including every case clearly within that object, if they can do so by any reasonable construction, although they point primarily to another or a more limited class of cases.

And see also, to the same effect, Sutherland on Statutory Construction, section 410; Potter's Dwaris on Statutes and Constructions, p. 231; and Sedgwick on Construction of Statutory and Constitutional Law, p. 309. The doctrine declared by these writers upon interpretation and construction is abundantly supported by citations from the decisions of the courts.

A case seemingly in point, in which the word "patent" as used in certain acts of Congress was regarded by the Supreme Court as embracing title by certification also, is that of *United States v. Winona and St. Peter Railroad Company* (165 U. S., 463). The United States sued in that case for the forfeiture of lands alleged to have been wrongfully certified to the State of Minnesota for the benefit of the railroad company, and asked the cancellation of the certification and restoration of the lands to the public domain. In commenting upon the limitations in the acts of March 3, 1891 (26 Stat., 1095, 1099), and March 2, 1896 (29 Stat., 42), upon the bringing of suits to vacate and annul "patents" to public lands, the court said:

It is true that these appellees cannot avail themselves of these limitations because this suit was commenced before the expiration of the time prescribed, and we only refer to them as showing the purpose of Congress to uphold titles arising under certification or patent by providing that after a certain time the government, the grantor therein, should not be heard to question them.

And again, after quoting the provision in the act of 1896 that, no patent to any lands held by a *bona fide* purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed, the court further said :

We are of the opinion that Congress intended by the sentence we have quoted from the act of 1896 to confirm the title which in this case passed by certification to the State. It not only declares that no patents to any lands held by a *bona fide* purchaser shall be vacated or annulled, but it confirms the right and title of such purchasers. Given a *bona fide* purchaser, his right and title is confirmed, and no suit can be maintained at the instance of the government to disturb it.

And so in that case, the court held that the statutory inhibition against vacating or annulling a *patent* covered also a case where the title claimed was under a *certification* only.

Before a selection under the said act of 1897 can be made, the United States must be reinvested with all the right and title to the tracts relinquished with which it had previously parted. When Belden made his deed to the United States he did not have such title. At that time the State of California had at least the legal title to the tract sought to be relinquished by Belden and he did not acquire full title thereto until January 23, 1899, when patent was issued to him by the State. It is doubtful whether his deed of December 17, 1897, which, on its face, purports to "release, remise, quitclaim and relinquish" to the United States only such title as he then had in the tract therein described, is sufficient to transfer to the United States the subsequently acquired full legal title, and it is therefore deemed best that Belden should execute and have properly recorded, and thereafter file in your office a new deed of relinquishment of the said tract. He should also file therewith a certificate by the recorder of deeds of the county wherein the tract is situated, that no instrument, except the said patent of the State, purporting to convey or in any way encumber the title to said tract or any part thereof has been filed or made of record in his office since December 21, 1897, the date of the recorder's last certificate.

It is therefore held, in accordance with the foregoing views :

1. Where an exchange of land is sought under the act of June 4, 1897, *supra*, the relinquishment and selection can be made only by the claimant or owner of the land within the limits of the forest reservation.

2. Unsurveyed as well as surveyed land, which is vacant and open to settlement, may be selected thereunder.

3. The words "tract covered . . . . . by a patent" as used therein embrace and include a tract to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent.

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

The previous decision of the Department herein is hereby recalled and vacated, and the decision of your office modified accordingly.

## EXCHANGE OF LANDS UNDER THE ACT OF JUNE 4, 1897.

## EMIL S. WANGENHEIM.

In an exchange of lands under the act of June 4, 1897, where title to the land relinquished has passed out of the government, or where certificate for patent thereto has issued, the selection may embrace contiguous or non-contiguous tracts, if in the same land district; but if the land relinquished is covered by an unperfected claim, to which certificate for patent has not issued, and the law under which said claim was initiated requires that land taken thereunder must be in one body, the same requirement must be observed in making the lien selection.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 14, 1899. (E. B., Jr.)

The Department has considered the appeal of Emil S. Wangenheim from the decision of your office of August 12, 1898, rejecting his application to exchange the S.  $\frac{1}{2}$  of Sec. 16, T. 12 S., R. 27 E., M. D. M., containing three hundred and twenty acres, for the same area of public lands described as the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 12, and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 22, T. 8 S., R. 6 E., M. D. M., San Francisco, California, land district. The tract offered in exchange is within the boundaries of the Sierra forest reservation, established by executive order of February 14, 1893 (27 Stat., 1059), and passed to the State of California upon survey in 1885, under its grant of lands for public schools.

Wangenheim claims title by mesne conveyances from the State. His application to exchange is made under the provision of the act of June 4, 1897 (30 Stat., 11, 36), which reads:

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

The rejection of the application by your office is upon the ground that "selections under said act should embrace contiguous tracts," and that "the tracts selected" in this case "are not contiguous." The appeal contends that there is nothing in the said provision which requires the applicant to select land in one body, and that the decision of your office is, therefore, erroneous.

The applicant in this case, as suggested in the argument, might have made eight separate relinquishments and selections, under the said provision, had he chosen to do so, and thus might secure the

identical tracts embraced in the selection to which your office objects. If he could have done this, as he unquestionably could, no useful purpose, it seems, would be served by refusing to allow him to accomplish the same result by a single relinquishment and selection. There is no such rule under other laws or grants relative to the selection of lieu or indemnity lands as your office proposes under the provision in question. Such rule would but obstruct the operation of this statutory provision, which was enacted to provide for an exchange of lands within reservation limits for lands outside such limits, and intended to be mutually beneficial to the government and the other parties to the exchange. A selection by legal subdivisions, whether contiguous or non-contiguous, if in the same land district and not exceeding in total area the tract or tracts relinquished, is believed to be within the contemplation and intent of the statute in any case where title to the land relinquished has previously passed out of the United States, or where certificate for patent thereto has issued. But where the land relinquished was "covered by an unperfected bona fide claim," to which certificate for patent has not issued, and the law under which the claim was initiated requires that land taken thereunder must be in one body, the same requirement must still prevail in the making of the lieu selection. This is made necessary in such case by the proviso of the statute, that:—

*Provided further,* That in cases of unperfected claims the requirements of the laws respecting settlement, residence, improvements, and so forth, are complied with on the new claims, credit being allowed for the time spent on the relinquished claims.

The decision of your office is accordingly reversed. If there is no other objection to Wangenheim's application, you will pass his selection of the said tracts to patent.

SURVEY—FOREST RESERVE—ACTS OF JUNE 4, 1897, AND MARCH 3, 1899.

OPINION.

The provisions in the appropriation act of March 3, 1899, requiring public land surveys thereafter made, whether within or without reservations, to be under the direction and supervision of the Commissioner of the General Land Office, do not preclude the completion, by the Geological Survey, of the sub-divisional survey of a township, within a forest reserve, begun under authority of the act of June 4, 1897.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*April 17, 1899. (A. B. P.)*

By your reference of April 13, 1899, I am in receipt of a communication addressed to you by the Director of the Geological Survey, under date April 12, 1899, in substance requesting instructions as to whether the Geological Survey may continue until July 1, 1899, to execute sub-

divisional surveys of the public lands situated within forest reserves, under authority contained in the act of June 4, 1897 (30 Stat., 11-32).

The act referred to was "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-eight, and for other purposes." Amongst other things said act made an appropriation of one hundred and fifty thousand dollars and directed that the same "be immediately available,"—

For the survey of the public lands that have been or may hereafter be designated as forest reserves by executive proclamation, under section twenty-four of the act of Congress approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior.

The act also declared:

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

Further provision was made that such surveys, field notes, and plats thus returned should have the same legal force and effect as theretofore given the surveys, field notes, and plats returned through the surveyor-general's office, and that such surveys which include subdivision surveys under the rectangular system, should be approved by the Commissioner of the General Land Office as in other cases.

By act of March 3, 1899, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, nineteen hundred, and for other purposes" (Public — No. 188, p. 27), it was provided amongst other things, under the heading "Surveying the Public Lands,"—

That hereafter all standard, meander, township and sectional lines of the public land surveys shall, as heretofore, be established under the direction and supervision of the Commissioner of the General Land Office whether the lands to be surveyed are within or without reservations, except that where the exterior boundaries of the public forest reservations are required to be coincident with standard, township or sectional lines such boundaries may, if not previously established in the ordinary course of the public land surveys, be established and marked under the supervision of the Director of the United States Geological Survey whenever necessary to complete the survey of such exterior boundary.

In the communication aforesaid the Director of the Geological Survey calls attention especially to the said last mentioned act and states that—

There is one township in the Black Hills reserve, the subdivisional survey of which has been commenced, that it is desired to complete before July 1, 1899, if not contrary to law to do so.

Your reference requests of me an opinion upon the question thus presented.

It will be observed that both the acts referred to are annual appropriation acts, dealing, generally speaking, only with matters pertaining to the public service for the particular fiscal year to which they relate. In the first mentioned act, however, the appropriation for the survey of forest reserves and of the public lands adjacent thereto as provided, was made "immediately available," and was thus taken out of the general rule that annual appropriations are limited to expenses connected with the public service for the particular year to which the appropriation act as a whole relates.

It is presumed that the work commenced upon the uncompleted subdivisional survey in question as stated in said communication is within the authority and terms of said first mentioned act and of the appropriation carried thereby, the said communication being silent in this particular. In view thereof there would seem to be no reason why such survey may not be completed, within the current fiscal year, unless there is something in said act of March 3, 1899, which prohibits it.

There is no provision in said latter act so far as it relates to this particular subject, making the appropriation carried thereby available except for expenses incurred and services rendered during the fiscal year ending June 30, 1900, nor is there anything in said act which indicates a purpose on the part of Congress to immediately put an end to all work of surveying previously commenced and then in progress under the authority of the former act. The appropriation carried by the latter act appears to come clearly within the general rule that moneys annually appropriated by Congress may be used only for expenses incurred in the public service during the fiscal year to which the act making the appropriation specifically relates. The particular provision now under consideration is a part of and is directly associated with the general provision of the act making the annual appropriation for the survey of the public lands during the fiscal year ending June 30, 1900. Clearly it can not be held that any part of such appropriation may be used for the purpose of carrying on the surveys of any of the public lands before the beginning of the fiscal year which will end June 30, 1900. If, therefore, the provision of said act hereinbefore quoted should be construed to prohibit the completion of surveys commenced under authority of the provision of the former act relating to the survey of forest reservations and of lands adjacent thereto, it would necessarily follow that the surveying of all such lands would be wholly suspended until after the beginning of the next fiscal year.

I do not think such a construction should be given the statute unless the language used clearly indicates a purpose to that end on the part of Congress. The language of the act taken as a whole does not in my judgment warrant such a construction.

It is therefore my opinion that the uncompleted survey referred to in the communication of the Director of the Geological Survey may be completed under the provisions of said act of June 4, 1897, provided the work as commenced is within the authority and terms of said act, which I presume to be the case in the absence of anything stated to the contrary.

Approved,

E. A. HITCHCOCK,

*Secretary.*

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RAILROAD GRANT—CLASSIFICATION OF MINERAL LANDS.

OPINION.

The provision in section 5, act of February 26, 1895, that at hearings held under protests filed against the acceptance of classifications of land, as returned by the commission, "the United States shall be represented and defended by the United States district attorney," etc., requires said attorney to assist in procuring a mineral classification of the land wherever the facts show that to be its true character, and to that end such officer should endeavor to sustain the mineral classifications of the commission.

*Secretary Hitchcock to the Attorney General, April 14, 1899.*

(W. V. D.)

(G. B. G.)

A letter from the Acting Attorney General, February 18, 1899, transmits for the information of this Department a communication from the United States attorney for the State of Montana, dated February 11, 1898, to the Department of Justice, wherein that officer asks that he be advised as to his duties under the proviso to section 5 of the act of February 26, 1895 (28 Stat., 683), entitled "An act to provide for the examination and classification of certain mineral lands in the States of Montana and Idaho.

This act authorizes and directs the Secretary of the Interior, as speedily as practicable, to cause all lands in the Bozeman, Helena, and Missoula land districts in the State of Montana, and in the Coeur d'Alene land district in the State of Idaho, within the land grant and indemnity limits of the Northern Pacific Railroad, as defined by the act of July 2, 1864 (13 Stat., 365), and acts supplemental to and amendatory thereof, to be examined and classified by commissioners to be appointed by the President of the United States, with special reference to the mineral or non-mineral character of such lands, and to reject, cancel, and disallow any and all claims or filings theretofore made, or which may thereafter be made, by or on behalf of the said Northern Pacific Railroad Company on any lands in said land districts which upon examination shall be classified as provided in said act as mineral lands. Said act then provides, among other things, that said commissioners shall examine and classify the lands therein mentioned

within their respective districts, according to such rules and regulations as the Secretary of the Interior shall prescribe, and file in the office of the register and receiver of the land office of the land district in which the land examined and classified is situated a full report, showing the lands classified by them as mineral lands and those classified as non-mineral; that upon receipt of such report the register of the land office shall cause to be published notice of the classification of lands as shown by said report, and any person, corporation, or company feeling aggrieved by such classification may file with the register and receiver of the land office a verified protest against the acceptance of said classification as to any described tract; whereupon a hearing shall be ordered by, and conducted before, the said register and receiver, under rules and regulations as near as practicable in conformity with the rules and practice of such land office in contests involving the mineral or non-mineral character of land in other cases; and an appeal from the decision of the register and receiver shall be allowed to the Commissioner of the General Land Office and the Secretary of the Interior, under such rules and regulations as the Secretary of the Interior may prescribe.

The proviso to section 5 is, in part, as follows:

*Provided*, That at such hearings the United States shall be represented and defended by the United States district attorney or his assistants for the judicial district in which the land is situated, unless the Secretary of the Interior shall detail some proper officer of the Department of the Interior for that purpose.

April 13, 1895 (20 L. D., 350-356), this Department issued instructions designed to secure a proper administration of this act, and at pages 354 and 355 thereof it was said:

The lands included in the lists reported by the various boards of commissioners, and incorporated in the published notice are *prima facie* of the character as classified and the Secretary of the Interior, upon receipt of the report [of the register and receiver specifying protests], will designate, under the proviso to the fifth section of the act, the official, to defend such classification, at said hearings in the name of the United States.

No such designation was or has been made by the Secretary of the Interior, but the Attorney General was requested by this Department, April 18, 1898, to direct the United States attorneys for the States of Montana and Idaho

to represent the government in a number of hearings ordered on the protests of the Northern Pacific Railroad Company against the acceptance of a large portion of the lands classified as mineral.

August 13, 1898, upon the complaint of the United States attorney for Montana of the insufficiency of the government's testimony, it was directed by this Department that a special agent of the General Land Office be detailed,

to render such assistance to the United States Attorney for Montana as he may require in securing the evidence necessary to sustain the classification of these lands.

In his said letter of February 11, 1898, the said United States attorney for the State of Montana expresses the opinion that it is his duty under said act "to appear for the mineral land commission and in defence of the classification made by it."

The manifest purpose of the act was to classify the lands in the districts named and thus facilitate the adjustment of the grant to the Northern Pacific Railroad Company, at the same time protecting the interests of the United States in the mineral lands which were excepted from the grant. The character of these lands is *prima facie* as classified, and the act provides, as to the lands against the classification whereof no protest has been filed, that such classification when approved by the Secretary of the Interior shall be considered final, except in cases of fraud. But as to those lands against the classification whereof a protest is filed, it is made the duty of the Secretary of the Interior to ascertain the true character of the land and correct the classification, if it is found to be wrong. To this end, the act provides that the United States attorney shall represent and defend the United States.

It is the duty of the government and to its interest to preserve and protect the mineral lands in these districts. None such, except coal and iron, were granted to the Northern Pacific Railroad Company. In the very nature of things the railroad company is fully equipped to protect its own interests and would expect to do so.

If Congress had intended to make it the duty of the United States attorney to defend the classification of the mineral land commission in all cases, adequate language could have been easily employed to express such intention. Instead the act only provides that he shall represent and defend the United States. To appear and insist that lands are non-mineral in character and therefore pass to the railroad company is defending the railroad company and not the United States.

Upon mature consideration this Department is of the opinion that the United States attorney will be representing and defending the United States if he appears at these hearings and insists upon and assists in procuring a mineral classification of the land wherever the facts if properly disclosed will show that to be its true character, and that to that end he should endeavor to sustain the mineral classifications of the commission which are deemed *prima facie* correct.

## RAILROAD GRANT—INDEMNITY SELECTION—APPLICATION TO ENTER.

## NORTHERN PACIFIC R. R. Co. v. WOLFE.

A railroad indemnity selection, regularly allowed under rulings in force at the time, should not be canceled on the ground that a proper basis had not been assigned therefor, without affording the company due opportunity to supply another and sufficient basis.

An application to make timber culture entry of land embraced within a prima facie valid railroad indemnity selection is properly rejected; and the applicant gains nothing by an appeal from such rejection.

*Secretary Hitchcock to the Commissioner of the General Land Office, April*  
(W. V. D.) 17, 1899. (F. W. C.)

The Northern Pacific Railroad Company has appealed from your office decision of September 17, 1898, holding for cancellation its indemnity selection covering the E.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , Sec. 13, T. 10 N., R. 38 E., Walla Walla land district, Washington, with a view to the allowance of the timber-culture application of Henry H. Wolfe covering said tract.

This land is within the indemnity limits of the grant to said company opposite to what is known as the main line of its road, to aid in the construction of which a grant was made by the act of July 2, 1864 (13 Stat., 365). It was included in list of selections filed January 5, 1884, which list, under departmental regulations of May 28, 1883, was not required to be accompanied by a designation of loss as a basis for the selection contained in the list. The company subsequently filed a list of losses specifying certain tracts in township 12 north, range 1 west, in the State of Washington, as lost to the grant and on account of which selection was made of the tract under consideration.

These last mentioned tracts are opposite the portion of the road extending northward from Portland, Oregon, to aid in the construction of which a grant was made by the joint resolution of May 31, 1870 (16 Stat., 378).

On November 3, 1887, Wolfe tendered timber-culture application for the tract here under consideration, in support of which he alleged that on June 25, 1883, he purchased certain improvements made upon this land by one Charles Hogan, a prior occupant thereof, and had since claimed the land; upon which allegation hearing was had, at which it was shown that prior to the company's selection about eighty acres of the tract had been broken and the entire tract fenced. There were no buildings upon the land, and Wolfe did not claim to have resided thereon, but simply to have cultivated the land.

Upon the record made at said hearing your office decision of April 20, 1895, held that, as Wolfe claimed the land under the timber-culture law, his right to the tract could not antedate the presentation of his application on November 3, 1887, which, being long subsequent to the selection of the tract by the company, could afford him no right as

against such selection, and therefore rejected the application; from which action he appealed to this Department, the appeal being considered in the decision of May 20, 1896, in which a hearing was ordered to ascertain whether Wolfe was qualified to assert claim to the land under the settlement laws at the date of the selection of the tract by the company.

It is upon the record made at said hearing that the case is again before this Department. At said hearing it was shown that Wolfe was duly qualified to make claim under the settlement laws at the date of the company's selection of this tract, but that he had since exhausted both his homestead and pre-emption rights; so that he can assert no claim to the land except under his timber culture application, made, as before stated, November 3, 1887.

Your office properly ruled that upon said application he could gain no right as against the company under its selection, but held that the tract assigned as a basis for the selection was not a proper one and for that reason, and with a view to allowing Wolfe's timber culture application, held the company's selection for cancellation.

Prior to the decision of the Department in the case of *Spaulding v. Northern Pacific R. R. Co.* (21 L. D., 57), the several grants for the Northern Pacific Railroad Company seem to have been adjusted as an entirety. Under these earlier decisions the tract assigned as a basis for the selection under consideration would be a proper one; but in the case of the Northern Pacific Railroad Company (25 L. D., 511) it was held that the grant to the same company by the joint resolution of May 31, 1870, must be adjusted separately, and that a loss, therefore, under the later grant will not support a selection along the line for which the grant of 1864 was made.

Should the decision in the *Spaulding* case be upheld by the courts, a suit having been instituted to have judicially determined the questions involved, the tract assigned as a basis for the selection under consideration would not support the selection.

Under the circumstances, however, the selection having been regularly allowed under rulings in force at the time, it should not be canceled without affording the company an opportunity to supply another and sufficient basis.

Wolfe's timber culture application tendered on November 3, 1887, at a time when the land was embraced in the *prima facie* valid railroad selection of record, was properly rejected, and he gained nothing by reason of his appeal from such rejection. (*Gallup v. Welch*, 25 L. D., 3.)

The decision of your office is accordingly reversed.

## HOMESTEAD CONTEST—EXTENSION OF TIME TO MAKE PAYMENT.

WEITZEIL *v.* SCHAGER.

A homestead entryman who is improperly allowed an extension of time within which to make commuted homestead payment, will be protected as against an intervening contest charging non-compliance with law, where it appears that he had duly complied with the law up to the time when he left the land under authority of said extension.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 17, 1899.* (L. L. B.)

December 4, 1896, Elmer H. Weitzel filed contest against the homestead entry of Edward Schager for lot 3 and the NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and N.  $\frac{1}{2}$  SE.  $\frac{1}{4}$ , Sec. 19, T. 33 N., R. 11 W., O'Neill, Nebraska, alleging failure to reside on, cultivate and improve the land covered by his entry.

The register and receiver, after hearing duly had, recommended the dismissal of the contest for failure to prove the allegations thereof. Contestant appealed. Your office decision of August 25, 1897, now here on appeal, dismissed the appeal of Weitzel because not taken within the time required by the rules of practice. The register and receiver served notice of their decision upon contestant's counsel by registered letter, which was mailed May 3rd, 1897, and reached the post-office at Spencer, Nebraska (the place of its destination and the address of contestant's counsel), the next day. The notice, however, was not received by the parties to whom it was sent until ten days later, May 14, and they claim that this delay was due to the failure of the postmaster at Spencer to notify them of the receipt of the registered package and assert that they are entitled to forty days from the date of receipt of notice by them (May 14, 1897), in which to file their appeal. The appeal was filed June 22, 1897, fifty days after the mailing of notice by the local officers, and thirty-nine days after receipt of the same by the attorneys for appellant.

Without considering whether or not the appeal was filed in time, an examination of the record fails to show any good reason for disturbing the conclusion reached in your office decision.

The defendant submitted commutation proof January 11, 1896, which as to residence, cultivation and improvements is shown to be satisfactory. Not having the money to pay for the land he applied for and was allowed a year's extension of time in which to make payment. While the extension of time was unauthorized in law, it was granted by your office and the defendant was led to believe that all that was required of him was to make payment within the extended time. It was while he was away trying to earn the money to make the payment that the contest was brought.

The preponderance of the evidence is that up to the time of his absence, so caused, he had complied with all the requirements of the

law. When he left there was no adverse claimant, and to allow an intervenor to come in and take advantage of his mistake occasioned through the erroneous action of the officers of the land department, would in view of his evident good faith be unjust and wrong. The decision appealed from in so far as it dismisses the contest and allows the entryman to complete his entry by showing future compliance with the homestead law, is affirmed.

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PRACTICE—EVIDENCE—RULE 42, AMENDED.

CIRCULAR.

*Commissioner Hermann to registers and receivers United States Land Offices, April 18, 1899.*

In order to avoid the expense and trouble of detaining witnesses at your offices after the close of hearings in contest cases, or of causing their subsequent return for the purpose of signing their testimony, written out from shorthand notes, the parties to the contest may, by proper stipulation in writing, waive that provision of Rule of Practice No. 42, which requires the testimony to be signed by the witnesses.

In all cases where such a stipulation is filed, you should let the record be accompanied by the stipulation, and your certificate that each of the witnesses was duly sworn before testifying, and also by the affidavit of the stenographer to the effect that the testimony, as transcribed, is a true and complete transcription of the short-hand notes of the testimony given in the case, which was faithfully reported in shorthand by him, as delivered by the several witnesses.

Approved:

E. A. HITCHCOCK,  
*Secretary.*

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PRACTICE—NOTICE OF CONTEST—RULE 35.

PROEFROCK *v.* KEPNER.

Notice of contest served thirty days before the day of hearing before the local office is sufficient, though an earlier date may be named therein for taking testimony under Rule 35 of Practice.

*Secretary Hitchcock to the Commissioner of the General Land Office, April (W. V. D.) 19, 1899. (C. J. W.)*

Millard F. Kepner made homestead entry for the NE.  $\frac{1}{4}$  of Sec. 21, T. 149, R. 69, at Devils Lake, North Dakota, on June 22, 1893.

On January 13, 1896, Carl Proefrock filed affidavit of contest against the entry, alleging that said entryman has abandoned the tract, has changed his residence therefrom for more than six months since making

entry, and that said land is not settled upon and cultivated by said party as required by law.

The local officers issued notice requiring the parties to appear before the clerk of the district court, at Fessenden, Wells county, on the 21st day of February, 1896, at two o'clock p. m., to respond to said charge and furnish testimony.

The notice was issued January 13, 1896, and was served on defendant January 23, 1896, the hearing to occur at the land office on February 28, 1896. On February 21, 1896, the plaintiff appeared in person; the defendant did not appear, but was represented by counsel, who appeared specially and under protest to object to the jurisdiction on account of defective notice of contest, but, afterwards, cross-examined the plaintiff's witnesses.

The evidence having been duly transmitted to the local office, on May 11, 1896, the local officers rendered a joint decision, in which they found that defendant had not resided on the land since his entry, and recommended its cancellation.

Kepner appealed, and, on May 19, 1897, your office affirmed the local officers, and held said entry for cancellation.

The case is before the Department on the further appeal of defendant from your office decision.

The same questions are presented by the appeal which were presented by defendant, first to the local officers, and subsequently to your office. It appears that defendant executed an affidavit asking for a continuance, and that a commission issue to take testimony in Eddy county, North Dakota, which he did not file in the local office until May 9, 1896, and then filed without evidence of service on the contestant.

It is alleged that the motion should have been granted. In reference to this contention, it is held that it was not error to overrule the motion.

The remaining alleged ground of error is, that the notice of contest was so defective as to leave the local officers without jurisdiction to try the case, the defect being in the service of said notice. It was served more than thirty days before it was returnable to the local office for hearing, but only twenty-nine days before the parties were required to submit testimony before the clerk of the district court of Wells county, the contention being that, under rule 35 of practice, notice of a hearing before the local officers must be served thirty days before such hearing, and that no earlier date can be named for taking testimony elsewhere.

The question presented has been specifically considered and passed upon by the Department in earlier cases. In the case of *McTighe v. Blanchard* (4 L. D., 540), it was held (syllabus):

Under Rule 35 of Practice thirty days notice of the hearing before the local office is sufficient, though an earlier date may be named in said notice for taking testimony elsewhere.

See also *Le Claire v. Bieber*, 15 L. D., 289.

It is manifest from the record that defendant has utterly failed to comply with the requirements of the homestead laws since making his entry.

Your office decision is accordingly affirmed; the entry of defendant is canceled, and the usual preference right of entry awarded to the contestant.

OKLAHOMA LANDS—ACT OF MARCH 3, 1893—"SOONERISM."

HENDERSON ET AL. *v.* SMITH.

Under the last proviso to section 3, act of March 3, 1893, opening the Kickapoo lands to settlement and entry, a person who has, at the date of his application under said act, attempted to, but for any cause failed to acquire title to a homestead under existing law, or shall have made entry under the commuted provision of the homestead law, is entitled to make a homestead entry of said lands. One who, during the prohibited period, is within the territory in the ordinary prosecution of his business, but does not thereby add anything to his previous knowledge of the land, and is outside of the territory at the hour of opening, is not disqualified as a settler.

*Secretary Hitchcock to the Commissioner of the General Land Office, April 19, 1899.* (W. V. D.) (G. R. O.)

This case involves the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and lots 10 and 13 of Sec. 9, T. 14 N., R. 2 E., in the Guthrie, Oklahoma, land district. Said tracts are within the territory thrown open to settlement and entry on May 23, 1895, by proclamation dated May 18, 1895 (29 Stat., 868). On May 23, 1895, Perry F. Smith made homestead entry for said land, and on May 27, 1895, William Robinette applied to enter the same tracts. On June 21, 1895, William H. Henderson filed an affidavit alleging—

That he on the 13th day of January, 1894, filed a soldiers' declaratory statement on lot No. 12 of said quarter section; that the same was a fractional part lying in the Iowa country; that on the 19th day of February, 1894, he commuted said S. D. S. to a homestead entry; that on the 23rd day of May, 1895, at about 10 minutes after 12 o'clock he made an entry into the land office here and made an application to file on the above tract of land and that said application was rejected for reason of conflict with homestead entry of Perry F. Smith No. 12575.

A hearing was ordered by the local officers to determine the conflicting claims of Smith, Robinette and Henderson. On November 6, 1895, all parties appeared, and testimony was submitted by Henderson and Robinette. Smith offered no testimony, but demurred to Henderson's complaint and to the testimony offered by him. On February 11, 1896, the local officers rendered a decision in favor of Smith, recommending the dismissal of Henderson's and Robinette's contests. On appeal by Robinette and the heirs of William Henderson, your office reversed said decision and accorded the right of entry to Robinette, holding Smith's entry subject to his prior right. Smith has now appealed from your decision to this Department.

Henderson having failed to appeal from your decision the judgment

of your office with respect to his claim to the land will be considered final. The conflicting claims of Robinette and Smith remain to be considered.

Robinette bases his claim to the tract upon his settlement made a few seconds after the time of the opening. To reach the land he had only to cross a small stream, about six feet in width. Smith's claim rests upon his application to enter, which was filed, as appears from the endorsement, at eleven minutes after twelve o'clock on the day of the opening. It is evident that Robinette's settlement was made prior to the time that Smith filed his application. Smith claims, however; that Robinette is not a qualified entryman, having exhausted his homestead right by making adjoining farm homestead entry No. 9202 for forty acres of land in Missouri, on February 28, 1889. Robinette abandoned said entry on October 10, 1892, and relinquished it on March 8, 1893, and claims that he is qualified to enter the land in controversy by Sec. 3 of the act of March 3, 1893 (27 Stat., 557). Said section makes provision for the disposal of lands acquired from the Kickapoo Indians, of which the land in controversy is a part, and it provides:

That any person having attempted to, but for any cause failed to acquire title in fee under existing law, or who made entry under what is known as the commuted provision of the homestead law, shall be qualified to make homestead entry upon said lands.

Section 13 of the act of March 2, 1889 (25 Stat., 980, 1005), contains a provision similar to that above-quoted. Construing said section, in the case of James W. Lowry (26 L. D., 448), the Department said:

If, then, any person has, at the date of his application under this act, attempted to, but for any cause failed to secure a title in fee to a homestead under existing law, or shall have made entry under the commuted provision of the homestead law, he is by virtue of this act qualified to make entry upon lands, in Oklahoma Territory, acquired from the Seminoles, or from the Muscogee or Creek Indians.

The act of March 3, 1893 (*supra*), therefore, clearly gives Robinette the right to make homestead entry of lands within this territory.

The appellant contends, also, that Robinette was disqualified by having entered into the territory prior to the time of opening and subsequent to March 3, 1893. The testimony on this point shows that he had lived in the immediate vicinity of the land in question from about October, 1892, until the time of the opening, and during that time he passed over the land several times. He hauled flour over the public road which ran over this land. The land is on the border of the territory and he could see all over it without crossing the line. He added nothing to his knowledge of the land by the trips he made into the territory, by which he gained any advantage over the others who made the run. He was not within the territory at the hour of opening. These facts are similar to those in the case of Curnutt v. Jones (21 L. D., 40), wherein it was held (syllabus):

One who in the ordinary prosecution of his business enters said Territory during the prohibited period, but does not thereby add to his prior knowledge of the

country, nor secure an advantage over others, and is outside of the Territory at the hour of its opening, is not by such entrance disqualified as a settler.

Robinette having settled upon the land prior to the time when Smith filed his homestead application, and being a qualified entryman, has the prior right to enter the land.

Your decision is affirmed.

RAILROAD GRANT—INDIAN RESERVATION.

NORTHERN PACIFIC R. R. CO. *v.* HACKETT.

The map and diagram, approved by the Department April 14, 1894, defining the limits of the Indian reservation of 1855, in the "Bitter Root valley above the Loo-lo Fork," will be recognized and followed in determining the extent of said reservation as against the subsequent grant to the Northern Pacific.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 19, 1899.* (F. W. C.)

A motion was filed on behalf of the Northern Pacific Railroad Company for review of departmental decision of March 19, 1895 (not reported), in the case of said company *v.* Ephraim E. Hackett, involving the SW.  $\frac{1}{4}$  of Sec. 27, T. 8 N. (not 18, as described in the motion), R. 21 W., Missoula land district, Montana, in which decision it was held that said tract was excepted from the grant for said company for the reason that it was a part of the Bitter Root valley above the Loo-lo fork, put in reservation on account of the Flathead Indians.

In the case of Northern Pacific R. R. Co. *v.* Eberhard (19 L. D., 532), it was held that the lands included in the Indian reservation created by the treaty of April 18, 1855 (12 Stat., 975), being the lands in the Bitter Root valley above the Loo-lo fork, are excepted from the operation of the grant for said company. In said case it was stated:

With the limited information contained in the records of your office, as to the exact boundaries and extent of the "Bitter Root valley above the Loo-lo fork," and the difficulties which may be met in the future in settling property rights, dependent upon such information, you will, as soon as practicable, take such steps as may be necessary to define the limits of that valley.

Acting under the direction here given, a map or diagram was prepared by your office, on which was delineated the boundaries of said valley. Said diagram was transmitted with your office letter "F" of April 4, 1894, and was accepted and approved as a basis for the determination of the rights of the Northern Pacific Railroad Company under its grant, by this Department, April 14, 1894. In the said letter of approval it was stated that—

It appears from your said office letter that the existing public surveys enables your office to define the limits of said valley, and that the diagram submitted is a correct map of the same. The diagram is therefore accepted and is, for the purposes above described, approved.

This diagram has since been recognized and followed as properly defining the limits of the lands put in reservation by reason of the treaty of 1855, with the Flathead Indians.

By the act of June 5, 1872 (17 Stat., 226), provision was made for the removal of the Flathead and other Indians from the Bitter Root valley to the Jocko reservation. The second section of said act is as follows:

That as soon as practicable after the passage of this act, the surveyor-general of Montana Territory shall cause to be surveyed, as other public lands of the United States are surveyed, the lands in the Bitter Root valley lying above the Lo-Lo fork of the Bitter Root river; and said lands shall be open to settlement, and shall be sold in legal subdivisions to actual settlers only, the same being citizens of the United States, or having duly declared their intention to become such citizens, said settlers being heads of families, or over twenty-one years of age, in quantities not exceeding one hundred and sixty acres to each settler, at the price of one dollar and twenty-five cents per acre, payment to be made in cash within twenty-one months from the date of settlement, or of the passage of this act. The sixteenth and thirty-sixth sections of said lands shall be reserved for school purposes in the manner provided by law. Town-sites in said valley may be reserved and entered as provided by law: *Provided*, That no more than fifteen townships of the lands so surveyed shall be deemed to be subject to the provisions of this act: *And provided further*, That none of the lands in said valley above the Lo-Lo fork shall be open to settlement under the homestead and pre-emption laws of the United States. An account shall be kept by the Secretary of the Interior of the proceeds of said lands, and out of the first moneys arising therefrom there shall be reserved and set apart for the use of said Indians the sum of fifty thousand dollars, to be by the President expended, in annual installments in such manner as in his judgment shall be for the best good of said Indians, but no more than five thousand dollars shall be expended in any one year.

This section, it will be seen, provides for the survey of the lands within said valley, the opening of the lands to settlement, and makes provision for their sale, in legal subdivisions, to actual settlers only. Account was to be kept of the proceeds of the sale of said lands, and provision was made for setting apart \$50,000 for the use of the Indians out of the funds first arising from the sale of the lands. It was further provided in said section, however, that not more than fifteen townships of the lands to be surveyed should be subject to the provisions of said act.

Following the passage of this act, survey was made of a portion of the lands within said valley, the remaining lands being surveyed at different periods up to and including the year 1893.

It is contended by counsel for the company that the extent of the valley should be limited to the lands surveyed in 1872.

This contention can not be acceded to, and no sufficient reason appears for disturbing the previous adjudication of this Department in approving the map and diagram submitted by your office defining the limits of said valley.

Action upon this case, with others, was suspended, at the request of the company, for the reason that there was pending in the supreme court of the United States a case involving the question as to the com-



Company, against the allowance of said entry, which protest was filed before the entry was allowed.

On September 2, 1896, Walter Sprankle filed a petition for the correction of the patent, which had been issued upon coal entry No. 33, Ute series, so as to embrace the land covered by coal entry No. 35, Ute series, on account of error and mistake in describing the land entered by him.

On October 22, 1896, your office directed that a hearing be had on the protest of The Baldwin Star Coal Company, which was subsequently had before the local officers and resulted in a decision by them, finding in favor of the validity of Quinn's filing and recommending that the protest of said coal company be dismissed. They expressed the opinion that it was too late to correct the alleged mistake in the description of the land embraced in the coal entry of Walter Sprankle, but without questioning the good faith of either Sprankle or his vendees.

There is no concurrence between your office and the local office upon the main question in the case. The oral testimony and the record in the case have been examined, and do not seem to fully support the conclusions reached either by your office or the local office. The testimony shows conclusively that the land described in the mineral entry made by Sprankle has no value as a coal mine; that it is not the land which he developed and improved, or the land the possession of which he turned over to Henry Purrier, who purchased from him, but that the land which Sprankle occupied and improved is the identical land the possession of which he turned over to his vendee when he sold. The proof shows clearly that Quinn knew what land Sprankle first, and his vendees subsequently, improved and were working and were in possession of when he went upon it, and your office properly held his entry for cancellation. There was at no time any doubt or uncertainty as to the actual identity of the land claimed by Sprankle and sold by him to Purrier, for its occupation and use was actual, exclusive and continuous, and they made no claim to the land which it appears is the land described in the entry made by Sprankle.

Your office in holding Quinn's entry for cancellation followed the ruling of the Department in the case of *Roberts v. Gordon* (14 L. D., 475), and the ruling of the supreme court in the case of *Atherton v. Fowler* (96 U. S., 513). Your decision in that respect is approved, and that leaves the case as between the protestants (who derive title through Walter Sprankle) and the United States.

The local officers, it appears, detected no bad faith upon the part of Sprankle or upon the part of the protestants, but treated Quinn as having an intervening adverse right, in the presence of which the error in the description of the land patented to Sprankle could not be corrected. This was a false premise, and if the correction of the entry is refused, it must rest upon some other ground. Even Sprankle appears to have no real interest in the matter further than to make good his contract of sale, but the protestant company is the real party at interest. There

being no one interested in the land claimed by the company except said company and the United States, it becomes a mere matter of administrative discretion whether the measures necessary to perfect the company's title will be adopted. It is evident the government is under no legal obligation to relieve the parties from the consequences of their own mistake in the description of the land purchased, but, if the mistake is real, and the protestant company an honest and good faith purchaser, and under no legal disability to take the title, there would appear to be no good reason for refusing to allow it to perfect its title. That the mistake in describing the land embraced in the entry and patent to Sprankle is real and, under the circumstances disclosed by the record, natural, is not to be doubted. When this mistake was brought to light by surveys set on foot by Quinn, with a view to the acquisition of the valuable coal mine then developed, and being worked by the protestant company, it appears for the first time to have discovered the defect in its title and to have promptly taken steps looking to the correction of the mistake. The method adopted was to reconvey to Walter Sprankle the land described in the patent and to have him reconvey the same to the United States, and to ask of the government the correction of the patent to correspond with the land developed and sold by him. The purpose of the reconveyance by the company to Sprankle and by Sprankle to the United States is thus understood to be for the purpose only of putting all parties in a status to cure by amendment the defect in the title of the protestants.

After title to the patented land was thus restored to the United States and accepted by you, your office appears to have entered upon an ex-parte inquiry into the qualifications of Sprankle to make a mineral entry on his declaratory statement at all, and proceeds to find that he cannot and to hold his entry for cancellation, although the local officers, with the approval of your office, had denied his right to be heard as a party. He was introduced at the hearing as a witness for protestants, and your office quotes certain questions and answers from his testimony, from which the inference is drawn that he made his entry for the benefit of others. It is doubtful if the language used by this witness should be given the interpretation which your office appears to have placed upon it, in any event, but certainly it should not be made the occasion for the cancellation of his entry when his right to make it was not in issue, and without any opportunity afforded him to explain his language. His final receipt bears date September 30, 1895, which acknowledges the receipt of \$1,600 in full payment for the land described, which by mistake was not the land intended, was not the land improved and in his possession, not the land the possession of which was afterwards turned over to his vendee, and is land which has no coal value, and very little of any sort. His trust deed to Henry Purrier to secure to him the \$1,600 borrowed from him to pay for the land bears date also September 30, and was presumably executed after obtaining the receipt. On October 8, 1895, he executed a warranty

deed to Henry Purrier for said land, in consideration of twenty-one hundred dollars, and on the same day obtained a release from J. E. Brothers, public trustee, of his trust deed, which was placed of record October 10, 1895.

Patent issued to Sprankle on January 18, 1896, and was recorded February 3, 1896.

The Baldwin Star Coal Company entered into articles of association on October 8, 1895, and filed said articles for record October 9, 1895, and was incorporated.

The warranty deed of Henry Purrier to The Baldwin Star Coal Company, dated January 24, 1896, and acknowledged June 25, 1896, was on the same day recorded. This company or association of persons was not in existence when Sprankle obtained patent to the land afterwards conveyed to it.

If there is anywhere any evidence of bad faith upon the part of the protestant company, it is not in the record. The company is composed of Henry Purrier, F. W. Delano, George I. Bentley and A. P. Sprankle, a brother of Walter Sprankle. It is shown to have expended eight or nine thousand dollars in improvements upon the land in question. It may be the owner of other lands, but it is not shown to be the owner of other than the eighty acres purchased from Walter Sprankle.

The deed from Walter Sprankle to the United States and the surrender of his patent for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 18, T. 15 S., R. 86 W., are accepted, and as it appears from the record as presented that the land described is not the land which said Sprankle improved and intended to enter, but that the N.  $\frac{1}{2}$  of said SE.  $\frac{1}{4}$  of Sec. 18, T. 15 S., R. 86 W., is the land which he developed and believed he had entered, the entry heretofore made by him for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 18, T. 15 S., R. 86 W., coal certificate No. 33, Ute series, will be corrected, by substituting for the S.  $\frac{1}{2}$  (as it now appears) the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 18, T. 15 S., R. 86 W., so as to conform to the intention of the party at the time said entry was made, and it is so ordered.

Your office decision is modified to conform hereto.

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#### APPROVAL OF INDIAN DEED—PROBATE OF INDIAN WILL.

THOMAS CHATFIELD, Jr.

Where an Indian deed, purporting to be executed by the sole heir of a deceased allottee, is submitted for the approval of the Secretary of the Interior, and a protest against such action is made on behalf of one claiming under an alleged will left by the decedent, the Department should take no action until after the validity or invalidity of said will has been determined by the local courts having probate jurisdiction.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*April 19, 1899.* (G. B. G.)

March 18, 1899, the Commissioner of Indian Affairs transmitted to the Department the papers in the matter of an application by Thomas

Chatfield, Jr., for the approval of a deed, executed by him September 3, 1898, the purpose of which is to convey to his wife, Emma Chatfield, the NE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 36, T. 15 N., R. 5 W., in the State of Michigan.

Chatfield claims to be the owner of this land by reason of the fact, as alleged, that he is the only heir at law of Maria Chatfield, deceased, who was the only child of Emma Aw-no-quo-to-quay, deceased, a Chippewa Indian woman, and the said Thomas Chatfield, Jr., who had lived together as man and wife according to the laws and customs of her tribe.

The above described land was located as an allotment by and on account of the said Emma Aw-no-quo-to-quay, and a preliminary or trust patent was issued to her therefor, December 16, 1885, in conformity with the provisions of treaty of August 2, 1855 (11 Stat., 533), and the treaty of October 18, 1864 (14 Stat., 657), between the United States and the Chippewa Indians of Saginaw, Swan Creek, and Black River, Michigan.

There is a provision in said patent

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.

The allottee died about April 13, 1887, leaving a will, dated the 10th day of the same month, written in the Indian language, the precise terms of which are in dispute because of the difficulty of translation, but from which it is claimed that it was the intention of the testatrix to devise said land to her sister Charlotte Petah-se-gay-quay.

The matter was referred to me March 22, 1899, for an opinion as to who,

under the laws of Michigan, is the legal heir of this patentee, the husband or the sister, and whether said will is of such form and character as to convey or pass title to real estate under the laws of Michigan.

The facts upon which Chatfield's claim is based are all denied. It is denied that he was ever married to this allottee under any law or custom, it is denied that they ever lived together as man and wife according to the Indian custom, or at all, and it is denied that he is the father of Maria Chatfield. Affidavits have been filed in support of his claim, and the "business committee" of the tribe support his claim. On the other hand, affidavits have been filed to the effect that he and Emma Aw-no-quo-to-quay never lived together; that she worked for him a short while as his housekeeper, but that both before and after her death he repudiated her child, and refused to contribute anything to its support.

I am of opinion that the question presented is not, under existing conditions, one for the determination of the Secretary of the Interior.

The fact shown by the papers that Emma Aw-no-quo-to-quay left a will, the purpose of which was to dispose of the land allotted to her, as aforesaid, does not seem to be disputed. And if this Indian allottee

was competent to make a will under the laws of Michigan, and the instrument is in form and character sufficient under those laws to pass her right and title to or interest in the allotted land to her devisee, such alienation would probably be entitled to approval by the Secretary of the Interior. But these are questions which must be determined by the local courts exercising probate jurisdiction under the laws of the State.

Until the requisite adjudication upon probate, the instrument, in so far as such adjudication should be wanting, would remain incomplete as an adjudged testamentary paper, and without any fixed legal value as a will. In so far as it should remain unproved, it could not have the full operation of a will. The fact of its being unproved, would not render it void.

But it could not be told whether it was void or not, until it should have passed the ordeal of probate.

If, upon being subjected on probate to every test possibly needful, in view of its nature and provisions, it should be allowed, it would then be fully operative as a will, and retroactively from the death of the testator.

Allison *et al.* v. Smith *et al.*, 16 Mich., 405-429.

I therefore advise that, upon the matters as now presented, the Secretary of the Interior take no action in the premises.

Approved,

E. A. HITCHCOCK,

*Secretary.*

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ACT OF JUNE 4, 1897—EXCHANGE OF LANDS.

OPINION.

The act of June 4, 1897, in providing for an exchange of lands included within a forest reservation and "covered by unperfected bona fide claim or by patent," contains no provision authorizing the suspension of action thereunder until the survey and examination of the reserved lands provided for in said act, and in the absence of such authority, and in view of the evident purpose of this legislation, the Department is not warranted in thus suspending the execution of said act.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*April 19, 1899.* (E. B., Jr.)

I am in receipt, by reference from the Acting Secretary, of the draft of a proposed circular, submitted with letters dated February 17, and March 21, 1899, by the Commissioner of the General Land Office, directing the local land officers "to refuse to accept applications for lieu selections" under the act of June 4, 1897 (30 Stat., 11, 36), "pending completion of surveys of existing reserves and examination and classification of lands embraced therein," the reference being "for an opinion as to the legality and expediency" of the proposed circular instructions.

The provisions of the said act relative to public forest reservations

are all embraced in pages thirty-four to thirty-six thereof, inclusive. They have reference to reservations established by the executive under authority of section twenty-four of the act of March 3, 1891 (26 Stat., 1095), and provide, among other things, for the survey, under the supervision of the Director of the Geological Survey, of the public lands within these reservations; declare the purposes for which such reservations are established and that it is not the purpose "to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes;" and provide for an exchange of public lands outside the reservations for lands claimed or owned within the limits of the reservations, and for the restoration to the public domain of any public lands within the reservations, which, "after due examination by personal inspection of a competent person appointed by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes."

The provision for an exchange of lands is as follows:

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

Relative to the establishment of public forest reservations and to the reasons which prompted the enactment of the foregoing remedial provision, the Department in the recent case of F. A. Hyde and Joseph William Belden (28 L. D., 284) said:

By the establishment of these reservations many claimants and owners of lands within the reservation boundaries were placed in a state of greater or less isolation from market and business centers, and from church, school, and social advantages, and the value of their property for residence and other purposes was thereby impaired. The withdrawal from settlement and other disposition of the surrounding public land precluded such persons from obtaining the advantages consequent upon the continuing and increasing settlement which was anticipated when their claims were initiated or their title acquired. In consequence they were clamorous for relief from Congress. Strenuous efforts were made to have the more recent reservations revoked *in toto*. Instead, Congress granted the measure of relief contained in the act of 1897.

The various provisions of that act, relating to lands within the limits of forest reservations, and additional to that hereinbefore set out, need not be recited. Under these provisions the general integrity of the reservations has been maintained, and rules and regulations have been prescribed and promulgated by virtue of authority vested in the Secretary of the Interior to insure the objects for which the reservations are created, which are to protect and improve the forests thereon for the purpose of securing a permanent supply of timber for the people and insuring conditions favorable to continuous water flow (Rules and Regulations, June 30, 1897, 24 L. D., 589). It is obvious that the accomplishment of these objects would be

subservd and promoted by exclusive governmental ownership and control of the lands within the reservation boundaries. The extinguishment of the claims, ownership and control of other parties in and over the lands, of the class or classes intended to be reserved, is very desirable on the part of the government, and where this can be done agreeably to the wishes of such parties under a reasonable construction of the above provision for an exchange of lands, it is believed to be the duty of the land department to place such construction upon the law and thus promote the best interests of all concerned.

This act has now been in force for almost two years, and in no instance has the survey of any one of said reservations, or an examination of the public lands therein, been completed. The said proposed circular instructions, if approved and put into effect, would suspend for an indefinite period the foregoing provision for an exchange of lands, and would practically deny to claimants and owners of lands within the limits of such reservations the benefits of said provision, and would also correspondingly impede the government in attaining the objects for which such reservations are established. No authority for such suspension is found in the act itself, or elsewhere. In the absence of legislation expressly authorizing such suspension or indicating plainly the purpose of Congress that the said provision was not to become effective until after the survey and examination provided for in the act should have been completed, the direction proposed to be given in the said circular would, in my opinion, be an unwarranted exercise of power by the land department.

The reasons stated by the Commissioner, in his letter of the 17th ultimo, for the proposed instructions, that "the lines of many reserves are poorly defined and impossible to locate without surveys and an examination and classification of reserved lands," and that such survey and examination are necessary "in order to avoid the patenting of lieu selections based on relinquishments of lands which may hereafter be excluded from reserves or which surveys will show never to have been reserved," do not seem to me sufficient to justify the course proposed. In any case wherein it is doubtful whether a tract proposed to be relinquished in order to entitle the claimant or owner thereof to make a lieu selection, is within the limits of a public forest reservation, the relinquishment should not be accepted or a lieu selection permitted until it be clearly established that such tract is within the limits of the reservation. Such case presents a simple matter of administration of the statute, however, and furnishes no ground for a general suspension thereof.

In my opinion, the circular should not be approved.

Approved,

E. A. HITCHCOCK,

*Secretary.*

## PRACTICE—RIGHT OF APPEAL—HOMESTEAD CONTEST.

SHUPE *v.* DANA.

The rejection of an affidavit of contest by the local office, is a final action on its part from which an appeal will properly lie; and the failure of the applicant to appeal in time should not operate to defeat his right to a hearing, if he is not duly notified of his right of appeal from the adverse action of the local office.

A charge that a homestead entryman "has relinquished his right and sold his interest in the land" warrants a hearing though made within less than six months after entry.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) April 24, 1899. (L. L. B.)

December 19, 1896, George W. Dana made homestead entry for the SE.  $\frac{1}{4}$  NW.  $\frac{1}{4}$  and NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$ , Sec. 2, T. 13 S., R. 44 E., at the Blackfoot, Idaho, land office.

April 8, 1897, John R. Shupe made affidavit of contest before the United States Commissioner for the district of Idaho, in which he alleged

that the said George W. Dana has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law; that the said George W. Dana has never lived upon the said land since the date of entry nor made any effort to comply with the law; and affiant is informed and believes he has relinquished his rights and sold his interest in said land to other parties.

His affidavit is corroborated by two witnesses who state that they "knew from personal observation that the statements therein made are true."

This affidavit seems to have been sent to the local office by mail and is endorsed:—"Rejected April 9, 1897, on account of six months for making settlement not having expired. John G. Brown, Register."

The only evidence in the record that Shupe was ever notified of the rejection of his said affidavit of contest is contained in a subsequent application (July 15, 1897) to be allowed a hearing thereon. This application is addressed—"To the register and receiver, Blackfoot, Idaho, and the Commissioner of the General Land Office, Washington, D. C." With this application he files, as an exhibit, what purports to be a copy of a letter from the register to Shupe's attorney, dated United States land office, Blackfoot, Idaho, April 9, 1897, as follows:

I have this day rejected H. E. of John R. Shupe for NE.  $\frac{1}{4}$  SW.  $\frac{1}{4}$  and SE.  $\frac{1}{4}$ , NW.  $\frac{1}{4}$ , Sec. 2, T. 13 S., R. 44 E., on account of H. E. No. 5560, made December 19, 1896, by George W. Dana.

I have also rejected contest affidavit of John R. Shupe *v.* said George W. Dana for the same land as described above on account of the six months allowed by law for beginning improvements not having expired, as the entry was made December 19, 1896, and the six months would not expire till June 19, 1897.

At the request of the receiver I return \$16.00.

Very respectfully,

JOHN G. BROWN, *Register.*

The next day, April 10, 1897, the attorney for Shupe wrote to the register and receiver asking that notice be issued on said affidavit on the following grounds:

Shupe says that George Dana has sold his interest in that land and has relinquished his right to a third party. This party will no doubt come in later and file his relinquishment and his entry.

Shupe wants his filing and contest to forestall this. Cannot it be done?

No further action seems to have been taken by the local officers on Shupe's affidavit of contest, but April 17, 1897, just a week after the rejection of Shupe's application to contest the entry Rudolph Ashliman presented the relinquishment of Dana and was allowed to make entry of the land covered thereby.

Shupe did not formally appeal from the action of the register in rejecting his contest affidavit, but July 15, 1897, applied to your office for an order directing a hearing thereon. In his said application to your office he set forth the facts above detailed and further stated, in what he designates as a supplemental affidavit of contest, that

the said Dana entered the said tract of land for fraudulent and speculative purposes. That immediately after the said entry, one Rudolph Ashliman, the present entryman, entered upon the said land and exercised acts of ownership and exhibited the receiver's receipt of Dana. That affiant is further ready to prove that \* \* \* he (Dana) sold all his right, title, and interest to the said Ashliman shortly after entering same for a valuable consideration.

This affidavit has other allegations, but the material statements are contained in the foregoing. It purports to have been subscribed and sworn to before the U. S. circuit court commissioner, district of Idaho, but neither the commissioner's name nor his official seal is attached thereto.

By your office letter of August 16, 1897, it was held "that in the absence of an appeal, no final certificate having been issued on Ashliman's entry, the matter was not properly before this office," and the papers were returned to the local office for disposition. On receipt of your said office letter the register and receiver rejected this application for a hearing and Shupe duly appealed from their said action.

By your office decision of December 13, 1898, now here on appeal by Shupe, the action of the local officers was affirmed and the entry of Ashliman was held intact.

The action of your office in refusing to consider Shupe's application for an order directing a hearing in his contest, for the reason that he had not appealed from the rejection of his contest affidavit by the local officers, was erroneous. Such application was in effect an appeal from such rejection, and if his contest affidavit stated sufficient ground for cancelling Dana's entry, a hearing thereon should have been ordered. While his said application for a hearing was not presented until after the expiration of thirty days from the date of the rejection of his affidavit of contest, there is nothing in the record showing that he was

ever notified of his right to appeal from such action by the register and receiver. Rule 70, of the rules of practice, provides that—

Rules 43 to 48 inclusive and rule 93, are applicable to all appeals from the decisions of registers and receivers.

Rule 43 is as follows:

Appeals from the final action or decisions of registers and receivers lie in every case to the Commissioner of the General Land Office.

Rule 44 requires that—

After hearing in a contested case has been had and closed the register and receiver will in writing notify the parties in interest of the conclusions to which they have arrived and *that thirty days* are allowed for an appeal from their decision to the Commissioner, the notice to be served personally or by registered letter through the mail to their last known address.

As before seen rule 70 makes this requirement applicable to all appeals from the decisions of registers and receivers. The rejection of his contest affidavit was the final action of the local office from which an appeal lies.

The failure of an applicant for a tract of land, to appeal from adverse action of the local office will not be held to prejudice his rights when such action is not endorsed on the application and the applicant notified of his right of appeal. (*Syllabus in Sheldon v. Roach et al.*, 22 L. D., 630; see also *Robles v. Kincaid*, 27 L. D., 632.)

The case was therefore properly before you for consideration when your office decision of August 16, 1897, was rendered in which consideration was denied for failure to appeal from the action of the local office, and it is now properly here for consideration, without prejudice to the inceptive rights of the appellant.

The only question to be determined is: Was his contest affidavit wrongfully rejected by the local office? In other words, did the affidavit state sufficient facts to authorize issue of notice and a hearing thereon?

This Department has frequently held that the charge of abandonment will not lie against a homestead entry where such charge is preferred within six months after the entry is made, but in the affidavit of contest here in question there is in addition to the charge of abandonment, an allegation that the defendant "has relinquished his right and sold his interest in said land."

This is a specific charge by no means necessarily analogous to the charge of abandonment as usually made under the statute, and if alleged and proven at any time before the expiration of five years from the date of entry, or before final certificate is issued, the entry must be canceled. *Lilly v. Thom et al.* (4 L. D., 245); *Smith v. Green et al.* (5 L. D., 262).

It was, therefore, error on the part of the register and receiver to reject the affidavit of contest as originally presented, and likewise error on the part of your office to deny a hearing thereon.

You will therefore direct that the original affidavit of contest be accepted; that notice issue thereon to both Dana and Ashliman, and that the latter be allowed to intervene and defend his entry. The testimony at the hearing will be confined to the allegation of the sale and relinquishment of the entryman's right and interest in the land.

The decision appealed from is accordingly modified.

SWAMP LAND GRANT—ERRONEOUS SURVEY.

STATE OF OREGON.

The actual status of land at the date of the swamp grant determines the right of the State thereto, and such right is not affected by the erroneous designation of a tract as a "lake" in the approved survey.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 24, 1899.* (W. M. W.)

The land involved in this matter is situated in sections 29, 32 and 33, T. 3 S., R. 39 E., and sections 4, 5 and 9, T. 4 S., R. 39 E., La Grande, Oregon, land district, containing an estimated area of 1,731.07 acres. Upon the approved plats of survey of said townships this land was designated as "Tule lake."

It appears that in January, 1873, the State of Oregon filed in your office a list of swamp land selections, which, among other lands, covered those embraced in "Tule lake," as it appeared on the township plats.

October 15, 1896, your office directed the local officers at La Grande to call upon the proper State officers to show cause, within sixty days, why the claim of the State under the swamp land grant should not be rejected as to the lands included in "Tule lake."

The State by its attorney general filed its showing, corroborated by affidavits, alleging, in substance, that "Tule lake," as shown on the plats of survey, was not, on March 12, 1860, a lake or body of water, as contradistinguished from land, but that the same was swamp and overflowed lands within the meaning of the act of September 28, 1850 (9 Stat., 519), as extended to Oregon by act of March 12, 1860 (12 Stat., 3); and also alleging that since the selection of January 29, 1873,

the State has sold and conveyed the said swamp lands designated as "Tule Lake" to one Fred Nodine in good faith, and the said Fred Nodine in good faith purchased and paid the State in full therefor, sometime about the year 1889, and that the said Fred Nodine has fully reclaimed the said swamp lands. The State therefore insists that its title to said lands as swamp and overflowed lands ought to be upheld, in order to protect its grantee and his assigns in their title to the same from the State.

Upon this showing your office, on February 6, 1897, transmitted the papers to the surveyor general of Oregon and authorized him to order a hearing for the purpose of determining whether the tract designated on the plats of survey as "Tule lake" was a lake in 1860 or a marsh or swamp as alleged by the State. The surveyor general was directed to

consider the testimony submitted in connection with the records of his office and any other information he might possess, and render a decision thereon and transmit it with the record to your office.

The hearing was ordered, and at the time set for taking evidence the State of Oregon appeared, by its attorney general and other counsel, and also appeared in person and by counsel one S. F. Newhart (or Newhard), claiming to be a grantee of the United States for lands adjacent and bordering upon the lands in controversy as riparian owner. Evidence was submitted on behalf of the State and said Newhart.

July 10, 1897, the surveyor general rendered his decision holding that the tract in controversy was not a lake at the date of the swamp grant to Oregon, but was in fact swamp and overflowed land within the purview of the swamp land grant to Oregon.

The record and evidence were transmitted to your office July 10, 1897, and in August of that year the surveyor general transmitted an appeal from his decision by said Newhart.

September 28, 1897, your office concurred in the conclusions of the surveyor general and held that the tract designated on the plats of survey of townships 3 and 4 S., R. 39 E., as "Tule lake," was not a lake on March 12, 1860, but was a marsh or swamp at that date, and as such inured to the State of Oregon under the swamp grant.

Newhart appeals.

It appears that the part of Oregon in which the land in question is situated was settled in 1862, and most of the witnesses who testified at the hearing were among the early settlers in the vicinity of the tract. Some of them, however, testified that they passed by it several years prior to that time. While none of the witnesses testified to the character of the land at the date of the swamp grant to the State, there is no reason to believe that it was different in character in 1860 from what it was in 1862, when these witnesses became acquainted with it. In other words, if the tract designated "Tule lake" on the township plats was not in fact a lake in 1862, the only reasonable conclusion to be drawn from the testimony would be that it was not a lake in 1860.

The evidence shows that what is designated as "Tule lake" on the plats is a low, almost level tract in the valley of Catharine creek, a mountain stream. This creek was usually high in the spring and summer by reason of the melting snow on the mountains. At such times the waters of said creek would spread out and cover a large area of country, including the greater part of the lands in controversy; in the early sixties this overflow was caused to some extent, or at least augmented, by obstructions, such as beaver dams in the channel of said creek below where it passed through this tract. In the fall and winter the water in said creek would gradually subside and pass off the tract, except a few ponds containing from one to three acres. Aside from said ponds the tract was covered by a dense growth of vegetation, such as tules or bulrushes, cane, swamp-grass, flags and other swamp vege-

tation, interspersed with willows. It is shown by the evidence that during the falls and winters of 1862, 3 and 4, hundreds of cattle and other stock were pastured upon the land in question and were kept entirely upon the grasses and other vegetation growing thereon; that men could go over practically all of the tract during the fall and winter season on foot or on horseback.

The State sold and conveyed the land in question as swamp land to Fred Nodine for \$1,819.35, and he has reclaimed it by clearing out obstructions in Catharine creek, ditching, etc., at an expense of about \$15,000.

It appears from your office decision appealed from that among the lots bordering on the so-called lake are lots 4, 5, 6, 7, and 8, of Sec. 5, T. 4 S., R. 39 E., which were embraced in commuted cash entry made by William Clark February 12, 1872, which entry was patented January 15, 1875, and the swamp land claim to such lots rejected July 7, 1891. It appears from the testimony in this case that S. F. Newhart, the appellant, is the transferee of said Clark.

The contention of counsel for Newhart, that the testimony on behalf of the State was incompetent for the reason that "it was largely the opinion of witnesses, rather than a statement of fact," is not borne out by the record.

It is claimed that the survey by the United States designated said land as a lake and meandered its boundaries, and that thereafter the United States in disposing of the adjacent riparian lots, parted to all claim to the land within the so-called lake, and is therefore "now without jurisdiction to determine this contest."

This claim is without force for the reason that the status or condition of the land at the date of the Oregon swamp land grant, March 12, 1860, is the criterion by which the right of the State must be determined and the existence of the lake at that time is disproved, and it is also shown that no such lake existed when the survey was made.

If counsel mean to be understood as claiming that in the absence of an existing lake as shown by the survey the action of the deputy surveyor in designating and meandering land as a lake was binding on the government, then such claim is without merit and requires no discussion.

The remaining questions presented by the appeal will be considered and disposed of in a general way, without specifically referring to them in the order presented by appellant.

It is the duty of the Secretary of the Interior, under the swamp land grant, to ascertain the character of lands claimed by a State as swamp, and whenever lands are found to be swamp and overflowed within the granting act the law makes it his duty to cause a patent to be issued to the State therefor. The State certainly has the right to protect its grantee by perfecting its own title to the land in controversy. There is nothing in the fact that the State selected other lands bordering upon

the so-called lake under another act of Congress which affected its right to this land under the swamp grant, or which operated as a ratification of the survey which meandered this land as a lake.

This proceeding is not an application by the State for the survey of land that was at one time covered by a lake. The approved survey returned the tract in dispute as a lake, and the State alleged, in effect, that there was a mistake in the survey, that it was erroneous and incorrect in showing a lake, and that the tract covered by what the survey returned as a lake was in fact land of the character granted to the State by the swamp act. The hearing was ordered to determine these facts, and not for the purpose of determining whether lands that as a matter of fact were at a given time covered by the waters of a lake should be surveyed. The real issue tendered by the State was that the land in controversy was swamp land on the 12th of March, 1860, and such in character was granted to the State.

It follows that the decisions of the Department relating to applications for surveys of lands that have been covered by actual lakes the existence of which was not questioned, can have no application to this case.

Neither is *Hardin v. Jordan*, 140 U. S. 371, applicable to this case. In that case the correctness of the survey, including the meander lines and the existence of the lake, was not in issue or questioned. In this case the non-existence of the lake indicated by the survey, and consequently the incorrectness of the meander lines, were the only material matters in issue. The distinction between the authorities cited by counsel for appellant and the case at bar is so clear as not to call for further discussion.

From a careful examination of the record and evidence in the case, and after considering all the questions presented in the record, the Department concurs in the findings of your office and the surveyor-general, that the tract designated as "Tule lake" on the plats of survey of townships 3 and 4 S., R. 39 E., La Grande, Oregon, was not a lake on March 12, 1860, but in fact a marsh or swamp at that date, and as such inured to the State of Oregon under its swamp land grant.

The decision appealed from is accordingly affirmed.

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#### MINING CLAIM—ADVERSE PROCEEDINGS—JUDICIAL AWARD.

##### STRANGER LODE.

An objection to a mineral application for the reason that the discovery shaft and improvements are upon ground specifically excluded from the published notice of application is not tenable, where in adverse judicial proceedings the ground so excluded has been awarded to the applicant.

An applicant for lode patent has no right to land embraced within the prior location and application of another, and against which said applicant filed no adverse claim.

The end line of a survey of a lode claim may be laid upon the surface of a prior location in order to hold land embraced within the lines of a valid location; but in case the prior location is excluded the end line may not be placed beyond the point where the lode in its onward course or strike intersects the exterior boundary of the excluded ground.

A failure to file an adverse claim against an applicant for mineral patent is a waiver of all right to the ground in conflict; and a judgment obtained in adverse proceedings against the subsequent application of another is of no avail as against such waiver, or as against a judgment obtained by one who successfully adversed the first applicant.

Where a party has two applications pending at the same time, each of which embraces the ground in conflict with other locators, and such ground is awarded to the applicant in judgments secured in adverse proceedings, he may, at his election, take the same under the senior application.

It is not material to the rights of an applicant under a favorable judgment obtained in adverse proceedings, that an adverse suit is still pending between the losing party in such proceedings and a third party, where a favorable judgment against the third party for the same ground has already been secured by the applicant.

A judicial award to the junior locator, made in adverse proceedings, of a small part of the ground in conflict, is none the less binding upon the parties and the Land Department because made in pursuance of a stipulation between the parties.

*Secretary Hitchcock to the Commissioner of the General Land Office, April*  
(W. V. D.) 25, 1899. (E. B., Jr.)

The Little Don Mining and Tunnel Company, for convenience hereinafter called the "company," has appealed from your office decisions of December 9, 1897, and May 10, 1898, in the matter of Pueblo, Colorado, mineral application No. 1673, for patent to the Stranger lode mining claim, survey No. 10,501.

The claim was located November 7, 1891. The company filed its application, May 25, 1896, for the entire claim as located and surveyed. The published notice of the application, which commenced May 30, 1896, excluded, "without waiver of right, Surs., Nos. 7452 am., 7996 am., 8177, 8277, 8287, 8714, 8715, 9168, 9260, 9346, and 9952," leaving a net area of 5.263 acres. The conflicts between these and other surveys and survey No. 10501 are shown in the accompanying diagram. No adverse claim was filed against the Stranger application. November 8, 1897, the company filed a supplemental application for the tract or parcel bounded by the overlapping survey lines of the Stranger and the White Elephant (survey No. 9260) claims, and for a parcel ten feet square, within the Devide claim, survey No. 9346, and immediately inside of the east end line of the Stranger, and equally divided by the center line of that claim. Thereupon the local office forwarded the papers to your office for instructions. The papers were considered by your office and by decision of December 9, 1897, it was held:

Entry could not be made on the application, for the reasons:

- (1) That no discovery of mineral is shown within *claimed* limits.
- (2) In view of the exclusions made the survey of the claim does not conform with the provisions of paragraphs 50 and 51, of the mining regulations.



(3) There are no improvements shown to have been made on claimed surface ground.

In view of the foregoing, the Stranger lode application for patent No. 1673 is hereby held for rejection and the subsequent proceedings on the part of the claimant in the matter dismissed.

Upon review, wherein additional papers filed by the applicant in the meantime were considered, your office held, May 10, 1898, that the application could not be allowed to embrace any part of the Devide claim; that the northeasterly end line of the Stranger "must be established either southwest of the Montazuma (survey No. 7996) or not further within said claim than is necessary to embrace ground properly located as part of the Stranger claim;" that "the Stranger claimant has no right to said White Elephant conflict," nor to the conflict between the Stranger and the Katie, survey No. 10,213; that "entry could not be allowed for the Hattie S. (survey 10,213)—General Browning—Stranger conflict;" that a judgment rendered July 8, 1897, in an adverse suit by the Stranger claimant against the Ground Hog (survey No. 9952) claimant would not be recognized or given effect as to the award therein made to the Ground Hog claimant of a small tract ten feet square on the north end line of the Ground Hog claim, but, instead, the tract would be considered as part of the Stranger claim, and the Ground Hog application was accordingly held for rejection as to such tract; that a similar award, by judgment rendered January 10, 1898, of a strip ten feet wide along the southerly ends of the Pactolus claims Nos. 3, 4 and 5, survey No. 9878, and of small tracts containing the discovery shafts of the Pactolus claims Nos. 3 and 5 would not be regarded or given any effect, but, instead, would be considered as a part of the Stranger claim, and the application for the Pactolus group was accordingly held for rejection as to the Pactolus Nos. 3 and 5; and, in conclusion, it was therein said that:

Should this decision become final the applicant for the Stranger claim will be required to have an amended survey made, and thereafter, upon filing an application to purchase in accordance with the terms of this decision, further and appropriate action will be taken.

From these decisions the company appeals, assigning error as follows:

First. In holding that no discovery of mineral is shown to have been made within the claimed limits.

Second. In holding that, in view of the exclusions made, the survey of the claim is not in conformity with the provisions of paragraphs 50 and 51 of the Mining Regulations (old).

Third. In holding that no improvements are shown to have been made on claimed ground.

Fourth. In holding that under the mining laws and regulations no valid entry could be made under the application as presented.

Fifth. In holding that the conflict of .002 of an acre with the Devide lode cannot be taken by the Stranger, and that the northeasterly end line of the Stranger must be established either southwest of the Montazuma claim, or not further within said

claim than is necessary to embrace ground properly located as a part of the Stranger claim.

Sixth. In holding that the Stranger has no right to the White Elephant conflict.

Seventh. In holding that the Stranger must exclude the Katie conflict.

Eighth. In holding that an entry could not be allowed the Stranger claimants for the Hattie S.—General Browning—Stranger conflict.

Ninth. In refusing to recognize the decree of the court in the adverse suit between the Stranger and the Ground Hog.

Tenth. In refusing to recognize and give effect to the decrees rendered on the adverse suits of the Stranger against the Pactolus Nos. 2, 3, 4 and 5 and the Hannibal claims.

The second decision of your office, in effect, modified the former decision to the extent of waiving the objections thereof numbered (1) and (3) to the company's application, and of vacating and recalling so much of the former decision as held the application for rejection. The said objections were based upon the fact that the discovery shaft, which is the applicant's only improvement, is upon a part of the claim specifically excluded by the published notice. This shaft is valued in the official survey of the claim at \$620, and is the basis of fact for the surveyor general's certificate that the necessary expenditure of \$500 has been made by the applicant or its grantors. In the adverse suit between the Stranger and Ground Hog claimants the land containing the Stranger discovery shaft was awarded to the company. In view of this award and the proof of over \$500 expenditure in the discovery shaft, the objections numbered (1) and (3) are no longer tenable (*Mitchell v. Brovo*, 27 L. D., 40; and *Hallett and Hamburg Lodes, Id.*, 104); and this your office seems to have recognized.

As already indicated herein, the conflict between the Stranger and Devide claims is excluded in the published notice of the Stranger application. Although the small tract ten feet square, above mentioned, within the Stranger-Devide conflict is embraced in the supplemental application filed November 8, 1897, by the company, its application to purchase, filed January 19, 1898, specifically excludes all of the Stranger-Devide conflict. Furthermore, it is not apparent upon what claim of right to that small tract the supplemental application rests. The Devide claim was located September 27, 1891, and therefore prior to the location of the Stranger. Application for patent to the former was filed June 14, 1895, and is still pending. Publication of notice thereunder commenced June 22, 1895. The company did not file any adverse claim against the Devide applicant. Both by reason of priority of location and of the failure of the company to adverse, the Devide applicant has the superior possessory title to the land in conflict. Upon the evidence now in the case it must therefore be held that the company has no right to the small tract in question, and its supplemental application as to such tract must stand rejected.

The next question presented is as to how far northeastward the northeasterly end line of the Stranger claim may be placed. Immediately within this end line, as now shown in the diagram, the Stranger loca-

tion conflicts with the Montazuma, survey No. 7996, the Devide, survey No. 9346, and the Iron King, survey No. 8287. By reason of exclusions made of the conflict with the Montazuma and Iron King, and of what has already been decided herein as to the Stranger-Devide conflict, the Stranger applicant is not entitled to any of the area embraced by these conflicting surveys. The Stranger location was made prior to the Montazuma, but subsequent to the Devide and Iron King. At its northeast corner the Stranger location embraces a small tract not claimed by any other party. To so much of this tract as was lawfully embraced within the lines of the location the owner of the Stranger is entitled, and to hold it the end line of the Stranger survey or location may be laid upon the surface of the other prior locations (Hallett and Hamburg Lodes, 27 L. D., 104; and Del Monte Mining and Milling Company *v.* Last Chance Mining and Milling Company, 171 U. S., 55). The Devide being a prior location and the conflict between it and the Stranger location being excluded by the published notice of the Stranger application, the company has no right to the Stranger lode beyond the point where the same in its onward course or strike intersects the Devide end line and passes within it (Paragraph 7 of mining regulations, approved December 15, 1897). Through this point then but not beyond it the end line of the Stranger may be established. The decision of your office is modified accordingly, and the Stranger survey will be amended to conform herewith.

The conflict between the Stranger and White Elephant, survey No. 9260, is also within the boundaries of the location of the General Browning lode claim (unsurveyed) and of the Hattie S., survey No. 10,213. The owner of the White Elephant filed application for patent thereto, February 28, 1895, and commenced publication of notice of the same March 2, following. This was the first application for the land. No exclusion of the ground within the White Elephant-Stranger conflict was made. No adverse claim was filed by the Stranger or the Hattie S. claimant. By failure to adverse both these parties finally and conclusively waived all right or claim to the ground in question. The owners of the General Browning duly adversed the White Elephant and in a suit in support thereof were awarded, with other ground, that embraced in the White Elephant-Stranger conflict. The Hattie S. subsequently filed application for patent, was adversed by the Stranger, and the Stranger applicant recovered a judgment in its adverse suit against the Hattie S. embracing the ground here in question. Such judgment, however, is of no avail against the waiver to the White Elephant claimant and the judgment obtained by the General Browning claimants. The Department concurs therefore in the decision of your office adverse to the claim of the Stranger, as to this ground. Its supplemental application therefor is accordingly rejected.

The conflict between the Stranger and the Katie, survey No. 10,213, is so small as to be comparatively insignificant. Still, as shown by

the accompanying diagram, there is a slight conflict. This conflict is also within the boundaries of the Sunday and Pactolus No. 5 locations, and most of it is also within the Pactolus No. 2 location. The applications for patent to the Stranger and Katie, and the application for the Pactolus Nos. 2, 3, 4, 5 and Hannibal, survey No. 9878, were received by mail at the same time, that is, at nine o'clock a. m., May 25, 1896. Application for the Sunday, survey No. 10,410, was filed by the said company, December 10, 1896. The periods of publication for the Stranger, Katie and the Pactolus group are identical, commencing May 30, 1896. No exclusion of the conflict in question was made by any of these applications, nor was it made in any of the several published notices save in the case of the notice for the Sunday, which excluded all conflict between that location and the Pactolus Nos. 2, 3, 4 and 5. Neither the Stranger nor Katie applicant adversed the other. But, in behalf of the Sunday, the company adversed the Katie; in behalf of the Stranger it adversed the Pactolus Nos. 2, 3, 4, and 5, and Hannibal, all owned by the same applicant; and in behalf of the Sunday it adversed the Pactolus Nos. 2, 3, 4 and 5. The owner of the Pactolus group also adversed the Katie. Suits were duly commenced on each of these adverse claims. That of the owner of the Pactolus group against the Katie is still pending, so far as appears. The company's adverse suits against the Katie and Pactolus, respectively, each terminated in a judgment, rendered the same day, January 10, 1898, by the same court, whereby is awarded to the company, together with other ground, that in the Katie-Stranger conflict. Although two of these suits were in behalf of the Sunday location, it seems, from the present proceedings, that the company prefers to embrace the ground in this conflict in the Stranger application. The Stranger is the prior location, and the application therefor was prior to the application for the Sunday claim. The company is entitled to the ground in question beyond peradventure. There can be no objection to its election to include it in the Stranger application. It will be allowed to do so. Your decision to the contrary is therefore reversed.

In the company's judgment against the Hattie S. (embraced in the same survey and application as the Katie) the entire conflict with the Hattie S. was awarded to the company as owner of the Stranger location. It is not material to the question of the Stranger claimant's rights under that judgment that, as recited in the decision of May 10, 1898, there is still pending an adverse suit by the owner of the Pactolus group, including the Haunibal, against the Hattie S., for the reason that the same judgment which awarded to the company the Katie-Stranger conflict in the adverse suit between the company as owner of the Stranger and the applicant for the Pactolus group, determined their rights, as between each other, to all the Stranger-Pactolus group conflict. By this judgment all the conflict, save as to a few small tracts hereinbefore mentioned, and hereinafter further considered, was

awarded to the said company. It is not necessary therefore that proceedings under the Stranger application should await the termination of the Pactolus-Hattie S. litigation. The suit by the General Browning claimants in support of their adverse claim against the Hattie S., involving the Hattie S.-General Browning-Stranger conflict, to which your said decision also calls attention as an additional reason for delaying proceedings under the Stranger application, was dismissed by order of court June 29, 1897, at plaintiff's costs, as shown by certificate of the clerk of the court filed here September 16, 1898. By such dismissal the adverse claim was released and discharged and ceased to present any reason for a stay of proceedings under the Stranger application.

The objection by your office to the award made to the Ground Hog claimant of a small tract ten feet square immediately within and about the center of the north end line of that claim by the judgment of July 8, 1897, above mentioned, is that such award was made according to stipulation between the Stranger and Ground Hog claimant, and that thereby such claimant obtained ground which in the opinion of your office belonged to the Stranger claimant under the prior Stranger location, "simply to give that claim (the Ground Hog) what might be considered a technical end line within the Stranger claim." It is no objection to the court's award that it follows and rests upon a stipulation between the parties.

The land department is not at liberty to disregard the judgment to the extent indicated, nor to any extent, for any reason given in your office decision. The court having regularly and rightfully obtained jurisdiction, and the judgment being clear in its terms and not in conflict with any similar judgment, the land department, as well as the immediate parties, is bound by it (*Richmond Mining Company v. Rose*, 114 U. S., 576, 585). The said objection by your office is not therefore well taken. What has just been said concerning the award of the court by the judgment of July 8, 1897, in the Stranger-Ground Hog case and the objection of your office thereto, applies with equal force to the similar award by the judgment of January 10, 1898, in the Stranger-Pactolus group case and the objection of your office thereto. Your office erred in disregarding these judgments, and in holding the applications for the Ground Hog and Pactolus group for rejection to the extent hereinbefore indicated, and your office decision of May 10, 1898, is reversed accordingly.

The Ground Hog applicant appealed from said decision. The action herein will satisfy and dispose of that appeal and you will duly advise the Ground Hog applicant. The applicant for the Pactolus group has not, so far as appears, appealed from the action of your office adverse to it. You will, however, duly notify it of the action herein affecting its application. The decision of your office is modified in accordance with the views and directions herein given.

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

## INSTRUCTIONS.

The act of June 4, 1897, in providing for an exchange of lands within forest reservations for public lands outside of said reservations does not authorize the relinquishment of mineral lands as a basis for lieu selections.

The right of relinquishment under said act is not limited to claims initiated or titles acquired under laws that require personal settlement and residence on the land, but includes any tract covered by any unperfected bona fide claim under any of the general land laws (other than the mining laws), or to which the full legal title has passed out of the government, and beyond the control of the Land Department, by any means which is the full legal equivalent of a patent.

The removal of timber, in pursuance of a lawful right, from land acquired under statutory authority, does not deprive the owner of said land or the government from receiving the benefit incident to an exchange of lands as provided for in said act.

Land acquired under a grant made to a State, or railroad company, by act of Congress is a proper basis for lieu selections under said act, provided that the full legal title thereto has passed out of the government, and beyond the control of the Land Department by a patent, or some means the full legal equivalent thereof.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 26, 1899.* (E. B., Jr.)

The Department is in receipt of your communications of December 7, and 13, 1898, relative to applications now pending in your office to exchange lands within the limits of public forest reservations for public lands outside such reservations, under the following provision of the act of June 4, 1897 (30 Stat., 11, 36):

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

Calling attention to a circular addressed to registers and receivers, issued August 11, 1898, by your office, without the approval of the Secretary of the Interior, and also referring to page 89 of your annual report for the year ending June 30, 1898, you ask (1) whether lands within the limits of forest reservations must be agricultural in character in order to be made bases for lieu selections under the foregoing provision of the act, (2) whether the claim or title thereto must have been initiated or acquired under the settlement laws of the United States, and (3) whether timber land acquired by purchase under the act of June 3, 1878 (20 Stat., 89) but since denuded of its timber, and land acquired

under a grant made to a State or a railroad company by act of Congress can be made bases for such lieu selections.

As to the first question, if by agricultural lands you mean lands the claim or patent to which is not based upon the mining laws of the United States, the question is answered in the affirmative. That the statute does not contemplate and therefore does not authorize the relinquishment or surrender of mineral lands as bases for the making of lieu selections, is shown by the provisions therein that:

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

\* \* \* \* \*

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

All other lands included within the limits of a public forest reservation are subject to relinquishment as bases for lieu selections, if claimed or owned as stated in the statute.

As to the second question, if by settlement laws you mean such laws as make personal settlement and residence upon the tract sought to be acquired a necessary condition to obtaining title, as in the case of the pre-emption and homestead laws, the question is answered in the negative. That which may be relinquished is described as "a tract covered by an unperfected *bona fide* claim or by a patent," and is believed to include any tract covered by any unprotected *bona fide* claim under any of the general land laws of the United States, or to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent. The thing which was objectionable to the forest reservation policy was the presence within the limits of a forest reservation of lands held and controlled by individual claimants or owners. Whether the claim or ownership was initiated or acquired under the homestead statute, which is a settlement law, or under the timber land purchase act, which is not a settlement law, its presence is equally an obstacle to the attainment of the purpose for which the forest reservation was established. In both cases the reservation of the surrounding lands is equally prejudicial to the interests of the claimant or owner.

As to the third question, the answer is in the affirmative, subject to the qualification that where the land is claimed under a grant made to a State or a railroad company by an act of Congress, the full legal title must have passed out of the government and beyond the control of the land department by a patent, or by some means which is the full legal equivalent thereof. Where under the timber land purchase act, or indeed under any other statute, one has acquired land having valuable timber thereon and has removed the timber, in pursuance of a lawful

right so to do, the removal of the timber does not affect his ownership of the land, and if it be included within the limits of a public forest reservation does not deprive him or the government from receiving the benefit incident to a relinquishment of that land, and a selection of other land outside the limits of the forest reservation in lieu thereof. The statute does not make it a condition to the exchange therein authorized that the tract within the forest reservation should have retained its original and natural condition.

You will please formulate and submit to the Department circular instructions to the local land officers revoking the circular issued by your office August 11, 1898, and also embodying the views expressed herein, and in the decisions of the Department in the case of F. A. Hyde *et al.* (28 L. D., 284), and Emil S. Wangenheim (28 L. D., 291). Action upon all applications for lieu lands under said act will be withheld until the circular instructions are adopted.

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#### REINSTATEMENT OF CANCELED ENTRIES—JURISDICTION.

##### INSTRUCTIONS.

Entries properly allowed of public land subject thereto and canceled on the erroneous supposition that the land was not subject to such disposition, should be reinstated, if the land is still within the jurisdiction of the Land Department and subject to its control.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *April 28, 1899.* (E. F. B.)

The Department is in receipt of your letter of March 16, 1899, calling attention to applications now pending before your office for reinstatement of certain cash entries in the New Orleans land district, which were canceled September 13, 1844, for supposed conflict with the Houmas grant.

You express the opinion that these entries should be reinstated, but because of the decision of the Department in the case of Joseph Crawford (18 L. D., 553), which has been followed in other cases, you say that you are restrained from taking any action in similar cases in conflict with said ruling.

The lands covered by these entries are in rear of the Houmas grant and beyond the depth of a league and a half from the Mississippi river.

It was claimed by the owners that the Houmas grant extended to the Amite river, and this claim was recognized by two of the commissioners appointed under the act of March 2, 1805 (2 Stat., 324), for the purpose of ascertaining the rights of persons claiming under French and Spanish grants in Louisiana, but in 1829 the Commissioner of the General Land Office determined that no lands should be held in reservation for said grant beyond the depth of one and a half leagues from

the Mississippi river. The lands beyond that depth were treated as public lands and entries thereof were made from that date until 1836, when all lands within the limits of the grant as claimed, which included these lands, were withheld from entry. It was during the period from 1829 to 1836 that the entries referred to in your letter were made.

On August 12, 1844, the Secretary of the Treasury, the head of the land department under the law then existing, determined that this grant was confirmed by the act of April 18, 1814 (3 Stat., 139), to the extent of the lands claimed, and the lands covered by the entries referred to in your letter were patented to Donaldson and Scott, claimants of that part of said grant. Thereupon all entries that had been allowed of said lands were canceled and the register of the land office at New Orleans was advised of said determination of the Houmas claim, in order that the parties who had made entries of said lands might be advised by the register of the cancellation of these entries and that the purchase money would be refunded upon proper application.

You state that it does not appear that the entrymen were notified of the cancellation of these entries or that they ever applied for the return of the purchase money.

A comprehensive history of the grant and of the action of the Department with reference to the lands covered by these entries is set out in the opinion of the court in the case of *Slidell v. Grandjean* (111 U. S., 412), from which it will be seen that in a suit brought by the United States to cancel the patent to Donaldson and Scott, it was adjudged and decreed that the patent was invalid and that the Houmas grant did not extend beyond the depth of eighty arpents from the Mississippi river and that the claimants thereof had no title whatever to any of the lands claimed under the grant, beyond that depth.

The lands covered by these entries are not within the limits of the Houmas grant but are public lands and at the date the entries were allowed they were not in reservation for any purpose but were subject to disposal under the public land laws and entries thereof were properly allowed.

The decision of the Department in the case of Joseph Crawford was based upon a misconception of the facts. It was held in that case that the entry was erroneously allowed for the reason that the land was within the depth of a league and a half from the Mississippi river, the limits fixed by the commissioners in 1829. But the lands were not within those limits and were not reserved or withheld from entry until 1836. On motion for review attention was called to this erroneous finding but the decision was adhered to upon another ground. In the unreported decision of January 10, 1895, upon motion for review, it was said:

Conceding for the time and for the purposes of this case that an accurate measurement would show the tract in question to be more than a league and a half distant from the Mississippi river in front of the Houmas grant, a careful consideration of the whole matter discloses no reason for rendering a judgment different from

that made in the decision a review of which is sought. A formal affirmance of your office decision of April 9, 1892, from which the appeal was taken, would have been sufficient. The decision rested on the terms and provisions of the act of March 2, 1889 (25 Stat., 877), which, in my opinion, are ample to sustain the judgment made.

There is evidently error in both decisions. In the first, an error of fact in finding that the entry was erroneously allowed and that it was within the limits of the league and a half designated by the commissioners as the reservation for said grant. In the second, an error of law in holding that the act of March 2, 1889, could affect the rights of persons claiming under valid entries which were erroneously canceled.

Where a tract of land subject to entry has been purchased and paid for it ceases to be the property of the United States, and if the entry was properly allowed the purchaser cannot be deprived of his rights by the action of the government in canceling the entry upon the erroneous supposition that the land entered was not public land.

If the lands covered by these entries were public lands subject to disposal, and the law under which the entries were made has been complied with and final certificates have been given, they are private property and the government has no power to revoke its action and cancel the entries. *Carroll v. Safford* (3 How., 450); *Witherspoon v. Duncan* (4 Wall., 210); *Wisconsin R. R. Co. v. Price Co.* (133 U. S., 496).

By such entry and payment the purchaser secures a vested interest in the property and a right to patent therefor, and can no more be deprived of it by order of the Commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest, will be corrected whenever the matter is presented so that the judiciary can act upon it. (*Cornelius v. Kessel*, 128 U. S., 456-461.)

If from the facts presented it is apparent that the erroneous action of the Department would be corrected by the courts, the rights of the entryman should be protected by executive action and he should not be compelled to resort to the judicial tribunals for redress.

Controlled by this principle, it is plainly the duty of the Department to reinstate all of these entries that were improperly canceled, if the land is still within its jurisdiction and subject to executive control. *Mee v. Hughart et al.* (28 L. D., 209).

You will therefore act upon said applications in accordance with the views herein expressed, without regard to the decisions of the Department herein referred to in the case of Joseph Crawford, but adequate notice must first be given to intervening claimants, if there be any.

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NORTHERN PACIFIC R. R. CO. *v.* HAYNES.

Motion for review of departmental decision of January 30, 1895, 20 L. D., 90, denied by Acting Secretary Ryan, April 28, 1899.

## APPLICATION TO ENTER—RIGHT OF AMENDMENT.

JUNKIN *v.* NILLSSON.

An application to enter that is defective, when tendered, in matters that may be supplied by amendment, and is returned by the local office without formal rejection or proper official notification of the reasons for such return, must be regarded as a pending application that will protect the applicant as against intervening claims.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) April 28, 1899. (H. G.)

Walter Junkin appeals from the decision of your office of June 12, 1897, reversing the decision of the local office and dismissing his contest against the homestead entry of Pher Nillsson, made November 1, 1895, for the W.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 33, T. 158 N., R. 41 W., and Lot 2, Sec. 4, T. 157 N., R. 41 W., in the Crookston, Minnesota, land district.

It is unnecessary to consider the ground of appeal that the attorney for the entryman, who appeared at the hearing and who prosecuted the appeal to your office from the decision of the local office, was not admitted to practice before this Department, as your office, on August 21, 1897, upon motion for review, correctly held that, although the records of your office do not disclose that the attorney for the entryman has been admitted to practice before this Department or your office, yet as the appeal was duly served on the opposite party, and was not objected to by him, and was entertained by your office, the objection to the appearance of such attorney was interposed too late to be considered.

The record discloses that a hearing was had upon the allegations in the affidavit of contest, at which both of the parties were present in person and were represented by attorneys. The evidence taken at such hearing is to the effect that about October 27, 1895, Junkin made application to enter the tract in dispute, through the probate judge of Marshall county, Minnesota. This application was received by the local office, but was returned with notice that the tender of fees was insufficient, there being an excess above one hundred and sixty acres of land in the tract. The proper fees were subsequently transmitted with the application, but the application was rejected, owing to the intervening entry of Nillsson for the tract. The local office did not notify Junkin of the rejection of his first application, nor of his right of appeal, nor call his attention to the failure to transmit an affidavit as to the reasons why his application was not made in person at the local office.

The local officers should have suspended action on the application, notified the applicant of the defects, and allowed him a reasonable time within which to cure them. This rule has been applied where the

applicant failed to sign his application, but where the accompanying affidavits were properly executed. (*Johnston v. Bane*, 27 L. D., 156, 159.) Where a non-mineral affidavit was made by one unacquainted with the land at the time, the effect thereof was to destroy the value of the affidavit, but the entry was not, however, thereby rendered illegal, and in the absence of any charge or allegation that the land was mineral in character, the defect was permitted to be cured by filing the proper affidavit. (*Corbin v. Dorman*, 25 L. D., 471, 472.)

The facts in the case of *Neff v. Snider*, 26 L. D., 389, are more in point. An application to enter was made by the first settler, but was not signed, and the money sent with it lacked five cents of the amount required to pay the fees and commissions, as the quarter section contained a fraction of an acre in excess of one hundred and sixty acres.

This small deficiency was sent in a letter to the local office as soon as the applicant received notice of the suspension of her application. Another party, however, was permitted to file upon the tract. It was held, under the circumstances disclosed by the record, that at the time the entry was allowed the prior application was pending and operated to reserve the tract covered thereby from other disposition until final action thereon, and the case of *Lawson H. Lemmons*, 19 L. D., 37, which held that an application for public land should be rejected, if defective when presented, and that the right of the applicant, in such case, to thereafter perfect his application, could not be recognized in the presence of an intervening adverse claim, was overruled, in so far as in conflict with the ruling in that case.

The application presented in the case at bar, by *Junkin*, was signed but was not accompanied by the affidavit required where applications were not personally made at the land office, but are sent by mail, and there was insufficient tender of fees. These omissions, however, were not jurisdictional, but could have been supplied, and the requisite additional fees were transmitted by the entryman upon receipt of the notice of the amount due. His attention was not called to the omitted affidavit.

The application was not invalid nor fatally defective and was not even rejected of record by the local office, or in any formal manner, but was returned to the applicant without proper official notification of the reasons for its return. It was a defective application and subject to completion within a reasonable time after notice of the omission to furnish the requisite affidavit and of the deficiency in the fees and commissions tendered. It must be considered that it is still pending and may be perfected within a reasonable time after notice to supply the affidavit and to pay the requisite fees.

The decision of your office is reversed. The contestant, *Walter Junkin*, will be permitted to perfect his application within such reasonable time as your office may direct; and upon his doing so, the homestead entry of *Pher Nilsson* will be canceled and *Junkin's* entry allowed.



and obtained receipt. A duplicate receipt, for the fee and commissions, for eighteen dollars, dated August 3, 1894, for the entry of the land by Dahl, was by him identified as being the one delivered to him, and was introduced in evidence. On further examination, he stated that he was not positive to whom he paid the balance of the money on August 3, 1894. He gave testimony as to the character of his improvements, residence, etc., which showed substantial compliance with the law in those respects.

Anglim, the receiver, testified that the records do not show that Dahl ever made entry of the land, and that he had no recollection of Dahl's ever having paid to him the \$10, as testified; that while it was not the practice of the local office to receive a part of the filing fees and wait for the balance, such "might be done on a special occasion;" but the records, which were kept by the clerk, show no such payment in Dahl's case.

P. J. Russell testified that he was chief clerk of the land office during the year 1894; that in the "spring" of that year Dahl came to the local office and expressed a desire to enter the land, but said he did not have the money at that time to pay the fees, etc., but would go out and earn it and return in about three weeks; that he did return "the first part of August," and said he was ready to file; that the receiver was not then in the office, and believing Dahl had the money, he made out the application and other papers; that when the receipt was prepared, Dahl informed him he had but \$10, but would have the balance in a week or ten days; that he never saw Dahl after that transaction, until he came in the office with the receipt; that the receipt had been left on the desk and afterwards found and mailed to Dahl by a mistake; that he never delivered the receipt to Dahl personally; that Dahl never paid the balance (\$9) of the entry fee; that he paid only the \$10; that the government fee for the land was \$18—one dollar being his fee for making out the application. On cross-examination, Russell testified that it was not possible for him to have been mistaken with respect to his testimony; that he paid to Colonel Andrews, land inspector, the \$10 given by Dahl and, in addition thereto, \$8, being a personal loss to him of the latter amount; that the money was turned over to the receiver. Russell admitted that he had made three mistakes by failing to note on the books entries already made. He resigned April 7, 1895.

Roddy, the entryman, testified that he learned the land was vacant; that he went and saw the land and thought it unoccupied; he found an "old shanty," but did not think it was on the land; he found no one in the house, but on looking through the window saw a stove, a bunk, and a stand with papers on it; he also saw a small barn; after entry he learned that those improvements were on the land.

There is nothing in the testimony that reflects upon the good faith of Roddy. He established his residence on the land; his family lived

thereon, and his improvements are much more valuable than those of Dahl.

At the first hearing, which was had September 15, 1896, the attorney for contestant declined to offer any evidence other than Dahl's receipt; the register and receiver thereupon dismissed the contest, because it was not sufficiently shown why Roddy's entry should be canceled.

Your office, on February 1, 1897, remanded the case for further hearing, under practice rule No. 72, in order to obtain additional facts.

The order for the rehearing is clearly within the discretion of your office.

The evidence given by Dahl and Russell is conflicting. The receiver of the local office, who was a witness in the case and who joined in the decision, appears to have believed the testimony of Dahl, to the effect that he paid the full entry fee. The fact that Dahl was in possession of the receiver's receipt for the eighteen dollars, coupled with his explanations as to how and when it was obtained, must be taken as true.

It being found that Dahl, in fact, made entry of the land and paid the entry fee and commissions, his right to the land cannot be defeated because the records in the local office failed to show such entry. *Dougherty v. Buck*, 16 L. D., 187.

The decision appealed from is affirmed.

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HOMESTEAD ENTRY—SOLDIERS' FILING—RESIDENCE.

McFARLAND *v.* McALISTER.

A homesteader who makes entry subject to a prior adverse soldier's declaratory statement of record, is not excused, on account of the existing adverse claim under the soldier's filing, from establishing his residence within six months from date of entry.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *April 28, 1899.* (G. C. R.)

Archibald McAlister has appealed from your office decision of September 3, 1897, holding for cancellation his homestead entry, made July 1, 1895, for the NE.  $\frac{1}{4}$  of Sec. 19, T. 96 N., R. 62 W., Mitchell, South Dakota.

You office affirmed the action of the register and receiver.

It appears that one Godfrie Donaldson, through an agent, on June 4, 1895, filed his soldier's declaratory statement for the land. When McAlister made entry, he was informed that Donaldson had made such a filing, which under certain conditions would serve to defeat his entry.

On June 4, 1896, or eleven months and twenty-seven days after McAlister made entry, Samuel E. McFarland filed his contest affidavit against

said entry, alleging abandonment, failure to establish residence, speculation, etc.

Upon the hearing it was shown that in the fall of 1895 the entryman broke about one acre of the land; in February, 1896, he leased a farm, for one year, near Scotland, South Dakota—twenty-six miles from the land; his family remained on that farm; about May 1, 1896, he came to the land, and built a small house, ten by twelve feet, into which he placed a bed, cooking utensils, dishes, etc.; he slept in the house a few times during that month—how many times he could not say. This was the extent of his presence upon and improvements of the land at the date of contest. He had considerable personal property—sixty-three head of cattle, eight horses, some hogs, and farming implements; he was also a cattle dealer, and had bank credit; all his property, except a plow and mowing machine, and what was in the little house on the land, was kept at his rented farm. He had not established a *bona fide* residence on the land when served with notice.

It is insisted that appellant was not required to live upon and improve the land, so long as Donaldson had the right of entry under his soldier's declaratory statement.

McAlister had six months from date of entry in which to establish his residence on the land. The statute (section 2304, Revised Statutes) also allows one filing a soldier's declaratory statement six months "within which to make his entry and commence his settlement and improvement." Twenty-eight days of McAlister's period of six months remained when (December 4, 1895,) Donaldson's time had fully expired within which the latter might have made entry and settlement under his soldier's declaratory statement. McAlister had ample time in that twenty-eight days to establish his residence on the land; had he done so, and thereafter complied in other respects with the provisions of the homestead laws, he could have obtained patent, and need to have had no fears of any rights being acquired under the soldier's filing, but he made his entry with knowledge of the soldier's declaratory statement, and assumed all the risks incident to it.

The law required the entryman to establish residence on the land within six months; the soldier's declaratory statement then filed for the land and which, under certain conditions, might have defeated his entry, did not excuse him from compliance with the provisions of the homestead law or authorize him to postpone the establishment of residence beyond the six months from date of entry.

Finding no sufficient grounds for disturbing the judgment appealed from, the same is affirmed.

## PRACTICE—NOTICE OF CONTEST—SUPERVISORY ACTION—HEARING.

NOEL *v.* HOWLAND.

Personal service of a notice of contest may be properly made upon a non-resident. It is within the proper exercise of the supervisory authority of the Secretary of the Interior, for the prevention of injustice and the ascertainment of alleged equities, to order a hearing between one holding under an entry secured as the result of a contest, and an intervenor alleging residence upon and improvement of the land involved prior to said contest, and that the entry in question was improperly allowed as the result of the prior proceedings.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) April 28, 1899. (H. G.)

Arthur D. Coolidge appeals from the decision of your office of October 12, 1898, refusing to direct the cancellation of the entry of Edmund H. Noel, made December 17, 1897, 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. 12, T. 29 N., R. 15 W., Santa Fe land district, New Mexico, and denying his application for a hearing.

August 31, 1896, Henry M. Howland made entry for said tract, which was canceled, after a hearing upon the contest initiated by Noel, on the ground of the abandonment of the tract by Howland for a period exceeding six months. The affidavit of contest was sworn to on March 26, 1897, and four days later was filed in the local office. The notice of contest was personally served upon Howland at Pasadena, California, on April 29, 1897, and service thereof was acknowledged by him on that date. The return of service also shows that the person serving the notice made affidavit of such service.

The testimony was taken before the clerk of the probate court of San Juan county, New Mexico, on May 29, 1897, at which time and place one Frank J. Coolidge appeared as "attorney in fact" for Howland and asked a continuance on the ground of the absence of the attorney for Howland; but this was refused by the commissioner who took the testimony. Testimony was then taken on behalf of Noel, the contestant. No testimony was offered on the part of Howland, the contestee. On the day set for the hearing before the local office, an attorney appeared for Howland and moved to dismiss the contest on the ground that the service was void, as made upon a non-resident personally, instead of by publication. This motion was overruled, and the attorney appearing for Howland appealed. The appeal was dismissed by your office, as the order overruling the motion was regarded as interlocutory and not appealable. Pending the appeal, Noel filed the affidavit of Howland, stating that he had abandoned the tract, that he acquiesced in the decision of the local office against him, and that an appeal was not authorized by him.

On September 18, 1897, Coolidge tendered his homestead application, accompanied by the relinquishment of Howland, for the tract; but this

application was rejected owing to the preference right of entry in favor of Noel under his contest. Coolidge appealed to your office, and his appeal was accompanied with a number of affidavits, which, with the evidence taken at the hearing, disclose substantially the following facts:

Dr. J. W. Coolidge, brother of the appellant, and others, then residing at Scranton, Pennsylvania, expended about one hundred thousand dollars in the construction of an irrigating ditch or canal, the waters conducted through which would serve to irrigate the tract in question as well as other lands in the vicinity. All entries in the vicinity were suspended for a time, it appears, and Dr. Coolidge endeavored to have this suspension removed in order to make entry for the tract. Howland was placed upon this tract by Dr. Coolidge, who sold him the improvements bought of a former settler, and it was understood that he was to enter a thirty-acre tract which had been cultivated to fruit and which is included in the tract in controversy. Howland made entry of the entire tract, however, and informed Dr. Coolidge that he made such entry for the purpose of "protecting" the rights of the latter. He left the premises September 21, 1896, and went to California, Dr. Coolidge furnishing him the money to make the trip. Dr. Coolidge thereafter wrote to his brother, Arthur D. Coolidge, the appellant, who was then at Cripple Creek, Colorado, to return to New Mexico, and the latter did so, occupying the tract as "carè taker" for Howland during his absence. About the first of the month of March, 1897, having learned from Howland that he would not return, Arthur D. Coolidge made arrangements to purchase the improvements and possessory rights of Howland, and finally completed such purchase.

Said Coolidge then erected a new house thereon of the value of about seven hundred dollars, and continued to reside there with his family. Howland sent the receiver's receipt for the tract, issued upon his entry, to Coolidge, who was contemplating entry, supposing that such paper was sufficient to clear the record from the entry of Howland. Upon being informed that he could not make entry without obtaining the relinquishment of Howland, he secured such relinquishment and a bill of sale from Howland, which was executed in California on April 17, 1897, prior to the service of notice of the contest by Noel upon him, and which was forwarded to Coolidge and was in his possession at the time of the taking of the testimony in the contest proceedings between Noel and Howland.

Coolidge insists that as the service was void because not made by publication, which he contends is necessary in case of a non-resident defendant, there was, therefore, no proper contest between the parties, and that his application to enter, on September 18, 1897, accompanied by Howland's relinquishment, should have been allowed. He asks that Noel's entry be canceled, or that a hearing be ordered to determine his rights in the premises.

In the case of *Vincent v. Gibbs* (24 L. D., 383) it was held that "the rules of practice do not require that the notice of hearing should be served within the jurisdiction of the register and receiver." The decision of your office upon the question of jurisdiction rested upon this decision, but it is now contended that such decision must have had reference to the service of notice within the Territory of Oklahoma, but within a land district therein other than that from which the notice of contest issued. An examination of the record in the case, however, discloses that the notice issued out of the Alva, Oklahoma, land district, and was served personally by the contestant upon the contestee in the State of Kansas, and it follows that the decision cited is controlling and that in the case at bar the service of notice upon Howland in the State of California, although issued from the Santa Fe, New Mexico, land office, was sufficient. Moreover, Howland does not complain of any defect in the service, but, on the contrary, acknowledged service of the notice in writing when it was made, and has acquiesced in the decision against him, as appears from his affidavit.

The affidavit of contest states, in the usual form, that Howland, the original entryman, "has wholly abandoned said tract; that he has changed his residence therefrom for more than six months since making said entry; that said tract is not settled upon and cultivated by said party as required by law." Such affidavit was made about one week after the expiration of six months from September 21, 1896, the date when the proof shows that Howland left the tract, with his family, to go to California. The proof in support of this charge is generally to the effect that Howland left the land at the date mentioned and had not returned.

The showing made by Coolidge establishes very clearly that when Howland left the land he had no intention of abandoning the same, but was leaving temporarily because he could not make a living thereon. Although the evidence taken at the hearing in a measure contradicts this, and contains the statements of Howland to the effect that he was seeking employment in California, the affidavits submitted on behalf of Coolidge are fully corroborated in this respect by the two affidavits of Howland himself—one to the effect that he left the land about October 1, 1896, "but without abandoning the same," and the other, made long afterwards and submitted by Noel, the contestant, to the effect that he had abandoned the land from the expiration of six months after the date when he left it, or on March 21, 1897, nine days before the notice of contest was issued.

In view of this showing it is not clear that the contestant proved abandonment as he alleged, and there ought to be a hearing between Noel and Coolidge to determine whether or not Howland did actually abandon the land when he left it on September 21, 1896, or whether he abandoned it at the time he fixes in his affidavits, at the expiration of six months after such date. If Howland did not intend to abandon

and did not abandon the tract when he left it, or for the full period of six months preceding the filing of the contest, the contest has not been sustained and Noel has no preference right. Howland, it appears, made settlement and established his residence upon the tract before his entry and resided thereon after his entry, and it must be clearly shown that he abandoned the tract for the full period of six months before his entry should be canceled. Although he has acquiesced in the decision, and directs that the appeal taken for him to your office be dismissed, yet before he was in default he sold the improvement upon the tract and subsequently executed his relinquishment therefor and a bill of sale for the improvements. Coolidge alleges that he was in possession of the tract at the time the contest was initiated, was residing thereon and had made substantial and permanent improvements with the reasonable expectation of making entry. He charges that Noel resided in the vicinity of the tract and had full knowledge and notice of his, Coolidge's, residence, occupancy and improvements prior to the initiation of the contest against Howland. From his showing his good faith is manifest, as he was about to make application for the tract before the initiation of the contest by Noel, when he was informed that the initial receiver's receipt sent to him by Howland was insufficient as a renunciation of the rights of the latter to the tract, and that he must obtain Howland's relinquishment. This was executed before Howland was served with notice of the contest, and was in the possession of Coolidge at the time of the hearing, and was not tendered with his application to make entry until about five months after he had received it, but during this period he was endeavoring to have the contest proceedings set aside and annulled upon the ground of the insufficiency of service.

Since the application of Coolidge has been under consideration here, your office has transmitted his appeal from the action of the local office in rejecting, on March 24, 1899, his application, certified on March 14, 1899, in the nature of a corroborated affidavit of contest, setting forth, in substance, the matters covered by the application now under consideration, alleging his priority of settlement, prior right of entry, and that Noel had no right to make entry, and further, that Noel's entry was made with fraudulent intent, for the purpose of speculation, and with actual personal knowledge of the prior rights of Coolidge. This application to contest Noel's entry was rejected by the local office for the reason that a contest for the same land is now pending before this Department. Your office did not pass upon the appeal, but forwarded it with the application.

It is true that Coolidge appears as intervenor and not as one of the parties to the contest, but his alleged settlement and residence upon and improvement of the tract prior to the initiation of the contest between Noel and Howland, require that his rights should be adjudi-

cated, or injustice may be done him. As was said by the supreme court in *Williams v. United States*, 138 U. S., 514, 524:

It is obvious, it is common knowledge, that in the administration of such large and varied interests as are intrusted to the Land Department, matters not foreseen, equities not anticipated, and which are therefore not provided for by express statute, may sometimes arise, and, therefore, that the Secretary of the Interior is given that superintending and supervising power which will enable him, in the face of these unexpected contingencies, to do justice.

The decision of your office denying a hearing upon the application of Coolidge is therefore reversed, and a hearing will be ordered by your office between Coolidge and Noel to determine the following matters:

1. At what time did Howland, the original entryman, actually abandon the tract in controversy.
2. The truth of the allegations set forth in the application of Coolidge for a hearing.
3. Any new matters presented in the affidavit of contest recently filed by Coolidge and rejected by the local office.

The local office will determine the case upon the evidence adduced at the hearing, subject to appeal as in other cases.

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BARKSDALE *v.* RHODES.

Motion for review of departmental decision of February 20, 1899, 28 L. D., 136, denied by Secretary Hitchcock, May 1, 1899.

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DESERT LAND ENTRY—RIGHTS OF HEIRS—ACT OF MARCH 1, 1877.

GASQUET ET AL. *v.* BUTLER'S HEIRS ET AL. (ON REVIEW).

The right of a desert land entryman under the act of March 1, 1877, who dies prior to the completion of his entry, descends to his heirs and may be perfected by them.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 1, 1899. (E. B., Jr.)

In the above entitled case, involving the S.  $\frac{1}{2}$  and the NW.  $\frac{1}{4}$  of Sec. 34, T. 26 S., R. 25 E., Visalia, California, land district, entered April 2, 1877, by John B. Butler under the desert land act of March 3, 1877 (19 Stat., 377), Joseph Gasquet and others have filed a motion for review of the decision of the Department, dated December 29, 1898 (27 L. D., 721).

The said decision affirmed the action of your office sustaining the entry against the charges of Gasquet and others that the land had not been reclaimed, that there had been failure to cultivate the same, and that the entry was invalidated by the assignment of the land by Butler's heirs to one Arthur Wallace. The assignment, which was made

February 17, 1896, before the submission of final proof, was held to be valid under the desert land act of March 3, 1877, *supra*, as amended by the act of March 3, 1891 (26 Stat., 1095). The entryman Butler died January 1, 1880, and the contention of the motion for review is that under the act of 1877 no right to complete the entry inured to the heirs of Butler, but that the right to acquire land thereunder was a personal right which died with the entryman.

This contention is not sound. None of the cases cited in the motion support it. It is true that the act in question does not contain any provision for succession to the rights of a deceased desert land entryman, but it does not follow, merely from the absence of such provision, that his heirs or devisees, if otherwise qualified, may not perfect the entry and receive patent for the land. It is repugnant to every principle of right and justice that after an individual, in compliance with law, has spent years of time and labor and much—perhaps all—of his means upon a tract of public land in the effort to acquire title to the same, upon his death before right to a patent has vested, his rights to the land and the improvements thereon should escheat to the government, and those upon whom the law or his will would otherwise cast his possession of the property be absolutely precluded from such possession or from deriving any benefit from his years of toil and the expenditure of his means.

The Department is not aware of any law providing for the acquisition of title to public land which does not permit either the widow, heir, devisee, or transferee of a deceased entryman to succeed to his rights and perfect his claim to the land. The homestead law makes no provision for succession to the rights of a settler who dies before entry, but it is well settled by the decisions of the Department that the heirs of such settler succeed to his rights and may perfect his claim; and this is true even where he dies before survey of the land (Tobias Beckner, 6 L. D., 134). In the case just cited it was said by the Department:

The broad underlying principle that controls the question is—that when a person initiates any right in compliance with, and by authority of the public land laws, and dies before completing or perfecting that right, it will not escheat and revert to the government, but inure to those on whom the law and natural justice cast a man's property, and the fruits of his labor after his death.

It is not necessary, however, to rely in this case upon the authority of analogous cases under other laws. The question here presented was considered by the Department, July 16, 1891 (13 L. D., 49), in response to a request from your office for instructions as to the issue of patents "in desert land cases in case of entryman's death." In its instructions of that date the Department said:

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.

The Department finds no reason to dissent from the views expressed in the above instructions, but, on the contrary, now expressly reaffirms them.

No reason appearing why the decision under review should be modified in any way, the same is adhered to and the motion denied.

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#### RAILROAD GRANT—LANDS EXCEPTED—DONATION CLAIM.

##### OREGON AND CALIFORNIA R. R. CO.

A proclamation that the "public lands" in a specified township will be offered for public sale does not include lands that were at such time embraced within an uncanceled donation notification.

An uncanceled donation notification existing of record at the date of the railroad grant of May 4, 1870, and at the date of the definite location thereunder, excepts the land included therein from the operation of said grant.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 1, 1899. (F. W. C.)

An appeal has been filed by the Oregon and California Railroad Company, as successor to the Oregon Central Railroad Company, from your office decision of January 31, 1896, holding that the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 5, T. 3 N., R. 1 E., Vancouver land district, Washington, was excepted from the grant made by the act of May 4, 1870 (16 Stat., 94), to aid in the construction of the Oregon Central railroad, because, at the date of the passage of said act, as well as the date of the filing of the map showing the line of definite location opposite the tract in question, on May 17, 1871, this tract was included in the uncanceled donation claim of Henry Thomas, proof of which was filed with the surveyor general on July 17, 1854.

The grant made by the act of May 4, 1870, *supra*, was of

each alternate section of the public lands, not mineral, excepting coal or iron lands, designated by odd numbers nearest to said road, to the amount of ten such alternate sections per mile, on each side thereof, not otherwise disposed of or reserved or held by valid pre-emption or homestead right at the time of the passage of this act.

On July 17, 1854, Henry Thomas filed with the surveyor general of Oregon, the land at that time being under the supervision of the surveyor general of Oregon, a notification of his claim made under the provisions of the act of Congress approved September 27, 1850 (9 Stat., 496, 498), the claim being for certain described lands aggregating one hundred and sixty acres, comprising parts of sections 5, 6 and 7 in said township number 3 north, range 1 east, W. M., among the tracts described being the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , Sec. 5, the tract here in question. He also made proof of qualifications as required by said act and that he had personally resided upon and cultivated that part of the public lands particularly described in his notification continuously from the 10th day of July, 1854, to the 17th day of July, 1854, the proof consisting of his own affidavit, corroborated by that of two witnesses. Whether he thereafter continued in his residence and cultivation of the land for the period of four years, as required by law, does not appear, but no proof thereof, or other proceeding towards perfecting said donation claim, was ever made or had before the land department, nor had any steps been taken to clear the record of said claim prior to the date of the passage of the act making the grant for the Oregon Central railroad or prior to the time of the filing of the map of definite location under said grant.

In support of the appeal on behalf of the company it is urged that said notification by Thomas did not serve to sever the tract from the public domain, nor did it amount to an appropriation of the tract as against the grant for the railroad company, and that even if the filing of said donation notification operated as a segregation or appropriation of the land in the first instance, it was set at naught by the proclamation of the President dated March 20, 1863, No. 693, which proclaimed the lands included in said notification for public sale and auction on August 3, 1863, which date was prior to the making of the grant for said company, and as the lands were not sold at the public sale, they passed to the company under its grant free from any claim on account of said donation notification.

Relative to the effect given a donation notification filed under the act before referred to, it may be stated that in departmental decision of March 6, 1882, in the case of John J. Elliott (1 L. D., 303) it was held that the filing of the original notification is an *ipso facto* segregation of the land described therein.

In the case of the Oregon and California R. R. Co., *v.* Kuebel (22 L. D., 308), it was held that lands embraced within the notification of a donation claim at the date of the grant made to aid in the construction of said railroad were excepted from the operation of such grant; and in the case of *Dyer v. Oregon and California R. R. Co.* (23 L. D., 569) a like conclusion was reached.

Under the act of September 27, 1850, the grant of these donation claims to settlers upon the public lands in the State of Oregon was

conditioned upon residence and cultivation of the land for four consecutive years, but no limitation was placed upon the time of making proof thereof. Section seven of the act in providing for the proof, prescribes that the claimant:

at any time after the expiration of four years from the date of such settlement, whether made under the laws of the late provisional government or not, shall prove in like manner, by two disinterested witnesses, the fact of continued residence and cultivation required by the fourth section of this act.

It is thus seen that proof of the required residence and cultivation could be made at any time after the expiration of four years from the date of settlement.

It is urged by the company that under the decisions of the supreme court the donation notification was without force or effect in the absence of proof of residence and cultivation. In support thereof reference is made to the following cases: *Hall v. Russell*, 101 U. S., 509; *Brazee v. Schofield*, 124 U. S., 495; *Maynard v. Hill*, 125 U. S., 215. In these cases the question at issue was as to when a *title* was acquired or secured by reason of a claim made under the donation act. No question was raised as to the segregative effect to be given a donation notification in the absence of proof of residence and cultivation as required by law; but in the case of *Brazee v. Schofield* the court in referring to the purpose and object of the filing of said notification, says as follows:

The object of the law was to give title to the party who had resided upon and cultivated the land, and who was, therefore, in equity and justice better entitled to the property than others who had neither resided upon nor cultivated it. But it was also of importance to the government to know the precise extent and location of the land thus resided upon and cultivated. *It was necessary to enable the government to ascertain what lands were free from claims of settlers, and thus subject to sale or other disposition.* There was nothing, however, in the information to be communicated which rendered it necessary that it should proceed from the husband alone. So long as he remained the head of the family settlement there was a manifest propriety in its proceeding from him, but in case of his death it is not perceived why it might not come with equal efficacy from his widow, who then took his place as the head of the family. The law contemplates in all its provisions that where a settlement has been joint, by the two together, the benefit of the donation intended for both should be secured, in case of the death of either, to his or her heirs. It is true, the notice to the surveyor general was the first proceeding which informed the public authorities of the intention of the occupant to avail himself of the benefits of the act, and of his acceptance of the proffered grant. But without the residence and cultivation required, the notice would be of no efficacy.

It will thus be seen that while, as stated by the court, without residence and cultivation as required, the notice would be of no efficacy,—that is, for the purpose of giving title to the lands notified upon,—yet the object of the notice was “to enable the government to ascertain what lands were free from claims of settlers, and thus subject to sale or other disposition.” It appears, therefore, that while the question was not directly before the court, these donation notifications were

referred to as notices given for the purpose of segregating the lands settled upon, from sale or other disposition, by the government.

It but remains, therefore, to determine the effect of the alleged offering of these lands in accordance with the proclamation, No. 693, before referred to.

An examination of this proclamation shows that the lands included in Thomas's donation claim were not specifically described in the proclamation. By the terms of the proclamation the *public lands* theretofore unoffered, situated in township three north of the base line and three east of the Willamette Meridian, were to be offered at public sale at the Vancouver office, commencing Monday, the third day of August, 1863. By reason of the filing of Thomas's notification the tracts covered thereby were not public lands within the meaning of the proclamation, and were therefore not included in its terms, nor was the effect of such notification changed by any erroneous interpretation which may have been placed upon the proclamation. For that reason the proclamation did not relieve the lands from the segregation resulting from the donation notification, which was a record claim sufficient to except the land covered thereby from the operation of the railroad grant.

Your office decision is accordingly affirmed.

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#### MINERAL LAND—MINING CLAIM—AGRICULTURAL CLAIMS.

##### COLEMAN ET AL. v. MCKENZIE ET AL.

A patent is not essential to the enjoyment of a mining claim held under a valid location; hence the failure of a mineral applicant to prosecute his application for patent is not in itself an abandonment of his claim.

Under the public land laws of the United States, lands valuable for their mineral deposits can be disposed of only under the mining laws.

The duty of determining the character of land, whether mineral or non-mineral, and of seeing that the public lands are only disposed of as authorized by law, rests upon the Land Department, of which the Secretary of the Interior is the head; a decision, therefore, of the Secretary that a specific tract of land is principally valuable for its mineral deposits, while undisturbed, is binding upon all the officers of the Land Department, and prevents disposition of the land in any other way than as prescribed by the laws specifically authorizing the sale of mineral lands.

The usual non-mineral affidavit filed by an agricultural claimant is not sufficient to overcome a prior decision of the Department that the land involved is mineral in character, or to justify a re-examination of such question of fact theretofore fairly tried and deliberately determined.

In the case of a hearing to determine the mineral or non-mineral character of a tract of land, theretofore held by the Department to be principally valuable for its mineral deposit, the burden of proof is with the agricultural claimants, and it is incumbent upon them to clearly overcome the effect of the former decision.

Agricultural claimants of land mineral in character will not be heard to plead special consideration on the ground that their entries were allowed by order of the General Land Office, and that they have settled upon and improved the land, where with full knowledge of a prior departmental decision holding the land to be mineral, and of rights asserted thereto under the mining laws, they procured the allowance of their entries without notice to the mineral claimants, and thereafter entered into possession against the protest of said claimants.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 4, 1899. (W. A. E.)

The facts necessary to a clear understanding of the questions presented by this controversy are as follows:

May 25, 1882, the Santa Clara Mining Association of Baltimore, a corporation organized under the laws of Maryland, applied to the United States surveyor general for the State of California, for the survey of a certain quicksilver mining claim, designated as the "Guadalupe Mine," located in townships 8 and 9 south and ranges 1 east and 1 west, M. D. M., San Francisco, California, land district, and containing some nine hundred acres. With this application was filed proof of location in proper manner and by qualified parties in 1865, before the enactment of the law limiting the extent or area of mining locations. Thereupon such survey was made and on June 19, 1882, the surveyor general approved the plat and field notes thereof.

October 6, 1882, the mining association presented to the local land office its application for patent to said claim, together with the requisite preliminary proof of posting of notice, etc. The land embraced in this application for patent was covered by certain homestead entries, pre-emption filings, and Valentine scrip locations, and the State of California claimed a portion thereof under its school land grant. On account of these agricultural claims the application of the mining association was rejected by the register. Thereupon the association filed an application for a hearing to determine the character of the land, alleging that it contained valuable deposits of mineral and that the association had spent more than fifty thousand dollars in developing the claim. Upon this application a hearing was ordered, of which the agricultural claimants were duly notified, and in which they fully participated. A large amount of evidence was submitted on each side, and after consideration thereof the local land office, the General Land Office, and the Department, successively, held the land to be principally valuable for its deposits of mineral. This case, which is entitled *Santa Clara Mining Association v. Scorsur et al.*, is reported in Vol. 4 of the Land Decisions, page 104, and it was therein said:

The testimony shows that the lands in question are located about sixty miles southeast of San Francisco, within a few miles of the city of San Jose, in Santa Clara county, adjoining the Capitancillos creek, and stretching out in a southeasterly [southwesterly] direction therefrom, embracing 957.32 acres. That the country is

rough and mountainous, cut into by numerous deep, precipitous gulches and canons, and covered to a great extent by dense brush, chaparral and scrub oak. That there are occasional patches of fairly good soil, varying from one to twenty acres in extent, but that the great mass of the soil is thin, and unfit for cultivation. That the land is situated in a mineral belt embracing within four miles the "Guadalupe," "New Almaden" and "Henriquita" quicksilver mines, all noted for the amount of quicksilver produced from them. That immediately to the northeast of said land lies the Guadalupe mine, also the property of the Santa Clara Mining Association. That from said Guadalupe mine there extend in a southwesterly direction, three distinct ore bearing zones, penetrating and passing through said section 30 of the lands in controversy. That several of the tunnels of the Guadalupe mine penetrate lots 7 and 8 of said land to a distance of three or four hundred feet; that many car loads of cinnabar have been taken from these tunnels, and that within ten years some forty or fifty thousand flasks of metal have been taken from the lands south of the Capitancillos creek. That the company has spent \$1,500,000 on its whole claim and that \$100,000 of that sum have been expended in developing the mineral resources of the public land in question. Some seventeen witnesses, including civil engineers, surveyors, mining experts, practical miners, assayers, mining engineers, the deputy county assessor, and neighboring farmers, all acquainted with the land, testified, on the part of claimants, that the formation of these lands is similar to that of the surrounding mineral bearing lands; that numerous specimens, produced in evidence, from croppings in various parts of sections 30 and 31, contained mineral, or indications thereof; that each lot and each ten acres of each lot is more valuable for mineral purposes than for agriculture, and that, as a fact, agriculture had been prosecuted thereon to a very limited extent. The witnesses on the part of contestant were principally neighboring farmers, none of whom claimed to be mining experts. Their testimony is to the effect that several tracts have been cleared and cultivated; that much more of the land is fit for cultivation, and is more valuable for agriculture than for minerals.

It is urged, in view of the fact that this land adjoins certain quicksilver mines, it would have been worked long ago if it had any mineral value, and that the bad faith of the company in this matter is shown by the fact that they have so failed to work said land. This would be a weighty objection were it not for the further fact that for the past seven or eight years—since 1875—the company has been actively engaged in developing the mineral resources of these lands and the lands immediately adjoining them on the northeast.

The testimony is conclusive that the land is more valuable for minerals than for agriculture.

As a result of this decision the agricultural entries and claims were canceled, or otherwise adversely disposed of according to the nature thereof, and no rights thereunder have since been asserted.

It seems that after this decision the association did not press its application for patent, but this is not in itself material because a patent is not essential to the enjoyment of a mining claim. In *Belk v. Meagher* (104 U. S., 279, 283) it is said:

A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold, and conveyed, and will pass by descent. *Forbes v. Gracey*, 94 U. S., 762. There is nothing in the act of Congress which makes actual possession any more necessary for the protection of the title acquired to such a claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators "shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations," which is to continue until there shall be a failure to do the requisite amount of work

within the prescribed time. Congress has seen fit to make the possession of that part of the public lands which is valuable for minerals separable from the fee, and to provide for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. In furtherance of this policy it was enacted by sect. 9 of the act of Feb. 27, 1865, c. 64 (13 Stat. 441, Rev. Stat., sect. 910), that no possessory action between individuals in the courts of the United States for the recovery of mining titles should be affected by the fact that the paramount title to the land was in the United States, and that each case should be adjudged by the law of possession.

December 21, 1893, John D. McKenzie filed his homestead application for lot 16 of section 25, T. 8 S., R. 1 W., being part of the land embraced in this mining claim. A few days prior to this time, to wit: on December 4, 1893, homestead applications for other portions of the land included within the mining claim had been tendered by Matthew E. Arnerich, Paul J. Arnerich and Charles P. Cole. No notice of these homestead applications was given to the mineral claimants. Each application was accompanied by the usual non-mineral affidavit, but in none of the applications was it alleged that the mineral claimants had abandoned the claim or that exploration and development subsequent to the former hearing or trial had shown the land to be non-mineral in character or that the former decision was based upon fraud or mistake such as would justify further inquiry into the character of the land.

The several homestead applications were rejected by the local officers on account of the mining claim. On appeal by the homestead claimants, which was without notice to the mineral claimants, your office, attributing to the prior departmental decision merely the quality and effect of a mineral return in the public surveys, reversed the action of the local officers, and held that there was no mineral entry or application for patent of record, and that a bare mineral survey did not segregate the land or withhold it from appropriation by any qualified applicant. In accordance with that ruling these applications were allowed and placed on record, but without notice to the mineral claimants.

November 10, 1894, your office addressed a letter to the United States surveyor general directing him to re-lot those portions of the legal subdivisions embraced within the mineral survey lines, said mineral survey to be thereafter ignored. In a subsequent letter to the surveyor general it was said by your office: "It was intended by said letter to obliterate said mineral survey." The action taken in these letters was equally without notice to the mineral claimants.

July 20, 1895, the State of California filed indemnity school selection for lots 1 and 8, Sec. 31, T. 8 S., R. 1 E., and on February 10, 1896, indemnity school selection for lots 7 and 8, Sec. 30, T. 8 S., R. 1 E., embracing portions of the land within the mining claim. These selections were apparently intended to be made for the benefit of C. P. Owen and V. A. Scheller. Upon consideration of such selections a hearing was ordered by your office letter of March 13, 1896, to determine the character of the lands covered thereby, it being held that the former

departmental decision was the equivalent of a mineral return within the meaning of paragraph 110 of the mining regulations, as amended by circular of July 21, 1894 (19 L. D., 5). While these proceedings were pending, James V. Coleman, Cecilia C. May, Isabelle C. May and E. F. Preston, as successors in interest of the Santa Clara Mining Association, presented an application for patent to this mining claim, describing the land by the original mineral survey made and approved in 1882. This application was received by the local officers, and notice thereof was published and posted.

By your office letter of May 26, 1896, further action upon this application for a mining patent was suspended, it being held that it was error to receive the same for lands already segregated by homestead entries and State selections, and the local officers were directed to cite the mineral claimants to the hearing ordered on the State selections. In some way which is not material, the present homestead claimants came into this hearing and participated therein as though they had originally been made parties thereto. All the opposing claimants, agricultural and mineral, appeared on October 6, 1896, at which date the taking of evidence in regard to the character of the land was commenced. Before any evidence was introduced the mineral claimants filed a protest against the hearing, alleging that the question as to the character of the land was *res judicata*, having been finally determined by the Department in 1885. This protest was overruled and the hearing proceeded. The several homestead claims and State selections were treated by the local officers as independent but closely connected cases. March 4, 1897, the register and receiver rendered joint opinions, holding in each case that the land covered by the particular homestead entry, or State selection, was valuable only for agricultural purposes. On appeal by the mineral claimants your office affirmed the decisions below, whereupon further appeal was taken to the Department.

Your office followed the method adopted by the local office of ignoring the mining claim as an entirety and treating each of the homestead entries and State selections as an independent case; but the several entries and State selections being in conflict with the same mining claim, all the cases having been briefed and argued as practically one case, and there being but one matter in dispute, viz: the character of the land, the entire controversy will be considered and disposed of in this decision.

The first question is whether your office erred in allowing the homestead applications to go of record in the face of departmental decision of August 24, 1885, holding the land to be mineral in character.

Under the public land laws of the United States lands valuable for their mineral deposits can be disposed of only under the mining laws. *Mining Co. v. Consolidated Mining Co.* (102 U. S., 167); *Deffebach v. Hawke* (115 U. S., 404); *Colorado Coal Co. v. United States* (123 U. S.,

327). In administering the public land laws the duty of determining the character of the land, whether mineral or non-mineral, and seeing to it that the public lands are disposed of only as authorized by law, is one which rests upon the land department, of which the Secretary of the Interior is the head. By the decision of August 24, 1885, the Secretary of the Interior, as the head of that department, declared the land here in question to be principally valuable for its mineral deposits, and so long as that decision remains undisturbed it is binding upon all the officers of the land department and prevents disposition of the land in any other way than as prescribed by the laws specially authorizing the sale of mineral lands.

A mistake was made by your office in giving to the decision of the Department merely the effect of a mineral return and allowing the homestead claimants to make entry of the land upon the mere filing of a non-mineral affidavit.

Here there had been not only a mineral survey, but also a contest between mineral and agricultural claimants. The character of the land had been put in issue, a large amount of testimony had been submitted on that point, and after consideration thereof the Department had held the land to be mineral in character. The effect of that decision could not be overcome or impaired by the mere allegation that the land contained no valuable mineral; nor could the mineral claimants be called upon to again sustain the mineral character of the land upon a mere repetition of the allegation made by the original agricultural claimants that it is not mineral land. (*Stinchfield v. Pierce*, 19 L. D., 12; *Dargin et al. v. Koch*, 20 L. D., 384; *McCharles v. Roberts*, 20 L. D., 564; *Mackall et al. v. Goodsell*, 24 L. D., 553; *Leach et al. v. Potter*, 24 L. D., 573; *Town of Aldridge v. Craig*, 25 L. D., 505; *Wilson v. Davis*, 25 L. D., 514.) To secure a hearing whereby the effect of that decision might be overcome it was necessary for the agricultural applicants to allege that exploration and development subsequent to the former hearing or trial had shown the land to be non-mineral or that the former decision was based upon fraud or mistake such as would justify further inquiry into the character of the land. At such a hearing proof of the abandonment of the mining claim would have been a circumstance tending to show that the mineral claimants deemed the land worthless for mining purposes. In the case of *McCharles v. Roberts*, *supra*, it is said that abandonment of the mining claim must be alleged and proven to avoid the effect of a former decision holding the land to be mineral, but a more accurate statement of the matter is that the allegation and proof of abandonment are material only in so far as they tend to disclose the estimate placed upon the value of the land for mining purposes by one who has been engaged in the exploration thereof and who was most interested in sustaining its declared mineral quality.

The usual non-mineral affidavit filed by each homestead claimant with his application, and by the State with its indemnity selections,

was not sufficient either to overcome the prior decision of the Department or to justify a re-examination of a question of fact theretofore fairly tried and deliberately determined. It follows that the homestead applications were improperly allowed and the hearing upon the State's indemnity selections was ordered without a proper basis therefor.

But notwithstanding the irregularity in the proceedings leading up to the hearing in these cases, the testimony submitted has been carefully considered, and to give to it its due weight it must be kept in mind that as the land has been heretofore held to be mineral in character the burden of proof is manifestly upon the agricultural claimants and it is incumbent upon them to clearly overcome the effect of that decision.

Of the witnesses for the agricultural claimants, only three, Bradford, Lance and Gleason, were experienced miners. Excepting Lance, who had worked in the mine, none of them had explored the land under the surface except to dig down a little here and there, mainly for the purpose of investigating the quality of the soil. From their testimony it appears that while the greater part of the land claimed by the mineral claimants is rough and covered to a great extent by dense brush and scrub oak, there are large portions which can be cleared and cultivated at a profit, the soil being adapted to the culture of fruit trees and grape vines.

Witness W. E. Bradford testified that he had been engaged in quicksilver mining about twelve years; that in September, 1892, he visited the land claimed by McKenzie; that he had been there two or three times since. On these trips he spent several hours examining the ground; picked up several small stones and looked at them closely and also kicked the soil here and there, but saw no indications of mineral, and did not investigate below the surface. Recalled in rebuttal, he testified that he had also been over the land covered by the other agricultural claims and had knocked off pieces of rock here and there with a hammer, and that he found only barren country rock with no traces of quicksilver.

Witness Richard Lance, jr., testified that he has known the land in dispute since 1875; that he worked for about twelve years in the Guadalupe quicksilver mine which is on Mexican-grant land adjoining the land in question on the northeast; that he is familiar with the nature, extent, and direction of the shafts, cuts, drifts, and tunnels made by the mining association in search of ore; that the main shaft, which is six hundred feet deep, is situated on the grant land, northeast of the land in dispute; that from the bottom of this shaft a tunnel or drift runs six hundred feet in a southeasterly direction, thence east about two hundred feet, from which point an incline shaft runs southeast; that at the end of this incline shaft a new station was made and drifts were run thence about five hundred feet south and one hundred and fifty feet north; that none of these shafts or drifts were on the lands here

in dispute; that about five hundred or six hundred feet southeast of the main shaft is the mouth of a tunnel known as the "Road Tunnel"; that this tunnel runs south about two hundred feet; that the mine shut down in 1884; that the ore had given out at that time; that the distance from the main working shaft to McKenzie's claim is about five thousand or six thousand feet, and none of the drifts or tunnels run in that direction; and that no ore or quicksilver was ever developed by the mineral claimants or by anyone for them upon any of the lands in dispute.

Witness A. M. Gleason testified that he had been engaged in mining for forty years; that he examined the land in contest in 1860 and again a few days before this hearing; that there is no quicksilver rock on the southwest side of Guadalupe creek; that he found no indications of quicksilver on the land claimed by McKenzie; that he picked up pieces of rock and examined ledges on the other agricultural claims but found only barren country rock with no signs of quicksilver; that he did not investigate below the surface.

From the testimony introduced on behalf of the mineral claimant it appears that the Guadalupe quicksilver mine is one of the oldest in that part of the country and that two or three million dollars worth of ore has been extracted from it. The main works of the company are located on Mexican-grant land, northeast of the lands in controversy and southwest of a creek referred to in the record as "Guadalupe Creek," but named on the maps as "Arroyo de los Capitancillos." This is the creek to which witness Gleason referred when he testified that there was "no quicksilver rock on the southwest side of Guadalupe creek." In that he was clearly mistaken because it appears by apparently indisputable evidence that the mineral claimants took quantities of quicksilver from southwest of this creek. It also appears that the receiver of the mining association was required to account to certain general creditors of the association for about \$70,000 worth of quicksilver mined by him from the lands here in contest, which lie southwesterly from the creek. The witness Lance had stated that the tunnels and underground workings of the mine do not any of them extend to the land in controversy and that they run in a southeasterly, and not in a southwesterly, direction from the main shaft, which he locates southwesterly from the creek and near to but northeasterly from the land in controversy. The witness is in error in his statement respecting the direction taken by these tunnels and underground workings, because some of them are clearly shown to take a southwesterly direction and to reach the land here in question.

John B. Treadwell on behalf of the mineral claimants testified that he is a civil mining engineer and deputy United States mineral surveyor; that he made the mineral survey of this mining claim in 1882; that he has examined the mine underground to determine the trend or pitch of the ore body; that he found it to be a fissure filled with

cinnabar ore, having a general pitch to the south and southwest; that the future of this mine is in the ore body that lies in the same direction south and southwest from the main shaft, which underlies principally the land, of which survey was made by him; that from his experience in mines and mining he believes this ore body may be expected to underlie the whole of this territory, and without this the future of the claim has a poor outlook; that the Road tunnel is about four hundred feet long, starts on grant land and runs in a southwesterly direction into this mining claim, and that in his opinion the land here involved is many times more valuable for mining than for agricultural purposes.

Herbert P. Thayer testified that he was the assistant superintendent and cashier of the Santa Clara Mining Association from 1879 to 1894; that his duties were both above and below the surface; that since 1894 he has been in the mine eight or ten times; that the main or "engine shaft" is six hundred feet deep; that drifts were run and ore extracted from the two hundred-foot level; that at the six hundred-foot level a drift was run south about 335 feet, thence east and west about four hundred or six hundred feet each way; that from the end of "No. 6 east drift" an incline shaft was run southwest about six hundred feet to what was known as the "No. 10 level;" that valuable drifts were opened in this incline shaft on an average of fifty feet apart; that these underground works represented an expenditure of over a quarter of a million of dollars; that "all of this work or the majority of it on the lower levels was upon the land in contest;" that in later years some work was done on the upper levels and a tunnel, called the "Road Tunnel" was run into the side of a hill; that there are three distinct veins of ore on the entire mining claim; that all the work was done upon the main vein which runs south and west; that another vein, running almost opposite to this, pitches into a hill a little north of McKenzie's claim; that about half a mile south of the McKenzie claim there is a tremendous outcropping of cinnabar; that these outcroppings are on this mining claim; that no actual mining has been done by the mineral claimants since December 15, 1884; that work was stopped then until some pending litigation could be settled; that the mine had not been more than half prospected and was not worked out; and that the distance from the main working shaft to the boundary of McKenzie's claim is 3440 feet.

Henry May testified that he was appointed receiver of the Guadalupe mine on July 9, 1880, and acted as receiver until December, 1883; that his wife is one of the present owners of the mine; that at the time he took charge as receiver the superintendent was working in all the available portions of the mine, but on account of matters growing out of the receivership work was stopped upon the land here involved; that drifts No. 6 west, No. 6 south, and the Road tunnel extended into this land and work in them was stopped on account of the order of the court; that the ore in the Guadalupe mine dips in a southwesterly direction

at an angle that would carry it under this land; that there are three distinct ledges of quicksilver ore on the entire mining claim; that there are several outcroppings of cinnabar ledge on the land here involved; that drift No. 6 west runs into this land about three hundred and fifty feet and the Road Tunnel about one hundred feet; that drift No. 5 west also goes into this land about one hundred feet; and that no work could be done after 1885 on account of the litigation in which the mine was involved.

Thomas P. B. Hicks testified for the mineral claimants but his testimony is shown to be so prejudiced that it is not entitled to much weight and need not be recited.

James Pierce testified that he has known the land in question since 1877; that he has been employed as a watchman at the Guadalupe mine for several years; that the land in controversy has been enclosed by a fence since 1887; that this fence was broken by the homestead claimants at the time they made settlement; that witness warned them off, but they became threatening and said they intended to stay; that ledges of quicksilver rock are found all over the land embraced within the mining claim, and that there is a ledge of quicksilver rock in front of McKenzie's house and another just to the east of it.

Edgar F. Preston testified that he is a part owner of the Guadalupe mine and has represented the mining association and the succeeding mineral claimants for a number of years as attorney. He gives the details of the litigation in which the property was involved from 1884 to 1892, and states that the present owners did not acquire title until after the decree of the United States circuit court, made in 1892; that the mine could not be worked while this litigation was pending; that shortly after the decree was rendered in 1892, Maria L. Coleman, the principal owner by purchase under that decree, died, and this prevented the working of the mine during the settlement of her estate; that witness has been all over the land in question a number of times; that there are cinnabar outcroppings thereon in several places; that the workings of the Guadalupe mine extend under this land and a large quantity of metal was taken therefrom until work thereon was stopped by order of the court.

From this analysis of the evidence it does not appear that the agricultural claimants have succeeded in establishing by a preponderance of the evidence that all or any portion of the land covered by the mining claim is more valuable for agricultural purposes than for mining. Considering the mining claim as an entirety, the land is shown to be many times more valuable for mining than for agricultural purposes, and considering the agricultural claims separately and independently, the agricultural claimants have not successfully sustained the burden of proof placed upon them as a result of the departmental decision of August 24, 1885. It must therefore be held that the mineral status given to these lands by that decision has not been overcome and remains undisturbed.

It is urged that the homestead claimants are entitled to special consideration because, relying upon the action of your office in ordering the allowance of their entries, they have settled upon and improved the tracts claimed by them; but of this it need only be said that, with full knowledge of the prior departmental decision holding the land to be mineral and with full knowledge of the rights asserted under the mining claim, they procured the allowance of their entries without giving the mineral claimants any notice thereof or affording them an opportunity to be heard, and then entered into possession of the land against the protest of the mineral claimants, so that their present situation is altogether one of their own making.

The homestead entries and State selections being for land which is shown to be mineral in character and therefore subject to disposition only under the mining laws, the homestead entries will be canceled, the State selections will be rejected and the suspension of the mineral claimants' application for patent will be revoked.

The decisions of your office are accordingly reversed.

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SCHOOL LANDS—INDEMNITY—GREAT SIOUX RESERVATION.

STATE OF NEBRASKA.

The directions contained in the act of March 2, 1889, restoring lands in the Great Sioux reservation to the public domain, that said lands should be subject to disposal only to actual settlers, on the payment of a fixed price therefor, and that the moneys accruing from such disposal should form a part of the permanent Indian fund, constituted an appropriation of said lands for the specific purpose of creating an Indian fund, and an inhibition upon their disposal in any other manner. Said lands are therefore not subject to selection as school indemnity for losses within said reservation, and the certification of lands thus selected is ineffective, and the State takes no title thereby.

The case of the State of Nebraska, 18 L. D., 124, overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 5, 1899. (E. F. B.)

The Department is in receipt of a communication from your office of July 5, 1898, submitting for consideration a list of school indemnity selections made by the State of Nebraska of lands lying within the Great Sioux Indian reservation, in that State, in lieu of lands lost in place within the limits of said reservation, and asking to be advised of the status of similar selections approved to said State May 22, 1897, and of what action is necessary in the premises in the event that the present list should not be approved.

It appears from your said communication that the lands included in the present list were inadvertently omitted from the list approved May 22, 1897, under departmental decision of February 12, 1894 (18 L. D., 124), in which it was held that the State of Nebraska is entitled to

select lands within the limits of said reservation as indemnity for school lands lost in place in said reservation. In the case of State of South Dakota (26 L. D., 347), involving the right of that State to select lands within the limits of the Great Sioux reservation, in lieu of school lands lost in place outside of said reservation, it was held that these lands are subject to disposal under the homestead law only, and that there is no authority vested in the Department to dispose of them, except in the manner and for the purposes contemplated by the act of March 2, 1889 (25 Stat., 888), which requires that payment shall be made for all the land within said reservation, the proceeds to be applied to the permanent fund of the Indians, and that therefore said lands are not subject to selection as indemnity under the school land grant.

Unless there is some statutory provision that takes the State of Nebraska out of the operation of this act, these decisions are evidently in conflict.

The act of April 19, 1864 (13 Stat., 47), providing for the admission of Nebraska into the Union, contained the usual grant of school lands,—that is, of sections sixteen and thirty-six in every township,

and when such sections have been sold, or otherwise disposed of, by any act of Congress other lands, equivalent thereto, in legal subdivisions of not less than one quarter section, and as contiguous as may be.

This reservation was created by the treaty of April 29, 1868 (15 Stat., 635), and at that time was wholly within the limits of the Territory of Dakota, organized by the act of March 2, 1861 (12 Stat., 239), which directed the usual reservation of the sixteenth and thirty-sixth sections for school purposes, when the lands should be surveyed.

By act of March 28, 1862 (22 Stat., 35), the northern boundary of Nebraska was extended so as to include all that portion of the Territory of Dakota lying south of the forty-third parallel of north latitude and east of the Keyapaha river and west of the main channel of the Missouri river, which embraced a part of this reservation. This act declared that the northern boundary of the State shall be extended to said forty-third parallel as fully and effectually as if said lands had been included in the boundaries of said State at the time of its admission to the Union.

This carried with it such rights, grants and privileges, in the added area as the State would have possessed had the added area been originally included within the political boundaries of the State, and no more. Among these was the grant of lands for the support of common schools.

The lands in this added area remained in reservation and unsurveyed until the act of March 2, 1889, *supra*, which created separate reservations from portions of the Great Sioux reservation, and restored the remainder of said lands to the public domain, except certain islands therein specified, to be disposed of by the United States to actual settlers only, but provided that the lands should be paid for at a certain price therein named, and that all money accruing from the disposal

thereof should be paid into the Treasury of the United States for the benefit of said Indians as part of their permanent fund.

It is evident that Congress did not contemplate that these lands should be subject to selection by the State as indemnity to compensate for school lands lost in place, or for deficiencies in townships, either in or outside of the reservation, without compensation being paid therefor, for the reason that such a disposition would tend to defeat the plain purpose of the act, which was to create a fund which should be set apart for the benefit of the Indians.

This is clearly shown by the obligation imposed upon the United States by the 24th section, which reserves for the use and benefit of the public schools the sixteenth and thirty-sixth sections, but provides that the United States shall pay to the Indians, out of any moneys in the Treasury not otherwise appropriated, the sum of one dollar and twenty-five cents per acre therefor. This intent is also plainly manifested by the provision contained in the 21st section of the act, which imposes upon the United States the obligation to take all of said lands remaining undisposed of at the end of ten years, and to pay for the same the graduated price fixed by the statute, which is to be credited to said Indians as part of their permanent fund.

No reason is apparent why Congress should provide for payment by the United States to the Indians for the sixteenth and thirty-sixth sections, which are reserved for school purposes, and make no provision for making like payment for other lands selected by the State as indemnity, if it was intended that the other lands in the reservation should be subject to such indemnity selection.

The reservation of the sixteenth and thirty-sixth sections for the benefit of public schools, with the obligation of the United States to pay to the Indians the price fixed by the act for the lands so reserved, can not be extended by implication to lands not reserved.

While Congress gave to Nebraska indemnity for sections sixteen and thirty-six where sold or otherwise disposed of by any act of Congress, there is nothing illogical or inconsistent in the action of Congress denying to the State the right to take its indemnity from a particular body of lands and requiring it to seek such indemnity elsewhere. The directions contained in this act respecting the disposition of these lands constituted an appropriation of them by an act of Congress for the specific purpose of raising funds for the Indians and was an inhibition upon their disposal in any other manner. No right to lands under an indemnity selection can be obtained unless they are at the time subject to selection. The act of February 28, 1891, amending sections 2275 and 2276 of the Revised Statutes relating to school indemnity lands provides that they "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," but as before shown the lands here selected were not unappropriated.

The certification of such lands to the State of Nebraska was as clearly contrary to the terms of the statute and the agreement with the Indians as was the certification to South Dakota of the lands involved in the decision reported in 26 L. D. at page 347, where it was held that the certification was null and void and ineffectual to convey to the State any right or title, for the reason that the lands certified were not of the character intended to be granted under the provision for school indemnity lands. (*Weeks v. Bridgman*, 159 U. S., 541), and hence it is the duty of the Department to execute the trust imposed by the statute and dispose of the lands for the benefit of the Indians, regardless of such certification.

The decision reported in 18 L. D., at page 124, must give way to the latter decision reported in 26 L. D., 347, and to the views herein expressed.

The action which was taken in the South Dakota case should be taken in this—to wit, that in view of the fact that the State may have disposed of some of the tracts since certification, an opportunity should be afforded the State or its grantees to obtain relief by legislation authorizing the purchase of the lands certified at the price fixed by the 21st section of the act of March 2, 1889, and to this end, you will withhold from entry all lands so certified, and notify the State of this action that it may take such steps as it may deem proper.

The list accompanying your said communication of July 5, 1898, is herewith returned without approval.

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PRACTICE—NOTICE OF CONTEST—SERVICE—ATTORNEY IN FACT.

NORMAN *v.* PHOENIX ZINC MINING AND SMELTING Co.

Service of notice of contest upon the attorney-in-fact for the defendant is not sufficient, in the absence of proof that such attorney-in-fact was empowered to receive service on behalf of the defendant.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 5, 1899. (J. L. McC.)

The Phoenix Zinc Mining and Smelting Company, on January 29, 1893, filed in the local office mineral application No. 62, for the Buck Branch placer mining claim, embracing the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 5; the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 6; the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 6; the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 7; and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 8, T. 17 N., R. 14 W. of the fifth principal meridian, Harrison land district, Arkansas.

On February 20, 1897, Simon B. Norman filed a corroborated affidavit, in the nature of a contest, involving the character of that part of the land embraced in said application, described as the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 7, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of

Sec. 8. It is alleged that the land thus described is non-mineral, more valuable for agricultural than for mining purposes; also that said Phoenix Zinc Mining and Smelting Company has wholly abandoned said claim, and has done no assessment work thereon since filing its application as above. At the same time he presented his application to make entry under the homestead law, of the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , of Sec. 7, and the NW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 8, said township and range. This application was rejected, and citation issued for a hearing, to be had May 5, 1897,—service being had upon George McCray, whose name appears in different places in the record as “attorney-in-fact” of said mining company.

The only question presented is the sufficiency of this service, which was accepted by the local office and by your office as sufficient.

An attorney-in-fact is a private or special attorney, appointed for some particular or definite purpose not connected with a proceeding at law, the formal authority by which he is appointed being called a letter or power of attorney, in which is expressed the particular act or acts for which he is appointed (Weeks on Attorneys, Sec. 28).

The powers of an attorney-in-fact are limited by the language of the instrument constituting him such; and as there is no copy of the power of attorney given to McCray in the record, what act or acts he was appointed to perform is left wholly uncertain. It was altogether irregular to proceed to render final decision in the case in the absence of any showing as to whether McCray had authority to receive service in behalf of the company.

The conclusion that the service on McCray was sufficient can not be reached by a negative process of reasoning; namely, that in the absence of any showing that McCray was *not* invested with general powers, it is to be presumed that he *was* invested with such powers. Service of notice must be affirmatively shown by the contestant, and service upon the attorney-in-fact for the defendant company is not sufficient in the absence of proof that such attorney-in-fact was empowered to receive service on behalf of the company. There being no affirmative evidence of proper service in this case, the local office should not have proceeded with the contest, and your office should not have undertaken to decide the case on the testimony submitted by the contestant.

The case is accordingly remanded to your office, with direction to return the papers to the local office for further proceedings upon proper notice, if contestant should so desire.

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BARRY *v.* HENDRICKS.

Motion for rehearing denied by Secretary Hitchcock May 5, 1899. See departmental decision of March 2, 1899 (28 L. D., 160).

## RAILROAD GRANT—INDEMNITY SELECTIONS—FOREST RESERVATION.

## OREGON AND CALIFORNIA R. R. Co.

The directions in section 2, of the railroad grant of July 25, 1866, that on the filing of the map of survey of the road the "Secretary of the Interior shall withdraw from sale public lands herein granted," etc., are applicable only to the lands within the primary limits of the grant.

A right conferred under a railroad grant to select indemnity within certain defined limits does not prevent Congress from otherwise appropriating or disposing of the lands within said limits at any time before a selection thereof becomes effective; and the establishment of a forest reservation that includes such lands, prior to the approval of selections therefor is such an appropriation of said lands as to defeat the right of indemnity selection.

The case of the Southern Pacific R. R. Co., 28 L. D., 281, cited and followed.

*Secretary Hitchcock to the Commissioner of the General Land Office May*  
(W. V. D.) 5, 1899. (E. F. B.)

On August 7, 1895, the Oregon and California Railroad Company filed in the local land office at Oregon City, Oregon, an application to select certain lands situated in township 1 south, range 6 east, embraced and described in list No. 24, as indemnity for lands lost to the company under the grant of July 25, 1866 (14 Stat., 239), to aid in the construction of said road. The local officers rejected said application for the reason that the lands applied for are within the limits of the Bull Run timber-land reserve created by proclamation of the President of June 17, 1892 (27 Stat., 1027), under the provisions of the 24th section of the act of March 3, 1891 (26 Stat., 1095).

Your office affirmed the action of the local officers rejecting said application and the company has appealed from your decision assigning error

in holding that said lands were public lands within the meaning of section 24, act of March 3, 1891, and therefore subject to forest reservation thereunder.

The tracts in controversy, selected and embraced in list 24, are within the indemnity limits of the grant to said company and also within the limits of the Bull Run timber-land reserve.

In support of its appeal the company contends that the granting act commanded the Secretary of the Interior to withdraw for the benefit of the company the sections of land of the designated numbers within the indemnity limits of said grant as well as within the place limits thereof, and that this withdrawal was accordingly made in 1870; that although an order was issued by the Secretary of the Interior in 1887 purporting to revoke this withdrawal of indemnity lands, it could not and did not have the effect of nullifying the statute and the order made in pursuance thereof; that neither in the act authorizing the forest reservation nor the proclamation of the President establishing the same, was it intended to include land previously reserved for the benefit of the

railroad company under its grant; and that prior to the establishing of the forest reservation the railroad company applied to select these lands but the application was rejected by the local officers because the lands were not then surveyed, from which ruling an appeal was prosecuted to your office and was there pending when the forest reservation was established.

A question similar to that involved in the last proposition was presented in the case of Southern Pacific Railroad Company (28 L. D., 281), which arose upon an application by said company to select as indemnity lands lying within the limits of the Sierra forest reserve, established under the 24th section of the act of March 3, 1891.

In that case it was claimed that the application had been filed in the local office and was pending at the date the forest reserve was created, and that the tract selected was then subject to selection under the terms of the grant, and was excepted from the operation of the proclamation creating the reservation. But it was held that as the selection had not been approved by the Secretary of the Interior at the date of the proclamation establishing the reservation the title remained in the United States subject to its disposal and that the reservation of the land for the purposes contemplated by the 24th section of the act of March 3, 1891, was such a disposition of the land as to defeat the right of selection although the tract may have been subject to selection at the time the preliminary proceedings were taken by the company. It was also held that the inchoate right acquired by the company under an unapproved selection pending at the date of the proclamation, was not protected by the clause in the proclamation excepting from its operation all lands which may have been prior to the date thereof embraced in any legal entry or covered by any lawful filing duly of record in the local land office.

The other contentions are rested upon the provision in the second section of the granting act directing that upon the filing of a map of survey of the road, "the Secretary of the Interior shall withdraw from sale public lands *herein granted* on each side of said railroad so far as located and within the limits before specified." The Secretary of the Interior did, on March 26, 1870, withdraw the lands within both the primary and indemnity limits which it is insisted was made in obedience to the statutory mandate contained in said section, and that by such withdrawal the lands were appropriated and removed from the category of public lands. It is also insisted that said withdrawal remains in full force, notwithstanding the purported revocation thereof; as to the indemnity limits, by the Secretary of the Interior in 1887. Your office held that under the rulings of the Department in the case of Northern Pacific R. R. Co. v. Miller (7 L. D., 100) and Northern Pacific R. R. Co. v. Davis (19 L. D., 87), the withdrawal was of no force or effect as to the indemnity limits and therefore did not specially consider its revocation.

A determination of the question here presented does not depend upon the validity or invalidity of that withdrawal of indemnity lands. The direction to the Secretary to withdraw lands on account of said grant was limited to the lands "herein granted" and did not include indemnity lands. The withdrawal of indemnity lands, if effective, rested upon executive power and authority and was subject to revocation by the same power and authority which created it. In this respect this grant does not differ materially from the grant to the Oregon Central R. R. Co., made by the act of May 4, 1870 (16 Stat., 94). See *Oregon and California R. R. Co. v. Bales* (28 L. D., 231).

If a valid withdrawal of lands for indemnity purposes was made for the benefit of this grant, such withdrawal conferred no vested right in the company to any of the lands within the indemnity limits, but the full legal title and right of disposal of such lands remained in the government until they were actually selected and approved by the Secretary of the Interior. The right to indemnity conferred by the grant is merely a right to select public lands within designated limits under certain contingencies, but no title to any particular land vested in the company until after a selection had been made and approved. *Kansas Pacific R. R. Co. v. Atchison R. R. Co.* (112 U. S., 414); *Wisconsin R. R. v. Price Co.* (133 U. S., 496); *United States v. M. K. & T. Ry. Co.* (141 U. S., 358).

The withdrawal of lands for the benefit of a grant reserves them from other disposition under the laws providing for the disposal of the public domain, but it confers no rights as against the government which did not exist without such withdrawal. The provision in the grant giving the company the right to select within defined limits other lands to supply deficiencies occurring in the granted limits, does not prevent Congress from otherwise appropriating or disposing of the lands within such indemnity limits at its pleasure at any time before a selection thereof becomes effective by the approval of the Secretary of the Interior. In *Wisconsin R. R. Co. v. Price* (133 U. S., 496, 512), the court said:

The government was, indeed, under a promise to give the company indemnity lands in lieu of what might be lost by the causes mentioned. But such promise passed no title, and, until it was executed, created no legal interest which could be enforced in the courts. (See also *Missouri, Kansas and Texas Ry. Co. v. United States*, 14 U. S., 358.)

But the clearest and most positive expression of the court as to the right of the company to indemnity lands, and of the absolute power of the government to dispose of all lands within indemnity limits at any time prior to selection by the company and approval by the Secretary of the Interior, is in *Kansas Pacific R. R. Co. v. Atchison, Topeka and Santa Fe R. R. Co.* (112 U. S., 414, 421), in which it is said:

For what was thus excepted other lands were to be selected from adjacent lands, if any then remained, to which no other valid claims had originated. But what

unappropriated lands would thus be found and selected could not be known before actual selection. A right to select them within certain limits, in case of deficiency within the ten-mile limit, was alone conferred, not a right to any specific land or lands capable of identification by any principles of law or rules of measurement. Neither locality nor quantity is given from which such lands could be ascertained. If, therefore, when such selection was to be made, the lands from which the deficiency was to be supplied had been appropriated by Congress to other purposes, the right of selection became a barren right, for until selection was made the title remained in the government, subject to its disposal at its pleasure.

The decision of your office rejecting said list of selections is affirmed.

SCHOOL LANDS—SETTLEMENT PRIOR TO SURVEY—ADJUSTMENT.

MUNRO ET AL. *v.* STATE OF WASHINGTON.

A settlement under the donation law prior to survey does not except the land covered thereby from the operation of the grant of school lands, where after survey the settler abandons his claim without asserting any right thereto before the Land Department.

In determining the amount of school indemnity land to which a State is entitled on account of a fractional township, the entire quantity of land in said township is the basis of adjustment, irrespective of the fact that a part of said township may be embraced within an Indian reservation.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 5, 1899. (F. W. C.)

Separate appeals have been filed on behalf of John Munro and Edson Gerry, agent for Mary F. Thurston, from your office decision of August 6, 1897, rejecting their applications to enter certain portions of Sec. 16, T. 38 N., R. 2 E., Seattle land district, Washington, because, as held in said decision, the tracts have passed to the State on account of the grant for school purposes.

These applications were filed on June 25, 1897, and were accompanied by a certified copy of the proceedings of the Board of State Land Commissioners, under date of June 21, 1897, disclaiming any interest in and to the lands applied for, upon the grounds that one James Munro, in the year 1859, which was prior to the government survey of the township, settled upon, took up, and improved as a donation claim under the laws of the United States, the land embraced in said applications; that the State has been fully compensated by the approval, by the Secretary of the Interior, of the list dated May 4, 1895, for all deficiencies in said township number 38 north, range 2 east, and

that the State of Washington is not asserting through its Land Department or otherwise any claim of ownership in or to said lands first above described as being included in the said James Munro's donation claim, and has no part of same listed or claimed among the school lands belonging thereto.

Upon consideration of said applications to enter in connection with the proceedings had by the State Land Commissioners, your office deci-

sion of August 6, 1897, held that there was no authority under the State constitution by which the State's title to school lands could be disposed of except at public auction to the highest bidder; that the lands covered by the applications by Munro and Thurston had passed to the State on account of the school grant, and therefore said applications were rejected; from which action the applicants have, as before stated, appealed to this Department.

An examination of the record submitted on appeal shows that these lands were formerly embraced in the homestead claims of David Dealy and Moses Younkin, who made settlement upon the land believing the same to be a part of the public land subject to homestead entry, and made very valuable improvements thereon, the improvements by Dealy being shown to be of the value of about \$8,000. Younkin was killed upon the tract here in question by an Indian, and Dealy has since died.

For the relief of their widows an act was passed February 10, 1894 (28 Stat., 981), by which the State was authorized to select other lands in lieu of those here in question, or to indicate its intention so to do, whereupon Martha A. Dealy and Mary Younkin were to be permitted to enter, under the homestead laws, the tracts embraced in their several claims and to complete title thereto upon compliance with the homestead laws.

The State was called upon by your office, through its proper officers, to make selection or indicate its purpose to make selection of other lands, as provided for in said act of February 10, 1894, and in response thereto there was transmitted the veto by the governor of the State of a bill passed by the State legislature, having as its object the carrying into effect of the relief intended to be extended to the above mentioned persons by the act of Congress before referred to. Said veto rested upon the opinion of the Attorney General of the State that, in view of article sixteen, sections one and two, of the State constitution, it was not within the power of the legislature to part with the title to any of the lands granted to the State for educational purposes until the full value thereof had been paid into the treasury. It was dated March 11, 1895, and no further action appears to have been since taken with a view to carrying into effect the relief intended to be granted by the act of February 10, 1894, *supra*.

Relative to the State's claim to this land under the school grant, it must be said that, so far as shown by the records, the tracts here in question were public lands free from all claim at the date of the public survey. The alleged claim of James Munro prior to survey appears to rest upon the affidavit of said James Munro, corroborated by other persons, to the effect that he settled upon, built a cabin and improved a portion of the tract in question prior to the government survey, with the intention of taking the same under the donation laws; that upon survey, being informed that the tract was a portion of section sixteen, and that he could not hold the land as against the State, he sold the

improvements he had made upon the land and abandoned all claim thereto. He does not appear to have ever filed a donation notification or made other claim to the land through a proceeding before the surveyor general or the land department. The showing made relative to said claim is not sufficient to defeat the operation of the school grant upon the tract embraced therein, and it must therefore be held that said tracts passed to the State upon their identification by the survey, and that its claim to the same is a good and sufficient cause for rejecting applications to make entry thereof, unless the State has taken other lands in lieu thereof. (Thomas E. Watson, on review, 6 L. D., 71.)

Upon the survey of this township it was found to be fractional, containing only 12,190.55 acres. Under the adjustment provided for in section 2276 of the Revised Statutes, as the township contained a greater quantity of land than one-half and not more than three-fourths, of a township, the State became entitled on account of said township to nine hundred and sixty acres for the benefit of the common schools.

It is contended that, as a portion of the land in this township was embraced within an Indian reservation, such portion should be excluded from the contents of the township in making the adjustment provided for in said section. This contention can not be acceded to, as the full quantity of lands included within the township, without regard to its condition, is made the basis of the adjustment therein provided for.

The land covered by the applications under consideration amounting to 270.50 acres has been treated as inuring to the State in place, in the adjustment, so far as made, of the State's grant on account of this township.

Selections have been made by the State for all deficiencies in this township, aggregating six hundred and eighty acres, six hundred and forty acres of which have been approved, leaving a selection of forty acres yet undetermined, which, together with the 270.50 acres, the portions of section 16 in place shown by the survey to be free from other claims and embraced in the applications now under consideration, make a total of 950.50 acres, or 9.50 acres less than the State became entitled to for common schools on account of said township.

It can not therefore be held, as claimed, that the State has been indemnified on account of the tracts here in question, and for that reason is prevented from asserting claim to the lands in place.

Relative to the disclaimer of interest by the Board of Land Commissioners, which accompanied the applications under consideration, it is sufficient to state that on August 18, 1897, the Board of State Land Commissioners passed a further order rescinding and setting aside its former order passed on the 21st of June, 1897.

Your office decision rejecting the applications by Jame Munro and Edson Gerry, agent for Mary F. Thurston, is therefore affirmed.

Should the State's claim be eliminated, the meritorious parties entitled to complete entry of these lands would be those claiming under or

through David Dealy and Moses Younkin, for whose relief the act of February 10, 1894, *supra*, was passed. It remains with the State, however, to extend this relief.

## SETTLEMENT RIGHT—RELINQUISHMENT—INTERVENING CLAIM.

WOOD *v.* BOND.

One who goes upon land covered by the entry of another under an agreement with the prior entryman that the entry shall be relinquished for his benefit, acquires no settlement right as against the intervening entry of a third party, made on the relinquishment of the prior entry, if he has taken no action toward securing the cancellation of said entry.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *May 6, 1899.* (E. P.)

The land involved in this appeal is the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 34, and the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 35, T. 40 N., R. 4 W., Lewiston land district, Idaho, and was formerly embraced in an entry of one David E. Nill, who executed a relinquishment of the same on or about March 1, 1897.

March 3, 1897, William H. Bond filed Nill's relinquishment of said land, and made homestead entry thereof.

March 12, 1897, David A. Wood filed affidavit of contest against Bond's entry, alleging, in substance, that at the time Bond made said entry he had never resided upon or improved the land; that Nill had abandoned the land for more than six months next prior to the date of his relinquishment; that on March 3, 1897, the day on which Nill's relinquishment was filed and Bond made his entry, affiant was the owner, by purchase from Nill, of the improvements placed on the land by Nill; that on said date, and for more than six months next prior thereto, affiant was residing with his family on the land; that said improvements purchased from Nill, together with the improvements placed on the land by affiant, were of the value of four hundred dollars; that at the time affiant purchased these improvements Nill informed him that it was his intention to abandon the land and relinquish his claim to the same.

May 25, 1897, hearing was had before the local officers, and on June 12, 1897, they held that there was no evidence that contestant ever applied for, or took any steps toward acquiring title to, said land, but that he denuded it of its timber for sawmill purposes, as a matter of commerce; that he was therefore a trespasser, and violated the law and the rules and regulations governing the use of timber on the public domain; and recommended that his contest be dismissed and Bond's entry held intact.

Wood appealed, and your office, by decision of September 20, 1897, held as follows:

In my opinion the only question to determine in this controversy is, whether Wood, by virtue of being an actual settler on the land when Nill's entry was canceled, is entitled to the prior right of entry.

It is well settled that where a person settles on land which at the time is covered by a valid existing entry, he can acquire no right as a settler against the entryman, but on the cancellation of said entry the right of the settler to the land attaches on that instant, and is prior to that of a subsequent entryman.

Your decision is therefore reversed, and H. E. 5010 held subject to Wood's prior right.

Bond has appealed to the Department, alleging that your office erred in holding that said Wood was a *bona fide* settler upon said land, and in failing to take into consideration the undisputed evidence on the part of contestee, to the effect that Wood did not intend to enter the land, but did intend to remove therefrom and abandon the same.

The record shows that about March 1, 1896, Nill, who at that time had an entry for the land, made an agreement with Wood to sell the latter his improvements on the land and relinquish the entry, on the delivery to him by Wood of 35,000 feet of common lumber, at the rate of eight dollars per thousand, one-half of which was to be delivered by June 1, 1896, and the remainder within six months; that Nill was to relinquish the land as soon as the lumber was delivered, or as soon as he was satisfied that the same would be delivered; that pursuant to this agreement Nill left the land and gave Wood possession; that Wood moved onto the land with his family April 3, 1896, and since that time has continuously resided thereon; that up to August 6, 1896, Wood had delivered to Nill, according to Wood's books, two hundred and six of the two hundred and eighty dollars' worth of lumber which he had agreed to give Nill for his improvements; that Wood had placed upon the land improvements of the value of about two hundred dollars; that he had cut from the land timber which had yielded from seventy-five thousand to one hundred thousand feet of lumber; that he had cultivated about one and a half acres of the land; that on March 3, 1897, Nill delivered to Bond, for the sum of fifty dollars, his relinquishment of the entry, whereupon Bond immediately filed the same and made entry for the land; that Bond knew when he purchased said relinquishment and entered the land that Wood was residing thereon with his family; that Bond had never resided upon or improved the land up to the date of the contest.

It will be seen that, under his agreement with Nill, Wood had been occupying the land for nearly eleven months, and had never taken any steps to clear the record of Nill's entry, either by procuring a relinquishment thereof, or by initiating contest against the same.

The facts in this case are in all essential particulars similar to those in the case of *Newbanks v. Thompson* (22 L. D., 490), wherein it was held that the settler, by his failure to contest the former entry, or procure the relinquishment of the same, not only subjected himself to the

rights of anyone who might choose to contest the entry, but also forfeited his rights as against the second entryman, who made his entry after filing the relinquishment of the former entryman.

Several cases are referred to in the case cited wherein the Department held that the right of a *bona fide* settler residing upon land covered by the entry of another attaches *eo instanti* on the relinquishment and cancellation of the entry, and that such right is superior to that of a homesteader who makes entry for the land immediately after the relinquishment; but in those cases none of the settlers had gone upon the land with the entryman's consent, and the settler's rights were held to be superior to those of the intervening entryman because, under the circumstances under which settlement was made, the equities were in the settler's favor; while in the cited case the settler's equities, by reason of his settlement, were more than offset by his action in allowing the land to remain segregated by an entry which, by reason of his own agreement with the entryman, was subject to contest.

Under the ruling in the above-cited case Wood's contest must be dismissed, and Bond's entry held intact. Your office decision is therefore reversed.

APPLICATION TO ENTER—INDEMNITY SELECTION—APPEAL.

FALJE *v.* MOE.

An application to enter lands included within a pending railroad indemnity selection, made in accordance with departmental rulings then in force, confers no right on the applicant where he does not attack the validity of such selection, and no rights are gained by an appeal from the rejection of an application thus presented.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 9, 1899. (H. G.)

Henrich Falje appeals from the decision of your office of March 19, 1898, holding his application to enter as a homestead the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and lots 3 and 4 of section 7, T. 124 N., R. 44 W. (described in the decision of your office as the SW.  $\frac{1}{4}$  of said section), in the Marshall, Minnesota, land district, tendered May 21, 1896, subject to the right of Arne D. Moe to enter said tract as a homestead, under his application tendered November 9, 1891.

It appears from the decision of your office herein that the St. Paul, Minneapolis and Manitoba Railway Company made indemnity selection of the tract in question, with other lands, on October 16, 1883, this tract being selected in lieu of the SW.  $\frac{1}{4}$  of Sec. 27, T. 138 N., R. 44 W., which tract is along the St. Vincent extension of its road.

Arne D. Moe, on November 9, 1891, made application to make homestead entry of the tract involved in this appeal, and the local office rejected his application because in conflict with the railroad selection. He appealed, assigning as error the rejection of his application, alleg-

ing that said selection was invalid. It does not appear that the railroad company had notice of his appeal. Falje, the present appellant before the Department, made application to enter as a homestead the tract in dispute on May 21, 1896, alleging that he had resided on the tract since the spring of 1893. His application was rejected by the local office because in conflict with the railroad selection and because of Moe's prior application then pending on appeal. He appealed to your office, alleging that the railroad selection was invalid and that he had, and Moe had not, settled upon the land. Notice of his appeal was mailed to the railroad company, but not by registered letter, as required by the rules of practice.

Upon consideration of this and other railroad selections, by your office, it was held for cancellation, because there was "no valid basis for the selections as they at present exist, such bases being upon the St. Vincent branch, while the selections are along the main line." It was also held that the selection being canceled, the railway company was in no wise injured by the failure to give it due notice of the appeals by Moe and Falje, citing the case of *Ashelman v. Northern Pacific R. Co.* (23 L. D., 513); that Falje's alleged settlement and residence gave him no advantage over Moe, who had made prior application to enter the tract; that by tendering his application for a tract covered by an invalid railroad selection Moe initiated a right, and that his application should be allowed as of the date of its presentation. Moe was therefore allowed to make entry within thirty days after the decision of your office should become final; and in case of his failure to do so, Falje was allowed thirty days within which to make entry.

At the respective dates of the presentation of the applications by both Moe and Falje, the tract applied for was included in a pending railroad indemnity selection, which, when made, was in accord with departmental decision holding that the grants for the main line and the St. Vincent Extension of the Manitoba railway should be adjusted as an entirety.

It is true that in the case of *St. Paul, Minneapolis and Manitoba Railway Co. v. Hastings and Dakota Railway Co.* (13 L. D., 440) it was held that 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 Manitoba railway. The tract here under consideration was not involved in said case, and while the ruling therein made in effect avoided the basis for the selection here in question, it did not avoid the selection, which might have been recognized upon the company's supplying a new and sufficient basis.

The circular of September 6, 1887 (6 L. D., 131), governing the disposition of tracts involved in unapproved railroad indemnity selections, provides:

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,

of which claim the applicant must be distinctly informed and memoranda thereof entered upon his papers.

Whenever such application to file or enter is presented, alleging upon sufficient *prima facie* showing that the land is not from any cause subject to the company's right of selection, notice thereof will be given to the proper representative of the company, which will be allowed thirty days after service of said notice within which to present objections to the allowance of said filing or entry.

Should the company fail to respond or show cause before the district land officers why the application should not be allowed, said application for filing or entry will be admitted, and the selection held for cancellation; but should the company appear and show cause, an investigation will be ordered under the rules of practice to determine whether said land is subject to the right of the company to make selection of the same which will be determined by the register and receiver, subject to the right of appeal in either party.

Neither Moe nor Falje asked that his application be received or held subject to the claim of the company, or made any showing against the company's selection. Their applications could not, therefore, have been properly allowed at that time, and, if received and held subject to the company's claim, no right could be predicated thereon until the cancellation of the existing selection. By their respective appeals it is urged that their respective applications should have been allowed, and not that they should have been received or held subject to the company's claim. Under these circumstances neither of them gained any rights by appeal and neither can be permitted to enter the lands by reason of his application so tendered and rejected before the cancellation of the selection. This is the general departmental rule where applications are made to enter lands which are for any cause not subject to entry. (*McInturf v. Gladstone Townsite*, 20 L. D., 93; *Richard L. Burgess*, 18 L. D., 14.) The effect of an appeal from the rejection of an application to enter has been repeatedly considered by this Department, and it has been uniformly held that no right is gained thereby unless the application was improperly rejected. (*Gallup v. Welch*, 25 L. D. 3, 6; *Northern Pacific R. R. Co. v. Wolfe*, 28 L. D., 298.)

These applicants were not contestants challenging the validity of the company's selection and can not be considered in the position of one contesting an entry of record. Their applications were presented as ordinary ones to enter public lands, not accompanied by any attack upon the claim of the company.

The decision of your office is reversed, and the applications of Moe and Falje will stand rejected. If Falje has acquired any rights by continuing his settlement until the land was freed from the railroad selection they will not be affected by this decision, because no claim predicated upon such continued settlement is here considered or determined.

SCHOOL LANDS—TERRITORIAL RESERVATION—ACT OF JANUARY 14,  
1889.

## STATE OF MINNESOTA.

The act of March 3, 1849, reserving lands in the Territory of Minnesota for school purposes, was not irrevocable by Congress.

The proposal made by the United States in the act of February 26, 1857, to grant to the State of Minnesota, when admitted into the Union, sections sixteen and thirty-six for school purposes, was modified by the joint resolution of March 3, 1857, and it was the proposal, as so modified, that was accepted in the State constitution adopted October 13, 1857.

Under the compact effected by said modified proposal and its acceptance, the status of said sections at the time of survey was made the criterion in determining whether the State became entitled to the specific sections, or to other equivalent lands as indemnity.

The lands known as the "Red Lake Indian reservation" in the State of Minnesota, were unsurveyed at the date of the passage of the act of January 14, 1889, and by the terms of said act, and the agreement with the Indians thereunder, were set apart and directed to be used in raising a fund for the benefit of the Indians, and by such appropriation were "reserved for public uses," within the meaning of said joint resolution, prior to survey; sections sixteen and thirty-six in said reservation, therefore, did not pass to the State under the school grant, but other equivalent unappropriated lands may be selected in lieu thereof.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 9, 1899. (W. C. P.)

The State of Minnesota, under the grant of lands made to that State for school purposes, claims sections sixteen and thirty-six of each township embraced within the boundaries of the former Red Lake Indian reservation.

The Territory of Minnesota was established by the act of March 3, 1849 (9 Stat., 403), section eighteen of which made the following reservation of lands for school purposes:

That when the lands in the said Territory shall be surveyed under the direction of the government of the United States preparatory to bringing the same into market, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same.

The act of February 26, 1857 (11 Stat., 166), authorized the people of the Territory to form a constitution and State government preparatory to their admission into the Union, and in its fifth section submitted the following proposition to the people of the proposed State for their acceptance or rejection, to wit:

SEC. 5. *And be it further enacted*, That the following propositions be, and the same are hereby offered to the said convention of the people of Minnesota for their free acceptance or rejection, which, if accepted by the convention, shall be obligatory on the United States and upon the said State of Minnesota, to wit:

First. That sections numbered sixteen and thirty-six in every township of public lands in said State, and where either of said sections, or any part thereof, has been sold or otherwise been disposed of, other lands, equivalent thereto and as contiguous as may be, shall be granted to said State for the use of schools.

March 3, 1857 (11 Stat., 354), before the admission of the State and before the acceptance of said proposition, Congress adopted a joint resolution, relating to the school lands in the proposed State, which provides:

That where any settlements, by the erection of a dwelling house, or the cultivation of any portion of the land, shall have been or shall be made upon the sixteenth or thirty-sixth sections (which sections have been reserved by law for the purpose of being applied to the support of schools in the Territories of Minnesota, Kansas and Nebraska, and in the States and Territories hereafter to be created out of the same) before the said sections shall have been or shall be surveyed; or where such sections have been or may be selected or occupied as townsites, under and by virtue of the act of Congress approved twenty-third of May, eighteen hundred and forty-four, or reserved for public uses before the survey, then other lands shall be selected by the proper authorities in lieu thereof, agreeably to the provisions of the act of Congress approved twentieth of May, eighteen hundred and twenty-six, entitled "An act to appropriate lands for the support of schools in certain townships and fractional townships not before provided for." And if such settler can bring himself, or herself, within the provisions of the act of fourth of September, eighteen hundred and forty-one, or the occupants of the townsite be enabled to show a compliance with the provisions of the law of twenty-third of May, eighteen hundred and forty-four, then the right of preference granted by the said acts, in the purchase of such portion of the sixteenth or thirty-sixth sections, so settled and occupied, shall be in them respectively, as if such sections had not been previously reserved for school purposes.

A constitution was adopted by the people of Minnesota October 13, 1857, under which the State was admitted into the Union by the act of May 11, 1858 (11 Stat., 285). Section three of article two of the State Constitution accepted this proposition, with others, the acceptance being couched in the following terms:

The propositions contained in the act of Congress entitled "An act to authorize the people of the Territory of Minnesota to form a constitution and the State government preparatory to their admission into the Union on an equal footing with the original States," are hereby accepted, ratified, and confirmed, and shall remain irrevocable without the consent of the United States.

The act of February 26, 1859 (11 Stat., 385), afterwards incorporated into section 2275 of the Revised Statutes, contained a general provision for the protection of persons making settlement upon sections sixteen or thirty-six before survey, which was re-enacted by the act of February 28, 1891 (26 Stat., 79), which latter act also contains the following general provision:

And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military or other reservation or are otherwise disposed of by the United States.

At the time of the admission of the State of Minnesota into the Union, the region of country embracing the lands here in controversy was occupied by the Chippewa Indians. By various treaties between the United States and these Indians the boundaries of the country claimed by the several bands had become definitely fixed and the lands

here in question were within the territory claimed and occupied by the Red Lake and Pembina bands. By the treaty of October 2, 1863 (13 Stat., 667), these bands ceded to the United States all their rights in and to a certain defined portion of the lands claimed and occupied by them in the State of Minnesota, leaving unceded a portion thereof, which is spoken of in the sixth article of the treaty as "the reservation," and which came to be known as the Red Lake reservation. The Indians thereafter occupied this unceded tract under the charge of an agent, and it was called the "Red Lake Indian reservation" in the President's order of March 18, 1879, enlarging the White Earth reservation. In the act of January 14, 1889 (25 Stat., 642), it is recognized by Congress as an existing Indian reservation, and this recognition is repeated in the act of June 2, 1890 (26 Stat., 126).

The act of 1889 provided for a commission to negotiate with the Chippewa Indians for the complete cession and relinquishment "for the purposes and upon the terms" stated in said act

of all their title and interest in and to all of the reservations of said Indians in the State of Minnesota, except the White Earth and Red Lake reservations, and to all and so much of these two reservations as in the judgment of said commission is not required to make and fill the allotments required by this and existing acts.

The act directed that any lands so ceded should be surveyed, examined and classified as "pine lands" and "agricultural lands," that the pine lands should be sold at public auction to the highest bidder and that the agricultural lands should be sold to actual settlers under the homestead law at one dollar and twenty-five cents per acre; that the moneys accruing from the disposal of these lands, after deducting expenses, should be placed in the Treasury of the United States to the credit of the Indians, and draw interest at five per centum per annum, and that the interest should be paid to and expended for the benefit of the Indians, and at the end of fifty years the principal should be paid to the Indians then living, in cash, in equal shares.

Under this act an agreement was effected with said Indians, which was approved by the President March 4, 1890, which ceded and relinquished to the United States "for the purposes and upon the terms stated in said act" a part of the lands occupied by the Red Lake and Pembina bands, and known as the Red Lake reservation. Sections sixteen and thirty-six in the ceded portion of this reservation are the lands here in controversy. Before any of the lands so ceded and relinquished were sold under the direction given in the act of 1889, the State of Minnesota presented her claim to every sixteenth and thirty-sixth section as inuring to her under the grant for school purposes. The act of February 26, 1896 (29 Stat., 17), after making some slight changes in the provisions of the act of 1889 respecting the survey, examination and sale of the ceded lands, contains this provision:

That sections numbered sixteen and thirty-six in each township so surveyed shall not be sold until the claim of the State of Minnesota to the ownership of said sections as part of the school lands of said State shall have been determined.

The State's claim to the specific sections sixteen and thirty-six in the ceded Red Lake reservation lands is predicated upon the following propositions: First, That by reason of the proposition made to the people of Minnesota by the act of February 26, 1857, and the acceptance thereof in the State constitution a compact was entered into whereby the lands which might by appropriate surveys be identified as embraced within those sections were irrevocably appropriated to the State, so that no law enacted subsequently to the compact could authorize a sale or other disposition of them by the United States. Second, That if the joint resolution of March 3, 1857, be regarded as modifying the proposition made by the United States in the act of February 26, 1857, before its acceptance by the State, these lands were never "reserved for public uses" within the meaning of the joint resolution, (a) because they never constituted an Indian reservation and (b) because lands reserved for Indians are not reserved for "public uses."

The propositions of the State can not be sustained.

It is not necessary to consider what the result would have been in the absence of the joint resolution of March 3, 1857, because both upon principle and authority the provisions of that resolution constitute an insurmountable obstacle to the State's claim to these specific sections. The act of March 3, 1849, was nothing more than an act of Congress reserving for future disposition the sections named. It did not attain and was not intended to attain the dignity of a compact irrevocable by Congress. Nor did the provision in the act of February 26, 1857, in itself constitute a grant of these lands to the proposed State. While it was intended to form the basis of a compact irrevocable by Congress, it remained until accepted simply a statutory proposal, subject to modification or revocation by the authority which made it. The lands in the proposed State were at that time unsurveyed, and the specific sections proposed to be granted were not susceptible of identification. To remove any possible uncertainty as to whether when these sections should become identified by survey the right of the State would relate back to the date of the compact so as to defeat any intervening sale or other disposition of the lands by the United States, or whether the right of the State would attach only to the specific sections which remained unsold and undisposed of at the time of their identification by survey, and to protect pre-emption and townsite claims to said sections initiated before the survey thereof, and also to protect reservations thereof for public uses, made while the lands remained unsurveyed, the joint resolution of March 3, 1857, was adopted by Congress and approved by the President. This joint resolution, which was called forth by a memorial from the legislature of the Territory of Minnesota, operated as an interpretation, or if need be, as a modification of the proposal made in the act of February 26, 1857, and being passed before the acceptance of that proposal it follows that the subsequent acceptance in the State constitution was of the proposal as so interpreted and

modified. The case of *Minnesota v. Bachelder*, 1 Wall., 109, involved the right of the State to lands in a section sixteen, which were claimed under the pre-emption law in pursuance of settlements made subsequent to the act of February 26, 1857, and prior to the survey. In presenting the case on behalf of the State, the Attorney-General contended:

The joint resolution of Congress is void. It cannot divest a title which the United States had previously granted. The organic act of the Territory constituted a *dedication* to public uses, perpetual and irrevocable, and whatever might have been its effect upon the naked fee, at least divested Congress of all power of disposition over the subject-matter, so far as such disposition should tend to impair the public rights created by that act.

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Neither is the case helped by the memorial from the Territorial legislature. The organic act (Par. 18), indicates an intention to consecrate these lands for the benefit of the generations who should in future inhabit the State; and while divesting Congress of all power of disposition over them, to withhold it from any other body then in existence. They are reserved "for the purpose of being applied to schools in said Territory, and in the States and Territories hereafter to be erected out of the same." They were not granted to the Territory, and were in no sense its property.

Justice Nelson, in delivering the opinion of the court, disposed of this matter by saying:

It is not important to inquire as to the power of Congress to pass this law independently of any application from the Territorial legislature, as the assent of the people through their convention, by coming into the Union as a State, upon the terms proposed, must be regarded as binding the State. The right of the State to the school sections within it must, therefore, be subject to the modification contained in the joint resolution, and that modification is, that in case a person shall have made a settlement upon any school section, by the erection of a dwelling-house on the same, or the cultivation of any portion of it before the survey, and further, can bring himself within the provisions of the pre-emption act of 1841, he shall be entitled to the section thus improved, in preference to any title of the State.

The effect of the joint resolution was to make the status of sections sixteen and thirty-six at the time of survey the criterion in determining whether the State is entitled to the specific sections or to other equivalent lands as indemnity. If at that time these sections were settled upon and improved with a view to pre-emption or were selected or occupied as townsites or were reserved for public uses, the proper authorities of the State were authorized to select other equivalent lands in lieu thereof. Where these sections were thus claimed or reserved before survey they were considered as having been sold or otherwise disposed of within the meaning of the act of February 26, 1857, and as therefore excepted from the grant to the State. If not so excepted there would have been no occasion for permitting the selection of equivalent lands, because it could not have been intended that the State should receive the specific sections and also the indemnity. The case of *Beecher v. Wetherby* (95 U. S., 517), relied upon by the State, is without application to the case at bar, for the reasons: first, that the compact between the United States and the State of Wisconsin there under consideration was not affected by any interpreting or modi-

fying joint resolution such as is here presented, and second, that, as shown by the opinion in that case, the section sixteen there in controversy was identified by survey in May or June, 1854, so that the title thereupon passed to the State beyond the power of revocation by Congress, while the treaty establishing the reservation which was claimed to except the land from the grant to the State did not take effect until in August following. It will not therefore be necessary to notice the claimed conflict between the decision in *Beecher v. Wetherby* and that in the earlier case of *Heydenfeldt v. Daney Gold and Silver Mining Co.* (93 U. S., 634). But in view of the provisions of the joint resolution of March 3, 1857, what was said by the court in the *Heydenfeldt* case is especially applicable here. The court there announced the conclusion that under the grant of school lands to the State of Nevada the right of the State to any specific tract must be determined by its status at the time of survey, and in support of that conclusion said (p. 639):

This interpretation, although seemingly contrary to the letter of the statute, is really within its reason and spirit. It accords with a wise public policy, gives to Nevada all she could reasonably ask, and acquits Congress of passing a law which in its effects would be unjust to the people of the Territory. Besides, no other construction is consistent with the statute as a whole, and answers the evident intention of its makers to grant to the State *in presenti* a quantity of lands equal in amount to the 16th and 36th sections in each township. Until the status of the lands was fixed by a survey, and they were capable of identification, Congress reserved absolute power over them; and if in exercising it the whole or any part of a 16th or 36th section had been disposed of, the State was to be compensated by other lands equal in quantity, and as near as may be in quality. By this means the State was fully indemnified, the settlers ran no risk of losing the labor of years, and Congress was left free to legislate touching the national domain in any way it saw fit, to promote the public interests.

Were these sections "reserved for public uses before the survey"? The claim of the State is that these lands never constituted an Indian reservation but remained simply unceded Indian country until the time of their cession and relinquishment under the act of 1889. This claim is clearly refuted by the recognition given to their status as an existing Indian reservation in the treaty of October 2, 1863, in the President's order of March 18, 1879, respecting the White Earth reservation, and in the acts of January 14, 1889, and June 2, 1890, all of which preceded their survey. However, the existence or non-existence of this reservation at or before the passage of the act of January 14, 1889, does not materially affect this controversy, because by that act and the agreement made with the Indians thereunder these lands were set apart and directed to be used in raising a fund to be employed in the support, education and civilization of the Indians. The lands were at that time unsurveyed and could therefore be reserved by Congress for public uses. The words "reserved for public uses" as they occur in the joint resolution, must be given a reasonable and not a constricted meaning, a meaning which would enable the government to set apart unsurveyed lands for use as the site of a military post or for use in raising a fund

to be employed in equipping and maintaining a military post. The support, education and civilization of the Indians is an obligation resting upon the government, and whatever is employed in the discharge of that obligation is devoted to a public use. Lands which are set apart for the Indians, whether to be used as homes for them or in providing a fund with which to meet the expenses of their support, education and civilization, are reserved for a public use within the meaning of the joint resolution.

The State's claim to sections sixteen and thirty-six here in controversy is denied, and your office will recognize the right of the proper authorities of the State to select other equivalent unappropriated public lands as indemnity, as provided by law.

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CONTEST—DEFECTIVE CHARGE—AMENDMENT.

CUTTER *v.* DUMAINE.

In the case of a hearing ordered on affidavit of contest that is defective, but susceptible of amendment, it is not necessary to remand the case for the amendment of the charge, and further hearing, where, at the hearing held, the contestee did not appear, or make objection to the sufficiency of the affidavit, and no one sought to intervene, and the evidence then submitted establishes the fact that the entryman had failed to comply with the law.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *April 20, 1899.* (C. J. W.)

The record in the above stated case shows that Noe Dumaine made homestead entry for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 21, and the S.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 22, T. 161, R. 73 W., at Devils Lake, North Dakota, on April 8, 1892.

On June 25, 1897, Louis Cutter, Jr., filed affidavit of contest against said entry, charging that the defendant had abandoned the same and changed his residence therefrom for more than six months since making said entry and next preceding the date of said affidavit. The plaintiff made affidavit that diligent search had been made, both in the vicinity of the land and of the last known post office address of defendant, and that he could not be found, and to his knowledge and belief was not a resident of the State, and asked that the defendant be served by publication. An order therefor was granted, and the notice duly published. Notice was also mailed, July 21, 1897, by registered letter addressed to defendant, at Dunseith, Rolette county, North Dakota—his post office address at date of entry, as shown by the record.

The parties were cited to appear before C. M. Wagner, a notary public in and for Rolette county, at Dunseith, in said county, on the 26th day of August, 1897, to respond and furnish testimony on the charge; and the hearing before the register and receiver was set

for the 31st day of August, 1897. Testimony was submitted by the contestant on said 26th of August, 1897, but defendant made default.

The testimony was duly transmitted to the local office, and on August 31, 1897, the local officers found that said homestead entry had been abandoned, and that the land had not been improved or cultivated, and that residence of defendant was unknown, and they recommended the cancellation of the entry, and forwarded the same to your office with the record, no appeal having been filed.

On October 14, 1898, your office considered the case and reversed the local office, holding that the affidavit was insufficient to confer jurisdiction on the local office to order the hearing, citing the case of *Shaffer v. Fox* (20 L. D., 185) as authority therefor.

The contestant has appealed to the Department.

The entry was made April 8, 1892, and on June 26, 1897, the affidavit charges the defendant with having abandoned the land for more than six months next preceding that date, which charge covers a part of the five year period.

That the affidavit is defective is not to be disputed, but it is not so defective as to render void the action of the local office in ordering a hearing.

In the recent case of *Engbard v. Runge et al.* (28 L. D., 147), it was held that a similar affidavit contained enough to amend by, and that it was error not to allow the contestant an opportunity to amend, so as to specifically negative the idea that defendant could have earned title to the land. In that case a hearing had been ordered by the local officers on the defective affidavit, and, on the day set for hearing, objection to the sufficiency of the affidavit was made by one not a party to the record, and the local officers thereupon refused to allow the affidavit to be amended, and dismissed the case, without hearing the contestant. The case was remanded, with directions that the contestant be allowed to amend his affidavit and be heard on his charges. In the case at bar, as in that case, the defendant has not appeared, or objected to the sufficiency of the affidavit, an objection to which no one but the defendant can make, unless the affidavit is absolutely void. There was no objection made in the case under consideration, and the contestant offered his testimony and that of his witnesses, which has become a part of the record. From that testimony it appears that defendant never established residence on the land after making entry, that he has never cultivated or improved it, but has abandoned it, and is not a resident of the country. He has made no defense, nor has any one sought to intervene.

There would appear to be no necessity for remanding the case for the amendment of the affidavit of contest and further hearing.

The Department is in possession of evidence which authorizes the cancellation of defendant's entry, and he is not objecting to it.

Your office decision is therefore reversed, and the entry canceled.

The contestant having at his own expense furnished the information on which this action is taken, your office will give him notice of this decision, and that he will be allowed thirty days from such notice within which to enter the land, if he so desires and shows himself qualified to do so.

PRE-EMPTION—INDIAN LANDS—TOWNSITE OCCUPANCY—COSTS.

COOPERTON TOWNSITE *v.* CHILDS.

The repeal of the pre-emption law does not affect the disposition of the Ute Indian lands under the act of June 15, 1880, which requires said lands to be disposed of by cash entry only in accordance with existing law.

The right of pre-emption will not be recognized, where prior to the date of the pre-emptor's settlement and filing the land was occupied and improved under a townsite settlement claim, and such occupants are seeking to make townsite entry, without affording them opportunity to be heard in the assertion of their claim. On a motion to retax costs the official report of the local officers, as to an oral agreement between the parties, made in open court, with respect to the costs, must control as against the statement of counsel.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *May 9, 1899.* (F. W. C.)

Frank A. Childs has appealed from your office decision of May 5, 1898, rejecting the proof offered upon his pre-emption declaratory statement covering lots 18 and 19, Sec. 28, T. 7 S., R. 88 W., sixth P. M., Glenwood Springs, Colorado, land district, and holding for cancellation said pre-emption filing.

The tract in question is a part of the Ute Indian lands ceded to the United States under an agreement with the confederated bands of Ute Indians in Colorado, which agreement was accepted and ratified by act of Congress approved June 15, 1880 (21 Stat., 199). By section three of said agreement, releasing the lands not allotted, it was provided:

and all the lands not so allotted, the title to which is, by the said agreement of the confederated bands of the Ute Indians, and this acceptance by the United States, released and conveyed to the United States, shall be held and deemed to be public lands of the United States and subject to disposal under the laws providing for the disposal of the public lands; at the same price and on the same terms as other lands of like character, except as provided in this act: *Provided*, That none of said lands, whether mineral or otherwise, shall be liable to entry and settlement under the provisions of the homestead laws; but shall be subject to cash entry only in accordance with existing law; and when sold the proceeds of said sale shall be first sacredly applied to reimbursing the United States. . . . And the remainder, if any, shall be deposited in the Treasury as now provided by law for the benefit of the said Indians.

In the case of *Schmidt et al. v. Masters* (18 L. D., 533) it was held that the repeal of the preemption law does not affect the disposition of the Ute Indian lands under the act of June 15, 1880, which requires said lands to be disposed of by cash entry only, in accordance with existing law.

The tracts here involved were, with other lands, included in the pre-emption filing made by Frederick C. Childs, the father of the present claimant, in 1885.

One Isaac Cooper, a man of some means, desiring to establish a town upon the lands here in question, secured a release from the elder Childs of the tracts here in question, his relinquishment being filed in 1887. Survey was made of the land into lots, blocks, streets and alleys, and during the year 1887 considerable improvement was made in the way of building houses, stores, and the partial erection of a hotel upon the tract here in question. A school house has also been built upon a portion of the land.

The improvements made upon this land appear to be of considerable value, and in addition to those named, a ditch was constructed for the purpose of irrigating the trees planted in the subdivision and for the use of the occupants of the townsite. A large portion of the improvements were made by Cooper and are claimed by his estate.

Cooper died in December, 1887, and, due to difficulty in the settlement of his estate and the financial depression existing at that time, the development of the town was greatly retarded.

Upon the approved plat of survey of this township, filed in 1891, the land in question is denominated as the "Cooperton or Rockford townsite."

It appears to have been Cooper's intention to make entry of the land in question for a townsite in the manner as provided by section 2382 of the Revised Statutes, and on October 1, 1888, a plat of the town (being described as the townsite of Cooperton) was filed by Sarah F. Cooper, his widow, for record in the office of the county clerk of the county of Garfield, in which the land is situated. This plat does not conform to the requirements of said section; further, a copy or transcript thereof does not appear to have been filed either in your office or in the local office, as required.

It further appears that in 1893 steps were taken to secure entry of the land through the county judge, an attorney being retained for that purpose, but the action taken appears to have been entirely informal in character. No filing or other proceeding has ever been instituted before the land department looking to the entry of these lands for townsite purposes, except that now under consideration.

Frank A. Childs, the present claimant, with full knowledge of the selection and use of the lands for townsite purposes, on December 9, 1895, filed preemption declaratory statement for this land, alleging settlement same date, and on June 20, 1896, in accordance with published notice, offered final proof thereon, at which time Sarah F. Cooper, on behalf of the occupants, filed an affidavit of contest, alleging prior settlement for trade and business, and in a supplemental affidavit asked that the occupants be permitted to enter the land as a townsite in accordance with law and the rules of the land department. Since

filing declaratory statement for this land, Childs has fenced and occupied about six acres and made improvements upon the land to the value of about \$300.

After a hearing had upon the contest, in August, 1896, the local officers made a personal inspection of the land, as requested by the parties, and in their opinion said:

From all the facts in this case we are constrained to believe that no such selection for townsite purposes as would bar a preemption entry has ever been made, and we so hold.

It appears that in the taxation of the costs of the hearing, each party was taxed for the testimony of his own witnesses upon direct examination and for the cross-examination of his adversary's witnesses. Following the trial of the case, a motion was made on behalf of Childs to re-tax the costs, assessing each party for the testimony of his own witnesses upon both direct and cross-examination. Relative to this motion the local officers in their opinion said:

This motion is in direct violation of an agreement entered into by counsel on both sides of this case to the effect that in the conduct of this trial each party shall bear the expenses of all testimony brought out by him, both on direct and cross-examination, and is therefore overruled.

Upon appeal, your office in its decision of May 5, 1898, affirmed the local office in overruling the motion to re-tax the costs, but upon the question as to whether the land was subject to the filing by Childs, reversed the local officers, holding that the land was occupied for purposes of business and trade at the time said filing was made, and for that reason was not subject to entry under the preemption laws. Childs in his appeal to this Department urges error in both rulings made in your office decision. Upon the question as to taxation of costs for reducing the testimony to writing, he urges that no agreement was ever made or filed and that the taxation was contrary to the practice which required each party to pay for the testimony of his own witnesses upon both direct and cross-examination.

While an examination fails to disclose any such agreement on file in the case, yet with the record transmitted is a report made by the local officers in response to your office letter of February 21, 1898, in which they state that the agreement was a verbal one made in open court and agreed to by counsel on both sides. In view of this report, which must control as against the statement of Childs's attorney, the action overruling the motion to re-tax the costs is sustained.

Relative to the question as to the condition of the land at the time Childs made filing therefor, it appears that the improvements begun in 1887, had decreased in value due to inattention; that the business conducted upon the land represented in 1887 by a grocery, two saloons, a butcher shop, blacksmith shop and a lumber yard, had been reduced to the general country store kept by the postmaster; but the number of

occupants does not appear to have been greatly diminished, consisting of nine or ten families and numbering about forty-five persons. These families generally cultivated the vacant adjoining lots to alfalfa and garden stuff, and, little business being done in the town, the male members sought employment elsewhere, generally at Carbondale, a promising town located about one mile and a quarter southeast of the tract in question.

Upon the showing made in this case it is clear that the occupants might have completed entry of the land under the townsite laws at the time Childs made preemption filing therefor.

They have failed, however, to take proper steps to protect themselves under the townsite laws and the question arises, can they now be permitted to complete entry in the presence of his adverse claim which has proceeded to the offer of proof showing compliance with law?

Childs settled within the townsite with full notice of the attempted appropriation of these lands for townsite purposes, and while he may have been justified in asserting an adverse claim believing that the projectors had abandoned the scheme and that an entry would never be made of the lands as a townsite, yet, this Department, bound to protect the interests of the public no matter in what manner presented, will not permit him to complete entry of the lands under the preemption law, where such lands had been occupied and improved long prior to the initiation of his claim under the preemption laws, and such occupants are seeking, and may be entitled, to enter the lands under the townsite laws, even though such persons may have been tardy in asserting their rights.

The act of June 15, 1880, *supra*, provided for the sale of these lands at cash entry only, and contemplated an early disposition, to the end that the Indians might receive any benefit arising from the sale of the lands, after reimbursing the United States, at the earliest possible date.

The occupants of this land should not therefore be permitted to hold the land for an indeterminate period as against sale to others, and it is directed that they be notified that they will be allowed a reasonable time, to be fixed by your office, within which to complete entry of the land as a townsite, and Childs's claim under his filing made of this land will be held subject thereto.

With this modification, your office decision is affirmed.

## LEASES IN FOREST RESERVES—ACT OF FEBRUARY 28, 1899.

## OPINION.

The act of February 28, 1899, authorizing the Secretary of the Interior to lease lands, adjacent to mineral springs within forest reserves, for hotel or sanitarium purposes, contemplates the leasing of land not wholly occupied by the hotel or sanitarium, whenever such action is necessary to the proper conduct of such hotel or sanitarium, and to make the beneficial properties of the springs available to the public.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,  
May 10, 1899. (W. C. P.)*

I am in receipt of the letter of the Commissioner of the General Land Office, dated April 22, 1899, and accompanying papers, relating to the matter of leases of land in forest reserves under the provisions of the act of February 28, 1899 (Public, No. 85), with your request for an opinion as to whether said act "authorizes the leasing of lands not wholly occupied by the hotel or sanitarium."

The act in question reads as follows:

That the Secretary of the Interior be, and hereby is, authorized, under such rules and regulations as he from time to time may make, to rent or lease to responsible persons or corporations applying therefor suitable spaces and portions of ground near, or adjacent to, mineral, medicinal, or other springs, within any forest reserves established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public. And he is further authorized to make such regulations, for the convenience of people visiting such springs, with reference to spaces and locations, for the erection of tents or temporary dwelling houses to be erected or constructed for the use of those visiting such springs for health or pleasure. And the Secretary of the Interior is authorized to prescribe the terms and duration and the compensation to be paid for the privileges granted under the provisions of this act.

Sec. 2. That all funds arising from the privileges granted hereunder shall be covered into the Treasury of the United States as a special fund, to be expended in the care of public forest reservations.

The question submitted arises upon the application of certain parties for a lease of a tract containing about three hundred and twenty acres of unsurveyed land in the Cascade Range forest reserve.

The authority given by this act is to rent or lease

suitable spaces and portions of ground near, or adjacent to, mineral, medicinal, or other springs . . . for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public.

The determination of what is a suitable space or portion of ground rests with the Secretary of the Interior. It was not in my opinion intended that the quantity of ground should be limited to the space actually occupied by the building to be erected. To meet the evident purposes of the act some additional ground would be necessary, and this additional quantity would vary with the surroundings. In each

case, therefore, the quantity to be leased must be determined by the circumstances, a due discretion being exercised to avoid extending the license to land in excess of what is actually necessary to provide proper and adequate accommodations and conveniences to the public. The purpose is to put these springs into such condition that their beneficial and health-giving properties may be taken advantage of by the public, and whatever portion of ground is necessary to meet this purpose may be utilized therefor under the provisions of said act.

I am of opinion, therefore, that said act authorizes the leasing of land not wholly occupied by the hotel or sanitarium whenever such action is necessary to the proper conduct of such hotel or sanitarium and to make the beneficial properties of the springs available to the public.

Approved, May 10, 1899.

THOS. RYAN,

*Acting Secretary.*

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ENTRY—RIGHT OF AMENDMENT—ADVERSE CLAIM.

NEWELL *v.* BAILEY.

During the pendency of an application to amend an existing entry no other person should be allowed to make entry of the tract covered by such application, but where it is for any reason denied, an entry irregularly allowed during the pendency of the application may be permitted to remain intact, notwithstanding the irregularity of its allowance.

The granting of an application to amend rests largely in the discretion of the Land Department, and where, during the pendency of the application, the relation of the applicant, or of another, to the land has become such as to make the allowance of the amendment manifestly inequitable, it will be denied.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 13, 1899. (F. W. C.)

Andrew K. Newell has appealed from your office decision of December 22, 1897, affirming the recommendation of the local officers that his homestead entry covering the SE.  $\frac{1}{4}$  of Sec. 6, T. 24 N., R. "3" W., Enid, Oklahoma, land district, be canceled with a view to allowing the application of Hiram J. Bailey to amend his homestead entry covering the SE.  $\frac{1}{4}$  of Sec. 6, T. 24 N., R. "6" W., so as to embrace the tract covered by Newell's entry.

The tract in question is a part of the Cherokee strip, and on the afternoon of the day of the opening of said strip, to wit, on September 16, 1893, Bailey selected the SE.  $\frac{1}{4}$  of Sec. 6, T. 24 N., R. 3 W., staked the same, dug a small hole, the following day piled a few fence poles in the form of a square, and on September 18, went to the local office to make entry of the land.

It appears that the attorney who made out Bailey's application made a mistake in describing the land intended to be entered, the range

being given as six west instead of three west, and on September 23, he was permitted to make entry of the land erroneously named in his application. After discovering the mistake, on October 16, 1893, he filed in the local office an application to amend his entry so as to embrace the land selected by him, and in support of his application alleged that the error was not the result of negligence on his part; that he had settled upon the land to which he had applied to amend his entry, and had made improvements thereon consisting of a sod house and three acres of breaking; and that "there is no one on or claiming said land and he still holds a residence on the land."

For some reason not disclosed by the record the local officers, on November 20, 1893, permitted Andrew K. Newell to make homestead entry of the land embraced in Bailey's pending application to amend. Said entry remained of record, unquestioned, until, on December 22, 1894, more than a year after the allowance of Newell's entry, your office, in considering the application filed by Bailey to amend his entry, directed the local officers to notify Newell that he would be allowed sixty days within which to show cause why his entry should not be canceled and Bailey allowed to amend as applied for.

In response to the call, Newell, on February 20, 1895, filed in the local office an affidavit, duly corroborated, in which he alleged that he (Newell)

is the prior settler upon said tract of land and that no person or persons except he, the said Andrew K. Newell, has made any improvements or acts of settlement upon said tract of land up to the present time.

Upon consideration of said showing, your office, on March 20, 1895, directed the local officers to order a hearing to determine the respective rights of the parties in the premises. Hearing was held September 25, following, and on May 6, 1896, the local officers recommended that Bailey's application to amend be allowed and the entry by Newell canceled. Upon appeal, your office affirmed the recommendation of the local officers, as before stated; from which Newell has appealed to this Department.

It may be here stated that on March 7, 1894, John M. Laden initiated a contest against Bailey's entry covering the land in range six west, alleging that he (Laden) had made settlement upon the land covered by said entry; and upon said contest hearing was held, the decision being in favor of Laden, Bailey having made default.

During the pendency of an application to amend an existing entry no other person should be allowed to make entry of the tract covered by such application, but where it is for any reason denied, an entry irregularly allowed during the pendency of the application may be permitted to remain intact, notwithstanding the irregularity in its allowance.

The granting of an application to amend rests largely in the discretion of the land department, and where during the pendency of the

application the relation of the applicant or of another to the land has become such as to make the allowance of the amendment manifestly inequitable it will be denied.

After careful consideration, it is the opinion of the Department that Bailey's application to amend should not be allowed. He claimed this land originally by selection and settlement on the day of the opening. In his application to amend, filed a month later, he alleged that he had made valuable improvements upon the land and was still residing thereon, thus asserting a continuation of his settlement claim, which is the real basis of his application to amend. After the allowance of his entry on September 23, he returned to the land on the following day, then went to Kansas where he formerly resided, returning to the land again October 10, following, when he built a small sod house. He claims that it was his intention to locate this house upon the tract in dispute, but as a matter of fact it was located west of the tract in dispute and upon the land claimed by his son-in-law. He lived in the house for two or three days, and his son-in-law also appears to have occupied the same house. He then went to Kansas again and returned to the tract in January, 1894, and spent a day and a night in the neighborhood, returning again in February, March and May, remaining but a short time on each visit and at no time living upon or improving the tract in question. He admits that he learned the sod house was not upon the land in question in January, 1894, but no steps were taken to improve said tract until in March, 1895, after the action of your office upon his application to amend. During March, 1895, he erected a sod house upon the land in controversy and moved his family upon the land in May following, and at the date of the hearing, in September, was still residing upon the land.

Newell settled upon the land on October 25, 1893, and admits that at the time of his settlement he found stakes upon the land with Bailey's name written thereon. Shortly thereafter a neighbor advised him that Bailey had staked the land and also that it had been staked by another party. So far as the stakes and other slight evidences of settlement placed upon the land by Bailey at the time of the opening are concerned, more than a month had elapsed when Newell's settlement was made and yet they had not been followed up by any improvements upon the land.

Newell began the construction of a sod house October 26th; dug a well on November 15, and on November 20, 1893, was permitted by the local officers to make homestead entry of the land. February 20, 1894, he built a box house upon the land, and during the next month fenced seventy acres. April 7, 1894, he moved his family upon the land, and during the following summer and autumn prepared and planted thirty acres to wheat. At the time of the hearing he had forty-five acres of breaking, his entire improvements being of the value of about \$300. He has made the tract his home since his settlement thereon.

It was no fault of the government that Bailey did not make entry of the land selected. It is true that he applied to amend as soon as he discovered the mistake in his entry, but his claimed right to amend rests, as before stated, upon his alleged settlement and residence, which were not maintained.

He knew, or ought to have known, that Newell had settled, and was residing, upon the land to which he sought to amend, and that Newell had been permitted to make entry thereof. With this knowledge he permitted Newell to continue in the enjoyment of the land for more than a year before making an effort to establish a residence thereon, and then, it appears, was only moved by the action of your office in calling upon Newell to show cause why his entry should not be canceled. Newell in no wise prevented Bailey's compliance with law or the maintenance of his claimed settlement and residence.

Upon a consideration of all the facts, it appears that it would be inequitable to cancel Newell's entry and allow Bailey's entry to be amended to this tract.

Your office decision is therefore reversed, and Bailey's application to amend will stand rejected.

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SWAMP LAND GRANT—ADJUSTMENT—JURISDICTION.

MORROW ET AL. *v.* STATE OF OREGON ET AL.

Under the swamp land grant it is the duty of the Secretary of the Interior to determine what are "swamp and overflowed lands made unfit thereby for cultivation," and therefore subject to the grant. Until the legal title passes to the State, by the issuance of patent, the authority of the Land Department to inquire into the validity of a claim under said grant does not terminate; and in the exercise of such authority the Secretary of the Interior may properly revoke his approval of swamp land selections.

While the legal title to land remains in the United States it is competent for the Secretary of the Interior to review or reverse a decision of his predecessor in office with respect thereto, provided the Secretary rendering such decision, if still holding office, would be in duty bound to review and reverse his own action.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) May 13, 1899. (W. M. W.)

Under date of April 5, 1897, the governor of the State of Oregon addressed a communication to the Department, as follows:

In accordance with the provisions of the acts of Congress, approved September 28, 1850 (9 Stat., 519), and March 12, 1860 (12 Stat., 3), I have the honor to request that you will cause patents to be issued to the State of Oregon for lands described in approved swamp land lists 30 and 31, Lakeview district, which said lists were approved by Mr. Secretary Noble on April 9, 1892, and December 3, 1892, respectively. The issuance of these patents has heretofore been requested by my predecessor in office, but I am advised that the patents have not yet been received.

An oral argument was heard on the governor's application for patent, in which all the parties in interest participated.

The facts are substantially as follows:

April 9, and December 3, 1892, respectively, Secretary Noble approved Oregon swamp land lists Nos. 30 and 31, "subject to any valid adverse right that may exist to any of the tracts therein described." Thereafter a petition was filed on behalf of certain adverse claimants, alleging that the lands embraced in these lists were not swamp and overflowed within the meaning of the swamp-land act at the date of the grant to Oregon, and that the lists had been prepared in the General Land Office, and submitted for the Secretary's approval, in entire disregard of the rights of those claiming said lands under the pre-emption, homestead, and other laws, and asking that the Secretary cancel his approval of said lists. Upon consideration of these allegations and charges, Secretary Noble, on March 2, 1893, revoked and canceled his said approval, the reason for and purpose of such cancellation being stated by him as follows:

If the charges and allegations made on behalf of the dry land claimants, had been presented to me before my approval of said lists, I should hardly have approved them without some further examination.

In view of the gravity of the charges and the magnitude of the interests involved, to the end that their truth so far as the records of your office may disclose, and the legal effect thereof may be more fully and carefully considered, and that the consideration thereof may not be prejudiced by my action in approving said lists in the absence of full and accurate information, I hereby revoke and cancel my approval of said swamp land lists No. 30 and 31, and direct that you take proper steps to make said revocation and cancellation formally effective.

You will also at once make full report to this Department in relation to all matters set forth on behalf of the dry land claimants so far as the same come within the cognizance of your office, transmitting here all papers relating to said matters that the same may be fully considered, and proper directions given in the premises.

These lists were thereafter considered by Secretary Smith who held December 19, 1893 (17 L. D., 571), that at the time of the Oregon swamp land grant the lands embraced in lists 30 and 31, were covered by a large body of water known as Lake Warner, which subsequently receded leaving these lands comparatively dry, that lands covered by such a body of water at the date of the grant were not swamp and overflowed within the meaning of the granting act and that the State has no claim thereto. October 10, 1894 (19 L. D., 254), Secretary Smith denied a motion for review and rehearing of that decision.

December 13, 1894, your office transmitted to the Department for approval Oregon swamp list No. 39, aggregating 794.02 acres; all of which had been formerly included in lists 30 and 31, theretofore considered by the Department.

August 4, 1896 (23 L. D., 178), Secretary Smith rejected list 39, and again considered lists 30 and 31, saying:

The lands embraced in said lists 30, 31 and 39, were not on March 12, 1860, swamp and overflowed lands made unfit thereby for cultivation, and the State of Oregon has no right, title, interest or estate therein.

August 11, 1896, Secretary Smith requested your office to return the decision of August 4, 1896, for further consideration, and directed that all action thereunder be suspended until further notice. Thereupon your office returned said decision with the information that it had not been promulgated.

January 14, 1897, Secretary Francis, referring to the suit against Secretary Smith, hereinafter mentioned, directed that

all further action by your office affecting said lists, or the lands embraced therein, be suspended for such action as my successor may see proper to take in relation thereto.

January 15, 1896, the Warner Valley Stock Company filed a bill in equity in the supreme court of the District of Columbia against Secretary Smith and Commissioner Lamoreux, claiming to be the grantee of the State of Oregon through mesne conveyances, and as such the owner of the lands embraced in swamp land lists Nos. 30 and 31. The bill charged that upon the approval of said lists by Secretary Noble the title to the lands therein described vested in the State of Oregon and took effect by relation as of the date of the granting act, inuring to the benefit of those claiming under the State, and that Secretary Noble was without authority or jurisdiction to reconsider or revoke his said approval. The bill prayed in effect that the Secretary's action in canceling such approval be declared void and that patents be directed to be prepared for issuance under lists 30 and 31, for the lands embraced therein. March 21, 1896, a decree was entered dismissing the bill, and plaintiff appealed to the court of appeals of the District of Columbia, where June 11, 1896, the decree was affirmed (9 App. D. C., 187). Plaintiff then appealed to the supreme court of the United States, where January 11, 1897, the decree appealed from was reversed with directions to dismiss the bill, the reason assigned being that the suit had abated by the resignation of Secretary Smith (165 U. S., 28).

Only such points in the arguments of counsel will be noticed as seem necessary to a determination of the case as now presented.

It is urged by the State and its grantees that the approval of lists 30 and 31 by Secretary Noble passed to the State the title to the lands embraced therein and that thereupon the right of the State to receive patents for said lands became fixed and irrevocable.

The acts of September 28, 1850 (9 Stat., 519), and March 12, 1860 (12 Stat., 3), govern the disposition of swamp lands in Oregon. Under those acts it is the duty of the Secretary of the Interior to determine what are "swamp and overflowed lands made unfit thereby for cultivation" that being the character of lands granted to the State.

That the Secretary is charged with this duty is not disputed, but the State and its grantees contend that Secretary Noble's approval of lists 30 and 31 constituted a final determination of the character of the lands therein, that he was thereafter without authority to recall or annul such approval, and that his action in revoking and canceling the same is consequently void.

This contention was made in *Warner Valley Stock Company v. Smith et al., supra*, and was denied both in the supreme court of the District of Columbia and in the court of appeals.

In *Michigan Land and Lumber Co. v. Rust* (168 U. S., 589, 592), a case involving the finality of the action of the Secretary of the Interior in approving and certifying a list of swamp and overflowed lands to the State of Michigan, the court says:

Generally speaking, while the legal title remains in the United States, the grant is in process of administration and the land is subject to the jurisdiction of the land department of the Government. It is true a patent is not always necessary for the transfer of the legal title. Sometimes an act of Congress will pass the fee. *Strother v. Lucas*, 12 Pet., 410, 454; *Grignon's Lessee v. Astor*, 2 How., 319; *Chouteau v. Eckhart*, 2 How., 344, 372; *Glasgow v. Hortiz*, 1 Black, 595; *Langdeau v. Hanes*, 21 Wall., 521; *Ryan v. Carter*, 93 U. S., 78. Sometimes a certification of a list of lands to the grantee is declared to be operative to transfer such title, *Rev. Stat. 2449*; *Fraser v. O'Connor*, 115 U. S., 102; but whenever the granting act specifically provides for the issue of a patent, then the rule is that the legal title remains in the government until the issue of the patent, *Bagnell v. Broderick*, 13 Pet., 436, 450; and while so remaining the grant is in process of administration, and the jurisdiction of the land department is not lost.

It is, of course, not pretended that when equitable title has passed the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed. *Cornelius v. Kessel*, 128 U. S., 456; *Orchard v. Alexander*, 157 U. S., 372, 383; *Parsons v. Venzke*, 164 U. S., 89. In other words, the power of the Department to inquire into the extent and validity of the rights claimed against the government does not cease until the legal title has passed. . . . After the issue of the patent the matter becomes subject to inquiry only in the courts and by judicial proceedings.

In *Brown v. Hitchcock* (173 U. S., 473, 476), in adhering to the ruling in *Michigan Land and Lumber Co. v. Rust, supra*, the court says:

Under the swamp land act the legal title passes only on delivery of the patent. So the statute in terms declares. The second section provides that the Secretary of the Interior, "at the request of said governor (the governor of the State) cause a patent to be issued to the State therefor; and on that patent, the fee simple to said lands shall vest in the said State." *Rogers Locomotive Works v. American Emigrant Company*, 164 U. S., 559, 574; *Michigan Land and Lumber Co. v. Rust*, 168 U. S., 589, 592.

In this case the record discloses no patent, and therefore no passing of the legal title. Whatever equitable rights or title may have vested in the State, the legal title remained in the United States.

Until the legal title to public land passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department.

Patent has not been issued for the lands embraced in lists 30 and 31, and the legal title still remains in the United States. The authority of the land department to inquire into the extent and validity of the rights to these lands claimed by the State of Oregon and its grantees, has not terminated, and Secretary Noble's cancellation of his approval of said lists was clearly an exercise of this authority.

On behalf of claimants who are adverse to the State and its grantees, it is asserted that the decisions of Secretary Smith rejecting lists 30,

31 and 39, are final, and not subject to review by a succeeding Secretary. The cases of *Michigan Land and Lumber Co. v. Rust*, and *Brown v. Hitchcock*, each presented the instance of one Secretary of the Interior reviewing and vacating the action of a preceding Secretary with respect to the approval of lists of lands claimed under the swamp-land act. Both cases sustain the action of the succeeding Secretary, where the legal title remains in the United States. The present contention was also denied in the case of *Beley v. Naphtaly* (169 U. S., 353, 364), where the court said:

The fact that a decision refusing the patent was made by one Secretary of the Interior, and, upon a rehearing, a decision granting the patent was made by another Secretary of the Interior, is not material in a case like this. It is not a personal but an official hearing and decision and it is made by the Secretary of the Interior as such Secretary, and not by an individual who happens at the time to fill that office, and the application for a rehearing may be made to the successor in office of the person who made the original decision, provided it could have been made to the latter had he remained in office.

In *New Orleans v. Paine* (147 U. S., 261, 266), in ruling upon the finality of action by the land department, the court says:

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

See also *Parcher v. Gillen* (26 L. D., 34); *State of Florida* (26 L. D., 117), and *Cagle v. Mendenhall* (26 L. D., 177).

There are other considerations which show a necessity for action by the present Secretary. August 11, 1896, Secretary Smith directed that his decision of August 4, 1896, affecting said lists, be returned for "further consideration," and suspended all action thereunder until further notice. That decision was then returned by your office, with the information that it had not been promulgated. This was the status of the matter when Secretary Smith went out of office and continues to be its status at the present time.

In his action of August 11, 1896, Secretary Smith did not in express words recall his decision of December 19, 1893, but since list 39, considered in the decision of August 4, 1896, covered only lands embraced in lists 30 and 31, considered in the earlier decision, the recalling of the latter decision and the suspending of action thereunder would be altogether futile unless action under the earlier decision were also suspended. The execution of the decision of December 19, 1893, by disposing of the lands covered thereby under agricultural entries, would have left nothing upon which the recall and suspension of August 11, 1896, could operate. Lists 30 and 31 having been again considered by Secretary Smith in the decision of August 4, 1896, with the same result as before, it seems reasonable to believe that he treated the decision of December 19, 1893, as having been merged into the one of August 4, 1896, and that in recalling the latter and suspending all action thereunder, he contemplated a recall of his entire action upon the three lists and a suspension of all proceedings thereunder.

It thus appears that each of the Secretaries, who have attempted a

determination of this matter, has afterward vacated or recalled his own decision and suspended action thereon, so that affirmative action by the present Secretary seems necessary to a disposition of the lands in controversy. Secretary Francis made no decision in the matter, but on January 14, 1897, as before stated, he also directed that all proceedings affecting these lists be suspended for such action as his successor might see proper to take in relation thereto.

It appears that the departmental decisions upon the merits heretofore rendered were largely based upon *ex parte* affidavits and the reports of special agents who were not examined under oath, and that suitable opportunity to present evidence in their own behalf and to cross examine opposing witnesses was not accorded the respective parties. There has not at any time been a hearing in the matter fairly conducted, and of which due notice was given to all claimants. For these reasons any finding or decision respecting the character of these lands based upon the proofs now before the Department would be unsatisfactory to all concerned. The decisions of December 19, 1893, October 10, 1894, and August 4, 1896, herein are accordingly vacated, and all decisions respecting the character of these lands, or any of them, heretofore rendered by the Department, your office or the local office, are set aside, with a view to a full and fair hearing, after due notice to all concerned.

The papers are therefore returned to your office, and you are directed to cause a hearing to be had before the register and receiver at Lakeview, Oregon, after due notice to the State of Oregon, its grantees, and all adverse claimants, which hearing shall be conducted in accordance with the stipulation in writing filed herein by counsel for the respective parties May 4, 1899. In addition to the lands embraced in said lists 30, 31 and 39, this decision and the hearing and proceedings herein directed shall extend to and include any and all other lands described in said stipulation of May 4, 1899.

After the evidence offered by the parties is concluded, the matter will be proceeded with according to the usual rules of procedure, and with as little delay as may be consistent with proper care and consideration.

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SETTLEMENT RIGHT—RELINQUISHMENT—TENANCY.

ATKINS *v.* MACY ET AL.

One who is living on land as the tenant of an entryman acquires no settlement right, on the relinquishment of the entry, by remaining on the land, that he can set up as against the intervening entry of a third party, where such occupancy is in effect a continuance of his previous relation to the land.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *May 15, 1899.* (W. M. W.)

The land involved in this case is the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 18, T. 18 N., R. 33 W., Harrison, Arkansas, land district, which W. L. Macy entered under the homestead law on March 23, 1891.

November 13, 1895, Harvey Atkins executed an affidavit of contest against Macy's entry, which was forwarded to and received at the local office November 20, 1895, upon which notice issued November 29, 1895.

November 14, 1895, Macy sold the improvements upon the tract to Sterling P. Holt, and on the next day executed a relinquishment of his entry, which was verified before a justice of the peace. Before forwarding it Holt was informed by some one that such verification was insufficient under the law and regulations, and he then returned it, and on November 20, 1895, Macy executed another one before a notary public.

About November 22, 1895, Holt presented said relinquishment, accompanied by his application to make adjoining farm entry of the tract, to the register and receiver, who returned these papers to Holt and informed him that Atkins had filed a contest against Macy's entry.

A hearing was ordered and had, at which both parties appeared and submitted evidence. Before a decision was made the evidence and papers in the case, together with the records of the local office, were destroyed by fire.

May 19, 1896, Holt presented to the local officers the same, or another, application to enter the tract, and also the same relinquishment, and thereupon they allowed Holt's entry.

In June, 1896, Atkins filed in the local office an affidavit showing the facts respecting his former contest, and thereupon your office directed the local officers to allow him thirty days within which to file corroborated affidavit showing charges made by him in his former affidavit against Macy's entry. Thereafter Atkins filed the required affidavit, alleging, as against Macy, abandonment, and as against Holt, prior settlement.

A hearing was had, at which the parties submitted evidence.

The local officers recommended the dismissal of the contest and that Holt's entry be permitted to stand.

Atkins appealed, and on July 3, 1897, your office reversed the judgment of the local office and held Holt's entry subject to Atkins' prior right.

Holt appeals.

The evidence shows that Macy never established actual residence upon the tract. His wife was seriously afflicted, and it was necessary for him to live in a town where medical attendance could be procured in haste during her bad spells, and these are the reasons he gave for his failure to establish and continue a residence on the tract. He made some substantial improvements in the way of repairs upon the house, barn, fences, etc., and by setting out three hundred apple trees on the tract.

In October, 1894, Macy entered into an agreement with his niece, Mrs. Atkins, and her son, the contestant, who was at that time a member of her family, whereby the Atkinses were to move upon the land and hold it for Macy until his wife should get well enough to live there

with safety. For the use of the house, barn, and premises, the Atkinses were to take care of the fruit trees and keep the fences in good repair and have all they could raise on the land.

November 14, 1895, Macy sold his improvements on the tract to Holt. On the same day Holt and Macy went to see the contestant and his mother about giving possession of the claim, and the contestant said nothing about having made or forwarded his contest affidavit against Macy's entry; nor did he in any manner intimate that he was then making, or ever intended to make, any claim to the tract. But, on the other hand, he entered into an agreement with both Macy and Holt to give possession of the premises as soon as he could secure another house to move into and his mother's health would permit her removal with safety. At the time Atkins made this agreement he knew that Holt was buying the improvements upon the land with a view of acquiring title to it from the United States.

Holt first learned of Atkins' contest against Macy's entry after he presented his application to enter and Macy's relinquishment. Holt purchased Macy's improvements and procured his relinquishment in good faith, without any notice of Atkins' contest or knowledge that he was claiming or intended to claim any settlement or other right to the land in question, and at the time Macy executed his relinquishment he had no notice or knowledge that Atkins was making any claim to the tract. Under these circumstances it is clear that Atkins' contest had nothing whatever to do with the relinquishment of Macy's entry, and that such relinquishment was not in any sense the result of or caused by said contest.

There is nothing in the evidence tending to show that Atkins ever at any time made any improvements upon the tract; nor is there anything to show that he cultivated any part of it after his tenancy under Macy was terminated.

The Department has frequently held, under facts somewhat analogous to the facts in this case, that one who occupies public land as the tenant of another acquires no settlement right, as will appear by reference to a few cases.

In *Griffin v. Pettigrew* (10 L. D., 510), it was held that one who remains on land by permission of others, asserting no right in himself, and fails to perform any of the acts required by the settlement laws, can not, while such conditions continue, be regarded as a settler under said laws.

In *Franklin v. Murch* (id., 582), it was held that one who occupies public land as the tenant of another does not thereby acquire a settlement right under the homestead law.

In *Ohio Creek Anthracite Co. v. Hinds* (11 L. D. 63) it was held that one who enters upon land as the representative of another, and remains thereon in such capacity, is not a settler within the meaning of the pre-emption law.



two claims. In other words, the said decision holds that, because of the stipulation and its incorporation into the judgment of the court, your office may go behind and override such judgment, determining for itself, according to the evidence in the case, the question of the right of possession. It is contended in the appeal that your office is bound by the judgment of the court, and that therefore the proposed cancellation, in part, of the entry is not warranted.

If this contention is sound, it is decisive of the case and no other question need be considered. The same question, though upon a somewhat different state of facts, which, however, in no way affects the principle involved, was considered and decided by the Department in the recent case of the Stranger Lode (28 L. D., 321). In that case it was said (p. 327):

It is no objection to the court's award that it follows and rests upon a stipulation between the parties. The land department is not at liberty to disregard the judgment to the extent indicated, nor to any extent, for any reason given in your office decision. The court having rightfully obtained jurisdiction, and the judgment being clear in its terms and not in conflict with any similar judgment, the land department, as well as the immediate parties, is bound by it. (*Richmond Mining Company v. Rose*, 114 U. S., 576, 585). The objection by your office is not well taken.

The views expressed in that case are equally applicable and controlling in the case at bar. In accordance therewith, the decision of your office is reversed, and the rule to show cause vacated. If there be found no other objection to the entry, you will pass it to patent.

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#### INDIAN LANDS—KIOWA AND COMANCHE RESERVATION.

JULIA E. MYERS.

The lands lying in the bend of the Washita river south of the recognized northern boundary of the Kiowa and Comanche reservation, between two points where said boundary line crosses said river, have not been opened to settlement or entry, either by proclamation of the President or by operation of law.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *May 22, 1899.* (J. L. McC.)

Julia E. Myers has appealed from the decision of your office, dated September 24, 1897, sustaining the action of the local officers at Oklahoma City, Oklahoma Territory, in rejecting her application to make homestead entry for the SW.  $\frac{1}{4}$  of Sec. 1, T. 7 N., R. 15 W.

The several specifications of error are in substance covered by the following extract therefrom:

That said land is situated upon and within the bend of the Washita river north of said river, and west of the west line of the Wichita and Caddo Indian reservation; and in accordance with the proclamation of President Harrison, issued on the 12th day of April, 1892, declaring said lands included within the Cheyenne and Arapahoe

Indian reservation open to settlement . . . citizens of the United States government are entitled to settle upon and occupy said lands; and that the same was thrown open for occupancy by proclamation of the President on the 19th day of April, 1892; for which appellant refers to said proclamation and boundary lines, including all lands declared open by proclamation within said Cheyenne and Arapahoe reservation, as well as maps of the same issued by the Secretary, John W. Noble.

The record facts bearing upon the question of the status of said land, briefly set forth, are as follows:

By the second article of the treaty of October 21, 1867, with the Kiowa and Comanche Indians (15 Stat., 581), the following described district of country was set apart for the use and occupation of said Indians:

Commencing at a point where the Washita river crosses the ninety-eighth meridian west from Greenwich; thence up the Washita river, in the middle of the main channel thereof, to a point thirty miles by river west of Fort Cobb as now established; thence due west to the north fork of Red river, provided said line strikes said river east of the one hundredth meridian of west longitude; if not, then only to said meridian line; and thence south, on said meridian line, to the said north fork of Red river; thence down said north fork, in the middle of the main channel thereof, from the point where it may be first intersected by the lines above described, to the main Red river; thence down said river, in the middle of the main channel thereof, to its intersection with the ninety-eighth meridian of longitude west from Greenwich; thence north, on said meridian line, to the place of beginning.

The Commissioner of Indian Affairs, on June 19, 1869, recommended, and on August 10, 1869, this Department ordered (see book of "Executive Orders Relating to Indian Reserves," pages 31, 32), that a section of country be set aside for the use and occupation of the Cheyenne and Arapahoe Indians, described as follows:

Commencing at the point where the Washita river crosses the ninety-eighth degree of west longitude; thence north on a line with said ninety-eighth degree to the point where it is crossed by the Red fork of the Arkansas (sometimes called the Cimarron river); thence up said river, in the middle of the main channel thereof, to the north boundary of the country ceded to the United States by the treaty of June 14, 1866, with the Creek nation of Indians; thence west on said north boundary and the north boundary of the country ceded to the United States by the treaty of March 21, 1866, with the Seminole Indians, to the one-hundredth degree of west longitude; thence south on the line of said one-hundredth degree to the north boundary of the country set apart for the Kiowas and Comanches by the second article of the treaty concluded October 21, 1867, with said tribes; thence east along said boundary to the point where it strikes the Washita river; thence down said Washita river, in the middle of the main channel thereof, to the place of beginning.

It is to be observed that the above description of the southern boundary of the country which the Commissioner proposed should be set apart for the Cheyenne and Arapahoe Indians, does not in all respects correspond with the north boundary line of the Kiowa and Comanche Indian reservation as it was evidently intended to be established by the treaty of October 21, 1867. The Kiowa and Comanche treaty describes a boundary which, upon reaching a point thirty miles, by the course of the Washita river, west from Fort Cobb, from that point

*runs due west*. to the north fork of the Red river. This line running due west, however, after five or six miles strikes the Washita river *again*, and crosses it, leaving about twenty-seven hundred acres of land in the bend of said river, south of said line. The agreement with the Cheyenne and Arapahoe Indians describes a line which, running east from the north fork of the Red river along the northern boundary of the Kiowa and Comanche reservation "to the point where it strikes the Washita river," thereafter follows the meanders of said river—turns to the southeast, "down said river"—instead of continuing directly eastward until it should strike the river *again*. This description embraces in the Cheyenne and Arapahoe reservation the land in the bend of the river which, by the treaty of October 21, 1867 (*supra*), was included in the Kiowa and Comanche reservation.

Nearly twenty-five years after the date of the executive order of August 10, 1869 (*supra*), setting apart the lands hereinbefore described for the Cheyenne and Arapahoe Indians, those Indians entered into an agreement with the United States government, whereby they ceded to said government the lands set aside for them by said executive order. Congress, by act of March 3, 1891 (26 Stat., 989, 1022), ratified and confirmed said agreement; and in describing the boundaries of said reservation followed verbatim the description contained in said executive order.

In view of the discrepancy hereinbefore pointed out between the two descriptions—that of the north boundary line of the Kiowa and Comanche reservation, and the south line of the Cheyenne and Arapahoe reservation—your office, by letter to the Department, dated June 24, 1892, requested instructions regarding the status of said land in the bend of the Washita river, thus apparently included in both reservations.

The Department on July 21, 1892, responded to said request (15 L. D., 87). It pointed out the fact that the 16th section of said act of March 3, 1891 (26 Stat., 989, 1026), does not of itself open said Cheyenne and Arapahoe lands to settlement, but provides that, *whenever* they shall, "by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of to actual settlers only," etc., etc.; and further that, while it is true that the proclamation of the President, issued April 12, 1892 (27 Stat., 1016), recited the boundaries of the Cheyenne and Arapahoe reservation (which included the tract of about twenty-seven hundred acres in the bend of the river and south of the line described in the treaty of October 21, 1867, as the northern boundary of the Kiowa and Comanche Indian reservation), yet it was expressly stated in said proclamation that—

The lands to be so opened for settlement are for greater convenience particularly described in the accompanying schedule, entitled "Schedule of Lands within the Cheyenne and Arapahoe Indian Reservation," opened to settlement by proclamation of the President.

The land in question (in the bend of the Washita river) was not included in said schedule; hence it is held that it is not opened to settlement by proclamation of the President.

A map of the lands so declared open to settlement accompanied the proclamation; but said land in the bend of the river is not represented thereon.

It is furthermore a fact that said lands in the bend of the river have not yet been opened to settlement "by operation of law"; for no further action of any kind has been taken by Congress in relation thereto.

It is clear that the SW.  $\frac{1}{4}$  of Sec. 1, T. 7 N., R. 15 W., applied for by Julia E. Myers, is not open to settlement or entry. The decision of your office is therefore correct, and is hereby affirmed.

RIGHT OF WAY—RESERVOIR SITE—INTERVENING CLAIM.

HAMILTON POPE.

The right of an applicant for a reservoir site under the act of March 3, 1891, will not be defeated by an intervening adverse entry, if at the date when the map showing the location of said reservoir site is filed the lands included therein were subject to such appropriation.

The case of the St. Paul, Minneapolis and Manitoba Railway Co., 26 L. D., 181, cited and followed.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *May 22, 1899.* (F. W. C.)

With your office letter of September 24, 1896, was transmitted a map of location upon which is delineated the survey of a reservoir site covering 98.09 acres, embracing parts of sections 17 and 20, T. 26 S., R. 66 W., 6th P. M., Pueblo land district, Colorado, which map was filed in the local office July 11, 1893, by Hamilton Pope, as an application under the act of March 3, 1891, (26 Stat., 1095) for a reservoir site. Said map was returned by your office for correction March 27, 1894, and again filed in the local office June 2, 1896.

The greater portion of the desired site is within the SW.  $\frac{1}{4}$  of Sec. 17, T. 26 S., R. 66 W., which tract was entered, under the timber-culture law, by one Edwin A. Lewis, June 16, 1888. On January 3, 1894, Pope initiated a contest against said entry, with a view to clearing the record, to the end that the land might become subject to his application. He was successful in his contest, Lewis' entry being ordered canceled by departmental decision of April 3, 1896, which was followed by a formal cancellation upon the local records on June 13, 1896. Pope was allowed a preferred right of entry, which he did not exercise because the only right he sought to acquire was a site for a reservoir under his map refiled as aforesaid on June 2, 1896.

On June 18, 1896, one Leonard Lewis tendered homestead applica-

tion covering said SW.  $\frac{1}{4}$  of Sec. 17; which was rejected by the local officers because of Pope's existing preference right secured by his contest. From said rejection Lewis appealed. Said appeal appears to have been considered by your office in submitting for the consideration of this Department the map of location filed by Pope. Relative to Pope's application for a reservoir site it was held, under the authority of the unreported case of Highland and Supply Ditch Company, that the filing of a map of location of a reservoir site does not operate to reserve the land included therein and affects only such lands as are vacant at the date of the approval of the map of location by the Department; that Lewis' application to make homestead entry should have been held in abeyance to await the action of the successful contestant; and that as said contestant did not apply to enter the lands within the time accorded by law, and as his application for a reservoir site did not reserve the land, Lewis' homestead application attached upon the expiration of the period accorded a successful contestant within which to make entry and operated to reserve the land, and in the future consideration of Pope's application for a reservoir site, the said SW.  $\frac{1}{4}$  must be considered as reserved land and not subject to such application.

As stated in your office decision, this Department, in the unreported decision of December 14, 1894, in the matter of the application of the Highland and Supply Ditch Company for a reservoir site, sustained the recommendation of your office and refused to approve a map of location, holding that there were no public lands to be affected thereby, when in the record it was shown that a portion of the lands, vacant at the date of the filing of the map of location, had been subsequently entered under the homestead law.

In the more recent case of the St. Paul, Minneapolis and Manitoba Railway Co. (26 L. D., 181), it was held that an intervening entry should not defeat the approval of a station plat if the land was open to appropriation under the right-of-way act at the date of the filing of said plat. In that case the right of way was claimed under the provisions of the act of March 3, 1875 (18 Stat., 482), granting a right of way for railroads across the public lands, but the language of the two acts in the matter of the approval of maps of location filed thereunder is practically the same, and the Department, after careful consideration of the matter, adheres to the later ruling and holds that in determining whether a map of location filed either under the act of March 3, 1875, or March 3, 1891, should be approved, the condition existing at the time of the filing of such map must be held to control.

The allowance of the application by Lewis to make homestead entry of said SW.  $\frac{1}{4}$  of Sec. 17, will therefore be subject to Pope's application filed under the act of 1891 for a reservoir site.

It also appears that a portion of the land embraced within the survey of the reservoir site is included in the pre-emption declaratory statement filed by one Robert Dillon September 12, 1883, alleging

settlement on the 10th of the same month. Relative to said filing your office holds that as the filing had expired long prior to the filing of the application by Pope, for the purpose of passing upon his claimed right of way under said application, the land embraced in said expired pre-emption filing must be considered as public land subject to the claimed right of way.

In view of the previous holding made therein, that the application by Lewis to make homestead entry, made subsequently to the filing of the application for a reservoir site, did not operate to reserve the land as against such prior application, and as the approval of the map of location is subject to all valid adverse rights, and further, as no claim is being now made under the preemption filing by Dillon, so far as shown by the record, it is deemed unnecessary to consider at this time the question of the effect of said ruling. It is clear, however, that any entry or claim initiated subsequently to the filing of the map of location of the reservoir site will be subject to the right of the reservoir claimant under the act of March 3, 1891, *supra*.

The map of location filed by Pope is therefore approved, subject to any valid adverse right.

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JOHN M. RANKIN.

Motion for review of departmental decision of March 15, 1899, 28 L. D., 204, denied by Secretary Hitchcock, May 22, 1899.

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SIoux INDIAN LANDS—COMMUTED ENTRY—ACT OF MARCH 3, 1899.

SAMUEL W. JOHNSON.

Under the act of March 3, 1899, persons who prior thereto settled on the Sioux Indian lands opened to settlement by the act of March 2, 1889, may secure patents for the land embraced within their entries by making the payments required by section 21, of said act of 1889, whether the proof and payment be made in fourteen months or five years from the date of settlement.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 22, 1899. (J. L. McC.)

Samuel W. Johnson, on August 2, 1894, made homestead entry for the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NE.  $\frac{1}{2}$ , and the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 17, T. 34 N., R. 16 W., O'Neill land district, Nebraska, under the act of March 2, 1889 (25 Stat., 888), paying, in accordance with section 21 of said act, at the rate of seventy-five cents per acre for said land, or one hundred and twenty dollars for the one hundred and sixty acres.

Said act does not provide specifically when the payments required thereunder must be made; but the departmental circular of March 25,

1890 (10 L. D., 562), relative thereto, directed that such amount "should not be collected when the original entry is made, but is required to be paid when final proof is tendered"—which in ordinary cases would be after a compliance with the requirements of the homestead law for a period of five years.

Cases arose, however, where parties purchasing these lands under the above-named act desired to obtain title thereto in less than five years; and in view of the language of said act, that the purchaser should be entitled to a patent for the land "after the full payment of said sums," your office held that such purchasers, upon compliance with the requirements of the homestead law for the period of fourteen months, as provided by the commutation clause (Sec. 2301) of the homestead act, as amended by section 6 of the act of March 3, 1891 (26 Stat., 1095), might obtain patent for such land at any time, "after the full payment of said sums"—that is, without making any additional payment.

The Department, however, in its decision in the case of the State of South Dakota, *ex parte*, rendered May 13, 1896 (22 L. D., 550, 556), directed attention to the language of said section 2301, amended as above, to the effect that the commutation provision of the homestead act

shall apply to lands on the ceded portion of the Sioux reservation . . . . but shall not relieve said settlers from any payments now required by law; (and held that said provision) means that where such entrymen so elect, they may commute, after the time named, by paying the minimum price for the land, in addition to the payments required under the act of 1889.

Prior to the rendition of said last-named decision, the local officers had issued final certificate to the homestead applicant in the case now under consideration (Samuel W. Johnson) upon payment of the amount required by section 21 of the act of March 2, 1889 (*supra*).

But in view of that decision your office called upon him for an additional payment of one dollar and a quarter per acre.

Johnson appealed to the Department, which, on September 14, 1898, sustained the action of your office.

The Department is now in receipt of your office letter of April 26, 1899, calling attention to the section (not numbered) of the sundry civil appropriation act of March 3, 1899 (30 Stat., 1102), which provides:

That all persons who may have heretofore settled upon that portion of the Great Sioux Indian reservation which was opened to settlement under and by virtue of the act of March second, eighteen hundred and eighty-nine, entitled "An act to divide a portion of the reservation of the Sioux Nation of Indians in Dakota into separate reservations; and to secure the relinquishment of the Indian title to the remainder, and for other purposes," may secure patents for the lands embraced in their entry upon making the payments required in section twenty-one of said act of March second, eighteen hundred and eighty-nine, above referred to; and no other or further payment shall be required of said claimants, whether proof and payment be made in fourteen months or five years from the date of settlement upon said land.

Your office resubmits to the Department the papers in the case of said Johnson, stating in the communication accompanying the same that he has complied with the law in the matter of residence, improvements, and cultivation, for fourteen months, and asking whether said entry can not now be approved for patenting under the remedial provision of said act—notwithstanding said departmental decision of September 14, 1898.

In the opinion of this Department, the provisions of said act above quoted were especially intended for the relief of persons in the situation of said Johnson; and it would appear that, in case his proof is in other respects satisfactory, said entry may be patented.

You are hereby directed to take action similar to that herein indicated, in other cases of settlers on land formerly embraced in the Great Sioux Indian reservation.

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HOMESTEAD ENTRY—DIVORCED WIFE—EQUITABLE ACTION.

MASSIE *v.* HAMLET.

In determining the status of a woman, who is claiming the right to submit final homestead proof as the deserted wife of an entryman, a decree of divorce obtained in a probate court of Oklahoma after August 14, 1893 (the date when such courts, under territorial legislation, ceased to have jurisdiction in matters of divorce), will be recognized as validated by the remedial act of February 28, 1895, of the Oklahoma legislature.

The rule allowing a child of the entryman who is not twenty-one years of age, but is the head of the family, to submit final proof, with a view to equitable action, where the deserted wife of such entryman is deceased, is equally applicable where the wife has been divorced.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *May 22, 1899.* (E. B., Jr.)

In the above entitled case, involving the NE.  $\frac{1}{4}$  of Sec. 35, T. 19 N., R. 1 W., Guthrie, Oklahoma, land district, for which Watt Hamlet made homestead entry October 23, 1889, it appears that said Hamlet duly complied with the requirements of the homestead law for the period of five years from the date of entry, and that thereafter, in July, 1895, he fled from his home on the land, a fugitive from justice, abandoning his family consisting of four or five children, the eldest being then about fourteen years of age. A contest against the entry, on the ground of abandonment, instituted July 14, 1896, by Rachel Massie, was dismissed by the local office October 21, 1896, on motion of the attorneys for Hamlet's children, because notice of contest had not been served on them, and because the contest was commenced, and the abandonment alleged to have occurred, more than five years after date of entry, and within the time allowed for making final proof. No

appeal appears to have been taken from this action, nor does the record show that due notice thereof was given to said Massie.

In the meantime, September 18, 1896, Mary Hamlet, the eldest child of the entryman, gave notice that she would submit final proof November 5, 1896. She offered final proof on that date, and at the same time Rachel Massie appeared and filed a protest against the approval thereof, on the grounds:

1. That Mary Hamlet is not twenty one years old, being not over sixteen years of age at this time.
2. That said Watt Hamlet is not dead, but is at this time alive, and a fugitive from justice.
3. That this affiant is the wife of said Watt Hamlet, and that she has occupied the said claim, and that all the improvements thereon were put there with her money.

The children of the entryman, by their attorneys, filed a motion, November 5, 1896, to dismiss this protest, for the reasons (1) that the same was not sworn to by the person by whom it purports to be made, and is not duly corroborated; (2) that it does not state a cause of action; and (3) that protestant does not ask to make final proof for the land, although alleging herself to be the wife of the entryman, but had heretofore filed a contest against the entry. This motion was the same day sustained and the protest dismissed by the local office.

On appeal by said Massie, your office decided May 24, 1897, that she was not the wife of the entryman, having been divorced from him January 20, 1894, by decree of the probate court of Payne county, Oklahoma; that she had no right to the land nor to make final proof therefor; that the said children, under the ruling in *Bray v. Colby* (2 L. D., 78), might make such proof; and that the proof submitted, showing a full and fair compliance with the law, would, in the event your office decision became final, "be approved and referred to the Board of Equitable Adjudication under paragraph 3, page 81, 2 L. D." Your office decision therefore affirmed the dismissal of the said protest, and, the record failing to show that said Massie had been notified of the dismissal of her contest and so afforded an opportunity to appeal, considered and affirmed the action of the local office dismissing the contest.

An appeal by said Massie brings the case to the Department. She contends that the decree of divorce by the said probate court is void for the reason that such court had no jurisdiction of actions for divorce after August 14, 1893, as decided by the supreme court of Oklahoma in *Irwin v. Irwin* (2 Oklahoma, 180,) and *Uhl v. Irwin* (3 Oklahoma, 388); and that, as the deserted wife of the entryman, she, rather than his children, is entitled to make final proof.

It appears that Watt Hamlet and Rachel Massie were married in January, 1891; that Hamlet was then a widower with four children, and that a decree of absolute divorce was rendered January 20, 1894, by the probate court of Payne county, Oklahoma, in the suit of said Hamlet against Rachel Hamlet, the appellant in the case at bar.

The organic act for Oklahoma Territory, passed May 2, 1890 (26 Stat., 81), provides

That the legislative power of the Territory shall extend to all rightful subjects of legislation, not inconsistent with the Constitution and laws of the United States, (and vests the judicial power of the Territory) in a supreme court, district courts, probate courts, and justices of the peace,

and declares that

the jurisdiction of the several courts herein provided for, both appellate and original, and that of the probate courts, and of the justices of the peace, shall be as limited by law: *Provided*, That . . . . said supreme and district courts, respectively, shall possess chancery as well as common law jurisdiction, and authority for redress of all wrongs committed against the constitution or laws of the United States or of the Territory affecting persons or property.

By the provisions of section 11 of this act, certain laws of Nebraska therein indicated are extended to and put in force in said Territory "until after the adjournment of the first session of the legislative assembly" thereof. These provisions vested exclusive jurisdiction, for the time specified, in matters of divorce, in the district courts of the Territory.

By section 4966, Statutes of Oklahoma, 1890, passed at the first session of the legislative assembly of the Territory, jurisdiction in actions for divorce was given to the district and probate courts. This jurisdiction of the probate courts was ratified by Congress in section 17 of the act of March 3, 1891 (26 Stat., 1026). In 1893 the legislature of Oklahoma enacted a code of civil procedure wherein exclusive jurisdiction in actions for divorce is vested in the district courts of the Territory (Statutes of Oklahoma, 1893, section 4543). This code went into effect "from and after its publication in the statute book," which was August 14, 1893. Notwithstanding the provisions of the Oklahoma code, relative to jurisdiction of actions for divorce, it seems that the probate courts of the Territory continued, generally, prior to the decisions of the Supreme Court of the Territory construing the acts of Congress and of the territorial legislature upon the subject, to assume and exercise such jurisdiction. September 4, 1894, in *Irwin v. Irwin*, *supra* (37 Pac. Rep., 548), the supreme court of the Territory held that the organic act gave the legislature of Oklahoma no power to vest divorce jurisdiction in the probate courts of the Territory, but that such jurisdiction was conferred upon these courts by virtue of the ratification contained in the act of March 3, 1891, *supra*, and continued in them until it was taken away and thereafter vested exclusively in the district courts by section 4543 of the Oklahoma code. The effect of this decision being to declare invalid all decrees of divorce pronounced by the probate courts in cases arising subsequent to August 14, 1893, when the code went into effect, and to call in question the validity of all marriages subsequently contracted between persons one of whom had been a party to such a decree, as a remedy for the resulting con-

fusion and uncertainty in the marital relations of these persons and in the interest of public morals, the legislature of Oklahoma, by act of February 28, 1895, provided (Session Laws of 1895, page 107):

That all decrees of divorce heretofore granted by the probate courts of the various counties of this Territory prior to the passage of this act be and the same are hereby declared legal, and the acts of said courts in the hearing of said divorce proceedings and the rendering of judgment and decree therein, and all the orders of said courts in said divorce proceedings, whether temporary or final, are hereby ratified and declared legal and valid in all respects.

In *Irwin v. Irwin*, on rehearing (41 Pac. Rep., 369), decided by the supreme court of Oklahoma July 27, 1895, and followed in *Battice v. Battice* (Id., 375) and in *Uhl v. Irwin*, *supra* (41 Pac. Rep., 376), that court, upon a careful review of its former decision, and of all the foregoing legislation save the curative act of February 28, 1895, while adhering to its previous conclusion that by reason of the provisions of the code of 1893 the probate courts have had no jurisdiction to entertain proceedings for divorce subsequent to August 14, of that year, overruled its former views as to the source and scope of the power of the legislature to enact laws upon the subject of divorce, holding that (syllabus by the court):

The power to regulate matters of divorce is a legislative one, and the conferring of jurisdiction upon probate courts to grant divorces is not a wrongful exercise of the right granted by the organic act to the legislature of this territory to pass enactments upon rightful subjects of legislation; and the act of the legislature of this territory of 1890, giving probate courts jurisdiction to entertain actions of divorce, needed no ratification by congress, and the act of congress subsequently passed approving the territorial legislative enactments granting jurisdiction to probate courts did not take away the right of the legislature to still further make regulations respecting divorce proceedings, nor the right to repeal its own enactments granting to probate courts jurisdiction in divorce cases.

In the opinion of the court it was further said (pp. 372-3):

We believe that the question of marriage and divorce, of the marriage relation and the dissolution thereof, is entirely a legislative question, and one which should and must be controlled by legislative enactment. Except for the act of congress prohibiting local and special legislative acts, the legislature might either grant divorces itself, or it might confer upon some other body, not necessarily a judicial tribunal, the power to grant the same. The right to grant divorces never was inherent in either courts of chancery or common law, and the inherent powers of the district and supreme courts of this territory are those possessed by chancery and common-law courts under the grant of the organic act, which is: "And said supreme court and district courts, respectively, shall possess chancery as well as common-law jurisdiction." 26 Stat., 81. So long, then, as an act of the legislature does not infringe on any of the common-law or equity jurisdiction of the courts of the territory, as defined by act of congress, and the act is within the grant of legislative power extended to the legislature of this territory, we can see no reason why it is not valid. We know of no reason why it cannot, on the one hand, enact, and no reason why it cannot repeal, the same. The act of congress ratifying this law giving jurisdiction to the probate courts does not prevent the legislature from repealing the same. There is nothing in the act of congress making the ratification which indicates that congress meant to repeal any of the provisions of our organic act. Congress had delegated to the territorial legislature the power to legislate upon "all

rightful subjects of legislation not inconsistent with the constitution or laws of the United States" (26 Stat., 84), and not prohibited by the other terms of the organic act, and there is no provision against its legislating by general enactment on the question of divorce. . . . We think the ratifying act of congress was only intended to give life and validity to such acts as would not be valid without congressional ratification, and did not intend, in addition thereto, to in any way affect the acts of the territorial legislature relating to probate courts, which it might have passed without authority of congress. It did not mean to take away any of the power granted by the organic act to legislate upon "all rightful subjects of legislation." This act of congress was a grant of validity to, and not a restraint upon, the power and exercise of power by the legislature, and the words used being words of approval and not of restraint, and there being several enactments to which it might by its general terms have applied, part of them requiring an act of congress to give life to the same because of the legislative inability to enact such provisions without such ratification, and part of them requiring no act of congress to make them valid, it cannot be presumed or held that such words of approval could have meant to apply to any other of the legislative provisions than those which required ratification, and cannot be construed to limit a broad congressional grant of legislative power which had been in no way exceeded. If the legislature had a right to legislate with reference to the granting of divorce before this approving act of congress, it still possessed it afterwards, and if it had a right to grant divorces for statutory causes, it still possessed the right, after this congressional enactment, to take it away; and having by its own provisions taken away the power prior to that granted by it to the probate courts, of course the probate courts do not now possess the power conferred upon them to grant divorces.

These views of that court upon the grant of power to legislate upon the subject of divorce are supported and reinforced by the case of *Whitmore v. Hardin*, (Utah) 1 Pac. Rep., 465, and of *Maynard v. Hill*, 125 U. S., 190. *Per contra*, however, see *In re Christensen's Estate* (Utah), 53 Pac. Rep., 1003.

Regarding as settled in the affirmative by the weight of authority the proposition that full power to legislate upon the subject of divorce is within the grant contained in the Oklahoma organic act, and also accepting as conclusive the decision of the supreme court of that Territory that the jurisdiction of actions for divorce theretofore conferred upon probate courts was taken away, after August 14, 1893, by the code of that year, the question arises: What effect is to be given in this case to the remedial and curative act of February 28, 1895?

The purpose of the Oklahoma legislature is so clearly expressed by the language of the act as to leave no room for construction. The decree of divorce here in question falls clearly within its terms, and is validated thereby, unless the act itself is invalid. The validity of the act has never, so far as appears, been called in question in any case before the Oklahoma supreme court, or other competent judicial tribunal. As a law of the Territory, duly enacted, upon a subject of legislation within the general power conferred by the organic act, and unquestioned by any competent judicial tribunal, the Department will not assume to deny its validity and controlling force in this case, unless it be shown to be in conflict with or repugnant to other legislation of Congress.

It has been suggested during the consideration of this case that the act of February 28, 1895, *supra*, is in effect special legislation granting divorces, and therefore prohibited by the provision of the first section of the act of Congress of July 30, 1886 (24 Stat., 170), which reads:

That the legislatures of the Territories of the United States now or hereafter to be organized shall not pass local or special laws in any of the following enumerated cases, that is to say:

Granting divorces.

The Department is of opinion that the Oklahoma act of February 28, 1895, is not in any proper sense a local or special law and hence not within the prohibition intended by the said act of July 30, 1886. On the contrary, the act in question is by its terms of general application throughout the Territory. It affects *all* decrees of divorce theretofore granted by the probate courts of the various counties of the Territory. It does not come within any well settled definition of a local or special law. In Sutherland on Statutory Construction, section 127, it is said:

Special laws are those made for individual cases, or for less than a class requiring laws appropriate to its peculiar condition and circumstances; local laws are special as to place.

And again in the same section, citing and quoting from *Van Riper v. Parsons* (40 N. J. Law, 123), it is further said that it is declared in that case:

that a general law, as contradistinguished from one special or local, is a law which embraces a class of subjects or places, and does not omit any subject or place naturally belonging to such class. The second time that case passed under judicial examination in the same court the holding was thus expressed: "A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purpose of the legislature, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law but a general law, without regard to the consideration that within this state there happens to be but one individual of that class, or one place where it produces effect." The statute which the court in that case gave effect to spent its force entirely in its application to one city.

Numerous other authorities are cited in a foot-note in support of the foregoing doctrine. And see also *Am. and Eng. Encyc. of Law*, Vol. 3, p. 695, and authorities cited.

Full force and effect must therefore be given by the land department to the decree of divorce entered January 20, 1894, by the probate court of Payne county, and it must be held that from that date appellant ceased to be the wife of Watt Hamlet. She has therefore no right, as contended, to make final proof under said homestead entry.

In *Bray v. Colby*, *supra*, it is laid down as a rule (after stating, among others, a rule allowing the deserted wife of an entryman to make final proof) that—

Where the entryman's wife is deceased, the foregoing rules shall apply to his child, who is not twenty-one years of age at date of the offer to purchase, commute, or make final proof as an agent, or at date of the offer to enter; provided that in the latter case the child shall be the head of the family.

The same rule will obviously apply with equal force where the wife has been divorced.

The decision of your office is affirmed in accordance with the foregoing.

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RAILROAD RIGHT OF WAY—SETTLEMENT RIGHT—SURVEY.

MELDER *v.* WHITE.

The Northern Pacific railroad company by section 2, act of July 2, 1864, holds its right of way under a qualified fee, which, so long as the qualification annexed is not at an end, confers upon the company the exclusive right of possession; a settlement, therefore, upon said right of way is not a settlement upon the public land, and confers no right or claim to adjoining public land.

Where the Northern Pacific railroad has been constructed across unsurveyed land, and a survey of the public lands is thereafter made and approved, in which the lines of survey are extended across the railroad right of way, as though it were a mere easement, such survey will not be set aside and a resurvey made for the purpose of closing the lines of survey upon said right of way; it appearing that many tracts adjoining said right of way have been disposed of under the existing survey, that neither the interest of the United States, nor of the company, require such action, and that there is no difficulty in identifying the portion of each sub-division that remains subject to settlement and disposition as public land.

Questions as to priority of right, or adjustment of rights, acquired by settlement prior to survey, can only arise where the settlement is made prior to the survey in the field.

In the absence of special statutory authority therefor, the public lands can only be disposed of according to the legal sub-divisions of the public survey; and it follows from such rule that the right obtained by settlement under the homestead law upon a given legal sub-division extends to the whole of that sub-division.

A notice of a possessory claim, given prior to survey in the field, will not estop the settler from afterwards making his entry conform to the legal subdivisions, in such manner as to include the land actually settled upon by him, as against settlers whose rights are acquired after such survey.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *May 22, 1899.* (C. J. W.)

November 27, 1895, John E. White made homestead entry for the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and lots 5 and 6, Sec. 2, T. 55 N., R. 2 E., Coeur d'Alene, Idaho, said entry being made on the day the approved plat of the township was filed in the local land office.

On the same day, but after White's entry was of record, Henry Melder, as probate judge of Kootenai county, Idaho, applied to file a townsite declaratory statement, with a plat of the town of Clark's Fork attached, for the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of said section, which was rejected because of conflict with White's entry. Subsequently, on January 8, 1896, said Melder, as probate judge, and for the benefit of the townsite claimants, filed an affidavit of contest, asking for the cancellation of

White's entry as to said NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , upon the ground that said forty acre tract had been used and occupied for townsite purposes since the year 1884, and that the entry was made for speculative purposes.

A hearing was had, at which both parties appeared and submitted testimony, which resulted in a decision by the local officers May 14, 1896, to the effect that about two acres of the forty acre tract in question should be awarded to the contestant, and that White's entry remain intact, provided he should agree to convey, after patent, said two acres to said probate judge, in trust for the benefit of the occupants for townsite purposes.

Both parties appealed from this decision, and on February 6, 1897, your office considered the case and held White's entry for cancellation as to the NW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 2, T. 55 N., R. 2 E., B. M.

The defendant moved for review of said decision, which motion was denied by your office on May 12, 1897. The defendant then appealed to the Department, and on August 31, 1898, your office decision of February 6, 1897, was affirmed (not reported).

Defendant White filed a motion for review of said departmental decision, an order entertaining which was made on November 16, 1898, and transmitted, together with the motion, to your office, to be returned to the applicant for service upon the opposite party.

December 30, 1898, your office transmitted said motion to the Department, with evidence of its service, and it is now to be considered, together with the showing made in opposition thereto.

The first and second grounds of alleged error do not require notice, as they present no question affecting the merits of the case, and constitute no sufficient reason for its review. The remaining grounds of error are as follows:

3. By holding in effect that occupation by lessees of the Northern Pacific Railroad Company, of land wholly covered by the right of way of said company, for the purpose of a *declining* and limited trade and business, excepted the whole of the forty acre tract traversed by said railroad and right of way from the operation of the homestead laws, even where such occupation was given up and abandoned for other locations after appellant's homestead rights had attached; and that a *bona fide* settlement made and an improvement by the settler of a part of said legal subdivision, not demanded and wholly unsuited for townsite purposes, will, after survey and years of improvement and continuous residence, count for naught and the homestead *entry* therefor have to be canceled on account of the townsite claims of such railroad lessees, each of whom, until four years subsequent to the initiation of such settlement, intended to acquire title to the same land under the homestead laws.

4. In failing to point out and correct errors of fact contained in the Commissioner's said decision of February 6, 1897, the existence of which were practically admitted in the decision of the Acting Commissioner of the General Land Office on review, a correct statement of which facts the appellant is clearly entitled to receive, even though your Honor should hold the same views entertained by the said Acting Commissioner as to the question of law involved.

5. By holding in effect that prior to White's settlement several residences on the land, off of the right of way, were occupied by persons doing business in the alleged

town and that such occupation was settlement and occupation for townsite purposes, and in holding that any part of the land not upon the right of way was used for the purpose of trade and business prior to the attaching of the adverse rights of the homestead entrymen.

6. By holding in effect that any part of the new buildings of Nagel's firm occupied any portion of the lots on which their building or buildings stood when on the right of way and by giving an incorrect idea as to the nature and extent of the improvements off of the right of way.

7. By holding in effect that occupants generally believed that said right of way was only one hundred feet in width on each side of the main track and in giving consideration to such alleged belief *in the face of the provision contained in a public statute to the contrary*.

8. In holding in effect that the contestant made a *prima facie* case, and that there was in fact such occupancy for townsite purposes as would reserve the land from settlement under the provisions of Sec. 2387, U. S. R. S.

These grounds present matters which require consideration.

The facts leading up to the controversy are stated by the local officers, who heard the testimony, as follows:

From the testimony it appears that one John G. Nagel located as a homestead, in the year 1884, all that portion of the tract in controversy north of the Northern Pacific railroad track; that he cleared, improved and cultivated the same; that afterwards he conducted a small general merchandise store, in connection with his said homestead, and continued to conduct the said store up to the year 1889.

In 1889 a discovery of mineral was made in the adjoining section, which caused a mining excitement, when Mr. Nagel had a portion of the tract in controversy (which was then a part of his homestead) surveyed into lots and blocks, not as a townsite, but, to use Mr. Nagel's own words: "*To accommodate the business then demanded*" (see Nagel's testimony, page 53).

A plat of said survey is filed with the testimony and marked "Contestant's exhibit D.," said plat does not give any boundaries of the tract of land embraced therein, nor the area, nor any statement of the extent and general character of the improvements; it is not verified, it does not appear to have been filed with the recorder of the county within which the land is situate, nor in the local land office, nor in the General Land Office, in fact it does not in any particular comply or attempt to comply with the provisions of sections 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, United States Revised Statutes. The testimony shows that the lots and blocks on said plat commence at a point one hundred and fifteen feet north from the center of the Northern Pacific Railroad track, and that said lots are one hundred and ten feet deep; that all the business buildings were erected on the front row of lots as shown by contestant's exhibit "D," thus it will be noticed that all of said business buildings were erected on the right of way of the Northern Pacific railroad company, and not on the tract in controversy. A reference to contestee's exhibit "A" will show the exact location of all buildings at Clark's Fork in December, 1892. Witnesses Nagel and Butler testify that when they built their houses they supposed the right of way of the Northern Pacific R. R. Co. was only one hundred feet on each side of the center of the main track, and that they supposed their houses were on the tract in controversy, up to some time in 1893 when the Northern Pacific R. R. Co. asserted its right to the land, and leased the ground upon which all the business houses at Clark's Fork were located to the respective owners of said houses.

This fact is stoutly denied by all the witnesses for the contestee, and especially by one S. R. Catlow, who testifies that the width of the right of way was discussed by nearly every person in Clark's Fork during the fall of 1889 and the winter of 1890; that he wrote to the General Land Office, and was informed that the right of way

was two hundred feet from each side of the center of the track; that this letter was public property, and was shown to nearly every person in and around Clark's Fork. (Catlow's testimony, page 124.)

In 1891 John E. White, the contestee, located with other lands nearly all of the tract in controversy south of the Northern Pacific railroad track, and commenced the erection of a dwelling thereon, and established actual residence in said house, with his family, in February, 1892, and has resided thereon, improved and cultivated the same continuously since 1892, and is now residing thereon, his improvements being valued at \$2000.00.

In 1891 M. P. Whitcomb (one of the applicants for the townsite) located as a homestead a small portion of the tract in controversy south of the Northern Pacific railroad track, and erected a dwelling house and established his residence therein during 1892, subsequent to that of White, and has continued to reside thereon and is now residing thereon. When the field work of the government survey was made in 1893, Whitcomb's residence or dwelling house was found to be partly on the tract in controversy and partly on section No. 3.

Thus the tract remained from 1889 to 1893 with the store of Nagel, the hotel of Roberts, and the saloon of Butler located on the north side of the railroad track and on the right of way of the Northern Pacific Railroad Company, and the residence of White and a portion of the residence of Whitcomb on the south of the railroad track.

During 1893 after the field work of the government survey was extended over the tract in controversy, White, Whitcomb, Nagel, and Butler gave out that they intended to enter the same under the homestead laws.

During 1893 the Northern Pacific Railroad Company asserted its right to the land occupied by Nagel, Roberts, and Butler Bros., and leased the same to the aforesaid parties, and they and each of them continued to occupy said premises under said lease and not otherwise up to the summer of 1894, when the Northern Pacific railroad company refused to further lease said premises to the Butler Bros., and notified them to remove their buildings off from the right of way, which they did some time in the fall of 1894, and moved their said buildings upon the tract in controversy.

The contestee testifies that in the spring of 1895, Whitcomb and Nagel attempted to effect a compromise, so that a joint filing could be made under the homestead laws, by which the said Nagel, Whitcomb, and contestee could perfect title to the land claimed by each of them prior to survey. This the contestee refused to do, and soon thereafter the said Whitcomb and Nagel commenced the erection of a store-building and occupied the same as a general merchandise store on the tract in controversy and off of the right of way. Roberts continues to lease from the railroad company, and his place of business is now located on the right of way of the Northern Pacific Railroad Company. Thus the matter stood until October 26, 1895, when notice was published that on and after the 27th day of November, 1895, the official plats of said township would be on file in this office, and that this office would receive filings or entries for lands in said township on and after said 27th day of November, 1895. On October 29, 1895, a petition (contestant's exhibit "C") was filed with the probate judge in and for Kootenai county, Idaho, signed by ten persons, claiming to be residing on the tract in controversy, asking the said probate judge to secure said tract as a townsite under the name of Clark's Fork. This appears to be the first attempt to obtain title to the tract in controversy under the townsite laws.

In pursuance to said petition the said probate judge caused a portion of the tract in controversy to be surveyed into lots and blocks, streets and alleys, a plat of which is filed herein marked contestant's exhibit "A."

It further appears from the testimony and exhibits that about twenty-five feet of the north or back end of the lots as surveyed in 1889 as shown by contestant's exhibit "D" is and was off of the right of way and on the tract in controversy, and

Nagel and Butler testify on rebuttal that said twenty-five feet was used in connection with their business.

Nagel, Butler and Whitcomb failing to exercise whatever rights they claimed as settlers under the homestead laws within the statutory period, waived the same.

Whitcomb, according to his own testimony (page 24), intended to enter the tract in controversy as a homestead up to September, 1895.

Butler, according to his own testimony (page 44), told a dozen people that it was his intention to enter the tract in controversy as a homestead as late as August, 1895.

Nagel, according to his own testimony (page 59), intended to include the tract in controversy in his homestead entry as late as 1895.

Thus it will be noticed that all of the parties now engaged in business on the tract in controversy intended to enter the same under the homestead laws. They certainly could not be asserting and maintaining claim to the tract in controversy under the homestead laws and under the townsite laws at the same time.

We are therefore of the opinion that said townsite claimants have no legal right to the tract in controversy, but as a matter of equity we believe they should be protected to the extent of the ground actually occupied and improved by them.

So far as the decision of the local officers undertakes to summarize the facts, the summary appears to be substantially correct.

It appears that the Northern Pacific Railroad was constructed through and over the land in controversy before any of the present claimants made settlement thereon, and that its track passes diagonally through the forty in question, leaving the major portion on the south and the minor portion on the north side of the track.

The first improvements were evidently erected under the impression that the right of way of the railroad company was only two hundred feet in width, and it resulted that they were erected upon the right of way, which was in fact two hundred feet in width on each side of the track.

The Northern Pacific Railroad Company holds its right of way under the second section of the act of July 2, 1864 (13 Stat., 365), which is as follows:

That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turntables, and water-stations; and the right of way shall be exempt from taxation within the territories of the United States. The United States shall extinguish, as rapidly as may be consistent with public policy and the welfare of the said Indians, the Indian titles to all lands falling under the operation of this act, and acquired in the donation to the (road) named in this bill.

It is insisted by contestee that under this grant the railroad company took the fee to the strip of land embraced in its right of way, and not a mere easement therein, and that neither settlement nor the erec-

tion of business houses upon the right of way could constitute a claim to adjoining public land.

The decision complained of treated the strip granted for right of way purposes as a mere easement, and held, in substance, that settlement upon it which did not interfere with the operations of the road by the company extended to the remainder of the forty acre tract on which such settlement was made. That decision treated the grant of the right of way as conveying no greater right to the railroad company than that conveyed by the act of July 4, 1884 (23 Stat., 73), granting the right of way to the Southern Kansas Railway Company, whose successor the Atchison, Topeka and Santa Fe Railroad Company is spoken of by the supreme court in the case of *Smith v. Townsend* (148 U. S., 490) as having only an easement in the land, and not the fee.

But, as before stated, it is insisted by the contestee that the Northern Pacific Railroad Company, under the act of July 2, 1864, *supra*, upon its compliance with the terms of the granting act, took the fee to its right of way, and reference is made to the case of *Missouri, Kansas and Texas Railway Company v. Roberts* (152 U. S., 114), and to the case of *New Mexico v. United States Trust Company*, decided by the supreme court December 5, 1898 (172 U. S., 171), in support of the contention.

The right of way clause considered in the latter case is as follows:

Sec. 2. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to the said Atlantic and Pacific Railroad Company, its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power and authority is hereby given to said corporation to take from the public lands adjacent to the line of said road material of earth, stone, timber and so forth, for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary grounds for station buildings, work shops, depots, machine shops, switches, side tracks, turn tables and water stations, and the right of way shall be exempt from taxation within the Territories of the United States.

The court held, in substance, that the railroad company took the fee under this grant and not a mere easement or incorporeal right. Referring, with approval, to the case first cited; the opinion declares (page 182):

So this court in *Missouri, Kansas and Texas Railway v. Roberts*, 152 U. S., 114, passing on a grant to one of the branches of the Union Pacific Railway Company of a right of way two hundred feet wide, decided that it conveyed the fee. The effect of this decision is attempted to be avoided by saying that the distinction between an easement and the fee was not raised. The action was ejectment, and was brought in Kansas, and under the law of that State title could be tried in ejectment. Title was asserted by Roberts, who was plaintiff in the state court, and this court evidently considered it involved in the case. The language of Mr. Justice Field, who delivered the opinion of the court, would be unaccountable else. The difference between an easement and the fee would not have escaped his attention and that of the whole court, with the inevitable result of committing it to the consequences which might depend upon such difference.

As the language of the grant of a right of way to the Northern Pacific Railroad Company is the same as in the grant to the Atlantic and Pacific Railroad Company, except as to width, it follows that the Northern Pacific Railroad Company took the fee and not a mere easement to the strip of land four hundred feet wide constituting its right of way.

While the language used by the supreme court in the two cases cited justifies the contention that the right of way clauses considered in said cases granted a fee in contradistinction to a mere easement, it is to be observed that the court in neither case undertakes to say what kind of fee was granted. Indeed, it is apparent, not only from the nature of the questions then before the court, but from the language used, that the court was considering whether the grant was an easement or a fee, rather than any question as to the character of the fee. It is not said in either case that the right of way clause conveyed a fee simple estate to the grantee, though it is expressly held that more than an easement was granted.

Blackstone (Vol. 2, p. 104,) describes a fee or fee simple as generally—importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general whether male or female, lineal or collateral.

Such title evidently confers upon the owner of property the right to use it for any purpose recognized as legitimate and to change the character of the use from time to time, or to suspend use of it at his pleasure. It is not believed that the Northern Pacific Railroad Company has such title to its right of way as would enable it to alienate the land granted to it for railroad purposes so as to enable the grantee to use it exclusively for some other and different purpose, or that, if the company's use of the land for railroad purposes was abandoned, its title would be unaffected. Yet, if the grant is a fee or fee simple as generally understood, this would be true.

Blackstone (Vol. 2, p. 109,) describes another character of fee as follows:

A base, or qualified fee, is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end. As, in the case of a grant to A and his heirs, *tenants of the manor of Dale*; in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated.

So the grant of land for a right of way to the Northern Pacific Railroad Company may endure forever, yet its duration depends upon the continued use of such land for the purpose for which the grant was made. This circumstance so far debases the donation as to make it a base or qualified fee.

Such seems to be the character of title under which the Northern Pacific Railroad Company holds its right of way. It is a complete

title, however, so long as the qualification annexed to it is not at an end, and confers upon the company the exclusive right of possession, so that a settlement upon the right of way is not a settlement upon the public land, and confers no right or claim to the adjoining public land.

The supreme court, in the case of Northern Pacific Railroad Company *v.* Smith (171 U. S., 260), rendered a decision which, while not involving the character of estate held by the company in its right of way, is not without some bearing upon the matter here under consideration. Smith claimed title to certain town lots within the right of way claimed by the railroad company. The lots were a part of a townsite patented to the mayor of Bismarck on July 21, 1879, and Smith claimed under a conveyance from the corporate authorities of the city. It appears that in the year 1872 the Lake Superior and Puget Sound Land Company occupied the land and surveyed it into town lots, but no plat of the survey was filed in the register's office until February 9, 1874, after the railroad company had constructed its road through the land and had gone into possession of its right of way. Afterwards, the survey and plat were adopted as the townsite of the city of Bismarck, and on application patent issued to John A. McLean as mayor of said city for the land so surveyed, in which the right of way of the railroad company was not mentioned. It was held, inasmuch as the railroad company constructed its road and occupied the land before the townsite map was filed, before title was obtained by said mayor, and without any protest or interference from the city of Bismarck or its grantee Smith, they could not disturb the possession of said railroad company in its right of way, extending two hundred feet on each side of its road. It is therein said:

The finding of the trial court, that only twenty-five feet in width has ever been occupied for railroad purposes, is immaterial. By granting a right of way four hundred feet in width, Congress must be understood to have conclusively determined that a strip of that width was necessary for a public work of such importance, and it was not competent for a court, at the suit of a private party, to adjudge that only twenty-five feet thereof were occupied for railroad purposes in the face of the grant and of the finding that the entire land in dispute was within two hundred feet of the track of the railroad as actually constructed, and that the railroad company was in actual possession thereof by its tenants. The precise character of the business carried on by such tenants is not disclosed to us, but we are permitted to presume that it is consistent with the public duties and purposes of the railroad company.

It being determined that the townsite claimants acquired no rights by virtue of any settlement upon or occupation of the right of way, it becomes necessary to consider the alternative proposition submitted by them, to the effect that, if it be held that the fee to the right of way is in the railroad company, the survey which was made over it, as though it was a mere easement, is void, and a new survey should be made and closed upon the lines of said right of way.

Section 2395 of the Revised Statutes lays down the general plan on which the surveys are to be conducted, and is as follows:

The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require.

It is apparent that the rules prescribed to be observed in making surveys are directory and intended to apply to bodies of unsurveyed public land, which are to be subdivided according to such rules, and disposed of according to survey.

Here, after the railroad was constructed through unsurveyed public land, a public survey was made, in which the lines of the survey were extended across the railroad right of way as in cases of a mere easement. The survey has been approved and many tracts of the public lands adjoining the right of way have been disposed of in accordance with such survey, and the question is, shall it be now set aside and a resurvey made, simply that the survey may be made to close upon the lines of the land granted to the railroad company for right of way purposes, when it does not appear that the interests either of the railroad company or of the United States render such course necessary. The survey did not and could not affect the title or right of the railroad company. The purpose of a survey is to so subdivide the public lands that they may be readily identified. But here that object is not defeated by the inclusion of this right of way in the lands surveyed. Their identification is not interfered with. The existence, location and extent, of the right of way across the several subdivisions are all well known so that there is no difficulty in identifying the portion of each subdivision which remains subject to settlement and disposition as public land. The disturbance of the survey at this late day is not justified upon any ground suggested.

Both parties claim to have acquired rights to the land in dispute by virtue of settlement upon it prior to survey.

The act of June 2, 1862 (12 Stat., 413), appears to be the first general statute which recognized the right to make settlement on the public lands before survey, with a view to acquiring title after survey, but it was limited to preemption claimants. This right was extended to settlers under the homestead laws by the act of May 14, 1880 (21 Stat., 140). The townsite acts of July 1, 1864 (13 Stat., 343), and March 2, 1867 (14 Stat., 541), also give recognition to townsite settlements made on the public lands prior to the survey thereof.

It is the established rule that, in the absence of a statute making special provision to the contrary, public lands can be disposed of only according to the legal subdivisions of the public survey, and as logically resulting from this it is equally established that the right obtained

by settlement under the homestead law upon a given legal subdivision extends to the whole of that subdivision.

Questions as to priority of right, or adjustment of rights, acquired by settlement prior to survey, can only arise where the settlement is made *prior to the survey in the field*. *Lord v. Perrin*, 8 L. D., 536.

In the case at bar, at the time of the survey in the field, White was the only settler on this subdivision except Whitcomb, the other parties at that time being located on the right of way, and as to them White's right, as a prior settler, attached to the entire tract from such time. Any right Whitcomb may have had as a homestead settler by reason of his settlement before survey in the field, is lost by his failure to assert the same under the homestead law.

The evidence shows that after the survey in the field White made claim to the entire tract and exercised rights of ownership over the same. It was necessary for him to adjust his settlement claim to the lines of the public survey, and in so doing to include the legal subdivision on which his improvements were placed.

It appears that November 18, 1890, White filed in the office of the county recorder of Kootenai county, Idaho, a notice of a "possessory right," to the land south of the railroad right of way, and it is urged that he is estopped from now claiming any part of the tract north of the railroad right of way, because it was not included in said notice. The notice was filed under a territorial act, approved December 10, 1864, afterwards embodied in sections 4552-4556 of the Revised Statutes of Idaho of 1887, relating to "Possessory Actions for Public Lands," and providing that

Any person . . . occupying and settled upon, any of the public lands of the United States in this Territory, for the purpose of cultivating or grazing the same, may commence and maintain any action for interference with, or injury to, his possession of such land against any person interfering with or injuring the same.

It is further provided therein that the claimant shall file in the county recorder's office an accurate description of his possessory claim.

White's notice concluded with the statement: "I make this location under the laws of the Territory of Idaho, pursuant to an act entitled an act prescribing the mode of maintaining and defending possessory action on the Public Lands in the Territory of Idaho, approved December 10, 1864." The purpose of the notice, as will be seen, was not to define any claim White might assert under the federal laws, but to enable him to protect, under the local laws, any invasion of his possessory claim. Aside, however, from the special purpose which the notice was intended to subserve, it cannot be held that a notice of a possessory claim, given prior to survey in the field, will estop the settler from afterwards making his entry conform to the legal subdivisions in such manner as to include the land actually settled upon by him, as against settlers whose rights were acquired after such survey.

This being true, the right of White is superior to that of the town-

site claimants, and Melder's contest is dismissed and White's entry held intact.

The departmental decision under review is hereby vacated, and your office decision of February 6, 1897, reversed, and the case will be disposed of in accordance with the views herein expressed.

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ELLIOTT v. SEARS.

Motion for review of departmental decision of February 25, 1899, 28 L. D., 143, denied by Secretary Hitchcock, May 22, 1899.

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REPAYMENT—ENTRY CANCELED IN PART.

WILLIAM H. IRVINE.

Where an entry has been erroneously allowed in part, or has been canceled in part for conflict, the entryman may relinquish the entry in its entirety, or retain and perfect his entry as to that part left intact. But a relinquishment of a specific part, in such case, is equivalent to a declaration of an intention by the entryman to avail himself of the benefit of his entry as to the remainder, and if such part is subsequently canceled for non-compliance with law, he is not entitled to repayment therefor.

The right to repayment does not exist where the entry is properly allowed upon the proofs presented by the entryman, but is afterwards canceled because it has been otherwise ascertained that the land is not of the character represented in the proofs.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *May 22, 1899.* (E. F. B.)

With your letter of January 28, 1899, you resubmit for consideration by the Department, the application of William H. Irvine for repayment of purchase money paid by him on desert land entry No. 2818, of the SW.  $\frac{1}{4}$  SE.  $\frac{1}{4}$ , Sec. 5, and W.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 8, T. 7 S., R. 3 E., Salt Lake City, Utah, embracing one hundred and twenty acres. Said application is resubmitted upon the letter of the Auditor for the Interior Department of October 7, 1898, requesting that the allowance of \$30.00 repayment on this claim be reconsidered as, in his opinion, only \$5.00 can be lawfully or properly repaid thereon: You recommend that the claim be allowed for the full amount of \$30.00.

It appears that Irvine made desert land entry of the tract above described, in 1889, and on January 8, 1891, a mineral application was filed in the local office for sixty acres of land, twenty acres of which were included in the entry of Irvine. On June 10, 1891, the local officers were instructed by our office that it was error to have received said mineral application while the land was covered by the desert land entry, but in view of the allegation in the mineral application as to the mineral character of the land, they were advised that a hearing might be ordered upon the request of either party.

On July 10, thereafter, Irvine filed in the local office a relinquishment of said twenty acres, of which the following is a copy:

I, William H. Irvine, being first duly sworn depose and say that I am the identical person who on July 29th, 1889, made desert entry No. 2818, on the SW.  $\frac{1}{4}$  of SE.  $\frac{1}{4}$ , Sec. 5, and W.  $\frac{1}{2}$  of NE.  $\frac{1}{4}$ , Sec. 8, Tp. 7 S., R. 3 E., S. L. M. Utah, and I hereby relinquish to the United States all my right, title, interest and claim in and to the S.  $\frac{1}{2}$  of SW.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of said Sec. 8, the same being a portion of the land embraced in my said entry.

That this relinquishment is made on account of the conflict with the 'Slate Placer No. 1' mining application No. 1959 filed by Frederick W. C. Hathenbruck *et al.*, on January 8th, 1891. That the said twenty acres of land hereby relinquished having been found to contain deposits of slate since my said entry was made, making the same thereby more valuable for mineral than for agricultural purposes.

(Signed) WILLIAM H. IRVINE.

Upon the filing of said relinquishment the entry was canceled as to said twenty acres and the mineral application was allowed, upon which patent was issued to the mineral claimant November 2, 1892. The entry as to the remaining one hundred acres was left intact. On January 25, 1894, said desert land entry No. 2818, was canceled by your office because the entryman failed to submit proof of reclamation.

May 11, 1898, Irvine made application for repayment of purchase money paid by him on said entry, amounting to \$30.00, which was approved by this Department September 7, 1898, without passing through the law division, and was returned by the Auditor for the Interior Department with his letter of October 7, 1898, requesting a reconsideration of the action of this Department.

Upon a reconsideration of this application the Department concurs in the views of the Auditor for the Interior Department that the desert land claim of Irvine for one hundred acres, remaining intact after the relinquishment of the twenty acres, was not erroneously allowed and could have been confirmed but for the default of the entryman.

Where an entry has been erroneously allowed in part or has been canceled in part for conflict, the entryman may relinquish all of it or may retain and perfect his entry as to that part of it left intact. But a relinquishment of a specific part is equivalent to a declaration of an intention by the entryman to avail himself of the benefit of his entry as to the balance left intact. In this case the entry remained of record for Irvine's benefit, as to the one hundred acres, and was not subject to cancellation until he made default. His action in relinquishing the specific twenty acres was a sufficient "expression of acquiescence in the retention or acceptance of the uncanceled portion of the entry."

These views are not in conflict but in harmony with the decision of the Department in the cases of Hiram H. Stone (5 L. D., 527); and Arthur L. Thomas (13 L. D., 359).

Upon a further consideration of this application the Department is satisfied that the approval of this claim for any amount was unauthorized by law. When Irvine made his application to enter the one

hundred and twenty acres embraced in his original entry, he also presented in support thereof the usual preliminary proof showing the land to be non-mineral and of the character subject to entry under the desert land law. Upon the proof so submitted the local officers rightly allowed the entry. The making and submitting of this proof was the act of the entryman; the examination of the proof and records and the allowance of the entry were the acts of the local officers. In this instance the mistake was in the proof presented by the entryman and not in any act of the local officers. The entry was not erroneously allowed. The right to repayment does not exist where the entry is properly allowed upon the proofs presented by the entryman but is thereafter canceled because it has been otherwise ascertained that the land is not of the character represented in the proofs. Christopher W. McKelvey (24 L. D., 536); George A. Stone (25 L. D., 111); Edward H. Sanford (26 L. D., 3); Bernhard Neuhaus (26 L. D., 673); Adolph Nelson (27 L. D., 448).

It was not the subsequent application for a mining patent which enforced the cancellation of Irvine's entry as to the twenty acres, but the admitted mineral character of the land. Had the twenty acres been non-mineral in character, as represented by Irvine in procuring his desert land entry, it could not have been lawfully included in a mining claim, but being mineral land it could not have remained subject to his entry even if it had not been included in a mining claim.

The action of the Department of September 7, 1898, allowing repayment for \$30.00, amount claimed, is recalled and vacated and said claim will be rejected for the entire amount. You will furnish the Auditor for the Interior Department with a copy of this decision.

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CUMMINS *v.* CRABTREE.

Motion for review of departmental decision of December 24, 1898, 27 L. D., 711, denied by Secretary Hitchcock, May 22, 1899.

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OTOE AND MISSOURIA LANDS—ADJUSTMENT OF SALES.

OPINION.

The authority conferred upon the Secretary of the Interior by the act of March 3, 1893, to revise and adjust, on principles of equity, and with the consent of the Indians, the sales of Otoe and Missouri lands made under the act of March 3, 1881, is not exhausted by an attempted revision and adjustment of said sales that has failed of consummation.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*May 22, 1899. (W. C. P.)*

With his letter of April 15, 1899, J. A. Van Orsdel, as attorney for purchasers of Otoe and Missouri lands in Nebraska, submitted a

proposition for the revision and adjustment of the sales of said lands. This was referred to the Commissioner of Indian Affairs for consideration and recommendation, who submitted his report April 27, 1899. The matter has now been referred to me

for opinion as to whether or not the Secretary of the Interior still has authority to revise and adjust the sales in question under the act of Congress approved March 3, 1893 (27 Stat., 568), an attempt at such revision and adjustment having been made in 1896 and 1897, and failed of consummation; or whether, because of such attempt and failure, the act referred to is now *functus officio*.

The lands in question were sold in 1883, under the provisions of the act of March 3, 1881 (21 Stat., 380). Extensions of time for the deferred payments were made by the acts of March 3, 1885 (23 Stat., 371), and August 2, 1886 (24 Stat., 214). Many purchasers having failed to complete their payments and complaint having been made of gross irregularities connected with the sales by reason of which it was asserted that the price at which the lands sold was in many instances far in excess of their real value, Congress, by act of March 3, 1893 (27 Stat., 568), "authorized and directed" the Secretary of the Interior "to revise and adjust, on principles of equity," the sales of said lands, "and in his discretion, the consent of the Indians having been first obtained," to allow to purchasers of said lands rebates of the amounts respectively paid or agreed to be paid by them. The matter was submitted to the Indians in January, 1895, and they refused to consent to any settlement involving any rebate whatever. July 18, 1895, Secretary Smith issued an order in which, after reference to this refusal of the Indians, it was said (21 L. D., 55):

It is evident, therefore, that the relief intended to be granted the purchasers of said lands by the act of March, 1893, can not be effected, and that nothing remains for the Department to do but to enforce the terms of said purchases.

Owing to the refusal of the Indians to consent to the relief intended to be extended to the purchasers of said lands by the act of March 3, 1893, *supra*, which makes the relief provisions of said act nugatory, it appears to be the duty of this Department to carry out the former legislation relative to said lands, action under which has been suspended owing to the pendency of said legislation and proceedings thereunder after the passage of the law.

You will therefore direct the district land officers to call upon the parties in default in payment of either principal or interest for said lands to pay the same within ninety days from receipt of notice, and to advise them that in the event of their failure to do so, their respective entries will be canceled.

Afterwards action under this order was suspended, and in April, 1896, a plan of adjustment was submitted to the Indians and by them rejected. Subsequently the Indians proposed a settlement on the basis of the rebate of ten years' interest to those purchasers who would make payment of the amounts due from them within ninety days after notice. Secretary Smith adopted this plan, and on July 20, 1896, issued an order directing that notice be given purchasers of these lands who were in arrears, that all who would within ninety days make

settlement would be allowed a rebate of ten years' interest on the amounts due and unpaid, and that on failure to make payment within the time specified their entries would be canceled (23 L. D., 143). In December, 1896, the Secretary of the Interior asked the Assistant Attorney General for an opinion upon the validity and effect of this order, the inquiry being as follows:

1st. Was the order of this Department of July 20, last (23 L. D., 143), in accordance with the provisions of said act?

2nd. If said order of July 20, last, was not in accordance with the provisions of said act, has the Secretary of the Interior, in the exercise of his supervisory power, authority to issue said order independent of the terms of said act?

3rd. If prior to the issuance of said order of July 20, last, there had been an effort made to obtain the consent of the Indians to a rebate as provided by the terms of said act, and the Indians had refused to consent to any rebate whatever, then and in that event, would the Secretary of the Interior, having made an effort to proceed under said act, have the right and authority, under his supervisory power, to issue the order of July 20, last?

In the opinion submitted December 20, 1896, in response to this request, each of the questions presented was answered in the negative. This opinion, while never formally approved by the Secretary of the Interior, was evidently accepted and concurred in by him because no action was thereafter taken to carry into execution the order of July 20, 1896. Some of the purchasers who were in arrears responded to the notice given under this order and paid the amount due, less the rebate of ten years' interest, but whether this was before or after the opinion of the Assistant Attorney General is not disclosed by the papers submitted.

The Commissioner of Indian Affairs in his report of April 27, 1899, upon the proposition under consideration, expresses the opinion that proceedings under the act of 1893 having been formally instituted, and having failed, the matter is *functus officio* and can not now be revived under that act.

No reason is given by the Commissioner of Indian Affairs for the opinion so expressed, no authority is cited in support thereof, and no provisions in the statute gives color to it.

The act "authorized and directed" the Secretary of the Interior "to revise and adjust on principles of equity" the sales of these lands, and in his discretion, the consent of the Indians having first been obtained, . . . to allow to the purchasers of said lands at said public sales, their heirs and legal representatives, rebates of the amounts, respectively, paid, or agreed to be paid, by said purchasers.

That which would exhaust the authority thus given to the Secretary of the Interior and make it *functus officio* would be a revision and adjustment of the sales made on principles of equity and with the consent of the Indians pursuant to the provisions of said act. No attempt or succession of attempts at such a revision and adjustment, no matter to what extent prosecuted, if not consummated in the man-

ner required, would exhaust his authority thereunder, or preclude further efforts to execute the direction given in the act.

I am therefore of opinion that the Secretary of the Interior still has authority to revise and adjust the sales in question under the act named.

Although not within the reference in response to which this opinion is given, I take the liberty of recommending that in any revision and adjustment of these sales protection should be given, as far as may be possible, to those who accepted and made payment under Secretary Smith's order of July 20, 1896, which was subsequently held by the Assistant Attorney General to be ineffectual.

Approved, May 22, 1899:

THOS RYAN,

*Acting Secretary.*

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ALASKAN LANDS—NATIVE OCCUPANCY—TOWNSITE ENTRY.

KITTIE CLEOGEUH ET AL.

Section 8, act of May 17, 1884, recognized the right of Alaskan Indians to the possession of the lands in their actual use and occupancy at the passage of said act, or that were then claimed by them, and contemplated that future legislation should provide the terms under which they could acquire title to such land.

If section 11, act of March 3, 1891, providing for townsite entries in Alaska, is not such "future legislation" as was contemplated in the act of 1884, then the lands in such actual use and occupancy of said Indians are not subject to disposal under the townsite law; and if said section conferred upon the Indians the right to take title under the townsite law, no other person could lawfully acquire title to lands in the actual use and occupancy of the Indians, as the townsite entry is made solely for the several use and benefit of the occupants of the land entered.

The open, notorious, exclusive, and continuous possession from the date of the act of May 17, 1884, of lands by Alaskan Indians, is notice to the world of their rights in the premises, and sufficient to prevent any one from becoming a *bona fide* purchaser of said lands.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 22, 1899. (E. F. B.)

With your letter of March 10, 1899, you transmit the petition of Kittie Cleogeuh and nine other Alaska Indians belonging to the Takou tribe, praying that a hearing may be had to enable them to make proof of their claim and right to certain lands in the Territory of Alaska, now embraced in the exterior boundaries of the townsite of Juneau and described in the survey of said townsite as blocks R, S and T.

The petition is addressed to the townsite trustee of the town of Juneau and from it and accompanying papers it appears that entry was made of the townsite of Juneau under the 11th section of the act of March 3, 1891 (26 Stat., 1095), and after the survey and platting of the townsite into streets, alleys, blocks and lots a patent was issued to the trustee for the several use and benefit of the occupants thereof according to

their respective interests. In accordance with the circular of instructions of June 3, 1891 (12 L. D., 583), the trustee gave notice by publication that on a day designated, or as soon thereafter as the trustee could receive applications he would proceed to set off the lots, blocks or grounds to which each occupant was entitled.

On March 21, 1898, John I. Waterbury and T. Jefferson Coolidge, Jr., filed their application with the trustee for the blocks in controversy, with other blocks in said townsite, submitting with their applications an abstract of their claimed title, as shown by the records of the district court of Alaska, and, there being no other applicant for said blocks, the trustee, on March 21, 1898, executed a deed therefor to the said Waterbury and Coolidge. Said grantees, on April 1st thereafter, conveyed said blocks to the Pacific Coast Company.

It is alleged in said petition that petitioners and their ancestors have been in the open, notorious and exclusive possession of said property from 1881 to the present time; that they have continuously resided there and have improved said property by the erection of a comfortable house or houses on each of said lots, some of the buildings costing from five hundred to three thousand dollars; that no improvements have been made on said property, except by petitioners and their ancestors; that the beach in front of said lots has been used by petitioners and their ancestors for landing their canoes, wood and fuel, and for fishing purposes; that their absolute and exclusive possession of said lots and beach has never been questioned or interfered with by any resident citizen of the district of Alaska or town of Juneau; that they have always believed that said lands were not within the townsite of Juneau and had no notice whatever to the contrary as no actual survey upon the ground has been made or stakes driven designating the lots or blocks. They also state that as they were the only occupants of said land May 17, 1884, when the act for the civil government of the district of Alaska was passed, they believed that they were fully protected by the 8th section of said act, and it has only recently come to their knowledge that said premises are within the exterior boundaries of the townsite of Juneau. They ask that they may be permitted to make the necessary showing to entitle them to a deed to said property.

Accompanying the said petition is a written but unsworn statement subscribed by fourteen persons, who declare that they are citizens and business men of the town of Juneau and have resided therein since the dates set opposite their respective names, which range from 1880 to 1887; that during all of said time the property in question has been exclusively and openly occupied by the Indians; that the improvements thereon were placed there by the Indians, and that the subscribers are willing to testify to these facts at any time when called upon to do so. The petition is also accompanied by the affidavits of two persons who state that they have been familiar with the property

in question since 1879 and 1880, respectively, and otherwise substantially repeat the declarations made in the unsworn statement aforesaid.

The petition and accompanying papers were served upon John R. Winn, who acknowledged service for Waterbury and Coolidge and answered said petition on behalf of the Pacific Coast Company, as attorney, alleging that said property was purchased by said Waterbury and Coolidge in conformity with the rules of procedure adopted by the townsite trustee who issued his deed for the same to said purchasers, which was recorded, and that thereafter the Pacific Coast Company purchased said property from the said Waterbury and Coolidge without any knowledge or information as to any facts concerning the title to said property, except what is set out in the deed and record title thereof. The answer does not admit or deny the facts set forth in said petition but claims that the deed issued by the townsite trustee is conclusive, and that the trustee is without power to grant the relief asked for in said petition.

The petition and answer were examined by the trustee, who held that he was without authority in the premises and that petitioners must apply to a court of equity for any relief which they may desire. Petitioners appealed to your office from this action of the trustee, alleging, among other errors, that—

Said trustee erred in making his deed of said lots to said J. I. Waterbury and T. Jefferson Coolidge, Jr., for the reason that the said Waterbury and Coolidge were not residents of the District of Alaska, and had made no improvements whatever on said lots; for the further reason, that the petitioners were in the open, exclusive, and notorious possession of said lots, occupying the same at the time said deed was made, and the said Waterbury and Coolidge, and their said attorneys, had full notice of that fact.

To this the Pacific Coast Company filed a reply, in which it is stated:

That the said John I. Waterbury and T. Jefferson Coolidge, jr.; held the said property in trust for the Pacific Coast Company, a corporation duly organized and existing under the laws of the State of New York and doing business in the District of Alaska, and owning and operating upon the said land in controversy, a public wharf; that said property had been occupied by said corporation and its grantors for more than ten years last past, as a public wharf, used by said corporation and the public generally; and that if any of said property is occupied by Kittie Cleogenh and other Indians, it is against the will and consent of the owner of said property, and said Indians moved upon and have been residing on said property since the Pacific Coast Company and its grantors have been in the possession of and the owners of the same.

Neither the trustee's deed to Waterbury and Coolidge nor any conveyance from them to the Pacific Coast Company is exhibited with the answer or with any of the other papers, so that the character of the original ownership of Waterbury and Coolidge, whether as trustees or otherwise, is not fully disclosed.

The petition and accompanying papers are now submitted by your office for consideration by the Department, with a recommendation that

a hearing be ordered upon said petition to determine whether a suit should be brought by the government to set aside the deed from the townsite trustee.

The claim of petitioners to the tracts in controversy is based upon the first proviso to the 8th section of the act of May 17, 1884 (23 Stat. 24), which is as follows:

That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress:

Here is a distinct recognition by Congress of the right of the Alaska Indians to the possession of the lands in their actual use and occupation or that were then claimed by them. It was evidently contemplated that future legislation should provide the terms under which they could finally acquire title to such lands.

Two views may be presented upon the question whether Congress has adopted the "future legislation" with respect to the acquisition of title to such lands by Indians in Alaska.

One view is, that the 11th section of the act of March 3, 1891, providing that lands in Alaska may be entered for townsite purposes for the several use and benefit of the occupants of such townsites, by trustees, under the provisions of section 2387 of the Revised Statutes, as near as may be, confers upon said Indians the right to receive title from the trustees to the lots severally claimed and occupied by them within such townsites and therefore partly fulfills the promise of future legislation. In the regulations issued by the Department for carrying into effect the provisions of this section, it was apparently so construed for it was therein directed that

the trustees of the several townsites entered in said territory, shall levy assessments upon the property either occupied or possessed by any native Alaskan, the same as if he were a white man, and shall apportion and convey the same to him according to his respective interests, without regard to the question of citizenship. Sec. 26, Instructions, 12 L. D., 583, 595.

The other view is that section 11 of the act of March 3, 1891, merely extends to the Territory of Alaska the provisions of section 2387 Revised Statutes, and that it was not intended that it should be extended to persons who would not be qualified to take title to town lots under said section as elsewhere applied and administered.

But in either view, no title to lands in the actual use and occupancy of Indians could be acquired by others under said section 11. If that section was not such "future legislation" as was contemplated by the 8th section of the act of 1884, then the lands in the actual use and occupancy of Indians would not be subject to disposal under the townsite law; and if said section conferred upon the Indians the right to take title under the townsite law as extended to Alaska, no other person could lawfully acquire title to lands in the actual use and occu-

pancy of the Indians, as the townsite entry was made solely for the several use and benefit of the occupants of the land entered.

If these petitioners have been in the open, notorious, exclusive and continuous possession of these lands from the date of the act of May 17, 1884, to the present time, as alleged in their petition, such possession was notice to the world of their rights in the premises and was sufficient to prevent any one from becoming a *bona fide* purchaser of said lands.

The papers are herewith returned to your office and you will notify Waterbury, Coolidge and the Pacific Coast Company that they will be allowed sixty days within which to make full answer to said petition and accompanying papers, exhibiting therewith copies of the deeds, or evidence of title under which they claim and you will then return the papers to the Department with your further recommendation for consideration.

APPLICATION TO ENTER—APPEAL—SETTLEMENT RIGHT.

OLSON *v.* WELCH.

No rights are secured by an appeal from the rejection of an application to enter lands embraced within a railroad indemnity selection, made in accordance with the rulings then in force, where said application is not accompanied by any attack upon the validity of the pending selection.

The right of one who is residing on a tract of land embraced within a railroad indemnity selection at the date of the cancellation thereof, and thereafter applies within three months of such cancellation to make entry, is superior to any adverse claim made after said cancellation.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 25, 1899. (F. W. C.)

Erik John Olson has appealed from your office decision of April 22, 1898, dismissing his contest and holding that Patrick Welch has the prior and superior right to make entry of the W.  $\frac{1}{2}$  of SE.  $\frac{1}{4}$ , lots 3 and 4, Sec. 1, T. 128 N., R. 47 W., Saint Cloud, Minnesota, land district.

This tract is within the indemnity limits of the grant for the St. Paul, Minneapolis and Manitoba Railway Company, along its main line, and was included in a list of selections filed by said company on August 11, 1890. Losses along the St. Vincent Extension of said road were made the bases of the selection under consideration and were sufficient bases under the decisions of this Department, in force at the time of the selection, holding that the main line and St. Vincent Extension should be adjusted as an entirety.

By your office decision of July 18, 1896, the selection of the tract in question, together with other selections having a like status, was held for cancellation, it being held that the bases therefor were insufficient—the ruling of the Department having in the meantime changed, holding that the grants for the two lines should be adjusted separately—and as

no appeal was filed from said decision, nor other and sufficient bases furnished, the selection was canceled by your office letter of October 23, 1896.

On January 6, 1896, Patrick Welch tendered at the local office his homestead application embracing the tract under consideration, which was rejected by the local officers on the same day for conflict with the indemnity selection of record, and Welch appealed to your office. Said appeal does not appear to have been considered by your office until after the cancellation of the company's selection when, by your office letter of November 21, 1896, the application by Welch was returned to the local officers with instructions to allow Welch to perfect entry of the land. Prior to the allowance of entry by Welch, to wit, December 9, 1896, Olson tendered his homestead application for the same land alleging prior settlement and upon said allegation hearing was duly ordered and held.

From the testimony adduced at the hearing it appears that during the years 1894, 1895 and 1896, Olson rented and farmed a tract adjoining that under consideration, upon which he lived. In 1894 he broke and cultivated about five acres of the tract under consideration, which breaking was increased during the following year to ten or fifteen acres. He did not take up a residence on the land in question until September, 1896, since which time he has resided continuously upon the land and has improvements to the value of about \$500. He swears that during the early part of January, 1896, he, together with his wife, slept in a barn upon the land in question a night or two, and that thereafter and during the month of January, 1896, he tendered his application to enter this land. What action was taken upon said application does not appear from the record now before the Department. He alleges that his application under consideration is the third presented by himself to enter the land in dispute.

Welch does not appear to have ever resided upon the land in dispute, his claim thereto resting alone upon his application presented on January 6, 1896. Said application was presented as an ordinary one to enter public lands and was not accompanied by any attack upon the claim of the company; nor did he ask to have his application held subject to the claim of the company. In his appeal from its rejection he urged that it should have been allowed and not that it should have been received and held subject to the company's claim. It has been uniformly ruled by this Department that no right is gained by appeal from the rejection of an application unless the application was improperly rejected. *Gallup v. Welch* (25 L. D., 3); *Northern Pacific R. R. Co. v. Wolfe* (28 L. D., 298); *Falje v. Moe* (28 L. D., 371). Under the circumstances of this case it must be held that Welch gained nothing by reason of his application so tendered and rejected before the cancellation of the railroad selection.

It is therefore unnecessary to determine whether Olson gained any

right by his alleged settlement antedating the tender of the application by Welch. It is clearly shown that at the time of the cancellation of the railroad selection Olson, together with his family, was residing upon the land in question, and as he presented his application to make entry of the land within three months after the cancellation of the selection, he is duly protected in his rights under his settlement and residence upon the land, as against any claim made to the land subsequently to such cancellation.

Your office decision is therefore reversed and Olson will be permitted to complete entry of the land as applied for.

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LAWSON ET AL. *v.* KING.

Motion for review of departmental decision of February 28, 1899, 28 L. D., 151, denied by Acting Secretary Ryan, May 29, 1899.

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LAWSON ET AL. *v.* REYNOLDS.

Motion for review of departmental decision of February 28, 1899, 28 L. D., 155, denied by Acting Secretary Ryan, May 29, 1899.

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ACCOUNTS—ALASKAN SURVEY—DEPOSIT.

CLINTON GURNEE, JR.

The fund available for the compensation of a deputy surveyor for surveying a claim to Alaskan land under the act of March 3, 1891, is not necessarily limited to the deposit made under the estimate furnished by the surveyor general, and prior to the instructions to the deputy or the commencement of the survey.

Funds deposited after the instructions to the deputy surveyor should not be applied in the settlement of his account without due notice to the applicant for survey, and opportunity for him to present any objections he may have to the allowance of the account, or any part thereof.

*Acting Secretary Ryan to the Commissioner of the General Land Office, May*  
(W. V. D.) 29, 1899. (E. B., Jr.)

Clinton Gurnee, Jr., a United States deputy-surveyor for Alaska, has appealed from the decision of your office of May 22, 1897, in the matter of his account for \$179.90, claimed by him as compensation for the execution of survey No. 52 of a tract of land in Alaska, applied for by James Tyson, as a salting and fishing station, under sections 12 to 14 of the act of March 3, 1891 (26 Stat., 1095, 1100). The account as adjusted by your office was approved for \$100.00 only, it being held in the decision appealed from that that sum, being the amount estimated by the ex-officio surveyor-general of Alaska for field work in this case,

is the limit of compensation allowable therein to Gurnee under the law and the instructions applicable thereto. Mr. Gurnee contends that he made the survey in accordance with instructions received from the surveyor-general and as directed by the applicant, and is therefore entitled to the full amount claimed, and that his account should be approved for the full sum claimed.

The survey was made June 7 and 8, 1894, and embraces a tract of land containing 141.16 acres situated on the left bank of the Ugashek river, Sitka, Alaska, land district. The survey was approved by the United States marshal, *ex-officio* surveyor-general of Alaska, February 12, 1895, but was suspended by your office decision of May 14, 1895, for the reason as therein stated that "more land is claimed than is occupied in the business, and because the tract is not, as near as practicable, in square form."

In the decision your office suggested that the survey be amended so as to reduce the area claimed to about ten acres, which would embrace all the land occupied by the applicant. This decision was affirmed by the Department, on appeal, October 3, 1896, and thereunder the survey still remains suspended, the requirements of your office not having been complied with, nor attempted to be complied with, so far as appears from the papers before the Department.

It appears that the cost of the survey in the field was estimated by the *ex-officio* surveyor general at \$100.00, and the cost for office work and stationery at \$35.00; that the sum of these amounts was deposited in the United States sub-treasury at San Francisco, California, by James Tyson, the applicant, and that Gurnee was employed to make the survey pursuant to section 13 of the act of 1891, *supra*, and paragraphs 2, 3 and 13 of regulations under the act, approved June 3, 1891 (12 L. D., 583-587). November 7, 1894, without having obtained any additional or corrected estimate from the surveyor general, Tyson deposited the additional sum of \$252.90 in the said sub-treasury, on account of the survey. By reason of the lack of an official estimate for this second deposit your office does not regard it as available for compensation of the deputy-surveyor, but holds that the only sum available therefor is the \$100.00 deposited in pursuance of a regularly obtained estimate, upon the basis of which the deputy-surveyor undertook to make the survey.

The deputy-surveyor, on the other hand, urges that his compensation was fixed at \$10.00 per day and necessary expenses, by the instructions under which he made the survey, and that his account is only for the time actually consumed and for his necessary expenses in the matter of the survey, pursuant to instructions, that he is not responsible for the failure of the applicant to secure an additional or corrected estimate before making the second deposit, and that as the second deposit was in effect subsequently approved by the surveyor general, and as he (Gurnee) performed the service required of him, the money covered by

both deposits should be held to be an available fund out of which he may be paid.

Upon careful consideration the Department is convinced that the objection stated in your office decision is not sufficient to justify you in limiting your approval of the account to the sum of \$100.00 only, of the amount claimed. While it is true, as above stated, that the instructions issued May 4, 1896, to Mr. Gurnee, advised him that his compensation would be \$10.00 per day and necessary expenses, it is also true, as stated in the decision of your office, that the same instructions limited the sum total of compensation to "the amount deposited in the United States depository for the survey of the site." But it does not necessarily follow from this limitation that only funds deposited previous to the date of the instructions to the deputy-surveyor or to the commencement of the survey could be drawn upon to defray the legitimate and proper expenses thereof.

In this case it appears that the second deposit, with date and sub-treasury number, is entered in the consolidated account duly verified and submitted July 16, 1895, by the deputy-surveyor, and that such account is certified to as correct by the surveyor-general March 19, 1896, after personal examination, and payment thereof is recommended by him. This amounts to an approval of the deposit although given subsequent to the making of the same. Under these circumstances it is believed that the irregularity consisting in the lack of a previous estimate as authority for such deposit, should be waived.

The said consolidated account, which embraces thirteen other accounts for surveys made in Alaska by Gurnee during the summer of 1894, while stating the several items of expense incurred and the total number of days spent in making the fourteen surveys, does not apportion the per diem and expense items to the several surveys, nor is an apportionment made therein to any one of the surveys. In a separate account undated, unverified and without certification or recommendation by the surveyor-general, Mr. Gurnee states the total compensation due him in the matter of survey No. 52 to be \$179.90, but no basis for the apportionment is stated in the account itself, or elsewhere in the papers in the case.

You will, therefore, call upon Mr. Gurnee to render a new account in the matter of survey No. 52, properly verified, and certified with recommendation by the surveyor-general, wherein the compensation he claims is apportioned to the survey from the total compensation claimed in said fourteen surveys, and the reasons for the apportionment are fully and clearly stated. You will also require Mr. Gurnee to make personal service of a copy of such new account and of this decision upon the applicant, the said James Tyson, with notice to him in writing, that he will be allowed sixty days after such service, if made elsewhere than in Alaska, and one hundred and twenty days if made in Alaska, within which to present to the General Land Office at Wash-

ington, D. C., any objections he may have to the allowance of such account, or any part thereof. When the new account has been rendered you will, in due time, consider the same, together with any objection thereto that may have been filed as above, and take such action thereon, in harmony with the views herein expressed, as the case may seem to require. The applicant Tyson may of course, by a statement in writing, assent to the allowance of the whole of said account, or to any stated portion thereof, and may waive the time given for presenting objections.

The decision of your office is modified accordingly.

MINING CLAIM—AMENDED ENTRY—RELINQUISHMENT.

VICTOR NO. 3 LODE CLAIM.

An applicant for mineral patent, who has excluded ground embraced within a prior application of his own for another claim, may amend his application and entry so as to include ground covered by the senior application, on the relinquishment of his claim thereto; but he will be required in such case to make new publication and posting, and otherwise comply with the law and regulations.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *May 29, 1899.* (C. W. P.)

This is an appeal by Charles A. Keith from the decision of your office, dated February 15, 1898, in the case of the Victor No. 3, lode claim, mineral entry No. 1087, Pueblo land district, Colorado.

December 3, 1895, Charles A. Keith made application for patent for the Victor No. 3 lode, and entry thereof was made by said Keith December 28, 1896.

The survey of the claim, as shown by the approved survey, discloses many conflicts with other claims, and after deducting proper exclusions there remained an area of only .089 of an acre, for which entry was allowed. Said application and entry excluded the area in conflict with the Panther lode, mineral application No. 1246, filed October 19, 1895, by Keith.

December 7, 1897, Mr. Keith applied to amend the Victor No. 3 application and entry so as to include certain portions of the Panther lode covered by a relinquishment by Mr. Keith as owner of the Panther lode filed with said application, and it appears that the only reservation contained in said relinquishment is an isolated tract which covers the Panther's discovery shaft.

Your office said:

In applicant's application and publication on the Panther the ground in conflict with the Victor No. 3 lode is included therein, and in the application and publication on the Victor No. 3 lode all the ground in conflict with the Panther lode is excluded therefrom. The applications for patent for both of the said lode claims were made by the said Charles A. Keith.

In view of the foregoing and the fact that entry for the Victor No. 3 lode was

regularly allowed and the conflict with the Panther lode expressly excepted and excluded therefrom, the relinquishment is accordingly hereby rejected and the application to amend the record denied, and M. E. 1087 approved for patenting.

The Department sees no good reason why the relinquishment filed by Mr. Keith as owner of the Panther lode claim may not be accepted, or why, under the circumstances of this case, he may not be allowed to amend his application for the Victor No. 3 lode claim, and also his entry for that claim upon proper proceedings therefor, so as to include in the latter the ground thus relinquished by him. His relinquishment, however, when accepted will run to the United States and not to himself as owner of the Victor No. 3 lode claim (*Shields et al. v. Simington*, 27 L. D., 369), and in order to secure the amendment of his entry for the latter claim so as to include the land relinquished to the United States, he will be required to make new publication and posting thereof and otherwise comply with the law and mining regulations (*Woods v. Holden et al*, 26 L. D., 198; Same, on review, 28 L. D., 24).

Your office decision is modified accordingly.

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RICARD L. POWEL, No. 2.

Motion for review of departmental decision of March 22, 1899, 28 L. D., 220, denied by Acting Secretary Ryan, May 29, 1899.

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ALASKAN LANDS—FINAL PROOF—CHARACTER OF OCCUPANCY.

WHITE STAR OLGA FISHING STATION.

Under the act of May 14, 1898, testimony on final proof taken outside of Alaska, in the case of a purchase of lands in said Territory, may be admitted in evidence. The use of land as a fishing place, and as a home for the fishermen employed by an applicant for the right of purchase under section 12, act of March 3, 1891, is not an occupation of said land "for the purpose of trade and manufactures," within the intent and meaning of said section.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 31, 1899. (C. W. P.)

The White Star Olga Fishing Station has appealed from the decision of your office, dated October 22, 1897, rejecting the final proof offered by said company upon its application to purchase the land embraced in Alaska survey No. 46 and holding for cancellation the cash entry made thereon.

Said proof was rejected partly upon the ground that the proof was taken outside of the territory of Alaska, but principally because the land included in the survey does not appear to be used and occupied for either of the purposes named in section 12 of the act of March 3, 1891 (26 Stat., 1095, 1100), under the provisions of which the White Star Olga Fishing Station seeks to purchase and enter the land in question.

Since the decision of your office, Congress has passed the act of May 14, 1898 (30 Stat., 409, 413-414), which provides that the testimony on final proof taken outside of Alaska, in the case of a purchase of lands in said territory, shall be admitted in evidence as if taken before the register and receiver of the proper local land office, and under the authority of said act the testimony of the witnesses taken in San Francisco should be considered.

Section 12 of the act of March 3, 1891, *supra*, provides:

That any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States, or of any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres, to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre.

This section has been the subject of several decisions of the Department.

In Alfred Packennen's case, 26 L. D., 232, it was held that the word "trade," as employed in said section, is used in its commercial sense, and that it was not the purpose of Congress to authorize the purchase of land used for farming, or for grazing cattle, or for the domestication and breeding of wild animals.

In the case of John G. Brady, Id., 305, it was held that Congress intended to limit the amount of land which might be acquired in Alaska by a claimant under said section to the area actually occupied for the purpose of trade or manufacture, when taken in the form prescribed by the act, and not to include lands occupied for the purpose of growing fruit, or of raising any agricultural crop, or of grazing thereon horses or cattle, as incident to the business of the purchaser.

In G. P. Hansen's case, Id., 568, it is said :

All the material facts disclosed by the record have been fully set out herein and it does not appear therefrom, as seen, that a trading post or manufacturing plant has been established upon the land sought to be purchased and entered by appellant, or that there is upon the land any salting or canning establishment whereat salmon or other fish are prepared for domestic or export trade. It may be stated, in short, that no business of any kind is carried on upon the land.

The only business engaged in by appellant, according to the report of the deputy, consists in catching fish in waters in that vicinity for the Bartlett Bay Packing Company, while it appears that he uses and occupies the land in question for domiciliary purposes, and the storage, perhaps, of articles of personal property, in the way of nets and seines, in the small cabin used as a lodging place.

Engaging in the business of fishing for a livelihood or profit by one who seeks to purchase and enter land under the provision of section 12 of the act of March 3, 1891, where such land is used and occupied, as in the present case, only for the purpose of a domicile, will not be deemed an occupation of the land for the purpose of "trade or manufactures" within the meaning of said act.

The survey was therefore rejected.

The plat of survey under consideration shows that the land in question is situated on the north shore of Olga bay, in the southern part of

Kodiak island in Alaska, and is as far as practicable in a square form, being approximately twenty by twenty chains, with an area of 31.76 acres. In the centre of the tract there is a lagoon of five acres connected with the bay by an inlet. Situated on the west side of the lagoon are two houses, but on the east side there are no improvements of any kind.

The facts, as disclosed by the record, do not show that any business or manufacture is carried on upon this land, but that the land is only used for salmon fishing and as a home for fishermen employed by the company; and that "there are almost 80,000 fish caught there annually." Of the two buildings on the land, one is used for a lodging house and the other for a mess house for fishermen. There are no permanent inhabitants, only fishermen employed by the company during the fishing season. It does not appear that the company has any salting or canning establishment on the land, or carries on any domestic or foreign trade on the land, and it is evident, as said in your office decision, that the purpose of the company in seeking to purchase the land is to control the shores and thereby acquire the sole right of fishing in the adjacent waters. In view of these facts, it cannot be held that the company's occupation of the land was "for the purpose of trade or manufactures" within the meaning of the act, and the decision of your office, holding for cancellation the cash entry No. 8 of the said company, is therefore affirmed.

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RAILROAD RIGHT OF WAY--ACT OF MARCH 3, 1875.

KOOTENAI VALLEY R. R. Co.

As between the United States, and a railroad company claiming the benefit of the act of March 3, 1875, the company is entitled to take from the public lands adjacent to the line of its proposed road timber and material necessary for the construction thereof, on the filing of its articles of incorporation and due proofs of organization, as provided in section 1, of said act.

The articles of incorporation and proofs of organization are required by said act to be filed with the Secretary of the Interior, and where the same are found sufficient to identify the company as a beneficiary of the grant, and are accepted by the Secretary, the right acquired by said acceptance will relate back to the time when said articles and proofs were presented, so as to protect the company in any subsequent use of timber and material necessary for the construction of the road.

If timber necessary for the construction of the road can not be found laterally adjacent to and within the termini of the proposed road, it is permissible to go beyond said termini to secure such material.

In determining whether timber is taken from lands adjacent to the line of the proposed road, the nature of the country to be traversed by said road, and the most available means of transportation may be considered.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) May 31, 1899. (F. W. C.)

With your office letter of May 24, 1899, was submitted, with request for instructions, five separate reports made by a special agent, in

accordance with directions given by your office, regarding the cutting and removal of timber from surveyed and unsurveyed public lands in the State of Idaho, in March and April last, by contractors, for use in the construction of the Kootenai Valley railroad. The amount of the cutting involved in the several reports aggregates 735,000 feet of timber and 31,025 railroad ties.

Articles of incorporation and proofs of the organization of said Kootenai Valley Railroad Company were submitted to this Department by your office November 5, 1898. They were returned to your office for correction and were again transmitted to the Department March 24, 1899, and were accepted as sufficient March 29, 1899.

According to the articles of incorporation this company was organized for the purpose of building a railroad in the State of Idaho from Bonners Ferry, on the line of the Great Northern railway, in a northerly direction to the international boundary. A map showing the line of location of the proposed road was filed in the local land office at Coeur d'Alene, Idaho, on November 23, 1898. No action appears to have been taken upon said map by your office, looking to the approval of the same, under the fourth section of the act of March 3, 1875 (18 Stat., 482).

In your office letter it is stated that the material cut as aforesaid has virtually been taken possession of by the government, on the ground that it was unlawfully procured from public lands, and the railroad company have been thereby delayed and obstructed in the building of the road, which will develop and open up to settlement an important section of the country;

but the Department is verbally informed by Mr. Thomas R. Benton, the attorney for the company, that it is his understanding that all timber and ties referred to in said reports are in the possession of the company, except 7,000 ties which are the subject of the agent's report of May 12, 1899, the same having been cut from and being now upon what will be, when survey is accepted, Sec. 2, T. 62 N., R. 2 E.

Your office letter submitting said reports states that the main questions suggested by the reports are as follows:

1st. Had the company the right, under the act of March 3, 1875 (18 Stat., 482), to procure timber from public lands for construction purposes, prior to the approval, or acceptance, of a copy of its articles of incorporation, etc., required by the act to be filed with the Secretary of the Interior?

2nd. If the company had such right, were the timber and ties specified in Special Agent Thorp's reports, cut by or for said company for actual construction purposes?—and

3rd. Were such timber and ties procured from public lands adjacent to the line of the road?

Relative to the first question you state:

I am of the opinion that the position heretofore taken by this office, that a right-of-way railroad, duly incorporated and organized as prescribed in the act of March 3, 1875, has no right to begin construction or to exercise the privileges granted by section 1 of said act, until a copy of its articles of incorporation and evidence of its

organization thereunder has been accepted or approved by the Secretary of the Interior, is erroneous, and not authorized or contemplated by said act.

There is no provision in the law which specifically requires the approval of the copies of articles of incorporation by this Department, but, even if such a requirement can be implied, the approval of the papers would relate back to date of filing, and in the case in question none of the timber or ties was cut until some four months after the filing of said papers by the railroad company.

In view, however, of the former practice or holdings of this office, that the rights of a right-of-way railroad to begin the construction thereof does not attach until after the copy of its articles of incorporation and evidence of its organization thereunder has been approved by the Department, I feel constrained to refer the entire matter to the Department for its consideration and for advisory instructions.

The question here raised relates to the time when a railroad company seeking to secure the benefits of the act of March 3, 1875, becomes entitled thereto. This question does not appear to have ever been made the subject of consideration by this Department, with respect to the right of the company to take material, etc., from the public lands adjacent to the line of road for the purpose of construction. In the case of *Dakota Central R. R. Co. v. Downey* (8 L. D., 115), it was held that the right of way conferred by the act of March 3, 1875, does not attach by the filing and acceptance of the company's articles of incorporation and proofs of organization, but when the line of road is definitely fixed, either by actual construction or the filing of the map of location as provided for in the fourth section of the act. The question involved in that case was as to whether a reservation should be made in the patent issued on account of an entry made of lands crossed by the claimed right of way.

The act of 1875 grants a right of way across the public lands one hundred feet in width on each side of the central line of the road, and also the right to take from the public lands adjacent to the line of the road material, earth, stone and timber, necessary for the construction of the railroad. So far as these grants may interfere with the rights of others claiming the land as settlers or by reason of entry thereof, it is clear that, in addition to the filing of the articles of incorporation and due proofs of the organization, the railroad company must also give fixedness to the line of its proposed road, on account of which a right is claimed, before the initiation of the adverse claim, in order to subject such land to the grant, but this can be done either by the filing of maps as provided for in the fourth section of the act, by reason of which the company would gain a right in advance of the actual construction of its road, or by the building of its road. Where, as in the matter under consideration, the question is one solely between the United States and the company claiming the benefits of the provisions of the act, all that is necessary in order to entitle the company to the right to take from the public lands adjacent to the line of its proposed road material, earth, stone and timber, necessary for the construction

thereof, is the filing of its articles of incorporation and due proofs of organization, as provided for in the first section of the act; for, if the full privileges of the grant made by the act can be secured by the construction of the road without the previous filing of the map of location, as recognized in the case of *Washington and Idaho R. R. v. Coeur d'Alene Ry.* (160 U. S., 77, 97), and the case of *Dakota Central R. R. v. Downey* (*supra*), the right to take stone and timber must exist before construction, for the use to be made of the material, earth, stone and timber, is limited to the construction of the road.

In the case of *United States v. Denver etc. Ry.* (150 U. S., 1, 14), it was said:

When an act, operating as a general law, and manifesting clearly the intention of Congress to secure public advantages, or to subserve the public interests and welfare by means of benefits more or less valuable, offers to individuals or to corporations as an inducement to undertake and accomplish great and expensive enterprises or works of a *quasi* public character in or through an immense and undeveloped public domain, such legislation stands upon a somewhat different footing from merely a private grant, and should receive at the hands of the court a more liberal construction in favor of the purposes for which it was enacted. *Bradley v. New York and New Haven Railroad*, 21 Connecticut, 294; *Pierce on Railroads*, 491.

The articles of incorporation and due proofs of organization are required by the act to be filed with the Secretary of the Interior, and where the same are found sufficient to identify the company as a beneficiary of the grant and are accepted by the Secretary of the Interior, the right acquired by the acceptance will relate back to the time of the presentation of the articles of incorporation and proofs of organization, so as to protect the company in any subsequent taking of material, earth, stone and timber, necessary for the construction of the road.

The second question, namely: "Were the timber and ties specified in Special Agent Thorp's reports cut by or for said company for actual construction purposes?" seems to be sufficiently answered in that portion of your said office letter which states that—

The second question is answered in full by Special Agent Thorp's reports and the affidavits submitted therewith, which seem to conclusively establish the fact that the timber and ties specified were procured from public lands solely for the construction of the Kootenai Valley Railroad.

In respect to the third question, namely: "Were such timber and ties procured from public lands adjacent to the line of the road?" your said office letter states that—

The question as to what are "public lands adjacent to the line of said road," which is involved in the third query, has been construed in many conflicting ways by the courts and by decisions of this office and the Department, and no definite conclusion can be arrived at which will apply, in general, to every case. In my opinion, it should apply, in general, to the nearest and most available public lands, within a reasonable distance from the line of the road, from which the necessary timber can be procured, and it should especially apply to such lands as are within such proximity to the road as to be directly benefited by the building of the road, by being opened up to settlement and development, to a degree equivalent to the

value of the timber or other material procured therefrom. Where the lands, however, are, while only from four to five miles from the line of a road, in a direct line, but are separated from the road by mountains which it would be impossible to get the timber across, and the only way the timber cut from said lands can reach the line of road is by a long and circuitous route of some ten or twelve miles, I am of the opinion that such lands can not be considered as "adjacent to the line of the road" within the meaning of the act of March 3, 1875.

With this view of the matter it seems to me that, in the case of Hopkins and Reed, reported by Agent Thorp May 11, 1899, involving 500,000 feet of timber cut from what will be, when survey is accepted, Secs. 20, 22 and 28, Tp. 62 N., R. 2 E., in the case of Parker Bros., reported by Agent Thorp May 12, 1899, involving 7,000 ties cut from what will be, when survey is accepted, Sec. 2, Tp. 62 N., R. 2 E., and in the case of Jerry Callahan, reported by Agent Thorp May 12, 1899, involving 235,000 feet of timber cut from what will be, when surveyed, Sec. 18, Tp. 60 N., R. 1 E., the lands cut from being over five miles distant from the line of the road in a direct line, or it being impossible to deliver the timber cut therefrom to the railroad without transporting it by a long and circuitous route of from seven to twelve miles, said lands can not be considered within the proximity of the line of the road or within such reasonable distance therefrom as to be considered lands "adjacent" to the line of the road, and I am of opinion that, demand should be made upon the railroad company and its contractors for the stumpage value of said material, as innocent trespassers, before said timber and ties are delivered to them.

With regard to the 24,025 railroad ties specified in the remaining two reports of Special Agent Thorp, both dated May 13, 1899, as cut from S.  $\frac{1}{2}$  NE.  $\frac{1}{4}$  Sec. 8, Tp. 62 N., R. 1 E., Sec. 6, Tp. 63 N., R. 1 E., and on what will be when surveyed Secs. 7, 20, 29 and 32, Tp. 64 N., R. 1 E., in which said agent reports that the lands are within one mile of the line of the road, and the ties have been hauled to and are now piled on the right of way, there appears to be no question but what said lands are adjacent to the line of the road and [the ties] should be released to said road.

It appears that the 235,000 feet of timber referred to in the agent's report of May 12th were cut from lands about ten miles due south of the southern terminus of the road, and that the 500,000 feet of timber referred to in the agent's report of May 11th were cut from lands almost directly east from the southern terminus of the proposed road and from five to seven miles distant therefrom.

In circular of March 3, 1883 (1 L. D., 699), issued under the act of March 3, 1875 (*supra*), it is stated, in paragraph numbered (2), that:

The right granted to any railroad company under this act to take timber or other material from the public lands "adjacent to the line of said road" for construction purposes is construed to mean that, in procuring timber or other material for the purposes indicated in the act, the same must be obtained from the public lands in the neighborhood of the line of road being constructed and within the terminal points of such roads, if possible. If, however, it should be found that the material required in the construction of such road can not be procured from the public lands in the neighborhood of, and within the terminal limits of, such road, then it is permitted that such company may obtain the material required outside the terminal limits of the road under construction; such material, however, to be taken from such points as are most accessible and nearest to the terminal limits thereof.

Under this construction of the act it would be possible to go beyond the termini of the road in securing timber for construction if it could not be found laterally adjacent to and within the termini of the proposed road.

It does not appear, however, that any inquiry has been instituted by your office with a view of ascertaining whether necessity existed for the cutting of timber beyond the terminus at Bonners Ferry.

As to the timber and ties cut from lands laterally adjacent to the line of road, it is stated in your said office letter that a portion, especially the 7,000 ties cut from what will be, when surveyed, Sec. 2, T. 62 N., R. 2 E., and the timber cut to the east of the road at its terminus at Bonners Ferry, were cut from lands "separated from the road by mountains which it would be impossible to get the timber across, and the only way the timber cut from said lands can reach the line of road is by a long and circuitous route of some ten or twelve miles." Your office is of opinion that these lands are not "adjacent to the line of the road" within the meaning of the act of March 3, 1875.

It is not stated that there is any nearer available timber that might be used by the company; and, when the nature of the country to be traversed by the proposed road is considered, together with the evident purpose to use the streams as a means to carry the timber to the road, thus saving hauling, it is the opinion of this Department that these lands are adjacent to the line of road notwithstanding they may be "separated from the road by mountains."

The reports, together with accompanying papers, are herewith returned for your further consideration and action in the light of the construction herein given to the act.

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SURVEY—MEANDER LINE—RIPARIAN RIGHTS.

FRENCH-GLENN LIVE STOCK CO. *v.* MARSHALL.

In the survey of land bordering upon a body of water the meander line is not run as a boundary, but for the purpose of ascertaining the quantity of land in the subdivisions rendered fractional by reason of their bordering upon the water.

Purchasers or grantees of meandered sub-divisions, bordering upon a body of water, take title thereto with all of the incidents of ownership, among which is that of a right to relictions. This right pertains to the ownership of lands bounded by a water line, without reference to the character of the land, and hence exists in the case of title acquired under the swamp grant.

*Secretary Hitchcock to the Commissioner of the General Land Office, May*  
(W. V. D.) 31, 1899. (W. C. P.)

By letter of July 14, 1898, you submitted for instructions the matter of the controversy between The French-Glenn Live Stock Company and certain parties, involving lands in the vicinity of Lake Malheur, Burns land district, Oregon.

The first survey of public land in this vicinity was made in 1877. By this survey townships 25, 26 and 27, ranges 31, 32, 32½ and 33, east of Willamette meridian, were returned as fractional by reason of bordering on Lake Malheur. Many of the tracts represented by this survey as bordering upon the lake were selected by the State of Oregon

under the swamp land grant. These selections were approved and patents have been issued thereon. In 1892 a petition was filed in your office asserting that the waters of the lake had receded, leaving exposed a considerable body of land between the line of the original survey and the waters of the lake, and asking that said land be surveyed as public land of the United States. This petition was presented by parties who claimed to have settled upon these lands and desired to acquire title thereto under the public land laws. When this matter was submitted to the Department your office was directed to order surveys of those lands where no meander line had been run and in townships where the government owned land adjoining the lake if the frontage were of sufficient extent and the body of land uncovered sufficiently large to warrant the extension of the lines. (16 L. D., 256.)

Difficulty was met in carrying out this order, and the surveyor general asked for further instructions. In submitting the matter to this Department your office said:

I respectfully ask for instructions with reference to the survey of the lands between the meander line and shore line of the lake, under Department decision of March 3, 1893 (16 L. D., 256), in view of the propositions submitted by the surveyor general in his letter of April 10, 1894, herewith, and would recommend that all the dry land between the meander and shore line of the lake be surveyed as the most desirable solution of the problem, and any riparian rights of the owners of the fractions bordering upon the lake, who entered the land in accordance with the subsisting plats, to any lands which might be shown to exist by the survey now in contemplation, under the supreme court decisions referred to in the departmental decision (16 L. D., 256), might be determined after the survey of said land.

In answer to this request this Department said (19 L. D., 439):

The recommendation contained in your said office letter, that "all dry land between the meander and shore line of the lake be surveyed as the most desirable solution of the problem," in conformity with the second plan submitted by the surveyor general, in his said letter, is concurred in by this Department.

A survey was made, and the approved plats thereof filed in your office January 15, 1897. Various entries of land embraced in this survey have been allowed by the local officers. October 27, 1897, Sarah E. Marshall submitted final proof under her homestead entry for a part of this land, described as the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 34, and the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and lot 2, Sec. 27, T. 26 S., R. 31 E.

The French-Glenn Live Stock Company, claiming to be the owner, by purchase from the State, of a large body of lands shown by the former survey and plats as bordering upon Lake Mallieur and adjudged to belong to the State under the swamp land grant, filed a protest against said final proof. This protest was based upon the grounds that the land covered by said homestead entry was made bare by the recession of the waters of the lake and that it became a part and parcel of certain lots belonging to the protestant company and shown by the original survey and plats thereof as bordering upon the lake. The local officers dismissed the protest, but took no formal action upon the

final proof, and the protestant appealed to your office. There argument was heard but no decision rendered, the papers being transmitted to this Department with request for instructions.

If the waters of the lake covered this land as indicated by the first survey, a conveyance of the lots shown by that survey to border upon the lake carried with it all riparian rights of the United States and consequently all land added to such lots by reliction. It is admitted that this is the general rule, but it is strenuously insisted that this case is an exception to such rule. This assertion is based upon the proposition that the lands acquired by the State were of a certain character, that is, swamp and overflowed, and that this limitation precluded the acquirement of riparian rights. In other words, that the grantee of swamp lands takes only lands of that character, and that the land under the water, forming the bed of the stream or lake which renders the surveyed tracts fractional, does not pass under such grant. Undoubtedly a grantor of lands bordering upon a body of water may by apt terms of description and limitation confine the conveyance to the dry land and retain all his rights in and to the submerged land. The cases cited in behalf of the homestead claimants in support of their position involved only the question as to the intention of the grantors as shown by the instrument of conveyance. None of these cases involved a conveyance by the United States of public lands.

In the original survey of this land the side lines were, according to the field notes and plats, extended to the waters of Lake Malheur and a meander line was run to mark the sinuosities of the water. The line thus run was not a boundary line, but was run for the purposes of ascertaining the quantity of land in the subdivisions rendered fractional by reason of bordering upon the water. Purchasers or grantees of these fractional subdivisions took title thereto with all the incidents of ownership, among which is that of a right to relictions. This right is an incident of the ownership of lands bounded by a water line, without reference to the character of the land. The contention that the right to relictions is not an incident to the title of lands acquired under the swamp land grant can not be sustained.

It is further contended that the field notes of the survey in this case show that the tracts acquired by the State were bounded by the shore line and not by the water line and hence that no riparian rights attached. This can not be sustained. The field notes show that one of the lines of the original survey of the tracts designated as bordering upon the lake was run as a meander line of the lake, as is properly done in such cases. These lines are not boundaries, but are run to determine the quantity of land in the fractional tract, the water line forming the boundary.

If, then, the water line of Lake Malheur as it existed at the time of the survey under which the State or her grantee claims title was as shown by that survey and the plat made therefrom, or approximately so, the land uncovered by the gradual recession of the waters of the

lake belongs to the owners of the tracts shown by that survey to border upon the waters of the lake. The allegations made at the time the second survey was ordered went only to the extent of asserting that the waters of the lake had receded and left bare land which was at the time of the original survey a part of the lake bed. Upon this showing it was properly ordered that a survey be made of such of the lands thus uncovered as pertained to the tracts yet belonging to the United States. It was not intended by that order, nor by any subsequent direction, to question the right of the owners of such tracts as had been alienated by the United States to have and hold the land thus uncovered which should pertain to the tracts so alienated.

At the time a new survey of lands in this vicinity was asked for it was asserted that the waters of the lake had receded, leaving uncovered a large body of agricultural land. In 1895 a petition was filed in behalf of the settler-claimants asserting that the instructions under which the new survey was being made were not such as to insure the survey of all the lands and asking modification thereof. This was supported by affidavits, but none of the affiants claimed to have known the condition of the country in 1877 when the original survey was made. In 1897 still further protest against the new survey was made, but again none of the affiants claims any knowledge of the vicinity in 1877 or makes any statement as to the location of the boundaries of the lake at that time.

Accompanying the brief filed in your office is an affidavit of John Cummins, attorney for the homestead claimant, bearing date April 12, 1898. This affiant does not claim a personal knowledge of the country at the time of the original survey in 1877, but states that on the trial of a case had in 1897 in the circuit court of Oregon, wherein The French-Glenn Live Stock Company sought to eject a settler from a tract of land lying between the meander line of the lake as shown by the survey of 1877 and that shown by the survey of 1895, the settler introduced many witnesses who testified that the character of this land is the same as it was in 1877 and that the meander line shown by the original survey was not run within a mile and a half or more of the lake. Said attorney asserted in the oral argument here that the lake did not exist in 1877, as shown by the survey of that year. It is urged that upon this showing a hearing should be had to determine whether the original survey was correctly executed. I do not deem these statements as presented sufficient to justify an order for a hearing to determine the correctness of a survey made more than twenty years ago. It is not necessary now to discuss or consider any proposition as to the authority of this Department in the premises, based upon the hypothesis that the survey of 1877 was incorrect either through mistake or fraud.

The papers in the case are herewith returned, and you will take such action in the premises as may be proper in accordance with the facts and the views herein set forth.

## RELINQUISHMENT—INTERVENING CONTEST.

HOWARD *v.* WYER ET AL.

It is not essential to the validity of a relinquishment that it shall be executed in writing on the receiver's duplicate receipt; it is sufficient if the proof offered satisfies the local officers that the entry is in fact relinquished.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) June 1, 1899. (G. C. R.)

On November 23, 1895, John L. Wyer made homestead entry for lots 5, 6, 7, 8, 9, 10, 11, and 12, of Sec. 9, T. 33 N., R. 2 E., B. M., Lewiston, Idaho.

On December 30, 1896, Erwin P. Howard filed his affidavit of contest against the entry, alleging abandonment. Service was had by publication, and hearing fixed for May 3, 1897.

After the contest affidavit was filed, but before the day of hearing, John P. Crites filed his affidavit in the local office, stating, in substance, that about July 1, 1896, he procured the entryman's (Wyer's) relinquishment, and, intending to take the land for a home, he placed valuable improvements thereon; that about July 15, 1896, he made application for the land, tendered the required fees, and presented Wyer's relinquishment—written on legal cap-paper; that, by reason of the relinquishment not having been executed on the duplicate receiver's receipt, and no affidavit having been offered to account for absence of the receipt, his application was suspended for a more perfect relinquishment; that he afterwards procured the original receiver's receipt and mailed the same to the local office, but failed to send therewith any letter of transmittal, believing the register would remember his original application, without his explaining why he sent it; he asked that his entry be allowed, and that no rights be acquired by the contestant, whose contest was filed subsequent to his application.

At the hearing Wyer, the entryman, made default. Contestant introduced testimony clearly proving his allegations of abandonment.

Crites was thereupon allowed to intervene; he introduced in evidence, from the files of the office, the following papers in support of his affidavit above mentioned: Receiver's receipt, No. 3841, issued to John L. Wyer, November 23, 1895; also Wyer's written relinquishment of the entry, dated July 7, 1896, and sworn to on same day before F. J. Wilmer, a notary public of the State of Washington; also his (Crites') homestead application for the land, sworn to before the register July 20, 1896, and his non-mineral affidavit executed on the same day.

The register and receiver recommended that the entry be canceled, and Howard, the contestant, "be allowed to file;" but in thus finding for Howard the register and receiver admit that Wyer's relinquishment

and Crites' application, etc., "are with the papers in this case," further saying:

The affidavits in this case show that they were sworn to before the register of this office, but were never filed or any entry made on the records of this office relating to said papers; and why they remained dormant so long we are unable to explain, further than the duplicate receiver receipt for said filing was found in our U. S. mail rec'd, but without any relinquishment or other explanation relating to it.

On appeal, your office, by decision of September 16, 1897, reversed that action and dismissed the contest. A further appeal brings the case here.

It sufficiently appears from the testimony in the record and the statements of the register and receiver that Crites applied for the land before Howard filed his affidavit of contest. Crites' application was also accompanied by Wyr's relinquishment.

It is not essential to the validity of a relinquishment that the same shall be evidenced only by a writing on the receiver's duplicate receipt. It is sufficient if the proof offered satisfies the local officers that the entry is, in fact, relinquished. If the relinquishment is acknowledged or sworn to before an officer qualified to take acknowledgments or administer oaths (and even that is not required—*Johnson v. Montgomery*, 17 L. D., 396), the proof should be regarded as sufficient. When, as in this case, the relinquishment was followed in a short time after its presentation, by the duplicate receipt sent in to the local office through the mail, the relinquishment should then have been accepted and Crites' application allowed.

It appearing that Crites applied for the land, tendering the required fees and swearing to the necessary affidavits, etc., and that he accompanied his application by a relinquishment of the then existing entry, followed soon thereafter by the duplicate receipt, all of which was done before the contest was filed, he obtained thereby a prior right to the land. The fact that no record was made of such application by the register was the latter's fault, and Crites cannot be held responsible for it; he had done all that was necessary to protect his rights.

The decision appealed from is affirmed.

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OKLAHOMA LANDS—SECOND HOMESTEAD ENTRY.

WALTON ET AL. *v.* MONAHAN.

The right of one who has abandoned all claim under a prior entry to make a second entry under section 13, act of March 2, 1889, 25 Stat., 980, is not affected by the fact that at the date of his settlement the prior entry had not been canceled of record.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) June 1, 1899. (C. J. G.)

October 28, 1893, Michael J. Monahan made homestead entry for lots 1, 2, 3 and 4 and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ , Sec. 32, T. 26 N., R. 3 E., Perry, Oklahoma, land district.

The entry was contested as follows:

December 4, 1893, by Benjamin F. Walton as to lots 3 and 4, and N.  $\frac{1}{2}$  NE.  $\frac{1}{4}$ ; December 11, 1893, by Burned Helda, as to lots 1 and 2; and December 18, 1893, by Simeon L. McQuiston as to the whole tract, all alleging priority of settlement.

As to the facts of this case there is very little question, both the local office and your office finding that Walton and Helda were the prior settlers; that they fully complied with the law as to residence and improvements; and that they are qualified to make entry.

Monahan and McQuiston have appealed from your office decision of May 14, 1897, to the Department, their principal contentions being that Helda and Walton are disqualified from making entry, the former by reason of premature entry into the Territory, and the latter by reason of a prior entry. Monahan stood on his entry alone and can therefore have no rights unless these contentions be sustained. Walton and Helda made the race into the Cherokee Outlet September 16, 1893, from the Chilocco Indian school reservation. The Department has subsequently held that such fact would not in itself disqualify a settler from making a homestead. McQuiston made settlement with the avowed understanding that if those who made the race from the Chilocco reservation were declared to have done so "legally" he would abandon the land. It appears that Helda, on September 8, 1893, in going to Arkansas City to secure a booth certificate crossed the Cherokee Outlet from the Osage reservation, and on this account it is alleged that he is disqualified. His testimony shows, however, that he passed along the public main-traveled road and that he gained no advantage of such trip. He is not thereby disqualified under the decisions of the Department from making entry. It appears, also, that Walton made an entry April 21, 1887, at the Lamar land office, Colorado. This entry was intact at the time he settled on the land in controversy, and remained so until the date of your office decision of May 14, 1897, when the same was canceled. From this fact it is contended that Walton was disqualified from making second entry. The evidence shows that Walton had wholly abandoned the land embraced in his original entry for reasons stated, having left the same in August, 1887, and never having derived any benefit therefrom. The fact that his original entry was not canceled of record at the date of his settlement on the land in controversy, is immaterial as he had fully abandoned his right and the possibility of securing title thereto, and he is therefore entitled to make second entry under section 13 of the act of March 2, 1889 (25 Stat., 980, 1005).

Your office decision is accordingly hereby affirmed.

## MINING CLAIM—REINSTATEMENT OF ENTRY—ISSUANCE OF PATENT.

## KOHNYO AND FORTUNA LODES.

A petition for the review of a departmental decision, under an exercise of the Secretary's supervisory authority, will not be entertained, where it is in effect an application for the reinstatement of an entry that was canceled under a ruling of the General Land Office not called in question when the case was before the Department on the appeal of the petitioner. The application in such case should be addressed to the General Land Office.

On application for reinstatement of a canceled mineral entry, where it appears that parties are claiming adversely thereto, the applicant should publish notice of his application for a period of sixty days, in the same manner as notice for an original application for patent is required to be published.

Where two claims are embraced within one entry, and there is no pending contest, protest, or adverse proceeding of any kind, against one of said claims, patent may issue therefor, on due showing of compliance with law, without waiting for the termination of pending litigation against the other claim.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 3, 1899.* (E. B., Jr.)

The Cripple Creek Gold Mining Company, by Lyman B. Goff its president, has filed a petition asking the Secretary in the exercise of his supervisory authority "to review and modify" the decision of the Department dated May 7, 1898, in the case of Cripple Creek Gold Mining Co. v. Mt. Rosa Mining, Milling and Land Co. (26 L. D., 622).

It appears that the first-named company made application March 7, 1894, for patent to the Kohnyo and Fortuna lode mining claims, survey No. 8612, Pueblo, Colorado, land district; that the Kohnyo claim as located October 2, 1891, was crossed just north of its center by the southeast corner of the previously located Mt. Rosa placer mining claim; that application for patent to the placer claim embracing the conflict between the placer and lode claims, was filed August 5, 1892, making no mention of the Kohnyo lode, and that patent for the placer was issued April 24, 1893; that mineral entry No. 573 for the Kohnyo and Fortuna claims was made March 6, 1895, the conflict with the placer claim being excluded from the entry pursuant to the exclusion thereof in the published notice of the application; and that the Kohnyo claim was thus divided into two non-contiguous parts the north one of which contained the discovery shaft and all other improvements.

Upon consideration of these facts, your office decided May 28, 1895, that by reason of their non-contiguity only one of the parts of the Kohnyo claim could be embraced in the entry, but that the lode claimant might elect which part it would retain therein, provided, that if it elected to retain the southern portion it would be required to show that mineral had been discovered thereon and that the statutory expenditure of \$500, had been made thereon; and it was further said in the decision:

Claimant will be allowed sixty days within which to furnish required evidence or to appeal, in default of which the entry will be canceled to the extent of that portion of the claim lying south of the patented Mt. Rosa placer claim, without further notice.

Thereupon the lode claimant alleged that the Kohnyo lode was known to exist within the ground in conflict prior to the date of the application for the placer claim and asked that in the event of its establishing this allegation it be allowed to file application for patent to the area in conflict. As a result of this allegation, and pursuant to direction given by your office, September 16, 1895, a hearing was had at the local office between the parties named above, and upon the evidence adduced the local office held that the allegation of the lode claimant had not been sustained. On successive appeals this decision of the local office was affirmed by your office October 22, 1897, and by the Department in its decision of May 7, 1898, *supra*.

June 14, 1898, the lode claimant, The Cripple Creek Gold Mining Company, filed in your office an instrument executed by its president, waiving its right to move for a review of the said decision of May 7, 1898, and electing, under your office decision of May 28, 1895, to retain in its entry the northern portion of the Kohnyo claim. June 17, 1898, the resident attorneys of said company moved for a suspension of action upon the company's election until its petition, there filed, asking to be allowed to retain in its entry both parts of the Kohnyo claim, could be considered and acted upon. The grounds upon which this petition was based are that a well-defined vein in rock in place carrying gold had been opened up in each of the detached parts of the Kohnyo claim; that the vein is shown to extend through the intervening patented placer; and that the company has been prevented by force and threats of violence from developing the southern portion of the Kohnyo claim, to such an extent as would enable it to elect intelligently which portion of the claim it ought to retain in its entry. The affidavits of two persons were filed in support of this petition.

There was also filed in your office on the date last mentioned, the protest of F. C. Brown, corroborated by John McConaghy, alleging that Brown is the owner of the Scorpion lode claim; that such claim conflicts with the southerly portion of the Kohnyo claim; that no mineral had been discovered in that portion of the Kohnyo at the date of the entry thereof; and that the improvements made for the Kohnyo claim are upon the northern part thereof: Wherefore the protestant objected to the inclusion of the southern part of the Kohnyo claim in the said entry. June 27, 1898, there was filed in your office the protest of said McConaghy, corroborated by two other persons, wherein it is alleged that the Kohnyo location is illegal as to all ground south of the point where the Kohnyo lode on its strike intersects the Mt. Rosa patented placer, and that he (McConaghy) has embraced the ground south and east of such intersection in a location known as the Hypatia lode claim: wherefore he objected to the inclusion of the southern part of the Kohnyo claim in the said entry.

July 16, 1898, your office further considered the Kohnyo-Fortuna entry and held as follows:

In view of the fact that no motion for review of the departmental decision of May 7, 1898, affirming the decision rendered by this office May 28, 1895, was filed within the time prescribed by the rules of practice, the decision last mentioned became final and it now devolves upon this office to execute the same.

In view of the foregoing said mineral entry is hereby canceled as to the Kohnyo claim except as to that portion of the ground lying easterly of line 25-26 survey No. 7407, for the Mt. Rosa patented placer claim.

The claimant of the Kohnyo lode claim will be allowed sixty days from due notice hereof within which to take the proper steps to have the amended survey made in accordance with the decision of May 28, 1895, and in case of default, said entry will be canceled in its entirety.

February 28, 1899, there were filed in your office the plat and field notes of an amended survey of the Kohnyo claim, embracing only the northern part of the claim as entered, which is the same part described in your office letter of May 28, 1895, as "that portion . . . lying east of line 25-26 survey No. 7407, for the Mt. Rosa placer claim."

March 14, 1899, there was filed in your office the corroborated protest of said McConaghy against the said amended survey, alleging, as owner of the Hypatia lode aforesaid, that in such amended survey the southerly end line of the Kohnyo is established at a point far south of that at which the Kohnyo vein intersects line 25-26 of the Mt. Rosa placer; that the amended survey is misleading in that it attempts to show that the Kohnyo vein intersects such southerly end line, and that his rights under the Hypatia location would be interfered with and destroyed if the southerly end line were allowed to be established as placed by the amended survey.

April 10, 1899, the resident attorneys of the said Cripple Creek Company, filed a written request that patent issue for the Fortuna lode claim, leaving its claim as to the Kohnyo to await the determination of the litigation in which it was still involved. In this request attention was called to the fact that there was no pending contest, protest, or adverse proceeding of any character against the Fortuna claim and it was alleged that the company had been seriously damaged in respect to that claim by the delay in patenting the same, due to the long-continued litigation concerning the Kohnyo claim.

In a decision dated April 27, 1899, your office, considering McConaghy's protest of March 14, 1899, and the company's request for the issue of patent to the Fortuna, denied the request and ordered a hearing

to determine the true position and course of the Kohnyo vein and to determine further at what point said vein on its southerly strike intersects one of the boundary lines of the Kohnyo lode claim, as described in the amended survey thereof.

May 13, 1899, the company appealed from the last-mentioned decision on both the points above indicated.

The foregoing recital discloses fully the present situation with respect to the Kohnyo and Fortuna claims. In its petition for review and modification of the departmental decision of May 7, 1898, *supra*, the said company calls attention generally to this situation, and, without pointing out any error in that decision, alleges that the evidence on file shows that the apex of the Kohnyo vein is well-defined throughout both the non-contiguous tracts, urges that in view of the recent decisions of this Department in Hallett and Hamburg Lodes (27 L. D., 104), and Stranger Lode (28 L. D., 321), and of the decision of the supreme court of the United States in Del Monte Mining and Milling Company *v.* Last Chance Mining and Milling Company (171 U. S., 55), an injustice has been done the petitioner by the cancellation of its entry as to the southern portion of the Kohnyo claim, that the land is still within the jurisdiction of the land department, and asks that its entry be restored to its original status, and patent issued for both the said parts of the Kohnyo claim.

There was no appeal from the decision of your office dated May 28, 1895, holding that by reason of their non-contiguity the two parts of the Kohnyo claim could not be embraced in the entry, nor was the question as to the soundness of that decision raised in the appeal from your office decision of October 22, 1897, nor was it considered by the Department in its decision of May 7, 1898. The question considered and decided in those decisions was whether the Kohnyo vein was known to exist in the ground in conflict between the Kohnyo and the Mt. Rosa placer locations at the time of the placer application for patent. There is, therefore, nothing in the decision of May 7, 1898, which the Department is called upon to review. What is really presented by the petition in question is an application for the reinstatement of the said entry. The Department is, in effect, asked to overrule your office decision of May 28, 1895, and restore the entry to its original status. This would be an unusual proceeding, for which no warrant is found in the existing situation. An application for reinstatement of the said entry, if made at all, should be presented to your office. It appearing that parties are claiming the ground covered by the canceled portion of the entry, adversely to the claim of the petitioner, and that such parties are entitled to be heard upon any application for the reinstatement of the entry, you are directed to advise the petitioner that your office will consider such application if filed in the local office within sixty days from notice hereof, provided notice of the application is published for the period of sixty days, commencing with the filing of the application, in the same manner as notice for original applications for patent is required to be published, and due proof of such notice is furnished.

It appearing further, as alleged in the company's request of April 10, 1899, for the issue of patent to the Fortuna claim alone, that there is no pending contest, protest, or adverse proceeding of any kind against that claim, and that no substantial reason is given by your office why

such request may not be granted, the only objection stated being that it is contrary to the usual course to issue patent for one claim embraced in an entry while such entry, as to another claim covered thereby, remains still pending, the Department is disposed, in view of the company's representations that it has already sustained serious damage in respect to the Fortuna claim by reason of the long delay incident to the litigation concerning the Kohnyo claim, and in view of the prospect of still further delay from the same cause, to grant its request, subject, of course, to a due showing of compliance with law as to the Fortuna claim.

If any further showing is found to be necessary in the premises, you will at once call upon the company to make the same, and upon compliance therewith you will proceed to issue patent to the Fortuna claim leaving the entry as to the Kohnyo to await the conclusion of the litigation over the same. This action as to the Fortuna will dispose of the pending appeal as to that claim, only; as to the other question or questions involved therein, action on the appeal will be deferred until the question of the reinstatement of the Kohnyo entry as to the southern portion of the Kohnyo location has been determined.

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SWAMP GRANT—ADJUSTMENT—ESTOPPEL.

STATE OF WISCONSIN.

The State is estopped from asserting a claim to lands under the swamp grant, where a certification thereof, under another grant to the State, was accepted, and has stood intact for many years, and the State has disposed of the lands thereunder, on the faith of which others have acquired rights therein.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) June 3, 1899. (F. W. C.)

An appeal has been filed on behalf of the State of Wisconsin from your office decision of January 29, 1897, in which it is held that certain lands approved to the State under the act of April 10, 1866 (14 Stat., 30), to aid in the construction of a breakwater and harbor and ship canal at the head of Sturgeon bay, had, by reason of such approval and certification, passed beyond the jurisdiction of this Department.

It is claimed on behalf of the State that these lands were in fact swamp and overflowed lands within the meaning of the act of September 28, 1850, and as the State still holds the title conveyed to it under the act of April 10, 1866, it desires to surrender such title to the end that the lands may be recertified and patented as swamp and overflowed lands, under the act of September 28, 1850.

Against the proposed reconveyance by the State a protest was filed by Elizabeth Pfister *et al.*, alleging that they are the present owners of

the land through mesne conveyances from the Sturgeon Bay, Lake Michigan and Ship Canal and Harbor Company.

The certification in this case was made as long ago as May 4, 1867, and the question as to the character of the land is presumed to have been considered at that time. Acting upon the strength of the adjudication resulting from the certification, that is, that the land was of the character granted, third parties have invested their money.

It is merely alleged now on behalf of the State that the field notes, made the basis for adjudicating the State's claim under the swamp grant, show the lands in question to be swampy in character within the meaning of that grant, and that the certification on account of the canal grant was made without examination of the field notes.

In view of the long time that has elapsed since the certification, and the further fact that the State of Wisconsin, the present claimant under the swamp land grant, accepted that certification and has disposed of the lands thereunder on the faith of which others have acquired rights therein, the Department must hold the State estopped from now asserting any right to the land under the swamp land grant and must refuse, upon the showing made, to entertain any proposition looking to a further examination as to the character of the lands.

Your office decision is therefore affirmed.

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REPAYMENT—DOUBLE MINIMUM EXCESS.

SHELTON McCLAIN.

There is no statutory authority for the return of the excess, where lands may have been improperly sold as double minimum, except in cases where the lands have been afterwards found not to be within the limits of a railroad grant.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 3, 1899.* (W. M. W.)

The land involved in this case is the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 22, T. 11 N., R. 20 W., Missoula, Montana, land district.

McClain made preemption cash entry for said land on January 1, 1884, and was required to pay double minimum price of \$2.50 per acre therefor.

On February 19, 1896, McClain applied under the act of June 16, 1880 (21 Stat., 287), for repayment of the excess over \$1.25 per acre so paid.

On February 29, 1896, your office rejected his application, and he appeals.

The application is based upon the claim that the price of the land was fixed and governed by the act of June 5, 1872 (17 Stat., 226).

This land is situated in the Bitter Root valley above the Lo-lo fork.

Your office found that said land is within the limits of the grant to the Northern Pacific railroad company and this finding is not contro-

verted. And following the rule announced in William P. Maclay (2 L. D., 675), which involved land embraced in an even-numbered section in the same township and range in which the land in this case is situated, your office held the land to be double minimum in price.

The act of 1872, *supra*, provided, among other things, for the survey of the public lands in the Bitter Root valley lying above the Lo-lo fork of the Bitter Root river; that said lands should be opened to settlement and sold to actual settlers only, possessing certain qualifications, in quantities not exceeding one hundred and sixty acres, "at the price of one dollar and twenty-five cents per acre," and after reserving sections sixteen and thirty-six and providing for the entry of townsites in said valley, it further provided: "That no more than fifteen townships of the land so surveyed shall be deemed to be subject to the provisions of this act."

It is insisted in behalf of the appellant that your office erred in following the decision in the Maclay case, *supra*, on the alleged ground that said case was overruled in the case of Northern Pacific R. R. Co. v. Eberhard (19 L. D., 532). As to this it is sufficient to say that the former case was not overruled by the latter.

The application for repayment is based upon the contentions that the land covered by McClain's entry is embraced in one of the fifteen townships set apart by the act of 1872 to be sold at \$1.25 per acre, and that this price is all that could properly be charged for such lands.

Even if these contentions were conceded, still McClain is not entitled to repayment of the excess, for the reason that the right to repayment is not recognized in the absence of express statutory authority, and there is no such authority for the return of the excess where lands may have been improperly sold as double-minimum, except in cases where the lands have been afterward "found not to be within the limits of a railroad grant." (Joseph Brown, 5 L. D., 316; Inez Rhodes, 27 L. D., 147; John P. Shannon, 27 L. D., 296.)

It follows that in the conclusion reached by your office there was no error, and the judgment appealed from is accordingly affirmed.

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*Regulations of the Department of the Interior, under act of March 2, 1899, concerning right of way for a railway, telegraph, and telephone line through any Indian reservation, lands held by any tribe or nation in Indian Territory, lands reserved for agency or other purposes connected with Indian service, or allotted lands.*

DEPARTMENT OF THE INTERIOR,  
OFFICE OF INDIAN AFFAIRS,  
Washington, D. C., April 18, 1899.

The following regulations are prescribed under the act of March 2, 1899 (30 Stat., 990), granting right of way for a railway, telegraph, and telephone line through any Indian reservation, lands held by any

tribe or nation in Indian Territory, lands reserved for agency or other purposes connected with Indian service, or allotted lands:

1. By said act a right of way is granted "through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian Service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation," to any railroad company organized under the laws of the United States or of any State or Territory.

#### PERMISSION TO SURVEY OR LOCATE ROAD.

2. No railroad company is authorized to survey or locate a line of road through or across any of said lands until permission from the Secretary of the Interior has first been obtained.

3. Any railroad company desiring to obtain such permission must file its application therefor in this office, for transmission to the Secretary of the Interior. Such application should, in as particular a manner as possible, describe the proposed line of road within the lands named in this act, and must be accompanied by—

*First.* A copy of its articles of incorporation, duly certified to by the proper officer of the company under its corporate seal or by the secretary of the State or Territory where organized.

*Second.* A copy of the State or Territorial law under which the company was organized, with the certificate of the governor or secretary of the State or Territory that the same is the existing law.

*Third.* When said law directs that the articles of association or other papers connected with the organization be filed with any State or Territorial officer, the certificate of such officer that the same have been filed according to law, with the date of the filing thereof.

*Fourth.* When a company is operating in a State or Territory other than that in which it is incorporated, the certificate of the proper officer of the State or Territory is required that it has complied with the laws of that State or Territory governing foreign corporations to the extent required to entitle the company to operate in such State or Territory.

No forms are prescribed for the above portion of the proofs required, as each case must be governed to some extent by the laws of the State or Territory.

*Fifth.* The official statement, under seal of the proper officer, that the organization has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing law. (Form 1.)

*Sixth.* An affidavit by the president, under the seal of the company, showing the names and designations of its officers at the date of the filing of the proofs. (Form 2.)

*Seventh.* If certified copies of the existing laws regarding such corporations, and of new laws as passed from time to time, be forwarded to this office by the governor or secretary of any State or Territory, a company organized in such State or Territory may file, in lieu of the requirements of the second subdivision of this paragraph, a certificate of the governor or secretary of the State or Territory that no change has been made since a given date, not later than that of the laws last forwarded.

4. If the above showing has been made in connection with an application for right of way over the public lands under the general right-of-way act of March 3, 1875, a reference to the previous application will be sufficient.

#### PREPARATION OF MAPS OF LOCATION.

5. It is provided by the third section of this act that "before the grant of such right of way shall become effective a map of the survey of the line of route of said road must be filed with and approved by the Secretary of the Interior."

6. All maps of location presented for approval under this act should be filed with this office and should be drawn on tracing linen and in duplicate.

7. Where the line of road is greatly in excess of 20 miles separate maps should be filed in 20-mile sections.

8. Where right of way is desired for spurs or short branch lines which will not greatly enlarge the size of the map, they may be shown on the same map with the main line, and should be separately described in the forms by termini and length. For longer lines separate maps should be filed. Grounds desired for station purposes may be indicated on the map of location of the road, but separate plats of such grounds must be filed and approved.

9. The maps should show any other road crossed, or with which connection is made, and, whenever possible, the station number on the survey thereof at the point of intersection. All such intersecting roads must be represented in ink of a different color from that used for the line for which the applicant asks right of way. Field notes of the surveys should be written along the line on the map. If the map would thereby be too much crowded to be easily read, then duplicate field notes should be filed separate from the map, and in such form that they may be folded for filing. In such case it will be necessary to place on the map only a sufficient number of station numbers to make it convenient to follow the field notes of the map. The map must also show the lines of reference of initial and terminal points, with their courses and distances.

10. Typewritten field notes, with clear carbon copies, are preferred whenever separate field notes are necessary, as they expedite the examination of applications. The field notes, whether given on the map or

filed separately, must be so complete that the line may be retraced from them on the ground. They should show whether lines were run on true or magnetic bearings; and in the latter case the variation of the needle and date of determination must be stated. One or more bearings (or angular connections with public survey lines) must be given. The ten-mile sections must be indicated and numbered on all lines of road submitted.

11. The scale of maps showing the line of route should be 2,000 feet to an inch. The maps may, however, be drawn to a larger scale when necessary; but the scale must not be so greatly increased as to make the map inconveniently large for handling. In most cases by furnishing separate field notes an increase of scale can be avoided. Plats of station grounds should be drawn on a scale of 400 feet to an inch, and must be filed separately from the line of route. Such plats should show enough of the line of route to indicate the position of the tract with reference thereto.

12. The termini of the line of road should be fixed, by reference of course and distance to the nearest existing corner of the public survey. The map, engineer's affidavit, and president's certificate (Forms 3 and 4) should each show these connections. The company must certify in Form 4 that the road is to be operated as a common carrier of passengers and freight. A tract for station grounds must be similarly referenced and described on the plat and in Forms 7 and 3, except when the tract conforms to the subdivisions of the public surveys, in which case it may be described in the forms according to the subdivisions.

13. When either terminal of the line of route is upon unsurveyed land it must be connected by traverse with an established corner of the public survey, if not more than 6 miles distant from it, and the single bearing and distance from the terminal point to the corner computed and noted on the map, in the engineer's affidavit, and in the president's certificate (Forms 3 and 4). The notes and all data for the computation of the traverse must be given.

14. When the distance to an established corner of the public survey is more than 6 miles, this connection will be made with a natural object or a permanent monument which can be readily found and recognized, and which will fix and perpetuate the position of the terminal point. The map must show the position of such mark, and course and distance to the terminus. There must be given an accurate description of the mark and full data of the traverse, as required above. The engineer's affidavit and president's certificate (Forms 3 and 4) must state the connections. These monuments are of great importance.

15. Whenever the line of survey crosses a township or section line of the public survey, the distance to the nearest existing corner should be ascertained and noted. The map or plat should show these dis-

tances and the station numbers at the points of intersection. When field notes are submitted, they should also contain these distances and station numbers.

16. The engineer's affidavit and president's certificate must be written on the map, and must both designate by termini and length, in miles and decimals, the line of route for which right-of-way application is made. (See Forms 3 and 4.) Station grounds must be described by initial point and area in acres (see Forms 7 and 8); and when they are on surveyed land the smallest legal subdivision in which they are located should be stated. No changes or additions are allowable in the substance of any forms, except when the essential facts differ from those assumed therein.

#### SHOWING TO ACCOMPANY MAP OF LOCATION.

17. It is further provided by this act—

That no right of way shall be granted under this act until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so objecting a full opportunity to be heard: *Provided further*, That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby.

18. In filing maps of location for approval under this act, the same should therefore be accompanied by the affidavit of the president or other principal officer of the company, defining the purpose, intent, and ability of the company in the matter of the construction of the proposed road. Further, each map should be accompanied by evidence of the service of an exact copy thereof, and the date of such service, upon (1) the individual; (2) in case of a reservation, the agent in charge; (3) in case of the Five Civilized Tribes, upon the principal chief or secretary of such tribe or nation.

19. No action will be taken upon such map until the expiration of twenty days from the date of such service.

20. If the line of location be parallel to, and within ten miles of, a railroad which was in course of construction, or actually constructed, at the date of this act, it must be shown wherein the public interests will be promoted by the construction of the proposed road.

#### APPROVAL OF MAPS OF LOCATION.

21. Upon the approval of a map of location by the Secretary of the Interior the duplicate copy will be forwarded to the Commissioner of the General Land Office, the original to remain on file in the office of the Commissioner of Indian Affairs.

## CONSTRUCTION OF ROAD.

22. A railroad company will not be permitted to proceed with the construction of any portion of its road until the map showing the location thereof has first been approved by the Secretary of the Interior.

The fourth section of the act provides as follows:

That if any such company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation: *Provided*, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built.

23. By the terms of section 6 of this act the provisions of section 2 of the act of March 3, 1875, are made applicable to rights of way granted in this act. Said section 2 is as follows:

That any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass or, defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: *Provided*, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile.

24. When the railroad is constructed, an affidavit of the engineer and certificate of the president (Forms 5 and 6) must be filed in this office, in duplicate. If a change from the route indicated upon the approved map of location is found to be necessary, on account of engineering difficulties or otherwise, new maps and field notes of the changed route must be filed and approved, and a right of way upon such changed lines must be acquired, damages ascertained, and compensation paid on account thereof, in all respects as in the case of the original location, before construction can be proceeded with upon such changed line.

ACQUIREMENT OF THE RIGHT OF WAY AND ASCERTAINMENT OF DAMAGES OCCASIONED BY THE CONSTRUCTION OF THE ROAD.

25. Upon the approval of the map of definite location specific directions will be given in the matter of the acquirement of the right of way and determination of damages occasioned by the construction of the road.

26. The act provides that before the grant of the right of way shall become effective—

the company must make payment to the Secretary of the Interior, for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken or damage done by reason of the construction of such railroad.

#### PAYMENT FOR TRIBAL LANDS.

27. The conditions on different reservations throughout the country are so varied that it is deemed inadvisable to prescribe definite rules in the matter of determining the tribal compensation and damages for right of way. As a rule, however, the United States Indian agent, or a special United States Indian agent, or Indian inspector, will be designated to determine such compensation and damages, subject to the approval of the Secretary of the Interior.

#### ALLOTTED LANDS AND LANDS OCCUPIED UNDER INDIAN CUSTOM.

28. Railway companies should not independently attempt to negotiate with the individual occupants and allottees for right of way and damages. When the lands are not attached to an agency some proper person will be designated to act with the allottee in determining the individual damages. Where such lands are attached to an Indian agency, the United States Indian agent or other proper person connected with the Indian service will be designated to act with and for the allottees or occupants in the matter of determining individual damages for right of way, subject to the approval of the Secretary of the Interior.

29. The act provides that—

In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisement of three disinterested referees to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appraisement, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo, and the judgment for damages rendered by the court shall be final and conclusive. When proceedings are commenced in court, as aforesaid, the railroad company shall deposit the amount of the award made by the referees with

the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned, and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this act. Witnesses shall receive the fees usually allowed by courts within the district where such lands are located. Costs, including compensation of the referees, shall be made part of the award or judgment and be paid by such railroad company.

#### RESERVED LANDS.

30. The superintendent of the school, United States Indian agent, or other proper person connected with the Indian service, will be designated to determine the damages for right of way through such lands.

#### CHARGES FOR PASSENGER AND FREIGHT SERVICE WITHIN THE INDIAN TERRITORY.

31. The fifth section of the act provides that—

. . . within the Indian Territory upon any railroad constructed under the provisions of this act the rates and charges for passenger and freight service, if not otherwise prescribed by law, may be prescribed by the Secretary of the Interior from time to time, and the grants herein are made upon condition that the companies shall transport mails whenever required to do so by the Post-Office Department.

A copy of the act is hereto attached.

[PUBLIC—No. 150.]

AN ACT To provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That a right of way for a railway, telegraph and telephone line through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this act and such rules and regulations as may be prescribed thereunder: *Provided,* That no right of way shall be granted under this act until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so objecting a full opportunity to be heard: *Provided further,* That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby.

SEC. 2. That such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, machine shops, side tracks, turn-outs, and water stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one

continuous length of ten miles of road: *Provided*, That this section shall apply to all rights of way heretofore granted to railroads in the Indian Territory where no provisions defining the width of the rights of way are set out in the act granting the same.

SEC. 3. That the line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisal of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried *de novo* and the judgment for damages rendered by the court shall be final and conclusive. When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or judgment, and be paid by such railroad company.

SEC. 4. That if any such company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned *ipso facto* as to that portion of the road not then constructed and in operation: *Provided*, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built.

SEC. 5. That when a railroad is constructed under the provisions of this act through the Indian Territory there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular nation or tribe through whose lands the road may be located, such an annual charge as may be prescribed by the Secretary of the Interior, not less than fifteen dollars for each mile of road,

the same to be paid so long as said land shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise required herein. And within the Indian Territory upon any railroad constructed under the provisions of this act the rates and charges for passenger and freight service, if not otherwise prescribed by law, may be prescribed by the Secretary of the Interior from time to time, and the grants herein are made upon condition that the companies shall transport mails whenever required to do so by the Post-Office Department.

SEC. 6. That the provisions of section two of the act of March third, eighteen hundred and seventy-five, entitled "An act granting to railroads the right of way through the public lands of the United States," are hereby extended and made applicable to rights of way granted under this act and to railroad companies obtaining such rights of way.

SEC. 7. That the Secretary of the Interior shall make all needful rules and regulations, not inconsistent herewith, for the proper execution and carrying into effect of all the provisions of this act.

SEC. 8. That Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any portion thereof.

Approved, March 2, 1899.

#### CASES NOT COVERED BY THESE REGULATIONS.

32. If in the administration of said act cases are found which are not covered by these regulations, such cases will be disposed of according to their respective merits under special instructions, or supplemental regulations embracing cases of that character will be adopted, as may seem necessary.

Very respectfully,

W. A. JONES,  
*Commissioner.*

Approved:

E. A. HITCHCOCK, *Secretary.*

#### FORMS FOR PROOF OF ORGANIZATION OF COMPANY AND VERIFICATION OF MAPS OF LOCATION AND CONSTRUCTION OF RAILROADS.

(1)

I, \_\_\_\_\_, secretary [or president] of the \_\_\_\_\_ Railroad Company, do hereby certify that the organization of said company has been completed; that the company is fully authorized to proceed with the construction of the road according to the existing laws of the State [or Territory], and that the copy of the articles of association [or incorporation] of the company herewith [or heretofore filed in the Department of the Interior] is a true and correct copy.

In witness whereof I have hereunto set my name and the corporate seal of the company.

[SEAL.]

\_\_\_\_\_,  
\_\_\_\_\_ of the \_\_\_\_\_ Railroad Company.

(2)

STATE OF \_\_\_\_\_,  
County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says that he is the president of the \_\_\_\_\_ Railroad Company, and that the following is a true list of the officers of the said company, with the full name and official designation of each, to wit: [Here insert the full name and official designation of each officer.]

[SEAL OF COMPANY.]

\_\_\_\_\_,  
*President of the Company.*

(3)

STATE OF \_\_\_\_\_,

*County of \_\_\_\_\_, ss:*

\_\_\_\_\_, being duly sworn, says he is the chief engineer of [or is the person employed to survey the line of route of the road of] the \_\_\_\_\_ Railroad Company; that the survey of the line of route of said road from \_\_\_\_\_ to \_\_\_\_\_, a distance of \_\_\_\_\_ miles, was made by him [or under his direction] as chief engineer of the company [or as surveyor employed by the company] and under its authority, commencing on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and ending on the \_\_\_\_\_ day of \_\_\_\_\_, 18—; and that such survey is accurately represented on the accompanying map.

Sworn and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[SEAL.]

\_\_\_\_\_  
\_\_\_\_\_  
*Notary Public.*

(4)

I, \_\_\_\_\_, do hereby certify that I am the president of the \_\_\_\_\_ Railroad Company; that \_\_\_\_\_, who subscribed the foregoing affidavit, is the chief engineer of [or was employed to make the survey by] the said company; that the survey of line of route of the company's road, as accurately represented on the accompanying map, was made under authority of the company; that the said line of route so surveyed and as represented on the said map was adopted by the company by resolution of its board of directors on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, as the definite location of the road from \_\_\_\_\_ to \_\_\_\_\_, a distance of \_\_\_\_\_ miles; and that the map has been prepared to be filed for the approval of the Secretary of the Interior, in order that the company may obtain the benefits of the act of Congress approved March 2, 1899, entitled "An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes."

\_\_\_\_\_  
\_\_\_\_\_  
*President of the \_\_\_\_\_ Railroad Company.*

Attest:

\_\_\_\_\_  
\_\_\_\_\_  
*Secretary.*

[SEAL OF COMPANY.]

(5)

STATE OF \_\_\_\_\_,

*County of \_\_\_\_\_, ss:*

\_\_\_\_\_, being duly sworn says that he is the chief engineer of [or was employed to construct the road of] the \_\_\_\_\_ Railroad Company; that said road has been constructed under his supervision from \_\_\_\_\_ to \_\_\_\_\_, a distance of \_\_\_\_\_ miles; that its construction was commenced on the \_\_\_\_\_ day of \_\_\_\_\_, 18—, and finished on the \_\_\_\_\_ day of \_\_\_\_\_, 18—; that the line of constructed road conforms to the line of located route which received the approval of the Secretary of the Interior on the \_\_\_\_\_ day of \_\_\_\_\_, 18—.

Sworn and subscribed to before me this \_\_\_\_\_ day of \_\_\_\_\_, 18—.

[SEAL.]

\_\_\_\_\_  
\_\_\_\_\_  
*Notary Public.*

(6)

I, \_\_\_\_\_, do hereby certify that I am the president of the \_\_\_\_\_ Railroad Company; that the portion of the road from \_\_\_\_\_ to \_\_\_\_\_, a distance of \_\_\_\_\_ miles, was actually constructed as set forth in the foregoing affidavit of \_\_\_\_\_, chief engineer, or the person employed by the company in the premises; that in its

construction the road does not deviate from the line of route approved by the Secretary of the Interior on the — day of —, 18—, and that the company has in all things complied with the requirements of the act of Congress approved March 2, 1899, granting to railroads the right of way through Indian reservations, Indian lands, and Indian allotments.

Attest:

\_\_\_\_\_,  
President of the \_\_\_\_\_ Railroad Company.

\_\_\_\_\_,  
Secretary.

[SEAL OF COMPANY.]

(7)

STATE OF \_\_\_\_\_,

County of \_\_\_\_\_, ss:

\_\_\_\_\_, being duly sworn, says he is the chief engineer of [or the person employed by] the \_\_\_\_\_ Railroad Company, under whose supervision the survey was made of the grounds selected by the company for [station, buildings, depots, etc., as the case may be], under the act of Congress approved March 2, 1899, granting to railroad companies the right of way through Indian reservations, Indian lands, and Indian allotments; said grounds being situated in the \_\_\_\_\_ quarter of section \_\_\_\_\_ of township \_\_\_\_\_, of range \_\_\_\_\_, in the State [or Territory] of \_\_\_\_\_; that the accompanying plat accurately represents the surveyed limits and area of the grounds so selected, and that the area of the ground so selected and surveyed is \_\_\_\_\_ acres and no more; that the company has occupied no other grounds for similar purposes upon public lands within the section of ten miles for which this selection is made; and that, in his belief, the grounds so selected and surveyed, and represented, are actually and to their entire extent required by the company for the necessary uses contemplated by said act of Congress approved March 2, 1899.

Sworn and subscribed to before me this — day of —, 18—.

[SEAL.]

\_\_\_\_\_,  
Notary Public.

(8)

I, \_\_\_\_\_, do hereby certify that I am the president of the \_\_\_\_\_ Railroad Company; that the survey of the tract represented on the accompanying plat was made under authority and by direction of the company, and under the supervision of \_\_\_\_\_, its chief engineer [or the person employed in the premises], whose affidavit precedes this certificate; that the survey as represented on the accompanying plat actually represents the grounds required in the \_\_\_\_\_ quarter of section \_\_\_\_\_ of township \_\_\_\_\_, of range \_\_\_\_\_, for the purposes indicated, and to their entire extent, under the act of Congress approved March 2, 1899, granting to railroad companies the right of way through Indian reservations, Indian lands, and Indian allotments; that the company has selected no other grounds upon public lands, for similar purposes, within the section of ten miles for which this selection is made; and that the company, by resolution of its board of directors, passed on the — day of —, 18—, directed the proper officers to present the said plat for the approval of the Secretary of the Interior, in order that the company may obtain the use of the grounds described, under said act approved March 2, 1899.

\_\_\_\_\_,  
President of the \_\_\_\_\_ Railroad Company.

Attest:

\_\_\_\_\_, Secretary.

[SEAL OF COMPANY.]

## OKLAHOMA TOWNSITE ENTRY—PROCEEDS OF COMMUTATION.

## TOWN OF BRAMAN.

Where an application is made under section 22, act of May 2, 1890, on behalf of an incorporated town, for the money paid on a commuted townsite entry, the evidence of the incorporation of the town, and its municipal organization, may be accepted, where the fact of incorporation is shown by a certified copy of the order made by the county board of commissioners, and it appears that the officers elected did effect an organization, though certain directory provisions in the statute, under which the town was incorporated, were not complied with in the manner prescribed.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
*June 1, 1899.* (C. W. P.)

Under the reference of the Acting Secretary, dated May 22, 1899, I have considered the question presented as to whether the evidence furnished by A. R. Hanna, as agent for the town of Braman, Oklahoma Territory, who has applied for the payment to that town for school purposes of the purchase price of said townsite, under the provision of section 22 of the act of Congress of May 2, 1890 (26 Stat., 81, 91), is sufficient, under paragraph 11 of the circular of November 30, 1894 (19 L. D., 352), to warrant the payment of the money applied for.

My attention is particularly directed to the following irregularities:

1. The certified copy of the statement of the inspectors, required by subdivision 2 of paragraph 11 of Departmental regulations is not sworn to as required by section 9 of the Oklahoma act. 2. Paragraph 19 of the Oklahoma act requires all municipal officers to qualify within five days after election. The evidence submitted shows that they did not qualify for ten days after election, and that the town trustees met and organized by electing one of their number president of the board one day before they qualified as officers of said municipality.

1. The ninth section of chapter 15, article 1, of the statutes of Oklahoma, provides that the return of the inspectors of the election shall be verified by the affidavit of the inspectors, and returned to the board of county commissioners at their next session, who, if satisfied of the legality of such election, shall make an order declaring that said town has been incorporated by the name adopted, which order shall be conclusive of such incorporation in all suits by or against such corporation, and it is declared that the existence of such corporation by the name and style aforesaid shall thereafter be judicially taken notice of in all courts and places in the territory without specially pleading or alleging the same.

The omission of the inspectors to swear to their return cannot be held to vitiate the return, but the provision referred to requiring their return to be sworn to must be held to be directory only, as the latter part of said section empowers the board of county commissioners, if they are satisfied of the legality of the election, to make an order declaring the town to have been incorporated by the name adopted,

which order is declared to be conclusive of such incorporation in all suits by or against the corporation, and the record contains a certified copy of the order of said board, declaring that the board are satisfied with the legality of the election, and that the town has been and is incorporated under the name of Braman. I am therefore of opinion that this objection is without merit.

2. The provision in section 19 that the oath of office shall be taken within five days is directory, and may be complied with after that time (1 Dillon on Municipal Corporations, 3rd Ed., Sec. 219). The section provides that the trustees shall elect a president from their own body. This was done. The fact that they had not then taken the required oath is not fatal. Their recognition, after taking the required oath, of their action in electing a president would cure any irregularity therein.

An examination of the record, together with the Oklahoma act, shows that the evidence of the organization of the town is regular in all other particulars.

Approved, June 1, 1899:

THOS. RYAN,

*Acting Secretary.*

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#### SOUTHERN PACIFIC R. R. Co.

Motion for review of departmental decision of April 14, 1899, 28 L. D., 281, denied June 3, 1899, by Acting Secretary Ryan.

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#### NORTHERN PACIFIC RAILROAD GRANT—ACT OF JULY 1, 1898.

##### INSTRUCTIONS.

All claims in conflict with the Northern Pacific grant, coming within the provisions of the act of July 1, 1898, which remained unpatented at the date of the passage thereof, should be adjusted in accordance with the terms of said act. Additional regulations under the act of July 1, 1898, adopted.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 3, 1899.* (F. W. C.)

The Department is in receipt of your office letter of May 1, 1899, presenting certain matters relating to the act of July 1, 1898 (30 Stat., 597, 620), in which you state:

By letter of April 8, 1899, Messrs. Britton and Gray, resident attorneys for the Northern Pacific R. R. Co., call the attention of this office to the fact that a number of patents have issued adversely to said company since the passage of the act of July 1, 1898, covering lands which, if unpatented, would come within the provisions of said act, and suggest that so much of the circular of February 14, 1899, as restricts the application of the act to unpatented lands, should be construed as applying only to lands patented prior to July 1, 1898; and hence, in cases where patents have been issued to individual claimants after that date, such claimants should be held to have

elected to retain the lands embraced in their respective entries and the company should be allowed the right to select other lands in lieu thereof under said act.

The question presented by said attorneys, as to whether the circular in question is to be interpreted, so as to exclude from disposition under the act of July 1, 1898, all patented lands whether patented prior to or after the date of the act, is therefore respectfully submitted for the consideration and instructions of the Department.

Paragraph seven of the regulations approved February 14, 1899 (28 L. D., 103), issued under the act of July 1, 1898, states that:

Since the issuance of patent terminates the jurisdiction of the Land Department over the lands patented and exhausts its power to examine and decide upon claims to such lands, and since this act manifestly refers to conflicting claims to lands which have not passed beyond the jurisdiction of the Land Department, it follows that its provisions are confined to unpatented lands, and that lands which have been patented are not the subject of relinquishment and can not be made the basis of a lieu selection under this act.

This portion of the paragraph can only relate to such lands as had been patented prior to the passage of the act of July 1, 1898, and as to all such lands said act is without application. But all conflicting claims coming within the provisions of said act to land which remained unpatented July 1, 1898, should be disposed of in accordance with the terms of that act.

The patenting of lands which were on July 1, 1898, the subject of such conflicting claims without following the provisions of said act was in violation of its terms and therefore erroneous.

To the end that the benefits intended to be extended by said act may be still secured to those entitled thereto, and to avoid possible and unnecessary litigation in the courts as a result of the inadvertent or erroneous issuance of patents since July 1, 1898, in such cases, the following regulation is added to those adopted February 14th last, under said act, namely:

47. Where any portion of an odd-numbered section within the limits of the grant to the Northern Pacific Railroad Company coming within the provisions of the act of July 1, 1898, as herein construed, has been patented without following the provisions of that act, the individual claimant will, notwithstanding the issuance of such patent, be advised, in the manner prescribed by paragraph 18, of the option accorded him by said act. If the patent was issued to him and he elects to relinquish his claim he will be required to make reconveyance of the land to the United States in the manner prescribed by paragraphs 24, 25 and 26; but if he elects to retain the land patented it will be listed according to paragraph 23, with a view to its relinquishment by the railroad company. If the patent was issued to the railroad company and the individual claimant elects to retain the land so patented the company will be required to make reconveyance thereof to the United States according to paragraphs 24 and 26, whereupon the individual claimant may perfect title thereto and the railroad company may select other lands in lieu thereof as in other cases.

THOMAS R. DEAN.

Motion for review of departmental decision of January 13, 1899, 28 L. D., 17, denied by Acting Secretary Ryan, June 3, 1899.

## FOREST RESERVATIONS—ACT OF JUNE 4, 1897.

## OPINION.\*

The act of June 4, 1897, makes no provision for the issuance of scrip, on the relinquishment of lands included within forest reservations.

The provisions made in said act for an exchange of land included within forest reservations, and covered by an unperfected bona fide claim or by patent, are applicable only to forest reservations established by executive action under section 24, act of March 3, 1891, and do not extend to reservations, or national parks, created by special acts of Congress.

*Secretary Bliss to Hon. Marion De Vries, House of Representatives, August 26, 1898.*

The Department is in receipt of your letter of June 24th, 1898, asking for an expression of opinion as to whether the provisions of the sundry civil act of June 4, 1897 (30 Stat., 34-36), "providing lieu scrip in exchange for lands in forest reservations," are applicable to the General Grant and Yosemite National Parks, created by the act of October 1, 1890 (26 Stat., 650).

In reply to your inquiry, I have the honor to state that the act of June 4, 1897, does not provide for the issuance of scrip in any form. The first portion of the act, or rather the first part of that portion thereof which refers to forest reservations, concerns the survey, establishment, modification, revocation and suspension of forest reservations established "by Executive proclamation, under section twenty-four of the act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to repeal timber culture laws, and for other purposes" (26 Stat., 1095, 1103). Then follow other provisions concerning the maintenance, administration and government of such reservations, the purpose and effect of which provisions are shown by the language of their introductory paragraph, which reads:

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

Among the provisions which follow is this:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, the settler or

\* Not reported in Vol. XXVII.

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

Your letter presents the question whether this last paragraph applies to all public forest reservations, including the General Grant and Yosemite National Parks. Considering the terms of the act of June 4, 1897, it seems to be clear that Congress had in mind, and was legislating with sole reference to forest reservations *created by executive action* under section 24 of the act of March 3, 1891. The absence of express language to this effect in the particular paragraph to which you call attention and which is quoted above, does not of itself serve to make that paragraph so general in character as to make it apply to forest reservations created by special acts of Congress and not by executive proclamation, under the general law of March 3, 1891.

In enacting the law of 1897, Congress was dealing with a particular class of forest reservations, established for the purposes therein named, by the President under section 24 of the act of March 3, 1891, and not with reservations, or more properly speaking national parks, such as the General Grant and Yosemite, created by special acts of Congress containing special provision for their administration and control.

While a contrary construction might be of advantage to persons who hold title to lands within these national parks, and might work no injustice to the government, that will not justify a strained or erroneous construction of the act of June 4, 1897. If settlers or owners of land within the General Grant National Park or the Yosemite National Park, or any other public park established by special legislative act, desire to be placed upon an equal footing with settlers and owners of land in reservations created by executive action under the act of March 3, 1891, their remedy must be obtained from Congress, as this Department is without authority under existing legislation.

I trust that the next session of Congress will extend to the General Grant, Yosemite and other similar national parks, the provision of the act of June 4, 1897, authorizing an exchange of private lands and claims in such parks for a like amount of public lands elsewhere located, and to that end I shall address an earnest communication to the Committee on Public Lands in the two branches of Congress.

Prepared by

WILLIS VAN DEVANTER,

*Assistant Attorney General.*

## CANALS AND DITCHES IN FOREST RESERVES.

## OPINION.

The grant made by the act of March 3, 1891, of rights of way for canals, ditches and reservoirs, over public lands and reservations of the United States was limited, by the terms of said act, to companies formed for purposes of irrigation, and while section 2, of the act of May 11, 1898, amendatory of the act of 1891, permits the use of rights of way, granted under said act of 1891, for other purposes, it does not enlarge the class of grantees, or make a new grant; hence, under these acts, the Secretary of the Interior has no authority to grant the right to establish a reservoir, or construct a ditch for mining or domestic purposes, within the limits of Yosemite Park, or any forest reserve in California.

The act of October 1, 1890, setting apart the forest reserve known as the "Yosemite National Park," confers no authority upon the Secretary of the Interior to permit the use of lands embraced therein as a right of way for canals or ditches for any purpose whatever.

The act of June 4, 1897, provides for the control and administration of all public lands set apart as forest reserves by the President, under section 24 act of March 3, 1891, but makes no grant of right of way through these reservations, and does not give the Secretary of the Interior any new or additional authority to permit the use of a right of way through them or within their boundaries, and is not applicable to reservations created by special act of Congress.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,  
June 6, 1899. (W. C. P.)*

In his letter to you of the 3d ultimo, the Hon. Marion DeVries, member of Congress for the second California district, refers to the importance of the matter of constructing reservoirs and ditches within forest reserves to control and utilize the water supply for mining purposes, and submits a question as follows:

I therefore address this letter to you, asking whether or not the Secretary of the Interior has the authority to grant to any individual or corporation, the right to establish a reservoir or construct a ditch within the limits of the Yosemite National Park, or any forest reserve within this State, for the purposes of mining, or, if you please, for domestic purposes.

Mr. DeVries calls attention to the Revised Statutes, evidently referring to sections 2339 and 2340, which read as follows:

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

By the act of March 3, 1891 (25 Stat., 1095), the right of way through the public lands and reservations of the United States is granted to any canal or ditch company, formed for the purpose of irrigation, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals and fifty feet on each side of marginal limits thereof, and it is further provided that nothing therein shall authorize such company to occupy the right of way except for the purposes of the canal or ditch.

The act of January 21, 1895 (28 Stat., 635), authorizes the Secretary of the Interior to permit the use of the right of way through the public lands not within the limits of any park, forest, military or Indian reservation, for tramroads, canals, or reservoirs, to the extent of the ground occupied by the water of the canals or reservoirs and fifty feet on each side thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber. This act was amended by that of May 14, 1896 (29, Stat., 120), but this amendment does not refer to permits for canals and ditches.

The act of May 11, 1898 (30 Stat., 404), amended that of January 21, 1895, by adding thereto the following:

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

SEC. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the act entitled "An Act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation.

The act of 1891, *supra*, granted the right of way through the public lands and reservations of the United States to any canal or ditch company formed for the purpose of irrigation and prohibited the occupancy of such right of way "except for the purpose of said canal or ditch." Under the provisions of this act this Department has refused to approve maps where it was shown that the water was to be used to generate electricity for the lighting of certain cities (H. H. Sinclair, *et al.*, 18 L. D., 573), where the reservoir was to be used for furnishing water to a city (South Platte Canal and Reservoir Co., 20 L. D., 154 and 464), where the purpose was to establish a waterway for the transportation of timber (Chaffee County Ditch and Canal Co., 21 L. D., 63), and where the water was to be used for domestic purposes, for manu-

facturing purposes, and in the operation of hydraulic mining machinery, in connection with irrigation (William Marr, 25 L. D., 344).

It was deemed advisable to extend the privileges in respect to the use of the public lands, and by the act of January 21, 1895, *supra*, the Secretary was authorized to permit the use of a right of way for tramroads and canals and reservoirs by any citizen or association of citizens engaged in the business of mining or quarrying or cutting timber and manufacturing lumber. This extension was, however, limited to the public lands not within any park, forest, military or Indian reservation, and hence is not important to the present inquiry.

The act of May 11, 1898, *supra*, purports to be an amendment of the act of 1895, and section one relates only to the public lands not within the limits of any reservation. Section two is in effect amendatory of the act of 1891, and relates to all lands coming within the purview of that act, which embraced both public lands and reservations of the United States. It provides that the rights of way granted under the act of 1891 may be used for purposes of a public nature and for water transportation, domestic purposes and for the development of power. This section does not purport to make any new grant, but simply permits the rights of way granted by the act of 1891 to be used for other purposes than that of irrigation. No new class of grantees is described in this section, and to determine who may be entitled to a right of way it is necessary to turn to the act of 1891. There the grantees are described as "any canal or ditch company formed for the purpose of irrigation." If it had been intended to enlarge the class of grantees some apt language similar to that of the first section would have been used in this second section of the act of 1898. The controlling idea was still, as in the act of 1891, irrigation.

So far as these acts are concerned the Secretary of the Interior has no authority to grant the right to establish a reservoir or construct a ditch within the limits of the Yosemite Park or any forest reserve in California for mining or for domestic purposes.

Sections 2339 and 2340 Revised Statutes do not authorize the Secretary of the Interior to grant any right of way for ditches and canals, but simply recognize such rights to the water upon the public domain as may have accrued under local usages and customs. These sections do not affect the question here under consideration.

There is nothing in the act of October 1, 1890 (26 Stat., 650), setting apart certain lands in California as a forest reserve, now known as "The Yosemite National Park," conferring upon the Secretary of the Interior authority to permit the use of lands embraced therein for the purpose of a right of way for canals or ditches for any purpose whatever, and hence the general rule applies to that reservation.

By section 24 of the act of March 3, 1891 (26 Stat., 1095), the President was authorized to set apart and reserve public lands bearing forests as public reservations. The act of June 4, 1897 (30 Stat., 11, 36), con-

tains provisions for the control and administration of all public lands set aside and reserved as forest reserves under said act of March 3, 1891. Among these provisions is the following:

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

This is the only provision relating to the subject under consideration. It does not grant a right of way through these reservations, nor does it confer upon the Secretary of the Interior any new or additional authority to permit the use of a right of way through them or within their boundaries. But even this act does not apply to any reservation created as was the Yosemite National Park, by special act of Congress, but is by its terms restricted to reservations set apart by the President under the provisions of the act of 1891.

Answering specifically the question submitted, I advise you that the Secretary of the Interior has not the authority to grant to any individual or corporation, the right to establish a reservoir or construct a ditch within the limits of the Yosemite National Park, or any forest reserve within the State of California, for the purposes of mining or for domestic purposes.

Approved June 6, 1899,

THOS. RYAN, *Acting Secretary.*

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BALDWIN STAR COAL CO. v. QUINN.

Motion for review of departmental decision of April 19, 1899, 28 L. D., 307, denied by Acting Secretary Ryan, June 6, 1899.

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RAILROAD GRANT—EXPIRED PRE-EMPTION FILING.

OREGON AND CALIFORNIA R. R. Co.

An expired pre-emption filing of record at the date when a railroad grant becomes effective is not an existing claim that serves to defeat the operation of the grant.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 6, 1899.* (F. W. C.)

An appeal has been filed on behalf of the Oregon and California Railroad Company from your office decision of July 30, 1897, in which it is held that the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$ , the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , and the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 21, T. 30 S., R. 1 E., Roseburg land district, Oregon, was excepted from the grant made by the act of July 25, 1866, to aid in the construction of said road.

The tract above described is opposite that portion of the road definitely located September 6, 1883. It is of the class known as "unoffered" land, never having been proclaimed and offered at public sale, and

under section 2267 of the Revised Statutes claimants under the pre-emption law are required to make proof and payment within thirty months after the expiration of the date for filing declaratory notices, as prescribed in section 2265 of the Revised Statutes.

On January 9, 1877, one L. M. Robertson filed pre-emption declaratory statement No. 3017 covering this tract, in which statement settlement was alleged the 5th of the same month. Said filing was never perfected into an entry by making proof and payment, as required by the pre-emption law. It was therefore of the class known as "expired" pre-emption filings at the date of the definite location of the company's road opposite the tract in question. But, because of the fact that the record of said filing had not been formally canceled at the date of the definite location of the company's line of road, it was held in your office decision that the tract embraced in the filing was for that reason excepted from the grant made to aid in the construction of said railroad.

In the recent case of Northern Pacific Railway Company *v.* James De Lacey, decided by the supreme court May 22, 1899 (174 U. S., —), in considering the effect of an expired pre-emption filing upon unoffered land, it was said:

We thus find that since 1871 all claimants of pre-emption rights lost those rights by operation of law, unless within thirty months after the date prescribed for filing their declaratory notices they made proper proof and payment for the lands claimed. The filing of their declaratory statement and the record made in pursuance of that filing became without legal value if within the time prescribed by the statute proper proof and payment were not made. Whether such proof and payment were made would be matter of record, and if they were not so made the original claim was canceled by operation of law, and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and canceled the entry just as effectually as if the fact were evidenced by an entry upon the record. The mere entry would not cause the forfeiture or cancellation. It is the provision of law which makes the forfeiture, and the entries on the record are a mere acknowledgment of the law, and have in and of themselves, if not authorized by the law, no effect. The law does not provide for such a cancellation before it is to take effect. The expiration of time is a most effective cancellation.

Again, in referring to the case of *Whitney v. Taylor* (158 U. S., 85), it was said: "The material fact that it was an existing claim was the fact upon which the case was decided." And in proceeding with the consideration of the case then before the court, it was further stated:

In this case, such fact does not exist. There was no existing claim at the time of the filing of the map of definite location by the plaintiff herein. It had expired and become wholly invalid by operation of law. The thirty months had expired years before the filing of this map. . . .

Upon the facts as found in this case, it seems to us that there was no claim against the land at the time of the passage of the act of 1864, and that years before the time of the filing of the map of definite location in 1884 the claim that once existed (in 1869) in favor of Flett had ceased to exist in fact and in law, and the title to the land passed to the railroad company by virtue of the grant contained in the act of 1864 and by reason of the filing of its map of definite location March 26, 1884.

Applying said decision to the case at bar, it must be held that the claim to this land in favor of L. M. Robertson by reason of his pre-

emption filing made of this tract in January, 1877, had ceased to exist in fact and in law at the date of the definite location of the company's line of road, and that the title to the land in question therefore passed to the railroad company by virtue of its grant.

Your office decision is therefore reversed, and the tract will be listed for approval on account of the grant, if otherwise regular and proper.

In so far as previous decisions of this Department relating to the adjustment of railroad land grants have given recognition to pre-emption filings as existing claims, after the expiration of the period within which by law proof and payment are required to be made, such decisions will no longer be followed.

PRICE OF LAND—SECTION 2357, REVISED STATUTES.

INSTRUCTIONS.

Alternate reserved sections within the limits of the grant along the constructed main and branch lines of the Southern Pacific railroad, and also within the limits of the forfeited Atlantic and Pacific grant, must be held at double minimum, irrespective of any question as to whether the Southern Pacific can acquire title to any or all of the odd numbered sections within said conflicting limits.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) June 6, 1899. (F. W. C.)

I am in receipt of your office letter of May 16, 1899, relative to a telegram from the receiver at Los Angeles, California, submitting the following inquiry: "Are even numbered sections within the Southern Pacific restored primary limits single, or double, minimum?"

It appears from your office letter that the inquiry relates to the even numbered sections coterminous with the portions of the grants for the Southern Pacific main and branch lines where said grants are overlapped by the grant made by the act of July 27, 1866 (14 Stat., 292), to aid in the construction of the main line of the Atlantic and Pacific railroad. The last mentioned grant, within the overlap referred to, was forfeited for non-construction by the act of July 6, 1886 (24 Stat., 123).

In submitting this matter your office letter states that:

Under the settled rulings of the Department contemporaneous grants to aid in the construction of railroads take moieties within their overlapping primary limits, and as to the even numbered sections of land lying within the common primary limits of the forfeited Atlantic and Pacific grant and the Southern Pacific, *main line*, grant (the road under the latter having been constructed and the grants having been made by the same act) it is suggested that they be held at the double minimum price (\$2.50 per acre) unless and until it shall be determined that said Southern Pacific main line grant takes *nothing* within the forfeited Atlantic and Pacific grant.

The title to the odd numbered sections of land lying within the common primary limits of the forfeited Atlantic and Pacific grant, act of 1866, and the Southern Pacific, *branch line*, grant, act of 1871, having been quieted in the United States (168 U. S., 1), and the Department having decided that these sections are to be disposed

of at one dollar and twenty-five cents per acre, I would suggest that the even numbered sections within the same limits be disposed of at the same price; inasmuch as the reason for the increase in price of said even sections has ceased.

The grant to the Atlantic and Pacific Railroad Company, unlike some other railroad grants, contained no provision whatever relative to the price of the alternate reserved sections. The only legislation upon the question is found in the latter part of section 2357 of the Revised Statutes, which reads:

*Provided*, That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

The grants for the main and branch lines of the Southern Pacific railroad were upon the same general terms as the grant to the Atlantic and Pacific Railroad Company, and in neither of the grants was there any provision whatever relating to the price of the alternate reserved sections. The portion of section 2357 of the Revised Statutes above quoted, however, increased in price all the alternate reserved sections within the limits of the grants along both the main and branch lines of said road to \$2.50 per acre.

The even sections made the subject of the telegram under consideration are, therefore, while coterminous with the portion of the grant for the Atlantic and Pacific railroad, which has been forfeited for non-construction, also coterminous with the portions of the grants for the Southern Pacific main and branch lines and opposite constructed road.

The question as to whether the Southern Pacific Railroad Company may acquire title to any or all of the odd sections within these conflicts, can not alter the price of the even sections fixed by the portion of the section of the Revised Statutes above quoted. Being alternate reserved sections and within the limits of the grants along the main and branch lines of the Southern Pacific railroad, they must necessarily be held at \$2.50 per acre, or at the double minimum price; and you will so instruct the local officers.

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PRIORITY OF SETTLEMENT—COMPLIANCE WITH LAW PENDING LITIGATION.

NOBLE ET AL. *v.* ROBERTS.

During the pendency of a contest, in which each party alleges priority of settlement, both are bound to comply with the law and maintain residence upon the land; and if the successful party therein fails so to do, such failure is properly the subject of inquiry on behalf of the losing party, and, although such inquiry is in the nature of a new contest, it is in effect a continuation of the original case.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) June 6, 1899. (H. G.)

Morris Brown has filed an application for a rehearing, or supplemental hearing, upon the charge of abandonment, and in support of his appli-

cation submits copies of certain affidavits, the originals of which were filed with the motion for review and rehearing denied by departmental decision of September 24, 1898 (unreported). The tract involved is the NE.  $\frac{1}{4}$  of Sec. 22, T. 23 N., R. 1 W., Perry, Oklahoma.

Your office, on November 9, 1898, denied the application on the ground that no such charge of abandonment is made by the affidavits as would justify the order for another hearing. These affidavits, with others, were under consideration in the departmental decision denying the motion for review and rehearing. The decision of your office does not correctly quote from such departmental decision, which disposed of the affidavits now under consideration as follows:

If, as alleged, Miss Cagle has abandoned the land since the hearing, such fact will be no proper ground for review in this case, and advantage thereof can be taken without a review or rehearing of the matters heretofore tried.

It is now sought to secure a hearing upon these matters by a motion for a rehearing or a supplemental hearing. Your office is not precluded by the denial of the motion for a review or rehearing from directing an inquiry "in the nature of a new contest" to determine questions arising since the original hearing. (*Lark v. Livingston*, 26 L. D., 163; *Forman v. Healey*, 28 L. D., 266.)

The motion was denied by your office, on the ground that the affidavits submitted in support thereof fail to charge abandonment at the time the same were made, but relate to abandonment or failure to maintain residence up to a date prior thereto, since which time the contestant, Miss Cagle, may have returned to the land.

This Department can not concur in this view. There is a marked distinction between a contest founded on the mere default of an entryman, and one based upon prior settlement of a contestant.

A defaulting entryman may cure his default in good faith before knowledge or notice of a contest, when there are no intervening settlement rights, while a contestant who relies upon a prior settlement must maintain residence and otherwise comply with the law. (*Rowan v. Kane*, 26 L. D., 341, 343; *Bates v. Bissell*, 9 L. D., 546, 551.)

The controversy was between Laura Cagle and Morris Brown, two of the contestants, the entryman having relinquished his entry after contest was initiated, and the contest of Noble, another contestant, having been dismissed. The departmental decisions have been in favor of Miss Cagle, holding that she was not disqualified to make entry of the tract and that she was the prior settler. During the pendency of the contest, under her claim of priority of right by virtue of her prior settlement, it was incumbent upon her to comply with the law and maintain her residence upon the tract, especially as her adversary also claimed by virtue of his prior settlement and was also bound to establish and maintain residence during that period for the same reasons. If she has not done so since the original hearing, that matter is properly the subject of an inquiry, as the maintenance of residence

or other compliance with the law during the pendency of a contest, by one claiming priority of settlement, is a question arising out of the original case, and an inquiry thereon, although in the nature of a new contest, is, in effect, a continuation of the original case. If it be true that Miss Cagle abandoned the land as alleged in the affidavits, copies of which are appended to the present motion, her return thereto prior to the filing of such affidavits would not relieve her from the effect of such abandonment in the presence of an adverse settlement right.

The decision of your office is accordingly reversed, and a hearing will be ordered by your office as applied for.

DESERTED WIFE—SETTLEMENT RIGHT—ILLEGAL MARRIAGE.

HERWIG *v.* COOPER.

A deserted wife, the head of a family, who is a settler on the land embraced within her husband's homestead entry, at the time of its relinquishment, is entitled to make entry thereof, if she asserts her settlement right within three months after cancellation of her husband's entry.

The status of a woman as a deserted wife is not affected by an illegal marriage after desertion.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 6, 1899.* (W. M. W.)

The land involved in this case is the SW.  $\frac{1}{4}$  of Sec. 22, T. 17 N., R. 1 E., New Orleans, Louisiana, land district.

Mrs. Tosha E. Herwig has appealed from your office decisions of August 13, and October 25, 1897, dismissing her contest against the homestead entry of James Cooper, made August 3, 1896, for said tract.

The record shows that one Charles Herwig made homestead entry for the land in question on October 23, 1891, and, as appears from your office decisions appealed from, said Herwig executed a relinquishment thereof February 6, 1896.

On July 31, 1896, said relinquishment was filed in the local office, together with James Cooper's application to enter the tract under the homestead law.

On August 3, 1896, Cooper's application was allowed, and on September 5, 1896, Mrs. Tosha E. Herwig filed an affidavit of contest against Cooper's entry, alleging that Cooper obtained the relinquishment of Charles Herwig by fraud; that said Herwig was contestant's husband; that he deserted her in September, 1892, without leaving her any means of support; and

that she has made said described land her home ever since the said desertion, and said James Cooper has never lived on said land, but affiant has lived on said land and is entitled by prior settlement and residence to H. E. same.

A hearing was ordered, notice served, and a commissioner appointed to take the evidence. At the time set for taking the evidence, the

parties appeared in person and by counsel before the commissioner and submitted evidence.

The local officers dismissed the contest. Mrs. Herwig appealed, and on August 13, 1897, your office affirmed their action. In said decision your office found, among other things, that the contestant was a settler on the land in question at the time the relinquishment was filed, and that contestant was not qualified to make entry of the tract for the reason that the evidence showed that on September 9, 1893, she married one W. W. Hays, and by reason thereof she could not initiate a claim to the land by settlement in 1896.

On September 4, 1897, Mrs. Herwig filed a motion for a rehearing in the case and a review of your office decision of August 13, 1897, in which it was claimed, among other things, that your office erred in holding that contestant was disqualified to make homestead entry in 1896, by reason of her marriage to Hays in 1893, for the reason that the evidence showed that he died shortly after said marriage, and with said motion there was filed the joint affidavit of two persons showing that said Hays died on the 12th day of September, 1893, and that contestant "has never remarried."

On October 25, 1897, your office considered this motion, and found, from an examination of the evidence, that it erred in the decision sought to have reviewed in finding that contestant was a settler on the land at the time Charles Herwig's relinquishment was filed, and thereupon said motion was denied.

#### Contestant appeals.

No evidence was introduced tending to prove the charge of fraud.

It appears from the testimony in the case that in July, 1892, the contestant married the entryman, Charles Herwig; that in September of that year they established an actual residence upon the land in question, which had a dwelling house upon it worth about \$100; that in a short time thereafter contestant's husband abandoned the land and deserted his wife and has not lived with her since the desertion; that she continued to live upon the land for about six months, when, on account of her inability to make a living on it and poverty, she left the tract and went to a neighboring town, where she did make a living by sewing and keeping boarders. Sometime after the separation she was informed that her husband was dead, and on September 9, 1893, she was married to a man by the name of W. W. Hays, who, it is contended on behalf of contestant, died on the 12th day of September, 1893. It also appears that contestant made occasional trips to the land at different times during the years 1893, 1894, and 1895. On such occasions she would remain on the land from one or two days to two or three weeks at a time.

The evidence shows that about the first of May, 1896, Mrs. Herwig resumed actual residence on the land by moving into and occupying the same house she and her husband first occupied; that she had in said

house a bed, bedding, cooking utensils, clothing and provisions; that she continued in the actual possession of the premises until the latter part of August, 1896; that about the 18th day of August, 1896, Cooper served upon Mrs. Herwig a written notice, dated August 7, 1896, wherein he notified her that he had purchased the improvements and entered the land on August 3, 1896, and notified her "to move off of said land, as I wish to occupy the house thereon." After this notice was served, Mrs. Herwig temporarily left the land in order to consult a lawyer as to her rights in the premises and left a person to hold possession. While she was gone and the person so left in possession was absent from the land for a few hours, Cooper took possession and moved his family into the house, and was living there when the evidence was taken in the case.

The evidence also shows that Mrs. Herwig caused some fence to be built on the tract in July or August, 1896.

A witness testified that about the 15th of July, 1896, he had a conversation with Cooper, in which the witness told Cooper that Mrs. Herwig was claiming the land in question and had been living upon it. These statements are not denied by Cooper.

From all the facts and circumstances in the case, it is satisfactorily shown that Mrs. Herwig was occupying and claiming the land before and at the time Charles Herwig's relinquishment was filed and Cooper's entry was allowed. And it necessarily follows that, if she was at that time qualified to make entry, her settlement rights attached upon the filing of said relinquishment, and her claim to the land is superior to that of Cooper under his entry, her contest having been initiated within three months from the cancellation of Herwig's entry. *Sinnett v. Cheek*, 28 L. D., 20.

She has a child dependent on her for support. It is not pretended that her husband, Herwig, is dead; and on this state of facts, he having abandoned her, she would, as a deserted wife and head of a family, be entitled to make entry unless otherwise disqualified.

It is asserted that she was thus disqualified through her marriage with Hays. This is untenable. It is not claimed that she was divorced from Herwig. She testified that she heard he was dead before she married Hays in 1893. Evidently this information was erroneous, as Herwig was alive in 1896 when the relinquishment was executed; and, indeed, so far as the record shows, it is to be presumed that he is yet alive. The contest is instituted by Mrs. Herwig, as his deserted wife, ignoring her marriage to Hays because, as she testifies, her attorney informed her that she was yet the legal wife of Herwig and that her other marriage was illegal. From all this it sufficiently appears that her marriage to Hays during the lifetime of Herwig, from whom she had not been divorced, was null and void, and consequently, she is yet the legal though deserted wife of Herwig, the head of a family and entitled to make entry of the tract in question by virtue of her settlement thereon at the date of the relinquishment by Herwig.

With the motion for review of your decision Mrs. Herwig filed the joint affidavit of two parties showing that Hays died a few days after his alleged marriage. A copy of this affidavit was served upon the opposite party, who has not questioned or denied the truth of the matters therein stated. Your refusal to consider said affidavit and the matters therein stated, as admissible, is specified as error in the appeal of Mrs. Herwig, and this specification is not noticed in the reply to the appeal. But in view of what has been already said the Department does not deem it necessary now to pass upon that question.

Entertaining these views, your judgment is reversed and Mrs. Herwig will be allowed to make entry of the tract in question, if she so desires, and is otherwise qualified, and upon such entry, that of Cooper will be canceled.

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PRACTICE—NOTICE OF APPEAL—ATTORNEY—RESIDENCE.

BRANDON *v.* TULLER.

Service of a notice of appeal on the appellee's attorney of record will not be held insufficient on the ground that at the time of such service said attorney had become register of the local office wherein the case originated, where it does not appear that the appellee had any other attorney at the time of such service, and no prejudice is claimed.

A charge of abandonment is not made out where it appears that the entryman in fact established his residence in good faith on the land, and that his absences thereafter were temporary in character, and necessary for his support and the maintenance of the claim.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 6, 1899.* (E. J. H.)

On November 2, 1893, Charles M. Tuller made homestead entry for the NW.  $\frac{1}{4}$  of Sec. 26, T. 29 N., R. 14 W., Alva land district, Oklahoma. On May 6, 1896, Fredonia T. Brandon filed affidavit of contest against said entry, alleging abandonment.

Hearing was had on June 29, 1896, both parties being present in person and with counsel. The local officers decided in favor of contestant, recommending that defendant's entry be canceled; from which decision he appealed, and, on August 11, 1897, your office affirmed said decision. From this decision defendant also appealed, which brings the case before the Department for consideration.

The first question to be considered in the case is raised by contestant's motion to dismiss the appeal from the decision of your office. Said motion alleges that notice of said appeal and specifications of error were not served upon contestant, nor filed in the General Land Office, within sixty days from the service of notice of the decision appealed from.

It seems that on August 17, 1897, R. A. Cameron, the attorney of

record for contestant, and defendant, Tuller, both made written acceptance of service of notice of the said decision of your office.

The affidavit of appellant, Tuller, is on file in the case, in which he states that on October 15, 1897, he went to the usual place of residence of contestant for the purpose of serving notice of his appeal from the decision of your office upon contestant; that he did not find her at home, and was there told by her father that she had gone to Kansas and would not return until the 18th, which date would be too late for the service of said notice; that on the following day, Saturday, October 16th, it being the last day for making said service, he proceeded to make service upon her attorney of record, Cameron. This was done by the written acknowledgment of said notice by Cameron, who, however, signed the same individually, striking out of said acknowledgment, as drawn up, all reference to himself as an attorney for contestant in the case, but he received the copies of notice, assignment of errors and brief of defendant.

Defendant's affidavit further states that on the following Monday morning, October 18th, he again went to the residence of contestant and made service upon her, delivering copies, etc.

The affidavit of contestant is also on file, stating that she was at home, only a half mile from the land in controversy, on October 16, 1897, and had not been away for more than a month; that she left that evening on a visit to Kansas, returning the next day, and that on October 19th defendant made service of said papers upon her. She also states that she was told by her father that defendant was there and called for her about eight o'clock the evening she left for Kansas.

While she claims that defendant was at her home on the 16th and 19th, instead of 15th and 18th, as claimed by him, it does not seem material which is correct. He unquestionably went to her residence on the 15th or 16th for the purpose of making service upon her of said notice and accompanying papers. Not finding her there he proceeded to make said service within the proper time, in the manner hereinbefore stated, upon Cameron, the party who had been her attorney all through the controversy, as shown by the record. It would seem that said Cameron was at the date of this service register of the Alva land office, in which the contest originated; hence, doubtless, his unwillingness to state specifically in said acceptance of service that he did so *as attorney for contestant*.

It is not shown when he became register of the land office, but he had, on August 17, 1897, two months before, accepted service of notice of your decision, and signed the same, "R. A. Cameron, Attorney for Contestant."

It does not appear that at the time defendant made the service in question upon Cameron, the contestant had any other attorney, and the notice reached her immediately thereafter, and it is not claimed that she was prejudiced by the manner in which service was made.

In the case of *Demars v. Donahue et al.*, 12 L. D., 113, it was held that—

A motion to dismiss an appeal on the ground that service thereof was not made upon appellee or his attorney, must be denied where it appears that service was duly made upon one, who, as attorney, had prior thereto represented the appellee; and where it is not claimed that the notice as served did not in fact reach the appellee, or that he was in any manner prejudiced by the service as made.

In *Atkins et al. v. Creighton* (14 L. D., 287) it was said that—

So long as the appearance of an attorney stands of record in a case, and there remains anything to be done in connection with that case, notice of which should be sent to the parties in interest, notice to such attorney is notice to the client.

The foregoing cases held without qualification that so long as the appearance of an attorney stands of record in a case service may be made upon him.

But the case of *Nichols v. Gillette*, 12 L. D., 388, is more clearly in point. The statement in that case shows that notice of an adverse decision was served upon the attorney of record; that he had been appointed register of the land office in another district and had moved thither; that he failed to notify his client of said decision, and as a result of such neglect the client received no notice of the decision adverse to him until more than sixty days after his attorney had received the same, and that when the party did file his appeal your office refused to allow it, on the ground that the time within which appeal could be taken had expired. He then applied to the Department for a writ of certiorari, which was refused upon the ground that the service thus made was notice to the client. In that case, through the failure of the attorney of record upon whom service was made to notify his client thereof, said party's right of appeal was lost, while in the case under consideration, wherein there was similar service, as has been shown, the contestant was immediately notified of the same and lost no rights.

The record also shows that evidence of the service of said notice of appeal, specifications of error and argument, was filed in the local office on October 16, 1897.

The motion to dismiss is therefore overruled.

Upon the merits of the case the only question is as to establishment and maintenance of residence upon the land by defendant. No claim is made but that he had ample improvements thereon, and cultivated and cropped a large portion of the land each year.

The testimony shows that defendant, prior to making his said entry on November 2, 1893, had been engaged in farming in Barber county, Kansas, and spent the following winter there, but went upon his claim within the six months and built a house, completing the same on May 2, 1894; that, assisted by hired help, he also dug and curbed a well and fenced a pasture of about twenty acres; that he remained there about a week, during which time he and his help cooked, ate and slept in the house.

This house was a "dug-out," about ten by twelve, or twelve by fourteen, feet in size, dug four feet in the ground and banked up two feet with sod, having board roof battened, also board door, and window having four lights. That season he broke a large amount of land, sixty-five or seventy acres as claimed by him, but estimated by some of contestant's witnesses as thirty-five or forty acres. He was also cropping land in Kansas and was back and forth until after harvest, when he remained steadily in Oklahoma. He had no family except a grown-up son who was away much of the time.

It also appears from the testimony that at the time of bringing the contest he had upon his claim the house, well, pasture, and cultivated land heretofore described, together with quite a lot of fruit trees of various kinds, and that he had in the house a combined heating and cooking stove, bedstead, good feather bed and pillows, blanket, bedspread, and all necessary furniture, dishes, and cooking utensils for housekeeping.

This was testified to by two witnesses, both of whom had stayed there over night with him, at different times. One of these, McGarry, was a principal witness for contestant. He had stayed there on two different occasions about a year apart and saw the foregoing articles there, together with provisions from which they cooked and ate.

Contestant and three principal witnesses testified that they lived in the immediate neighborhood and were acquainted with defendant and the land in controversy and had been ever since he entered the same. They testified, generally, that he did not make his home upon his claim, but "principally," as one of them said, with one Mrs. Ellis, who had homestead entry upon an adjoining tract.

The record is burdened with a good deal of incompetent and irrelevant testimony, particularly as to the *supposed* relations existing between defendant and Mrs. Ellis, both while they had been living in Oklahoma and prior thereto, while they were living in Kansas. These witnesses had been at defendant's house but a very few times, and then did not see him there, except McGarry, who, as heretofore related, had stayed over night there with defendant on two occasions.

They also testified that he kept his horses, machinery and personal property generally, at Mrs. Ellis's and that from their knowledge and understanding of the situation, if in search of defendant they would have gone to Mrs. Ellis's to find him. On cross-examination, each of these three witnesses acknowledged that he had tried to get defendant indicted on account of the manner in which it was claimed he was living with Mrs. Ellis, but did not succeed. Two of them were not on good terms with him and had said they would make him all the trouble they could, and the other one acknowledged that there had been some talk among the friends of contestant that if defendant was indicted it would be an easier contest against his homestead.

Defendant testified in his own behalf and introduced Mrs. Ellis and two neighbors, who, so far as appears, were entirely disinterested.

The testimony of defendant and Mrs. Ellis is to the effect that he had been doing a large job of breaking in Kansas prior to making his homestead entry, and had also farmed quite extensively; that he had borrowed money at various times of Mrs. Ellis to pay help and expenses until he was indebted to her for about \$800; that he had poor crops and lost money, and as a result had to give her a mortgage on the half interest in his horses, machinery, and all his personal property, before going to Oklahoma to reside, and it was agreed that said property should remain in her possession; that this was the reason said property when taken to Oklahoma was kept upon the claim of Mrs. Ellis, and that in the fall of 1895, in order to pay Mrs. Ellis for the balance of the money he was owing her, he gave her a bill of sale of all this personal property.

They also testified that defendant's failure of crops and losses rendered it impossible for him to remain constantly on his claim, and that he was obliged to go out to work to earn money to live on and keep up his improvements; that on coming to Oklahoma he engaged to work for Mrs. Ellis, carry on her farming operations, and did do so with the aid of some hired help, which necessitated his spending much time upon the claim of Mrs. Ellis; that it was usually late when he got through taking care of the horses and doing the chores, and being tired much of the time he slept there instead of going to his own claim; that he slept on his own claim about one-fourth of the time.

Defendant's other two witnesses testified that they considered that he resided on his claim. They lived in the neighborhood, had frequently seen him there, and one of them had worked for him on said claim. Much of said testimony was not disputed by contestant's witnesses, but some of them did say that they had heard defendant at various times speak of the horses and other articles of personal property as belonging to him.

From the testimony the Department is unable to agree with the decision of your office, but holds that when defendant went upon the land in the spring of 1894, built his house, dug a well and fenced a pasture, remaining a week, eating and sleeping there, he established his residence.

Residence is established from the time the settler goes upon the land with the *bona fide* intention of making his home there to the exclusion of one elsewhere. (Grimshaw v. Taylor, 4 L. D., 330.)

It was held in the case of Andrew J. Healy, 4 L. D., 80, that—

No fixed rule can be formulated as to what shall constitute good faith. The facts and circumstances surrounding each case should be carefully considered, and if the acts of the entryman do not clearly indicate bad faith the entry should not be forfeited.

The cultivation of crops from year to year and the presence of valuable improvements are an indication of good faith on the part of the claimant. (See case of Alfred M. Smith, 9 L. D., 146.)

The question of what constitutes establishment and maintenance of residence is well settled by repeated decisions and it is not necessary to multiply authorities here on that question.

The local officers say in their decision that—

If the defendant established a legal residence on the land in May, 1894, his absences afterwards might be excused, his improvements and the cultivation of the land being accepted as sufficient evidence of good faith.

The evidence shows that these improvements were nearly all made in May, 1894, when he claims to have made settlement and established residence on his claim; that he spent several days there and had a man to help him; that he then had in the house the furniture, cooking utensils, etc., heretofore described herein. His absences during that season were for the purpose of caring for and harvesting the crops he had growing in Kansas. He clearly had the right to do this. The witnesses for the contestant were prejudiced against the defendant. They acknowledge this on cross-examination, and that they had tried to get him indicted about the time of the bringing of this contest.

In your decision you say that "the personal property of Tuller, such as horses and farming implements, was taken to the house of Mrs. Ellis and kept there to the time of trial." The testimony as heretofore related shows that Mrs. Ellis owned a half interest in all of said property when it was taken to Kansas, and that in the fall of 1895, she purchased the other half, and the bill of sale therefor, from Tuller, is on file in this case.

It is not strange, nor inconsistent with Mrs. Ellis's ownership of the horses, machinery, etc., that defendant, who carried on her farming operations, and had this property in his charge, should in the course of conversation have spoken of some article as being his. The evidence does not show that he actually claimed ownership of the same. It is clear from the evidence that defendant established his residence upon the land in controversy in the spring of 1894, and has maintained the same.

Your office decision is reversed.

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APPLICATION TO ENTER—PENDING CLAIM.

MCINTOSH *v.* GREEN.

It is not necessary for the protection of a settlement claim, on land included within the prior pending application of another, that the settler should assert his settlement right by an application to enter while the land occupies such status.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) June 9, 1899. (F. W. C.)

William A. McIntosh has appealed from your office decision of September 22, 1897, dismissing his contest against the homestead entry

of Chester A. Green, made February 13, 1897, covering the NE.  $\frac{1}{4}$  of Sec. 25, T. 18 N., R. 19 W., Broken Bow, Nebraska, land district.

McIntosh filed contest against Green's entry on March 6, 1897, alleging that he had resided on the land for more than a year and that Green did not make entry for his own benefit, but for the benefit of one Robert N. Norcutt.

Notice issued upon said contest the same day, April 19th, following, being set for the hearing of the case. On that day McIntosh appeared, and upon filing evidence of service of the notice of contest the same was found to be defective. He thereupon filed an amended affidavit of contest; which amendment was not allowed, and on the following day his contest was dismissed for want of prosecution. Upon his motion subsequently made the case was reinstated May 13, 1897, and hearing was held thereon June 15th, following.

The local officers upon the record made recommended that his contest be dismissed; which decision was affirmed by your office. McIntosh has further prosecuted the case by appeal to this Department.

It appears that Robert N. Norcutt, on November 18, 1895, filed an application for restoration of his homestead right, accompanied by an application to make entry of the tract here in question. Said application was denied by your office decision of January 20, 1896; from which decision Norcutt appealed to this Department.

Your office decision denying Norcutt's application was affirmed by this Department January 8, 1897. Upon being advised of said departmental decision Norcutt, accompanied by his nephew, Chester E. Green, the present entryman, appeared at the local office on February 13, 1897, when Norcutt disclaimed any intention to move for a review of departmental decision; whereupon Green presented his homestead application covering the tract in question, which was accepted by the local officers and permitted to go of record.

Following the decision of your office denying Norcutt's right to enter this land, to wit, on February 10, 1896, McIntosh, the present contestant, tendered at the local office his application to make homestead entry of this land; which was rejected by the local officers on account of the pending application by Norcutt.

McIntosh claims that he was never legally served with notice of the rejection of said application, but for the determination of the present controversy it is unnecessary to consider this feature of the case.

Your office decision held that the application tendered by McIntosh February 10, 1896, should have been received and held to await the final determination of Norcutt's rights under his application then pending, but as he failed to appeal from the rejection of said application, no rights are accorded him by reason of the tender thereof. It was further held that:

After establishing his residence on the land, he took no action for more than ten months, although the land was not, during that period covered by an entry and an

application to enter would have attached, subject, of course, to Norcutt's prior application.

McIntosh having been negligent in asserting his rights, and Green's entry having in the meantime been allowed, it must be held that he, McIntosh, has forfeited his right to the land, consequently your decision is affirmed, and the contest is dismissed, subject to appeal.

The record shows that after the action of the local officers rejecting his application, McIntosh commenced the building of a house upon the land in question, which was subsequently completed and into which he moved his family about the middle of April, 1896, where they were still residing at the date of the hearing. He had at the latter date enclosed the land with a wire fence, and in addition to his dwelling house, had a stable, corrals, corn cribs, a granary and shed, a reservoir of water, and forty or forty-five acres under cultivation, the improvements being worth between four and five hundred dollars.

Green makes no claim to the land prior to his entry of February 13, 1897, at which time he was fully aware of McIntosh's claim to and improvement of the tract.

For the determination of this controversy it is immaterial whether the application tendered by McIntosh on February 10, 1896, was properly rejected, or should have been held suspended to await action upon the prior application by Norcutt. Until Norcutt's application had been finally disposed of, an entry by McIntosh would not properly have been allowed. Until that time it can not be held that McIntosh was obliged to take steps to protect himself in his settlement by tendering an application at the local office, and as before shown, he began the contest here under consideration, with that object in view, within less than a month thereafter.

Your office decision is therefore reversed, and the entry by Green is held subject to the prior right of entry in McIntosh, of which you will advise him, and upon his completion of entry within a reasonable time to be fixed by your office the entry by Green will be canceled.

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#### MOUNT RANIER NATIONAL PARK—DEPARTMENTAL REGULATIONS.

##### OPINION.

The departmental regulations to be issued under the act of March 2, 1899, setting apart certain lands for a national park, should provide for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities or wonders within said park, but should declare that they do not prevent or interfere with the *bona fide* exploration, location, occupation and purchase, according to the mineral laws of the United States, of the mineral lands lying within said park.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,*  
June 12, 1899. (F. W. C.)

Through the reference of the Acting Secretary I am in receipt of certain papers relating to the act of March 2, 1899 (30 Stat., 993), by

which certain lands in the State of Washington were set aside as the Mount Ranier National Park, with a request for an opinion as to whether sections two and five of that act are rightly construed by the Commissioner of the General Land Office in his report of May 12th last, and as to

whether the paragraph suggested by the Commissioner for incorporation in the regulations to be promulgated for the government of the park is sufficient to properly carry into effect the provisions of section 5 of the act.

The second section of the act provides (*inter alia*):

That said public park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish, as soon as practicable, such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition. . . . He shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and generally shall be authorized to take all such measures as shall be necessary to fully carry out the objects and purposes of this act.

Section five of the act provides:

That the mineral-land laws of the United States are hereby extended to the lands lying within the said reserve and said park.

In his report the Commissioner states that—

In regard to mining claims upon the land included in the said park, it is to be noticed that section 2 of said act provides for the "preservation from injury or spoliation of . . . mineral deposits." It is not believed that it was intended thereby to render nugatory the subsequent provision that the mineral land laws shall apply to the lands in said reservation. On the contrary, it is obvious, that in order to give effect to the apparent intent of Congress, the provision of said section 2 must, so far as it relates to mineral deposits claimed and held under the mineral land laws, give way to the provision of section 5, extending the mineral land laws to said lands, and that it was the intention of Congress that the limitations prescribed in section 2 were for the purpose of preventing wanton destruction or waste or interfering in any way with the timber, mineral deposits, natural curiosities, or wonders on lands within said park, and not included in any valid mining claim.

Taking this view of the purpose and object of said act, I have to recommend that the following paragraph be incorporated in the proposed regulations, to wit:

"That the lands in said Park are subject to the operation of the mineral land laws of the United States, but that prospectors or miners shall not be permitted to injure or destroy or interfere with the retention in their natural condition of any timber, mineral deposits, natural curiosities, or wonders within said Park, outside the boundaries of their respective mining claims, duly located and held under the mining laws, and that the superintendent or official in charge of such Park shall take the necessary steps to secure a compliance herewith and to report any violation of this requirement to the Secretary of the Interior, for his consideration and action."

In general I agree with the construction placed upon said sections by the Commissioner of the General Land Office. The fifth section plainly extends the mineral land laws of the United States to the lands

lying within said reserve or park. By the second section the park is placed under the exclusive control of the Secretary of the Interior, whose duty it is made to publish such rules and regulations as may be deemed necessary or proper for the care and management of the park. The regulations should provide "for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition," but should declare that they do not prevent or interfere with the *bona fide* exploration, development, location, occupation and purchase, according to the mineral laws of the United States, of the mineral lands lying within said reserve or park.

The injury or spoliation of the timber, mineral deposits, natural curiosities, or wonders within the park under the guise or pretense of prospecting for, developing or locating minerals within the park, should be prohibited by the regulations.

In lieu of the paragraph recommended by the Commissioner of the General Land Office, I suggest the following:

No person shall cut, break, remove, impair, or interfere with any trees, shrubs, plants, timber, minerals, mineral deposits, curiosities, wonders, or other objects of interest in the park, and all of the same shall be retained in their natural condition: *Provided, however,* That nothing herein shall interfere with or prevent *bona fide* exploration, development, location, occupation and purchase, according to the mineral land laws of the United States, of the mineral lands lying within said park, but this will not authorize or permit the injury or spoliation of the timber, mineral deposits, natural curiosities or wonders within the park under the mere guise or pretense of prospecting for, developing or locating minerals within the park.

Approved, June 12, 1899.

E. A. HITCHCOCK, *Secretary.*

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#### RAILROAD GRANT—LANDS EXCEPTED—RESERVATION.

##### NORTHERN PACIFIC R. R. CO. *v.* WARREN (ON REVIEW).

Lands set apart as an Indian reservation, at the date of the Northern Pacific grant, are not within the terms of the granting act, and on their subsequent cession revert to the public domain.

*Secretary Hitchcock to the Commissioner of the General Land Office, June*  
(W. V. D.) 12, 1899. (W. C. P.)

The Northern Pacific Railroad Company has filed a motion for review of departmental decision of May 14, 1896, in the case of Annie M. Warren *v.* The Northern Pacific Railroad Company (22 L. D., 568), involving the NE.  $\frac{1}{4}$  of Sec. 29, T. 43 N., R. 27 W., Taylor's Falls land district, Minnesota.

The tract in question is within the twenty miles primary limits of the grant of July 2, 1864 (13 Stat., 365), for said company, as adjusted to the line of definite location shown upon the map filed November 20, 1871.

It was within the limits of the reservation created by the treaty of February 22, 1855 (10 Stat., 1165), with the Chippewa Indians for the Mille Lac band. The Indians ceded a part of this reservation by the treaty of March 11, 1863 (12 Stat., 1249), and a further cession was made by the Indians in the treaty of May 7, 1864, amended by the Senate February 6, 1865, which amendment was assented to by the Indians February 14, 1865, and finally proclaimed March 20, 1865 (13 Stat., 693). The tract involved here was a part of the lands ceded by this latter treaty.

This tract was listed on account of the grant to said company June 22, 1883. George H. Warren filed pre-emption declaratory statement therefor February 10, 1891, and Annie M. Warren made homestead entry therefor October 27, 1891. Your office held both the filing and entry for cancellation for conflict with the railroad grant. Upon appeal by Annie M. Warren, this Department, in the decision complained of, reversed your office decision, held the land excepted from the grant, and directed that Warren's homestead entry be allowed to stand.

The only points necessary to consider under this motion are the allegations that it was error to have made any distinction between these lands and general Indian country, and that it was error to hold that the title did not pass under the grant even if said lands had not been released from reservation. At the date of the grant the cession made by the treaty of May 7, 1864, had not taken effect, because that treaty was not perfected until the amendment made by the Senate had been assented to by the Indians. Prior to that time it was still a matter of negotiation, and no change in the claim of the Indians had yet been effected. These lands were at the date of the grant set apart for the use of the Indians, and were not, therefore, within the terms of the granting act. There was no error in the decision complained of in so holding. If the claim of the Indians was afterwards released, the lands became a part of the public domain and did not inure to the benefit of this grant. This point was involved in this company's claim to lands in the ceded portion of the Coeur d'Alene Indian reservation in Idaho. In fact one of the allegations of the motion under consideration is that it was error to have decided this case prior to a decision in that. That case has, however, been finally decided adversely to the company's claim, the motion for review therein having been denied March 23, 1898 (26 L. D., 422). Upon the authority of that case it is held that the lands involved in this case reverted to the public domain upon the cession thereof by the Indians.

After a careful examination of the matter, the previous decision of this Department is adhered to, and the motion for review denied.

## RAILROAD GRANT—INDEMNITY SELECTION—EXPIRED FILING.

HENSLEY *v.* MISSOURI, KANSAS AND TEXAS RY. CO.

An expired pre-emption filing of record is no bar to the selection of the lands covered thereby as indemnity under a railroad grant.

*Secretary Hitchcock to the Commissioner of the General Land Office, June*  
(W. V. D.) 12, 1899. (W. C. P.)

In the decision of January 5, 1891 (12 L. D., 19), in the case of W. F. Hensley *v.* Missouri, Kansas and Texas Railway Company, this Department affirmed your office decision rejecting Hensley's application to make homestead entry for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 10, and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 15, T. 26 S., R. 14 E., Topeka, Kansas, land district, for conflict with the company's selection thereof as indemnity.

John K. Townsend filed pre-emption declaratory statement covering the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 10, and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 15, June 30, 1863, and Hugh P. Allen filed pre-emption declaratory statement for the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of Sec. 10, and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 15, March 14, 1867, which filings were never perfected, although they remained of record until June 30, 1891, when that of Allen was canceled as to the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 10. June 26, 1879, the railroad company selected the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 10 as indemnity, and re-selected it November 17, 1885. The N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 15 was selected September 25, 1882. The withdrawal made for the benefit of this grant March 19, 1867, was revoked August 17, 1887. In December, 1883, Hensley filed in the local office his affidavit asserting that the SW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  of said Sec. 10, and the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of Sec. 15, were excepted from the grant to said company and the withdrawal thereunder by reason of Allen's filing, and that he desired to acquire said land under the homestead laws. Before your office acted upon this matter the withdrawal was revoked, and thereupon, on October 15, 1887, Hensley applied to make homestead entry for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 10, and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 15. The testimony taken at the hearing had upon the company's protest against this application showed that both Townsend and Allen were qualified preemptors and made actual settlement, as claimed, but that they abandoned their claims about one year after the filing of their declaratory statements.

With these facts presented, this Department, in the decision of January 5, 1891, *supra*, said:

The claims which served to work the exception from the withdrawal had, however, expired and, as shown by the evidence, been abandoned long prior to the application of the company to select the tracts as indemnity, and were not therefore sufficient to prevent such selection thereof by the company.

In June, 1897, Hensley presented a petition for further consideration and allowance of his homestead application, basing it upon the decision of this Department in the case of *Counterman v. The Missouri, Kansas and Texas Railway Company*, July 13, 1896 (not reported). Your office forwarded this petition with recommendation that it be granted.

In the Counterman case the facts were similar to those here, and the decision of the Department was in favor of the railroad company. Upon a motion for review, filed within the time allowed therefor, that decision was recalled and vacated and the company's selection was canceled. This action was taken upon the authority of the case of *Whitney v. Taylor* (158 U. S., 85), as construed by this Department in *Fish v. Northern Pacific R. R. Co.* (23 L. D., 15).

Since that a different rule has been announced and now prevails. In the recent case of *Oregon and California Railroad Company*, decided June 6, 1899 (28 L. D., 477), the question as to the effect of expired pre-emption filings was under consideration, and upon the authority of *Northern Pacific R. R. Co. v. De Lacey* (174 U. S., ) it was held that such a filing would not serve to except the land covered thereby from a railroad grant. In conclusion it was said:

In so far as previous decisions of this Department relating to the adjustment of railroad land grants have given recognition to pre-emption filings as existing claims; after the expiration of the period within which by law proof and payment are required to be made, such decisions will no longer be followed.

The period within which proof and payment should have been made under the filings relied upon by Hensley to prevent the allowance of the selections of this land by the company had expired long prior to such selections, and such filings constituted no bar to those selections. The petition for further consideration is denied.

This action is taken without considering whether such petition would in any event have been favorably considered after the lapse of so long a period between the date of the decision and the presentation of the petition.

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#### HODGES *v.* DANIELS.

Motion for review of departmental decision of February 6, 1899, 28 L. D., 91, denied by Secretary Hitchcock, June 12, 1899.

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#### DESERT LAND ENTRY—ASSIGNMENT—RECLAMATION.

##### HEINZMAN ET AL. *v.* LETROADEC'S HEIRS ET AL.

An assignment of a desert land entry to one disqualified to acquire title under the desert land law does not render the entry fraudulent, but leaves the right thereto still in the entryman.

Where a desert land entry is suspended, and the order of suspension subsequently revoked, time will not begin to run, in the matter of reclamation, until notice of such revocation is served on the entryman, or his successors in interest.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 12, 1899.* (H. G.)

The tract involved in this case is described as the NE.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of Sec. 12, T. 25 S., R. 25 E., M. D. B. and M., Visalia, California, land

district, and is embraced in the desert land entry, No. 290, of Maxmilian Letroadee, made May 17, 1877. Pursuant to departmental direction of September 12, 1877, all desert land entries in said land district were, on September 28, 1877, suspended by your office and remained suspended until the promulgation, on February 10, 1891, of the decision of *United States v. Haggin* (12 L. D., 34), which directed that the suspension be removed. It appears from the decision of your office that an effort was made to notify the entryman of said order of revocation by registered letter of August 23, 1893, which seems to have been returned uncalled for. Emil Chauvin, to whom the entry was assigned June 10, 1884, appears to have been notified of the order of revocation on the date before mentioned.

On February 18, 1891, John Heinzman, John W. Ramsey and Thomas B. Twaddle, severally filed affidavits of contest, each alleging that the land was not then, nor at the date of entry, desert land; that the entry was fraudulently made and the land since fraudulently held thereunder, in this, that the entry was made for speculative purposes and was soon thereafter assigned to one Emil Chauvin, who, by his own entry and similar assignments held lands in excess of the amount allowed by law; and that neither the land, nor any part thereof, has been reclaimed, nor has any *bona fide* effort to reclaim it been made by the entryman or his assignee: wherefore the contestants severally asked that they be allowed to prove these allegations and that the entry be canceled.

Owing to causes not necessary to be recited here, proceedings under these affidavits were delayed until October 30, 1895, when the contests were consolidated, hearing was set for December 18, 1895, and notice thereof was given. The attorney for the contestants, as set forth in his affidavit made the day the hearing began, having discovered since bringing the action that the entryman had died intestate several years prior thereto, leaving him surviving his brother Julian Letroadee, his sister, Celestine Scouler, both residing at San Francisco, California, and a younger brother, who died after the death of the entryman, intestate, leaving no issue, notice of the contest was served upon the said alleged living heirs and also upon the assignee of the entryman. At the hearing, which was concluded December 28, 1895, the alleged heirs made default and all of the other parties appeared. The local office decided that the tract in controversy was not desert land at the date of the entry, and further, it appearing that Chauvin, the assignee of the entryman, held three different tracts of desert land by assignment, one other tract under his own entry, and had perfected title to yet another tract as heir of his son, the entryman thereof, held that to permit him to obtain the benefit of the entry in question would be to defeat the provision of the original desert land law, which prohibited more than one entry of six hundred and forty acres of land to one

person, and would make the law an instrument of speculation. The cancellation of the entry was therefore recommended.

On appeal by Chauvin and Julian Letroadec, your office, on April 16, 1897, dismissed the contest, holding that the allegation of non-reclamation was premature; that the assignment to Chauvin was invalid by reason of his incapacity to take the same, as he was then holding six hundred and forty acres of desert land under his own entry, without regard to the other assignments to him, but that the invalid assignment did not affect the validity of the entry of Maximilian Letroadec, the one in question; and that the contestants had failed to prove that the land was not desert land at the date of the entry.

Appeals by the contestants and by Chauvin bring the case to the Department. Chauvin contends that the assignment to him was valid. The contestants, among other things, contend that the assignment vitiated the entry and calls for its cancellation.

The assignment by Letroadec, the entryman, is by a written instrument, dated and witnessed June 10, 1884, and acknowledged six days later, and purports to assign the certificate of entry and the tract in controversy to Emil Chauvin. It was filed in the local office September 24, 1891. The entry of Letroadec was made under the desert land act of March 3, 1877 (19 Stat., 377). Prior to April 15, 1880, the right to assign desert land entries was recognized by the land department, but by a ruling of that date (S. W. Downey, 7 C. L. L., 26) they were held to be non-assignable. This ruling was thereafter followed as to all assignments made after April 15, 1880, until the act of March 3, 1891 (26 Stat., 1095), permitting assignments, but assignments made prior to the promulgation of the rule announced in the Downey decision were recognized, owing to the erroneous official instructions then in force authorizing assignments of desert-land entries. (David B. Dole, 3 L. D., 214.) It was also held in the case last cited that no one can be permitted to directly or indirectly acquire more than 640 acres under the desert land act, that, as the two entries there assigned to Dole aggregated 1,160 acres, being for 640 and 520 acres, respectively, he would be allowed to elect under which entry he would claim, and that as to the other entry the assignment would be held void, and the rights obtained thereunder by the entryman's partial compliance with the law would remain in him unaffected by the void assignment.

It has recently been held that the provisions of the act of March 3, 1891, amendatory of the original desert land act, with respect to the assignment of desert land entries, are applicable to an entry made under the original act, but assigned after the passage of the amendatory act and perfected in accordance therewith. (Gasquet *et al.* v. Butler's Heirs *et al.*, 27 L. D., 721.) The assignment in the case under consideration was made prior to the passage of the amendatory act, and while the ruling of the Department prohibited the same. It was

clearly invalid because the assignee at that time already held, under his own desert land entry, the full amount allowed to one person, irrespective of his holding as heir of one entryman, and as assignee of other entrymen. It is contended by Chauvin, the assignee, that he may make proof for the assignor, and that if he should attempt to make final proof for himself, upon one or more of the assignments to him, the question might then be successfully raised, but that such is not the case now presented. It is further contended by the assignee that he can not be compelled to elect for what particular tract he will make final proof, before the same is offered. But as Chauvin already holds under a desert land entry as much as he is entitled to of his own right, without regard to the assignments of other desert land entries, and as he has received patent for yet another tract as heir of his deceased son, it is clear that this assignment to him can not be recognized or supported.

An assignment of a desert land entry to one disqualified to acquire title under the desert land law, does not render the entry fraudulent, but leaves the right thereto still in the entryman, and this was held in a case where Chauvin, the assignee in the case now under consideration, was evidently the assignee. (*Vradenburg's Heirs et al. v. Orr et al.*, 25 L. D., 323, upon review, 533.) By the assignment, therefore, to Chauvin, the integrity of the entry was not affected, and the right thereto still remains in the original entryman.

The evidence sought to be introduced at the hearing upon the failure to reclaim the tract, was properly excluded, and the elimination of the charge to that effect from the several affidavits of contest was not erroneous. So your office held, sustaining the action of the local office. The contest on that ground was prematurely brought, as the order revoking the suspension of the entry apparently was not served upon the entryman at all, and not upon the assignee until August 23, 1893, some time after the contests were initiated. As the entryman, and his heirs after his death, the date of which does not appear, under this decision are chargeable with default, if any occurred, and not the assignee, notice upon him or them must appear before time will run in the matter of reclamation. (*Farnell et al. v. Brown*, on review, 21 L. D., 394; *Vradenburg's Heirs et al. v. Orr et al.*, upon review, 25 L. D., 533.)

The evidence relating to the main ground of the contest, that of the non-desert character of the land, is very conflicting. The testimony of the witnesses for the contestants tends to show that land in the vicinity of the tract of the same character was cultivated to various crops with fair return, and that the tract in question produced a growth of grass, known as alfilaria or alfilerilla, in large quantities, which was nutritious for stock and which would bring a fair price as hay, if the land were devoted to that purpose, while the testimony of the witnesses for the assignee shows that the tract and others in the neighborhood

did not produce, one season with another, paying crops; and that many tracts in the vicinity were abandoned by small farmers as not capable of producing fair crops without artificial irrigation. The annual rainfall is fixed at from five to six inches by one of the witnesses for the contestants, and there is no dispute that this is the maximum amount. This is much less in quantity than that recognized as the limit of successful agriculture. (See *Babcock v. Watson et al.*, 2 L. D., 19, 21.) The contestants have not shown by a preponderance of the evidence the non-desert character of the tract in dispute either at the time the entry was made or at a time subsequent thereto.

There is some doubt about the sufficiency of the proof as to the death of the entryman, of his dying intestate, and of the sole heirship of the parties served as his heirs. The local office had no proof of these matters except the allegations contained in the affidavit of the attorney for the contestants. Julian Letroadee, one of the alleged heirs, appealed to your office, not contesting the service made upon him and the other alleged heir, but contending that the contest should have been brought against the heirs of the deceased entryman as such. Inasmuch as the rights of the heirs are not prejudiced by this decision, but on the contrary are upheld, it is unnecessary to consider this branch of the case.

The decision of your office dismissing the contest must be affirmed.

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RAILROAD GRANT—STATE ACT OF MARCH 1, 1877.

JAMES GREENHALGH.

Under the act of March 1, 1877, of the State legislature of Minnesota, the protection extended thereby to settlement claims cannot exceed one hundred and sixty acres to any one settler.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *May 22, 1899.* (F. W. C.)

In your office letter of April 28, 1899, are submitted the record facts bearing upon lot 6, Sec. 33, T. 150 N., R. 46 W., Minnesota; from which it appears that said lot is within the indemnity limits of the grant made to aid in the construction of the St. Vincent Extension of the St. Paul, Minneapolis and Manitoba railway.

On November 10, 1874, one Charles Mark was permitted to file pre-emption declaratory statement covering said lot, with other tracts; but proof has never been submitted upon said pre-emption filing, although it remains of record uncanceled.

The company made selection of this tract in its list No. 9, filed March 11, 1880.

On July 26, 1880, the governor of the State of Minnesota, assuming the right to do so under the provisions of the act of the State leg-

islature of March 1, 1877 (Special Laws of Minnesota, 1877, p. 257), made relinquishment in favor of James Greenhalgh of lots 6, 7, 8, 9 and 10, in said section 33.

Upon inquiry at your office it is learned that one James Greenhalgh, on May 14, 1873, filed pre-emption declaratory statement covering lots 7, 8, 9, 10 and 11, in said section 33, aggregating 150.46 acres. He made proof and payment under said pre-emption filing, and on August 8, 1883, cash certificate issued to him for the land covered by his declaratory statement.

It would thus appear that Greenhalgh's claim as made by him excluded lot 6, now under consideration, and included lot 11; which latter lot was not embraced in the relinquishment made by the governor of the State in his favor.

Section 10 of the act of the legislature of Minnesota of March 1, 1877, *supra*, provides:

The Saint Paul and Pacific Railroad Company, or any company or corporation taking the benefits of this act, shall not in any manner, directly or indirectly, acquire or become seized of any right, title, interest, claim, or demand in or to any piece or parcel of land lying and being within the granted or indemnity limits of said branch lines of road, to which legal and full title has not been perfected in said Saint Paul and Pacific Railroad Company, or their successors or assigns, upon which any person or persons have in good faith settled and made or acquired valuable improvements thereon, on or before the passage of this act, or upon any of said lands upon which has been filed any valid pre-emption or homestead filing or entry—not to exceed one hundred and sixty acres to any one actual settler; and the governor of this State shall deed and relinquish to the United States all pieces or parcels of said lands so settled upon by any and all actual settlers as aforesaid, to the end that all such actual settlers may acquire title to the lands upon which they actually reside, from the United States, as homesteads or otherwise, and upon the acceptance of the provisions of this act by said company, it shall be deemed by the governor of this State as a relinquishment by said company of all such lands so occupied by such actual settlers; and in deeding to the United States such lands, the governor shall receive as *prima facie* evidence, of actual settlement on said lands, the testimony and evidence of copies thereof, heretofore or which may be hereafter taken in cases before the local United States land offices, and decided in favor of such settlers.

Under this act relinquishments were limited to one hundred and sixty acres to any one settler. As the pre-emption claim of James Greenhalgh, made in 1873, under which he has received patent, embraces 150.46 acres, adding the area of lot 6, shown to be 34.55 acres, would greatly exceed the limit of protection intended to be extended by the State act of March 1, 1877.

It would appear, however, that on March 26, 1887, James Greenhalgh tendered a homestead application for said lot 6, in connection with other tracts in said section, which application was denied for conflict with the railroad selection of record. Applications were also presented, at different times, by Hans C. Burnstad, Hiram M. Pierce, and Andrew Baker, embracing said lot 6.

Your office decision of October 17, 1889, held that said lot 6 was

public land, subject to disposal in view of the governor's relinquishment, and a hearing was subsequently held between the several applicants therefor, in order to determine their respective rights in the premises. At the hearing, only Greenhalgh and Baker appeared, and the contest between them resulted in departmental decision of April 18, 1894 (not reported), in which Greenhalgh's application was given preference, not on account of any claim made prior to the passage of the State act of March 1, 1877, but because of the priority of his application over that presented by Baker.

Under this decision Greenhalgh was permitted to make homestead entry covering said lot 6, on October 4, 1894. Thereafter said lot 6 together with other lands, was certified to this Department for approval on account of the railway grant, and due to the fact that no reference was made to Greenhalgh's entry, said list was approved May 7, 1895, and patent issued thereon May 10, 1895.

On April 23, 1898, Charles W. Greenhalgh, on behalf of the heirs of James Greenhalgh, deceased, tendered final proof under said homestead entry; which was rejected by the local officers because of the outstanding patent to the railroad company.

By your office letter of April 19, 1898, the company was requested to reconvey the land to the United States, to the end that patent might issue upon Greenhalgh's homestead entry; in response to which the company declined to make reconveyance as requested; and the matter is submitted with request for instructions in the premises.

A consideration of the matter leads to the belief that a mistake has been made in the description of the claim of James Greenhalgh as originally made, either by erroneously including lot 11 of said section 33 in his pre-emption claim upon which he has made proof, or in the relinquishment executed in his favor by the governor including lot 6, the tract under consideration. The limit of his claim can not exceed one hundred and sixty acres, under the State act, so that he can not be permitted to retain both lots 6 and 11. Investigation should therefore be had to determine the actual land included in his claim as made at the time of the passage of the State act of March 1, 1877, and thereafter you will again transmit the matter to this Department, with such recommendation as the facts disclosed may warrant.

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INTERLOCUTORY ORDER—RESIDENCE—DESERTED WIFE.

BAYLISS *v.* BROOK.

The discretion of the Commissioner of the General Land Office, in the matter of ordering a rehearing, will not be interfered with by the Department, in the absence of its apparent abuse.

The continuity of a homesteader's residence is not affected by temporary absences resulting from illness, and the necessity of earning money for the maintenance of the claim and personal support.

The right of a deserted wife to make a homestead entry will not be defeated by her erroneous designation as an "unmarried woman" in the preliminary affidavit.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) June 14, 1899. (G. C. R.)

On October 26, 1893, Maude A. Parker (now Brook) made homestead entry for the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , and lot 7, Sec. 8, T. 25 N., R. 1 W., Perry, Oklahoma.

On December 8, 1893, Henry T. Bayliss filed his affidavit of contest against the entry, alleging that he had improvements of a substantial nature upon the land prior to said entry, and that the entry was made for the benefit of "other parties."

On October 20, 1894, Bayliss filed a supplemental affidavit, charging that Mrs. Parker was a married woman, and not an "unmarried woman," as set forth in her homestead affidavit, and that her entry was thus fraudulently made, etc.

Hearing was had, commencing May 27, 1895. The register and receiver found that Mrs. Parker reached the land and settled thereon in advance of Bayliss' arrival. It was further found, however, that she failed to maintain a *bona fide* residence on the land, and for that reason the local officers recommended the cancellation of the entry.

On appeal, your office, by decision dated February 15, 1896, affirmed that action and held the entry for cancellation for the reason that the testimony tended to show that her home subsequent to the entry was in Perry, Oklahoma, and not on the land.

On April 18, 1895, she was married to R. T. Brook.

On March 12, 1896, Mrs. Brook filed a motion for review and rehearing, which your office considered on July 9, 1896. The motion for review was denied; but your office, upon the showing made (hereinafter referred to), remanded the case for further hearing to enable Mrs. Brook to show that she established a *bona fide* residence on the land in September, 1893.

The further hearing was had, commencing September 11, 1896, and ending five days later. The register and receiver found that Mrs. Brook was the prior settler; that her improvements were valuable; that she established a *bona fide* residence on the land; and that her absences thereafter from the land were caused by sickness and were therefore excusable. For these reasons it was recommended that the contest be dismissed and the entry remain intact.

On appeal, your office, by decision of June 24, 1897, affirmed that action, and Bayliss further prosecutes his appeal to this Department.

The appeal alleges nineteen specifications of error, which may be summed up as follows:

1. In remanding the case for further hearing.
2. In considering testimony erroneously admitted by the register and receiver at the rehearing upon questions other than the establish-

ing of residence on the land by Mrs. Brook, and in considering evidence over the objections of the defendant (probably the plaintiff) as to matters not in issue under the order remanding the case.

3. In finding that the defendant was the prior settler, and in finding that she established a *bona fide* settlement on the land prior to the year 1895, and in not finding that the claimant failed to exercise diligence in the matter of residence.

4. In not finding that Mrs. Brook attempted to perpetrate a fraud upon the government in her statement that she was at the date of the entry an unmarried woman.

5. In finding that the claimant was an invalid for months after her entry, and in excusing her absences for such alleged cause, and in further holding that her absences were necessary "to earn a support and receive medical attention."

6. In failing to find where Mrs. Brook's real home was prior to 1895, and in misquoting the testimony as to when she furnished her house, etc.

In her sworn petition for a rehearing Mrs. Brook sets forth fully her reasons for not being present at the first hearing. She also gave a full history of her settlement, the extent of her improvements, when she established residence, her absences from the land, and the reasons therefor (sickness, etc.).

Her petition was supported by sundry affidavits of physicians and others.

Her motion for rehearing appears to have been served on the opposite party, who moved its dismissal, supporting his motion by elaborate arguments, etc.

On due consideration of all that was presented, your office sustained the petition for a rehearing. Such action is within the discretion of your office, which will not be interfered with by the Department in the absence of its apparent abuse. (*Witter v. Ostroski*, 11 L. D., 260; *French v. Noonan*, 16 L. D., 481.)

A careful examination of the motion, with its accompanying affidavits, etc., shows that there was no abuse of such discretion. On the contrary, the order for a rehearing was proper.

The second and third specifications of error may be considered together. Much irrelevant testimony was introduced and the record is needlessly voluminous.

The rehearing was ordered on the question of Mrs. Brook's residence, but much testimony was taken as to who reached the land first. The register and receiver and your office had found that issue in favor of Mrs. Brook at the first hearing, and it was error to admit further testimony on that point.

In his affidavit of contest Bayliss did not allege that he was the prior settler, and the testimony shows that he was not. On the contrary, a preponderance of the testimony shows that Mrs. Brook reached and

staked the land before Bayliss's arrival thereon. Bayliss admits that Mrs. Brook was in advance of him, but states that it was his judgment that she was on the adjoining claim to the north when he settled on the land. The evidence shows that he was mistaken.

The principal issue in this case is whether Mrs. Brook, after her settlement on the land, established and maintained a *bona fide* residence thereon.

As before seen, Mrs. Brook was not present at the first hearing. At the second hearing she was permitted to give testimony as to her settlement, i. e., how she made the race, what time she reached the land, what she did, etc. She swears that she was strong and healthy before she made the race, but that in running to the land her horse plunged over a ditch, spraining her back and otherwise injuring her; that thereafter she had been a constant sufferer from the injury and its resulting consequences; and that she was frequently confined to her bed as a result and received medical treatment (hereinafter referred to).

After settling on the claim she remained there until the evening of September 17, 1893, and then went to Arkansas City for lumber. She returned to the claim on Wednesday after the opening, September 21, bringing with her lumber for a house, also bedding, dishes, etc., and had a house built on the land the next day, into which she moved her goods, etc. She remained on the land until the following Friday or Saturday, when she went to Perry to make entry. She obtained her "number" and was taken sick and went to her parents in the State of Kansas. She returned to Perry about October 20, and remained there till she made entry (October 26). She went to the land about October 28 (1893). In the meantime she had sent one Doty to her former home in Kansas after more furniture, which she found in the house on her arrival. She remained on the land, living in her house, from October 28, to November 5, 1893, and while there had her house floored. While in Perry in October, 1893, she was offered a position by a Mr. Hoggett to work as bookkeeper and correspondent for the Perry Coal and Transfer Company, and having spent all her means in building the house, moving her furniture, making entry, etc., and being obliged, as she states, to work to earn her living, she accepted the position, but in doing so arranged with the company to be allowed to live on the land as much as possible, in order to look after its improvement, etc., her wages to be deducted accordingly.

She left all her furniture, beds, bedding, stove, chairs, etc., together with part of her wearing apparel, in the house when at work in Perry. While there at work she was frequently sick, the sickness being the result of the injury before mentioned.

She states she was again on the land from last of November till about December 10, 1893, and while there papered her room. About this time her mother made her a visit of several days. She was taken sick on the claim and returned to Perry for treatment, and was there

confined to her bed from December 15th to January 1, 1894. During this illness she was treated by a physician who, on December 19, 20, and 21, visited her twice a day. She returned to the claim about January 9, 1894, and remained about eight days. She took chickens to the claim that month. She returned to Perry about January 20, 1894, and was sick again. Dr. Walker treated her January 31. About February 15, 1894, she went out to the land to see after making additional improvements, and staid three days. In the meantime she was expending in improvements on the land every cent she made, except what was necessary for herself. On February 28, she again went to the claim, and had lumber hauled to build a stable. At this time she arranged for some breaking. She returned to Perry and was sick in March, Dr. Walker visiting her. This physician visited her also on April 12, 23, and 24; also on May 13, and 19, 1894. Dr. Doggett visited her twice on May 20 and 21. She was also sick in June, and was visited by same physician June 14, 21, 22, 23, 24, 25, and 30. Some of these days two visits were made.

During the spring of 1894 she had forty-five acres broken, fenced five acres, built a stable, and had forty acres planted to corn and Kaffir corn.

While in Perry she used none of her own household goods. She states she was on the claim every month, more or less, in the year 1894. She states she was sick, more or less, in every month in 1894, and gives the dates from bills rendered by her physicians of their visits. She was also sick in 1895, more or less, every month, and gives numerous dates upon which she was visited by her physicians. She states that her physicians advised her not to live on the land, by reason of her physical condition. She persisted in her claim, and went to the land, ignoring their advice. Up to 1895 there was no month she was not on the claim more or less, and her absences therefrom were to earn money for her support, and by reason of her continued ill health. In the fall of 1894 she had another room added to her house. All these improvements were made with means she earned while at work in Perry. In the spring of 1895 she had fifty-five acres cultivated, of which twenty acres were sowed to oats, for which she paid thirty-five cents a bushel, and the balance to corn, etc.

In 1896, the year of the last hearing, she had about sixty-five acres planted to various kinds of crop. In May, 1895, her husband wrote her to come to him in Seattle, Washington. While there she was again taken sick, and was in that condition at the date of the first hearing. When in Washington, and on June 8, 1895, Bayliss attached her crop, her pony and household goods, for (as she says) alleged damages done by her pony in breaking into Bayliss' two-acre corn patch. All her household goods were taken by the officer to a nearby village (Tonkawa) until the court met, when (October, 1895) she had the attachment proceedings dismissed. As soon as she got her goods back to her house,

she commenced residing there again, and with her husband has since continuously remained on the land.

At the date of the hearing she had about seventy-five acres of the land under cultivation; also houses, a barn, a very large granary, wells, trees, etc., value, from \$700 to \$1,100.

The testimony of Dr. Brengle and others corroborates her testimony as to her continued illness. Mr. English, the druggist, swore that he filled prescriptions for Mrs. Brook from the fall of 1893 to 1895, every month, without exception; that these prescriptions were given for Mrs. Brook's use by Drs. Walker, Brengle and Doggett. Anne Howard, a servant for Mr. Brook, testified that she nursed Mrs. Brook through several spells of sickness while in Perry in 1894 and 1895; also that Mrs. Brook went to her claim about once a month while she worked as bookkeeper in Perry.

Mrs. Brook often did her work as correspondent, etc., when unable to leave the house, and often when still confined to her bed, the nature of her disease not permitting her to move about.

There was much testimony given of a negative character by Bayliss' witnesses as to their frequently passing Mrs. Brook's house and observing no person about the place. Mrs. Bayliss made it a part of her business to watch Mrs. Brook's house, and made a record in a book of the time of Mrs. Brook's several appearances on the land.

Bayliss had moved his family to the land about February 20, 1894, and Mrs. Bayliss testified that Mrs. Brook was on the place March 2, 1894, and remained three days, April 14, and remained two days, July 18, and remained eight days, September 26, and remained two days, December 3, and remained sixteen days, and March 2, 1895, and remained two days. Mrs. Bayliss thought these were the only times Mrs. Brook was on the place, but in the nature of things she could not be positive. A part of the time given by Mrs. Bayliss, i. e. from June 4, 1894, to June 4, 1895, during which Mrs. Brook was not seen about the place, is covered by a leave of absence granted to Mrs. Brook, and even during that period Mrs. Bayliss' testimony shows that Mrs. Brook was on the land four times, and remained twenty-eight days. Much testimony was given of Mrs. Brook's frequent presence on the land.

A copy of the testimony given by Mrs. Brook in the case of *Doty v. Mills* was introduced at the second hearing on behalf of Bayliss. In this testimony Mrs. Brook is shown to have testified as to the facts of her settlement, residence, etc. It was introduced before Mrs. Brook took the stand in her own behalf. Upon the question of her residence on the land it was much less explicit than the testimony given by her in her own case. In the one she is uncertain as to the different periods she was on the land, in the other she was certain. She explains the difference in her statements by saying that she looked up certain memoranda to enable her to be more explicit as to the testimony in her own case. Her explanations are satisfactory.

From the above recitation it must be held that Mrs. Brook was not only the first settler upon the land, but that she established her residence thereon in a few days after settlement; that all her acts in relation to the land, i. e. her constant improvement, expenditures, etc., evince good faith. Her absences, solely for the purpose of her own support, were excusable (Helen Dement, 8 L. D., 639), and when from her meager earnings it is shown that she spent therefrom "every cent" not necessary for her support, and that substantial improvements were made from time to time with those earnings, she accomplished more in the way of making herself a home than if she had remained constantly on the land in ill health and unable to do the manual labor which her wages as bookkeeper enabled her to employ.

Her maiden name was Lawrence. On November 17, 1892, she was married to one Parker, in Chicago. After getting from her all the money she had (\$40.00), and being disappointed that it was not a greater sum, Parker left her. She wrote to her parents for money and returned to them. Until the day she made entry (October 26, 1893), Parker had remained away from her. She was clearly at that time a deserted wife, and as such entitled to make a homestead entry. (Pawley v. Mackey, 15, L. D., 596; Scott v. Pinney, 13 L. D., 621; Maggie Adams, 19 L. D., 242.) Her homestead affidavit states that she was "an unmarried woman," and stress is laid upon that statement by appellant, who insists that her entry on that account was fraudulently made, etc.

As before seen, she made her entry under her then proper name of Maude A. Parker, taking the name of her husband who had deserted her. In explanation of this incident she states that the description "unmarried woman" must have been interpolated after she had sworn to her affidavit. The fact that she entered the land in her proper name, at a time, too, when she knew there was another claiming it, would indicate that she intended no fraud, even if she knew that description was in her affidavit. The fact remains that she was at the time qualified to make entry as a deserted wife, and if in the preparation of her entry papers the term "unmarried woman" was by accident or even by design erroneously employed, it would not show corrupt motives; in the absence of positive evidence to the contrary.

Under due consideration of all the testimony in the record, together with the specifications of error assigned on appeal, no sufficient grounds appear for disturbing the judgment appealed from.

The same is therefore affirmed.

## CONFLICTING SETTLEMENT RIGHTS—SURVEY IN THE FIELD.

VACA *v.* PETERSEN.

Conflicting settlement rights, acquired after survey in the field and before the filing of the plat, must be determined by actual priority of settlement and the good faith of the parties.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 14, 1899.* (E. J. H.)

On October 27, 1896, William Petersen made homestead entry covering the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 13, and the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 14, T. 31 S., R. 16 E., M. D. M., San Francisco land district, California, and on November 25, 1896, Arcadia Vaca applied to enter the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of said section 14. This application was rejected by the local officers for conflict with the said homestead entry of Petersen as to the NW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$  of said section 14.

Thereupon, on December 11, 1896, Vaca filed affidavit of contest, alleging prior settlement, and hearing was ordered thereon for April 19, 1897, the testimony to be taken before the county clerk of San Luis Obispo county, California, on April 12, 1897. The local officers rendered decision in favor of Petersen, and Vaca appealed to your office, where decision was rendered affirming that of the local office, dismissing Vaca's contest and holding Petersen's entry intact. From this decision Vaca likewise appealed to the Department.

It appears that the township in which this land is situated was surveyed in the field in 1882, but that the township plat was not filed in the local office until October 27, 1896, and Petersen made entry the same day. No explanation is given for this delay of fourteen years in filing the plat.

The evidence shows that both of the parties were qualified homestead entrymen, and each built a house and settled on the land embraced in his application after the government survey in the field, Vaca having settled some eleven years, and Petersen seven or eight years, prior to the initiation of this contest; that neither of the parties lived upon the tract in dispute; that prior to the time Petersen came there Vaca pastured his stock thereon, and afterwards, for several years, both parties used it as common pasture ground for their stock, it not being then enclosed. Vaca had good buildings and improvements upon his claim, and his family consisted of a wife and nine children. The extent of Petersen's improvements is not shown, but no question was raised as to their sufficiency.

The testimony is to quite an extent indefinite and conflicting, but it would seem that about four or five years prior to the initiation of this contest a fence was built upon the north line of the tract in dispute, by Vaca and one Cochran, who was interested in the tract adjoining it on the north, each having a half interest in the fence, and that Petersen

subsequently succeeded to Cochran's interest; that afterwards, in July, 1894, Mrs. Petersen, acting for her husband who was away at work earning money to support his family, employed one Fenn to fence the tract on the other three sides. Fenn testified that "as there was no survey at that time, she instructed me to build it as near the line as I could. Meanwhile, she was notified by Mr. Vaca, I believe, or his wife, that they claimed the level land on that forty, and she told me to put the fence back of the same." Upon this point Mrs. Petersen testified that she told Fenn to "put the fence as near on the line as possible, not to come on Mr. Vaca." Fenn built the fence, leaving out, however, the "level land" on the west side of said tract and adjoining other lands embraced in Vaca's claim, amounting to eight or ten acres, from which it would seem that Mrs. Petersen, who was acting as agent for her husband, acquiesced in allowing Vaca to retain possession of that portion of the tract. This remained in Vaca's possession, and he put a few acres thereof in crops in 1895 and 1896. The balance of the tract, being about thirty acres, was, after the fence was built in 1894, in the possession of Petersen and used by him as a pasture.

It is not shown that Petersen made any objection to Vaca's putting in a crop on the land in 1895 and 1896, but in November, 1896, after Petersen had made entry of said tract, Mrs. Petersen notified Vaca, who was starting in to plow thereon, not to do so. One McLaughlin, who was present on that occasion, testified in behalf of Petersen that Vaca then acknowledged, in reply to an inquiry of Mrs. Petersen, that he had on one or two occasions, some years before, told her that he did not claim the tract; that he also then acknowledged that he had said to her and to another party, that he claimed his land in the form of a "Z", meaning thereby that he claimed the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , and the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , which would not include the tract in controversy but take in the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  instead, but that in so stating he was mistaken. Vaca stoutly denied ever having made these statements to Mrs. Petersen or anybody, and denied having made the acknowledgments testified to by McLaughlin.

Three or four disinterested witnesses, at least two of whom were living in that neighborhood before either Vaca or Petersen came there, testified to the use and occupancy of this tract by Vaca as heretofore related herein, and that they always understood that he claimed it. Petersen never cultivated or cropped any of the tract, simply using it to pasture stock on.

The decision of your office and that of the local office, are based upon the ground that at the time of the entry by Petersen he had the "greater part of the tract in dispute in his possession." But it should be borne in mind that Vaca settled there three or four years before Petersen; that when the latter came there, as was shown by two or three witnesses, Vaca was using the land to pasture stock on as a part of his settlement claim, which must have been known to Petersen; that after

Petersen came there Vaca helped Cochran build the fence along the north line, and at the time of the hearing still owned a half interest therein, though Petersen seems to have appropriated it to his own use; that while Vaca was away from home when Petersen built the fence in 1894, so that he could not object, Mrs. Vaca told them to leave out the "level land," referring to that portion since cultivated by Vaca, and it would seem that they did so.

If these parties had settled there prior to the survey in the field, under the testimony and the situation in the case, unquestionably an equitable solution of the question would be a joint entry, but under the ruling of the Department in *Lord v. Perrin*, 8 L. D., 526, and other cases, that can not be done; hence one or the other of them must be allowed to enter the whole of the tract.

The testimony was taken before the county clerk, and does not seem to have been very well taken. The local officers did not have the benefit of the presence of the witnesses before them, so as to bring the case within the rule that "the finding of the local officers, with the witnesses before them, is entitled to special consideration in the case of conflicting testimony."

After a very careful examination of said testimony and consideration of the case, the Department is unable to agree with your office decision affirming that of the local office, both of which seem to have been rendered by reason of the fact that Peterson, at the time of his entry, had more of the land under his control than Vaca. This necessarily would not be at all satisfactory or conclusive. All the circumstances as to how he came into such possession, the priority of settlement, improvements, good faith and other elements, are to be taken into consideration, and these mainly seem to be in favor of Vaca, as hereinbefore shown.

Your office decision is therefore reversed, and the case remanded for proceedings consistent herewith.

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DESERT LAND ENTRY—WATER RIGHT—APPROPRIATION.

A. W. LINDSEY.

Under section 1, of the desert land act of March 3, 1877, the waters of non-navigable streams are open to appropriation for purposes of irrigation, and may be so taken by the entryman, if he is the first *bona fide* appropriator thereof; and the fact of such appropriation may be shown by parol evidence.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 14, 1899.* (W. M. W.)

A. W. Lindsey has appealed from your office decision of March 6, 1897, rejecting his final proof, made on his desert land entry No. 359, for two hundred acres of unsurveyed land in Lakeview land district, Oregon.

The record shows that on July 23, 1895, said Lindsey filed desert declaratory statement for said tract, and on August 15, 1895, he was permitted to make entry therefor.

September 28, 1895, Lindsey submitted final proof, which was forwarded to your office by the register and receiver on February 9, 1897.

March 6, 1897, your office found the proof to be satisfactory, "with the exception that claimant has not furnished proper evidence of his water right."

Respecting the matter of water right the entryman's final proof witnesses testified that he owned and controlled a right to water sufficient to properly and permanently irrigate all the land embraced in his entry; that the source and volume of his water supply were acquired from a spring and from Stone House creek. And one of said witnesses swears that "no one claims the water adversely." In his final proof Lindsey testified that he owned a right to the use of water sufficient to irrigate the whole of the land and for keeping the same permanently irrigated "by having been the prior appropriator, and no person claims any adverse right." In addition to this, the entryman submitted his affidavit, in which he states that he—

is the owner of the waters of a certain creek named Stone House creek, running through my desert land entry No. 359, and a certain spring located thereon; that I am the prior appropriator of said waters, having used them continuously for irrigation and other ranch purposes upon said entry for more than three years last past . . . That there is no prior valid adverse claim to said water and that no person whomsoever claims or uses the same.

Your office found that this is not such evidence of water right as can be accepted, and directed the local officers to—

advise any known party in interest that he will be required to file a certificate from the proper State officer that the claimant has the right to use the water taken from said creek, and has complied with the laws of the State governing the appropriation of water for irrigation purposes . . . and upon failure to show such right or to appeal in sixty days, the proof will stand rejected.

Lindsey appeals, and assigns errors as follows:

1. In holding that parol evidence can not be accepted of the right of entryman to the waters of Stone House creek.
2. For requiring the certificate of State officers, that the claimant has the right to appropriate the waters of said creek when there is no law of the State of Oregon authorizing any officer to make such certificate.

The affidavits of two lawyers were filed with the appeal, tending to show that there is no law in the State of Oregon which, in terms, provides for the acquisition and holding of water rights for irrigation purposes; that it is the accepted practice there that the person who secures possession is entitled to hold the same to the extent of his appropriation and lawful needs and that there is no State officer who could or would certify that a claimant has the right to the use of the water taken from said creek or that he has complied with the laws of the State governing the appropriation of water for irrigation purposes.

The proof and the entryman's affidavit submitted therewith clearly show that the entryman appropriated the waters in Stone House creek and a spring on the land and distributed such waters over the land by means of ditches in such a manner as to reclaim all of it except a few high knolls at different places on the tract; that he was the first person to appropriate said waters and that there is no one claiming the right to said waters adversely to him. The *bona fides* of his appropriation of such waters for the purpose of irrigating and reclaiming the land is not questioned.

The first section of the desert land act of March 3, 1877, provides that it shall be lawful for any citizen of the United States, etc., to file a declaration that he intends to reclaim a tract of desert land by conducting water upon the same. And further provides:

That the right to the use of water by the person so conducting the same, on or to any tract of desert land . . . shall depend upon bona fide prior appropriation; and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation; and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. (See 19 Stat., 377.)

The second section of the act of March 3, 1891 (26 Stat., 1095), amended the original desert act by adding five new sections thereto, but there is nothing in the added sections that repeals, modifies or changes the provisions just quoted of section one of the original act. Therefore said provisions are in force and constitute a part of the act under which appellant submitted his proof.

Stone House creek is not shown to be a navigable stream, and under the provisions of section one of the act of 1877, *supra*, its water was free and open to appropriation by the entryman, provided he was the first *bona fide* appropriator thereof. And he could lawfully acquire by appropriation the right to the use of so much of the water of said creek, in addition to the water of the spring on the tract, as was necessary to use in irrigating and reclaiming the land covered by his entry.

This conclusion is supported by Callahan *et al v. Sullivan*, 9 L. D., 6.

As the water right in cases of this sort can be acquired by appropriation under the desert land act, there is no good reason why the facts necessary to prove the *bona fide* appropriation may not be shown by parol evidence, and consequently there is no necessity for requiring the certificate of any State officer that he (the entryman) has the right to the use of the water of said creek.

Inasmuch as a desert entryman is protected in a water right acquired by appropriation under the desert land act, it is unnecessary to determine whether such entryman would be protected under section 2339 Revised Statutes and the laws and the decisions of the supreme court of the State of Oregon.

It follows that your office decision appealed from was erroneous, and it is accordingly reversed.

Lindsey's proof will be accepted.

APPLICATION—PENDING CONTEST—CIRCULAR REGULATIONS.

STEWART *v.* PETERSON. *See 207 U.S. 407.*

Under the first rule announced in *Cowles v. Huff*, 24 L. D., 81, no rights, either inchoate or otherwise, are acquired to lands involved in a pending contest, by an application to enter filed before the rights of the entryman have been finally determined.

Directions given for the preparation of a circular letter to the effect that no application to enter will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office, and providing for the disposition of applications filed during the existence of the contestant's preferred right of entry.

*Acting Secretary Ryan to the Commissioner of the General Land Office,*  
(W. V. D.) *June 14, 1899.* (F. W. C.)

Minnie S. Peterson has appealed from your office decision of August 17, 1898, holding for cancellation her homestead entry covering the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 11, T. 22 N., R. 46 W., Alliance land district, Nebraska, with a view to the allowance of the application of John Stewart embracing said tract.

The tract above described, together with the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of said Sec. 11, was included in the homestead entry of Amos W. Brown, which was contested, upon the charge of abandonment, by one James W. Watson. By your office decision of June 8, 1896, the contest was sustained and Brown's entry was held for cancellation; from which decision Brown appealed to this Department, and by departmental decision of February 28, 1898, your office decision was affirmed. A copy of said departmental decision was forwarded to the local officers by your office on March 5, 1898, and on March 8th Brown was advised thereof by registered mail. In the absence of a motion for review the case was, on May 16, 1898, declared closed and thereafter Brown's entry formally canceled upon the record and Watson advised of his preferred right secured by reason of his contest.

On March 16, 1898, following the departmental decision upon Watson's contest, John Stewart filed what is termed by your office an affidavit of contest, which, after reciting that Brown, the former entryman, had wholly abandoned the tract, refers to the contest filed by Watson and to the departmental decision thereon sustaining that contest, and proceeds as follows:

That the said James Watson filed said contest at the instigation and procurement of one Frank Peterson, and for the use and benefit of said Peterson, or for the use and benefit of one whom the said Peterson might designate to file upon said land.

That the said contest of the said Watson was speculative and filed with speculative intent, and not with the intent on the part of said Watson of ever residing upon and making a homestead proof of said land in the event this said contest was successful. That the said contest after having been decided by the local office in favor of entryman, was appealed by the attorney for contestant at the instigation, direction and procurement of said Peterson, and not by the direction or with the consent of the said Watson. That the expense of prosecuting this said contest, including attorney's fees for same, were paid by the said Peterson and not by the said Watson. That the said Watson has waived and relinquished his preference right to file on this land, and has contracted and agreed to waive and relinquish his preference right to file upon said land to the benefit of the said Peterson.

On April 16th following, he tendered a homestead application covering the land embraced in Brown's entry.

The local officers took no action upon said affidavit and application filed by Stewart until May 23, 1898, on which date Watson filed a waiver of his preference right of entry, and Minnie S. Peterson was permitted to make homestead entry covering the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of said Sec. 11; whereupon Stewart's contest was dismissed.

One G. M. Sullivan, on June 18, 1898, pretending to act as the attorney for said Stewart, filed an appeal from the action of the local officers in dismissing Stewart's contest.

In forwarding said appeal the local officers reported that Sullivan had failed to file evidence of his authority to represent Stewart, and, furthermore, had not served the entryman, Peterson, with a copy of said appeal, although he had been requested by them to file authority from Stewart and to serve a copy of this appeal upon the entryman.

Your office decision therefore refused to consider said appeal, but held that, as Stewart's homestead application was filed after the departmental decision upon Watson's contest, the same should, under departmental decision in the case of *Cowles v. Huff* (24 L. D., 81), have been held to await the action of Watson under his contest, and that upon the filing of Watson's waiver of the preferred right, said application attached and reserved the land from other disposition, and that the allowance of the entry by Minnie S. Peterson covering a portion of the land formerly embraced in Brown's entry and included in Stewart's homestead application, was error, and for that reason said entry was held for cancellation with a view to allowing Stewart to complete entry of the land upon his application presented as before stated.

From the foregoing it is apparent that at the time of filing his contest affidavit Stewart was aware of the judgment of the Department upon Watson's contest, which ordered the cancellation of Brown's entry. He could not, therefore, gain anything by reason of the charge of abandonment against Brown's entry. Said affidavit was at most a protest against according to Watson a preferred right of entry by reason of his contest of Brown's entry, and he secured no advantage over any subsequent application to enter this land by reason of the filing of said affidavit. His homestead application filed on April 16, 1898, was in no wise benefited by said affidavit, so that the sole question for con-

sideration is, Was the land on April 16, 1898, subject to said application?

In the case of *McDonald et al. v. Hartman et al.* (19 L. D., 547), it was held that 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.

Since this decision the question as to the exact time when a tract included in an entry subsequently canceled becomes subject to the application of another, has been often considered. It was the intention of the Department in the case of *Cowles v. Huff, supra*, to establish a uniform rule for the disposition of such applications, and in said case two rules were formulated, the first governing the disposition of applications presented prior to the final determination of the entryman's rights, and the second, applications filed during the period of preferred right accorded a successful contestant; the rules being as follows:

1. That no application to make entry will be received by the local officers during the time allowed for appeal from a judgment of cancellation of an entry; but in all such cases the land involved will not be subject to entry or application to enter until the rights of the entryman have been finally determined until which time no other rights, inchoate or otherwise, can attach.

2. If during the time accorded a successful contestant to make entry of the land involved an application or applications to enter should be made by a stranger or strangers to the record, such application or applications will be received and the time of presentation noted thereon, but held to await the action of the contestant, and should such contestant fail to exercise his preference right, or duly waive it, then such application or applications must be acted upon and disposed of in accordance with law and the rulings of the Department.

These rules would seem to leave a hiatus between them. The time accorded a successful contestant within which to make entry does not begin to run until the cancellation of the contested entry upon the record and notice has been given him of his preferred right of entry. The rights of the entryman are finally determined either by his failure to appeal from the decision of your office holding his entry for cancellation, or, in the event of the filing of an appeal, after the decision of the Department thereon and the expiration of the period accorded the entryman within which to file a motion for a review of that decision. Until the expiration of the period accorded the entryman within which to file a motion for review, the judgment of the Department is not carried into effect and the entry canceled from the record. (See circular March 30, 1893, 16 L. D., 334.)

In the case of *John W. Korba* (24 L. D., 408) it was held that an application filed by a third party to enter land embraced within a judgment of cancellation, rendered by the Department, should be received and held to await the action on the part of the successful contestant; and if the preferred right of entry is subsequently waived, the application to enter, so held in abeyance, is entitled to precedence as against other claims arising subsequently thereto.

This holding was made on the authority of the decision in the case of *Cowles v. Huff et al.* (*supra*).

An examination of the case discloses that the application by John W. Korba was filed on November 26, 1895, and was rejected by the local officers for the reason that the land applied for was already covered by the entry of Marye Korba. Said entry had been contested by one Larson on the ground of abandonment, which had been sustained by departmental decision of October 11, 1895.

The time within which to file a motion for review had not expired at the time John W. Korba tendered his application, and the prior entry was not canceled and the case closed until February 15, 1896, nearly three months after the tender of said application.

It would appear, therefore, that the rights of the entryman had not been finally determined at the date of the tender of said application, so that the case properly fell within the first rule announced in the case of *Cowles v. Huff*, and the application was properly rejected.

Through an inadvertence said case was disposed of under the second rule announced in the case of *Cowles v. Huff*, viz., the rule governing the disposition of applications filed during the period accorded a successful contestant within which to make entry of the land.

Said case therefore made an improper application of the rules announced in the case of *Cowles v. Huff*, and has since been followed in the recent case of *McDade v. Hively* (27 L. D., 185).

In the last mentioned case, however, the application by Hively was filed after the former entryman's rights had been finally determined, for the motion filed for review of departmental decision in that case had been overruled before the tender of said application.

The former entry had not, however, been canceled from the records and the case closed, so that, while it was presented after the rights of the entryman had been finally determined, it was not presented during the time accorded a successful contestant within which to make entry of the land.

In neither of these cases, therefore, was it proper to have disposed of the applications under the second rule announced in the case of *Cowles v. Huff*, for they were not presented during the time accorded a successful contestant within which to make entry. The case under consideration is in all material respects similar to that of John W. Korba, the application by Stewart having been presented before the expiration of the period accorded Brown, the former entryman, within which to file a motion for review of the departmental decision sustaining Watson's contest, and it was therefore improper to have disposed of the case under the second rule announced in the case of *Cowles v. Huff*, and the decision of your office is reversed, and Stewart's application will stand rejected.

The case of *McDade v. Hively* (*supra*) evidences what has before been stated in this opinion, viz., that the rules announced in the case

of *Cowles v. Huff* do not sufficiently cover all cases, for there is a hiatus between the time when the former entryman's rights are finally determined and the beginning of the period accorded a successful contestant within which to make entry of the land.

In order that this important matter of regulation may be perfectly clear, it is directed that no application will be received, or any rights recognized as initiated by the tender of an application for a tract embraced in an entry of record, until said entry has been canceled upon the records of the local office. Thereafter, and until the period accorded a successful contestant has expired, or he has waived his preferred right, applications may be received, entered, and held subject to the rights of the contestant, the same to be disposed of in the order of filing upon the expiration of the period accorded the successful contestant or upon the filing of his waiver of his preferred right.

You will prepare a circular letter containing these directions, for the information of the local officers.

CONTEST—INDIAN ALLOTMENT—HOMESTEAD APPLICATION.

MORTON *v.* LAVEASCH.

A homestead entry should not be allowed for land embraced within a suspended application for Indian allotment; nor a contest entertained against the allotment claim pending departmental inquiry as to the validity of such claim.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 20, 1899.* (J. L. McC.)

Your office, on April 14, 1899, transmitted the papers in the matter of the appeal of James C. Morton from its action in rejecting his application to make homestead entry for lots 2 and 3, and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 19, T. 66 N., R. 18 W., Duluth land district, Minnesota, and to contest the claim of certain Indians for said land.

The land had been in part embraced in the Indian allotment of Alice Brown, for the S.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$ , and the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of said Sec. 19. This allotment was held for cancellation by your office on July 26, 1897.

Said Alice Brown (having by marriage become Alice Niles) afterward applied to make timber-land entry for the same tract. Said application was rejected, and her allotment canceled, by your office, on November 4, 1898.

On January 19, 1895, Angelie Laveasch applied for the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and lot 3 of Sec. 19, T. 66 N., R. 18 W., as an Indian allotment for her minor child George; and for the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  and lot 2 of the same section as an Indian allotment for her minor child Ben. These allotment applications were suspended by the Department December 6, 1895.

On January 27, 1898, James C. Morton applied to make homestead entry for lots 2 and 3, and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 19, T. 66 N., R. 18 W., and to contest the allotment claims of Mrs. Laveasch (for her sons), inasmuch as his homestead application embraced the land included in both of said allotment claims, excepting the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of said Sec. 19.

Your office, on November 4, 1898, rejected his application to enter, and also his application to contest said allotment claims. Morton has appealed to the Department.

He does not allege settlement prior to said Indian allotment applications, nor prior to the date of the departmental order suspending the same, but contends that said allotment applications ought not to be allowed, for the reasons, (1) that Ben and George Laveasch are not Indians; (2) that no settlement has been made by them, or by their mother for them, on said land; (3) that the land is not of the class subject to appropriation under the Indian allotment acts; also that the mere applications for allotments for Mrs. Laveasch's minor sons, unallowed, constituted no bar to appellant's homestead entry, which should have been placed of record, or at least held in abeyance until the Laveasch allotment applications were disposed of.

The government had commenced an investigation into the character of the land and the qualification of the Indian allotment applicants prior to Morton's application to contest. The Department held, in the case of William Kalmbach (26 L. D., 207, syllabus):

In proceedings by the government to determine whether an application by an Indian to select certain tracts as an allotment shall be allowed, a stranger to the record, alleging prior settlement rights, will not be heard to set up his claim, but must await the disposition of the pending action.

Quoting and commenting upon the above, the Department said, in the case of *Bradley v. Lemieux et al.* (28 L. D., 196, 198):

In this class of cases, if the right of contest should be denied a contestant who alleges prior settlement upon the land involved, there certainly would be equal, if not stronger, reason for denying the right to one who alleges settlement after the filing and suspension of the allotment claim.

In the cases cited, settlement on the land was alleged by the applicant to contest, as the primary ground of contest; but by analogy of reasoning the same rule is applicable here. It is the duty of the government, upon consideration of the allotment applications, to determine whether the applicants are qualified to take, and also whether the lands are of the class subject to such allotment, and a stranger to the record will not be heard to set up his claim pending the allotment proceedings, but must await the final disposition thereof.

There was therefore no error in the action of your office in rejecting Morton's application to contest the Indian allotment claims in question, nor in rejecting his application to make homestead entry of the land covered thereby.

The decision appealed from is accordingly affirmed.

## FOREST RESERVES.

[Lien Lands Selections, Act June 4, 1897 (30 Stat., 36).]

DEPARTMENT OF THE INTERIOR,

GENERAL LAND OFFICE,

Washington, D. C., May 9, 1899.

REGISTERS AND RECEIVERS,

*United States Land Offices.*

GENTLEMEN: Your attention is called to a decision by the Honorable Secretary of the Interior, dated the 26th ultimo, 28 L. D., 328, addressed to this office, which reads as follows, to wit:

The Department is in receipt of your communications of December 7, and 13, 1898, relative to applications now pending in your office to exchange lands within the limits of public forest reservations for public lands outside such reservations, under the following provisions of the act of June 4, 1897 (30 Stat., 11, 36):

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

Calling attention to a circular addressed to registers and receivers, issued August 11, 1898, by your office, without the approval of the Secretary of the Interior, and also referring to page 89 of your annual report for the year ending June 30, 1898, you ask (1) whether lands within the limits of forest reservations must be agricultural in character in order to be made bases for lieu selections under the foregoing provision of the act, (2) whether the claim or title thereto must have been initiated or acquired under the settlement laws of the United States, and (3) whether timber land acquired by purchase under the act of June 3, 1878 (20 Stat., 89), but since denuded of its timber, and land acquired under a grant made to a State or a railroad company by act of Congress can be made bases for such lieu selections.

As to the first question, if by agricultural lands you mean lands, the claim or patent to which is not based upon the mining laws of the United States, the question is answered in the affirmative. That the statute does not contemplate and therefore does not authorize the relinquishment or surrender of mineral lands as bases for the making of lieu selections, is shown by the provisions therein that:

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

\* \* \* \* \*

And any mineral lands in any forest reservation which have been or which may be shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained."

All other lands included within the limits of a public forest reservation are subject to relinquishment as bases for lieu selections, if claimed or owned as stated in the statute.

As to the second question, if by settlement laws you mean such laws as make

personal settlement and residence upon the tract sought to be acquired a necessary condition to obtaining title, as in the case of the preemption and homestead laws, the question is answered in the negative. That which may be relinquished is described as "a tract covered by an unperfected bona fide claim or by a patent," and is believed to include any tract covered by any unperfected bona fide claim under any of the general land laws (except the mining laws) of the United States, or to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent. The thing which was objectionable to the forest reservation policy was the presence within the limits of a forest reservation of lands held and controlled by individual claimants or owners. Whether the claim or ownership was initiated or acquired under the homestead statute, which is a settlement law, or under the timber land purchase act, which is not a settlement law, its presence is equally an obstacle to the attainment of the purpose for which the forest reservation was established. In both cases the reservation of the surrounding lands is equally prejudicial to the interests of the claimant or owner.

As to the third question, the answer is in the affirmative, subject to the qualifications that where the land is claimed under a grant made to a State or a railroad company by an act of Congress, the full legal title must have passed out of the government and beyond the control of the land department by a patent, or by some means which is the full legal equivalent thereof. Where under the timber land purchase act, or indeed under any other statute, one has acquired land having valuable timber thereon and has removed the timber, in pursuance of a lawful right so to do, the removal of the timber does not affect his ownership of the land, and if it be included within the limits of a public forest reservation does not deprive him or the government from receiving the benefit incident to a relinquishment of that land, and a selection of other land outside the limits of the forest reservation in lieu thereof. The statute does not make it a condition to the exchange therein authorized that the tract within the forest reservation should have retained its original and natural condition.

You will please formulate and submit to the Department circular instructions to the local land officers revoking the circular issued by your office August 11, 1898, and also embodying the views expressed herein, and in the decisions of the Department in the cases of F. A. Hyde *et al.* (28 L. D., 284), and Emil S. Wangenheim (28 L. D., 291). Action upon all applications for lieu lands under said act will be withheld until the circular instructions are adopted.

The decision in the case of Hyde *et al.*, *supra*, holds that—

Where an exchange of land is sought under the act of June 4, 1897, the relinquishment and selection can be made only by the claimant or owner of the land within the limits of the forest reservation.

Unsurveyed as well as surveyed land, which is vacant and open to settlement may be selected under said act.

The words "tract covered . . . by a patent," as used in said act, embrace and include a tract to which the full legal title has passed out of the government and beyond the control of the land department by any means which is the full legal equivalent of a patent.

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

The decision in the case of Wangenheim, *supra*, holds that—

In an exchange of lands under the act of June 4, 1897, where title to the land relinquished has passed out of the government, or where certificate for patent thereto has issued, the selection may embrace contiguous or non-contiguous tracts, if in the same land district; but if the land relinquished is covered by an unperfected claim,

to which certificate for patent has not been issued, and the law under which said claim was initiated requires that land taken thereunder must be in one body, the same requirement, must be observed in making the lieu selection.

Every selection of unsurveyed land must designate the same according to the description by which it will be known when surveyed, if that be practicable, or, if not practicable, must give, with as much precision as possible, the locality of the tract with reference to known landmarks, so as to admit of its being readily identified when the lines of public survey come to be extended; and the selection must be made to conform to such survey within thirty days from notice, by the local office, to the party making the selection, of the receipt at the local land office of the approved plat of the survey of the township embracing such tract.

Selections of unsurveyed lands will in no event be passed to patent until after the lands have been surveyed; and where the selections are in lieu of lands to which the title had passed out of the United States, or to which certificate for patent had issued, the selections will not be passed to patent until after the expiration of four months from the date of receipt at the local land office of the approved plat of survey of the township embracing the lands selected.

The purpose of the last paragraph is, in all instances, where no notice by publication will be required before the issuance of final certificate, to give the settlers, if any, upon the lands at the time of selection thereof, the full period prescribed by law within which to apply at the local office to make homestead entry of the land, and to afford ample time for the local officers to advise the Commissioner of the General Land Office of any such application before the time arrives for issuing patent under the selection.

In all cases relinquishments made in pursuance of said act must be executed, acknowledged and recorded in the same manner as conveyances of real property are required to be executed, acknowledged and recorded by the laws of the State or Territory in which the land is situated. Where the legal title to the land has passed out of the United States, there must also be filed with the relinquishment a duly certified abstract of title showing that at the time the relinquishment was filed for record the legal title was in the party making the relinquishment and that the land was free from liability for taxes and from other incumbrance. In case the land relinquished is covered by an unperfected *bona fide* claim, to which certificate for patent has not issued, there must be filed a certificate by the recorder of deeds or official custodian of the records of transfers of real estate in the proper county that no instrument purporting to convey or in any way incumber the title to the land or any part thereof is on file or of record in his office, or if any such instrument or instruments be on file or of record therein, the certificate must show the facts; and in case certificate for patent to such land has been issued there must also be filed the certificate of the receiver

of taxes for the proper county showing that the land is free from all liability for taxes.

Relinquishments by individuals of lands to which the legal title has passed out of the United States or to which certificate for patent has issued, must also be executed by the wife of the claimant, if he have one, in such manner as will effectually bar any dower, homestead or other interest on her part in or to the lands relinquished.

The forms of application (4-634 and 4-643), copies herewith, should be used in the classes of cases to which they respectively apply. Other forms will be prepared and furnished you by this office as occasion may seem to require.

The circular of August 11, 1898, herein referred to, is hereby revoked.

Very respectfully,

BINGER HERMANN,  
*Commissioner.*

Approved, May 9, 1899.

E. A. HITCHCOCK,  
*Secretary.*

#### MINING CLAIM—PROOF OF EXPENDITURE.

ROBERT S. HALE.

Where an application for mineral patent embraces several locations held in common, and is made and passed to entry prior to July 1, 1898, proof of an expenditure of five hundred dollars on the group of claims is sufficient, under amended rule 53 of the mining regulations.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 20, 1899.* (G. B. G.)

April 30, 1898, Robert S. Hale filed an application for a patent for the Long Horn, Short Horn, Big Horn, West Gem and Trajan lode claims, the official plat of the survey of said claims having been filed in the local land office at Helena, Montana, that day.

June 30, 1898, he made mineral entry No. 3618, embracing said lode claims, after notice of said application by posting and publication as required by law, no adverse claim having been filed during that period.

These claims are shown to be contiguous and to form a group held by the entryman. The showing as to expenditure in labor and improvements was to the effect that \$710.00 had been expended upon the Long Horn, \$350.00 on the Short Horn, \$210.00 on the Big Horn, \$60.00 on the West Gem and \$60.00 on the Trajan.

November 7, 1898, your office held that the showing of expenditure in labor and improvements was not sufficient to justify the patenting of the group because it is not shown that an expenditure of \$500.00 was made for the benefit of all of the claims.

The claimant has appealed from this decision.

The only question presented is, whether the proof of the expenditure upon this group of claims is sufficient to authorize the patenting thereof. The making of this proof is governed by a clause in section 2325 of the Revised Statutes, which reads:

The claimant at the time of filing this application for a patent or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors.

March 14, 1898, the following paragraph upon this subject was made a part of the mining regulations (26 L. D., 378):

The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register, a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several locations held in common, that an amount equal to five hundred dollars for each location, had been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully identify the premises and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof: *Provided*, That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

This regulation was in force at the time of Hale's application and entry, and the action of the local officers in accepting the proof of expenditure as sufficient and in allowing the entry is fully sustained by the proviso to the regulation. The certificate of the surveyor-general shows that \$1390 had been expended in labor and improvements upon this group of claims. The application was made and passed to entry before July 1, 1898, the date named in the regulation.

For a time it was held by the land department that where a mineral application embraced several locations held in common they should be treated as a consolidated claim and as requiring, as a condition to the issuance of patent, only the expenditure in labor or improvements prescribed for a single claim. By a regulation adopted December 15, 1897 (25 L. D., 561, 578), which was amended by the one in question, this ruling was superseded, but it was deemed wise to except from the operation of the new rule the applications for patent named in the proviso so that no injustice should be done to those who had made or were then making the necessary expenditure in labor or improvements upon their claims to enable them to obtain patents under the old ruling, and who should within the time named in the proviso make and prosecute their applications to entry or to that point where entry within that time was alone prevented by protests or adverse claims.

The reasons for the new ruling and the fault in the one which was

thereby superseded are stated in a letter of the Secretary of the Interior dated June 21, 1898 (27 L. D., 91).

The case under consideration clearly comes within the proviso to the amended regulation, and for that reason the decision appealed from is reversed.

MINING CLAIM—PLACER—CHARACTER OF LAND—DISCOVERY.

REINS *v.* RAUNHEIM.

In the case of a placer entry allowed on a sufficient showing as to the character of the land, and the development of the claim, the Department should not, after the lapse of many years, permit the sufficiency of said proof to be questioned by one who had no interest in the land at the time when the entry was made.

It is immaterial whether a mineral discovery is made before or after the location of a claim, if it is made before the rights of others intervene.

An award of the right of possession in adverse proceedings under section 2326 R. S., necessarily involves a finding by the court that due discovery of mineral was made by the party declared to have the right of possession, which may be accepted by the Department, as against a subsequent allegation of non-discovery on the part of another mineral claimant.

A discovery of mineral on each twenty acres of a placer claim is not essential to a valid location.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 23, 1899.* (F. W. C.)

An appeal has been filed on behalf of Raunheim and the Boston and Montana Consolidated Copper and Silver Mining Co. from your office decision of August 25, 1897, ordering a hearing upon the protest filed by John P. Reins against the issue of patent on mineral entry No. 832, covering the E.  $\frac{1}{2}$  of lot 6, the E.  $\frac{1}{2}$  of lot 9, and the S.  $\frac{1}{2}$  of lot 8, or the E.  $\frac{1}{2}$  of the E.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the S.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  of Sec. 8, T. 3 N., R. 7 W., Helena land district, Montana, to determine:

1. Whether a valid discovery of placer mineral was made upon said claim by the locators at or prior to the date of location, and if so, upon what particular twenty acre tract?

2. Whether or not there has been a discovery of placer mineral made upon each twenty acre tract embraced in the placer claim?

The land above described was located as a placer mining claim on February 22, 1880, by Erastus A. Nichols, S. E. Nichols, and George F. Marsh. By subsequent conveyances the claim was transferred to Saly Raunheim, who, on July 16, 1881, filed in the local land office an application for a patent for said claim, alleging himself to be the owner thereof by purchase. The register caused notice of said application to be published and posted as required, for the period of sixty days, the publication being completed in September, 1881.

The surveyor-general's certificate showed the following expenditure in labor and improvements to have been made upon the claim:

Excavations and prospect shafts .....	\$150
Steam machinery for mining .....	500
Total .....	650

No adverse claim to any portion of the ground covered by the application was filed within the period of publication, so Raunheim made payment for the land, his application was passed to entry by the local officers and patent certificate was issued to him May 23, 1882. July 5, 1882, Henry C. Dahl, claimant of the Betsey Dahl lode, filed a protest against the placer entry, claiming that it conflicted with his lode claim. It appears that Dahl, on March 9, 1881, located the Betsey Dahl lode claim, and on March 16, 1882, filed in the local office an application for patent therefor, the lode claim as located and as described in said application embracing a tract of three and ninety one-hundredths acres in conflict with the placer claim. The local officers appear to have accepted Dahl's application for patent without exclusion of the ground in conflict with Raunheim's prior application, and to have caused notice of Dahl's application to be regularly published and posted.

On May 24, 1882, the day after Raunheim's placer entry was allowed, he filed in the local office what was termed an adverse against the application of Dahl, and thereafter commenced a suit against the latter in the proper local court to quiet title in himself to the ground in conflict, following which your office directed that further action upon the placer entry be stayed until a decision of the controversy. In this suit judgment was rendered in favor of Raunheim in the local court and, on successive appeals, was affirmed by the supreme court of Montana and the supreme court of the United States. (*Dahl v. Raunheim*, 132 U. S., 260.) No further action appears to have been taken upon Raunheim's placer entry until, upon consideration of a protest against the issue of patent thereon, filed by John P. Reins February 16, 1897, your office, in the decision now under review, ordered a hearing for the purposes before stated.

In his protest Reins claims to have located the Combination lode mining claim on April 13, 1893, embracing the identical ground theretofore covered by the Betsey Dahl lode claim, including the conflict with Raunheim's placer claim. The protest also alleges that he has since complied with the requirements of the mining laws and regulations; that he has expended upon his lode claim in labor and improvements the sum of \$1,630, and that Raunheim's placer claim and entry are invalid, for several reasons.

Your office decision considers the several allegations affecting the validity of the placer claim and entry and rejects all of them excepting such as question the character of the land embraced in the placer claim and the discovery of mineral therein preceding the location thereof.

Relative to these matters, your office decision states:

This brings us to the consideration of the allegations that Raunheim's application was and is insufficient, illegal and void for the reason that no discovery of a valuable mineral deposit was ever made upon said claim by Raunheim or his predecessors in interest and that the land embraced in said claim is not in fact placer mining ground. These allegations bring into issue the character of the land, the validity of Raunheim's location, and the application and entry based thereon.

It is urged by counsel for Raunheim that the judgment of the supreme court finally determined these questions and left to the Land Department simply the ministerial duty of issuing patent upon the entry.

I cannot agree with this view. The Hon. Secretary of the Interior in the case of *Snyder v. Waller*, 25 L. D., 7, uses the following language:

"The adverse proceeding contemplated by the statute is for the purpose of determining the right of possession as between parties claiming conflicting mining claims, and does not, in my judgment, comprehend a suit in the courts to settle the question as to the character of the land. That subject is one that is exclusively within the jurisdiction of the land department, and any judgment of a court on this question would not be necessarily binding on the Department. Where the character of the land is involved to the extent that the determination of that question fixes the right to purchase the same, it can only be decided by the executive branch of the government which is clothed with the power to determine the question."

See also 4 L. D., 314; 23 L. D., 174, and 154 U. S., 320.

A careful examination of the record in this case fails to disclose any direct statement relative to the discovery of mineral upon the claim at or prior to date of location.

\* \* \* \* \*

I am of the opinion that the allegations of the protest relative to the non-discovery and non-existence of mineral justify the ordering of a hearing to determine these questions.

As before stated, the case is now before this Department on an appeal from this order for a hearing.

The showing made by Reins does not entitle him to equitable consideration. At the time of making his lode location in 1893, he well knew that the land in conflict was then, and had been for eleven years, embraced in Raunheim's placer entry and that this entry had been sustained by the supreme court of the United States against the Betsey Dahl lode location covering the ground here in conflict. His location of this ground does not, therefore, affect the validity of Raunheim's placer entry, which under the facts here presented, is a matter solely between the government and those claiming under that entry.

The land embraced in the placer entry was returned as mineral in quality by the surveyor-general; it was entered as placer ground as long ago as 1882, and that entry has been sustained, as against a lode claim for the ground here in controversy, by the district and supreme courts of Montana, and by the supreme court of the United States. In the opinion of the latter it is said:

It does not appear in the present case that a patent of the United States has been issued to the plaintiff Raunheim; but it appears that he has complied with all the proceedings essential for the issue of such a patent. He is therefore the equitable owner of the mining ground, and the government holds the premises in trust for him to be delivered upon the payments specified. We accordingly treat him, in so far as the questions involved in this case are concerned, as though the patent had been delivered to him. Being entitled to it, he has a right to ask a determination of any claim asserted against his possession which may throw doubt upon his title.

Raunheim's claim has been transferred to others, and now after the lapse of more than seventeen years since his entry was allowed and patent certificate issued to him, the government is asked to order a hearing to determine the validity of that entry.

In the proof made preceding the allowance of the entry it was shown that \$150 had been spent in excavations and prospect shafts, and in supplemental proof filed in your office in January, 1883, it was stated that the soil is composed of gold-bearing gravel; that a number of prospect holes had been sunk within the boundaries of the claim; that it was well adapted for placer mining purposes, water having been brought on the side hill about it in sufficient quantities to mine the same; and that a sum exceeding \$500 had been spent in developing the claim; that it was particularly valuable as placer ground, and that it had no special value for any other purpose. This showing was sufficient to warrant passing the entry to patent, and after the lapse of so many years the government should not permit it to be questioned by any one who had no interest whatever in the land at the time of the entry.

Does the charge that a discovery of mineral was not made preceding the location of the placer claim justify the order for a hearing?

In the supplemental proof, before referred to, the placer claimant and two supporting witnesses swear that the soil is composed of gold-bearing gravel, and this clearly amounts to a statement that placer gold had been found and discovered within the boundaries of the claim. It is immaterial whether the discovery occurred before or after the location, if it occurred before the rights of others intervened. *Erwin v. Prego et al.*, (93 Fed. Rep., 608). As the supplemental proof was filed in 1883, and as the Combination lode claim was not located until 1893, it is manifest that the placer discovery preceded by several years the acquisition of any right on the part of Reins.

In addition to the showing evidencing a discovery, an additional reason appears for refusing to order a hearing on the charge of an absence of discovery. In the case of *Hallett and Hamburg Lodes* (27 L. D., 104, 112), involving conflicting mineral claims, it is held that due discovery of mineral being a condition to the right of possession of a mining claim, is necessarily in issue in adverse proceedings brought to determine such right, and that a judgment in such proceedings presupposes a finding upon that issue favorable to the claimant declared to have the right of possession. Observation and experience have demonstrated the wisdom of applying a ruling of this character to cases of conflicting mineral claims, the assertion of which is manifestly a concession of the mineral character of the land. The suit instituted by *Raunheim* against *Dahl* was treated by the Supreme Court of Montana (6 Mont., 167) as an adverse proceeding under section 2326 of the Revised Statutes, and there are many reasons for so considering it.

Under the case of the *Union Oil Co.* (25 L. D., 351), a discovery of mineral upon each twenty acres of a placer claim is not essential to a valid location.

After careful consideration it is held that the showing made in the protest under consideration is not sufficient to warrant a hearing, and you are therefore directed to revoke the order for such hearing.

## CONTEST—TOWNSITE CLAIM—SUCCESSFUL CONTESTANT.

BRUMMETT *v.* WINFIELD.

A pending townsite claim, under which final proof has been submitted that establishes the right of entry, is properly the subject of a contest; and one who successfully attacks such claim, and pays the costs of the proceedings, is entitled to a preferred right of entry.

The period within which a successful contestant is required to assert his preferred right of entry does not begin to run until he is notified of such right.

An occupant of a town lot within an abandoned townsite claim acquires no right by his occupancy that will defeat the preferred right of one who successfully contests the townsite claim; nor will the homestead application of such occupant, tendered during the pendency of said contest, operate as a bar to the exercise of the contestant's preferred right.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 23, 1899.* (F. W. C.)

Alonzo Brummett has appealed from your office decision of August 20, 1898, according to Martin Winfield the right to make additional entry, under section six of the act of March 2, 1889 (25 Stat., 854), of the E.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 32, T. 26 N., R. 3 W., Enid land district, Oklahoma, and rejecting his, Brummett's, claimed right to make entry of said land.

This tract was formerly included in the application, made on November 24, 1893, by D. B. Madden, as probate judge for "L" county, Oklahoma, for townsite purposes, under which proof was made on January 6, 1894, the time appointed therefor. On March 24, 1894, your office rejected the application, which was made on account of McCordia townsite, for want of authority in said probate judge to make the entry as applied for. It was held in said decision, however, that the conditions surrounding the town—

are so in conformity with the requirements of the act of May 14, 1890, as to justify its entry as a townsite under that act, and therefore the trustees of the townsite board No. 12, Round Pond, will be instructed to make entry of said town of McCordia pursuant to said act.

Said townsite board was so instructed, and on April 3, 1894, filed its application to make entry of the land here in question, and later offered final proof, when C. W. Humphrey filed a protest charging that the entry was sought for speculative purposes.

The hearing was proceeded with under said protest, and upon the termination thereof the board moved to dismiss the protest, the record being transmitted to your office, where the matter was considered in your office decision of October 20, 1894, which dismissed Humphrey's protest. He subsequently attempted to appeal, which appeal was disallowed because filed out of time; whereupon he applied to the Department for a writ of certiorari, which was denied April 13, 1895.

The final proof offered by said townsite board showed that the land had been surveyed into lots, was used and occupied for townsite pur-

poses, and had seventeen houses "built or being built for occupancy and residence," and nine mercantile buildings, all valued at \$4,300; that there were fifteen inhabitants upon the land included in the townsite, and that there were about thirty-five other lot claimants; further, that the land had been occupied as a townsite since October 13, 1893.

February 10, 1895, Alonzo Brummett filed an affidavit of protest, in the nature of a contest, alleging abandonment of the town by the settlers; that there were only ten houses on the land, all of which had been abandoned since the date of final proof except one occupied as a store, the proprietor of which together with two other parties, were all the residents upon the townsite; and that these parties had informed affiant that they would remove from the land within thirty days from the date of his affidavit. He therefore asked for a hearing to determine the status of the land and for preference right to enter it as a homestead. Upon his application hearing was ordered and had, the full expenses of the hearing being borne by him, and upon the record made decision was rendered in favor of contestant, Brummett, it being held that the townsite had been abandoned by the former settlers thereon.

Subsequently to the closing of the hearing a motion was filed by Martin Winfield and others to reopen the case; which was denied by the local officers.

Winfield was one of the witnesses offered by the townsite board, upon the hearing had upon Brummett's charge of abandonment, and in his testimony he states that he owned a store situated upon one of the lots within the townsite and that he and his family, consisting generally of about three members, were the only persons residing upon the land; that he claimed this lot as an occupant under the townsite laws; that he began a mercantile business upon the land in March, 1895; the stock carried by him being valued at from one hundred to one hundred and fifty dollars; and that he plowed and cropped the town park, consisting of about eight acres, together with other portions of the tract included within the townsite application.

The evidence further discloses that the protestant, Brummett, and his father signed a petition to the county judge requesting him to enter this land for townsite purposes; that there was, prior to the filing of this protest, a so-called townsite organization, of which protestant's father was a member, which issued lot certificates to lot applicants for a consideration; that protestant's father had been looking after protestant's interest in this protest; and that the father sold the son's building that was upon a lot within the townsite at the time this protest was filed, which building has since been removed.

Upon a consideration of the entire record made at the hearing, the local officers recommended the rejection of the townsite application and that Alonzo Brummett be allowed a preferred right of entry, "subject to the right of Martin Winfield to make entry for the technical subdivision of said tract upon which he has settled."

An appeal was filed from the decision of the local office, the questions presented thereby being passed upon by your office decision of May 29, 1896, in which it was held that—

While this land may have been built upon for purposes of business and trade, it is evident that it has since been abandoned for such purposes by all persons except M. Winfield, and there is no evidence to warrant the belief that it will ever become so extensive, or that the conditions surrounding the land are such as to invite the competition and settlement of others to an extent to ever become a municipality. Before it can be entered as a townsite it must be raised above the dignity of a mere homestead settlement.

Whatever rights Winfield or Brummett may have in and to the land, will not be determined until they assert them by application for it.

The proof submitted by the townsite board was therefore rejected and the application to enter the land for townsite purposes was dismissed. From said decision an appeal was taken to this Department, the same being considered in decision of May 22, 1897 (24 L. D., 468), in which the decision of your office was affirmed.

It now appears that following the decision of your office upon the case arising upon Brummett's contest, to-wit, on June 4, 1896, Brummett, evidently acting under the holding made in your office decision, tendered a homestead application for this land, accompanying the same by the required fees and commissions. This application was received by the local officers and suspended to await the result of the case arising upon Brummett's protest against the acceptance of the proof offered on behalf of the townsite.

After the departmental decision of May 22, 1897, *supra*, to-wit, on June 2, 1897, Martin Winfield filed in the local office an application to make entry of the tract here involved under the provisions of the act of March 2, 1889, *supra*, as additional to his homestead entry made December 5, 1893, covering lots 3, 4, and 12, Sec. 4, and lots 6 and 7, Sec. 5, T. 125 N., R. 3 W. In his papers the tract applied for was described as range 3 "east," instead of range 3 "west," but the circumstances of the case clearly indicate that the mistake in description was a mere clerical inadvertence, and the action of your office so treating the matter is sustained.

In support of this application Winfield stated that at the time he made his said entry of December 5, 1893, he desired to include within that entry the land here in question but was not allowed to do so because it was embraced in the pending application of the townsite of McCordia; that he was still the owner of the land embraced in his former homestead, and that on February 5, 1895, he removed therefrom to the land here in question, where he still resides, and that his improvements thereon are of the value of \$300.

Said application and the showing filed in support of it were forwarded by the local officers without action, but the same were returned by your office letter of June 18, 1897, and by letter of June 23, 1897, the local officers retransmitted the application, recommending that

Winfield's application to make entry of the land here in question be not allowed, because the showing filed in support thereof, namely, that he was not permitted to include it within his original entry, was not deemed sufficient to authorize the allowance of the additional entry as applied for.

By letter of October 6, 1897, the register transmitted a protest by Alonzo Brummett, filed on the preceding day, in which he protested against the allowance of the application by Winfield to make additional entry of the tract here in question. In said protest he recited the history of the case arising upon his protest against the application made by the townsite board, and stated that he had, on June 4, 1896, tendered homestead application for the land, which had been suspended to await the result of the proceedings upon said protest; that he had not been notified of the action of your office in closing the case arising upon said protest; and that the land here in question is not contiguous to the land included in Winfield's former homestead entry. He therefore asked that Winfield's application be denied, for the following reasons:

First. That it is in conflict with protestant's preference right earned by his contest against the townsite application.

Second. That the land is segregated by protestant's suspended homestead application.

Third. That Winfield can not base a homestead right upon a settlement for townsite purposes.

With said protest the local officers forwarded Brummett's application, filed on June 4, 1896; also a motion filed by Brummett July 15, 1897, offering to complete said application and asking that the same be placed of record, and filing therewith his homestead affidavit showing his qualification as a homesteader on that date. On said motion was a note by the register to the effect that no action could be taken thereon because the case arising upon Brummett's protest against the townsite application was then pending before the Department.

These several applications were considered in your office decision of August 20, 1898, appealed from, in which it was held that under the instructions of March 25, 1897 (25 L. D., 61), based on the decision in the case of *Cowles v. Huff et al.* (24 L. D., 81), the local officers should not have received the application of Brummett while his contest against the townsite application was pending and that no rights, inchoate or otherwise, could attach under said application or under the motion filed on June 15, 1897, to complete the same. It was further held that during the thirty days succeeding the date of the final termination of said contest Brummett made no effort to exercise the preference right of a contestant, and any rights which he may have acquired under his contest are lost.

In considering the application by Winfield it was held that, as his original entry was made subsequently to the date of the act of March 2, 1889, *supra*, under departmental decision in *Nancy A. Stinson* (25 L. D., 113) he should not be held to have exhausted his rights under

section six of said act, and the local officers were therefore directed, upon amendment of the application, to allow the same to go of record under said section six, if no other objection appeared thereto.

From said decision Brummett has appealed to this Department.

Your office decision while not directly according Brummett a preferred right of entry by reason of said contest, notes the fact that "during the thirty days succeeding the date of the final termination of said contest, Brummett made no effort to exercise the preferred right of a contestant," and holds that "any rights which he may have acquired under his contest are lost."

It is true that at the time Brummett filed his protest or contest against the townsite application it had not yet passed to entry. Proof had been made thereon however, after notice, which appears to have shown such a condition then existing as to warrant entry. Brummett's protest rested upon abandonment after final proof.

During the pendency of said proof the townsite claim had the same operative effect as an entry. In fact the townsite had then entitled itself to entry.

A contest was had to clear the record of the townsite claim, and as Brummett furnished the information and paid the costs of the hearing he is entitled to a preferred right of entry as a successful contestant, under the rulings of the Department.

In *Olmstead v. Johnson* (17 L. D., 151), a preferred right of entry was accorded the successful contestant of a timber-land entry, and therein it was said:

Thereupon you rendered your said decision of April 23, 1892, whereby you held that Olmstead, by reason of his successful contest was entitled to a preference right of entry.

You accordingly allowed Olmstead's statement and held that of Johnson for cancellation. From this judgment Johnson appeals here and alleges that no mention of the timber land entries being made in the act of May 14, 1880, conferring for the period of thirty days a preference right of entry upon successful contestants who have 'procured the cancellation of any pre-emption, homestead or timber-culture entry,' Olmstead acquired no such right and that consequently Johnson's statement being first in point of time should prevail.

This contention is without force. In the case of *Fraser v. Ringgold* (3 L. D., 69), it has been held that a successful contestant against a desert land entry was entitled to a preference right of entry under the act of May 14, 1880, 'inasmuch as said law is remedial and this class of entries, if not embraced by the letter are within the reason and purpose of the statute.' This ruling has been uniformly followed and as you have well held, 'the same reasons for giving the successful contestant of a coal land entry, a desert land entry, and swamp land selection the preference right of entry will apply in the case of a timber land entry.'

From the record before this Department it does not appear that Brummett was ever notified of the closing of the case arising upon his charge of abandonment, or of his preferred right of entry. It does not appear, therefore, from the record transmitted, that "any rights which he may have acquired under his contest are lost."

It but remains to consider whether Winfield is shown by the record to have such a right as would bar Brummett's rights under his contest.

Winfield was an occupant of a lot within the townsite but took no step to contest the townsite claim, although he was fully aware that the occupants, with the exception of himself, had abandoned the land; on the contrary, he was the chief witness for the townsite at the hearing upon Brummett's contest. He can not therefore be held to have secured any such rights by his occupation as would bar Brummett's rights under his contest. He is restricted, therefore, to his application presented June 2, 1897, shortly after the departmental decision upon Brummett's contest and before the same had been transmitted to the local office, but no such rights were acquired by the tender of this application as to deprive Brummett of the privilege secured by his successful contest.

Your office decision is therefore reversed, and Brummett will be accorded a preference right of entry, of which he is entitled to due notice. The application by Winfield will stand rejected.

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ALASKAN LANDS—RIGHTS OF NATIVES.

JOHN G. BRADY.

In the sale of Alaskan lands under sections 12 to 14 of the act of March 3, 1891, the rights of native Alaskans must be protected by the government.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 23, 1899.* (E. B., Jr.)

By its decision of March 4, 1898 (26 L. D., 305), in the matter of cash entry No. 10, survey No. 6½, Sitka, Alaska, land district, made May 2, 1894, by John G. Brady, under sections 12 to 14, act of March 3, 1891 (26 Stat., 1095, 1100), the Department directed that the claimant be required to have his survey and entry amended so as to reduce the area of his claim to "enough land to include all his buildings, in an approximately square form," and suggested, in conformity therewith, certain boundaries for the reduced area which would embrace a tract of about fifty acres immediately adjacent to Sitka harbor. Such amendment would leave a small wedge-shaped parcel of public land within the limits of the claim as heretofore surveyed and entered, on the south side of the claim as reduced, and between the same and a tract marked "Lee claim" on the plat of said survey.

In a communication dated the 8th instant, Mr. Charles W. Needham, as attorney for Mr. Brady, calls attention to the facts above stated with reference to the said wedge shaped tract, urges that it is of considerable value to Mr. Brady and of little value to the government, and that if it were added to the fifty acre tract above indicated the resulting tract would still be in an approximately square form, and

requests that the claimant be allowed to embrace the wedge shaped tract in his amended survey and entry.

It appears that the Indian village adjacent to Sitka, on the shore of Sitka harbor, is near the southwest corner of the said fifty acre tract, and that on December 12, 1893, four of the chiefs or headmen of the Indian tribes resident at Sitka filed, in behalf of the tribes, a protest against the allowance of an entry by Brady of the land embraced in the said survey or any part thereof, alleging that the same had been claimed and used by them for more than sixty years under grant in perpetuity from the Russian authorities; that their title has been acquiesced in by the United States; that the Indian village is overcrowded and expansion is not possible, except in the direction of the land applied for by Mr. Brady; that his use and occupancy of the land have been without the consent of the tribes and are in derogation of their rights; and that if patent to said land be issued to him irreparable injury would thereby be done the Indians, and they would be deprived of rights absolutely indispensable to them as a community.

Upon this protest a hearing was ordered, which was continued from time to time until May 2, 1894. The contest was terminated by an agreement, in writing, signed and acknowledged on the last mentioned date by said Brady and seven of the headmen and representatives of the Indians, by the terms of which Brady agrees to convey to the said headmen and representatives "in trust for all other Indians" all the land included within the triangle therein described, to allow the Indians to "gather berries for their own use on said land," and to cross the land through gates and by trails as therein indicated, etc., etc.

The said triangle contains about two acres of land and forms the base of the wedge shaped parcel which Mr. Brady asks to be allowed to include in his amended survey and entry. By entering into the said agreement Mr. Brady admits that the land embraced in the triangle should go to the Indians, and the Department is of opinion that the rights of the Indians, if any, to such land can be more appropriately determined and protected if the legal title thereto is not conveyed to Mr. Brady.

Upon careful consideration it is directed that the boundaries of the tract which may be embraced in the amended survey and entry, as set out on page 309 of the decision of March 4, 1898, *supra*, may be changed so as to read:

Commencing at corner No. 1 of survey No. 6 $\frac{1}{2}$ , thence following the meandered coast line on the southwest to corner No. 6, thence, by a line to be run, to corner No. 16, thence southeasterly following the meander line of Swan Lake, to corner No. 19, thence southwesterly, by a line to be run, on the same course as between corners Nos. 18 and 19 to a point on the line between corners Nos. 20 and 1, and thence to corner No. 1, the place of beginning.

You will require Mr. Brady to elect in writing within sixty days from notice hereof whether he will take the tract as herein bounded or will take the fifty acre tract as bounded in the decision of March 4, 1898. The said decision is modified accordingly.

## OKLAHOMA LANDS—GREER COUNTY—ACT OF JANUARY 18, 1897.

## FRANK JOHNSON.

An "occupant" of a tract of land, as the word is ordinarily used, is one who has the "use and possession" thereof, whether he resides upon it or not, and Congress so used the word in the act of January 18, 1897; it therefore follows that any qualified claimant who, on March 16, 1896, was in the actual use and possession of the land claimed by him, is entitled to the benefits of the first section of said act, whether he was actually residing upon the land at that date or not.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) June 23, 1898. (W. A. E.)

June 30, 1897, Frank Johnson made homestead entry at the Mangum, Oklahoma, land office for the NE.  $\frac{1}{4}$  of sec. 29, T. 1 N., R. 20 W., I. M., and cash entry for the SE.  $\frac{1}{4}$  of the same section. Both of these entries were made under the act of January 18, 1897 (29 Stat., 490), the first section of which reads, in part, as follows:

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

August 25, 1897, Johnson submitted final proof on his homestead entry. This proof showed that he had fenced the homestead tract in 1888; that he had used it for a pasture since then; that from June, 1892, to August 22, 1897, he had lived with his family on the adjoining tract, now covered by his cash entry; and that on the latter named date he changed his residence from the SE.  $\frac{1}{4}$  of the section, to the NE.  $\frac{1}{4}$ , the land embraced in his homestead entry.

This proof was approved by the receiver, but the register declined to approve it for the reason that in his opinion "five years residence and cultivation of the land is necessary to comply with the act of January 18, 1897."

When the matter came before your office it was held, by letter of April, 27, 1898, that—

the words occupant and occupation, as used in the first section of the act of January 18, 1897, *supra*, taken in connection with the further statement that title may be perfected under the homestead law, imply that the occupation must be such as is required under the homestead law and includes actual residence on the land.

In view of the fact, however, that the proof showed that Johnson had resided for five years on the land covered by his cash entry, it was considered that he had possibly made a mistake in describing the land in the two entries. He was therefore allowed sixty days in which to apply to have said entries amended.

Instead of taking advantage of this opportunity to amend, Johnson, who seems to have entirely misapprehended the ruling of your office, filed a corroborated affidavit reiterating the facts in regard to the establishment of his residence on the homestead tract on August 22, 1897.

No further action having been taken by him, your office, by letter of November 30, 1898, held that he was not qualified to make homestead entry or additional entry under section 1 of said act of January 18, 1897. His final proof was accordingly rejected, but his homestead entry was allowed to stand subject to compliance with the homestead law under section 2 of said act. In regard to his cash entry, the local officers were directed to notify him that he would be allowed thirty days in which to show cause why said entry should not be canceled and that if he failed to take action within the time specified the entry would be held for cancellation.

Johnson's appeal from the action of your office brings the matter before the Department.

Had Johnson made homestead entry for the SE.  $\frac{1}{4}$  of the section, the tract upon which he was living on March 16, 1896, and cash entry for the NE.  $\frac{1}{4}$ , instead of *vice versa*, there would have been no question as to his rights under the first section of the act of January 18, 1897. As he has elected, however, to make cash entry for the tract upon which he was living and homestead entry for the adjoining tract, and has failed, after due opportunity given him to apply to amend said entries, it becomes necessary to determine whether the benefits of the first section of said act can be extended to one who was not, on March 16, 1896, residing upon the tract for which he subsequently filed homestead application.

The privileges accorded by this section are extended to "every person qualified under the homestead laws of the United States, who, on March sixteenth, eighteen hundred and ninety-six, was a *bona fide* occupant of land within the territory established as Greer County, Oklahoma." Nowhere in the section is it expressly stated that such person must have been a *resident* of the tract at that date. The case turns then upon the construction to be given the word "occupant" as used in the act under consideration. Does it, as here used, necessarily, imply residence?

Webster defines an "occupant" to be "one who has the actual use or possession, or is in possession of a thing." The same definition is given in Bouvier's and Anderson's law dictionaries and the American and English Encyclopaedia of Law. This definition is quoted and

adopted by the United States supreme court in the case of *Missionary Society v. Dallas* (107 U. S., 343).

In the case of *Lechler v. Chapin* (12 Nev., 65), it was said, at page 72: "To be an occupant, the party must have the actual use or possession of the land."

See also *Bishop of Nesqually v. Gibbon*, 21 Pac. Rep., 315; *Jackson, Van Vechter and others v. Sill and others*, 11 Johns., N. Y., 214; *People v. Ambrecht*, 11 Abb. Pr. (N. Y.) 97; *Redfield v. Utica and Syracuse R. R. Co.*, 25 Barb., 54; *City of Bangor v. Rowe et al.*, 57 Me., 439; *Inhabitants of Phillipsburgh v. Bruck's Executor*, 37 N. J., Eq., 482; *Walters v. People*, 65 Amer. Dec., 730 (18, 111, 194).

In *Lawrence v. Fulton* (19 Cal., 684), the court said:

The word occupation may be so used in connection with other expressions, or under peculiar facts of a case as to signify a residence. But ordinarily, the expressions 'occupation,' 'possessio pedes,' 'subjection to the will and control,' are employed as synonymous terms, and as signifying actual possession.

In *Fleming v. Maddox* (30 Iowa, 239), the following language was used:

By the term 'occupation' is meant *use or tenure*, as a house in the occupation of A. (2 Bouv. Law Dic., 254.) An occupier is one who is in the use or enjoyment of a thing. (Ibid.) A mechanic is in the occupation of his shop where he carries on his business; a merchant of his store; a lawyer of his office; a farmer of his farm. It is not necessary to make his occupation complete that the mechanic should reside in his shop or upon the same lot. He is in the occupation because he uses and enjoys it in carrying on his legitimate calling. So with the merchant, the lawyer, the farmer. If the farmer leases his farm to a tenant, he would still have the possession, because the possession of the tenant is that of his landlord, but he would not be in the actual occupation; he has parted with that to his tenant. The tenant, after entry under the lease, has the use and enjoyment of the premises, and pays to his landlord the stipulated rent therefor. But, where the owner of land is in the actual use and enjoyment of it himself, although in such use and enjoyment he employs others to perform all the labor connected therewith, he is in its actual occupation, within the meaning of that term.

In *Tweed v. Metcalf* (4 Mich., 379), it was said:

There is something in the phraseology of the statute which would seem to favor the idea urged by counsel, that to authorize an assessment of lands to a tenant, he must actually reside upon them. The term used, however, is 'occupant' and to be an occupant, it is not necessary that he should have his home upon the premises; and there is no reason why a person living upon his own lands, cultivating and raising crops upon other lands not his own, situate in the same township, should not be liable to have such lands assessed to him as an occupier, the same as if he actually resided upon them.

It has been held by the Department in several cases that personal residence is not necessary to the occupancy of a town lot. *Berry v. Corette*, 15 L. D., 210; *Benson v. Hunter*, 19 L. D., 290; *Kelso v. Jalonic*, 21 L. D., 98; *Bowie v. Graff*, 21 L. D., 522; *Young v. Severy et al.*, 22 L. D., 121; *Aldrich v. Schlusser et al.*, 22 L. D., 177. See also *Hussey v. Smith*, 99 U. S., 20.

It is clear, from these authorities, that the terms "occupant" and

"occupancy" do not necessarily imply residence. According to the ordinary signification of the word, an "occupant" of a tract of land is the one who has the actual use and possession of it whether he resides upon it or not.

Is the word used in its ordinary meaning in the act of January 18, 1897, or do the context and subject matter import the additional idea of residence?

To satisfactorily answer this question we must look, not only to the act itself, but also to the circumstances of its enactment and the evils it was intended to remedy.

For many years there was a dispute between the United States and the State of Texas as to the ownership of the territory now known as Greer county, Oklahoma. Up to March 16, 1896, the State of Texas exercised jurisdiction over Greer county, and the laws of that State were administered there. Persons seeking to acquire title to portions of the public lands looked to the State for title. On March 16, 1896, however, the United States supreme court decided that Greer county was not within the limits nor under the jurisdiction of the State of Texas, but was subject to the exclusive jurisdiction of the United States (162 U. S., 1).

On the same day that this decision was rendered the President, for the purpose of preserving intact the status of lands in Greer county until Congress could take action in regard thereto, issued a proclamation declaring these lands to be in a state of reservation (29 Stat., 878).

By act of May 4, 1896 (29 Stat., 113), Greer county was annexed to Oklahoma and all proceedings and actions of the Texas courts and officers in Greer county up to March 16, 1896, were validated. Nothing was said in this act as to the disposition of the public lands and the reservation created by the President's proclamation continued in force up to the passage of the act of January 18, 1897. This act established a land office at Mangum, in said county, and provided for the entry of said lands. So much of the first section of the act as we are immediately concerned with has already been quoted.

By act approved June 23, 1897 (30 Stat., 105), the time for the exercise of the preference right of entry given by the act of January 18, 1897, to *bona fide* occupants of public lands in Greer county was extended to January 1, 1898, and by act approved March 1, 1899 (30 Stat., 966), this preference right of entry was extended to those who had had the benefit of the homestead laws of the United States and who had purchased lands in Greer county from the State of Texas prior to March 16, 1896.

Up to March 16, 1896, occupants of public lands in Greer county looked to the State of Texas for title to the tracts claimed by them. It becomes necessary, therefore, in construing the first section of the act of January 18, 1897, to examine the public land laws of Texas so far as they affected lands in Greer county.

By chapter 19, Texas Acts of 1879, "all vacant and unappropriated public domain" in Greer county was appropriated, the even numbered sections for the public free schools, and the odd numbered sections for the payment of the State debt.

By chapter 99, Acts of 1887, it was provided that the State lands set apart for the public free schools should be examined and classified into agricultural, pasture, and timber lands. Accurate plats of each section were to be prepared and filed with the Commissioner of the General Land Office, showing the relative proportions of timber and open land on such section, the quality of the soil, the topography of the land, the quality and kind of timber, and the streams and other sources of water supply. When any portion of the free school land had thus been classified to the satisfaction of the Commissioner, it became subject to sale, to actual settlers only, in quantities of not less than one hundred and sixty acres nor more than six hundred and forty acres, except that lands classified as purely pasture lands, and without permanent water thereon, might be sold in quantities not to exceed four sections to the same settler. The purchaser was required to reside upon the land purchased by him for a period of three years from the date of his purchase and after proof of such residence and payment in full of the government price, he was entitled to a patent.

It does not appear that any provision was made, up to March 16, 1896, for the classification and sale of the lands set apart for the payment of the State debt.

It is stated in the supplemental brief filed by the attorneys for Johnson that the classification of school lands provided for in chapter 99 of the Acts of 1887, was never made in Greer county and as these lands could not be purchased until after the classification was made, there was no means, prior to March 16, 1896, by which persons could acquire title to them. There was likewise no means by which persons could acquire title to the lands reserved for the payment of the State debt as no provision had been made for the disposition of these lands. Prior to 1879, land certificates had been issued, under an act of the legislature, to Mexican war veterans. The land department of Texas for a while construed this legislative enactment as vesting in the holder of such land certificates the right to locate them upon any land that was public domain at the date of the act, regardless of such subsequent legislative appropriation as the act of 1879 above referred to. Considerable land in Greer county was located under these certificates and in a number of instances patent was duly issued, but for several years prior to March 16, 1896, the State authorities took a different view of the matter and refused to issue patent in such cases.

Up to March 16, 1896, persons desiring lands in Greer county either purchased from patentees or simply took possession of so much vacant public land (generally a section) as they reasonably expected to be able to acquire from the State when the land was offered for sale. Pending

this offering, the possession of land in Greer county was protected by the district courts against all intruders, it being held that the person in possession had the highest and best evidence of right to the land.

It is stated by the attorneys for Johnson that on March 16, 1896, there were about sixteen hundred persons residing on and claiming portions of the public lands in Greer county and about one-fourth as many had selected, improved and cultivated land upon which they intended to make a permanent home, but for various reasons they were temporarily residing elsewhere at that date. In some instances these absentees had previously established residence on the land claimed by them, but had been forced by successive drouths and crop failures to leave their homes and seek work elsewhere. Some, unable to erect dwellings, were residing in dugouts made in the side of a hill in the neighborhood of their claims, and others were residing with relatives on adjoining tracts.

These claimants believed that Texas owned the lands and all their acts were with a view to eventually obtaining title from the State. If the decision of the United States supreme court had been in favor of Texas, these claimants could have acquired title from the State without regard to whether they were residing upon the land on March 16, 1896, for those claiming land in even or school sections could have purchased as "settlers" when the land became subject to purchase, and those located on odd sections could have put themselves in compliance with whatever new law the State legislature might have passed for the disposition of these lands.

It is to be presumed that Congress had knowledge of these facts and conditions when it passed the act of January 18, 1897. The Congressional Record shows that the act in question was drawn by Judge G. A. Brown of Texas, in whose judicial district Greer county was located up to March 16, 1896, and who had been sent to Washington by the people of Greer county for the purpose of explaining to Congress the condition of affairs existing there.

The act, then, was a remedial one. It was passed for the purpose of meeting a very peculiar and unusual state of affairs. Like all remedial acts it is to be construed liberally and

if there be any doubt or ambiguity, that construction should be adopted which will best advance the remedy provided and help to suppress the mischief against which it was aimed. Black on Interpretation of Laws, p. 307.

It is believed that the purpose of the statute will be best effectuated by giving to the word "occupant," as used in said act, its ordinary meaning of "one who has the actual use and possession of a thing." To hold that the benefits of the first section of the act of January 18, 1897, are confined to those who were actually residing upon their respective claims on March 16, 1896, would be unjust to a large number of claimants who were as honest in their efforts to comply with law and obtain title to their claims as were those who had actually established residence.

It is said, in paragraph 248 of Sutherland on Statutory Construction: "The words of a statute are to be read in their ordinary sense unless so construing them will lead to some incongruity or manifest absurdity." We have seen that the word occupant, as ordinarily used, does not necessarily imply residence. Its ordinary meaning is "one who has the actual use and possession of a thing." Independent of any equitable considerations, this word must be read in its ordinary sense in the act of January 18, 1897, unless so construing it will lead to incongruity or manifest absurdity; but when it is considered that this statute is a remedial one, that its purpose will be best effectuated by giving to the word occupant its ordinary meaning, and that no incongruity or manifest absurdity follows from this construction, the conclusion is irresistible that the word must be taken in its ordinary meaning.

The view taken by your office is, that the clause in said act, "shall be entitled to perfect title thereto under the provisions of the homestead law," clearly implies a compliance with all the terms of the general homestead law, including residence. This is probably true so far as regards the time *after* entry, but it does not necessarily imply that the claimant should have been residing on the land on March 16, 1896. In the clause directly after this it is provided that "such person shall receive credit for all time during which he or those under whom he claims shall have continuously occupied the same prior to March sixteenth, eighteen hundred and ninety-six." Here is a striking innovation and exception to the general homestead law, for an ordinary homestead claimant can not take advantage of the occupancy or residence of a former claimant from whom he has purchased. It is incredible that Congress should have been so considerate of those claimants who happened to be residing on their respective claims on March 16, 1896, and at the same time have been harshly indifferent to those who were as honest in their endeavors to comply with law and obtain title, but who for various reasons, in many cases reasons beyond their control, were not actually residing on the land at that date.

To sum up, then, the conclusions to which we come are, that the word "occupant," as ordinarily used, is synonymous with "use and possession" and does not necessarily imply residence; that Congress used the word in the act under consideration in its ordinary meaning; and that consequently any qualified claimant who, on March 16, 1896, was in the actual use and possession of the land claimed by him, is entitled to the benefits of the first section of said act whether he was actually residing upon the land at that date or not.

In the present case it clearly appears that Johnson was on March 16, 1896, in the actual use and possession of the tract covered by his homestead entry, and that he is a qualified entryman.

Your office decision is accordingly reversed, Johnson's homestead and cash entries are held intact, and unless some further objection appears his final proof will be approved.

## PRIVATE CLAIMS—HOMESTEAD ENTRY—ACT OF MARCH 3, 1891.

## JUAN DE LA CRUZ TRUJILLO.

The phrase "disposed of by the United States," as employed in section 8, act of March 3, 1891, to define the lands excepted from the confirmatory provisions of said act, must be construed to mean a final and permanent divestiture of whatever title the United States may have had, or an obligation to convey such a title. A homestead entry, under which title had not been earned, at the time when a decree of confirmation was entered by the court, under said act, is not a disposition of the land embraced therein that excepts the same from the operative effect of the decree.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 23, 1899.* (E. F. B.)

The land in controversy, to wit: the SW.  $\frac{1}{4}$  of the NE.  $\frac{1}{4}$ , the NW.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ , the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ , and the SE.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ , Sec. 1, T. 21 N., R. 5 E., Santa Fe, New Mexico, is within the limits of the grant to Juan Jose Lobato, which was confirmed by decree of the court of private land claims, at the November term, 1893, of said court.

August 29, 1890, Juan de la Cruz Trujillo made homestead entry of said tract, upon which he submitted final proof October 31, 1895, and thereupon final certificate issued.

By letter of December 10, 1896, you held said entry for cancellation because of conflict with said private land claim, from which decision Trujillo has appealed, alleging error in not holding that said entry was confirmed by the 14th section of the act of March 3, 1891 (26 Stat., 854), establishing the court of private land claims and providing for the settlement and confirmation of private land claims in certain states and territories.

The 8th section of said act gave to all persons claiming lands in the states and territories therein named, under titles derived from the Spanish or Mexican government that were complete and perfect at the date the United States acquired sovereignty therein, the right (but were not bound) to apply to said court for confirmation of such title, and—

if in any such case a title so claimed to be perfect shall be established and confirmed, such confirmation shall be for so much land only as such perfect title shall be found to cover, always excepting any part of such land that shall have been disposed of by the United States, and always subject to and not to affect any conflicting private interests, rights, or claims held or claimed adversely to any such claim or title, or adversely to the holder of any such claim or title.

By the 14th section of said act, it was provided:

That if in any case it shall appear that the lands or any part thereof decreed to any claimant under the provisions of this act shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree, and upon proof being made to the satisfaction of said court of such sale or grant, and the value of the land so sold or granted, such court shall render judgment in favor of such claimant

against the United States for the reasonable value of said lands so sold or granted, exclusive of betterments, not exceeding one dollar and twenty-five cents per acre for such lands; and such judgment, when found, shall be a charge on the Treasury of the United States.

Under the provisions of said act the owners of the Juan Jose Lobato grant presented their petition to the court for confirmation of title, and after hearing evidence thereupon, the court at the November term, 1893, found that by virtue of the grant to Lobato, and the confirmation and ratification thereof, and the continued possession of the same,

the title thereto was complete and perfect at and before the treaty entered into between the King of Spain and the Mexican nation, A. D. 1821, and that the same was a complete, perfect and subsisting valid title at and before the treaty of Guadalupe Hidalgo between the United States and the Republic of Mexico, A. D. 1848, and is now so complete, perfect, subsistent and valid, and vested in the heirs, assigns, legal representatives of the said Juan Jose Lobato, and that the petitioners as such are entitled to the confirmation of said grant to them.

Whereupon it was ordered, adjudged and decreed that the said grant, with the exception of that portion included in the exterior limits of the Plaza Colorado, Plaza Blanca and Town of Abiquin Grant,

is hereby established and confirmed to the heirs, assigns and legal representatives of the said Juan Jose Lobato as against the United States of America, but this decree shall not affect any conflicting private interests under the said grant.

The boundaries of the grant as confirmed were then fixed and established by the decree, which covered the land embraced in the entry of Trujillo. Upon inquiry of your office it is ascertained that no appeal has been taken by the United States, the decree has become final and the survey has been made in accordance therewith and has been approved by the court.

At the date of said decree, the land had not "been sold or granted by the United States," unless the homestead entry of Trujillo, upon which final proof had not been made, was such a disposition of the land as was contemplated by the act.

By article 8 of the treaty of Guadalupe Hidalgo, the property of Mexican citizens within the territory ceded by Mexico to the United States was to be inviolably respected, and they and their heirs and grantees were to enjoy, with respect to it guaranties equally ample as if the same belonged to citizens of the United States, but while private rights of property within the ceded territory were not affected by change of sovereignty and jurisdiction, and were entitled to protection, the duty of providing the mode of securing these rights and of fulfilling the obligations imposed upon the United States by the treaties belonged to the political department of the government, which Congress might itself discharge or delegate to the judicial department. *Astiazaran v. Santa Rita Mining Co.*, 148 U. S., 80.

By the act of July 22, 1854 (10 Stat., 308), establishing the office of surveyor-general in New Mexico, Congress reserved to itself the power to finally pass upon all claims under grants from the Spanish or Mex-

ican government within the territory ceded by the treaty of Guadalupe Hidalgo, and provided—

that it shall be the duty of the surveyor-general, under such instructions as may be given by the Secretary of the Interior, to ascertain the origin, nature, character and extent of all claims to lands under the laws, usages and customs of Spain and Mexico,

and to make a full report upon such claims, to be laid before Congress, for such action thereon as may be deemed just and proper, with a view to confirm *bona fide* grants, and give full effect to the treaty of 1848 between the United States and Mexico. It further provided that—

until the final action of Congress on such claims, all lands covered thereby shall be reserved from sale or other disposal by the government.

No action whatever appears to have been taken upon this claim under the provisions of said act.

Such was the status of this claim when the act of March 3, 1891, *supra*, was passed, establishing the court of private land claims, which extended to all persons claiming lands within said territory under titles derived from the Spanish or Mexican government which were complete and perfect at the date of the treaty of Guadalupe Hidalgo, the right to present their petition to said court for confirmation of their title, providing that there shall always be excepted from such confirmation any part of such land that shall have been disposed of by the United States.

These claimants were not bound to apply to said court for confirmation of their title, but having invoked the jurisdiction of the court for that purpose, they were bound by all of the provisions of the act, and in accepting its benefits they consented that, if any part of the lands decreed to them under the provisions of said act "shall have been sold or granted by the United States to any other person, such title from the United States to such other person shall remain valid, notwithstanding such decree," and that they will accept from the United States in lieu thereof the reasonable value of said land, not exceeding one dollar and twenty-five cents per acre.

But the only lands excepted from confirmation are those which have been "sold or granted by the United States." As to these lands it is declared that "such *title* from the United States to such other person shall remain valid, notwithstanding such decree," which clearly indicates that it was not the intention of the act that judgment should be entered up against the United States for the value of any lands except those of which it had assumed to convey the title or where the title as between the government and the purchaser, grantee or entryman had been earned. Nor can the claimants be held to have waived their right to any lands except those for which they would clearly be entitled to have a judgment entered up in their favor for a reasonable value thereof against the United States.

It was not the intention of the act to except from confirmation any

lands without compensating the grant claimants by the payment of a reasonable value therefor, and as they would only be entitled to a judgment for such lands as might be shown to the satisfaction of the court to have been sold or granted by the United States to other persons under the 14th section of the act, the words "disposed of by the United States," as they occur in the 8th section of the act, must be construed to mean a final and permanent divestiture of whatever title the United States may have had, or an obligation to convey such a title.

The entry of Trujillo was not such a disposition of the land embraced therein. At the time the decree was entered up, he had not earned the title to the land by residing on it for the period required by law, and as he did not offer to commute the entry before the rights were acquired by the grant claimants under the decree, his submission of final proof thereafter, and the issuance of final certificate, conferred upon him no better right as against the grant owners than he had under his original entry.

He acquired no vested right as against the United States by his original entry, and the government was not bound to make good the title. *Whitney v. Taylor* (156 U. S., 85, 95). The lands embraced within the limits of this grant were never a part of the public domain, and the rights of the owners to every part thereof as established by the decree can not be impaired or diminished, except under the plain terms of the statute.

Your decision is affirmed.

#### HOMESTEAD ENTRY—SETTLEMENT RIGHT.

##### WITHERS *v.* PAGE.

One who goes upon land covered by an existing entry, with intent to acquire the same as a homestead, and purchases the relinquishment of said entry, together with the improvements and household effects of the entryman, and thereupon assumes possession of the premises, initiates a settlement right superior to the claim of another who, with full knowledge of said facts, subsequently, and prior to the filing of the relinquishment, settles on said land.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 23, 1899.* (F. C. D.)

On March 12, 1894, one Roberts filed a relinquishment of his homestead entry embracing the SE.  $\frac{1}{4}$  of NE.  $\frac{1}{4}$  of Sec. 20, and lots Nos. eight (8) and nine (9), of Sec. 21, T. 20 N., R. 10 E., Perry, Oklahoma, land district, and immediately thereafter Francis M. Page made homestead entry of said land.

On March 17, 1894, Peter E. Withers filed an affidavit of contest against the said entry of Page, alleging that prior to and at the time Page made entry for said land, he, Withers, was an actual settler and resident thereon.

Thereupon contest notice issued and a hearing was duly had.

The local officers upon considering the case rendered a joint decision in favor of the entryman, Page.

On appeal, your office found that the appeal of Withers was not filed within the time required by the rules of practice, and, on motion of Page, dismissed the same. Your office, however, considered the case under rule 48 of practice, treated the decision of the local office as final as to the facts but held that the facts did not warrant the conclusion reached therein; and, thereupon, held the entry of Page subject to Withers's prior right, from which action Page has appealed to this Department.

As your office found that the decision of the local office was not in accordance with existing law, your action in considering the case, notwithstanding the appeal was not filed in time, was warranted by the second exception to rule 48 of practice (*Bushnell v. Burt*, 5 L. D., 212). The objection thereto by Page is therefore not well taken.

The facts will not be here recited except in so far as is considered necessary.

After reviewing the facts in the case the local officers said:

It is a difficult question for the register and receiver to determine who ought to have this land. But we are of the opinion that the plowing done on the land on the 10th of March for defendant, together with the buying and paying for his household effects on the 9th and 10th, and the knowledge that contestant had that defendant had gone to the land office to file, and the fact that he paid \$250.00, for the improvements and relinquishment of Roberts gives him the better right.

Your office held "that the plowing done on the land March 10, 1894, by the agent of Page during his absence was not a personal act of settlement and that he acquired thereby no right to the land," and further held that Withers being an actual resident on the land when Roberts filed his relinquishment in the local office, Withers's right attached on that instant, and he, therefore, has the better right to the land.

As the evidence shows that when Page hired the man to do the plowing above referred to and when the said plowing was done Page was not on the land in controversy, such act can not be considered as an initial act of settlement, but might be considered as an additional act of settlement providing a settlement had been initiated, and might be considered in determining the intention and good faith of Page. Your office seems to have determined the question as to whether or not Page initiated a settlement right on the land, by the performance of this one act—that of plowing the land. It appears to this Department that that act does not control the question.

To initiate a valid settlement under the homestead law, a settler must do two things: first, he must go upon the land with the intention of taking the same as a homestead and then he must do some act sufficient to indicate such intention. That Page went upon the land in controversy on March 9, 1894, with the intention to acquire the same as a homestead can not be seriously questioned and is established by

the evidence, which shows that Page, while on the land on that date, besides completing the bargain for the purchase of the relinquishment and improvements of Roberts, also purchased and paid for the household effects of Roberts being in the house on the land. On that day Roberts yielded possession of the land to Page, and the latter assumed possession of the same, and in furtherance of this assumption of possession, on the following day employed a man to do plowing upon the tract. These acts clearly show his intent to claim the land. The purpose of the rule requiring some overt act of settlement in addition to the purchase of the improvements of a prior settler upon the tract of land is to give notice to the world of the settlement right and claim of the person so purchasing. The reason for that rule does not apply to this case, because Withers had been duly warned and notified of the condition of the land and of Page's claim thereto. Withers admits that long before he reached this land, when at Tulsa, he was informed that Roberts had sold out to Page and that Page had gone to Perry to file; and further admits that after he reached this land and before he put up his tent or had finished unloading his effects he was warned by Page's father; and that he, Withers, said he would "settle on it anyway."

This whole matter of the knowledge of Withers as to Roberts having sold to Page and of Page having gone to file, does not seem to have been considered by your office in the determination of the rights of the parties, although it is of great importance as showing that Withers did not settle there innocently and without notice of the rights claimed by others. While Withers testifies that he had previous to going after his family contracted with Roberts for the relinquishment to said land, he does not sufficiently establish that fact. However, the evidence clearly shows that Page was not informed or aware of any such contract existing, if it did, therefore no bad faith can be imputed to him.

As was held by your office, no rights can be acquired by settlement and residence on land covered by an existing entry as against the entryman. But as between settlers on land thus reserved, the settler who has the prior and superior right to the land is entitled to precedence, upon cancellation of the entry for relinquishment. Thus, in accordance with the views herein expressed it is hereby held that Page, on March 9, 1894, initiated such a settlement on the land in controversy as was superior and prior to any rights that Withers may have acquired thereto by going thereon and performing his first acts of settlement on March 11, 1894, with knowledge of the claims of Page; and that on cancellation of Robert's entry Page's rights attached *eo instanti*.

The views entertained herein do not conflict with the well established principle that a mere purchaser of the improvements and relinquishment of an entryman does not acquire such a right to the land as will defeat the settlement of one who settles in good faith on the land

while embraced in an existing entry from attaching on the cancellation of the entry on relinquishment.

The decision of your office is reversed; the contest of Withers dismissed and the entry of Page held intact subject to future compliance with the law.

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MINING CLAIM—PUBLICATION OF NOTICE—ADVERSE CLAIM.

DAVIDSON *v.* ELIZA GOLD MINING CO. (ON REVIEW.)

The law does not provide, nor does any regulation of the Department direct, that notice of an application for patent on a mining claim shall contain a citation to adverse claimants, or notice of the time within which adverse claims must be filed.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 23, 1899.* (G. B. G.)

January 9, 1897, The Eliza Gold Mining Company filed in Pueblo, Colorado, local office, an application for patent to the Nancy Smith Lode claim.

Notice of this application was published in a weekly newspaper, the notice appearing in the issue of January-16, 1897, and in each of the nine succeeding weekly issues, the last of which was on March 20, 1897.

March 19, 1897, which was after the sixtieth day of such publication, George Davidson filed in the local office an adverse claim on account of the Julia Lode, which adverse claim was rejected by the local officers, because not filed within the sixty days' period of publication, and, on appeal to your office, this ruling was affirmed, July 2, 1897. Upon the further appeal of Davidson to the Department, it was here held (28 L. D., 224—syllabus):

The sixty days of publication required by section 2325 R. S., on application for mineral patent is complete when the notice has been inserted in nine successive issues of a weekly newspaper, and the full statutory period has elapsed; and there is no authority to permit the filing of an adverse claim after the expiration of such period.

Davidson has filed a motion for review of this decision, in which it is alleged that the notice of the application for patent herein as published by the register of the local land office was "misleading and deceptive," and, in the brief of counsel accompanying the motion, it is said:

The notice in this case is manifestly illegal, because it does not contain any citation whatever to adverse claimants and notice of the time within which adverse claims must be filed.

The notice of the application for patent in this case conforms to the requirements of section 2325 of the Revised Statutes, and regulation 44 thereunder approved December 15, 1897 (25 L. D., 576). It gives the date of posting, the name of the claimant, the name of the claim,

the mining district and county, the book and page where the location is recorded and where the record may be found, the number of feet claimed along the vein and the presumed direction thereof, the number of feet claimed on the lode in each direction from the point of discovery, the name of one adjoining claim, and a statement that no other adjoining claims are known to exist.

The law does not provide, nor does any regulation of the Department direct, that notice of an application for patent for a mining claim shall contain a citation to adverse claimants or notice of the time within which adverse claims must be filed.

If the protestant was misled in this case, he was misled as to a question of law and not because of anything contained in the published notice of the application for patent. The publication in this case was in accordance with the regulations and decisions then in force, which required ten insertions of the notice in a weekly newspaper, and the rights of this protestant were not in the least affected by the changed ruling in the case at bar in this regard, for it was the well settled rule of the Department, even when ten insertions of the notice in a weekly newspaper were required, that an adverse claim could not be filed after the sixtieth day of publication. *Miner v. Mariott*, 2 L. D., 709.

No question is presented by the motion which did not receive the careful consideration of the Department at the time its decision herein was rendered, or which shakes confidence in the correctness of the rulings therein made.

The motion is denied.

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REPAYMENT—ENTRY ERRONEOUSLY ALLOWED.

ANTHRACITE MESA COAL MINING CO.

An entry is not "erroneously allowed" within contemplation of the repayment statute where the alleged defect is not of such character as to necessarily defeat confirmation of the entry, and might have been cured on compliance with the requirements of the General Land Office.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) June 23, 1899. (C. J. G.)

The Anthracite Mesa Coal Mining Company has appealed from your office decision of January 25, 1898, denying its application for repayment of purchase money paid on coal entry No. 31, Ute series, made February 28, 1883, by J. W. Hallowell, for the NE.  $\frac{1}{4}$  NE.  $\frac{1}{4}$ , Sec. 20, T. 13 S., R. 86 W., Gunnison, Colorado, land district.

Upon examination of the record of said entry your office found that the affidavit required of the entryman by paragraph 32 of the coal land regulations had not been made by him but by one Howard F. Smith, attorney-in-fact. Two attempts were made to notify the entryman that he would be allowed to furnish a new affidavit *nunc pro tunc* and that

in the event of his failure to do so the entry would be canceled; but he could not be found and the entry was finally canceled for the want of a proper affidavit by the entryman.

Upon consideration of the application for repayment by your office it was found from certain papers filed in the record of the canceled entry that the party in whose name the entry was made had, in fact, sold the land over two years prior to the date of the entry. From this circumstance your office concluded that the entry had been procured upon false testimony and for that reason held that the application for repayment could not be allowed.

As already shown, the entry was canceled because of the absence of an affidavit by the entryman as required by the coal land regulations. It is urged in support of the application for repayment that the entry was erroneously allowed for the reason that the required affidavit was not furnished, and could not be confirmed, and that the question as to the truth or falsity of the testimony upon which the entry was based is immaterial.

If the question of the truth or falsity of the testimony originally submitted and upon which the entry was allowed, be eliminated from the case, as suggested by counsel for the applicant, nevertheless it does not appear that the error, if there was one, in the allowance of the entry, was such as would necessarily prevent its subsequent confirmation. Conceding, therefore, for the sake of the argument that the entry was erroneously allowed, for the reason alleged, yet that error would not necessarily have defeated its confirmation, for, upon furnishing the new affidavit as required, which was a matter solely within the power of the entryman, and to procure which an effort was made by your office, the alleged defect would have been cured, and in so far as that matter is concerned the entry would have been allowed to stand and might have been confirmed.

Independently therefore of any question as to the falsity of the testimony upon which the entry was based, the case is not one which comes within the terms of the repayment statute.

With this modification, the action of your office in denying repayment is hereby affirmed.

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#### RESERVOIRS FOR WATERING LIVE-STOCK.

Act of January 13, 1897 (29 Stat., 484).

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE,

*Washington, D. C., June 23, 1899.*

#### AMENDATORY CIRCULAR.

In order that those desiring to obtain the benefits of the act of January 13, 1897 (29 Stat., 484), relating to reservoirs for watering live-stock, may have a clear understanding of the purpose and effect of that

act, and in order that appropriate action by the local land officers may be had on all such declaratory statements, the following amendments and additions to the circular of July 8, 1898 (27 L. D., 200, 210), issued under said act, are hereby prescribed and promulgated:

Paragraphs 34 and 35 of said circular are hereby amended so as to read as follows:

34. The declaratory statement must be made under oath and should be drawn in accordance with Form 9 (herewith), and must contain the following statements:

First. The post-office address of the applicant; the county in which the reservoir is to be or has been constructed; the description by the smallest legal subdivisions, 40-acre tracts or lots, of the land sought to be reserved, under no circumstances exceeding 160 acres; that the land is not occupied or otherwise claimed; that to the best of applicant's knowledge and belief the land is not mineral or otherwise reserved; the business of the applicant, including a full and minute statement of the extent to which he is engaged in breeding, grazing, driving, or transporting live stock, giving the number and kinds of such stock, the place where they are being bred or grazed, and whether within an enclosure or upon unenclosed lands, and also from where and to where they are being driven or transported; the amount and description of the land owned or claimed by the applicant in the vicinity of the proposed reservoir; that no part of the land sought to be reserved is or will be fenced, but the same will be kept open to the free use of any person desiring to water animals of any kind; and that the lands so sought to be reserved are not, by reason of their proximity to other lands reserved for reservoirs, excluded from reservation by the regulations and rulings of the land department.

Second. The location of the reservoir described by the smallest legal subdivisions, forty-acre tracts or lots, its area in acres, its capacity in gallons, the source from which water is to be obtained for such reservoir, whether there are any streams or springs within two miles of the land sought to be reserved, and if so where.

Third. The number, location, and area of all other reservoir sites filed upon by the applicant, especially designating those located in the same county.

35. Upon the filing of such declaratory statements there will be noted thereon the date of filing over the signature of the officer receiving it, and they will be numbered in regular order, beginning with No. 1. The register will make the usual notations on the records, in pencil, under the designation of "Reservoir Declaratory Statement, No.—," adding the date of the act. The local officers will be authorized to charge the usual fees. (Sec. 2238, U. S. Rev. Stat.) The declaratory statements will be forwarded with the regular monthly returns, with abstracts, in the usual manner. In acting upon these statements the following general rules will be applied:

First. No reservation will be made for a reservoir containing less

than 250,000 gallons, and for a reservoir of less than 500,000 gallons capacity not more than 40 acres can be reserved. For a reservoir of 500,000 gallons and less than 1,000,000 gallons capacity not more than 80 acres can be reserved. For a reservoir of 1,000,000 gallons and less than 1,500,000 gallons capacity not more than 120 acres can be reserved. For a reservoir of more than 1,500,000 gallons capacity 160 acres may be reserved.

Second. Not more than 160 acres shall be reserved for this purpose in any section.

Third. Not more than 160 acres shall be reserved for this purpose in one group of tracts adjoining or cornering upon each other.

Fourth. No reservation shall be made within one half mile of the boundaries of a group of 160 acres of adjoining or cornering tracts already reserved under this act.

Fifth. The local officers will reject any reservoir declaratory statement not in conformity with these rules.

Sixth. Lands so reserved shall not be fenced but shall be kept open to the free use of any person desiring to water animals of any kind. If lands so reserved are at any time fenced or otherwise inclosed, or if they are not kept open to the free use of any person as aforesaid desiring to water animals of any kind, or if the reservoir applicant attempts to use them for any other purpose, or if the reservation is not obtained for the bona fide and exclusive purpose of constructing and maintaining a reservoir thereon according to law, the declaratory statement, upon any such matter being made to duly appear, will be canceled and all rights thereunder be declared at an end.

Seventh. Notwithstanding the action of the local officers in accepting any such declaratory statement the Commissioner of the General Land Office will reject the same if upon considering the matters set forth therein it does not appear that the declaratory statement is filed in good faith for the sole purpose of accomplishing what the law authorizes to be done.

Eighth. All declaratory statements filed before this circular is received at the local land office must, by an amended or supplemental statement, be made to conform to these regulations, and if after receiving notice to that effect the applicant makes default for sixty days his declaratory statement will be rejected. The local officers must give notice of this requirement by registered mail.

BINGER HERMANN,  
*Commissioner.*

Approved, June 23, 1899:  
E. A. HITCHCOCK, *Secretary.*

## ADDITIONAL HOMESTEAD—SECTION 6, ACT OF MARCH 2, 1889.

## CHARLES BOOS.

The right to make an additional homestead entry under section 6, act of March 2, 1889, is limited to persons who, at the time of applying for the exercise of such right, have submitted final proof and received final receipt on the original entry. On the allowance of an additional entry under said section, the entryman must establish and maintain residence on the land embraced therein, and otherwise comply with the requirements of the homestead law.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) June 23, 1899. (H. G.)

Charles Boos appeals from the decision of your office of June 30, 1897, holding for cancellation his homestead entry, made December 14, 1893, for "lots 5 and 6 of S. W. ( $\frac{1}{4}$ ) and 7 and 8 of S. E. ( $\frac{1}{4}$ ) of section 34 in township 20 N. of R. 6 (W)," in the Enid, Oklahoma, land district. His application to make entry is for the "north quarter of the south half" of said section, and evidently means the N.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  and the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$  of Sec. 34, T. 20 N., R. 6 W., in said land district, which includes lots 1, 2, 3 and 4 of the section. The decision of your office states that the application and the receiver's receipt were evidently intended for lots 1, 2, 3 and 4 of said section containing 78.40 acres, as shown by the official plat of survey on file in your office, as lots 5, 6, "7" and "8" of said section lie south of the southern boundary of the "Cherokee Outlet", in the Kingfisher land district, and are covered by prior existing entries.

The claimant states in his homestead affidavit: "That I have never filed (a) homestead application, except on the SW.  $\frac{1}{4}$  of SW.  $\frac{1}{4}$  and lots 5 and 6 of Sec. 34, T. 20 N., R. 6 W., being 80 acres, and this application is made to complete 160 acres to which I am entitled." The decision of your office further recites that said Charles Boos made homestead entry at Kingfisher, Oklahoma, on September 12, 1892, on land originally described therein as the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and lots "7" and "8," Sec. 34, T. 20 N., R. 6 W., and that this entry was amended in accordance with letter "C", December 12, 1892, of your office, so as to make the description of the land entered the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and lots "5" and "6" of said section. From the instructions of your office, appearing in the record as communications addressed to the local officers at Kingfisher, Oklahoma, it appears that the lot numbers in sections 32, 34 and 35, T. 20 N., R. 6 W., as shown by the township plat on file in said local office, differed from those on the plat on file in your office, the former showing a tier of lots along the northern boundary of the Kingfisher district numbered from east to west, 5 to 8 inclusive, while in the latter said lots were numbered from west to east. These differences were thereafter corrected and the original entry of Boos in the Kingfisher district was amended to conform therewith.

The entryman made affidavit in response to the rule to show cause why his entry should not be canceled, setting forth, in substance, that at the time the "Cherokee Outlet" was opened to settlement (September 16, 1893), he had made improvements on the land mentioned in his first entry; that no one else settled upon or made any improvements thereon; that he was informed by an attorney that he had the lawful right to take the additional land covered or intended to be covered by his second entry, which lies in the Enid, Oklahoma, land district, contiguous to the land covered by his first entry in the Kingfisher land district; that acting upon such advice he went to the Enid land office and made his application for said lots 1, 2, 3 and 4, Sec. 34, T. 20 N., R. 6 W., and being informed by the register that he was entitled to the land, made his entry accordingly; that he has since cultivated about ten acres of said land for about three years and now has a crop of wheat growing thereon and has dug a well thereon and obtained good water; that no one has settled upon said tract of land last mentioned or in anywise improved the same except the entryman; that he would not have applied to enter the tract unless he had been so advised by the attorney and had been informed that he could make entry thereof by the register of the land office at Enid at the time he applied to enter the same; that he relied upon said advice and made entry for said tract; that he has been residing upon the tract for which he made entry at the Kingfisher land office September 12, 1892, since prior to said entry, and has made valuable and permanent improvements thereon; that the tract for which he made entry at Enid, Oklahoma, adjoins on the north the tract for which he made entry at Kingfisher, in said Territory, and together the two tracts constitute one quarter of a section of land. He therefore prays that his additional entry be allowed to remain intact.

The decision of your office holds that from the statement made in his homestead application, it appears that Boos had made a former entry and followed this by the second entry as an additional entry under the act of March 2, 1889 (25 Stat., 854); that as the benefits of said act are limited to persons who had, prior to its passage, entered less than one quarter section of land (*Lizzey Peyton*, 15 L. D., 548), and as there was no provision in the act opening the "Cherokee Outlet" to settlement, allowing those who had entered less than a quarter section of land in Oklahoma adjoining said outlet, to take adjacent lands in said Outlet sufficient to make a full quarter section (*Andrew J. Whitehair*, 22 L. D., 95), although the party was misled through advice upon which he had good reason to rely," in view of the law and the decisions cited, the relief prayed for could not be granted, and the second or additional entry of Boos was held for cancellation.

Since the decision of your office, it appears from the record that Boos has made final proof for the SW.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and lots 5 and 6, in

section 34, T. 20 N., R. 6 W., before the land office at Kingfisher, Oklahoma, the lands embraced in his original entry, and that the final receiver's receipt has issued to him therefor.

The final proof papers are now before this Department, having been transmitted by your office.

The entryman evidently seeks to bring himself within the terms of the act of March 2, 1889, which provides among other things, in section 6 thereof:

That every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres.

The ruling in the case of Nancy A. Stinson (25 L. D., 113, 116) is relied on and Boos claims that he is entitled to make entry for the tract as an additional entry. Section 5 of the act of March 2, 1889, relating to additional entry for contiguous land, would apply to the relief asked if the original entry had been made prior to the passage of the act, but it was made thereafter.

In the case cited *supra* it was held that by the said act Congress intended to provide a means whereby every homesteader might acquire title to one hundred and sixty acres of land, notwithstanding a prior partial exercise of the homestead privilege, and that the right to make an additional entry under section 6 of the act extends to one whose original entry may have been made either before or after the passage of the act, "if he be otherwise within the terms of said section."

The original entry of Boos was for 80.88 acres and the tract he seeks to make additional entry for contains 78.40 acres, the aggregate area being 159.28 acres, so that the entire land for which he seeks patent under the homestead law would be less than one hundred and sixty acres. The proviso to section 6 of the act of March 2, 1889, however, makes an important restriction as to the beneficiaries of the act, as follows:

*Provided*, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws.

The final proof of Boos for the land covered by his original entry was made August 20, 1898, under an allegation of settlement made in April, 1892, and the establishment of his residence thereon during said year. His entry intended for the tract he now seeks as an additional entry

was allowed December 14, 1893. Manifestly he could not have complied with the law since his additional entry as to residence thereon, and he so admits in his affidavit filed in response to the rule to show cause, when he states that his residence was upon the tract for which he made his first entry. He is therefore unable to complete his title under his additional entry as it now stands or as it would be if amended to cover the tract he intended to enter. One claiming the benefits of the act for additional entries made after its passage must establish and maintain residence upon the tract entered as a homestead as in the case of other homesteads, or he can not obtain patent.

His intention to make entry for lots 1, 2, 3 and 4 of the section is apparent from the description of the land in his application for entry and from the fact that the land described in the receiver's initial receipt as lots 5, 6, 7 and 8 of the same section, lie in another land district and cover lands previously entered by Boos and others. But the entry can not be so amended as to conform to the entryman's intention, as it never should have been allowed. He had not at the time of such additional entry made his final proof under his original entry for less than one hundred and sixty acres and was not qualified to make the additional entry, and he has not since the entry established nor maintained his residence upon the land covered by the additional entry.

But as the entryman was misled by the advice of one of the local officers, and his entry was improperly allowed, and as his good faith is apparent from his cultivation and improvement of the tract, and as he is now in a situation to meet the requirements of the law governing additional entries, having made his final proof and received the receiver's final receipt for the tract embraced in his original entry, his present entry in the Enid land office will be canceled and he will be permitted to make a new entry, upon a new application (as an additional entry to make up the deficiency of land covered by his original entry) for lots 1, 2, 3 and 4 of section 34, T. 20 N., R. 6 W., in the Enid, Oklahoma, district, under the terms of section six of the act of March 2, 1889, within such reasonable time as your office may designate, if no adverse claims have intervened, such entry to be followed by the establishment and maintenance of a residence on the tracts entered as in other homestead cases.

The decision of your office is modified accordingly.

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SWAMP GRANT—JURISDICTION OF LAND DEPARTMENT—CASH ENTRY.

HAGEN *v.* STATE OF FLORIDA.

Under the swamp land grant the legal title passes only on delivery of the patent, and until such title passes from the government, inquiry as to all equitable rights involved in the adjustment of said grant comes within the cognizance of the Land Department.

A cash entry of land claimed under the swamp grant, made after the passage of the act of March 2, 1855, and prior to the act of March 3, 1857, should be passed to patent under the terms of said acts, as against an approved, but unpatented, swamp land selection, the State not having, within ninety days after the passage of the former act, reported any sale or disposition of said tract.

*Secretary Hitchcock to the Commissioner of the General Land Office, June*  
(W. V. D.) 23, 1899. (G. B. G.)

Your office letter of June 22, 1896, called the attention of the Department to the conflicting claims of Mary Hagen and the State of Florida, to the N.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 11 and the N.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 12, T. 5 S., R. 17 E., Newmansville, Florida.

It is stated in your said office letter that the State of Florida, June 22, 1855, selected said tracts under its swamp land grant, that said selection was approved by the Secretary of the Interior, July 16, 1855, and that a certified copy of the list covering the same was transmitted to the governor of Florida, August 8, 1855, but that patent has not issued therefor.

It is further stated that Mary Hagen made cash entry for said land August 2, 1855, and that the entry has remained suspended in your office because of the conflict with the State's selection.

The matter was submitted to the Department for instructions, but has been held in abeyance here to await a judicial determination of the question of the authority of the Secretary of the Interior to cancel an approved swamp land selection.

April 3, 1899, the supreme court, in the case of *Brown v. Hitchcock* (173 U. S., 473), held that under the swamp land act the legal title passes only on delivery of the patent, and that until legal title to public land passes from the government, inquiry as to all equitable rights comes within the cognizance of the land department.

This Department may, therefore, inquire into the claimed rights of Mary Hagen to the land in controversy, and cancel the State's selection thereof, if the law and facts justify such action.

Section 1 of the act of March 2, 1855 (10 Stat., 634), entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled, That the President of the United States cause patents to be issued, as soon as practicable, to the purchaser or purchasers, locator or locators, who have made entries of the public lands, claimed as swamp lands, either with cash, or with land warrants, or with scrip, prior to the issue of patents to the State or States, as provided for by the second section of the act approved September twenty-eight, eighteen hundred and fifty, entitled "An act to enable the State of Arkansas and other States to reclaim the swamp lands within their limits," any decision of the Secretary of the Interior, or other officer of the government of the United States, to the contrary notwithstanding: Provided, That in all cases where any State, through its constituted authorities, may have sold or disposed of any tract or tracts of said land to any individual or individuals prior to the entry, sale, or loca-*

tion of the same, under the pre-emption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State, through its constituted authorities, shall release its claim thereto, in such form as shall be prescribed by the Secretary of the Interior: *And provided further*, That if such State shall not, within ninety days from the passage of this act, through its constituted authorities, return to the General Land-Office of the United States, a list of all the lands sold as aforesaid, together with the dates of such sale, and the names of the purchasers, the patents shall be issued immediately thereafter, as directed in the foregoing section.

The act of March 3, 1857 (11 Stat., 251) confirmed to the several states all selections of swamp lands theretofore made and reported to the Commissioner of the General Land Office, in so far as the same remained vacant and unappropriated, and not interfered with by an actual settlement under any existing law of the United States, and directed that such selections be approved and patented to the several states, with the following proviso:

*Provided, however*, That nothing in this act contained shall interfere with the provisions of the act of Congress entitled "An act for the relief of purchasers and locators of swamp and overflowed lands," approved March the second, eighteen hundred and fifty-five, which shall be and is hereby continued in force, and extended to all entries and locations of lands claimed as swamp lands made since its passage.

It is not necessary to inquire in this case whether Congress in the passage of the act of March 2, 1855, *supra*, had in view only conditions existing at that date, or whether it was intended that the act should operate prospectively upon cases involving entries of public lands claimed as swamp, made at any time thereafter, prior to the issue of patents to the State therefor.

The cash entry of Mary Hagen was made after the passage of the act of March 2, 1855, and before the passage of the act of March 3, 1857, and is within the provisions of the act of March 2, 1855, the act of 1857 having extended the provisions of the act of 1855 "to all entries and locations of lands claimed as swamp lands made since its passage."

It appears that Mary Hagen purchased the land in controversy, and made an entry thereof with cash; that it is public land claimed as swamp land, and that no patent has issued to the State therefor, either before or since the purchase. It further appears from informal inquiry in your office that the State of Florida did not, within ninety days from the passage of the act of March 2, 1855, or at all, return a list to your office of lands claimed as swamp lands which had been sold or disposed of by the State prior to the entry, sale or location of the same, under federal laws, and that the governor of Florida reported, under date of March 17, 1855, that the State had made no sales of swamp and overflowed lands.

Mary Hagen is, therefore, by the terms of the act of 1855, as extended by the act of 1857, entitled to a patent for said land.

The State's selection thereof is hereby canceled, and your office will carry said entry to patent, unless objection other than the conflict with said selection appears.

## HOMESTEAD ENTRY—RIGHT OF WAY—ALIENATION.

SOUTH PERRY TOWNSITE *v.* REED.

The words "For the right of way of railroads," as used in section 2288 of the Revised Statutes, are not limited to the width of the railroad track, but include such space as is necessary for side track, stock yards, or other purpose incident to the proper business of a railroad as a common carrier.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 24, 1899.* (C. J. W.)

On August 19, 1898, your office considered together two decisions by the local officers and appeals therefrom, relating to the homestead entry of Charles E. Reed, for the N.  $\frac{1}{2}$  of the SE.  $\frac{1}{4}$ , the SE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$  and the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of Sec. 22, T. 21 N., R. 1 W., I. M., Perry land district, Oklahoma. One of said decisions was rendered on a hearing involving the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  only, and the other was rendered on evidence introduced at a hearing improperly allowed in connection with Reed's final proof on his entire entry, offered while the controversy as to the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  was still pending. Both parties appealed from your office decision, and on February 16, 1899, said cases and appeals were considered by the Department and your office decision was affirmed and your office directed to return the final proof of Reed to the local officers for appropriate action, after the case involving the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  was closed (decision not reported).

Two motions for review of said departmental decision have been filed—one by Reed, in which he alleges that it was error not to sustain his entry as to the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$ ; and the other by the townsite claimants, in which they object to the construction placed by the Department upon a deed executed by Reed and his wife to the Southern Kansas Railway Company, purporting to convey sixty-nine one-hundredths of an acre ("as and for a right of way upon which to construct and maintain stock yards"), a copy of which deed accompanied the record.

The controversy in reference to the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  arose in this way. The contest case of Reed against Cook, for said forty acres only, was reopened by departmental decision of December 21, 1897, and a hearing was ordered to ascertain the priority of right to this tract as between Reed and the townsite claimants (not reported). In reference to that matter, your office found that the townsite claimants settled upon the NE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  prior to Reed and prior to Cook's entry. This finding is supported by the evidence produced at the hearing, and was properly affirmed by the Department. Reed's motion for review is therefore denied. When Reed offered his final proof in support of his whole entry, the townsite claimants filed a protest, and, amongst other allegations, charged that Reed had alienated a part of the SE.  $\frac{1}{4}$ . After the hearing closed in the contest case, the local

officers took up Reed's final proof and the protest, and both parties introduced testimony, the deed from Reed and wife to the Southern Pacific Railway Company being the evidence of the alleged alienation. While final action was not taken on Reed's final proof, it would have been trifling with his rights to invite him to re-offer his proof, if his deed to the railway company operated as a forfeiture of his entry; hence, the effect of that deed was considered and passed upon.

No reason is found for changing the construction placed upon this instrument. The words "for the right of way of railroads," as used in section 2288 of the Revised Statutes, are not limited to the width of the track and cars, but include such space as is necessary for side tracks, stock yards, or other purpose incident to the proper business of a railroad as a common carrier.

The deed in this case provides for the reversion of the land to Reed should the railroad cease to use it for the purpose for which the purchase was made. The deed does not vitiate Reed's entry.

The motion for review, filed by townsite claimants, is accordingly denied.

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MINING CLAIM—CONFLICTING LODE CLAIMS.

KOHNYO AND FORTUNA LODES.

[Instructions under departmental decision of June 3, 1899, 28 L. D., 451.]

*Secretary Hitchcock to the Commissioner of the General Land Office, June*  
(W. V. D.) 24, 1899. (E. B., Jr.)

The Department is in receipt of your communication of the 21st instant, inviting attention to departmental decision of June 3, 1899, in the matter of Pueblo, Colorado, mineral entry No. 573, made March 6, 1895, by The Cripple Creek Gold Mining Company, for the Kohnyo and Fortuna lode claims, survey No. 8612, wherein you ask to be instructed whether the said decision is "to be construed as directing the issuance of a patent for the Fortuna lode claim exclusive or inclusive of the conflict with the Kohnyo lode claim as shown by the amended survey."

In reply you are advised that, subject of course to a due showing of compliance with law as to the Fortuna claim, the said decision is to be construed as directing the issuance of a patent for the Fortuna lode claim inclusive of the conflict with the Kohnyo lode claim, as shown by the amended survey.

The said departmental decision is herewith returned.

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SOUTHERN PACIFIC R. R. CO. v. DAVIS.

Motion for review of departmental decision of April 30, 1898, 26 L. D., 595, denied by Secretary Hitchcock June 27, 1899.

## RAILROAD GRANT—QUALIFICATIONS OF SETTLER.

HASTINGS AND DAKOTA RY. CO. *v.* MOE (ON REVIEW).

An affidavit as to the citizenship of a settler, who is claiming adversely to a railroad indemnity selection, duly served on the company, may be accepted as a satisfactory showing in such matter, in the absence of any counter showing on behalf of the company.

*Secretary Hitchcock to the Commissioner of the General Land Office, June*  
(W. V. D.) 27, 1899. (F. W. C.)

The appeal filed on behalf of the Hastings and Dakota Railway Company from your office decision of June 10, 1898, in the matter of the case of said company against Julius J. Moe, involving the SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  and the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of Sec. 13, T. 120 N., R. 41 W., Marshall land district, Minnesota, in which the showing filed on behalf of Moe accompanying his homestead application tendered for this land on August 31, 1894, was held to be sufficient to evidence a claim to the land prior to its selection by the company on October 29, 1891, and in which said selection was held for cancellation with a view to the allowance of Moe's homestead application, was considered in departmental decision of December 20, 1898 (27 L. D., 694), and therein you were directed to order a hearing to determine whether Moe was a qualified settler at the date of selection. A motion was subsequently filed for review of said decision, accompanied by an affidavit by Moe in which he swears—

That he is a native born citizen of the United States; that he was born on the 23rd day of September, A. D., 1867, in Olmstead county, Minnesota.

He further swears that if his homestead application shows anything different from this statement it is the fault of the party who made out his application and affidavit for the land applied for.

He further swears that he is the son of Johannes Bordeson Moe, who declared his intention to become a citizen of the United States in Dodge county, Minnesota, April 18th, 1867, who was, subsequently, naturalized a full citizen of the United States, and made homestead entry No. 4009, final certificate No. 2742, for NW.  $\frac{1}{4}$  24-120-41, Litchfield series, subsequently Benson, and now Marshall, Minnesota, land district. Patent recorded in Vol. 6, page 162; under President Grant's administration; patent dated 13th day of December, A. D., 1875.

This motion was entertained and returned for service, and has been again filed bearing evidence of its service upon resident counsel for the railroad company.

No counter showing has been filed on behalf of the company, and after consideration of the matter the order made for a hearing in this case is revoked, and your office decision of June 10, 1898, is affirmed.

Upon completion of entry by Moe within a reasonable time to be fixed by your office, the selection by the company will be canceled.

## INDIAN ALLOTMENTS—SECTION 4, ACT OF FEBRUARY 8, 1887.

## OPINION.

In the enactment of section 4, act of February 8, 1887, with respect to allotments for non-reservation Indians, Congress contemplated that it should be administered in part by the Commissioner of the General Land Office, and in part by the Commissioner of Indian Affairs, each officer acting in a separate and distinct sphere of duty under the direction of the Secretary of the Interior.

Modification of the regulations of June 15, 1896, 22 L. D., 709, recommended.

*Assistant Attorney-General Van Devanter to the Secretary of the Interior,  
June 27, 1899. (A. B. P.)*

By departmental references of December 22, 1898, and May 8, 1899, I am in receipt of certain official correspondence relative to the authority and duties of the Commissioner of the General Land Office and the Commissioner of Indian Affairs, respectively, in the matter of the administration of the fourth section of the Indian allotment act of February 8, 1887 (24 Stat., 388), amended by the act of February 28, 1891 (26 Stat., 794).

By section 1 of the act of 1887, the President of the United States was authorized, in all cases where any tribe or band of Indians had been or should thereafter be located upon any reservation created and set apart for their use, by treaty stipulation, act of Congress or executive order, and where in his opinion the land of such reservation or any part thereof is advantageous for agricultural or grazing purposes, to cause the same to be surveyed and allotted to the Indians located thereon, in the quantities therein specified. Sections 2, 3 and 5 prescribe the manner in which these allotments shall be made and the agencies which shall be employed in their making, viz: the allotments shall be selected by the Indians, heads of families selecting for their minor children and the agents selecting for orphan children. The allotments shall be selected in such manner as to embrace the improvements of the Indian allottees, and where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing the subdivision between them and other lands assigned to each so as to make the full quantity to which he is entitled. The allotments shall be made by special agents appointed by the President, and the agent in charge of the reservation, under rules and regulations to be prescribed by the Secretary of the Interior and shall be certified in duplicate to the Commissioner of Indian Affairs, one copy to be retained in the Indian office and the other to be transmitted to the Secretary of the Interior for his action and to be deposited in the General Land Office. Upon the approval of an allotment by the Secretary of the Interior, he must cause a trust patent to issue to the allottee declaring that the United States will hold the land thus allotted for the period of twenty-five years in trust for the sole use and benefit of the allottee,

or, in case of his decease, of his heirs, and at the expiration of that period, or of such extended period as the President in his discretion may fix, will convey the land to the allottee, or his heirs, in fee, discharged of said trust and free of all charges or encumbrances. During the trust period the conveyance of the land and contracts touching the same are absolutely prohibited.

Section 4 provides:

That where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; 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 as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior.

The further sections of the act of 1887 and the changes made by the act of 1891 are not material to the questions here presented.

From the date of the first instructions issued under the act of 1887 to the present time, the fourth section thereof has been administered by the Commissioner of the General Land Office and the Commissioner of Indian Affairs, under what may be called, for want of a better term, a divided jurisdiction, each officer acting in a designated sphere of duty under the direction of the Secretary of the Interior. See Circular Instructions of September 17, 1887, and of July 2, 1891; also, of June 15, 1896 (22 L. D., 709).

The Commissioner of the General Land Office states in substance and effect that under this divided jurisdiction neither officer has assumed proper responsibility for the administration of the law, and that as a result numerous frauds have been and are being perpetrated against the government in the allowance of allotments to persons not entitled thereto, and of lands not subject thereto, whereby many tracts of the public lands, of eighty or one hundred and sixty acres each, have been and are still being illegally segregated from the public domain and thus withheld from settlement and entry. He contends that the provision of section four allowing allotments to only non-reservation Indians who have made settlement upon unappropriated public lands, makes the same essentially a settlement law, and that in view thereof, and of the further provision that such allotments can be allowed only upon application to the local land office for the district in which the lands so settled upon are situated, the administration of the law legitimately falls exclusively within the jurisdiction of his office. For these

reasons, and with a view to the correction of the evils resulting, as claimed, from the existing practice, he recommends that the "entire jurisdiction and responsibility" in the matter of the allotment and appropriation of the public lands under section four be given to his office.

The Commissioner of Indian Affairs dissents generally from the views expressed by the Commissioner of the General Land Office and declines to concur in the latter's recommendation. He insists that sole jurisdiction of the matters embraced in section four can not be conferred, under the law, upon the General Land Office, and submits an earnest argument in support of his position. The reference to me, as I understand it, calls for an opinion upon the issue thus presented.

The general jurisdiction, powers and duties of the officers mentioned, respectively, are defined by statute. Sections 453 and 463 of the Revised Statutes are especially pertinent to the matter under consideration.

Section 453 declares:

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.

Section 463 declares:

The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian Affairs, and of all matters arising out of Indian relations.

Considering these sections, each without reference to the other, the jurisdiction of the Commissioner of the General Land Office, under the direction of the Secretary of the Interior, would seem to be exclusive in all matters respecting the public lands, and the jurisdiction of the Commissioner of Indian Affairs, under like direction, would seem to be exclusive in all matters pertaining to Indian affairs, or arising out of Indian relations. In the case of *Bishop of Nesqually v. Gibbon* (156 U. S., 155, 167) the supreme court, in construing section 453, said:

It may be laid down as a general rule that, in the absence of some specific provision to the contrary in respect to any particular grant of public land, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. It is not necessary that with each grant there shall go a direction that its administration shall be under the authority of the land department. It falls there unless there is express direction to the contrary.

With equal aptness it may be said, in reference to section 463, that in the absence of specific direction to the contrary in respect to any particular statute pertaining to Indian affairs, or arising out of Indian relations, its administration falls wholly and absolutely within the jurisdiction of the Commissioner of Indian Affairs, under the supervision of the Secretary of the Interior.

The difficulty presented by the present controversy lies in the fact that the proper administration of section four of the act of 1837 involves both matters respecting the public lands and matters pertaining to Indian Affairs. While the allotments provided for in this section are allowed only to non-reservation Indians who are settlers on the unappropriated public lands, and to the children of such Indian settlers, "upon application to the local land office for the district in which the lands are located," yet the allotments are to be made "in quantities and manner as provided in this act for Indians residing upon reservations."

Other than as thus indicated, no specific direction is given in the law itself as to the jurisdiction under which section four shall be administered.

I am of opinion that it was within the contemplation of Congress in the enactment of this section that it should be administered in part by the Commissioner of the General Land Office and in part by the Commissioner of Indian Affairs, each officer acting in a separate and distinct sphere of duty and each acting under the direction of the Secretary of the Interior; that in so far as the provisions of the section distinctly relate to matters respecting the public lands, the proper jurisdiction for the administration thereof is with the Commissioner of the General Land Office, and that in so far as its provisions distinctly relate to matters respecting Indian affairs, the proper jurisdiction for the administration thereof belongs to the Commissioner of Indian Affairs. In the absence of any specific direction to the contrary, such would necessarily be the conclusion, it seems to me, under the statutes referred to defining the duties of said officers, respectively, and I find no directions to the contrary in the act under consideration. The provision that allotments shall be made upon application to the local land office for the district in which the lands settled upon are located, clearly implies that action upon such applications shall be taken by the land department, and the requirement that the allotments shall be made in the manner provided for allotting lands to reservation Indians, which is done altogether under the direction of the Commissioner of Indian Affairs, implies with equal clearness that action thereon shall be taken by that officer.

I am further of opinion that the rules and regulations heretofore issued respecting the administration of said fourth section, do not define the jurisdiction of the Commissioner of Indian Affairs, as distinguished from that of the Commissioner of the General Land Office in the premises, with entire correctness. By the circular of June 15, 1896, *supra*, it is, among other things, provided that—

the action of the Office of Indian Affairs on said allotments shall be conclusive, so far as the General Land Office is concerned, as to whether the Indian was a settler upon said land and whether he was entitled, as an Indian, to take an allotment.

In so far as this regulation attempts to give to the Commissioner of Indian Affairs exclusive jurisdiction to determine whether the Indian

applying at the local land office for an allotment has made settlement upon the land applied for, I think the same is erroneous. The lands which are subject to settlement and allotment under this section are not Indian lands, falling within the jurisdiction of the Commissioner of Indian Affairs under section 463, but are unappropriated public lands falling within the jurisdiction of the Commissioner of the General Land Office under section 453. Whether the lands sought to be allotted are of the character subject to allotment, whether the required settlement has been effected, whether the Indian applicant has the prior and better claim, and whether he is seeking to obtain the land in good faith as an allotment, or is seeking to obtain the same for the benefit of another not entitled thereto, are questions more directly relating to the disposition of the public lands, and which the General Land Office is best equipped to determine. Whether the applicant is an Indian, and whether a non-reservation Indian, are questions more directly pertaining to Indian affairs, and which the Indian Office is best equipped to determine.

By section 441 of the Revised Statutes "the Secretary of the Interior is charged with the supervision of public business relating to. . . . The public lands. . . . The Indians," and this power of supervision, extending equally to the public lands and the Indians, is sufficient to enable him to designate the boundaries and limits of the authority and duties of the Indian Office and the General Land Office, wherever by reason of the mixed or dual character of the authority to be exercised or duties to be performed, the prompt, efficient and orderly transaction of the public business will be promoted by so doing.

I therefore recommend that the regulations of June 15, 1896, be modified so as to read:

In the disposition of applications for Indian allotments under section 4, act of February 8, 1887 (24 Stat., 388), amended by the act of February 28, 1891 (26 Stat., 794), it shall be the duty of the General Land Office, subject to the supervision of the Secretary of the Interior, to determine whether the lands applied for are of the character subject to allotment, whether the required settlement has been made, whether the applicant has the prior and better claim, and whether he is seeking to obtain the land in good faith as an allotment, or is seeking to obtain the same for the benefit of another not entitled thereto; and it shall be the duty of the Office of Indian Affairs, subject to like supervision, to determine whether the applicant is an Indian, and if so whether he is a non-reservation Indian. The General Land Office may by examination through special agents and by hearings at the local land offices ascertain the facts respecting those matters committed to its determination.

Approved, June 27, 1899.

E. A. HITCHCOCK,

*Secretary.*

## INDIAN ALLOTMENTS—SECTION 4, ACT OF FEBRUARY 8, 1887.

## REGULATIONS.

*Secretary of the Interior to the Commissioner of the General Land Office,  
and the Commissioner of Indian Affairs, June 27, 1899.*

GENTLEMEN: The regulations issued June 15, 1896 (22 L. D., 709), under section 4 of the act of February 8, 1887 (24 Stat., 388), amended by the act of February 28, 1891 (26 Stat., 794), are hereby changed and modified so as to read as follows:

In the disposition of applications for Indian allotments under section 4, act of February 8, 1887 (24 Stat., 388), amended by the act of February 28, 1891 (26 Stat., 794), it shall be the duty of the General Land Office, subject to the supervision of the Secretary of the Interior, to determine whether the lands applied for are of the character subject to allotment, whether the required settlement has been made, whether the applicant has the prior and better claim, and whether he is seeking to obtain the land in good faith as an allotment, or is seeking to obtain the same for the benefit of another not entitled thereto; and it shall be the duty of the Office of Indian Affairs, subject to like supervision, to determine whether the applicant is an Indian, and if so whether he is a non-reservation Indian. The General Land Office may by examination through special agents and by hearings at the local land offices ascertain the facts respecting those matters committed to its determination.

## ABANDONED MILITARY RESERVATION—ACT OF MARCH 3, 1893.

BLAIR *v.* STATE OF NEBRASKA.

A settlement on an odd numbered section within the Fort Randall abandoned military reservation after the passage of the act of March 3, 1893, and an application to enter the tract, thus settled upon, filed prior to the expiration of the period accorded to the State, by said act, within which to exercise a preferred right of school indemnity selection, can not defeat the assertion of such right on the part of the State.

*Secretary Hitchcock to the Commissioner of the General Land Office,  
(W. V. D.) June 27, 1899. (G. B. G.)*

October 4, 1897, Henry A. Blair presented his homestead application to enter the NW.  $\frac{1}{4}$  of Sec. 3, T. 34, R. 11 W., O'Neill land district, Nebraska, alleging settlement March 9, 1893. This application was rejected by the local officers, because the land applied for was within the Fort Randall abandoned military reservation, and for that reason not subject to homestead entry.

The applicant appealed from this action, and your office, by letter of January 28, 1898, returned the application to the local office for allowance, but it was returned to your office by the register of that office,

February 9, 1898, with a statement that the records of his office showed that the tract applied for by Blair had been selected by the State of Nebraska, November 11, 1897, as indemnity on account of its school grant, and he requested further instructions as to whether said application should be allowed to go to record.

March 7, 1898, your office revoked its former action of January 28, 1898, and affirmed the action of the local officers in rejecting the application, but directed the local officers to advise the applicant that, if he procured the relinquishment of the State to the tract in question, his application would be given equitable consideration, and that the State would be allowed to select other lands of equal area from any of the undisposed of odd numbered sections in said reservation.

May 10, 1898, Blair filed his appeal to the Department, and submitted therewith certain correspondence between the Commissioner of Public Lands and Buildings for the State of Nebraska and the appellant's attorney, from which it appears that it was not intended to select any tract of land upon which there was a settlement claim, but that the State declines to make any change in its list of selections, or to relinquish the tract involved.

In a letter of February 23, 1899, to the Secretary of the Interior, the Commissioner of Public Lands and Buildings for said State says that it was his intention when making these selections to avoid as far as possible the selection of land which was occupied as a home by persons who had expected to homestead the land as soon as it came into market, and that the quarter section here involved was omitted from the selection list when the same was made up in his office, as he then thought Mr. Blair was a homestead claimant for the land, but that upon arriving at O'Neill, he was informed that Mr. Blair did not live upon this quarter section, but occupied another, which was then upon the list, and that he thereupon put upon the list of lands selected the land here involved and took therefrom the quarter section which he was led to believe was occupied by him. It is said that this statement is made in order that the intentions of the State may be known, but there is nothing in the letter to indicate that the State intends to relinquish the tract selected.

The act of March 3, 1893 (27 Stat., 555), entitled "An act to provide for the survey and transfer of that part of the Fort Randall military reservation in the State of Nebraska to said State for school and other purposes," is as follows:

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the odd numbered sections in the portion of the Fort Randall military reservation situated in the State of Nebraska, after the same shall have been surveyed as herein provided, may be selected by the State of Nebraska at any time within one year after the filing of the official plats of survey in the district land office as a part of the lands granted to said State as school indemnity for school lands lost in place under the provisions of "An act to provide for the admission of the State of Nebraska into the Union," approved February ninth, eighteen hundred*

and sixty-seven: *Provided*, That no existing lawful rights under any of the land laws of the United States providing for the disposition of the public lands shall be prejudiced by this act: *And provided further*, That said lands shall be accepted by said State of Nebraska in full satisfaction of lawful claims now existing, or that may hereafter arise, for school-land indemnity for a corresponding number of acres, upon assignment of the bases of the claims by description and selection in accordance with the regulations of the Interior Department within the period of limitation aforesaid; such selections to be equally distributed, so far as practicable, among the several townships.

Sec. 2. That even numbered sections, and all of the odd numbered sections in said reservation not selected under the provisions of section one of this act, shall be open to settlement under the homestead law only: *Provided*, That before said lands shall be opened to settlement under this section, the Secretary of the Interior shall appoint a commission of three disinterested citizens of the United States, who shall appraise said lands and fix the value of each quarter section, and persons who may take such lands under the homestead laws, shall pay for such lands in three equal installments, at times to be fixed by the Secretary of the Interior, and they shall also comply with all provisions of the homestead laws of the United States.

Sec. 3. That the Secretary of the Interior be, and is hereby, authorized and directed to cause the lands embraced in that part of the said military reservation of Fort Randall in the State of Nebraska to be regularly surveyed by an extension of the public surveys over the unsurveyed portions of the same.

The triplicate plat of the survey of the land embraced in the portion of the Fort Randall military reservation situated in the State of Nebraska was filed in the local land office, at O'Neill, November 27, 1896.

In a letter of instructions sent by your office to the register and receiver at O'Neill, Nebraska, August 18, 1897 (25 L. D., 141), it was said:

Under the terms of said act of March 3, 1893, the even numbered sections on this portion of said reservation, and such of the odd numbered sections as may not be selected by the State within the time prescribed, were opened to settlement under the homestead law only. As said lands have been surveyed and appraised, and the appraisal approved, you are hereby directed to allow homestead entries to go to record for lands in the said even numbered sections, but you will, *under no circumstances, allow entries to go to record for any of the lands in the odd numbered sections on this reservation until further orders.*

The land in controversy is an odd numbered section covered by said survey, was selected by the State within one year after the filing of the plat of survey, and, if the selection is otherwise regular, it must be sustained, unless such action will be prejudicial to an existing lawful right under some land law of the United States providing for the disposition of the public lands. Blair does not claim to have had any right whatever to the land at the time of the passage of the act of March 3, 1893, and by the terms of that act the lands in the odd numbered sections, to which there was no existing lawful right when the act was passed, were to be withheld from other disposition until one year after the filing of the official plats of survey in the district land office in order that the State might at any time during said year select the same as indemnity school lands. These lands if not so selected by the State within the time named, were to be appraised as provided in

section two, and then, and not before, were to be open to settlement under the homestead law.

If rights to any of the lands in odd numbered sections could be acquired by homestead settlement made after the passage of the act and before the expiration of the time accorded to the State for the exercise of its preference right of selection, rights to all the land in said sections could be acquired in this manner, and thus the State be defeated in its right of selection. Nothing of this sort was intended. The State was plainly given a preferred right to be exercised at any time within one year after the filing of the plats in the district land office. Blair's settlement on March 9, 1893, and his application to enter on October 4, 1897, were both subsequent to the date of the act and prior to the time given to the State for the exercise of its preferred right of selection.

If the State's selection of the land here in question was in accordance with the regulations of this Department governing the selection of school indemnity lands, the decision of your office is correct. Although the conclusion reached in that decision of necessity presupposes the regularity of the selection, no affirmative declaration seems to have been made upon this subject. Subject to the condition named, the decision of your office is affirmed.

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RAILROAD GRANT—INDEMNITY SELECTION—POSSESSORY CLAIM.

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

A possessory claim to land, and improvement thereof, unaccompanied by actual residence thereon, will not defeat the right of the company to make indemnity selection thereof.

The case of Hastings and Dakota Ry. Co. *v.* Christenson et al., 22 L. D., 257, overruled.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 29, 1899.* (F. W. C.)

With your office letter of February 10, 1897, was transmitted a motion, filed on behalf of John E. Elisensen, for review of departmental decision of October 3, 1896 (not reported), in the matter of his contest against the Hastings and Dakota Railway Company, involving the NW.  $\frac{1}{4}$  of Sec. 13, T. 122 N., R. 44 W., Marshall land district, Minnesota. Said departmental decision affirmed the decision of your office rejecting Elisensen's application, tendered May 18, 1892, to make homestead entry of said land, for conflict with indemnity selection made by said company on October 29, 1891, and therein the case of Hastings and Dakota Railway Company *v.* Christenson *et al.* (22 L. D., 257) was overruled.

Elisensen alleges actual residence upon the land since April 21, 1892, about six months after the selection of the land by the railway com-

pany, but claims settlement prior to said selection by virtue of the purchase of the improvements of a prior settler and continued improvement of the land.

As presented the case is controlled by departmental decision in the case of *Hastings and Dakota Railway Company v. Grinden* (27 L. D., 137), in which it was held that a possessory claim to land, and cultivation thereof, unaccompanied by actual residence thereon, will not defeat the right of the company to make indemnity selection thereof.

The previous decision of this Department affirming the rejection of *Elisenon's* application is therefore adhered to. The motion is accordingly denied.

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STATE OF CALIFORNIA *v.* SOUTHERN PACIFIC R. R. Co.

Motion for review of departmental decision of October 15, 1898, 27 L. D., 542, denied by Secretary Hitchcock, June 29, 1899.

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FOREST RESERVE—SETTLEMENT CLAIM—TIMBER LAND APPLICATION.

THOMAS E. ROE.

The lands excepted by settlement claims from the proclamation of September 28, 1893, establishing the Cascade Range forest reserve, were limited to those upon which a valid settlement had been made, and the statutory period for filing or entry had not expired at the date of the proclamation.

An applicant for the right of timber land entry within the limits of said forest reserve can not be heard to plead settlement on the land prior to said proclamation, for his timber land application operates as a waiver and abandonment of all right under his alleged settlement.

*Secretary Hitchcock to the Commissioner of the General Land Office,*  
(W. V. D.) *June 29, 1899.* (E. F. B.)

Thomas E. Roe, as the transferee of Thomas A. Roe, has appealed from your office decision of February 5, 1898, holding for cancellation the timber land entry of the latter for the W.  $\frac{1}{2}$  of the NW.  $\frac{1}{4}$  of Sec. 28, and the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of Sec. 29, T. 10 S., R. 5 E., Oregon City, Oregon, land district.

The record shows that on September 29, 1893, Thomas A. Roe filed his sworn statement for said land under the timber and stone act of June 3, 1878 (20 Stat., 89). He made his proof, and his entry was allowed by the register and receiver on January 2, 1894.

On February 5, 1898, your office found that:

Said tract is situate and lying within the boundaries of the Cascade Range forest reserve, which was established by President's proclamation dated September 28, 1893, and was therefore not subject to entry on September 29, 1893, the date on which said entry was initiated.

Accordingly, said entry having been illegally allowed, it is hereby held for cancellation, subject to appeal.

The land in controversy is within the limits of the Cascade Range forest reserve established by proclamation of the President September 28, 1893 (28 Stat., 1240) under authority of the twenty-fourth section of the act of March 3, 1891 (26 Stat., 1095). The proclamation took effect on the day of its date and thereafter the lands within the designated boundaries of said reservation were reserved for public uses and were not subject to settlement, entry or other disposition under the public land laws, unless they came within the following clause of said proclamation:

Excepting from the force and effect of this proclamation all lands which may have been, prior to the date hereof, embraced in any legal entry or covered by any lawful filing duly of record in the proper United States Land Office, or upon which any valid settlement has been made pursuant to law, and the statutory period within which to make entry or filing of record has not expired; and all mining claims duly located and held according to the laws of the United States and the rules and regulations not in conflict therewith.

As the claim of Roe to the land in controversy, under the act of June 3, 1878, was not initiated until September 29, 1893, after the land had been reserved from entry under the public land laws, the land was not excepted from the force and effect of the proclamation, and hence was not subject to entry under said act.

The transferee has filed an affidavit in support of his claim in which he alleges, substantially, that the entryman was a son of deponent; that he died intestate on May 20, 1894; that in September, 1892, deceased settled, built a house and resided upon the land in question, intending to enter it under the homestead law; that on account of ill health he was unable to remain on the tract, and therefore he took said land as a timber claim; that the register and receiver of the local office advised him to file timber claim for it, and acting upon their advice he filed his claim on September 29, 1893, after having resided upon the land for more than a year; that the local office did not receive notice of the President's proclamation of September 28, 1893, in relation to the Cascade Range forest reserve, until November 1, 1893; that the entryman paid \$400.00 for said land on January 2, 1894, and received receipt therefor, which affiant holds; that affiant purchased said land from the entryman "March 17, 1894, by deed bearing that date, and still holds the title so purchased." In view of these facts he asks that a patent be issued to him on said entry.

The facts alleged in said affidavit do not show that any claim or right to the tract in controversy existed at the date of the proclamation, which would take said tract out of its operation. The proclamation withdrew from disposal under the public land laws all lands within the designated boundaries which were subject to the control of the government and which do not come within the terms of the excepting clause. Southern Pacific R. R. Co. (28 L. D., 281).

Lands excepted from the force and effect of the proclamation by reason of settlement thereon, are by the very terms thereof specifically limited to those lands "upon which any valid settlement has been made

pursuant to law, and the statutory period within which to make entry or filing of record has not expired." No mere settlement claim would take the land out of the operation of the proclamation unless the time within which the entry or filing was required to be made under the settlement laws had not expired at the date of the proclamation. This is the express language of the excepting clause and it can not be extended to any case that does not come within its terms. Here the land became subject to entry May 17, 1893, by reason of the filing of the approved map of survey in the local land office and the statutory period for making entry under said settlement claim had expired forty-three days before the proclamation.

But independently of this, the application of Roe to make entry of said land under the timber and stone act was an absolute abandonment and waiver of all claim under his alleged settlement, even if the land had been subject to entry at the date of his application. Much less could his transferee claim any right by reason of such settlement that was not availed of by the entryman in his lifetime.

The decision of your office is affirmed.

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RAILROAD GRANT—LANDS EXCEPTED—ACT OF JULY 2, 1864.

UNION PACIFIC RY. CO. *v.* LANDRUM.

An unexpired pre-emption filing of record at the date of the grant to the Union Pacific excepts the land covered thereby from the operation of the grant. The act of July 2, 1864, enlarging the grant of 1862 to the Union Pacific, did not make a new grant as to the lands included within the ten-mile limits.

*Secretary Hitchcock to the Commissioner of the General Land Office, June*  
(W. V. D.) 29, 1899. (F. W. C.)

An appeal has been filed on behalf of the Union Pacific Railway Company from your office decision of June 28, 1897, in which it was held that lots 2 and 3 of Sec. 19, T. 12 S., R. 23 E., Topeka land district, Kansas, were excepted from its grant made by the act of July 1, 1862 (12 Stat., 489), this tract being within the ten-mile limit, because they were, at the date of said grant, included in the subsisting pre-emption filing of William H. Sharawk, filed September 2, 1859, alleging settlement August 1, 1859.

This tract was offered August 3, 1863, in accordance with proclamation No. 693. Until said offering, which was subsequent to the passage of the act making the grant, the filing by Sharawk was a subsisting claim of record, and as such served to except the tract covered thereby from the operation of the grant. See *Northern Pacific R. R. Co. v. Smalley*, 15 L. D., 36; *Union Pacific Ry. Co. v. Wade*, 27 L. D., 46.

It is contended in the appeal that the company did not take advantage of the act of 1862, and as all right under Sharawk's filing had

been terminated prior to the act of July 2, 1864 (13 Stat., 356), enlarging the grant from ten to twenty miles, it must be held that the land passed to the company by virtue of the later grant free from the filing by Sharawk.

This contention can not be acceded to. The grant of 1862 remained, and the effect of the act of 1864 was not to make a new grant as to the lands included within the ten-mile limits, but rather to enlarge that grant to twenty miles.

In the case of *Missouri, Kansas, and Texas Ry. Co. v. Kansas Pacific Ry. Co.* (97 U. S., 491, 497), it was said by the court:

It is true that the act of 1864 enlarged the grant of 1862; but this was done, not by words of a new and an additional grant, but by a change of words in the original act, substituting for those there used words of larger import. This mode was evidently adopted that the grant might be treated as if thus made originally; and therefore, as against the United States, the title of the plaintiff to the enlarged quantity, with the exceptions stated, must be considered as taking effect equally with the title to the less quantity as of the date of the first act. *United States v. Burlington and Missouri Railroad Co.*, 4 Dill., 305.

Your office decision is accordingly affirmed and the homestead entry of Joel D. Landrum allowed for this tract March 1, 1897, will be permitted to remain intact, subject to compliance with law.

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GENERAL LAND OFFICE.

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UNITED STATES MINING LAWS,  
AND  
REGULATIONS THEREUNDER.

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APPROVED JUNE 24, 1899.

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UNITED STATES MINING LAWS, AND REGULATIONS THERE-  
UNDER, RELATIVE TO THE RESERVATION, EXPLORATION,  
LOCATION, POSSESSION, PURCHASE, AND PATENTING OF THE  
MINERAL LANDS IN THE PUBLIC DOMAIN.

DEPARTMENT OF THE INTERIOR,  
GENERAL LAND OFFICE.

TITLE XXXII, CHAPTER 6, REVISED STATUTES.

MINERAL LANDS AND MINING RESOURCES.

SEC. 2318. In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. Mineral lands reserved.

4 July, 1866, c. 166, s. 5, v. 14, p. 86.

SEC. 2319. All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States. Mineral lands open to purchase by citizens.

10 May, 1872, c. 152, s. 1, v. 17, p. 91.

SEC. 2320. Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end lines of each claim shall be parallel to each other. Length of mining claims upon veins or lodes.

10 May, 1872, c. 152, s. 2, v. 17, p. 91.

Proof of citizenship.

10 May, 1872, c. 152, s. 7, v. 17, p. 94.

SEC. 2321. Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

Locators' rights of possession and enjoyment.

10 May, 1872, c. 152, s. 3, v. 17, p. 91.

SEC. 2322. The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, Territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Owners of tunnels, rights of.

10 May, 1872, c. 152, s. 4, v. 17, p. 92.

SEC. 2323. Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Regulations made by miners.

10 May, 1872, c. 152, s. 5, v. 17, p. 92.

SEC. 2324. The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, subject to the following requirements: The location must be distinctly marked on the ground so that its

boundaries can be readily traced. All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures.

SEC. 2325. A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land office an application for a patent, under oath, showing such compliance, together with a plat and field notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land

Patents for  
mineral lands,  
how obtained.

10 May, 1872, c.  
152, s. 6, v. 17, p.  
92.

office, upon the filing of such application, plat, field notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter.

Adverse claim,  
proceedings on.

10 May, 1872, c.  
152, s. 7, v. 17, p.  
98.

SEC. 2326. Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment roll with the register of the land office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to sepa-

rate and different portions of the claim, each party may pay for his portion of the claim with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land-Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of a title conveyed by a patent for a mining claim to any person whatever.

SEC. 2327. The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim.

SEC. 2328. Applications for patents for mining-claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

SEC. 2329. Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

SEC. 2330. Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona fide preemption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona fide settler to any purchaser.

SEC. 2331. Where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular sub-

Description of vein claims on surveyed and unsurveyed lands.

10 May, 1872, c. 152, s. 8, v. 17, p. 94.

Pending applications; existing rights.

10 May, 1872, c. 152, s. 9, v. 17, p. 94.

Conformity of placer claims to surveys, limit of.

9 July, 1870, c. 235, s. 12, v. 16, p. 317.

Subdivisions of ten-acre tracts; maximum of placer locations.

9 July, 1870, c. 235, s. 12, v. 16, p. 217.

Conformity of placer claims to surveys, limitation of claims.

10 May, 1872, c. 152, s. 10, v. 17, p. 94.

divisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral lands in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or preemption purposes.

What evidence of possession, &c., to establish a right to a patent.

9 July, 1870, c. 235, s. 13, v. 16, p. 217.

SEC. 2332. Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining claim or property thereto attached prior to the issuance of a patent.

Proceedings for patent for placer claim, &c.

10 May, 1872, c. 152, s. 11, v. 17, p. 94.

SEC. 2333. Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Surveyor-general to appoint surveyors of mining claims, &c.

10 May, 1872, c. 152, s. 12, v. 17, p. 95.

SEC. 2334. The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land-Office shall also have power to establish the maximum charges for surveys and

publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-district where mines are situated for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land-Office.

SEC. 2335. All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party can not be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

SEC. 2336. Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

SEC. 2337. Where non-mineral land not contiguous to such 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.

SEC. 2338. As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Verification of affidavits, &c.

10 May, 1872, c. 152, s. 13, v. 17, p. 95.

Where veins intersect, &c.

10 May, 1872, c. 152, s. 14, v. 17, p. 96.

Patents for non-mineral lands, &c.

10 May, 1872, c. 152, s. 15, v. 17, p. 96.

What conditions of sale may be made by local legislature.

26 July, 1866, c. 262, s. 5, v. 14, p. 252.

Vested rights to use of water for mining, &c.; right of way for canals.

26 July, 1866, c. 262, s. 9, v. 14, p. 253.

Patents, pre-emption, and homesteads subject to vested and accrued water rights.

9 July, 1870, c. 235, s. 17, v. 16, p. 218.

Mineral lands in which no valuable mines are discovered open to homesteads.

26 July, 1866, c. 262, s. 10, v. 14, p. 253.

Mineral lands, how set apart as agricultural lands.

26 July, 1866, c. 262, s. 11, v. 14, p. 253.

Additional land districts and officers, power of the President to provide.

26 July, 1866, c. 262, s. 7, v. 14, p. 252.

Provisions of this chapter not to affect certain rights.

10 May, 1872, c. 152, s. 16, v. 17, p. 96.

9 July, 1870, c. 235, s. 17, v. 16, p. 218.

SEC. 2339. Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

SEC. 2340. All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

SEC. 2341. Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of pre-emption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads."

SEC. 2342. Upon the survey of the lands described in the preceding section, the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

SEC. 2343. The President is authorized to establish additional land-districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

SEC. 2344. Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

SEC. 2345. The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated

in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona-fide entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands.

Mineral lands in certain States excepted.

18 Feb., 1873, c 159, v. 17, p. 465.

SEC. 2346. No act passed at the first session of the Thirty-eighth Congress, granting lands to States or corporations to aid in the construction of roads or for other purposes, or to extend the time of grants made prior to the thirtieth day of January, eighteen hundred and sixty-five, shall be so construed as to embrace mineral lands, which in all cases are reserved exclusively to the United States, unless otherwise specially provided in the act or acts making the grant.

Grant of lands to States or corporations not to include mineral lands.

30 Jan., 1865, Res. No. 10, v. 13, p. 567.

#### ACTS OF CONGRESS PASSED SUBSEQUENT TO THE REVISED STATUTES.

AN ACT to amend the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of the fifth section of the act entitled "An act to promote the development of the mining resources of the United States," passed May tenth, eighteen hundred and seventy-two, which requires expenditures of labor and improvements on claims located prior to the passage of said act, are hereby so amended that the time for the first annual expenditure on claims located prior to the passage of said act shall be extended to the first day of January, eighteen hundred and seventy-five.

Claim located prior to May 10, 1872, first annual expenditure extended to Jan. 1, 1875.

Act of Congress appd. June 6, 1874 (18 Stat. L., 61).

AN ACT to amend section two thousand three hundred and twenty-four of the Revised Statutes, relating to the development of the mining resources of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That section two thousand three hundred and twenty-four of the Revised Statutes, be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purpose of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act.

Money expended in a tunnel considered as expended on the lode.

Act of Congress approved February 11, 1875 (18 Stat. L., 315).

AN ACT to exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two.

Missouri and Kansas excluded from the operation of the mineral laws.

Act of Congress approved May 5, 1876 (19 Stat. L., 52).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of the mining resources of the United States," approved May tenth, eighteen hundred and seventy-two and all lands in said States shall be subject to disposal as agricultural lands.

AN ACT authorizing the citizens of Colorado, Nevada, and the Territories to fell and remove timber on the public domain for mining and domestic purposes.

Citizens of Colorado, Nevada, and the Territories authorized to fell and remove timber on the public domain for mining and domestic purposes.

Act of Congress approved June 3, 1878 (20 Stat. L., 88).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That all citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of the Territories of New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands, and for other purposes: *Provided,* The provisions of this act shall not extend to railroad corporations.

SEC. 2. That it shall be the duty of the register and the receiver of any local land office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts.

SEC. 3. Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months.

AN ACT to amend sections twenty-three hundred and twenty-four and twenty-three hundred and twenty-five of the Revised Statutes of the United States concerning mineral lands.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That* section twenty-three hundred and twenty-five of the Revised Statutes of the United States be amended by adding thereto the following words: "Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits: *And provided*, That this section shall apply to all applications now pending for patents to mineral lands."

Application for patent may be made by authorized agent.

SEC. 2. That section twenty-three hundred and twenty-four of the Revised Statutes of the United States be amended by adding the following words: "Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two."

On unpatented claims period commences on Jan. 1 succeeding date of location.

Act of Congress appd. Jan. 23, 1880 (21 Stat. L., 61).

AN ACT to amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining-claims.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That* if, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land office or be entitled to a patent for the ground in controversy until he shall have perfected his title.

In action brought title not established in either party.

Act of Congress approved March 3, 1881 (21 Stat. L., 505).

AN ACT to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That* the adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly authorized agent or attorney in fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any

Adverse claim may be verified by agent.

Sec. 1, act of Congress approved April 26, 1882 (22 Stat. L., 49).

court of record of the United States or the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory.

Affidavit of citizenship; before whom made.

Sec. 2, act of Congress approved April 26, 1882 (22 Stat. L., 49).

SEC. 2. That applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record, or before any notary public of any State or Territory.

AN ACT to exclude the public lands in Alabama from the operation of the laws relating to mineral lands.

Alabama excepted from the operation of the mineral laws.

Act of Congress approved March 3, 1883 (22 Stat. L., 487).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: *Provided, however,* That all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale: *And provided further,* That any bona fide entry under the provisions of the homestead law of lands within said State heretofore made may be patented without reference to an act approved May tenth, eighteen hundred and seventy-two, entitled "An act to promote the development of the mining resources of the United States," in cases where the persons making application for such patents have in all other respects complied with the homestead law relating thereto.

AN ACT providing a civil government for Alaska.

Mining laws extended to the District of Alaska.

Act of Congress approved May 17, 1884 (23 Stat. L., 24).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* \* \* \*

SEC. 8. That the said district of Alaska is hereby created a land district, and a United States land office for said district is hereby located at Sitka. The commissioner provided for by this act to reside at Sitka shall be ex officio register of said land office, and the clerk provided for by this act shall be ex officio receiver of public moneys and the marshal provided for by this act shall be ex officio surveyor-general of said district and the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, under the administration thereof herein provided for, subject to such regulations as may be made by the Secretary of the Interior, approved by the President: *Provided,* That the Indians or other persons in said district shall not be disturbed in the possession of any lands actually in their use or occupation or now claimed by them but the terms under which such persons may acquire title to such lands is reserved for future legislation by Congress: *And provided further,* That parties who have located mines or mineral privileges therein under the laws of the United States applicable to the public domain, or who have occupied and improved or exercised acts of ownership over such claims, shall not be disturbed therein, but shall be allowed to perfect their title to such claims by

payment as aforesaid: *And provided also*, That the land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action 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.

\* \* \* \* \*

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

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, \* \* \**

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States. \* \* \*

Right of entry under all the land laws restricted to 320 acres. (Repealed, see act March 3, 1891, sec. 17.)  
Reservation in patents for right of way for ditches and canals constructed.

Act of Congress approved August 30, 1890. (26 Stat. L., 371.)

AN ACT to repeal the 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, \* \* \**

SEC. 16. That town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: *Provided*, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant.

Town sites on mineral lands authorized.

Lands entered under the mineral laws not included in restriction to 320 acres.

Act of Congress approved March 3, 1891 (26 Stat. L., 1095).

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 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 and that the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "no person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not include lands entered or sought to be entered under mineral land laws.

\* \* \* \* \*

AN ACT to authorize the entry of lands chiefly valuable for building stone under the placer mining laws.

Entry of lands chiefly valuable for building stone under the placer-mining laws.

Act of Congress approved August 4, 1892 (27 Stat. L., 348).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer-mineral claims: *Provided,* That lands reserved for the benefit of the public schools or donated to any State shall not be subject to entry under this act.

AN ACT to amend section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, relating to mining claims.

Requirement of proof of expenditure for the year 1893 suspended except as to South Dakota.

Act of Congress approved Nov. 3, 1893 (28 Stat. L., 6).

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-three so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-

three: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act shall cause to be recorded in the office where the location notice or certificate is filed on or before December thirty-first, eighteen hundred and ninety-three, a notice that he or they, in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

This act shall take effect from and after its passage.

AN ACT to amend section numbered twenty-three hundred and twenty-four of Revised Statutes of the United States relating to mining claims.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the provisions of section numbered twenty-three hundred and twenty-four of the Revised Statutes of the United States, which require that on each claim located after the tenth day of May, eighteen hundred and seventy-two, and until patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, be suspended for the year eighteen hundred and ninety-four, so that no mining claim which has been regularly located and recorded as required by the local laws and mining regulations shall be subject to forfeiture for nonperformance of the annual assessment for the year eighteen hundred and ninety-four: *Provided*, That the claimant or claimants of any mining location, in order to secure the benefits of this act, shall cause to be recorded in the office where the location notice or certificate is filed, on or before December thirty-first, eighteen hundred and ninety-four, a notice that he or they in good faith intend to hold and work said claim: *Provided, however*, That the provisions of this act shall not apply to the State of South Dakota.

Requirement of proof of expenditure for the year 1894 suspended except as to South Dakota.

Act of Congress approved July 18, 1894 (28 Stat. L., 114).

SEC. 2. That this act shall take effect from and after its passage.

AN ACT to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws of the United States.

*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: *Provided*, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof.

Entry and patenting of lands containing petroleum and other mineral oils under the placer mining laws.

Act of Congress approved, February 11, 1897 (29 Stat. L., 526).

AN ACT extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes.

Mining rights in Alaska to native-born citizens of the Dominion of Canada.

Act of Congress approved, May 14, 1898 (30 Stat. L.).

SEC. 13. That native-born citizens of the Dominion of Canada shall be accorded in said District of Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said District of Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect.

### REGULATIONS.

#### NATURE AND EXTENT OF MINING CLAIMS.

1. Mining claims are of two distinct classes: Lode claims and placers.

#### LODE CLAIMS.

2. The status of lode claims located or patented previous to the 10th day of May, 1872, is not changed with regard to their extent along the lode or width of surface; but the claim is enlarged by sections 2322 and 2328, by investing the locator, his heirs or assigns, with the right to follow, upon the conditions stated therein, all veins, lodes, or ledges, the top or apex of which lies inside of the surface lines of his claim.

3. It is to be distinctly understood, however, that the law limits the possessory right to veins, lodes, or ledges, *other* than the one named in the original location, to such as were not *adversely claimed on May 10, 1872*, and that where such other vein or ledge was so adversely claimed at that date the right of the party so adversely claiming is in no way impaired by the provisions of the Revised Statutes.

4. From and after the 10th May, 1872, any person who is a citizen of the United States, or who has declared his intention to become a citizen, may locate, record, and hold a mining claim of *fifteen hundred linear feet* along the course of any mineral vein or lode subject to location; or an association of persons, severally qualified as above, may make joint location of such claim of *fifteen hundred feet*, but in no event can a location of a vein or lode made after the 10th day of May, 1872, exceed fifteen hundred feet along the course thereof, whatever may be the number of persons composing the association.

5. With regard to the extent of surface ground adjoining a vein or lode, and claimed for the convenient working thereof, the Revised Statutes provide that the lateral extent of locations of veins or lodes made after May 10, 1872, shall in no case *exceed three hundred feet on each side of the middle of the vein at the surface*, and that no such surface rights shall be limited by any mining regulations to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the 10th May, 1872, may render such limitation necessary; the end lines of such claims to be in all cases parallel to each other. Said lateral measurements can not extend beyond three hundred feet on *either* side of the middle of the vein at

the surface, or such distance as is allowed by local laws. For example: 400 feet can not be taken on one side and 200 feet on the other. If, however, 300 feet on each side are allowed, and by reason of prior claims but 100 feet can be taken on one side, the locator will not be restricted to less than 300 feet on the other side; and when the locator does not determine by exploration *where* the middle of the vein at the surface is, his discovery shaft must be assumed to mark such point.

6. By the foregoing it will be perceived that no lode claim located after the 10th May, 1872, can exceed a parallelogram fifteen hundred feet in length by six hundred feet in width, but whether surface ground of that width can be taken depends upon the local regulations or State or Territorial laws in force in the several mining districts; and that no such local regulations or State or Territorial laws shall limit a vein or lode claim to less than fifteen hundred feet along the course thereof, whether the location is made by one or more persons, nor can surface rights be limited to less than fifty feet in width unless adverse claims existing on the 10th day of May, 1872, render such lateral limitation necessary.

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

8. Where, however, the lode claim for which survey is being made was located prior to the conflicting claim, and such conflict is to be excluded, in order to include all ground not so excluded the end line of the survey may be established within the conflicting lode claim, but the line must be so run as not to extend any farther into such conflicting claim than may be necessary to make such end line parallel to the other end line and at the same time embrace the ground so held and claimed. The useless practice in such cases of extending *both* the side lines of a survey into the conflicting claim and establishing an end line wholly within it, beyond a point necessary under the rule just stated, will be discontinued.

9. Locators can not exercise too much care in defining their locations at the outset, inasmuch as the law requires that all records of mining locations made subsequent to May 10, 1872, shall contain the name or names of the locators, the date of the location, and such a *description of the claim or claims* located, by reference to some natural object or permanent monument, as will identify the claim.

10. No lode claim shall be located until after the discovery of a vein or lode within the limits of the claim, the object of which provision is evidently to prevent the appropriation of presumed mineral ground for speculative purposes, to the exclusion of *bona fide* prospectors, before sufficient work has been done to determine whether a vein or lode really exists.

11. The claimant should, therefore, prior to locating his claim, unless the vein can be traced upon the surface, sink a shaft or run a tunnel or drift to a sufficient depth therein to discover and develop a mineral-

bearing vein, lode, or crevice; should determine, if possible, the general course of such vein in either direction from the point of discovery, by which direction he will be governed in marking the boundaries of his claim on the surface. His location notice should give the course and distance as nearly as practicable from the discovery shaft on the claim to some permanent, well-known points or objects, such, for instance, as stone monuments, blazed trees, the confluence of streams, point of intersection of well-known gulches, ravines, or roads, prominent buttes, hills, etc., which may be in the immediate vicinity, and which will serve to perpetuate and fix the *locus* of the claim and render it susceptible of identification from the description thereof given in the record of locations in the district, and should be duly recorded.

12. In addition to the foregoing data, the claimant should state the names of adjoining claims, or, if none adjoin, the relative positions of the nearest claims; should drive a post or erect a monument of stones at each corner of his surface ground, and at the point of discovery or discovery shaft should fix a post, stake, or board, upon which should be designated the name of the lode, the name or names of the locators, the number of feet claimed, and in which direction from the point of discovery; it being essential that the location notice filed for record, in addition to the foregoing description, should state whether the entire claim of fifteen hundred feet is taken on one side of the point of discovery, or whether it is partly upon one and partly upon the other side thereof, and in the latter case, how many feet are claimed upon each side of such discovery point.

13. The location notice must be filed for record in all respects as required by the State or Territorial laws and local rules and regulations, if there be any.

14. In order to hold the possessory title to a mining claim located prior to May 10, 1872, and for which a patent has not been issued, the law requires that *ten dollars* shall be expended annually in labor or improvements on each claim of *one hundred feet* on the course of the vein or lode until a patent shall have been issued therefor; but where a number of such claims are held in common upon the same vein or lode, the aggregate expenditure that would be necessary to hold all the claims, at the rate of ten dollars per hundred feet, may be made upon any one claim. The first annual expenditure upon claims of this class should have been performed subsequent to May 10, 1872, and prior to January 1, 1875. From and after January 1, 1875, the required amount must be expended *annually* until patent issues.

15. In order to hold the possessory right to a location made since May 10, 1872, not less than one hundred dollars' worth of labor must be performed or improvements made thereon annually until entry shall have been made. Under the provisions of the act of Congress approved January 22, 1880, the first annual expenditure becomes due and must be performed during the calendar year succeeding that in which the location was made. Expenditure made or labor performed prior to the first day of January succeeding the date of location will not be considered as a part of or applied upon the first annual expenditure required by law.

16. Failure to make the expenditure or perform the labor required upon a location made before or since May 10, 1872, will subject a claim to relocation, unless the original locator, his heirs, assigns, or legal representatives have resumed work after such failure and before relocation.

17. Annual expenditure is not required subsequent to entry, the date of issuing the patent certificate being the date contemplated by statute.

18. Upon the failure of any one of several coowners of a vein, lode, or ledge, which has not been entered, to contribute his proportion of the expenditures necessary to hold the claim or claims so held in ownership in common, the coowners, who have performed the labor or made the improvements as required by said Revised Statutes, may, at the expiration of the year, give such delinquent coowner personal notice in writing, or notice by publication in the newspaper published nearest the claim for at least once a week for ninety days; and if upon the expiration of ninety days after such notice in writing, or upon the expiration of one hundred and eighty days after the first newspaper publication of notice, the delinquent coowner shall have failed to contribute his proportion to meet such expenditures or improvements, his interest in the claim by law passes to his coowners who have made the expenditures or improvements as aforesaid. Where a claimant alleges ownership of a forfeited interest under the foregoing provision, the sworn statement of the publisher as to the facts of publication, giving dates and a printed copy of the notice published, should be furnished, and the claimant must swear that the delinquent coowner failed to contribute his proper proportion within the period fixed by the statute.

#### TUNNELS.

19. The effect of section 2323, Revised Statutes, is simply to give the proprietors of a mining tunnel run in good faith the possessory right to fifteen hundred feet of any blind lodes cut, discovered, or intersected by such tunnel, which were not previously known to exist, within three thousand feet from the face or point of commencement of such tunnel, and to prohibit other parties, after the commencement of the tunnel, from prospecting for and making locations of lodes on the *line thereof* and within said distance of three thousand feet, unless such lodes appear upon the surface or were previously known to exist.

20. The term "face," as used in said section, is construed and held to mean the first working face formed in the tunnel, and to signify the point at which the tunnel actually enters cover; it being from this point that the three thousand feet are to be counted upon which prospecting is prohibited as aforesaid.

21. To avail themselves of the benefits of this provision of law, the proprietors of a mining tunnel will be required, at the time they enter cover as aforesaid, to give proper notice of their tunnel location by erecting a substantial post, board, or monument at the face or point of commencement thereof, upon which should be posted a good and sufficient notice, giving the names of the parties or company claiming the tunnel right; the actual or proposed course or direction of the tunnel; the height and width thereof, and the course and distance from such face or point of commencement to some permanent well-known objects in the vicinity by which to fix and determine the locus in manner heretofore set forth applicable to locations of veins or lodes, and at the time of posting such notice they shall, in order that miners or prospectors may be enabled to determine whether or not they are within the lines of the tunnel, establish the boundary lines thereof, by stakes or monuments placed along such lines at proper intervals, to the terminus of the three thousand feet from the face or point of commencement of the tunnel, and the lines so marked will define and govern as to the specific boundaries within which prospecting for lodes not previously known to exist is prohibited while work on the tunnel is being prosecuted with reasonable diligence.

22. At the time of posting notice and marking out the lines of the tunnel as aforesaid, a full and correct copy of such notice of location defining the tunnel claim must be filed for record with the mining recorder of the district, to which notice must be attached the sworn statement or declaration of the owners, claimants, or projectors of such tunnel, setting forth the facts in the case; stating the amount expended by themselves and their predecessors in interest in prosecuting work thereon; the extent of the work performed, and that it is *bona fide* their intention to prosecute work on the tunnel so located and described with reasonable diligence for the development of a vein or lode, or for the discovery of mines, or both, as the case may be. This notice of location must be duly recorded, and, with the said sworn statement attached, kept on the recorder's files for future reference.

23. By a compliance with the foregoing much needless difficulty will be avoided, and the way for the adjustment of legal rights acquired in virtue of said section 2323 will be made much more easy and certain.

24. This office will take particular care that no improper advantage is taken of this provision of law by parties making or professing to make tunnel locations, ostensibly for the purposes named in the statute, but really for the purpose of monopolizing the lands lying in front of their tunnels, to the detriment of the mining interests and to the exclusion of *bona fide* prospectors or miners, but will hold such tunnel claimants to a strict compliance with the terms of the statutes; and a *reasonable diligence* on their part in prosecuting the work is one of the essential conditions of their implied contract. Negligence or want of due diligence will be construed as working a forfeiture of their right to all undiscovered veins on the line of such tunnel.

#### PLACER CLAIMS.

25. But one discovery of mineral is required to support a placer location, whether it be of twenty acres by an individual, or of one hundred and sixty acres or less by an association of persons.

26. The act of August 4, 1892, extends the mineral-land laws so as to bring lands chiefly valuable for building stone within the provisions of said law, by authorizing a placer entry of such lands. It does not operate, however, to withdraw lands chiefly valuable for building stone from entry under any existing law applicable thereto. Registers and receivers should therefore make a reference to said act on the entry papers in the case of all placer entries made for lands containing stone chiefly valuable for building purposes. It will be noted that lands reserved for the benefit of public schools or donated to any State are not subject to entry under said act.

27. It is to be observed that the provisions of the mineral laws relating to placers are extended by the act of February 11, 1897, so as to allow the location and entry thereunder of public lands chiefly valuable for petroleum or other mineral oils, and entries of that nature made prior to the passage of said act are to be considered as though made thereunder.

28. By section 2330 authority is given for the subdivision of forty-acre legal subdivisions into *ten-acre* lots, which is intended for the greater convenience of miners in segregating their claims both from one another and from intervening agricultural lands.

29. It is held, therefore, that under a proper construction of the law these ten-acre lots in mining districts should be considered and dealt with, to all intents and purposes, as legal subdivisions, and that an

applicant having a legal claim which conforms to one or more of these ten-acre lots, either adjoining or cornering, may make entry thereof, after the usual proceedings, without further survey or plat.

30. In cases of this kind, however, the notice given of the application must be very specific and accurate in description, and as the forty-acre tracts may be subdivided into ten-acre lots, either in the form of squares of ten by ten chains, or, if parallelograms, five by twenty chains, so long as the lines are parallel and at right angles with the lines of the public surveys, it will be necessary that the notice and application state specifically what ten-acre lots are sought to be patented in addition to the other *data* required in the notice.

31. Where the ten-acre subdivision is in the form of a square it may be described, for instance, as the "SE.  $\frac{1}{4}$  of the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$ ," or, if in the form of a parallelogram as aforesaid, it may be described as the "W.  $\frac{1}{2}$  of the W.  $\frac{1}{2}$  of the SW.  $\frac{1}{4}$  of the NW.  $\frac{1}{4}$  (or the N.  $\frac{1}{2}$  of the S.  $\frac{1}{2}$  of the NE.  $\frac{1}{4}$  of the SE.  $\frac{1}{4}$ ) of section ———, township ———, range ———," as the case may be; but, in addition to this description of the land, the notice must give all the other *data* that is required in a mineral application, by which parties may be put on inquiry as to the premises sought to be patented. The proofs submitted with applications for claims of this kind must show clearly the character and the extent of the improvements upon the premises.

The proof of improvements must show their value to be not less than *five hundred dollars* and that they were made by the applicant for patent or his grantors. The annual expenditure to the amount of \$100, required by section 2324, Revised Statutes, must be made upon placer claims as well as lode claims.

32. Applicants for patent to a placer claim, who are also in possession of a known vein or lode included therein, must state in their application that the placer includes such vein or lode. The published and posted notices must also include such statement. If veins or lodes lying within a placer location are owned by other parties, the fact should be distinctly stated in the application for patent, and in all the notices. But in all cases, whether the lode is claimed or excluded, it must be surveyed and marked upon the plat, the field notes and plat giving the area of the lode claim or claims and the area of the placer separately. It should be remembered that an application which omits to include an application for a known vein or lode therein must be construed as a conclusive declaration that the applicant has no right of possession to the vein or lode. Where there is no known lode or vein, the fact must appear by the affidavit of two or more witnesses.

33. By section 2330 it is declared that no location of a placer claim, made after July 9, 1870, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys.

34. Section 2331 provides that all placer-mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States systems of public surveys and the subdivisions of such surveys, and no such locations shall include more than twenty acres for each individual claimant.

35. The foregoing provisions of law are construed to mean that after the 9th day of July, 1870, no location of a placer claim can be made to exceed one hundred and sixty acres, whatever may be the number of locators associated together, or whatever the local regulations of the district may allow; and that from and after May 10, 1872, no location can exceed twenty acres for each individual participating therein; that

is, a location by two persons can not exceed forty acres, and one by three persons can not exceed sixty acres.

36. The regulations hereinbefore given as to the manner of marking locations on the ground, and placing the same on record, must be observed in the case of placer locations so far as the same are applicable, the law requiring, however, that where placer claims are upon surveyed public lands the locations must hereafter be made to conform to legal subdivisions thereof as near as practicable.

#### PROCEDURE TO OBTAIN PATENT TO MINERAL LANDS.

37. As a condition for the making of application for patent according to section 2323, there must be a preliminary showing of work or expenditure upon each location, either by showing the full amount sufficient to the maintenance of possession under section 2324 for the pending year, or, if there has been failure, it should be shown that work has been resumed so as to prevent relocation by adverse parties after abandonment.

The "pending year" means the calendar year in which application is made, and has no reference to a showing of work at date of the final entry.

38. This preliminary showing may, where the matter is unquestioned, consist of the affidavit of two or more witnesses familiar with the facts.

39. The claimant is required, in the first place, to have a correct survey of his claim made under authority of the surveyor-general of the State or Territory in which the claim lies, such survey to show with accuracy the exterior surface boundaries of the claim, which boundaries are required to be distinctly marked by monuments on the ground. Four plats and one copy of the original field notes in each case will be prepared by the surveyor-general; one plat and the original field notes to be retained in the office of the surveyor-general, one copy of the plat to be given the claimant for posting upon the claim, one plat and a copy of the field notes to be given the claimant for filing with the proper register, to be finally transmitted by that officer, with other papers in the case, to this office, and one plat to be sent by the surveyor-general to the register of the proper land district, to be retained on his files for future reference. As there is no resident surveyor general for the State of Arkansas, applications for the survey of mineral claims in said State should be made to the Commissioner of this office, who, under the law, is *ex officio* the U. S. surveyor-general.

40. The survey and plat of mineral claims required to be filed in the proper land office with application for patent must be made subsequent to the recording of the location of the claim (if the laws of the State or Territory or the regulations of the mining district require the notice of location to be recorded), and when the original location is made by survey of a United States deputy surveyor such location survey can not be substituted for that required by the statute, as above indicated.

41. The surveyors-general should designate all surveyed mineral claims by a progressive series of numbers, beginning with survey No. 37, irrespective as to whether they are situated on surveyed or unsurveyed lands, the claim to be so designated at date of issuing the order therefor, in addition to the local designation of the claim; it being required in all cases that the plat and field notes of the survey of a claim must, in addition to the reference to permanent objects in the neighborhood, describe the locus of the claim with reference to the lines of public surveys by a line connecting a corner of the claim with

the nearest public corner of the United States surveys, unless such claim be on unsurveyed lands at a distance of more than two miles from such public corner, in which latter case it should be connected with a United States mineral monument. Such connecting line must not be more than *two miles* in length and should be measured on the ground direct between the points, or calculated from actually surveyed traverse lines if the nature of the country should not permit direct measurement. If a regularly established survey corner is within two miles of a claim situated on unsurveyed lands, the connection should be made with such corner in preference to a connection with a United States mineral monument. The connecting line must be surveyed by the deputy mineral surveyor at the time of his making the particular survey, and be made a part thereof.

42. Upon the approval of the survey of a mining claim made upon surveyed lands the surveyor-general will prepare and transmit to the local land office and to this office a diagram tracing showing the portions of legal 40-acre subdivisions made fractional by reason of the mineral survey, designating each of such portions by the proper lot number, beginning with No. 1 in each section, and giving the area of each lot.

43. The following particulars should be observed in the survey of every mining claim:

(1) The exterior boundaries of the claim, the number of feet claimed along the vein, and, as nearly as can be ascertained, the direction of the vein, and the number of feet claimed on the vein in each direction from the point of discovery or other well defined place on the claim should be represented on the plat of survey and in the field notes.

(2) The intersection of the lines of the survey with the lines of conflicting prior surveys should be noted in the field notes and represented upon the plat.

(3) Conflicts with unsurveyed claims, where the applicant for survey does not claim the area in conflict, should be shown by actual survey.

(4) The total area of the claim embraced by the exterior boundaries should be stated, and also the area in conflict with each intersecting survey, substantially as follows:

	Acres.
Total area of claim .....	10.50
Area in conflict with survey No. 302.....	1.56
Area in conflict with survey No. 948 .....	2.33
Area in conflict with Mountain Maid lode mining claim, unsurveyed.....	1.48

It does not follow that because mining surveys are required to exhibit all conflicts with prior surveys the areas of conflict are to be excluded. The field notes and plat are made a part of the application for patent, and care should be taken that the description does not inadvertently exclude portions intended to be retained. It is better that the application for patent should state the portions to be excluded in express terms.

44. The claimant is then required to post a copy of the plat of such survey in a conspicuous place upon the claim, together with notice of his intention to apply for a patent therefor, which notice will give the date of posting, the name of the claimant, the name of the claim, the number of the survey, the mining district and county, and the names of adjoining and conflicting claims as shown by the plat of survey. Too much care can not be exercised in the preparation of this notice, inasmuch as the data therein are to be repeated in the other notices required by the statute, and upon the accuracy and completeness of these notices

will depend, in a great measure, the regularity and validity of the proceedings for patent.

45. After posting the said plat and notice upon the premises, the claimant will file with the proper register and receiver a copy of such plat and the field notes of survey of the claim, accompanied by the affidavit of at least two credible witnesses that such plat and notice are posted conspicuously upon the claim, giving the date and place of such posting; a copy of the *notice* so posted to be attached to and form a part of said affidavit.

46. Accompanying the field notes so filed must be the sworn statement of the claimant that he has the possessory right to the premises therein described, in virtue of a compliance by himself (and by his grantors, if he claims by purchase) with the mining rules, regulations, and customs of the mining district, State, or Territory in which the claim lies, and with the mining laws of Congress; such sworn statement to narrate briefly, but as clearly as possible, the facts constituting such compliance, the origin of his possession, and the basis of his claim to a patent.

47. This sworn statement must be supported by a copy of the location notice, certified by the officer in charge of the records where the same is recorded, and where the applicant for patent claims the interests of others associated with him in making the location, or only as purchaser, in addition to the copy of the location notice, must be furnished a complete abstract of title as shown by the record in the office where the transfers are by law required to be recorded, certified to by the officer in charge of the record, under his official seal. The officer should also certify that no conveyances affecting the title to the claim in question appear of record other than those set forth in the abstract, which abstract shall be brought down to the date of the application for patent. Where the applicant claims as sole locator, his affidavit should be furnished to the effect that he has disposed of no interest in the land located.

48. In the event of the mining records in any case having been destroyed by fire or otherwise lost, affidavit of the fact should be made, and secondary evidence of possessory title will be received, which may consist of the affidavit of the claimant, supported by those of any other parties cognizant of the facts relative to his location, occupancy, possession, improvements, &c.; and in such case of lost records, any deeds, certificates of location or purchase, or other evidence which may be in the claimant's possession and tend to establish his claim, should be filed.

49. Before receiving and filing a mineral application for patent, local officers will be particular to see that it includes no land which is embraced in a prior or pending application for patent or entry, or for any lands embraced in a railroad selection, or for which publication is pending or has been made by any other claimants, and if, in their opinion, after investigation, it should appear that a mineral application should not, for these or other reasons, be accepted and filed, they should formally reject the same, giving the reasons therefor, and allow the applicant thirty days for appeal to this office under the Rules of Practice.

50. Upon the receipt of these papers, if no reason appears for rejecting the application, the register will, at the expense of the claimant (who must furnish the agreement of the publisher to hold applicant for patent alone responsible for charges of publication), publish a notice of such application for the period of sixty days in a newspaper published

nearest to the claim, and will post a copy of such notice in his office for the same period. When the notice is published in a *weekly* newspaper, nine consecutive insertions are necessary; when in a *daily* newspaper, the notice must appear in each issue for sixty-one consecutive issues. In both cases the first day of issue must be excluded in estimating the period of sixty days.

51. The notices so published and posted must embrace all the data given in the notice posted upon the claim. In addition to such data the published notice must further indicate the locus of the claim by giving the connecting line, as shown by the field notes and plat, between a corner of the claim and a United States mineral monument or a corner of the public survey, and thence the boundaries of the claim by courses and distances.

52. The register shall publish the notice of application for patent in a paper of established character and general circulation, to be by him designated as being the newspaper published nearest the land.

53. The claimant at the time of filing the application for patent, or at any time within the sixty days of publication, is required to file with the register, a certificate of the surveyor-general that not less than five hundred dollars' worth of labor has been expended or improvements made, by the applicant or his grantors, upon each location embraced in the application, or if the application embraces several locations held in common, that an amount equal to five hundred dollars for each location, has been so expended upon, and for the benefit of, the entire group; that the plat filed by the claimant is correct; that the field notes of the survey, as filed, furnish such an accurate description of the claim as will if incorporated in a patent serve to fully identify the premises and that such reference is made therein to natural objects or permanent monuments as will perpetuate and fix the locus thereof: *Provided*, That as to all applications for patent made and passed to entry before July 1, 1898, or which are by protests or adverse claims prevented from being passed to entry before that time, where the application embraces several locations held in common, proof of an expenditure of five hundred dollars upon the group will be sufficient and an expenditure of that amount need not be shown to have been made upon, or for the benefit of, each location embraced in the application.

54. The surveyor-general may derive his information upon which to base his certificate as to the value of labor expended or improvements made from his deputy who makes the actual survey and examination upon the premises, and such deputy should specify with particularity and full detail the character and extent of such improvements.

55. It will be the more convenient way to have this certificate indorsed by the surveyor-general, both upon the plat and field notes of survey filed by the claimant as aforesaid.

56. After the sixty days' period of newspaper publication has expired, the claimant will furnish from the office of publication a sworn statement that the notice was published for the statutory period, giving the first and last day of such publication, and his own affidavit showing that the plat and notice aforesaid remained conspicuously posted upon the claim sought to be patented during said sixty days' publication, giving the dates.

57. Upon the filing of this affidavit the register will, if no adverse claim was filed in his office during the period of publication, permit the claimant to pay for the land according to the area given in the plat and field notes of survey aforesaid, at the rate of five dollars for each acre and five dollars for each fractional part of an acre, except as other-

wise provided by law, the receiver issuing the usual duplicate receipt therefor. The claimant will also make a sworn statement of all charges and fees paid by him for publication and surveys, together with all fees and money paid the register and receiver of the land office, after which the complete record will be forwarded to the Commissioner of the General Land Office and a patent issued thereon if found regular.

58. At any time prior to the issuance of patent, protest may be filed against the patenting of the claim as applied for, upon any ground tending to show that the applicant has failed to comply with the law in a matter which would avoid the claim. Such protest can not, however, be made the means of preserving a surface conflict lost by failure to adverse or lost by the judgment of the court in an adverse suit. One holding a present joint interest in a mineral location included in an application for patent who is excluded from the application, so that his interest would not be protected by the issue of patent thereon, may protest against the issuance of a patent as applied for, setting forth in such protest the nature and extent of his interest in such location, and such a protestant will be deemed a party in interest entitled to appeal. This results from the holding that a coowner excluded from an application for patent does not have an "adverse" claim within the meaning of sections 2325 and 2326 of the Revised Statutes. See *Turner v. Sawyer*, 150 U. S., 578-586.

59. Any party applying to make entry as trustee must disclose fully the nature of the trust and the name of the *cestui que trust*; and such trustee, as well as the beneficiaries, must furnish satisfactory proof of citizenship; and the names of beneficiaries, as well as that of the trustee, must be inserted in the final certificate of entry.

60. The proceedings to obtain patents for claims usually called placers, including all forms of deposit, excepting veins of quartz or other rock in place, are similar to the proceedings prescribed for obtaining patents for vein or lode claims; but where said placer claim shall be upon surveyed lands, and conforms to legal subdivisions, no further survey or plat will be required; and all placer mining claims located after May 10, 1872, shall conform as nearly as practicable with the United States system of public-land surveys and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer claims can not be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands. But where such claims are located previous to the public surveys, and do not conform to legal subdivisions, survey, plat, and entry thereof may be made according to the boundaries thereof, provided the location is in all respects legal.

61. The proceedings for obtaining patents for veins or lodes having already been fully given, it will not be necessary to repeat them here, it being thought that careful attention thereto by applicants and the local officers will enable them to act understandingly in the matter, and make such slight modifications in the notice, or otherwise, as may be necessary in view of the different nature of the two classes of claims; placer claims being fixed, however, at two dollars and fifty cents per acre, or fractional part of an acre.

62. The first care in recognizing an application for patent upon a placer claim must be exercised in determining the exact classification of the lands. To this end the clearest evidence of which the case is capable should be presented.

(1) If the claim be all placer ground, that fact must be stated in the application and corroborated by accompanying proofs; if of mixed

placers and lodes, it should be so set out, with a description of all known lodes situated within the boundaries of the claim. A specific declaration, such as is required by section 2333, Revised Statutes, must be furnished as to each lode intended to be claimed. All other known lodes are, by the silence of the applicant, excluded by law from all claim by him, of whatsoever nature, possessory or otherwise.

(2) Deputy surveyors shall, at the expense of the parties, make full examination of all placer claims surveyed by them, and duly note the facts as specified in the law, stating the quality and composition of the soil, the kind and amount of timber and other vegetation, the locus and size of streams, and such other matters as may appear upon the surface of the claim. This examination should include the character and extent of all surface and underground workings, whether placer or lode, for mining purposes.

(3) In addition to these data, which the law requires to be shown in all cases, the deputy should report with reference to the proximity of centers of trade or residence; also of well-known systems of lode deposit or of individual lodes. He should also report as to the use or adaptability of the claim for placer mining; whether water has been brought upon it in sufficient quantity to mine the same, or whether it can be procured for that purpose; and, finally, what works or expenditures have been made by the claimant or his grantors for the development of the claim, and their situation and location with respect to the same as applied for.

(4) This examination should be reported by the deputy under oath to the surveyor-general, and duly corroborated; and a copy of the same should be furnished with the application for patent to the claim, constituting a part thereof, and included in the oath of the applicant.

(5) Applications awaiting entry, whether published or not, must be made to conform to these regulations, with respect to examination as to the character of the land. Entries already made will be suspended for such additional proofs as may be deemed necessary in each case.

#### MILL SITES.

63. Land entered as a mill site must be shown to be nonmineral. Mill sites are simply auxiliary to the working of mineral claims, and as section 2337, which provides for the patenting of mill sites, is embraced in the chapter of the Revised Statutes relating to mineral lands, they are therefore included in this circular.

64. To avail themselves of this provision of law parties holding the possessory right to a vein or lode, and to a piece of nonmineral land not contiguous thereto for mining or milling purposes, not exceeding the quantity allowed for such purpose by section 2337, or prior laws, under which the land was appropriated, the proprietors of such vein or lode may file in the proper land office their application for a patent, under oath, in manner already set forth herein, which application, together with the plat and field notes, may include, embrace, and describe, in addition to the vein or lode, such noncontiguous mill site, and after due proceedings as to notice, etc., a patent will be issued conveying the same as one claim. The owner of a patented lode may, by an independent application, secure a mill site if good faith is manifest in its use or occupation in connection with the lode and no adverse claim exists.

65. Where the original survey includes a lode claim and also a mill site the lode claim should be described in the plat and field notes as "Sur. No. 37, A," and the mill site as "Sur. No. 37, B," or whatever

81. Where an agent or attorney in fact verifies the adverse claim, he must distinctly swear that he is such agent or attorney, and accompany his affidavit by proof thereof.

82. The agent or attorney in fact must make the affidavit in verification of the adverse claim within the land district where the claim is situated.

83. The adverse notice must fully set forth the nature and extent of the interference or conflict; whether the adverse party claims as a purchaser for valuable consideration or as a locator; if the former, a certified copy of the original location, the original conveyance, a duly certified copy thereof, or an abstract of title from the office of the proper recorder should be furnished, or if the transaction was a merely verbal one he will narrate the circumstances attending the purchase, the date thereof, and the amount paid, which facts should be supported by the affidavit of one or more witnesses, if any were present at the time, and if he claims as a locator he must file a duly certified copy of the location from the office of the proper recorder.

84. In order that the "boundaries" and "extent" of the claim may be shown, it will be incumbent upon the adverse claimant to file a plat showing his entire claim, its relative situation or position with the one against which he claims, and the extent of the conflict: *Provided, however,* That if the application for patent describes the claim by legal subdivisions, the adverse claimant, if also claiming by legal subdivisions, may describe his adverse claim in the same manner without further survey or plat. If the claim is not described by legal subdivisions, it will generally be more satisfactory if the plat thereof is made from an actual survey by a deputy mineral surveyor, and its correctness officially certified thereon by him.

85. Upon the foregoing being filed within the sixty days' publication, the register, or in his absence the receiver, will 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, and to prosecute the same with reasonable diligence to final judgment, and that, should such adverse claimant fail to do so, his adverse claim will be considered waived, and the application for patent be allowed to proceed upon its merits.

86. When an adverse claim is filed as aforesaid, the register or receiver will indorse upon the same the precise date of filing, and preserve a record of the date of notifications issued thereon; and thereafter all proceedings on the application for patent will be suspended, with the exception of the completion of the publication and posting of notices and plat, and the filing of the necessary proof thereof, until the controversy shall have been adjudicated in court, or the adverse claim waived or withdrawn.

87. Where an adverse claim has been filed and suit thereon commenced within the statutory period, and final judgment determining the right of possession rendered in favor of the applicant, it will not be sufficient for him to file with the register a certificate of the clerk of the court, setting forth the facts as to such judgment, but he must, before he is allowed to make entry, file a certified copy of the judgment, together with the other evidence required by section 2326, Revised Statutes.

88. Where such suit has been dismissed, a certificate of the clerk of the court to that effect or a certified copy of the order of dismissal will be sufficient.

89. After an adverse claim has been filed and suit commenced, a relinquishment or other evidence of abandonment will not be accepted, but the case must be terminated and proof thereof furnished as required by the last two paragraphs.

90. Where an adverse claim has been filed, but no suit commenced against the applicant for patent within the statutory period, a certificate to that effect by the clerk of the State court having jurisdiction in the case, and also by the clerk of the circuit court of the United States for the district in which the claim is situated, will be required.

APPOINTMENT OF DEPUTIES FOR SURVEY OF MINING CLAIMS—  
CHARGES FOR SURVEYS AND PUBLICATIONS—FEES OF REGISTERS  
AND RECEIVERS, ETC.

91. Section 2334 provides for the appointment of surveyors of mineral claims, and authorizes the Commissioner of the General Land Office to establish the rates to be charged for surveys and for newspaper publications. Under this authority of law the following rates have been established as the maximum charges for newspaper publications in mining cases:

(1) Where a daily newspaper is designated the charge shall not exceed seven dollars for each ten lines of space occupied, and where a weekly newspaper is designated as the medium of publication five dollars for the same space will be allowed. Such charge shall be accepted as full payment for publication in each issue of the newspaper for the entire period required by law.

It is expected that these notices shall not be so abbreviated as to curtail the description essential to a perfect notice, and the said rates established upon the understanding that they are to be in the usual body type used for advertisements.

(2) For the publication of citations in contests or hearings involving the character of lands the charges shall not exceed eight dollars for five publications in weekly newspapers or ten dollars for publications in daily newspapers for thirty days.

92. The surveyors-general of the several districts will, in pursuance of said law, appoint in each land district as many *competent* deputies for the survey of mining claims as may seek such appointment, it being distinctly understood that all expenses of these notices and surveys are to be borne by the mining claimants and not by the United States. The claimant may employ *any* deputy surveyor within such district to do his work in the field. Each deputy mineral surveyor before entering upon the duties of his office or appointment shall be required to enter into such bond for the faithful performance of his duties as may be prescribed by the regulations of the land department in force at that time.

93. With regard to the *platting* of the claim and other *office work* in the surveyor-general's office, that officer will make an estimate of the cost thereof, which amount the claimant will deposit with any assistant United States treasurer or designated depository in favor of the United States Treasurer, to be passed to the credit of the fund created by "individual depositors for surveys of the public lands," and file with the surveyor-general duplicate certificates of such deposit in the usual manner.

94. The surveyors-general will endeavor to appoint mineral deputy surveyors, so that one or more may be located in each mining district for the greater convenience of miners.

95. The usual oaths will be required of these deputies and their assistants as to the correctness of each survey executed by them.

The duty of the deputy mineral surveyor ceases when he has executed the survey and returned the field notes and preliminary plat thereof with his report to the surveyor-general. He will not be allowed to prepare for the mining claimant the papers in support of an application for patent or otherwise perform the duties of an attorney before the land office in connection with a mining claim.

The surveyors general and local land officers are expected to report any infringement of this regulation to this office.

96. Should it appear that excessive or exorbitant charges have been made by any surveyor or any publisher, prompt action will be taken with the view of correcting the abuse.

97. The fees payable to the register and receiver for filing and acting upon applications for mineral-land patents are five dollars to each officer, to be paid by the applicant for patent at the time of filing, and the like sum of five dollars is payable to each officer by an adverse claimant at the time of filing his adverse claim. (Sec. 2238, R. S., paragraph 9.)

98. At the time of payment of fee for mining application or adverse claim the receiver will issue his receipt therefor in duplicate, one to be given the applicant or adverse claimant, as the case may be, and one to be forwarded to the Commissioner of the General Land Office *on the day of issue*. The receipt for mining application should have attached the certificate of the register that the lands included in the application are vacant lands subject to such appropriation.

99. The register and receiver will, at the close of each month, forward to this office an abstract of mining applications filed, and a register of receipts, accompanied with an abstract of mineral lands sold, and an abstract of adverse claims filed.

100. The fees and purchase money received by registers and receivers must be placed to the credit of the United States in the receiver's monthly and quarterly account, charging up in the disbursing account the sums to which the register and receiver may be respectively entitled as fees and commissions, with limitations in regard to the legal maximum.

#### HEARINGS TO DETERMINE CHARACTER OF LANDS.

101. The Rules of Practice in cases before the United States district land offices, the General Land Office, and the Department of the Interior will, so far as applicable, govern in all cases and proceedings arising in contests and hearings to determine the mineral character of lands.

102. No public land shall be withheld from entry as agricultural land on account of its mineral character, except such as is returned by the surveyor-general as mineral; and the presumption arising from such a return may be overcome by testimony taken in the manner hereinafter described.

103. Hearings to determine the character of lands are practically of two kinds, as follows:

(1) Lands returned as mineral by the surveyor general.

When such lands are sought to be entered as agricultural under laws which require the submission of final proof after due notice by publication and posting, the filing of the proper nonmineral affidavit in the absence of allegations that the land is mineral will be deemed sufficient as a preliminary requirement. A satisfactory showing as to character of land must be made when final proof is submitted.

In case of application to enter, locate, or select such lands as agricultural, under laws in which the submission of final proof after due publication and posting is *not* required, notice thereof must first be given by publication for sixty days and posting in the local office during the same period, and affirmative proof as to the character of the land submitted. In the absence of allegations that the land is mineral, and upon compliance with this requirement, the entry, location, or selection will be allowed, if otherwise regular.

(2) Lands returned as agricultural and alleged to be mineral in character.

Where as against the claimed right to enter such lands as agricultural it is alleged that the same are mineral, or are applied for as mineral lands, the proceedings in this class of cases will be in the nature of a contest, and the practice will be governed by the rules in force in contest cases.

104. Where a railroad company seeks to select lands not returned as mineral, but within six miles of any mining location, claim, or entry, or where in the case of a selection by a State, the lands sought to be selected are within a township in which there is a mining location, claim, or entry, publication must be made of the lands selected at the expense of the railroad company or State for a period of sixty days, with posting for the same period in the land office for the district in which the lands are situated, during which period of publication the local land officers will receive protests or contests for any of said tracts or subdivisions of lands claimed to be more valuable for mining than for agricultural purposes.

105. At the expiration of the period of publication the register and receiver will forward to the Commissioner of the General Land Office the published list, noting thereon any protests, or contests, or suggestions as to the mineral character of any such lands, together with any information they may have received as to the mineral character of any of the lands mentioned in said list, when a hearing may be ordered.

106. At the hearings under either of the aforesaid classes, the claimants and witnesses will be thoroughly examined with regard to the character of the land; whether the same has been thoroughly prospected; whether or not there exists within the tract or tracts claimed any lode or vein of quartz or other rock in place, bearing gold, silver, cinnabar, lead, tin, or copper, or other valuable deposit which has ever been claimed, located, recorded, or worked; whether such work is entirely abandoned, or whether occasionally resumed; if such lode does exist, by whom claimed, under what designation, and in which subdivision of the land it lies; whether any placer mine or mines exist upon the land; if so, what is the character thereof—whether of the shallow-surface description, or of the deep cement, blue lead, or gravel deposits; to what extent mining is carried on when water can be obtained, and what the facilities are for obtaining water for mining purposes; upon what particular ten-acre subdivisions mining has been done, and at what time the land was abandoned for mining purposes, if abandoned at all.

107. The testimony should also show the agricultural capacities of the land, what kind of crops are raised thereon, and the value thereof; the number of acres actually cultivated for crops of cereals or vegetables, and within which particular ten-acre subdivision such crops are raised; also which of these subdivisions embrace the improvements, giving in detail the extent and value of the improvements, such as house, barn, vineyard, orchard, fencing, etc., and mining improvements.

108. The testimony should be as full and complete as possible; and in addition to the leading points indicated above, where an attempt is made to prove the mineral character of lands which have been entered under the agricultural laws, it should show at what date, if at all, valuable deposits of mineral were first known to exist on the lands.

109. When the case comes before this office such decision will be made as the law and the facts may justify; in cases where a survey is necessary to set apart the mineral from the agricultural land, the proper party *at his own expense* will be required to have the work done, at his option, either by United States deputy, county, or other local surveyor; application therefor must be made to the register and receiver, accompanied by a description of the land to be segregated, and the evidence of service upon the opposite party of notice of his intention to have such segregation made; the register and receiver will forward the same to this office, when the necessary instructions for the survey will be given. The survey in such case, where the claims to be segregated are vein or lode claims, must be executed in such manner as will conform to the requirements in section 2320, United States Revised Statutes, as to length and width and parallel end lines.

110. Such survey when executed must be properly sworn to by the surveyor, either before a notary public, officer of a court of record, or before the register or receiver, the deponent's character and credibility to be properly certified to by the officer administering the oath.

111. Upon the filing of the plat and field notes of such survey with the register and receiver, duly sworn to as aforesaid, they will transmit the same to the surveyor-general for his verification and approval; who, if he finds the work correctly performed, will properly mark out the same upon the original township plat in his office, and furnish authenticated copies of such plat and description both to the proper local land office and to this office, to be affixed to the duplicate and triplicate township plats respectively.

112. With the copy of plat and description furnished the local office and this office must be a diagram tracing, verified by the surveyor-general, showing the claim or claims segregated, and designating the separate fractional agricultural tracts in each 40-acre legal subdivision by the proper lot number, beginning with No. 1 in each section, and giving the area in each lot, the same as provided in paragraph 45, in the survey of mining claims on surveyed lands.

113. The fact that a certain tract of land is decided upon testimony to be mineral in character is by no means equivalent to an award of the land to a miner. In order to secure a patent for such land he must proceed as in other cases, in accordance with the foregoing regulations.

Blank forms for proofs in mineral cases are not furnished by the General Land Office.

MINING RIGHTS WITHIN THE DISTRICT OF ALASKA TO NATIVE-BORN CITIZENS OF THE DOMINION OF CANADA—SECTION 13, ACT OF MAY 14, 1898.

114. Section 13, act of May 14, 1898, according to native-born citizens of Canada "the same mining rights and privileges" accorded to citizens of the United States in British Columbia and the Northwest Territory, by the laws of the Dominion of Canada, is not now and never has been operative, for the reason that the only mining rights and privileges granted to any person by the laws of the Dominion of

Canada are those of leasing mineral lands upon the payment of a stated royalty, and the mining laws of the United States make no provision for such leases.

#### MINERAL ENTRIES WITHIN FOREST RESERVES.

115. The following is an extract from circular entitled Rules and Regulations Governing Forest Reservations, established under section 24 of the act of March 3, 1891 (26 Stat. L., 1095). Approved June 30, 1897. (24 L. D., 589-593-594.)

#### LOCATION AND ENTRY OF MINERAL LANDS.

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

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

#### FREE USE OF TIMBER AND STONE.

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

This provision is limited to persons resident in forest reservations who have not a sufficient supply of timber or stone on their own claims or lands for the purposes enumerated, or for necessary use in developing the mineral or other natural resources of the lands owned or occupied by them. Such persons, therefore, are permitted to take timber and stone from public lands in the forest reservations under the terms of the law above quoted, strictly for their individual use on their own claims or lands owned or occupied by them, but not for sale or disposal, or use on other lands, or by other persons: *Provided*, That where the stumpage value exceeds one hundred dollars, application must be made to and permission given by the Department.

BINGER HERMANN,  
*Commissioner.*

DEPARTMENT OF THE INTERIOR, June 24, 1899.

Approved:

E. A. HITCHCOCK, *Secretary.*

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States . . . . shall not be sold for less than double minimum," the sections so remaining are identified when the map showing the definite location of the line of road is filed and accepted, and from such time, irrespective of any order of withdrawal or notice to the local office, are subject to sale only at the double minimum price. . . . .	25	limits of the Indian reservation of 1855, in the "Bitter Root valley above the Loo-lo Fork," will be recognized and followed in determining the extent of said reservation as against the subsequent grant to the Northern Pacific. . . . .	305
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## Reservoir Site.

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The Northern Pacific railroad company by section 2, act of July 2, 1864, holds its right of way under a qualified fee, which, so long as the qualification annexed is not at an end, confers upon the company the exclusive right of possession; a settlement, therefore, upon said right of way is not a

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